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SC Court of Appeals

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

C.A. No: 2019-CP-40-06243
Appellate Case No. 2021-000648

Peter D. Protopapas, as Receiver for Starr Davis Company, Inc. and Starr Davis
Company of S.C., Inc..... Respondents,

v.

Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company;
The Standard Fire Insurance Company; St. Paul Fire and Marine Insurance Company;
The Employers' Fire Insurance Company; Southeastern Agency Group and M.I.A.
Company, Inc. individually and as successors to or f/k/a Merrimon Insurance Agency,
Inc.; Robert E. Aspray; Nell Ashworth, individually and as personal representative of the
Estate of Robert J. Ashworth; Betty C. D'Amico, individually and as Executor of the
Estate of Julian D'Amico, Jr.; Kayla Keith, individually and as the personal
representative of the Estate of Jerry W. Archer, Sr.; Richard L. Knight II, as personal
representative of the Estate of Teddy L. Knight, Sr., and Linda Knight, individually;
David D. Rollins; James W. Smith and Frances R. Smith; and Linda J. White,
individually and as personal representative of the Estate of Lubert R. White, Jr.,..... Defendants,

of which

Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company
and The Standard Fire Insurance Company are the Appellants.

RECORD ON APPEAL
(VOLUME I)

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

PETER D. PROTOPAPAS, as Receiver for
STARR DAVIS COMPANY, INC. and
STARR DAVIS COMPANY OF S.C., INC.,

Plaintiff,

vs.

TRAVELERS CASUALTY AND SURETY
COMPANY f/k/a THE AETNA CASUALTY
AND SURETY COMPANY; THE
STANDARD FIRE INSURANCE
COMPANY; ST. PAUL FIRE AND MARINE
INSURANCE COMPANY; THE
EMPLOYERS' FIRE INSURANCE
COMPANY; SOUTHEASTERN AGENCY
GROUP and M.I.A. COMPANY, INC.
individually and as successors to or f/k/a
MERRIMON INSURANCE AGENCY, INC.;
ROBERT E. ASPRAY; NELL ASHWORTH,
individually and as personal representative of
the Estate of ROBERT J. ASHWORTH;
BETTY C. D'AMICO, individually and as
Executor of the Estate of JULIAN D'AMICO,
JR.; KAYLA KEITH, individually and as the
personal representative of the Estate of
JERRY W. ARCHER, SR.; RICHARD L.
KNIGHT II, as personal representative of the
Estate of TEDDY L. KNIGHT, SR., and
LINDA KNIGHT, individually; DAVID D.
ROLIINS; JAMES W. SMITH and FRANCES
R. SMITH; and LINDA J. WHITE,
individually and as Personal Representative of
the Estate of LUBERT F. WHITE, JR.,

Defendants.

Case Number: 2019-CP-40-06243

In Re:

Asbestos Personal Injury Litigation
Coordinated Docket

RECEIVED**Jun 18 2021****SC Court of Appeals****ORDER**

INTRODUCTION

This matter is before the Court on the motion of Starr Davis Company, Inc. and Starr Davis Company of South Carolina, Inc. (Starr Davis Company, Inc. is referred to as “Starr Davis Co.”, Starr Davis of South Carolina, Inc. is referred to as “Starr Davis of South Carolina,” and the two companies are collectively referred to as “Starr Davis”), by and through their duly-appointed Receiver, Peter D. Protopapas (the “Receiver”), for partial summary judgment (the “Motion”) as to their claims for declaratory judgment against defendants Travelers Casualty and Surety Company, formerly known as The Aetna Casualty and Surety Company and referred to herein individually as “Aetna,” and The Standard Fire Insurance Company, referred to individually as “Standard Fire” (collectively “Travelers”).

Having considered all of the papers filed by the parties, as well as the arguments of counsel presented at the extensive January 25, 2021, hearing by video conference to which all parties consented, the Court **Grants** the Receiver’s Motion for Partial Summary Judgment and issues a declaratory judgment as follows:

BACKGROUND

The South Carolina Supreme Court appointed the undersigned to serve as the Chief Judge for Administrative Purposes over all asbestosis and asbestos litigation filed within the state court system. The asbestos litigation in South Carolina constitutes a significant number of complex multi-party cases. A typical case will include an injured plaintiff alleging that an asbestos-related cancer was caused by dozens of different defendants. The Asbestos cases on my docket are predominantly brought by claimants who allege they have contracted mesothelioma by reason of exposure to asbestos containing products sold or installed or used by defendants. Mesothelioma has a long latency period before the disease manifests. These cases usually involve exposures 20 plus years ago, which have been discovered recently within the statute of limitations period. The

insurance policies which cover liability claims against the defendants are typically “per occurrence coverage” rather than the more modern “claims made policies.” It sometimes happens that a defendant will be a company not currently in operation. Nevertheless, the older “legacy” policies which cover “occurrences” during the policy period, rather than “claims made” during the policy period, will still be liable for coverage of these mesothelioma claims. Where a defendant is no longer operating, I have been appointing a Receiver to pursue coverage to provide for the defense and payment of claims on behalf of these companies.

This Court has worked diligently to manage this docket and to organize this complicated statewide litigation into an orderly process whereby cases are assigned for trial in a predictable fashion. This process is designed to allow the litigants to participate in discovery in an orderly fashion to facilitate the evaluation of litigation positions well before trial and to try the cases as necessary.

This Court appointed Peter Protopapas as the Receiver of Starr Davis on February 22, 2019. The Court vested the Receiver with the “power and authority to fully administer all assets of Starr Davis,” which is “inclusive of, but not limited to, the right and obligation to administer any insurance assets of Starr Davis as well as any claims related to the actions or failure to act of Starr Davis’ insurance carriers.” Order Granting Motion to Appoint a Receiver and Appointing Receiver at 1, *Hopper v. Air & Liquid Sys.*, No. 2019-CP-40-00076 (S.C. Com. Pl. Feb. 22, 2019).

NATURE OF THE CASE AND THE MOTION

Starr Davis began business operations as an insulation contractor in the 1940s. Over the course of the next forty years, the company grew to become a major regional insulation contractor—installing, removing, replacing and repairing insulation, including at pertinent times asbestos-containing insulation—in a variety of industrial facilities throughout the southeastern United States, principally in South Carolina, North Carolina, Georgia, Alabama, Virginia and

Tennessee. Over the course of the company's existence, Starr Davis paid premiums to purchase significant amounts of liability insurance from Travelers.

Following substantial and unexcused delay in complying with its basic discovery obligations under South Carolina law, Travelers ultimately produced liability insurance policies and evidence of liability insurance policies issued to Starr Davis. The Motion seeks resolution of a number of issues concerning the existence and terms of the Travelers policies, and Starr Davis' request that the Court issue the following declarations concerning the interpretation and application of the Travelers' policies to the asbestos suits that have been filed, continue to be filed, and likely will be filed against Starr Davis into the future:

1. Multiple-year policies and policies that were subject to annual renewal provide for a full separate limit of liability for product liability and completed operations claims and a full per occurrence limit for premises and operations claims separately for each annual period or portion thereof;
2. Primary insurance policies issued by Travelers have an unlimited supplemental duty to pay or reimburse defense costs;
3. The duty to pay or reimburse defense costs is "triggered" whenever there is any obligation that could potentially involve the policy coverage;
4. The duty to pay or reimburse defense costs is triggered by the allegations of a complaint asserted against Starr Davis;
5. In the unique case of Starr Davis, where multiple primary policies were issued for the same policy year, and these multiple policies provide coverage for the same claim, Starr Davis may select one or both of the policies to respond to the claim and may also "stack" the limits of such policies for each and every such claim;

6. The burden of proving any limitation or exclusion to coverage is on the insurer, here Travelers;
7. All of the Travelers liability insurance policies in effect from a person's first exposure to asbestos through manifestation of an asbestos-related disease or condition, and, ultimately, to death, cover the asbestos cases unless coverage is otherwise excluded under a policy;
8. The "completed operations hazard" described in the Travelers policies, and the corresponding aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos products *after* Starr Davis completed its installation or removal operations or work at a particular jobsite;
9. As to any individual asbestos lawsuit, it is Travelers' burden to prove that the suit seeks the recovery of damages that are subject to any aggregate limits of liability applicable to the "products" or "completed operations" provisions in its policies;
10. The asbestos insulation contracting, or "operations," claims against Starr Davis have resulted from multiple "occurrences" under the Travelers policies, thus entitling Starr Davis to multiple "per occurrence" limits of liability to satisfy its asbestos liabilities;
11. As to the asbestos "operations" claims against Starr Davis, Travelers is obligated to pay those claims "in full" up to its "per occurrence" limit of liability; and
12. While product liability or completed operations losses are subject to allocation on a "time-on-the-risk" pro rata allocation method, "operations" claims are allocated on an "all sums" basis, and, in either case, in light of its non-operating defunct status, no loss may be allocated to Starr Davis as part of any "time-on-the-risk"

allocation scheme.

Based on this Court's review of the evidence and arguments of the parties, this Court will grant the Motion in its entirety and enter partial summary judgment in favor of Starr Davis.

UNDISPUTED FACTS

Starr Davis began operations in the 1940s, and engaged in the installation, removal, replacement and repair of insulation in various facilities across South Carolina and in the neighboring states of North Carolina, Tennessee and Georgia, as well as Alabama and Virginia, for over four decades. Starr Davis' operations involved the installation, removal, replacement, repair and disturbance of insulation materials, typically supplied, required, or acquired by other parties. At pertinent times, insulation materials contained asbestos, and Starr Davis' operations allegedly resulted in bodily injury to South Carolina citizens.

The State of North Carolina rescinded Starr Davis Company, Inc.'s corporate charter in 1996, and the State of South Carolina rescinded Starr Davis Company of South Carolina, Inc.'s corporate charter in 1997, for failure to file the appropriate documentation with their respective Secretaries of State. *See* Exhibit 3 to the Motion.

Travelers has always been, and continues to be, aware of the nature of Starr Davis' prior operations.¹ Travelers also understands that many of the asbestos contracting claims against Starr

¹ For example, as late as the policy issued for the period January 1, 1978, through January 1, 1979, Standard Fire listed Starr Davis's business as including:

“Steam Pipe or Boiler Insulation –
Applying Cork, Asbestos or Other
Non Conducting Materials”

See policy materials attached as Exhibit 5 to the Motion, comprising an “Incomplete Policy” for Policy No. 25 AL 802 646 CNS 8, issued for the policy period January 1, 1978 to January 1, 1979 by The Standard Fire Insurance Company, and Exhibit 4 to the Motion, comprising an “Incomplete Policy” for Policy No. 25 AL 801 362 CMA 8 for the same policy period issued by The Aetna Casualty and Surety Company.

Davis invoke the “operations” coverage portion of their policies because the claims did not result from Starr Davis’ “completed operations” or from Starr Davis’ “products” after the company relinquished possession of those products into the stream of commerce, as discussed further below.

In its authority as the Receivership Court for Starr Davis, this Court issued a subpoena to Travelers pursuant to a request by the Receiver, seeking copies of insurance policies issued by Aetna and Standard Fire (both Travelers companies) to Starr Davis, as well as multiple other categories of documents, including underwriting and claims documents. *See* Exhibits 6 and 7 to the Motion. Initially, Travelers categorically refused to produce the requested documents on the ground that it did not believe the subpoena was served properly: “A subpoena *duces tecum* to Travelers is only proper if issued by the Connecticut Superior Court in the judicial district in which Travelers is located.” *See* Exhibit 8 to the Motion.

Travelers’ failure to comply with this Court’s subpoena came despite the fact that Travelers had previously admitted that it issued liability insurance coverage to Starr Davis for the period 1959 to 1985. A document entitled “Interim Agreement” between Starr Davis and Aetna, dated November 19, 1985, shows that Travelers issued coverage to Starr Davis continuously from 1959 to 1985. *See* Exhibit 9 to the Motion at 5-8.

Paragraph 1 of the Interim Agreement specifies, however: “Neither this Interim Agreement nor any part thereof shall be offered in evidence or used for any purpose in any court of law as support for the position being asserted by either party hereto in connection with the meaning, intent or construction of any insurance policy or policies issued by Aetna or purchased by Starr Davis.” Travelers nevertheless relies *substantially* on the Interim Agreement in support of its opposition to the Motion—something Travelers’ counsel repeated *several times* at the hearing on the Motion—concerning the “meaning, intent or construction” of the insurance policies memorialized

by the Interim Agreement. These arguments violate the specific terms of the Interim Agreement prohibiting the parties from using the document for this very purpose, and the Court admonishes Travelers and its counsel for reliance on admittedly inadmissible material in opposing the Motion. By contrast, Starr Davis uses the document only as evidence of the existence of the insurance policies, an appropriate use of the Interim Agreement.

While most of the policy documentation concerning the Travelers coverage has apparently been destroyed—at this point something this Court has grown accustomed to seeing when Travelers and its many affiliated and subsidiary insurance companies are involved—there is sufficient secondary evidence, including partial or incomplete policies, to prove the existence of a multi-decade relationship between Travelers and Starr Davis. The undisputed evidence presented by Starr Davis in connection with the Motion shows a 40-year uninterrupted relationship between the parties from January 1, 1946 to April 30, 1986, during which Travelers issued liability insurance coverage under which it agreed to defend and indemnify Starr Davis against, among other things, asbestos-related bodily injury suits.

Because essentially all of the Travelers policies were destroyed by Travelers,² this Court has been called upon by Starr Davis to render partial summary judgment on several issues relating to policy issuance by Travelers. Partial summary judgment is appropriate based on discovery to date, Travelers' admissions, and legal principles implied or imposed by law. The documents and admissions by Travelers demonstrate the following as a matter of undisputed fact:

² As has become customary over the course of several cases pending in this Court, Travelers seeks to be absolved from its destruction of insurance policies and related insurance documentation because Starr Davis, itself, is also unable to locate copies of its historic insurance policies. Travelers, however, is in the business of insurance; Starr Davis was not. Travelers is, and was, responsible to maintain documentation integral to its business operations. Its behavior is not excused because its insured, a defunct regional insulation contractor, did not maintain its own copies of Travelers' insurance documentation.

A. The Aetna Casualty and Surety Asbestos Coverage

The Aetna Casualty and Surety Company (“Aetna”) issued primary coverage that was renewed annually on an uninterrupted basis for 40 years which provides defense and indemnity coverage for asbestos-related bodily injury suits. These policies were issued from January 1, 1946 through April 30, 1986.

The Aetna primary coverage indemnifies Starr Davis against damages for bodily injury for operations claims that are subject only to a per occurrence limit (“premises/operations claims”), and for products and completed operations claims which are also subject to an aggregate limit of liability. There is no aggregate limit of liability as respects premises/operations claims. The primary coverage issued by Aetna provides \$11,900,000 in products/completed operations limits and \$11,900,000 per occurrence in premises/operations limits. There is no limit to the number of occurrences to which the Aetna policies respond.

Aetna also issued umbrella liability coverage to Starr Davis for 11 policy years, from January 1, 1974 to May 1, 1983.

With the exception of the primary policies from January 1, 1974 to May 1, 1980, which do not cover North Carolina claims, the Aetna policies, which are also summarized in the policy schedule that appears below, cover all asbestos-related suits asserted against Starr Davis Co. or Starr Davis of South Carolina.³

B. The Standard Fire Insurance Company Asbestos Coverage

Standard Fire issued primary policies to Starr Davis Co. and Starr Davis of South Carolina with an unlimited supplemental defense obligation and separate annual products/completed

³ An incomplete Aetna policy produced by Travelers appears as Exhibit 4 to the Motion. Travelers and Aetna routinely destroyed policies such as those issued to Starr Davis and Starr Davis of South Carolina.

operations limits for each of the two annual periods January 7, 1974 to January 7, 1976 with separate annual limits of \$300,000 per occurrence and in the aggregate. Standard Fire also issued primary policies to Starr Davis Co. and Starr Davis of South Carolina for five annual periods between January 7, 1976 and May 1, 1980, each affording \$500,000 in coverage per occurrence and in the aggregate. The aggregate limit of liability does not apply to “operations” claims. There is no limit to the number of occurrences the Standard policies pay. These Standard Fire policies were issued to Starr Davis Co. and Starr Davis of South Carolina but cover operations only in North Carolina. They are also summarized in the policy schedule that appears below.

C. Rulings Concerning Policy Provisions

There is no evidence, or any other indication, that the Travelers policies were issued on anything other than standard policy forms used during the pertinent time periods. Based on this fact, and based on the policy evidence produced by Travelers, the Court issues the following rulings concerning the policy provisions in the Travelers policies:

1. All of the Travelers policies summarized in the policy schedule below are either multiple-year policies or policies that were subject to annual renewal and all such policies issued by Travelers provide for a full separate limit of liability for product liability and completed operations claims and for premises/operations claims on a per occurrence basis for each annual period or portion thereof;
2. All of the primary insurance policies issued by Travelers have an unlimited supplemental duty to pay or reimburse defense costs;
3. The duty to pay or reimburse defense costs in these policies is “triggered” whenever there is any obligation that could potentially involve the policy coverage;
4. The duty to pay or reimburse defense costs is triggered by the allegations of a complaint asserted against Starr Davis;

5. In the unique case of Starr Davis, where multiple primary policies were issued for the same policy year, and multiple policies provide coverage for the same claim, Starr Davis may select one or both of the policies to respond to the claim and may “stack” the limits of such policies for each and every such claim;
6. The policy limits of successive Travelers primary or umbrella policies that respond to an asbestos suit may also be stacked to the extent necessary for the claimant to be paid in full for a Starr Davis liability;
7. The burden of proving any limitation or exclusion to coverage is on the insurer, here Travelers;
8. All of the Travelers liability insurance policies in effect from a person’s first exposure to asbestos through manifestation of an asbestos-related disease or condition, and, ultimately, to death, cover the asbestos cases unless coverage is otherwise excluded under a policy;
9. The “completed operations hazard” described in Travelers’ policies, and the corresponding aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos attributed to Starr Davis *after* Starr Davis completed its installation or removal operations or work at a particular jobsite;
10. The “products hazard” described in Travelers’ policies, and the corresponding aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos attributed to Starr Davis *after* Starr Davis relinquished possession of the products and placed them into the stream of commerce;
11. As to any individual asbestos lawsuit, it is Travelers’ burden to prove that the suit seeks the recovery of damages that are subject to the aggregate limits of liability

applicable to the “completed operations hazard” or “products hazard” provisions in its policies;

12. The asbestos insulation contracting, or “operations,” claims against Starr Davis have resulted from multiple “occurrences” under the Travelers policies, thus entitling Starr Davis to multiple “per occurrence” limits of liability to satisfy its asbestos liabilities;
13. As to the asbestos “operations” claims against Starr Davis, Travelers is obligated to pay those claims “in full” up to its “per occurrence” limit of liability; and
14. While product liability or completed operations losses are subject to allocation on a “time-on-the-risk” pro rata allocation method, in light of its non-operating defunct status, no loss may be allocated to Starr Davis as part of any “time-on-the-risk” allocation scheme.

* * *

Travelers represents that the documents it produced comprise all that Travelers has in terms of the Starr Davis policies. Travelers has admitted its insuring relationship with Starr Davis Co. and Starr Davis of South Carolina. Starr Davis Co. and Starr Davis of South Carolina submit that, as to the foregoing, it has met its burden and, accordingly, Travelers’ response “must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial.” *Moody v. McLellan*, 295 S.C. 157, 163, 367 S.E.2d 449, 454 (Ct. App. 1988). Travelers cannot do so. The foregoing rulings are based on Travelers’ own documents. It destroyed all of the remaining evidence.

Travelers also makes a number of arguments why the Court's rulings on missing policy issues are "premature" based on its asserted need to conduct discovery. The Court rejects these arguments for several reasons.

First, Travelers asserts that an open issue exists as to whether the parties have "already agreed which alleged or missing policies provide coverage for the asbestos claims, and which do not." This appears to be an argument concerning the construction or application of the Travelers policies based on the Interim Agreement. As noted above, the Court finds that this type of argument is precluded by the Interim Agreement.

Second, Travelers claims that it needs discovery from Starr Davis' former insurance brokers or agents which it asserts may have copies of the missing Travelers policies. This is not necessary since the documents that Travelers produced are sufficient for the Court to make rulings as to the existence of the Travelers policies and the substance of the material terms and conditions of the policies that are relevant to the asbestos suits against Starr Davis.

Third, Travelers asserts that it needs to know from the insurance brokers or agent for Starr Davis about the circumstances under which the Travelers policies were lost or destroyed. Beneath this argument is an assumption by Travelers that a symmetry of interest and responsibility exists between an insurer and its insured concerning the maintenance of insurance-related documentation. Insurance documentation is integral to the functioning of an insurance organization. It is not integral to the functioning of an insulation contractor. The Court has been presented with sufficient policy evidence, produced by Travelers, to reach conclusions concerning the existence and scope of the Travelers policies issued to Starr Davis. There is no contrary evidence.

Fourth, Travelers asserts it needs to discover whether Starr Davis purchased primary or excess liability insurance coverage from other insurers such that it may have potential contribution claims against those insurers. This is not a good faith argument in opposition to an assertion by an insured that it has unearthed sufficient evidence of policy terms and conditions to obtain declarations that the insurer, in fact, issued coverage under policies that the insured cannot presently locate. Whether Travelers has contribution claims against other insurers has nothing to do with whether sufficient evidence of the Travelers coverage presently exists for the Court to grant the Motion. Travelers is free to continue searching for insurance coverage issued to Starr Davis by other insurers in support of potential contribution claims. This is immaterial, however, as to whether the Court can, and should, grant the Motion.

Consequently, it is not premature for the Court to rule on the missing Travelers policy issues framed by the Motion. The Court therefore finds, based on a compilation of policy dates, insurer, policy number, and occurrence and aggregate limits provided by defendants, that Travelers issued liability insurance coverage to Starr Davis as is depicted in the following Policy Schedule:

Policy Begin Date	Policy End Date	Insurer	Policy No.	Bodily Injury Occurrence Limits	Bodily Injury Aggregate Limits
01/01/1946	01/01/1947	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1947	01/01/1948	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1948	01/01/1949	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1949	01/01/1950	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1950	01/01/1951	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1951	01/01/1952	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1952	01/01/1953	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1953	01/01/1954	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000

01/01/1954	01/01/1955	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
10/14/1954	01/02/1955	Aetna Casualty & Surety Co.	25 LC 120	300,000	300,000
01/01/1955	01/01/1956	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1956	01/01/1957	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1957	01/01/1958	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1958	01/01/1959	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	100,000	100,000
01/01/1960	01/01/1961	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1961	01/01/1962	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	100,000	100,000
01/01/1962	01/01/1963	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000
01/01/1963	01/01/1964	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	50,000	100,000

Policy Begin Date	Policy End Date	Insurer	Policy No.	Bodily Injury Occurrence Limits	Bodily Injury Aggregate Limits
01/01/1964	01/01/1965	Aetna Casualty & Surety Co.	25 AL 6996 CM	300,000	300,000
01/01/1964	01/01/1965	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	300,000	300,000
01/01/1965	01/01/1966	Aetna Casualty & Surety Co.	25 AL 8026 CM	300,000	300,000
01/01/1966	01/01/1967	Aetna Casualty & Surety Co.	25 AL 009308 CM	300,000	300,000
01/01/1967	01/01/1968	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	300,000	300,000
01/01/1968	01/01/1969	Aetna Casualty & Surety Co.	25 AL 106258 CMA	300,000	300,000
01/01/1969	01/01/1970	Aetna Casualty & Surety Co.	25 AL 108793 CMA	300,000	300,000
01/01/1970	01/01/1971	Aetna Casualty & Surety Co.	25 AL 111525 CMA	300,000	300,000
01/01/1970	01/01/1971	Aetna Casualty & Surety Co.	25 AL 106258 CMA	300,000	300,000
01/01/1971	01/01/1972	Aetna Casualty & Surety Co.	25 AL 114022 CMA	300,000	300,000
01/01/1972	01/01/1973	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	300,000	300,000
01/01/1973	01/01/1974	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	300,000	300,000
01/01/1974	01/01/1975	Aetna Casualty & Surety Co.	25 AL 214134 CMA	300,000	300,000

01/01/1974	01/01/1975	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	300,000	300,000
01/01/1975	01/01/1976	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	300,000	300,000

Policy Begin Date	Policy End Date	Insurer	Policy No.	Bodily Injury Occurrence Limits	Bodily Injury Aggregate Limits
01/01/1976	01/01/1977	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	500,000	500,000
01/01/1977	01/01/1978	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	500,000	500,000
01/01/1978	01/01/1979	Aetna Casualty & Surety Co.	25 AL 801 362 CMA 8	500,000	500,000
01/07/1979	05/01/1979	Aetna Casualty & Surety Co.	25 GL 802 646 CMA 9	500,000	500,000
05/01/1979	05/01/1980	Aetna Casualty & Surety Co.	25 GL 802 646 CMA 9	500,000	500,000
05/01/1980	4/31/81	Aetna Casualty & Surety Co.	25 GL 56819 CCA	500,000	500,000
05/01/1981	05/01/1982	Aetna Casualty & Surety Co.	25 GL 269082 CCA	500,000	500,000
05/01/1982	05/01/1983	Aetna Casualty & Surety Co.	25 GL 355800 CCA	500,000	500,000
05/01/1982	05/01/1983	Aetna Casualty & Surety Co.	25 GL 56819 CCA	500,000	500,000
05/01/1983	05/01/1984	Aetna Casualty & Surety Co.	25 GL 456932 CCA	500,000	500,000
04/30/1984	04/30/1985	Aetna Casualty & Surety Co.	25 GL 541203 CCA	500,000	500,000
04/30/1985	04/30/1986	Aetna Casualty & Surety Co.	25 GL 601412 CCA	500,000	500,000

Policy Begin Date	Policy End Date	Insurer	Policy No.	Bodily Injury Occurrence Limits	Bodily Injury Aggregate Limits
01/07/1974	01/07/1975	Aetna Casualty & Surety Co.	25 XS 1344 WCA	1,000,000	1,000,000
01/07/1975	08/04/1975	Aetna Casualty & Surety Co.	25 XS 802646 WCA	1,000,000	1,000,000

Policy Begin Date	Policy End Date	Insurer	Policy No.	Bodily Injury Occurrence Limits	Bodily Injury Aggregate Limits
08/04/1975	01/07/1976	Aetna Casualty & Surety Co.	25 XS 802646 WCA	2,000,000	2,000,000

01/07/1976	01/07/1977	Aetna Casualty & Surety Co.	25 XS 802646 WCA	2,000,000	2,000,000
01/07/1977	01/07/1978	Aetna Casualty & Surety Co.	25 XS 802646 WCA	2,000,000	2,000,000
01/07/1978	01/07/1979	Aetna Casualty & Surety Co.	25 XS 802646 WCA	2,000,000	2,000,000
01/07/1979	05/01/1979	Aetna Casualty & Surety Co.	25 XS 802 646 WCA	2,000,000	2,000,000
05/01/1979	05/01/1980	Aetna Casualty & Surety Co.	25 XS 802646 WCA	2,000,000	2,000,000
05/01/1980	05/01/1981	Aetna Casualty & Surety Co.	25 XS 7245 WCA	2,000,000	2,000,000
05/01/1981	05/01/1982	Aetna Casualty & Surety Co.	25 XS 54578 WCA	2,000,000	2,000,000
05/01/1982	05/01/1983	Aetna Casualty & Surety Co.	25 XS 102709 WCA	2,000,000	2,000,000

Policy Begin Date	Policy End Date	Insurer	Policy No.	Bodily Injury Occurrence Limits	Bodily Injury Aggregate Limits
01/07/1974	01/07/1975	Standard Fire Ins. Co.	25 SM 802 646 FPS	300,000	300,000
01/07/1975	01/07/1976	Standard Fire Ins. Co.	25 AL 802 646 CNS 8	300,000	300,000

Policy Begin Date	Policy End Date	Insurer	Policy No.	Bodily Injury Occurrence Limits	Bodily Injury Aggregate Limits
01/07/1976	01/07/1977	Standard Fire Ins. Co.	25 AL 802 646 CNS 8 (North Carolina)	500,000	500,000
01/07/1977	01/07/1978	Standard Fire Ins. Co.	25 AL 802 646 CNS 8 (North Carolina)	500,000	500,000
01/07/1978	01/07/1979	Standard Fire Ins. Co.	25 AL 802 646 CNS 8 (North Carolina)	500,000	500,000
01/07/1979	05/01/1979	Standard Fire Ins. Co.	25 AL 802 646 CNS 8 (North Carolina)	500,000	500,000
05/01/1979	05/01/1980	Standard Fire Ins. Co.	25 AL 802 646 CMA (North Carolina)	500,000	500,000

SUMMARY JUDGMENT STANDARD

“[S]ummary judgment is proper when there is no genuine issue as to [any] material fact and the moving party is entitled to judgment as a matter of law.” *S.C. Pub. Interest Found. v. S.C. Dep’t of Transp.*, 421 S.C. 110, 117, 804 S.E.2d 854, 858 (2017) (citing Rule 56(c), SCRCF). “The party seeking summary judgment has the burden of clearly establishing the absence of a genuine

issue of material fact.” *Gauld v. O’Shaughnessy Realty Co.*, 380 S.C. 548, 558, 671 S.E.2d 79, 85 (Ct. App. 2009). However, once that party carries its initial burden, the “opposing party must, under Rule 56(e), ‘do more than simply show that there is some metaphysical doubt as to the material facts,’ but ‘must come forward with specific facts showing that there is a genuine issue for trial.’” *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (emphasis in original)); *See also Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 390, 701 S.E.2d 776, 780 (Ct. App. 2010) (non-moving party may not rely on speculation to survive summary judgment) (citations omitted); *McKnight v. S.C. Dep’t of Corr.*, 385 S.C. 380, 389, 684 S.E.2d 566, 570 (Ct. App. 2009) (“[E]vidence must amount to more than speculation and conjecture to submit a case to the jury.”) (citations omitted).

AUTHORITY OF THIS COURT TO INTERPRET POLICIES

On November 27, 2018, the Receiver filed an action styled *Covil Corporation by its duly appointed Receiver, Peter D. Protopapas v. Zurich, Sentry, USF&G, and others*, in the South Carolina Circuit Court. This action sought a determination of the insurance coverage provided by the various defendant insurance companies to Covil Corporation. Shortly thereafter, this matter was removed to the United States District Court for the District of South Carolina, Spartanburg Division. U.S. District Court Judge Bruce Howe Hendricks describes the course of this litigation as follows:

This is an insurance coverage action in which the parties dispute the relative rights and obligations of Covil, its Receiver, and certain of Covil’s insurers under policies issued or allegedly issued to Covil. Among other issues, the parties dispute the manner in which it should be determined whether injuries in underlying asbestos actions are within the products and completed operations hazard of the policies

(rendering them subject to an aggregate limit), or outside the products and completed operations hazard (in which case no aggregate limit would apply), as well as the proper method for allocating injury across multiple policy years. Opinion and Order at 2, *Covil Corporation by its duly appointed Receiver, Peter D. Protopapas v. Zurich, Sentry, USF&G, and others*, CA No.: 7:18-3291-BHH (U.S.D.C.S.C. Mar. 1, 2021) (internal citation omitted).

South Carolina District Court Judge Bruce Howe Hendricks denied motions to remand to state court and issued an injunction against determination of these issues in State Court pending further rulings by the federal court. Judge Hendricks has now reconsidered her original order, withdrawn her injunction as improvidently granted and made it clear that this Court is fully empowered to determine asbestos coverage matters in cases in which the Receiver is involved on behalf of non-operational companies such as Starr Davis. Thus, there is no impediment to this Court's determination of this motion in this case. *See infra Covil Corp. by Protopapas v. Zurich, et al.*

POLICY INTERPRETATION ISSUES

As to the matters of insurance policy construction, this Court notes that South Carolina law applies to matters before South Carolina courts unless a material difference exists between the law of South Carolina and the law of another state. Travelers asserts that North Carolina law *might* have something to say on these issues, but it has not identified any material conflict between the law of South Carolina and the law North Carolina on these issues. Opp. at 4 n.2, 6, 25. Travelers might have a better argument regarding North Carolina law as to the five primary policies issues by Standard Fire Insurance Company from January 7, 1976 to May 1, 1980, which cover North Carolina occurrences (the "Standard Fire Policies"), *see* Motion at 11, but Travelers did not even mention these policies in its opposition, or attempt to make a demonstration regarding North

Carolina law. Opp. at 6, 25. In the absence of any arguable conflict, even as to these policies, reliance on South Carolina law is appropriate, including under the “false conflict” doctrine. The Court therefore does not need to engage in a conflicts of law analysis to rule on the Motion.

Travelers asserts that contract interpretation rulings are also premature because it needs to conduct discovery. Opp. at 19–22. It asserts that fact issues exist on a number of topics, including that it believes that “very little of Starr Davis’ revenues—approximately 10%—involved contracting work.” The other 90%, according to Travelers, involved product fabrication work or product distribution. Travelers asserts that this means that resulting fabrication-related claims would involve “classic ‘products hazard’ injuries.” If that is a true statement—and the Court makes no ruling one way or the other since the issue is not before it—then perhaps certain asbestos suits against Starr Davis will involve “classic ‘product hazard’ injuries.” Or, perhaps, only those plaintiffs injured during Starr Davis’ contracting work will pursue asbestos claims against Starr Davis, regardless of whether contracting was, or was not, a significant source of the company’s revenue. As discussed below, Travelers’ policies respond to the allegations in the underlying complaints, and to the facts proven in the underlying cases, not to “revenues” or a percentage of sales. There is nothing germane about the facts asserted by Travelers as a ground to defer ruling, especially since cases continue to be asserted against Starr Davis and this Court has been asked to make rulings regarding the responsiveness of the policies to actual lawsuits.

The Court does not need the facts behind Starr Davis’ historical revenue to rule on the Motion. Starr Davis has not asked the Court to declare that some percentage of asbestos suits against Starr Davis do not involve “classic ‘products hazard’ injuries,” or that some percentage of the asbestos cases against Starr Davis involve “operations injuries.” Instead, the Motion asks this Court to declare the applicable *rules* to determine whether any particular asbestos case against

Starr Davis involves “operations injuries,” “products hazard injuries” or “completed operations hazard injuries.” Motion at 11–13. These rules are based on insurance contract language. Contract interpretation is a question of law.

Indeed, this Court has not been asked in the Motion to determine whether any particular asbestos suit is, or is not, an “operations” claim under the Travelers policies. Nor is the Court being called upon to rule that a claim pursued by a theoretical asbestos plaintiff exposed to asbestos after 1972—allegedly the final year in which Starr Davis may have “touched” asbestos according to Travelers, *see* Opp. at 24—is or is not an “operations” claim under the Travelers policies. The Court can only make coverage rulings on *particular asbestos claims* based on the record evidence from the underlying tort cases. Although Travelers says it is “currently seeking discovery” on “fact issues” as to when Starr Davis last “touched” asbestos, *see* Opp. at 24, those issues are not germane to the contract interpretation issues framed by the Motion.

Furthermore, the Court notes that the issues for coverage will depend upon when the underlying asbestos claimants allege exposure or injury to Starr Davis operations or products. This Court is not going to pre-judge what those allegations or facts will be when brought before this and other courts in which underlying asbestos suits are adjudicated against Starr Davis. As noted earlier in this order, as late as the policy period January 1, 1978 through January 1, 1979, Travelers described Starr Davis’ business as including “Steam Pipe or Boiler Insulation – Applying Cork, Asbestos or Other Non-Conducting Materials.” *See* materials comprising Standard Fire Policy No. 25 AL 802 646 CNS 8. The Court finds it difficult to square this policy language with Travelers’ assertion that Starr Davis last “touched” asbestos in 1972. The Court also notes that the word “applying” connotes the installation of materials, not “fabrication.” The Court does not need to

make factual findings on Travelers' assertions, but it does note that the statements regarding a need for fact discovery appear to lack foundation, and they perhaps lack candor.

Travelers also asserts that the Interim Agreement resolves certain "allocation" and "reimbursement" issues between the parties. *See Opp.* at 21. That is incorrect. As noted above, the Interim Agreement states in no uncertain terms that it may not be used to resolve disputes between the parties concerning the meaning, intent or construction of the Travelers policies. As respects contract interpretation issues, the Motion seeks to resolve disputes between the parties concerning the meaning, intent and the construction of the Travelers policies. The Interim Agreement is irrelevant to the contract interpretation issues raised in the Motion. Neither Travelers nor its counsel should have attempted to rely on the agreement in a manner that is indisputably contrary to its express terms.

LEGAL RULINGS AS TO POLICY INTERPRETATION

Starr Davis was engaged for more than four decades in the insulation contracting business. Whether contracting work comprised 10%, 50% or 100% of its revenues is immaterial to the Motion. The Starr Davis business *included* installing, removing, replacing, repairing and distributing insulation materials in premises that were not owned or controlled by Starr Davis. The Travelers policies make clear that Starr Davis performed contracting work, and, given the four-decade relationship with Starr Davis, Travelers certainly was aware of Starr Davis' operations. Travelers also knew that Starr Davis was a major business with operations conducted in at least the states of South Carolina, North Carolina, Georgia, Alabama, Tennessee and the Commonwealth of Virginia.

This Court is aware from its extensive experience and briefing on these issues in other matters before this Court that Travelers (and other insurers) seek to rely on the decision of the United States Court of Appeals for the Fourth Circuit in *In re Wallace & Gale Co.*, 385 F.3d 820

(4th Cir. 2004), which purported to apply Maryland law. More specifically, *Wallace & Gale* adopted the view that operations claims transform into completed operations claims where there is continuing injury post-dating completion of the installation. *Id.*, 385 F.3d at 833-34.

This is a South Carolina case. Because *Wallace & Gale* purported to interpret only Maryland law, under basic principles of federalism, it established no state law precedent relevant to the outcome of this South Carolina case. The insurance issues present here turn on the interpretation of South Carolina law, which requires an independent analysis.

A. Continuous Trigger of Coverage

There is no real dispute between the parties as to the “trigger of coverage” for the asbestos suits against Starr Davis.

The term “trigger of coverage” describes the necessary events for a liability policy to respond to a suit seeking damage because of bodily injury. The South Carolina Supreme Court adopted an “injury-in-fact” trigger of coverage for progressively deteriorating property damage in the defective construction arena:

Under this theory, coverage is triggered whenever the damage can be shown in fact to have first occurred, even if it is before the damage became apparent, and the policy in effect at the time of the injury-in-fact covers all the ensuing damages.

Joe Harden Builders, Inc. v. Aetna Cas. and Sur. Co., 326 S.C. 231, 236 (1997).

The Court therefore rules that the policies at issue respond to the asbestos suits against Starr Davis when exposure resulting in bodily injury takes place during the policy period, regardless of when the injury becomes known or knowable. All of an insured’s policies in effect from a person’s first exposure to asbestos through manifestation of an asbestos disease and, ultimately, to death cover the asbestos cases against Starr Davis unless coverage is otherwise excluded. This approach is also called a “continuous trigger of coverage” inasmuch as medical science established long ago that asbestos injuries begin upon first inhalation of asbestos fibers

and continue progressively thereafter. As respects asbestos injury and death suits, the “continuous trigger of coverage” and the “injury in fact trigger of coverage” yield the same result such that the court need not choose between these conceptually similar approaches. *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 45 (1996) (“We find no error in the trial court’s use of an injury-in-fact analysis to apply a continuous trigger.”).

Consequently, all of Starr Davis’ policies in effect from a person’s first exposure to asbestos through death cover the asbestos claims against Starr Davis unless coverage is otherwise excluded.

B. The Distinction between “Operations” and “Products” and “Completed Operations.”

It has been long-established that the risk insured by the “products hazard” and the “completed operations hazard” is “the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than the product or completed work itself.” Roger C. Henderson, *Insurance Protection For Products Liability And Completed Operations – What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971). By contrast, “[w]here an insured begins an operation and the evidence shows it is still in progress” when an injury or damage occurs, the applicable hazard is “premises-operations” and not “completed operations.” *Id.* at 434–35.

Case law issued while Travelers insured Starr Davis, and shortly after it no longer insured the company, agrees with this basic formulation. For example, in *Boyer Metal Fab, Inc. v. Maryland Casualty Co.*, 750 P.2d 1195, 1197 n.2 (Or. Ct. App. 1988), the court noted that:

the purpose of the product hazard and completed operations hazard coverage is to insure against the risk that the product or work, if defective, will cause bodily injury or damage to property of others after it leaves the insured’s hands

Earlier, in *Friestad v. Travelers Indemnity Co.*, 393 A.2d 1212 (Pa. Super. Ct. 1978), the court

held:

Regardless of the involvement of the insured's products, so long as an accident occurs on the insured's business premises or away from his premises, but while he has the jobsite under his control, the premises operations clause obtains and coverage is afforded thereunder. It is only after he has relinquished control of a jobsite that the products hazard or completed operations hazard exclusions will operate to deny coverage.

See also CPS Chemical Co. v. Cont'l Ins. Co., 489 A.2d 1265, 1270 (N.J. Super. Ct. Law Div. 1984), reversed on other grounds by 495 A.2d 886 (N.J. Super. Ct. App. Div. 1985) ("Commentators are in complete agreement that [the completed operations hazard] refers to accidents caused by defective workmanship which arise after completion of work by the insured on construction or service contracts.").

Despite this historical understanding, the *Wallace & Gale* court adopted the view that operations claims somehow are transmuted into completed operations claims where there is continuing injury post-dating completion of the installation. Under *Wallace & Gale*, a single continuing injury claim could be within the "operations" hazard of one of the insured's policies, but within the "completed operations hazard" of all of the insured's other policies.⁴ This is antithetical to the nature of a "hazard" against which insurance policies cover insureds.

At its most fundamental level, a "hazard" in an insurance policy "is the source from which an accident may arise, or 'a danger or risk lurking in a situation which by chance or fortuity develops into an active agency of harm.'" *Ketona Chem. Corp. v. Globe Indem. Co.*, 404 F.2d 181, 185 (5th Cir. 1968) (quoting *Hough v. Contributory Ret. Appeal Bd.*, 36 N.E.2d 415, 418 (Mass. 1941)); *see also Serv. Welding & Mach. Co. v. Mich. Mut. Liab. Co. of Detroit*, 311 F.2d 612, 617

⁴ Travelers asserts that "[e]ven the State of California, often a bastion of pro-policyholder law, agrees" with *Wallace & Gale*. Opp. at 31. Travelers' lone citation for this bold assertion is an unpublished decision of a California trial court in a long-dismissed case. *Id.* Travelers has cited no published appellate authority from any state agreeing with *Wallace & Gale*.

(6th Cir. 1962) (“The word ‘hazard’ as used in the policy must mean ‘the source of a risk.’” Thus, a ‘hazard’ is a danger or risk lurking in a situation or place.”). “Along with other meanings, the standard dictionary defines the noun ‘hazard’ as exposure to the chance of loss or injury.” *Caminetti v. Guaranty Union Life Ins. Co.*, 52 Cal. App. 2d 330, 334 (1942). The Merriam-Webster Online Dictionary defines “hazard” to include “a source of danger.” *Hazard*, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/hazard> (last visited Jan. 17, 2020); *see also Travelers Cas. & Sur. Co. v. Emp’rs Ins. of Wausau*, 130 Cal. App. 4th 99, 114 n.6 (2005) (“Examples of injuries covered under the premises-operations coverage include injuries suffered by a shipyard worker while installing insulation at the insured’s facility and injuries caused by a subcontractor’s negligent construction of a wall that fell on a worker while the job was in progress.”). Or, in other words, the “completed operations hazard” protects Starr Davis from the risk of loss caused by its *completed* operations. The source of the “danger” against which this particular coverage protects Starr Davis is its *completed* insulation work, not its ongoing insulation work. That risk of injury caused by Starr Davis’ ongoing work is covered under the “operations” hazard in the policies. The source of a claimant’s harm—the insured’s work-in-progress or its completed work—does not change over time, even if the claimant’s bodily injury persists and progresses throughout several policy periods after injurious contact with the insured’s work.

Consequently, the “completed operations hazard,” and the corresponding aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos *after* Starr Davis completed its installation or removal operations or work at a particular jobsite. The Court rejects Travelers’ assertion that that aggregate limits of liability in its policy apply to *any* third party’s claim against Starr Davis involving exposure to asbestos that took place before the *inception date* of a particular

policy. The policies are not written in that manner, however. There is nothing in the definition of “completed operations” that focuses on the *inception* date of a policy.

In short, no aggregate limits of liability apply to suits seeking the recovery of damages for bodily injury where the plaintiff was exposed to asbestos while Starr Davis was performing work at a particular jobsite. As discussed above, the distinctions between “operations” on the one hand, and “products” and “completed operations” have been well-established for many decades. No contract interpretative rule justifies applying one approach to claims of instantaneous injury resulting from an accident, and a different approach to claims of long-term injury resulting from injurious exposures to toxic conditions. Rules of contract interpretation are uniformly applied. The “completed operations hazard” is so named because it protects the insured against liability “caused by” or “arising out” of its “completed operations”—not its un-completed operations. Bodily injury caused by Starr Davis’ ongoing operations or ongoing work is an “operations” claim. Bodily injury caused by Starr Davis’ completed operations or completed work is a “completed operations” claim. Bodily injury caused by Starr Davis’ products after Starr Davis relinquished possession of the products and place them into the stream of commerce is a “products” claim.

C. Travelers Must Show the Applicability of a Contract Limitation or Exclusion

Travelers bears the burden of proving any exclusion or limitation of coverage, including the application of aggregate limits to particular suits and the “exhaustion” of the aggregate limits of liability in their policies.

The South Carolina Supreme Court has recognized that insurers bear the burden of proving the applicability of a coverage provision that limits their liability to their insured: “Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion’s applicability.” *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2004) (citing *Boggs v. Aetna Cas. and Sur. Co.*, 272 S.C. 460, 252 S.E.2d 565

(1979)); *see also Auto Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 144–48, 781 S.E.2d 137, 141–44 (2015) (upholding circuit court decision to construe ambiguous terms in favor of coverage, and noting that “ambiguous terms are to be construed strictly against the insurer”). Courts have held that this basic principle also applies to “limitations” on coverage. *Ins. Co. of N. Am. v. Kayser-Roth Corp.*, 770 A.2d 403 (R.I. 2001) (“[o]nce the insured makes a prima facie showing of coverage, ‘the insurer then bears the burden of proving the applicability of policy exclusions and limitations in order to avoid an adverse judgment.’” (quoting *Gen. Accident Ins. Co. v. Am. Nat’l Fireproofing, Inc.*, 770 A.2d 403, 416 (R.I. 1998))); *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1446 (3d Cir. 1996) (“[T]he insurer bears the burden of proving the applicability of any exclusions or limitations on coverage, since disclaiming coverage on the basis of an exclusion is an affirmative defense”).

Travelers seems to be arguing that Starr Davis has the burden of showing that a particular asbestos claimant’s injury is not subject to the aggregate limits of liability in its policies. This is an odd proposition because it would require Starr Davis to prove two negative propositions for an asbestos claim not to be subject to an aggregate limit of liability, e.g., that an asbestos claim is not a “completed operations” claim, and that it also is not a “products” claim. However, the Travelers policies do not define a “premises-operations hazard” or an “operations hazard.” They define the “products hazard” and the “completed operations hazard.” Consequently, claims seeking the recovery of damages for bodily injury are “operations” claims unless they are shown to satisfy the definition of the “products hazard” or the “completed operations hazard” in the policies.

A party seeking to show that an asbestos claim is within the “products hazard” or the “completed operations hazard”—here, Travelers seeking to impose an aggregate limit of liability onto Starr Davis—naturally should have the burden of proving that the definition of the “products

hazard” or the “completed operations hazard” has been satisfied. Otherwise, Starr Davis would be in the unenviable position of “proving” negatives. The law generally does not impose this type of burden.

Consequently, as to any individual asbestos lawsuit, it is Travelers’ burden to prove that the suit seeks the recovery of damages that are subject to the aggregate limits of liability, if any, applicable to the “completed operations hazard” or “products hazard” in its policies, where such aggregate limits have been proven by Travelers as to each specific policy or policy period. By definition, aggregate limits restrict coverage. Accordingly, Travelers bears the burden of demonstrating that aggregate limits in its policies, if any, apply to any particular asbestos suits.⁵

D. Number of Occurrences

The Travelers policies at issue provide coverage for legal liabilities resulting from an “occurrence.” An “occurrence” is typically defined as an accident, including continuous or repeated exposure to substantially similar conditions, that results in bodily injury during the policy period. *See, e.g., Crossmann Cmty. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 47–48, 717 S.E.2d 589, 592–93 (2011). The Court understands Starr Davis’ motion to be seeking a multiple occurrence ruling only as respects “operations” claims, and not “completed operations” claims or “products” claims.

Nevertheless, Travelers asserts that all “operations” asbestos cases against Starr Davis must result from a single “occurrence” under its policies by citing to several asbestos *products* cases where the evidence against the product-manufacturer insureds were the same in every case—they manufactured and/or sold a defective product that resulted in injury or death. *Opp.* at 34–37. The single “cause” in each of those cases was the manufacture of a harmful product. *Id.* (citing *Liberty*

⁵ Travelers again cites to the unpublished decision of a California trial court in support of its contrary view. *Opp.* at 31. The Court does not find this decision persuasive. *See also* n. 8, above.

Mut. Ins. Co. v. Treesdale, Inc., 418 F.3d 330 (3d Cir. 2005); *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254 (Del. 2010); *Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.*, 597 F. Supp. 1515 (D.D.C. 1984); *Owners Ins. Co. v. Salmonsens*, 622 S.E.2d 525 (S.C. 2005) (all addressing products coverage rather than ongoing operations coverage)).

This is not the same thing as cases arising from Starr Davis’ installation, disturbance and/or removal of asbestos-containing materials. Those cases do not involve liability simply for placing defective products into the “stream of commerce.” They are cases arising from Starr Davis’ alleged negligence and its failure to warn and protect bystanders of harm arising from its insulation contracting work. The evidence against Starr Davis is different in each one of these types of cases because the asbestos plaintiff’s contact with Starr Davis is unique to his or her particular circumstances. The cause of injury in all of the Starr Davis insulation contracting cases is not uniform like it is in manufacturer asbestos products cases, and it is not uninterrupted. Travelers’ reliance on insurance coverage decisions concerning manufacturers of asbestos products—not at issue here—is therefore misplaced.

Indeed, the asbestos insulation operations suits against Starr Davis are not repetitive products liability suits alleging exposure to asbestos from the same defective product. Instead, these suits allege that Starr Davis’ operations exposed workers and other bystanders to asbestos. Courts have held that the type of asbestos operations claims against Starr Davis resulted from multiple ‘occurrences’ under the standard definition of ‘occurrence’ used during the time of the insurers’ policies. See, e.g. *Travelers Cas. & Sur. Co. v. Gerling Global Reinsurance Corp. of Am.*, 419 F.3d 181, 184 (2d Cir. 2005) 184 (“[I]f claims arising from multiple occurrences triggered [operations] coverage, then Travelers was exposed to unlimited liability; each occurrence was subject to a \$1 million limit on liability, but there was no cap on total liability. Regardless of how

much Travelers had paid for previous non-products occurrences under a single policy, each additional non-products occurrence under that policy subjected Travelers to liability anew.”).

Travelers has not provided a persuasive argument as to why the Court should come to a different conclusion in connection with asbestos operations claims against Starr Davis. The Court will not do so.

E. Allocation of Losses to the Travelers’ Policies

Exposure to asbestos results in progressive injury spanning many years, thereby triggering coverage under multiple policies. Exposure to asbestos during the conduct of operations that results in bodily injury during the policy period or periods during which the operations were conducted also presents an allocation issue.

The issue is somewhat theoretical in this case, as opposed to other cases, since Travelers alone issued forty years of uninterrupted liability insurance coverage to Starr Davis. Equally important is that Starr Davis is in a Receivership, with no assets other than its insurance policies and proceeds, which also affects any allocation of loss to the insured since Starr Davis cannot absorb any allocation of loss. Finally, the Court notes that the language of the policies typically requires the insurers to pay “all sums” —meaning everything—for which the insured is legally obligated to pay if a claimant sustains bodily injury during the period of the policy.

The Court remains quite mindful of the South Carolina Supreme Court’s decision in *Crossmann Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), and notes that it speaks generally to allocation of loss in a continuing construction property loss case, but does not address the particular circumstances presented by this Receivership, i.e., the applicability of operations coverage and the impracticability of allocation of loss to Starr Davis itself.

Therefore, the Court will apply the rule of *Crossmann Communities of N.C., Inc.*, except

in the case of operations claims where the policies in effect during the conduct of the operations will apply on an “all sums” basis. The Court also interprets *Crossmann* such that allocation of loss will not be made to policy years after 1986, when Starr Davis does not have any available or responsive coverage. Starr Davis lacks the ability to absorb loss allocations from Travelers, its liability insurer over a forty-year period. Allocation of loss from a judgment or settlement to an insured which cannot pay any portion of the judgment or settlement —especially when there is abundant insurance to pay for the loss but for a judicially-created allocation formula—is unproductive, as well as inequitable. The reason for a “time on the risk” allocation is to accomplish an “equitable” allocation. However, there is no “equity” in either driving an insured further into insolvency through a formulistic allocation method or by leaving a portion of a settlement or judgment unpaid. Nor is it “equitable” to apportion any loss to an insured in receivership when there is any responsive insurance.⁶

Finally, the Court notes one additional allocation aspect, which is unique to this case. As set forth, the Standard Fire policies apply to North Carolina occurrences for the policy years 1976 to May 1980 and there are Aetna policies for the same policy periods that apply to other occurrences. If a claimant alleges exposure or injury that invoke or implicate both the Standard

⁶ Travelers notes that a federal court in North Carolina allegedly applied the *Crossman* rule in the context of a defunct insured receivership and therefore allocated proportionate responsibility to the defunct insured during the time in which asbestos liability was not insurable. Opp.. at 42 (citing *Zurich-Am. Ins. Co. v. Covil Corp.*, No. 1:18-CV-932, 2020 WL 4483236, at *11 (M.D.N.C. Aug. 4, 2020). However, at issue in the *Covil* decision upon which Travelers relies was coverage for the judgment entered in the *Finch* lawsuit, which was indisputably a “products” case under the policies before the court. Here, Starr Davis seeks contract interpretation rulings applicable to asbestos “operations” suits that continue to be asserted against the company. The *Covil* decision thus is based on distinguishing factual circumstances that neither determine nor suggest an outcome here.

Fire policies and Aetna policies for the same policy period, Starr Davis can “stack” the limits of such policies. This declaration is a reasonable construction of these policies.

Conclusion

This Court Grants Receiver’s Motion for Partial Summary Judgement and issues a declaratory judgment as above set forth.

AND IT IS SO ORDERED!

Jean H. Toal, Chief Justice of the Supreme Court,
Retired, acting as Circuit Court Judge

_____, 2021
Columbia, South Carolina



Richland Common Pleas

Case Caption: Starr Davis Company Inc , plaintiff, et al vs Hartford Accident And Indemnity Company , defendant, et al

Case Number: 2019CP4006243

Type: Order/Summary Judgment

So Ordered

Jean H. Toal

Electronically signed on 2021-03-03 16:40:25 page 34 of 34

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019-CP-40-06243

Peter Protopapas, as Receiver for Starr Davis
Company, Inc., et al
PLAINTIFF(S)Travelers Casualty and Surety Company, et al
DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ 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.
- ☐ **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 _____
- ☐ **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:

This matter comes before the court upon Travelers Casualty and Surety Company and The Standard Fire Insurance Company's Motion to Reconsider filed March 12, 2021. After fully considering the Defendant's Motion to Reconsider the Court's March 3, 2021, Order granting Starr Davis's Renewed Supplemental Motion for Partial Summary Judgment, the Court DENIES the Defendant's Motion to Reconsider.

ORDER INFORMATION

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.**

Circuit Court Judge

Judge Code

Date**For Clerk of Court Office Use Only**

This judgment was entered on the _____ day of _____, 20__ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20__ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT**Court Reporter:**



Richland Common Pleas

Case Caption: Starr Davis Company Inc , plaintiff, et al vs Hartford Accident And Indemnity Company , defendant, et al

Case Number: 2019CP4006243

Type: Order/Form 4

So Ordered

Jean H. Toal

Electronically signed on 2021-05-19 11:23:59 page 3 of 3

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

Starr Davis Company, Inc. and Starr Davis
Company of S.C., Inc, through its Receiver,
Peter D. Protopapas,

Plaintiff,

v.

Hartford Accident and Indemnity
Company; Twin City Fire Insurance
Company; Travelers Casualty and Surety
Company f/k/a The Aetna Casualty and
Surety Company; The Standard Fire
Insurance Company; Southeastern Agency
Group and M.I.A. Company, Inc.
individually and as successors to or f/k/a
Merrimon Insurance Agency, Inc.; Robert
E. Aspray; Nell Ashworth, individually and
as Personal Representative of the Estate of
Robert J. Ashworth; Betty C. D'amico,
Individually and as Executor of the Estate
of Julian D'amico, Jr.; Kayla Keith,
Individually and as the Personal
Representative of the Estate of Jerry W.
Archer, Sr.; Richard L. Knight II, as
Personal Representative of the Estate of
Teddy L. Knight, Sr., and Linda Knight,
Individually; David D. Rollins; James W.
Smith and Frances R. Smith; and Linda J.
White, Individually and as Personal
Representative of the Estate of Lubert F.
White, Jr.,

Defendants.

C/A No.: 3:19-3481-JFA

ORDER

This matter is currently before the Court on several motions including Defendant
Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company

(“Travelers Casualty”) and Defendant The Standard Fire Insurance Company’s (“Standard Fire”), a subsidiary of Travelers (collectively “Travelers”), motion to realign the parties pursuant to Federal Rule of Civil Procedure 21 (ECF No. 3) and Peter D. Protopapas’, as the duly-appointed Receiver for Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc., (collectively “Starr Davis” or “Plaintiff”), motion to remand (ECF No. 15).

Because both motions are vital to the threshold question of jurisdiction and contain overlapping factual and legal analysis, they will be considered here together. Both motions have been fully briefed and are thus ripe for review. Based on the thorough and comprehensive briefing offered by the parties, the Court does not feel a hearing would aid in its analysis. *See* Local Civ. Rule 7.08 (D.S.C.).

I. FACTUAL AND PROCEDURAL HISTORY

Starr Davis operated as an installer of thermal insulation materials in South Carolina between 1949 and 1997. During a portion of that period, from at least 1964 through 1986, Merrimon Insurance Agency, Inc. (“Merrimon”) served as Starr Davis’ insurance broker. Starr Davis relied on Merrimon to provide advice regarding the insurance it required for its business needs and to procure that insurance coverage. During the relevant time periods, Starr Davis alleges to have purchased insurance coverage from Travelers Casualty and Standard Fire, as well as Defendant Hartford Accident and Indemnity Company (“Hartford”), and Defendant Twin City Fire Insurance Company (“Twin City”) (collectively “Insurers”).

Several asbestos claimants, including Defendants Robert E. Aspray, Nell Ashworth (individually and as personal representative of the Estate of Robert J. Ashworth), Betty C. D'Amico (individually and as Executor of the Estate of Julian D'Amico, Jr.), Kayla Keith (individually and as the personal representative of the Estate of Jerry W. Archer, Sr.), Richard L. Knight II (as personal representative of the Estate of Teddy L Knight, Sr., and Linda Knight, individually), David D. Rollins, James W. Smith, Frances R. Smith, and Linda J. White (individually and as personal representative of the Estate of Lubert F. White, Jr.) (collectively "Claimants") have alleged that during the conduct of Starr Davis' operations, they were exposed to asbestos, thereby suffering bodily injuries. The Claimants currently have underlying cases pending in South Carolina state court seeking to recover from Starr Davis. The Receiver is acting on behalf of Starr Davis in those proceedings and, as a result, brought this declaratory judgment action against its insurers, its former insurance broker, and the Claimants in the Richland County Court of Common Pleas. The complaint contains six causes of action:

- Count I is a declaratory judgment claim in which Plaintiff seeks a declaration that "each Defendant Asbestos Claimant and Defendant Insurer must fairly compensate the Receiver" or "declare which Defendants are responsible for compensating the Receiver for the substantial time, effort, and expenses the Receiver put towards his responsibilities as Receiver of Starr Davis." (Compl. ¶¶ 36–37).
- Count II is a declaratory judgment claim in which Plaintiff seeks a declaration that Plaintiff is "entitled to copies of all Defendant Insurance policies," "that if Defendant Insurers did not issue the policies containing their names and specifically through Merrimon [] that the Court find Defendant Merrimon [] responsible for the defense and indemnification of Plaintiff during those respective years," that "Defendants have a duty to defend the Asbestos Claimants lawsuits," and that "Merrimon breached its obligation to maintain Starr Davis policies." (Compl. ¶¶ 42–47).

- Count III is a declaratory judgment claim in which Plaintiff seeks a declaration “as to the interpretation and meaning of the insurance policies, including those for years for which Merrimon [] is responsible” (Compl. ¶ 48).
- Count IV is a “failure to procure insurance” claim against Merrimon. (Compl. ¶¶ 50–61).
- Count V is a breach of contract claim against Merrimon. (Compl. ¶¶ 62–65).
- Count VI is a declaratory judgment claim in which Plaintiff seeks a declaration limiting and curtailing certain rights of the Claimants. (Compl. ¶ 68).

Travelers subsequently removed this action to this Court on December 13, 2019. (ECF No. 1). Contemporaneous with the notice of removal, Travelers also filed the instant motion to realign the parties. Shortly thereafter, Starr Davis filed the instant motion to remand.

It appears undisputed that, for the purposes of determining jurisdiction, Starr Davis is a citizen of South Carolina and North Carolina; the Claimants are residents of South Carolina or North Carolina; Merrimon is a citizen of North Carolina; Hartford is a citizen of Connecticut; Twin City is a citizen of Indiana and Connecticut; Travelers Casualty is a citizen of Minnesota and Connecticut; and Standard Fire is a citizen of Connecticut. What is disputed however, is whether the above parties are properly aligned or subject to removal via the fraudulent joinder doctrine.

II. APPLICABLE LAW

Removal

“[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States.” 28 U.S.C. § 1441. Federal district courts “have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different States.” 28 U.S.C. § 1332. Complete diversity “mean[s] a plaintiff cannot be a citizen of the same state as any defendant.” *Johnson v. Am. Towers, LLC*, 781 F.3d 693, 704 (4th Cir. 2015). Additionally, “[a] civil action otherwise removable solely on the basis of [diversity] jurisdiction . . . may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.” 28 U.S.C. § 1441(b)(2). Moreover, all defendants must timely consent to removal in order for the removal to be effective. 28 U.S.C. § 1446(b)(2).

The party seeking removal bears the burden to establish federal subject matter jurisdiction. *Hoschar v. Appalachian Power Co.*, 739 F.3d 163, 169 (4th Cir. 2014). Courts must strictly construe the removal statutes and “resolve all doubts about the propriety of removal in favor of retained state court jurisdiction.” *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir. 1993); *see also Dixon v. Coburg Dairy*, 369 F.3d 811 (4th Cir. 2004) (*en banc*) (“We are obliged to construe removal jurisdiction strictly because of the ‘significant federalism concerns’ implicated. Therefore, ‘[i]f federal jurisdiction is

doubtful, a remand [to state court] is necessary.”) (alterations in original) (citations omitted).

Fraudulent Joinder

The “fraudulent joinder” doctrine can permit a court “to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and thereby retain jurisdiction.” *Mayes v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999). To establish fraudulent joinder, the removing party must demonstrate either that the plaintiff “committed outright fraud in pleading jurisdictional facts, or that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court.” *Weidman v. Exxon Mobil Corp.*, 776 F.3d 214, 218 (4th Cir. 2015) (internal quotation marks omitted). “The party alleging fraudulent joinder bears a heavy burden—it must show that the plaintiff cannot establish a claim even after resolving all issues of law and fact in the plaintiff’s favor.” *Johnson v. Am. Towers, LLC*, 781 F.3d 693, 704 (4th Cir. 2015) (internal quotation marks omitted). “This standard is even more favorable to the plaintiff than the standard for ruling on a motion to dismiss under FED. R. CIV. P. 12(b)(6) . . . because a jurisdictional inquiry is not the appropriate stage of litigation to resolve the[] various uncertain questions of law and fact.” *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 424, 425 (4th Cir. 1999). To defeat an allegation of fraudulent joinder, the plaintiff need establish “only a slight possibility of a right to relief.” *Mayes*, 198 F.3d at 464 (internal quotation marks omitted).

Realignment of Parties

The United States Supreme Court held in *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 69 (1941), that:

Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to "look beyond the pleadings, and arrange the parties according to their sides in the dispute." . . . Whether the necessary "collision of interest" exists, is therefore not to be determined by mechanical rules. It must be ascertained from the "principal purpose of the suit" and the "primary and controlling matter in dispute."

(emphasis added) (internal citations omitted).

"For the purpose of removal, the federal law determines who is plaintiff and who is defendant." *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 580 (1954).

To fulfill this duty, the Fourth Circuit has specifically adopted the "principal purpose" test in deciding how to properly align parties. *See United States Fid. and Guar. Co. v. A & S Mfg. Co.*, 48 F.3d 131, 133 (4th Cir. 1995). Applying the "principal purpose" test entails two steps: "First, the court must determine the primary issue in the controversy. Next, the court should align the parties according to their positions with respect to the primary issue." *Id.* If the court determines that the parties should be realigned based on the "principal purpose" test, then the court must determine whether complete diversity exists based on the realignment of the parties. *Id.*

III. ANALYSIS

Although the Complaint on its face indicates that complete diversity of citizenship is lacking, Travelers nonetheless contends that this Court should exercise diversity jurisdiction over the action because (i) Merrimon was not properly joined as a defendant

in this action and/or it should be realigned as a plaintiff, and (ii) Claimants were not properly joined as defendants in this action and/or they should be realigned as plaintiffs. Conversely, Starr Davis and Claimants contend that (i) Travelers failed to meet the technical requirements for removal, (ii) the parties are properly aligned and thus this Court lacks jurisdiction.

According to Travelers, upon dismissal and/or realignment of Merrimon and Claimants as plaintiffs, complete diversity of citizenship would exist between the resulting plaintiffs, which are allegedly citizens of North Carolina and South Carolina, and the Insurers, which are citizens of Connecticut, Indiana, and Minnesota. Additionally, no party disputes that the amount in controversy exceeds the jurisdictional threshold of \$75,000.

Fraudulent Joinder

Initially, Travelers argues that Starr Davis fraudulently joined Merrimon in an effort to defeat federal diversity jurisdiction because Plaintiff has not asserted, and cannot assert, a viable cause of action against Merrimon. Travelers makes no assertion of “outright fraud” in Starr Davis’ inclusion of Merrimon.

In support of this contention, Travelers argues that Plaintiff has failed to allege specific facts outlining the relationship between Starr Davis and Merrimon which would establish a viable cause of action. Additionally, Travelers asserts that Starr Davis’ claims against Merrimon are time barred by the applicable statute of limitations. In response, Starr Davis points to numerous factual assertions within the Complaint that allege Starr Davis relied upon Merrimon to provide guidance as to the proper insurance coverage needed and also to aid in procuring that coverage. (Compl. pp. 13–15). Starr Davis then goes on to

allege that Merrimon breached its duty¹ to Starr Davis by failing to procure the requested coverage (at least for one applicable year). *Id.* Additionally, Starr Davis alleges that South Carolina’s “discovery rule” dictates that the claims at issue are not time barred because Starr Davis only became aware of the facts necessary to bring this claim well within the applicable limitations period. (ECF No. 15) (citing *Epstein v. Brown*, 610 S.E.2d 816, 818 (S.C. 2005)).

Determining these contentions would require this Court to resolve numerous issues of both law and fact in Merrimon’s favor to conclude that Starr Davis has no possibility to establish a cause of action against Merrimon. Because this Court is required to resolve all issues of law and fact in favor of Starr Davis however, it cannot be said that the allegations in the Complaint fail to offer Starr Davis even a slight possibility of a right to relief. *See Johnson v. Am. Towers, LLC*, 781 F.3d 693, 704 (4th Cir. 2015).

To be sure, Travelers asserts numerous arguments that could support Merrimon’s own motion to dismiss or other dispositive motion presented before a court of competent jurisdiction. However, the standard here is “even more favorable to the plaintiff than the standard for ruling on a motion to dismiss under FED. R. CIV. P. 12(b)(6) . . . because a jurisdictional inquiry is not the appropriate stage of litigation to resolve the[] various uncertain questions of law and fact.” *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 424, 425

¹ Travelers seemingly admits the existence of a duty owed to Starr Davis by Merrimon by stating that the courts “have long recognized the general rule that insurance agents and brokers are required to exercise due care in placing insurance and would be personally liable for the neglect of that duty.” (ECF No. 1) (quoting *Riddle-Duckworth, Inc. v. Sullivan*, 171 S.E.2d 486, 490 (S.C. 1969)).

(4th Cir. 1999). Accordingly, Travelers has failed to show that Starr Davis has no possibility of a right to relief from Merrimon. Thus, Merrimon cannot be disregarded under the fraudulent joinder doctrine for purposes of determining jurisdiction.

In addition to these initial arguments, Travelers also submitted a “supplemental opposition” to the motion to remand in which it introduces a “cost sharing agreement” that purportedly acknowledges the existence of insurance coverage during the entire 1959–1985 period. (ECF No. 42). This would necessarily include coverage for the time period in which Starr Davis alleges Merrimon failed to procure proper insurance coverage. Travelers asserts that this agreement now “moots Starr Davis’ claims against Defendant Merrimon.” *Id.*

As above, arriving at this conclusion proposed by Travelers would necessarily require this Court to resolve issues of law and fact in favor of Merrimon based solely on Travelers’ acknowledgement of this cost sharing agreement. Travelers appears to request an adjudication of Starr Davis’ claims against Merrimon on the merits as opposed to determining that “there is no possibility that the plaintiff would be able to establish a cause of action against” Merrimon. *Weidman v. Exxon Mobil Corp.*, 776 F.3d 214, 218 (4th Cir. 2015). The Court is unpersuaded that such a leap is justified at this early stage of litigation. This is especially true when Travelers admits that this agreement is “secondary evidence” that does “not necessarily establish[] terms, conditions and provisions of the alleged policies.”² (ECF No. 42). Again, this argument may prove to be valuable support for

² Curiously, the agreement itself also calls into question its admissibility in this action as it states that “[n]either this Interim Agreement nor any part thereof shall be offered in evidence or used for

Merrimon in its motion for summary judgment.³ However, dismissing the claims against Merrimon at this time would be improper.

Realignment

Because Merrimon is not subject to dismissal under the fraudulent joinder doctrine, the Court must next determine if the parties should be realigned such that Merrimon becomes a plaintiff for purposes of the jurisdictional inquiry.

In arguing the applicable “primary purpose” test, Travelers asserts that the primary purpose of this action is to “establish the availability and amount of potential insurance coverage under the insurance policies the Defendant-Insurers allegedly issued to Starr Davis.” (ECF No. 38.) Included within that of course is the question of whether Merrimon ever procured the necessary insurance coverage at issue as requested by Starr Davis. Accordingly, the claims against Merrimon are part and parcel of Travelers’ proposed primary purpose.

Moreover, contrary to Travelers’ contention, Merrimon is not more closely aligned with Starr Davis in this declaratory judgment action. Travelers contends that Merrimon will argue that “the single missing insurance policy, amongst many years of confirmed other policies, exists, not that it failed to procure that one policy” and would thus “stand

any purpose in any court of law as support for the position being asserted by either party hereto in connection with the meaning, intent or construction of any insurance policy or policies issued by Aetna or purchased by Starr Davis.” (ECF No. 42-1 p. 2).

³ Additionally, this Court is well aware that when reviewing a fraudulent joinder claim “the court is not bound by the allegations of the pleadings, but may instead consider the entire record, and determine the basis of joinder by any means available.” *AIDS Counseling & Testing Ctrs. v. Group W Telev., Inc.*, 903 F.2d 1000, 1004 (4th Cir. 1990). However, this Court declines to dismiss Merrimon on what amounts to a summary judgment motion at such an early stage of the proceedings.

shoulder to shoulder with Starr Davis.” (ECF No. 38). However, Merrimon could alternatively argue, as apparently the Insurers have, that the alleged policies at issue do not provide coverage for the underlying asbestos claims and therefore failure to procure one year’s worth of identical policy coverage would have resulted in no harm to Starr Davis. In that instance, Merrimon would stand in a position identical to that of the Insurers.

Additionally, the plain language of the claims within the Complaint indicate that Starr Davis is seeking the exact same remedy from Merrimon as it seeks from the Insurers - defense and indemnity under insurance policies that were or should have been procured by Merrimon.⁴ *See* Compl. ¶¶ 42–47 (requesting that “the Court find Defendant Merrimon [] responsible for the defense and indemnification of Plaintiff during those respective years.”). Accordingly, both the Insurers and Merrimon share the primary goal of avoiding obligations to Starr Davis. *See U.S. Fid. & Guar. Co. v. A & S Mfg. Co.*, 48 F.3d 131, 134 (4th Cir. 1995) (“The potentially substantial, though not principal, controversies that USF & G raises are subsumed in the primary issue of the insurers' liability to A & S. The insurers share the primary goal of avoiding obligations to A & S, and the district court properly realigned them as plaintiffs opposite the defendant A & S.”) (emphasis added).

⁴ “If the agent or broker fails, because of his fault or neglect, to procure the insurance, or does not follow instructions, or if the policy is void or materially deficient, or does not provide the coverage he undertook to supply, he is liable to his principal for the loss sustained thereby in the amount that would have been due under the insurance policy if it had been obtained and provided the desired coverage.” *Riddle-Duckworth, Inc. v. Sullivan*, 253 S.C. 411, 421, 171 S.E.2d 486, 490 (1969).

Accordingly, Merrimon is a proper party and is correctly aligned as a defendant adverse to Starr Davis. Because Merrimon and Starr Davis share a common state of citizenship—North Carolina—complete diversity does not exist. Therefore, this Court lacks subject matter jurisdiction and this case must be remanded to South Carolina state court. Because statute 28 U.S.C. § 1332 requires complete diversity, the citizenship of the Claimants, and thus whether they are properly joined as defendants, is moot in light of the above. Accordingly, the Court declines to address the motion to realign or strike as improperly joined as it relates to the Claimants.

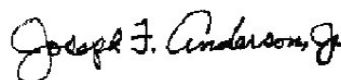
Additionally, all other arguments included in the motion to remand, including the assertion that Insurers failed to meet the technical requirements of the removal statutes, are likewise moot.

IV. CONCLUSION

For the reasons discussed above, Starr Davis' motion to remand (ECF No. 15) is granted and Travlers' motion to realign the parties (ECF No. 3) is denied. This case is remanded back to the Richland County Court of Common Pleas for lack of jurisdiction. Accordingly, this Court does not have jurisdiction to consider the pending Motion to Dismiss. (ECF No. 6).

IT IS SO ORDERED.

January 30, 2020
Columbia, South Carolina



Joseph F. Anderson, Jr.
United States District Judge

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

STARR DAVIS COMPANY, INC. and
STARR DAVIS COMPANY OF S.C., INC.
through its Receiver, Peter D. Protopapas,

Plaintiff,

Case Number:

In Re:

Asbestos Personal Injury Litigation
Coordinated Docket

Vs.

SUMMONS

HARTFORD ACCIDENT AND
INDEMNITY COMPANY; TWIN CITY
FIRE INSURANCE COMPANY;
TRAVELERS CASUALTY AND SURETY
COMPANY f/k/a THE AETNA CASUALTY
AND SURETY COMPANY; THE
STANDARD FIRE INSURANCE
COMPANY; SOUTHEASTERN AGENCY
GROUP and M.I.A. COMPANY, INC.
individually and as successors to or f/k/a
MERRIMON INSURANCE AGENCY,
INC.; ROBERT E. ASPRAY; NELL
ASHWORTH, individually and as personal
representative of the Estate of ROBERT J.
ASHWORTH; BETTY C. D'AMICO,
individually and as Executor of the Estate of
JULIAN D'AMICO, JR.; KAYLA KEITH,
individually and as the personal representative
of the Estate of JERRY W. ARCHER, SR.;
RICHARD L. KNIGHT II, as personal
representative of the Estate of TEDDY L.
KNIGHT, SR., and LINDA KNIGHT,
individually; DAVID D. ROLLINS; JAMES
W. SMITH and FRANCES R. SMITH; and
LINDA J. WHITE, individually and as
Personal Representative of the Estate of
LUBERT F. WHITE, JR.,

Defendants.

TO THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served on you, and to serve a copy of your Answer to the said Complaint upon the subscribers at 1329 Blanding Street, Columbia, South Carolina 29201, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in such Complaint.

Respectfully submitted,

RIKARD & PROTOPAPAS, LLC

s/ Jescelyn T. Spitz

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

This 6th Day of November, 2019

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

STARR DAVIS COMPANY, INC. and
STARR DAVIS COMPANY OF S.C., INC.
through its Receiver, Peter D. Protopapas,

Plaintiff,

Case Number:

In Re:

Asbestos Personal Injury Litigation
Coordinated Docket

Vs.

HARTFORD ACCIDENT AND
INDEMNITY COMPANY; TWIN CITY
FIRE INSURANCE COMPANY;
TRAVELERS CASUALTY AND SURETY
COMPANY f/k/a THE AETNA CASUALTY
AND SURETY COMPANY; THE
STANDARD FIRE INSURANCE
COMPANY; SOUTHEASTERN AGENCY
GROUP and M.I.A. COMPANY, INC.
individually and as successors to or f/k/a
MERRIMON INSURANCE AGENCY,
INC.; ROBERT E. ASPRAY; NELL
ASHWORTH, individually and as personal
representative of the Estate of ROBERT J.
ASHWORTH; BETTY C. D'AMICO,
individually and as Executor of the Estate of
JULIAN D'AMICO, JR.; KAYLA KEITH,
individually and as the personal representative
of the Estate of JERRY W. ARCHER, SR.;
RICHARD L. KNIGHT II, as personal
representative of the Estate of TEDDY L.
KNIGHT, SR., and LINDA KNIGHT,
individually; DAVID D. ROLLINS; JAMES
W. SMITH and FRANCES R. SMITH; and
LINDA J. WHITE, individually and as
Personal Representative of the Estate of
LUBERT F. WHITE, JR.,

Defendants.

COMPLAINT FOR DECLARATORY
JUDGMENT AND
BREACH OF CONTRACT

NOW COMES the Plaintiff complaining of the above-named defendants hereby alleges
as follows:

THE PARTIES

1. Peter D. Protopapas was appointed Receiver of STARR DAVIS COMPANY, INC. and STARR DAVIS COMPANY OF S.C., INC. (collectively hereinafter “Starr Davis”) on February 21, 2019, by Order of the Honorable Jean H. Toal of the Fifth Judicial Circuit Court, in the case of *Charles T. Hopper and Rebecca Hopper v. Air & Liquid Systems Corporation, et al.*, case number 2019-CP-4000076. **See Exhibit A.** Plaintiff’s primary place of business is Richland County South Carolina.
2. STARR DAVIS COMPANY, INC. is a former North Carolina corporation whose principal place of business was in North Carolina.
3. STARR DAVIS COMPANY OF S.C., INC. is a former South Carolina corporation.
4. Defendant HARTFORD ACCIDENT AND INDEMNITY COMPANY (“Hartford”) is a Connecticut corporation with its headquarters in Connecticut;
5. Defendant TWIN CITY FIRE INSURANCE COMPANY (hereinafter “Twin City”), is an Indiana corporation with its headquarters in Connecticut.
6. Defendant TRAVELERS CASUALTY AND SURETY COMPANY f/k/a THE AETNA CASUALTY AND SURETY COMPANY, is a Minnesota corporation with its headquarters in Connecticut.
7. Defendant THE STANDARD FIRE INSURANCE COMPANY (hereinafter collectively referred to as “Travelers” along with THE AETNA CASUALTY AND SURETY COMPANY), is a Connecticut corporation with its headquarters in Connecticut.
8. Defendant MERRIMON INSURANCE AGENCY INC. is upon information and belief a North Carolina corporation that has either maintained its status as a North

Carolina company as MIA COMPANY, INC. and/or as SOUTHEASTERN AGENCY GROUP, INC. (hereinafter collectively referred to as Merrimon Insurance).

9. Defendant ROBERT E. ASPRAY (hereinafter “Aspray”), is a citizen and resident of South Carolina.
10. Defendant NELL ASHWORTH, individually and as personal representative of the Estate of ROBERT J. ASHWORTH (hereinafter “Ashworth”), is a citizen and resident of South Carolina.
11. Defendant BETTY C. D’AMICO, Individually and as Executor of the Estate of JULIAN D’AMICO, JR. (hereinafter “D’Amico”) is a citizen and resident of North Carolina.
12. Defendant KAYLA KEITH, individually and as the personal representative of the Estate of JERRY W. ARCHER, SR. (hereinafter “Keith”), is a citizen and resident of South Carolina.
13. Defendant RICHARD L KNIGHT II, as personal representative of the Estate of TEDDY L KNIGHT, SR., and LINDA KNIGHT, individually (hereinafter “Knight”), is a citizen and resident of South Carolina.
14. Defendant DAVID D. ROLLINS (hereinafter “Rollins”), is a citizen and resident of the State of South Carolina.
15. Defendant JAMES W. SMITH and FRANCES R. SMITH (collectively hereinafter “Smith”), are citizens and residents of North Carolina.

16. Defendant LINDA J. WHITE, Individually and as Personal Representative of the Estate of LUBERT F. WHITE, JR. (hereinafter “White”), is a citizen and resident of the State of South Carolina.

JURISDICTION AND VENUE

17. This Court has jurisdiction over this suit inasmuch as this Court appointed the Plaintiff as Receiver of Starr Davis, a former South Carolina and former North Carolina corporation.
18. Venue is proper in this Court as it is the Receiver Court with cases pending and anticipated new filings in this Court. Further, on March 3, 2019, pursuant to the Order of the Supreme Court of South Carolina, Order Number 2017-03-03-01, the Honorable Jean H. Toal was appointed to have jurisdiction in all circuits in this state to dispose of all pretrial matters and motions, as well as trials, arising out of asbestos and asbestos litigation filed within the state court system. Thus, the Honorable Jean H. Toal will have jurisdiction over this matter.

FACTUAL BACKGROUND

19. Upon information and belief, Starr Davis was incorporated from May 9, 1949, through August 19, 1997. During that time, Starr Davis supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to the installation and removal of asbestos-containing thermal insulation.
20. Throughout its period of operations, Starr Davis is alleged to have exposed numerous employees, clients, and/or contractors to asbestos-containing products, materials,

and/or equipment including, but not limited to, Defendant's Ashworth, Aspray, D'Amico, Keith, Knight, Rollins, Smith, and White (hereinafter "Asbestos Claimants").

21. Merrimon Insurance served as the insurance broker to Starr Davis from at least 1964 through 1986. Based out of Greensboro, North Carolina, Merrimon Insurance touted itself as a general insurance agency building solid relationships and protecting businesses and families throughout the area.

22. Upon information and belief, Starr Davis relied upon Merrimon Insurance to provide advice to Starr Davis on the best insurance options for its needs; as a result, Starr Davis purchased the following insurance policies at the advice of Merrimon Insurance:

- a. Aetna Casualty and Surety Company primary policies: 25AL6996CM (1/1/1964-1/1/1965); 25AL8026CM (1/1/1965-1/1/1966); 25AL009308CM (1/1/1966-1/1/1967); 25AL802362CMA (1/1/1972-1/1/1973);¹ 25AL801362CMA (1/1/1974-1/1/1975); 25AL802646CNS (1/1/1975-1/1/1976); 25AL801362CMA (1/1/1975-1/1/1976); 25AL802646CNS (1/1/1976-1/1/1977); 25AL801362CMA (1/1/1976-1/1/1977); 25AL801362CMA (1/1/1977-1/1/1978); 25AL802646CNS (1/1/1977-1/1/1978); 25AL802646CNS (1/1/1978-1/1/1979); 25AL801362CMA (1/1/1978-1/1/1979); 25AL802646CMA (1/1/1979-5/1/1979); 25GL802646CMA (1/1/1979-5/1/1979); 25GL802646CMA (5/1/1979-5/1/1980); 25GL56819CCA (5/1/1980-4/30/1981); 25GL269082CCA

¹ Merrimon represented to Starr Davis that it had placed this coverage; however, Travelers asserts that no such insurance was placed.

(5/1/1981-5/1/1982); 25GL355800CCA (5/1/1982-5/1/1983);
 25GL456932CCA (5/1/1983-5/1/1984); 25GL541203CCA (4/30/1984-
 4/30/1985); and 25GL601412CCA (4/30/1985-6/30/1985);

b. Aetna Casualty and Surety Company umbrella policies: 25XS1344WCA
 (1/7/1974-1/7/1975); 5XS802646WCA (1/7/1975-1/7/1976);
 25XS802646WCA (1/7/1976-1/7/1977); 25XS802646WCA (1/7/1977-
 1/7/1978); 25XS802646WCA8 (1/7/1978-1/7/1979); 25XS802646WCA9
 (1/7/1979-5/1/1979); 25XS802646WCA9 (5/1/1979-5/1/1980);
 25XS7245WCA (5/1/1980-5/1/1981); and 25XS102709WCA (5/1/1982-
 5/1/1983);

c. Aetna Casualty and Surety Company special multi-peril policies:
 25SM56433FPS (1/1/81-1/1/84); 25SM820807FCA (4/11/83-4/11/84);
 25SM911057FCA (4/11/84-4/11/85); 25SM962749FCA (4/11/85-4/11/86);
 and 25SM1032143FCA (4/11/8604/30/86); and

d. Hartford umbrella policy: 22HU370154 (1/7/1973-1/7/1974).

23. On or after January 3, 2019, complaints were filed against Starr Davis for asbestos personal injury.

24. On February 21, 2019, Plaintiff was appointed Receiver in the case against Starr Davis, giving him the power and authority to fully administer all assets of Starr Davis, accept service on behalf of Starr Davis, engage counsel on behalf of Starr Davis, and take any and all steps necessary to protect the interest of Starr Davis, whatever they may be.

25. Since appointment, the Receiver has expended substantial time and incurred expenses to identify potential assets and responsive policies and to defend asbestos lawsuits in fulfillment of his responsibilities as Receiver.
26. The Receiver will continue to expend substantial time and incur expenses.

FIRST CAUSE OF ACTION
DECLARATORY JUDGMENT

27. An actual and justiciable controversy exists between the Plaintiff and each of the Defendants Hartford, Twin City, Travelers, and Merrimon Insurance (hereinafter "Defendant Insurers") and Asbestos Claimants concerning their obligations to compensate the Receiver.
28. Judicial declarations are necessary and appropriate at this time, under the circumstances alleged above, so that Plaintiff may ascertain its rights to compensation and reimbursement of expenses from the Defendant Insurers', Starr Davis Insurance Policies as well as from the Asbestos Claimants.
29. Furthermore, pursuant to S.C. Code Ann. § 15-65-100, Receiver shall be allowed such commissions as may be fixed by the Court appointing the Receiver.
30. Pursuant to the Supreme Court of South Carolina's ruling in *Ex Parte Simons*, a Receiver's fee is based on value of receiver's services and at the appointing Court's discretion.
31. Starr Davis has no assets in which to compensate Plaintiff for his services as Receiver.
32. Plaintiff dedicated a substantial amount of time and incurred substantial expenses in his role as Receiver for Starr Davis.

33. The primary beneficiaries of the time and expenses Plaintiff put towards this case are the Defendant Asbestos Claimants and Defendant Insurers.
34. Defendant Asbestos Claimants and Defendant Insurers had claims processed and suits defended that otherwise would not have been processed or defended, but for the diligent work of Plaintiff as Receiver.
35. For example, the Defendant Insurers and Asbestos Claimants have a representative of the Insured to direct their efforts and process claims against their responsive policies.
36. Plaintiff respectfully requests this Court to declare that each Defendant Asbestos Claimant and Defendant Insurer must fairly compensate the Receiver.
37. If that is not possible, declare which Defendants are responsible for compensating the Receiver for the substantial time, effort, and expenses the Receiver put towards his responsibilities as Receiver of Starr Davis.

SECOND CAUSE OF ACTION
DECLARATORY JUDGMENT

38. Pursuant to *Jeffcoat v. Morris* 300 S.C. 526, 389 S.E.2d 159 (Ct. App. 1989), a receiver holds the property coming into his or her hands by the same right and title as the person for whose property he or she is receiver.
39. Upon information and belief, Starr Davis held insurance policies with each of the Defendant Insurers throughout its period of existence. These policies are property of Starr Davis.
40. Plaintiff as Receiver for Starr Davis is entitled to these policies, which are believed to be in the possession of Defendant Insurers.
41. Plaintiff has tendered the Asbestos Claimants lawsuits to Defendant Insurers.

42. Plaintiff seeks a declaration that he is entitled to copies of all Defendant Insurance policies.
43. Further Plaintiff seeks a declaration that if Defendant Insurers did not issue the policies containing their names and specifically through Merrimon Insurance Agency that the Court find Defendant Merrimon Insurance Agency responsible for the defense and indemnification of Plaintiff during those respective years.
44. Plaintiff further seeks a declaration that Defendants have a duty to defend the Asbestos Claimants lawsuits.
45. As of the filing of this Complaint, none of the Defendant Insurers have provided Plaintiff with complete copies of Starr Davis' Insurance Policies. Furthermore, Merrimon has also failed to provide copies of the Starr Davis policies.
46. As of the filing of this Complaint, some Defendant Insurers are providing a defense and some are not.
47. Further Plaintiff respectfully requests that for those insurance policies that are incomplete that the Court declare the insurance policy and its coverage. Plaintiff also seeks a declaration that Merrimon breached its obligation to maintain Starr Davis policies.

THIRD CAUSE OF ACTION
DECLARATORY JUDGMENT

48. The Receiver seeks a further declaration as to the interpretation and meaning of the insurance policies, including those years for which Merrimon Insurance is responsible, that:

- a. The Insurance Policies cover all damages of alleged bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of the policy periods;
- b. The Insured may select the policy or policy years to which to assign or allocate asbestos related loss;
- c. In the case of a claimed ambiguity in any Insurance Policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Insurance Policies;
- d. Defense costs for the Insured are supplemental, and the payment of defense costs does not erode or impair any limit of liability of any of Starr Davis Insurance Policies;
- e. Each of the Insurers must cover asbestos claims, in full, including but not limited to any “per occurrence” limits;
- f. Asbestos Claimants exposure to asbestos for which Starr Davis is liable, during Starr Davis’ operations, including Starr Davis’ construction, installation, maintenance or removal activities, are, including but not limited to, subject only to the “per occurrence” limits of the Insurance Policies, and not subject to “aggregate” limits, if any, of the Insurance Policies;
- g. Any aggregate limit on coverage in any of the Starr Davis Policies is a limitation on coverage, and therefore each Defendant Primary Insurers has the burden to prove any assertion that any claim is subject to the aggregate limits in the Starr Davis Insurance Policies, if any.

49. Each Primary Insurer has the burden to prove, based on the evidence, that an asbestos claim is either a “products” claim or a “completed operations” claim, as those terms are defined in the Insurance Policies, in order to subject the claim to the aggregate limits in the Starr Davis Insurance Policies, if any.

FOURTH CAUSE OF ACTION
FAILURE TO PROCURE INSURANCE

50. Upon information and belief, Defendant Merrimon Insurance was the broker for Starr Davis insurance including the years 1972 and 1973 as well as the years referenced above.
51. Upon information and belief, Defendant Merrimon Insurance had a duty to exercise reasonable skill, care, and diligence to procure appropriate insurance coverage for Starr Davis.
52. Upon information and belief, Defendant Merrimon breached its duty owed to the Plaintiff by failing to place insurance to protect Plaintiff from liability for claims arising from Plaintiff’s anticipated business activities.
53. Upon information and belief, Defendant’s breach of these duties of care include but are not limited to failing to adhere to the applicable standard of care in placing insurance; failing to give Plaintiff competent and reasonable advice; failing to procure sufficient and appropriate coverage; and in such other and further particulars as may be disclosed in discovery and established at trial.
54. Defendant Merrimon also had an obligation to maintain the records of Starr Davis’ insurance and failed to do so.

55. Furthermore, upon information and belief, Defendant Merrimon Insurance was instructed by Starr Davis to place its primary general liability policies with Aetna for the years 1972 through 1973.
56. Upon information and belief, Merrimon represented to Starr Davis that it had placed primary insurance through Aetna for the years 1972 through 1973.
57. Aetna through its successor Travelers Casualty and Surety Company asserts that no such insurance was placed for the years 1972 and 1973.
58. Furthermore, for the years in which insurance was placed, upon information and belief, the insurance is not performing as intended.
59. Upon information and belief, Defendant Merrimon Insurance was negligent and breached its duty to procure appropriate insurance policies for Starr Davis during each of the years Defendant Merrimon Insurance was obligated to procure insurance.
60. Further, Defendant Merrimon Insurance breached its obligation to maintain Starr Davis records.
61. As a direct and proximate result of Defendant's negligent actions and breaches of duties, Plaintiff has been injured and is entitled to recover damages including, but not necessarily limited to, actual damages, prejudgment interest, attorney's fees, the costs of this action, and such other and further relief as the Court deems just and proper. Defendant Merrimon is further responsible for all damages flowing from the lack of insurance benefits that the Plaintiff would have otherwise received if coverage had been appropriately produced.

FIFTH CAUSE OF ACTION
BREACH OF CONTRACT

62. Upon information and belief, Starr Davis contracted for valuable consideration with Merrimon Insurance for Merrimon Insurance to secure appropriate insurance for Starr Davis.
63. Upon information and belief, Defendant breached the terms of the contract in one or more of the following particulars:
- a. Failing to procure sufficient insurance coverage as requested by Plaintiff;
 - b. By failing to provide services in accordance with the terms of the contract;
and
 - c. In such other and further particulars as may be developed during the course of discovery and proven at trial.
64. Upon information and belief Starr Davis has limited and/or inadequate insurance for the years of its operation.
65. As a direct and proximate result of Merrimon Insurance's breach of contract, Plaintiff has been injured and is entitled to recover damages in such amount as may be proven at trial, including, but not necessarily limited to, actual damages, consequential damages, prejudgment interest, attorney's fees, the costs of this action, and such other and further relief as the Court deems just and proper.

SIXTH CAUSE OF ACTION
DECLARATORY JUDGMENT

66. The claims Defendant Asbestos Claimants will likely outstrip the insurance policies and Starr Davis has no other assets.

67. Certain of the Starr Davis Policies may have aggregate limits of liability for product liability claims.

68. In light of the foregoing, Starr Davis seeks a declaration and order that certain rights and interests of the individually-named defendants be limited and curtailed as follows: (i) that any judgment obtained against Starr Davis in a asbestos suits be limited to all sums that may be collected from defendant Insurers, individually or collectively; (ii) that punitive or exemplary damages are not awardable against the Receiver or the Receiver acting on behalf of Starr Davis pursuant to South Carolina Code § 15-65-10; and (iii) that any judgment obtained against Starr Davis that is or may be subject to an aggregate limit of any insurance policy or policies issued to Starr Davis must fairly and equitably take into account such other judgments or claims that may be outstanding.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that this Court inquire into these matters, find that Plaintiff is entitled to the declarations requested, and also find that Defendant Merrimon is liable to Plaintiff for all actual damages, consequential damages, pre-judgment interest, attorney's fees, the costs of this action, and such other and further relief as the Court deems just and proper.

[Signature Page to Follow]

Respectfully submitted,

RIKARD & PROTOPAPAS, LLC

s/ Jescelyn T. Spitz

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

This 6th Day of November, 2019

EXHIBIT A

ELECTRONICALLY FILED - 2019 Feb 22 11:57 AM - RICHLAND - COMMON PLEAS - CASE#2019CP4000076
ELECTRONICALLY FILED - 2019 Nov 06 11:39 AM - RICHLAND - COMMON PLEAS - CASE#2019CP4006243

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
CHARLES T. HOPPER and	)	CASE NO. 2019-CP-4000076
REBECCA HOPPER	)	
	)	
Plaintiffs,	)	In Re:
	)	Asbestos Personal Injury Litigation
v.	)	Coordinated Docket
	)	
AIR & LIQUID SYSTEMS	)	
CORPORATION, et al.	)	
	)	
Defendants.	)	

ORDER GRANTING MOTION TO APPOINT A RECEIVER AND APPOINTING RECEIVER

CAME ON February 21, 2019 to be heard the Plaintiffs Motion for Appointment of a Receiver. This Court finds that the application is meritorious under the applicable statute because Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. (collectively, "Starr Davis"). Starr Davis Company of S.C. has dissolved and Starr Davis Company, Inc., a North Carolina Corporation, has forfeited its right to transact business in the State of South Carolina. Starr Davis has further failed to answer this case and therefore, Plaintiffs request for an expedited ruling on this motion is appropriate and also granted.

Therefore, this Court hereby appoints Peter Protopapas, Esq., a member of the South Carolina Bar, be and hereby is appointed Receiver in this case pursuant to the South Carolina Law with the power and authority fully administer all assets of Starr Davis, accept service on behalf of Starr Davis, engage counsel on behalf of Starr Davis and take any and all steps necessary to protect the interests of Starr Davis whatever they may be. This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Starr Davis as well as any claims related to the actions or failure to act of Starr Davis' insurance carriers.

In addition to the powers of the Receiver set forth herein, the Receiver shall have the following rights, authority and powers with respect to the Respondent's property, to: 1) collect all accounts receivable

EXHIBIT A

of Respondent and all rents due to the Respondent from any tenant; 2) to change locks to all premises at which any property is situated; 3) open any mail addressed to the defendant and addressed to any business owned by the Respondent; redirect the delivery of any mail addressed to the Respondent or any business of the Respondent, so that the mail may come directly to the receiver; 4) endorse and cash all checks and negotiable instruments payable to Respondent, except paychecks for current wages; 5) hire a real estate broker to sell any real property and mineral interest belonging to the Respondents; 6) hire any person or company to move and store the property of Respondent; 7) to insure any property belonging to the Respondents (but not the obligation); 8) obtain from any financial institution, bank, credit union, savings and loan or title company, credit bureau or any other third party, any financial records belonging to or pertaining to the Defendants; 9) obtain from any landlord, building owner or building manager where the Respondent or the Respondent's business is a tenant, copies of the Respondent's lease, lease application, credit application, payment history and copies of Respondent's checks for rent or other payments; 10) hire any person or company necessary to accomplish any right or power under this Order; and 11) take all action necessary to gain access to all storage facilities, safety-deposit boxes, real property, and leased premises wherein any property of Respondent may be situated, and to review and obtain copies of all documents related to same.

SIGNED this _____ day of _____, 2019.

Jean H. Toal, Chief of the Supreme
Court of South Carolina (Retired),
Acting as Circuit Court Judge

EXHIBIT A



Richland Common Pleas

Case Caption: Charles T Hopper , plaintiff, et al vs Air & Liquid Systems Corporation , defendant, et al
Case Number: 2019CP4000076
Type: Order/Appointment of Receiver

IT IS SO ORDERED.

s/ Jean H. Toal #2758

Electronically signed on 2019-02-22 10:21:14 page 3 of 3

ELECTRONICALLY FILED - 2019 Feb 22 11:57 AM - RICHLAND - COMMON PLEAS - CASE#2019CP4000076
ELECTRONICALLY FILED - 2019 Nov 06 11:39 AM - RICHLAND - COMMON PLEAS - CASE#2019CP4006243

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

PETER D. PROTOPAPAS, as Receiver for
STARR DAVIS COMPANY, INC. and
STARR DAVIS COMPANY OF S.C., INC.,

Plaintiff,

Case Number: 2019-CP-40-06243

In Re:

Asbestos Personal Injury Litigation
Coordinated Docket

vs.

SUMMONS

TRAVELERS CASUALTY AND SURETY
COMPANY f/k/a THE AETNA CASUALTY
AND SURETY COMPANY; THE
STANDARD FIRE INSURANCE
COMPANY; ST. PAUL FIRE AND MARINE
INSURANCE COMPANY; THE
EMPLOYERS' FIRE INSURANCE
COMPANY; SOUTHEASTERN AGENCY
GROUP and M.I.A. COMPANY, INC.
individually and as successors to or f/k/a
MERRIMON INSURANCE AGENCY, INC.;
ROBERT E. ASPRAY; NELL ASHWORTH,
individually and as personal representative of
the Estate of ROBERT J. ASHWORTH;
BETTY C. D'AMICO, individually and as
Executor of the Estate of JULIAN D'AMICO,
JR.; KAYLA KEITH, individually and as the
personal representative of the Estate of
JERRY W. ARCHER, SR.; RICHARD L.
KNIGHT II, as personal representative of the
Estate of TEDDY L. KNIGHT, SR., and
LINDA KNIGHT, individually; DAVID D.
ROLIINS; JAMES W. SMITH and FRANCES
R. SMITH; and LINDA J. WHITE,
individually and as Personal Representative of
the Estate of LUBERT F. WHITE, JR.,

Defendants.

TO THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the complaint in this action, a copy of which is hereby served on you, and to serve a copy of your Answer to the said Complaint upon the subscribers at 1329 Blanding Street, Columbia, South Carolina 29201, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in such complaint.

Respectfully submitted,

RIKARD & PROTOPAPAS, LLC

s/ Brian M. Barnwell
Brian Barnwell (SC Bar 78249)
Jescelyn T. Spitz (SC Bar 101880)
Rikard & Protopapas, LLC
1329 Blanding Street
Post Office Box 5640 (29250)
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August 6, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

PETER D. PROTOPAPAS, as Receiver for
STARR DAVIS COMPANY, INC. and
STARR DAVIS COMPANY OF S.C., INC.,

Case Number: 2019-CP-40-06243

Plaintiff,

In Re:

Asbestos Personal Injury Litigation
Coordinated Docket

Vs.

TRAVELERS CASUALTY AND SURETY
COMPANY f/k/a THE AETNA CASUALTY
AND SURETY COMPANY; THE
STANDARD FIRE INSURANCE
COMPANY; ST. PAUL FIRE AND MARINE
INSURANCE COMPANY; THE
EMPLOYERS' FIRE INSURANCE
COMPANY; SOUTHEASTERN AGENCY
GROUP and M.I.A. COMPANY, INC.
individually and as successors to or f/k/a
MERRIMON INSURANCE AGENCY, INC.;
ROBERT E. ASPRAY; NELL ASHWORTH,
individually and as personal representative of
the Estate of ROBERT J. ASHWORTH;
BETTY C. D'AMICO, individually and as
Executor of the Estate of JULIAN D'AMICO,
JR.; KAYLA KEITH, individually and as the
personal representative of the Estate of
JERRY W. ARCHER, SR.; RICHARD L.
KNIGHT II, as personal representative of the
Estate of TEDDY L. KNIGHT, SR., and
LINDA KNIGHT, individually; DAVID D.
ROLIINS; JAMES W. SMITH and FRANCES
R. SMITH; and LINDA J. WHITE,
individually and as Personal Representative of
the Estate of LUBERT F. WHITE, JR.,

**FIRST AMENDED COMPLAINT FOR
DECLARATORY JUDGMENT,
BREACH OF CONTRACT, AN
ACCOUNTING AND OTHER LEGAL
AND EQUITABLE RELIEF**

Defendants.

NOW COMES the Plaintiff Peter D. Protopapas, as Receiver for Starr Davis Company,
Inc. and Starr Davis Company of S.C., Inc. (hereinafter "Plaintiff"), complaining of the above-

named defendants hereby alleges upon knowledge as to his own acts and upon information and belief as to all other matters, as follows:

THE PARTIES

1. The plaintiff was appointed Receiver of STARR DAVIS COMPANY, INC. and STARR DAVIS COMPANY OF S.C., INC. (collectively hereinafter “Starr Davis”) on February 22, 2019, by Order of the Honorable Jean H. Toal of the Fifth Judicial Circuit Court, in the case of *Charles T. Hopper and Rebecca Hopper v. Air & Liquid Systems Corporation, et al.*, case number 2019-CP-4000076. Exhibit A. Plaintiff’s primary place of business is Richland County South Carolina.
2. STARR DAVIS COMPANY, INC. is a former North Carolina corporation whose principal place of business was at pertinent times in North Carolina.
3. STARR DAVIS COMPANY OF S.C., INC. is a former South Carolina corporation.
4. Defendant TRAVELERS CASUALTY AND SURETY COMPANY f/k/a THE AETNA CASUALTY AND SURETY COMPANY, is a Connecticut corporation with its headquarters and principal place of business located in Hartford, Connecticut.
5. Defendant THE STANDARD FIRE INSURANCE COMPANY, an affiliate of Travelers, is a Connecticut corporation with its headquarters and principal place of business in Hartford, Connecticut.
6. Defendant ST. PAUL FIRE AND MARINE INSURANCE COMPANY is a Connecticut corporation with its headquarters and principal place of business located in Hartford, Connecticut. Defendant “ST. PAUL” is an affiliate of Travelers, and it along with THE STANDARD FIRE INSURANCE COMPANY and THE AETNA

CASUALTY AND SURETY COMPANY, and their affiliates may be collectively referred to herein as the “Travelers Entities.”

7. Defendant THE EMPLOYERS’ FIRE INSURANCE COMPANY is a Pennsylvania corporation with its headquarters in the Commonwealth of Pennsylvania.
8. Defendant MERRIMON INSURANCE AGENCY INC. is upon information and belief a North Carolina corporation that has either maintained its status as a North Carolina company as MIA COMPANY, INC. and/or as SOUTHEASTERN AGENCY GROUP, INC. (hereinafter collectively referred to as Merrimon Insurance).
9. Defendant ROBERT E. ASPRAY (hereinafter “Aspray”), is a citizen and resident of South Carolina.
10. Defendant NELL ASHWORTH, individually and as personal representative of the Estate of ROBERT J. ASHWORTH (hereinafter “Ashworth”), is a citizen and resident of South Carolina.
11. Defendant BETTY C. D’AMICO, Individually and as Executor of the Estate of JULIAN D’AMICO, JR. (hereinafter “D’Amico”) is a citizen and resident of North Carolina.
12. Defendant KAYLA KEITH, individually and as the personal representative of the Estate of JERRY W. ARCHER, SR. (hereinafter “Keith”), is a citizen and resident of South Carolina.
13. Defendant RICHARD L KNIGHT II, as personal representative of the Estate of TEDDY L KNIGHT, SR., and LINDA KNIGHT, individually (hereinafter “Knight”), is a citizen and resident of South Carolina.

14. Defendant DAVID D. ROLLINS (hereinafter “Rollins”), is a citizen and resident of the State of South Carolina.
15. Defendant JAMES W. SMITH and FRANCES R. SMITH (collectively hereinafter “Smith”), are citizens and residents of North Carolina.
16. Defendant LINDA J. WHITE, Individually and as Personal Representative of the Estate of LUBERT F. WHITE, JR. (hereinafter “White”), is a citizen and resident of the State of South Carolina.

JURISDICTION AND VENUE

17. This Court has jurisdiction over this suit inasmuch as this Court appointed the plaintiff as Receiver of Starr Davis, a former South Carolina and former North Carolina corporation.
18. Venue is proper in this Court as it is the Receiver Court with cases pending and anticipated new filings in this Court. Further, on March 3, 2019, pursuant to the Order of the Supreme Court of South Carolina, Order Number 2017-03-03-01, the Honorable Jean H. Toal was appointed to have jurisdiction in all circuits in this state to dispose of all pretrial matters and motions, as well as trials, arising out of asbestos and asbestos litigation filed within the state court system. Thus, the Honorable Jean H. Toal will have jurisdiction over this matter.

FACTUAL BACKGROUND

19. Upon information and belief, the Starr Davis companies were incorporated from the late 1940s through the late 1990s. During that time, Starr Davis supplied, installed, replaced, repaired, removed, and/or used insulation materials including at pertinent

- times asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to the installation and removal of asbestos-containing thermal insulation.
20. Starr Davis Company, Inc. filed dissolution papers with the North Carolina Secretary of State on October 9, 1996.
21. Starr Davis Company of S.C., Inc. filed dissolution papers with the South Carolina Secretary of State on August 19, 1997.
22. Throughout its operations, Starr Davis is alleged to have exposed persons to asbestos-containing products, materials, and/or equipment including, but not limited to, defendant's Ashworth, Aspray, D'Amico, Keith, Knight, Rollins, Smith, and White (hereinafter "Asbestos Claimants" in "Asbestos Suits").
23. On February 21, 2019, plaintiff was appointed Receiver, with the order appointing him, giving him the power and authority to fully administer all assets of Starr Davis, accept service on behalf of Starr Davis, engage counsel on behalf of Starr Davis, and take any and all steps necessary to protect the interests of Starr Davis, whatever they may be.
24. Since appointment, the Receiver has expended, and will continue to expend, substantial time and effort and has and will continue to incur substantial expenses to identify assets and to defend Asbestos Suits in fulfillment of his responsibilities as Receiver.
25. The Receiver has identified and is administering substantial assets benefitting Starr Davis.

FIRST CAUSE OF ACTION
DECLARATORY JUDGMENT

26. An actual and justiciable controversy exists between the Receiver for Starr Davis and each of the Travelers Entities, The Employers' Fire Insurance Company, and Merrimon Insurance (hereinafter "Defendant Insurers") and Asbestos Claimants concerning their rights and obligations with respect to the Receiver.
27. Judicial declarations are necessary and appropriate at this time, under the circumstances alleged above, so that plaintiff may ascertain his rights to compensation from the Defendant Insurers' Starr Davis Insurance Policies as well as with respect to the Asbestos Claimants.
28. Pursuant to S.C. Code Ann. § 15-65-100, Receiver shall be allowed such commissions as may be fixed by the Court appointing the Receiver.
29. Pursuant to the Supreme Court of South Carolina's ruling in *Ex Parte Simons*, a Receiver's fee is based on value of a receiver's services and at the appointing Court's discretion.
30. Starr Davis has no assets in which to compensate plaintiff for his services as Receiver, aside from the assets identified in this complaint.
31. Plaintiff has dedicated and will continue to dedicate a substantial amount of time and incur substantial expenses in his role as Receiver for Starr Davis.
32. The primary beneficiaries of the time and expenses plaintiff put towards this case are the Defendant Asbestos Claimants and Defendant Insurers.
33. Defendant Asbestos Claimants and Defendant Insurers had claims processed and suits defended that otherwise would not have been processed or defended, but for the diligent work of plaintiff as Receiver.

34. For example, the Defendant Insurers and Asbestos Claimants have a representative of the Insured to direct their efforts and process claims against their responsive policies.
35. Plaintiff respectfully requests this Court to declare that each Defendant Asbestos Claimant and Defendant Insurer must fairly compensate the plaintiff.
36. If that is not possible, the Receiver requests that this Court declare which Defendants are responsible for compensating plaintiff for the substantial time, effort, and expenses Plaintiff put towards his responsibilities as Receiver of this case.

SECOND CAUSE OF ACTION
DECLARATORY JUDGMENT

37. Pursuant to established South Carolina law, a receiver holds the property coming into his or her hands by the same right and title as the person for whose property he or she is receiver.
38. Upon information and belief, Starr Davis purchased, and owns insurance policies with each of the Defendant Insurers at all pertinent times. These policies are property of Starr Davis.
39. Plaintiff as Receiver for Starr Davis is entitled to these policies, which are believed to be in the possession of Defendant Insurers.
40. Plaintiff has tendered the Asbestos Claimants lawsuits to Defendant Insurers.
41. As of the filing of this Complaint, none of the Defendant Insurers has provided plaintiff with complete copies of Starr Davis' Insurance Policies.
42. As of the filing of this complaint, certain Defendant Insurers are providing a defense to the Asbestos Suits.
43. Plaintiff seeks a declaration that he is entitled to all Defendant Insurance policies.

44. Further plaintiff seeks a declaration that if Defendant Insurers did not issue the policies to protect Starr Davis, and specifically through Merrimon Insurance Agency, that the Court find Defendant Merrimon Insurance Agency responsible for the defense and indemnification of Starr Davis during those respective years.
45. Plaintiff further seeks a declaration that the insurance company and agency Defendants have a duty to defend the Asbestos Claimants lawsuits on behalf of the Receiver.
46. Further plaintiff respectfully requests that for each and all of those insurance policies that are missing or incomplete that the Court declare the essential terms and conditions of each such insurance policy and its coverage afforded to Starr Davis, specifically as respects the Asbestos Suits.

THIRD CAUSE OF ACTION
DECLARATORY JUDGMENT

47. All of the policies that the Insurer Defendants issued to Starr Davis, outlined in the coverage charts and schedules in Tab A, are referred to as the “Starr Davis Insurance Policies.” As to all of the Starr Davis Insurance Policies, including those years for which Merrimon Insurance is responsible, plaintiff seeks the following declarations as to the interpretation and meaning of the insurance policies:
- a. The Starr Davis Insurance Policies cover all damages of alleged bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of the policy periods;
 - b. The multiple-year policies and policies that were subject to annual renewal provide for a full separate limit for product liability and completed operations claims and a full per occurrence limit for premises and operations claims separately for each annual period or portion thereof;

- c. All of the liability insurance policies in effect from a person's first exposure to asbestos through manifestation of an asbestos-related disease or condition, and, ultimately, to death, cover the asbestos cases unless coverage is otherwise excluded under the policy;
- d. The Insured may select the policy or policy years to which to assign or allocate asbestos related loss;
- e. In this unique case, where multiple primary policies were issued to Starr Davis for the same policy year, and these multiple policies provide coverage for the same claim, Starr Davis may select one or both of the policies to respond to the claim and may also "stack" the limits of such policies for each and every such claim;
- f. As to any individual asbestos lawsuit, it is the Insurer Defendants' burden to prove that the suit seeks the recovery of damages that are subject to any aggregate limits of liability applicable to the "products" or "completed operations" provisions as those terms are defined in the Starr Davis Insurance Policies, in order to subject the claim to the aggregate limits in the Starr Davis Insurance Policies, if any;
- g. In the case of a claimed ambiguity in any Starr Davis Insurance Policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Insurance Policies;
- h. The burden of proving any limitation or exclusion to coverage is on the Defendant Insurers;

- i. Each of the Starr Davis primary insurance policies has an unlimited supplemental duty to pay or reimburse defense costs;
- j. The duty to pay or reimburse defense costs is “triggered” whenever there is any obligation that could potentially involve the policy coverage;
- k. The duty to pay or reimburse defense costs is triggered by the allegations of a complaint asserted against Starr Davis;
- l. Defense costs for the Insured are supplemental, and the payment of defense costs does not erode or impair any limit of liability of any of the Starr Davis Insurance Policies;
- m. The asbestos insulation contracting, or “operations,” claims against Starr Davis have resulted from multiple “occurrences” under the Starr Davis Insurance Policies, thus entitling Starr Davis to multiple “per occurrence” limits of liability to satisfy its asbestos liabilities;
- n. As to the asbestos “operations” claims against Starr Davis, the Defendant Insurers are obligated to pay those claims “in full” up to each applicable policy’s “per occurrence” limits of liability;
- o. While product liability or completed operations losses are subject allocation on a “time on the risk” pro rata allocation method, “operations” claims are allocated on an “all sums” basis, and, in either case, in light of its non-operating defunct status, no loss may be allocated to Starr Davis as part of any “time-on-the-risk” allocation scheme;
- p. Asbestos Claimants’ exposure to asbestos for which Starr Davis is liable, during Starr Davis’ operations, including Starr Davis’ construction, installation, repair,

maintenance or removal activities, are, including but not limited to, subject only to the “per occurrence” limits of the Insurance Policies, and not subject to “aggregate” limits, if any, of the Starr Davis Insurance Policies; and

- q. The “completed operations hazard” described in the Starr Davis Insurance Policies, and the corresponding aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos products *after* Starr Davis completed its installation or removal operations or work at a particular jobsite.

48. Plaintiff further seeks a declaration that Aetna and/or the other Travelers Entities, issued primary liability insurance coverage to Starr Davis that included an endorsement such that Starr Davis was, and is, entitled to participate in the earnings of Travelers.

FOURTH CAUSE OF ACTION
FAILURE TO PROCURE INSURANCE

49. Defendant Merrimon Insurance had a duty to exercise reasonable skill, care, and diligence to procure appropriate insurance coverage for Starr Davis.

50. Upon information and belief, Defendant Merrimon Insurance was negligent and breached its duty to procure appropriate insurance policies for Starr Davis during each of the years Defendant Merrimon Insurance was obligated to procure insurance.

51. Defendant Merrimon Insurance’s breach was the proximate cause of any failure to receive the insurance benefits that the plaintiff would have otherwise received if coverage had been appropriately procured, should plaintiff fail fully to be covered for the Asbestos Suits by Defendant Insurers.

FIFTH CAUSE OF ACTION
BREACH OF CONTRACT

52. Starr Davis contracted with Merrimon Insurance for Merrimon Insurance to secure appropriate insurance for Starr Davis and to assure that Starr Davis got the full insurance benefits it purchased.
53. Upon information and belief Starr Davis may have limited and/or inadequate insurance for the years of its operation, or be unable to prove such insurance because said agency failed adequately to maintain records of the insurance it was contracted to purchase for Starr Davis. Furthermore, Defendant Merrimon Insurance failed to collect or assure that Starr Davis was paid the earnings to which it was entitled by reason of the endorsement entitling Starr Davis to share in the earnings of Travelers, as alleged herein.
54. As a direct and proximate result of Merrimon Insurance's breach of contract, Starr Davis has suffered direct and consequential damages including but not limited to exposure to Asbestos Suits.

SIXTH CAUSE OF ACTION
BREACH OF CONTRACT

55. Standard Fire issued policy number 25 AL 802646 to Starr Davis for the policy period January 1, 1978 to January 1, 1979.
56. Policy number 25 AL 802646, which Standard Fire issued to Starr Davis, included a "Participating Endorsement" with the following language: "The Insured shall participate in the earnings of the Company, to such an extent and upon such conditions as shall be determined by the Board of Directors of the Company in accordance with

law and as made applicable to this policy, provided the Insured shall have complied with all of the terms of this policy with respect to the payment of premium.”

57. Upon information and belief, Starr Davis complied with the terms of the policy with respect to paying the stated premiums for the policy.

58. Upon information and belief, Starr Davis never was paid any amount to participate in the earnings of Standard Fire or the other Travelers Entities.

59. As a direct and proximate result of Standard Fire’s breach of contract, Starr Davis has suffered direct and consequential damages, including but not limited to denial of compensation due to the Receiver as a participant in the earnings of the Travelers Entities.

SEVENTH CAUSE OF ACTION
ACTION FOR AN ACCOUNTING

60. Standard Fire issued policy number 25 AL 802646 to Starr Davis for the policy period January 1, 1978 to January 1, 1979.

61. Policy number 25 AL 802646, which Standard Fire issued to Starr Davis, included a “Participating Endorsement” with the following language: “The Insured shall participate in the earnings of the Company, to such an extent and upon such conditions as shall be determined by the Board of Directors of the Company in accordance with law and as made applicable to this policy, provided the Insured shall have complied with all of the terms of this policy with respect to the payment of premium.”

62. Upon information and belief, Starr Davis complied with the terms of the policy with respect to paying the stated premiums for the policy.

63. Upon information and belief, Starr Davis never was paid any amount to participate in the earnings of Standard Fire or the other Travelers Entities.
64. The Traveler Entities were unjustly enriched by its failure to share its earnings with Starr Davis under the terms of policy number 25 AL 802646.
65. The Traveler Entities had a duty to Starr Davis under policy number 25 AL 802646 to share its profits with Starr Davis.
66. The Traveler Entities are the only parties with access to information regarding its profits during the period at issue, and the only party with information regarding the conditions determined by the Standard Fire Board of Directors to determine the amount payable to Starr Davis in shared profits under the terms of the “Participating Endorsement.”
67. Discovery is required to determine the amount of profits to which Starr Davis is entitled under the terms of the “Participating Endorsement.”
68. Starr Davis seeks a full and complete accounting of the Traveler Entities’ profits to determine the amount of lost income and lost capital gain resulting from the Traveler Entities’ breach of their duties to Starr Davis.

EIGHTH CAUSE OF ACTION
UNJUST ENRICHMENT

69. Standard Fire issued policy number 25 AL 802646 to Starr Davis for the policy period January 1, 1978 to January 1, 1979.
70. Policy number 25 AL 802646, which Standard Fire issued to Starr Davis, included a “Participating Endorsement” with the following language: “The Insured shall participate in the earnings of the Company, to such an extent and upon such conditions as shall be determined by the Board of Directors of the Company in accordance with

law and as made applicable to this policy, provided the Insured shall have complied with all of the terms of this policy with respect to the payment of premium.”

71. Upon information and belief, Starr Davis complied with the terms of the policy with respect to paying the stated premiums for the policy.
72. Upon information and belief, Starr Davis never was paid any amount to participate in the earnings of Standard Fire or the other Travelers Entities.
73. By their failure to share profits under the terms of the “Participating Endorsement,” the Travelers Entities held, and continue to hold, money which does not equitably belong to them, and which they cannot in good conscience retain or withhold from Starr Davis.
74. On information and belief, the Travelers Entities held the money intended for Starr Davis as shared profits and considered the money their own personal income.
75. As a direct and proximate result of the Traveler Entities’ breach of contract, Starr Davis has suffered direct and consequential damages, including but not limited to loss of compensation due to the Receiver.

NINTH CAUSE OF ACTION
IMPOSITION OF A CONSTRUCTIVE TRUST

76. Standard Fire issued policy number 25 AL 802646 to Starr Davis for the policy period January 1, 1978 to January 1, 1979.
77. Policy number 25 AL 802646, which Standard Fire issued to Starr Davis, included a “Participating Endorsement” with the following language: “The Insured shall participate in the earnings of the Company, to such an extent and upon such conditions as shall be determined by the Board of Directors of the Company in accordance with

law and as made applicable to this policy, provided the Insured shall have complied with all of the terms of this policy with respect to the payment of premium.”

78. Upon information and belief, Starr Davis complied with the terms of the policy with respect to paying the stated premiums for the policy.
79. Upon information and belief, Starr Davis never was paid any amount to participate in the earnings of Standard Fire or the other Travelers Entities.
80. By their failure to share profits under the terms of the “Participating Endorsement,” the Travelers Entities have held, and continue to hold, money which does not equitably belong to it, and which it cannot in good conscience retain or withhold from Starr Davis.
81. On information and belief, the Travelers Entities held the money intended for Starr Davis as shared profits and considered the money their own income.
82. Plaintiff respectfully requests that this Court institute a constructive trust to allow for the segregation and subsequent orderly disposition of the shared Travelers Entities’ profits for use in the orderly management of Starr Davis and distribution of transactional costs and potential indemnity payments for claims made against Starr Davis by the Asbestos Claimants and to compensate the Receiver for his services..

TENTH CAUSE OF ACTION
DETERMINATION OF PARTNERSHIP BY OPERATION OF LAW

83. Policy number 25 AL 802646, which Standard Fire issued to Starr Davis, included a “Participating Endorsement” with the following language: “The Insured shall participate in the earnings of the Company, to such an extent and upon such conditions as shall be determined by the Board of Directors of the Company in accordance with

law and as made applicable to this policy, provided the Insured shall have complied with all of the terms of this policy with respect to the payment of premium.”

84. Upon information and belief, Starr Davis complied with the terms of the policy with respect to paying the stated premiums for the policy.

85. Upon information and belief, Starr Davis never was paid any amount to participate in the earnings of Standard Fire or the other Travelers Entities.

86. Upon information and belief, this arrangement yields a partnership between Starr Davis and Travelers, derived by operation of law. Plaintiff respectfully requests that this Court make a determination of partnership by operation of law as between Travelers and Starr Davis.

ELEVENTH CAUSE OF ACTION
DETERMINATION OF JOINT VENTURE ARRANGEMENT
BETWEEN STARR DAVIS AND TRAVELERS

87. Policy number 25 AL 802646, which Standard Fire issued to Starr Davis, included a “Participating Endorsement” with the following language: “The Insured shall participate in the earnings of the Company, to such an extent and upon such conditions as shall be determined by the Board of Directors of the Company in accordance with law and as made applicable to this policy, provided the Insured shall have complied with all of the terms of this policy with respect to the payment of premium.”

88. Upon information and belief, Starr Davis complied with the terms of the policy with respect to paying the stated premiums for the policy.

89. Upon information and belief, Starr Davis never was paid any amount to participate in the earnings of the Travelers Entities.

90. Upon information and belief, this arrangement yields a joint venture between Starr Davis and the Travelers Entities, derived by operation of law. Plaintiff respectfully requests that this Court make a determination of a joint venture relationship existing between the Travelers Entities and Starr Davis.

TWELFTH CAUSE OF ACTION
DETERMINATION OF EQUITABLE OWNERSHIP

91. Policy number 25 AL 802646, which Standard Fire issued to Starr Davis, included a “Participating Endorsement” with the following language: “The Insured shall participate in the earnings of the Company, to such an extent and upon such conditions as shall be determined by the Board of Directors of the Company in accordance with law and as made applicable to this policy, provided the Insured shall have complied with all of the terms of this policy with respect to the payment of premium.”
92. Upon information and belief, Starr Davis complied with the terms of the policy with respect to paying the stated premiums for the policy.
93. Upon information and belief, Starr Davis never was paid any amount to participate in the earnings of Standard Fire or the other Travelers Entities. Upon information and belief, this arrangement results in an equitable ownership relationship between Starr Davis and Travelers such that “Even if an ownership interest is required, Plaintiff may be able to invoke the principle of equitable ownership, which courts have recognized as a viable route to satisfying the elements of alter ego liability.” *See Finch v. U.S. Fidelity & Guaranty Co., et al.*, No. 3:19-cv-01827, ECF 55 at 9 (D.S.C. June 4, 2020). Plaintiff respectfully requests that this Court make a determination of equitable ownership as between Travelers and Starr Davis.

THIRTEENTH CAUSE OF ACTION
BREACH OF FIDUCIARY DUTIES

94. As a partner of Starr Davis, each and every one of the Travelers Entities described above owed and owes fiduciary duties to Starr Davis in every aspect of their dealings with Starr Davis.
95. The Travelers Entities have failed to meet these duties and have instead breached their duties to Starr Davis based on the allegations set forth above, including, but not limited to their failure to share profits under the terms of the “Participating Endorsement.”
96. As a direct and proximate result of the Travelers Entities breach of their fiduciary duties, Starr Davis has suffered direct and consequential damages, including but not limited to denial of compensation due to the Receiver as a participant in the earnings of the Travelers Entities.

FOURTEENTH CAUSE OF ACTION
CONVERSION

97. Under the “Participating Endorsement, Starr Davis has an ownership interest in its share of the Travelers Entities profits.
98. The funds belonging to Starr Davis are specific and are cable of being identified based on an examination of the Travelers Entities’ records.
99. The Travelers Entities converted these funds to their own use and did not deliver them to Starr Davis as required.
100. The Travelers Entities conversion of these funds was without Starr Davis’ permission.
101. As set forth herein, the Travelers Entities actions have been willful, reckless, and or committed with conscious indifference to Starr Davis’ rights.

102. Therefore, Star Davis is entitled to its actual damages and punitive damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that the Court declare judgment as follows:

1. For plaintiff's compensation, in an amount set by this Court;
2. For plaintiff's compensation, Defendant Asbestos Claimants and Defendant Insurers be found and held to be jointly and severally liable;
3. For the Starr Davis Insurance Policies, Defendant Insurers must provide the policies to plaintiff;
4. Defendant Insurers must provide Starr Davis a defense to Asbestos Claimants' claims against Starr Davis;
5. For each of the Starr Davis Insurance Policies, that the interpretation and meaning of the Starr Davis Insurance Policies includes, but is not limited to, the following:
 - a. The Starr Davis Insurance Policies cover all damages of alleged bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of the policy periods;
 - b. The multiple-year policies and policies that were subject to annual renewal provide for a full separate limit for product liability and completed operations claims and a full per occurrence limit for premises and operations claims separately for each annual period or portion thereof;
 - c. All of the liability insurance policies in effect from a person's first exposure to asbestos through manifestation of an asbestos-related disease or condition, and,

ultimately, to death, cover the asbestos cases unless coverage is otherwise excluded under the policy;

- d. The Insured may select the policy or policy years to which to assign or allocate asbestos related loss;
- e. In this unique case, where multiple primary policies were issued to Starr Davis for the same policy year, and these multiple policies provide coverage for the same claim, Starr Davis may select one or both of the policies to respond to the claim and may also “stack” the limits of such policies for each and every such claim;
- f. As to any individual asbestos lawsuit, it is the Insurer Defendants’ burden to prove that the suit seeks the recovery of damages that are subject to any aggregate limits of liability applicable to the “products” or “completed operations” provisions as those terms are defined in the Starr Davis Insurance Policies, in order to subject the claim to the aggregate limits in the Starr Davis Insurance Policies, if any.
- g. In the case of a claimed ambiguity in any Starr Davis Insurance Policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Insurance Policies;
- h. The burden of proving any limitation or exclusion to coverage is on the Defendant Insurers;
- i. Each of the Starr Davis primary insurance policies have an unlimited supplemental duty to pay or reimburse defense costs;
- j. The duty to pay or reimburse defense costs is “triggered” whenever there is any obligation that could potentially involve the policy coverage;

- k. The duty to pay or reimburse defense costs is triggered by the allegations of a complaint asserted against Starr Davis;
- l. Defense costs for the Insured are supplemental, and the payment of defense costs does not erode or impair any limit of liability of any of the Starr Davis Insurance Policies;
- m. The asbestos insulation contracting, or “operations,” claims against Starr Davis have resulted from multiple “occurrences” under the Starr Davis Insurance Policies, thus entitling Starr Davis to multiple “per occurrence” limits of liability to satisfy its asbestos liabilities;
- n. As to the asbestos “operations” claims against Starr Davis, the Defendant Insurers are obligated to pay those claims “in full” up to each applicable policy’s “per occurrence” limits of liability;
- o. While product liability or completed operations losses are subject allocation on a “time on the risk” pro rata allocation method, “operations” claims are allocated on an “all sums” basis, and, in either case, in light of its non-operating defunct status, no loss may be allocated to Starr Davis as part of any “time-on-the-risk” allocation scheme;
- p. Asbestos Claimants’ exposure to asbestos for which Starr Davis is liable, during Starr Davis’ operations, including Starr Davis’ construction, installation, maintenance or removal activities, are, including but not limited to, subject only to the “per occurrence” limits of the Insurance Policies, and not subject to “aggregate” limits, if any, of the Starr Davis Insurance Policies; and

- q. The “completed operations hazard” described in the Starr Davis Insurance Policies, and the corresponding aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos products *after* Starr Davis completed its installation or removal operations or work at a particular jobsite.
6. The Travelers Entities issued primary liability insurance coverage to Starr Davis that included an endorsement such that Starr Davis was, and is, entitled to participate in the earnings of the Travelers Entities.
 7. Defendant Merrimon Insurance breached its obligations by not procuring the appropriate insurance for Starr Davis.
 8. The Travelers Entities breached thier contract with Starr Davis by failing to share their profits with Starr Davis.
 9. That the Travelers Entities engage in a full and complete accounting of their profits to determine the amount of lost income and lost capital gain resulting from their breach of duty to Starr Davis.
 10. That the Court impose a constructive trust on an amount equal to the Travelers Entities’ earnings since January 1, 1978 and segregate these amounts to address and remedy Starr Davis’ claim for profit sharing under the 1978 endorsement.
 11. For a determination of a partnership by operation of law as between Starr Davis and the Travelers Entities as of January 1, 1978.
 12. For a determination of a joint venture as between Starr Davis and the Travelers Entities as of January 1, 1978.
 13. For a determination of equitable ownership as between Starr Davis and the Travelers Entities beginning on January 1, 1978.

14. For punitive damages.

15. For such other and further relief as the Court may deem just and proper, including pre-judgment and post-judgment interest as provided by South Carolina law.

Respectfully submitted,

RIKARD & PROTOPAPAS, LLC

s/ Brian M. Barnwell
Brian Barnwell (SC Bar 78249)
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August 6, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

PETER D. PROTOPAPAS, as Receiver for
STARR DAVIS COMPANY, INC. and
STARR DAVIS COMPANY OF S.C., INC.,

Plaintiff,

v.

Case No.: 2019-CP-40-06243

TRAVELERS CASUALTY AND SURETY
COMPANY f/k/a THE AETNA CASUALTY
AND SURETY COMPANY; THE
STANDARD FIRE INSURANCE COMPANY;
ST. PAUL FIRE AND MARINE INSURANCE
COMPANY; THE EMPLOYERS' FIRE
INSURANCE COMPANY; SOUTHEASTERN
INSURANCE COMPANY; SOUTHEASTERN
AGENCY GROUP and M.I.A. COMPANY, INC.
individually and as successors to or f/k/a
MERRIMON INSURANCE AGENCY, INC.;
ROBERT E. ASPRAY; NELLASHWORTH,
individually and as personal representative of the
Estate of ROBERT J. ASHWORTH;
BETTY C. D'AMICO, individually and as
Executor of the Estate of JULIAN D'AMICO, JR.;
KAYLA KEITH, individually and as the personal
representative of the Estate of JERRY W.
ARCHER, SR.; RICHARD L. KNIGHT II,
as personal representative of the Estate of
TEDDY L KNIGHT, SR., and LINDA KNIGHT,
individually; DAVID D. ROLLINS; JAMES
W. SMITH and FRANCES R. SMITH; and
LINDA J. WHITE, individually and as Personal
Representative of the Estate of LUBERT F.
WHITE, JR.,

Defendants.

**TRAVELERS CASUALTY
AND SURETY COMPANY
f/k/a THE AETNA CASUALTY
AND SURETY COMPANY
AND THE STANDARD FIRE
INSURANCE COMPANY'S
ANSWER TO FIRST
AMENDED COMPLAINT,
COUNTERCLAIMS, AND
CROSS-CLAIMS**

Defendants Travelers Casualty and Surety Company f/k/a the Aetna Casualty and Surety Company and The Standard Fire Insurance Company (together, “Travelers”), by and through undersigned counsel, hereby submit this Answer to the First Amended Complaint (the “Complaint”) of the Receiver for Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. (collectively, “Starr Davis”), Counterclaims, and Cross-Claims, and state as follows:

ANSWER

All allegations of the Complaint not hereinafter specifically admitted, explained or qualified are denied and, with reference to each paragraph therein, Travelers states the following.

THE PARTIES

1. Travelers admits that, on or around February 22, 2019, Peter D. Protopapas was appointed Receiver of Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. by Order of the Honorable Jean H. Toal in the case of *Charles T. Hopper et al. v. Air & Liquid Systems Corp. et al.*, case number 2019-CP-4000076 in the Court of Common Pleas for the Fifth Judicial Circuit. Travelers further admits on information and belief that Mr. Protopapas’ primary place of business is in Richland County, South Carolina.

2. Admitted on information and belief.

3. Admitted on information and belief.

4. Admitted.

5. Admitted.

6. Travelers admits only that St. Paul Fire and Marine Insurance Company is a Connecticut corporation with its principal place of business in Connecticut, and that it is an affiliate of Travelers.

7. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 7, and therefore denies same.

8. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 8, and therefore denies same.

9. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 9, and therefore denies same.

10. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 10, and therefore denies same.

11. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 11, and therefore denies same.

12. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 12, and therefore denies same.

13. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 13, and therefore denies same.

14. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 14, and therefore denies same.

15. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 15, and therefore denies same.

16. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 16, and therefore denies same.

JURISDICTION AND VENUE

17. Travelers admits that Peter D. Protopapas was appointed Receiver of Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. by Order of the Honorable Jean H. Toal in

the case of *Charles T. Hopper et al. v. Air & Liquid Systems Corp. et al.*, case number 2019-CP-4000076 in the Court of Common Pleas for the Fifth Judicial Circuit. Travelers also admits on information and belief that Starr Davis Company, Inc. is a former North Carolina corporation, and that Starr Davis Company of S.C. is a former South Carolina corporation. The remaining allegations of Paragraph 17 are legal conclusions to which no response is required. To the extent a further response is required, the remaining allegations are denied.

18. Travelers admits that in an Order dated March 3, 2017 (Order No. 2017-03-03-01), the Supreme Court of South Carolina “ORDERED that the Honorable Jean Hoefer Toal, retired Chief Justice of the Supreme Court, shall have jurisdiction in all circuits in this state to dispose of all pretrial matters and motions, as well as trials, arising out of asbestosis and asbestos litigation filed within the state court system.” The remaining allegations of Paragraph 18 are legal conclusions to which no response is required. To the extent a further response is required, the remaining allegations are denied.

FACTUAL BACKGROUND

19. Travelers admits on information and belief that Starr Davis Company, Inc. was incorporated in North Carolina in or around 1963, and that Starr Davis Company of S.C., Inc. was incorporated in South Carolina in or around 1962. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the remaining allegations of Paragraph 19, and therefore denies same.

20. Travelers admits on information and belief that Starr Davis Company, Inc. was dissolved in or around 1996. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the remaining allegations of Paragraph 20, and therefore denies same.

21. Travelers admits on information and belief that Starr Davis Company of S.C., Inc. was dissolved in or around 1997. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the remaining allegations of Paragraph 21, and therefore denies same.

22. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations of Paragraph 22 given their vagueness, and therefore denies same.

23. Travelers admits that, on or around February 22, 2019, Peter D. Protopapas was appointed Receiver of Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. by Order of the Honorable Jean H. Toal in the case of *Charles T. Hopper et al. v. Air & Liquid Systems Corp. et al.*, case number 2019-CP-4000076 in the Court of Common Pleas for the Fifth Judicial Circuit. The remaining allegations of Paragraph 23 are legal conclusions to which no response is required. To the extent a further response is required, the remaining allegations are denied.

24. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations of Paragraph 24, and therefore denies same.

25. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations of Paragraph 25, and therefore denies same.

FIRST CAUSE OF ACTION
DECLARATORY JUDGMENT

26. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required at this time.

27. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required at this time.

28. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required at this time.

29. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required at this time.

30. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required at this time.

31. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required at this time.

32. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required at this time.

33. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required at this time.

34. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required at this time.

35. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required at this time.

36. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required at this time.

SECOND CAUSE OF ACTION
DECLARATORY JUDGMENT

37. Paragraph 37 states legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

38. Travelers admits that it issued certain insurance policies to Starr Davis. The remaining allegations of Paragraph 38 are legal conclusions to which no response is required. To the extent a further response is required, the remaining allegations are denied.

39. Traveler admits that it issued certain insurance policies to Starr Davis. The remaining allegations of Paragraph 39 are legal conclusions to which no response is required. To the extent a further response is required, the remaining allegations are denied.

40. Travelers admits that Starr Davis has tendered certain asbestos claims to Travelers. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations of Paragraph 40 as respects other defendants, and therefore denies same in that regard.

41. Denied.

42. Travelers admits that it is providing a defense to Starr Davis with respect to certain asbestos claims tendered to Travelers by Starr Davis. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations of Paragraph 42 as respects other defendants, and therefore denies same in that regard.

43. Travelers has filed a motion to dismiss this portion of this cause of action; therefore, no further response is required at this time.

44. Paragraph 44 states legal conclusions and contains a declarative description of the relief sought by “plaintiff” as to which no response is required. To the extent a response is required, Travelers denies that the Receiver and/or Starr Davis are entitled to any relief whatsoever from Travelers. The remaining allegations are directed to entities other than Travelers, and therefore no response is required.

45. Paragraph 45 states legal conclusions and contains a declarative description of the relief sought by “Plaintiff” as to which no response is required. To the extent a response is required, Travelers denies that the Receiver and/or Starr Davis are entitled to any relief whatsoever from Travelers.

46. Paragraph 46 states legal conclusions and contains a declarative description of the relief sought by “plaintiff” as to which no response is required. To the extent a response is required, Travelers denies that the Receiver and/or Starr Davis are entitled to any relief whatsoever from Travelers.

THIRD CAUSE OF ACTION
DECLARATORY JUDGMENT

47. Paragraph 47 and subparagraphs a-q state legal conclusions and contain declarative descriptions of the relief sought by “plaintiff” as to which no response is required. To the extent a response is required, Travelers denies that the Receiver and/or Starr Davis are entitled to any relief whatsoever from Travelers. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations regarding the “coverage charts and schedules in Tab A” given that the Amended Complaint does not include any such “Tab A,” and thus Travelers denies all such allegations and demands strict proof thereof.

48. Paragraph 48 states legal conclusions and contains a declarative description of the relief sought by “Plaintiff” as to which no response is required. To the extent a response is required, Travelers denies that the Receiver and/or Starr Davis are entitled to any relief whatsoever from Travelers.

FOURTH CAUSE OF ACTION
FAILURE TO PROCURE INSURANCE

49. The allegations in Paragraph 49 are not directed at Travelers and therefore no response is required.

50. The allegations in Paragraph 50 are not directed at Travelers and therefore no response is required.

51. The allegations in Paragraph 51 are not directed at Travelers and therefore no response is required.

FIFTH CAUSE OF ACTION
BREACH OF CONTRACT

52. The allegations in Paragraph 52 are not directed at Travelers and therefore no response is required.

53. The allegations in Paragraph 53 are not directed at Travelers and therefore no response is required.

54. The allegations in Paragraph 54 are not directed at Travelers and therefore no response is required.

SIXTH CAUSE OF ACTION
BREACH OF CONTRACT

55. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

56. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

57. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

58. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

59. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

SEVENTH CAUSE OF ACTION
ACTION FOR AN ACCOUNTING

60. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

61. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

62. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

63. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

64. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

65. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

66. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

67. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

68. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

EIGHTH CAUSE OF ACTION
UNJUST ENRICHMENT

69. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

70. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

71. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

72. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

73. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

74. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

75. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

NINTH CAUSE OF ACTION
IMPOSITION OF A CONSTRUCTIVE TRUST

76. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

77. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

78. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

79. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

80. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

81. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

82. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

TENTH CAUSE OF ACTION
DETERMINATION OF PARTNERSHIP BY OPERATION OF LAW

83. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

84. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

85. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

86. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

ELEVENTH CAUSE OF ACTION
DETERMINATION OF JOINT VENTURE ARRANGEMENT
BETWEEN STARR DAVIS AND TRAVELERS

87. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

88. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

89. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

90. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

TWELFTH CAUSE OF ACTION
DETERMINATION OF EQUITABLE OWNERSHIP

91. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

92. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

93. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

THIRTEENTH CAUSE OF ACTION
BREACH OF FIDUCIARY DUTIES

94. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

95. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

96. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

FOURTEENTH CAUSE OF ACTION
CONVERSION

97. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

98. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

99. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

100. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

101. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

102. Travelers has filed a motion to dismiss this cause of action; therefore, no further response is required.

RESERVATION OF RIGHTS AND GENERAL DENIAL

Travelers' Answer, as well as its Affirmative Defenses set forth below, are based on information currently available to Travelers. Travelers reserves the right to amend its pleadings in accordance with the South Carolina Rules of Civil Procedure or applicable law, and to the extent it learns of new or additional information during discovery or otherwise. Any allegation not specifically admitted above is denied. Travelers hereby asserts the following defenses and affirmative defenses in total and/or partial bar of the claims for relief and/or alleged damages sought in Starr Davis' Complaint. By including the following defenses or affirmative defenses, Travelers does not assume the burden of proof where such burden lies with Starr Davis or parties other than Travelers.

AFFIRMATIVE DEFENSES

1. Starr Davis fails to state a claim upon which relief can be granted.
2. Starr Davis's claims may be barred by accord and satisfaction.
3. Starr Davis's claims may be barred by the doctrine of ratification.

4. Starr Davis's claims may be barred or limited by the Interim Agreement dated November 19, 1985.

5. Starr Davis's claims may be barred by waiver.

6. Starr Davis's claims may be barred by estoppel.

7. Starr Davis's claims may be barred by misrepresentation.

8. Starr Davis's claims may be barred by unclean hands.

9. Starr Davis's claims may be barred by statutes of limitations.

10. Starr Davis's claims may be barred by the doctrine of laches.

11. Starr Davis's claims may be barred by payment.

12. Starr Davis's claims may be barred by the doctrine of unjust enrichment.

13. Starr Davis's claims may be barred by spoliation.

14. Travelers' obligations to Starr Davis, if any, are limited by the terms of the insurance policies it issued to Starr Davis, including, without limitation, conditions, exclusions, declarations, endorsements, limits of liability, per occurrence and aggregate limits, definitions, deductibles, self-insured retentions, policy periods, requirements of exhaustion of other insurance, and notice requirements. Travelers expressly reserves, and does not waive, its rights under all of the terms of the insurance policies it issued to Starr Davis.

15. Travelers asserts all available affirmative defenses that arise pursuant to the documents referenced herein, in the Complaint and/or executed by or on behalf of the parties.

16. Any punitive damages would violate Travelers' rights under the United States Constitution and the Constitution of South Carolina.

PRAYER FOR RELIEF

WHEREFORE, Travelers respectfully requests that the Complaint be dismissed in its entirety and with prejudice, and that Travelers be awarded its reasonable attorneys' fees, costs, and any such other and further relief as the Court deems just and proper.

**COUNTERCLAIM FOR
DECLARATORY JUDGMENT**

For its Counterclaim against Starr Davis, Travelers states as follows:

1. An actual, justiciable controversy exists between Travelers and Starr Davis regarding their respective obligations and liabilities under, and the interpretation of, the liability insurance policies Travelers issued to Starr Davis (collectively, "Starr Davis Insurance Policies" or individually, "Starr Davis Insurance Policy"), as well as an agreement entered into by and between Travelers and Starr Davis dated November 19, 1985 (the "1985 Agreement").

2. Judicial declarations concerning the Starr Davis Insurance Policies and the 1985 Agreement are necessary and appropriate at this time so that the parties may ascertain their rights and obligations in defending and settling asbestos bodily injury claims and lawsuits brought against Starr Davis.

3. Therefore, Travelers requests that the Court make the following judicial declarations regarding the rights and responsibilities of Travelers and Starr Davis:

The 1985 Agreement

a. The 1985 Agreement is an independent contract between Travelers and Starr Davis and remains in full force and effect today.

b. Pursuant to the 1985 Agreement, Travelers and Starr Davis agreed that Travelers "has afforded products liability/completed operations insurance coverage to Starr Davis from January 1, 1959 to June 30, 1985," but not for any other periods. Accordingly,

Travelers has no responsibility under the Starr Davis Insurance Policies for liability associated with asbestos-related bodily injury prior to January 1, 1959 or after June 30, 1985.

c. Pursuant to the 1985 Agreement, Travelers and Starr Davis agreed that Starr Davis must “reimburse [Travelers] for the expense for any portion of [liability for alleged asbestos] occurring in a period of [Travelers’] policies that have been exhausted by the payment of indemnity.” Accordingly, Starr Davis must reimburse Travelers to the extent Travelers pays any portion of Starr Davis’s liability after Travelers has exhausted any Starr Davis Insurance Policy by payment of indemnity.

d. Pursuant to the 1985 Agreement, Travelers and Starr Davis agreed that Travelers’ “liability for the cost of defense will be limited to the same percentage of the total defense cost that the number of years of alleged exposure during [Travelers’] coverage period [1959-1985] bears to the total number of years of alleged exposure to Starr Davis’s products or completed operations.” Accordingly, Travelers’s liability for the cost of defense, if any, with respect to any asbestos bodily injury claim is limited to a percentage of the total defense cost, specifically, the percentage derived by taking the number of years of alleged exposure between 1959-1985, and dividing it by the total number of years of alleged exposure to Starr Davis’s products or completed operations.

e. Pursuant to the 1985 Agreement, Travelers and Starr Davis agreed that Travelers’ “liability for the cost of disposition of the asbestos claims will be limited to the same percentage of the total disposition cost that the number of years of exposure to Starr Davis’ asbestos products or completed operations during [Travelers’] periods of coverage bears to the total number of years of exposure to Starr Davis’ asbestos products or

completed operations.” Accordingly, Travelers’s liability for the cost of disposition, if any, with respect to any asbestos bodily injury claim is limited to a percentage of the total defense cost, specifically, the percentage derived by taking the number of years of alleged exposure between 1959-1985, and dividing it by the total number of years of alleged exposure to Starr Davis’s products or completed operations.

f. Pursuant to the 1985 Agreement, Travelers and Starr Davis agreed that “[n]otwithstanding any other provision of the” 1985 Agreement, Travelers “will not be responsible for any payment of expense or indemnity on any policy after the aggregate limits of such policy have been exhausted by payment of indemnity.” Accordingly, Travelers will not be responsible for any payment of expense or indemnity associated with any asbestos bodily injury claims on any Starr Davis Insurance Policy after the aggregate limits of such policy have been exhausted by payment of indemnity.¹

The Starr Davis Insurance Policies

g. With respect to asbestos-related bodily injury claims tendered to Travelers under the Starr Davis Insurance Policies where asbestos-related bodily injury is alleged to have taken place in more than one policy period, the liability associated with each such claim must be divided between all annual periods, including insured, uninsured and/or underinsured periods, from initial injurious exposure to manifestation of disease.

h. With respect to asbestos-related bodily injury claims tendered to Travelers under the Starr Davis Insurance Policies, the allocation between annual periods, including insured, uninsured and/or underinsured periods, from initial injurious exposure to

¹ The 1985 Agreement is a contract cited by Travelers to enforce its terms. Travelers does not cite the 1985 Agreement in support of the meaning, intent or construction of the Starr Davis Insurance Policies.

manifestation of disease, must be based on the relative amount of injury that took place in each annual period; if there is insufficient evidence with which to specifically allocate the amount of injury to each annual period, the liability must be pro-rated equally to each annual period from initial injurious exposure to manifestation of disease, including insured, uninsured and/or underinsured periods.

i. With respect to asbestos-related bodily injury claims tendered to Travelers under the Starr Davis Insurance Policies, each Starr Davis Insurance Policy covers only the liability allocable to alleged bodily injury, as defined by the policy, that takes place during that particular policy's policy period; the policy does not cover any liability allocable to bodily injury that takes place either before or after that particular policy period begins or ends.

j. With respect to asbestos-related bodily injury claims tendered to Travelers under the Starr Davis Insurance Policies, any Starr Davis Insurance Policy that spans multiple years is not subject to an annual limit of liability for liability associated with the product liability and/or completed operations hazards unless the policy explicitly so states.

k. With respect to asbestos-related bodily injury claims tendered to Travelers under the Starr Davis Insurance Policies, because no Starr Davis Insurance Policy that spans multiple years provides for an annual limit of liability for liability associated with any other type of injury other than injury that falls within the product liability and/or completed operations hazards, including so-called premises and/or operations injury, no annual limit of liability applies to such injury.

l. With respect to asbestos-related bodily injury claims tendered to Travelers under the Starr Davis Insurance Policies, there are no primary policies which cover the

same risk for the same policy period; thus, Starr Davis may not “pick” between primary policies to respond to the liability associated with any particular policy period, and may not “stack” the limits of any policies with respect to any such claim.

m. With respect to asbestos-related bodily injury claims tendered to Travelers under the Starr Davis Insurance Policies, it is Starr Davis’s burden, as the insured, to prove that the injury falls outside the “products” or “completed operations” hazards, as those terms are defined in the Starr Davis Insurance Policies, if it seeks to avoid the aggregate limit applicable to such injury.

n. With respect to asbestos-related bodily injury claims tendered to Travelers under the Starr Davis Insurance Policies, Starr Davis’ liability for all such claims arises from the continuous or repeated exposure to substantially the same general conditions; thus, all such claims are subject to a single per occurrence limit of liability.

o. With respect to asbestos-related bodily injury claims tendered to Travelers under the Starr Davis Insurance Policies, Starr Davis may not “stack” per occurrence or aggregate limits from different years.

p. With respect to asbestos-related bodily injury claims tendered to Travelers under the Starr Davis Insurance Policies, all liability associated with asbestos-related bodily injury during a policy period that happened after the claimant was no longer exposed to the relevant injury-causing Starr Davis operation or the injury-causing product has been relinquished by Starr Davis is subject to the aggregate limit applicable to the products and completed operations hazards.

q. With respect to asbestos-related bodily injury claims tendered to Travelers under the Starr Davis Insurance Policies, Travelers has no duty to defend Starr Davis under

any Starr Davis Insurance Policy once Travelers has exhausted the applicable per occurrence and/or aggregate limit of that policy by payment of settlements or judgments.

WHEREFORE, Travelers demands judgment against Starr Davis for declaratory relief set forth above and for attorneys' fees, litigation expenses, and any such other and further relief as the Court deems appropriate.

CROSS-CLAIMS

For its Cross-Claims, Travelers states as follows:

Count I – Indemnification

(Against All Defendants Other Than Travelers and St. Paul Fire and Marine Insurance Company)

1. Travelers repeats and incorporates by reference the foregoing allegations set forth in its Answer and Counterclaim as if fully set forth herein.

2. To the extent that Travelers's liability is fixed based upon the imputation of the acts or omissions of another Defendant, Travelers is entitled to implied indemnification for any amount paid towards any award to Starr Davis; its attorney fees; and its litigation expenses from any Defendant whose acts or omissions are imputed to Travelers.

Count II – Contribution

(Against All Defendants Other Than Travelers and St. Paul Fire and Marine Insurance Company)

3. Travelers repeats and incorporates by reference the foregoing allegations set forth in its Answer and Counterclaim as if fully set forth herein.

4. To the extent that Travelers is found to be jointly and severally liable to Starr Davis along with any other Defendant, Travelers is entitled to contribution from such Defendant to the

extent of any amount paid towards any award to Starr Davis in excess of Travelers' pro tanto or pro rata share of any joint and several liability.

WHEREFORE, Travelers demands judgment against all Defendants other than Travelers and St. Paul Fire and Marine Insurance Company for compensatory damages, attorneys' fees, litigation expenses, and any such other and further relief as the Court deems appropriate.

Respectfully submitted,

/s/William P. Davis

William P. Davis

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Pro Hac Vice Application Pending

Attorneys for Travelers Defendants

September 21, 2020

Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

PETER D. PROTOPAPAS, as Receiver for
STARR DAVIS COMPANY, INC. and
STARR DAVIS COMPANY OF S.C., INC.,

Plaintiff,

v.

Case No.: 2019-CP-40-06243

TRAVELERS CASUALTY AND SURETY
COMPANY f/k/a THE AETNA CASUALTY
AND SURETY COMPANY; THE
STANDARD FIRE INSURANCE COMPANY;
ST. PAUL FIRE AND MARINE INSURANCE
COMPANY; THE EMPLOYERS' FIRE
INSURANCE COMPANY; SOUTHEASTERN
INSURANCE COMPANY; SOUTHEASTERN
AGENCY GROUP and M.I.A. COMPANY, INC.]
individually and as successors to or f/k/a
MERRIMON INSURANCE AGENCY, INC.;]
ROBERT E. ASPRAY; NELLASHWORTH,
individually and as personal representative of the]
Estate of ROBERT J. ASHWORTH;
BETTY C. D'AMICO, individually and as]
Executor of the Estate of JULIAN D'AMICO, JR.;
KAYLA KEITH, individually and as the personal]
representative of the Estate of JERRY W.
ARCHER, SR.; RICHARD L. KNIGHT II,]
as personal representative of the Estate of
TEDDY L KNIGHT, SR., and LINDA KNIGHT,]
individually; DAVID D. ROLLINS; JAMES
W. SMITH and FRANCES R. SMITH; and]
LINDA J. WHITE, individually and as Personal
Representative of the Estate of LUBERT F.]
WHITE, JR.,

Defendants.

**TRAVELERS CASUALTY AND
SURETY COMPANY f/k/a THE
AETNA CASUALTY AND
SURETY COMPANY AND THE
STANDARD FIRE INSURANCE
COMPANY'S FIRST AMENDED
ANSWER TO FIRST AMENDED
COMPLAINT,
COUNTERCLAIMS, AND
CROSS-CLAIMS**

Defendants Travelers Casualty and Surety Company f/k/a the Aetna Casualty and Surety Company and The Standard Fire Insurance Company (together, “Travelers”), by and through undersigned counsel, hereby submit this Answer to the First Amended Complaint (the “Complaint”) of the Receiver for Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. (collectively, “Starr Davis”), Counterclaims, and Cross-Claims, and state as follows:

ANSWER

All allegations of the Complaint not hereinafter specifically admitted, explained or qualified are denied and, with reference to each paragraph therein, Travelers states the following.

THE PARTIES

1. Travelers admits that, on or around February 22, 2019, Peter D. Protopapas was appointed Receiver of Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. by Order of the Honorable Jean H. Toal in the case of *Charles T. Hopper et al. v. Air & Liquid Systems Corp. et al.*, case number 2019-CP-4000076 in the Court of Common Pleas for the Fifth Judicial Circuit. Travelers further admits on information and belief that Mr. Protopapas’ primary place of business is in Richland County, South Carolina.

2. Admitted on information and belief.

3. Admitted on information and belief.

4. Admitted.

5. Admitted.

6. Travelers admits only that St. Paul Fire and Marine Insurance Company is a Connecticut corporation with its principal place of business in Connecticut, and that it is an affiliate of Travelers.

7. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 7, and therefore denies same.

8. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 8, and therefore denies same.

9. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 9, and therefore denies same.

10. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 10, and therefore denies same.

11. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 11, and therefore denies same.

12. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 12, and therefore denies same.

13. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 13, and therefore denies same.

14. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 14, and therefore denies same.

15. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 15, and therefore denies same.

16. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 16, and therefore denies same.

JURISDICTION AND VENUE

17. Travelers admits that Peter D. Protopapas was appointed Receiver of Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. by Order of the Honorable Jean H. Toal in

the case of *Charles T. Hopper et al. v. Air & Liquid Systems Corp. et al.*, case number 2019-CP-4000076 in the Court of Common Pleas for the Fifth Judicial Circuit. Travelers also admits on information and belief that Starr Davis Company, Inc. is a former North Carolina corporation, and that Starr Davis Company of S.C. is a former South Carolina corporation. The remaining allegations of Paragraph 17 are legal conclusions to which no response is required. To the extent a further response is required, the remaining allegations are denied.

18. Travelers admits that in an Order dated March 3, 2017 (Order No. 2017-03-03-01), the Supreme Court of South Carolina “ORDERED that the Honorable Jean Hoefer Toal, retired Chief Justice of the Supreme Court, shall have jurisdiction in all circuits in this state to dispose of all pretrial matters and motions, as well as trials, arising out of asbestosis and asbestos litigation filed within the state court system.” The remaining allegations of Paragraph 18 are legal conclusions to which no response is required. To the extent a further response is required, the remaining allegations are denied.

FACTUAL BACKGROUND

19. Travelers admits on information and belief that Starr Davis Company, Inc. was incorporated in North Carolina in or around 1963, and that Starr Davis Company of S.C., Inc. was incorporated in South Carolina in or around 1962. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the remaining allegations of Paragraph 19, and therefore denies same.

20. Travelers admits on information and belief that Starr Davis Company, Inc. was dissolved in or around 1996. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the remaining allegations of Paragraph 20, and therefore denies same.

21. Travelers admits on information and belief that Starr Davis Company of S.C., Inc. was dissolved in or around 1997. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the remaining allegations of Paragraph 21, and therefore denies same.

22. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations of Paragraph 22 given their vagueness, and therefore denies same.

23. Travelers admits that, on or around February 22, 2019, Peter D. Protopapas was appointed Receiver of Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. by Order of the Honorable Jean H. Toal in the case of *Charles T. Hopper et al. v. Air & Liquid Systems Corp. et al.*, case number 2019-CP-4000076 in the Court of Common Pleas for the Fifth Judicial Circuit. The remaining allegations of Paragraph 23 are legal conclusions to which no response is required. To the extent a further response is required, the remaining allegations are denied.

24. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations of Paragraph 24, and therefore denies same.

25. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations of Paragraph 25, and therefore denies same.

FIRST CAUSE OF ACTION
DECLARATORY JUDGMENT

26. Paragraph 26 states a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

27. Paragraph 27 states a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

28. Paragraph 28 states legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

29. Paragraph 29 states legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

30. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations of Paragraph 30, and therefore denies same.

31. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations of Paragraph 31, and therefore denies same.

32. To the extent the allegations are directed to other parties, Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations of Paragraph 32, and therefore denies same. To the extent the allegations are directed at Travelers, Travelers denies the same.

33. To the extent the allegations are directed to other parties, Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations of Paragraph 33, and therefore denies same. To the extent the allegations are directed at Travelers, Travelers denies the same.

34. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations of Paragraph 34, and therefore denies same.

35. Paragraph 35 states a legal conclusion and contains a declarative description of the relief sought by “plaintiff” as to which no response is required. To the extent a response is required, Travelers denies that the Receiver and/or Starr Davis are entitled to any relief whatsoever from Travelers.

36. Paragraph 36 states a legal conclusion and contains a declarative description of the relief sought by “plaintiff” as to which no response is required. To the extent a response is

required, Travelers denies that the Receiver and/or Starr Davis are entitled to any relief whatsoever from Travelers.

SECOND CAUSE OF ACTION
DECLARATORY JUDGMENT

37. Paragraph 37 states legal conclusions to which no response is required. To the extent a response is required, the allegations are denied.

38. Travelers admits that it issued certain insurance policies to Starr Davis. The remaining allegations of Paragraph 38 are legal conclusions to which no response is required. To the extent a further response is required, the remaining allegations are denied.

39. Traveler admits that it issued certain insurance policies to Starr Davis. The remaining allegations of Paragraph 39 are legal conclusions to which no response is required. To the extent a further response is required, the remaining allegations are denied.

40. Travelers admits that Starr Davis has tendered certain asbestos claims to Travelers. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations of Paragraph 40 as respects other defendants, and therefore denies same in that regard.

41. Denied.

42. Travelers admits that it is providing a defense to Starr Davis with respect to certain asbestos claims tendered to Travelers by Starr Davis. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations of Paragraph 42 as respects other defendants, and therefore denies same in that regard.

43. Paragraph 43 states a legal conclusion and contains a declarative description of the relief sought by “plaintiff” as to which no response is required. To the extent a response is required,

Travelers denies that the Receiver and/or Starr Davis are entitled to any relief whatsoever from Travelers.

44. Paragraph 44 states legal conclusions and contains a declarative description of the relief sought by “plaintiff” as to which no response is required. To the extent a response is required, Travelers denies that the Receiver and/or Starr Davis are entitled to any relief whatsoever from Travelers. The remaining allegations are directed to entities other than Travelers, and therefore no response is required.

45. Paragraph 45 states legal conclusions and contains a declarative description of the relief sought by “Plaintiff” as to which no response is required. To the extent a response is required, Travelers denies that the Receiver and/or Starr Davis are entitled to any relief whatsoever from Travelers.

46. Paragraph 46 states legal conclusions and contains a declarative description of the relief sought by “plaintiff” as to which no response is required. To the extent a response is required, Travelers denies that the Receiver and/or Starr Davis are entitled to any relief whatsoever from Travelers.

THIRD CAUSE OF ACTION
DECLARATORY JUDGMENT

47. Paragraph 47 and subparagraphs a-q state legal conclusions and contain declarative descriptions of the relief sought by “plaintiff” as to which no response is required. To the extent a response is required, Travelers denies that the Receiver and/or Starr Davis are entitled to any relief whatsoever from Travelers. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations regarding the “coverage charts and schedules in Tab A” given that the Amended Complaint does not include any such “Tab A,” and thus Travelers denies all such allegations and demands strict proof thereof.

48. Paragraph 48 states legal conclusions and contains a declarative description of the relief sought by "Plaintiff" as to which no response is required. To the extent a response is required, Travelers denies that the Receiver and/or Starr Davis are entitled to any relief whatsoever from Travelers.

FOURTH CAUSE OF ACTION
FAILURE TO PROCURE INSURANCE

49. The allegations in Paragraph 49 are not directed at Travelers and therefore no response is required.

50. The allegations in Paragraph 50 are not directed at Travelers and therefore no response is required.

51. The allegations in Paragraph 51 are not directed at Travelers and therefore no response is required.

FIFTH CAUSE OF ACTION
BREACH OF CONTRACT

52. The allegations in Paragraph 52 are not directed at Travelers and therefore no response is required.

53. The allegations in Paragraph 53 are not directed at Travelers and therefore no response is required.

54. The allegations in Paragraph 54 are not directed at Travelers and therefore no response is required.

SIXTH CAUSE OF ACTION
BREACH OF CONTRACT

55. Admitted that Standard Fire Insurance Company issued policy number 25 AL 802646 CNS to Starr Davis for the policy period January 1, 1978 to January 1, 1979.

56. Travelers admits that the endorsement contains the quoted language, as well as other language. Travelers refers to policy number 25 AL 802646 CNS and to the referenced endorsement for a full and accurate description of their contents.

57. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 57, and therefore denies same. Travelers is further without knowledge or information sufficient to determine that Starr Davis failed to pay any premiums due for policy number 25 AL 802646 CNS.

58. Paragraph 58 assumes a legal conclusion as to Travelers' contractual obligations to which no response is required. To the extent a further response is required, Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 58, and therefore denies same.

59. Paragraph 59 states legal conclusions to which no response is required. To the extent a further response is required, the remaining allegations are denied.

SEVENTH CAUSE OF ACTION
ACTION FOR AN ACCOUNTING

60. Admitted that Standard Fire Insurance Company issued policy number 25 AL 802646 CNS to Starr Davis for the policy period January 1, 1978 to January 1, 1979.

61. Travelers admits that the endorsement contains the quoted language, as well as other language. Travelers refers to policy number 25 AL 802646 CNS and to the referenced endorsement for a full and accurate description of their contents.

62. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 62, and therefore denies same. Travelers is further without knowledge or information sufficient to determine that Starr Davis failed to pay any premiums due for policy number 25 AL 802646 CNS.

63. Paragraph 63 assumes a legal conclusion to which no response is required. To the extent a further response is required, Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 63, and therefore denies same.

64. Paragraph 64 states legal conclusions to which no response is required. To the extent a further response is required, the remaining allegations are denied.

65. Paragraph 65 states a legal conclusion to which no response is required. To the extent a further response is required, the remaining allegations are denied.

66. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 66, and therefore denies same.

67. Paragraph 67 states a legal conclusion to which no response is required. To the extent a further response is required, the remaining allegations are denied.

68. Paragraph 68 states legal conclusions and contains a declarative description of the relief sought by "plaintiff" as to which no response is required. To the extent a response is required, Travelers denies that the Receiver and/or Starr Davis are entitled to any relief whatsoever from Travelers.

EIGHTH CAUSE OF ACTION
UNJUST ENRICHMENT

69. Admitted that Standard Fire Insurance Company issued policy number 25 AL 802646 CNS to Starr Davis for the policy period January 1, 1978 to January 1, 1979.

70. Travelers admits that the endorsement contains the quoted language, as well as other language. Travelers refers to policy number 25 AL 802646 CNS and to the referenced endorsement for a full and accurate description of their contents.

71. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 71, and therefore denies same.

Travelers is further without knowledge or information sufficient to determine that Starr Davis failed to pay any premiums due for policy number 25 AL 802646 CNS.

72. Paragraph 72 assumes a legal conclusion as to Travelers' contractual obligations to which no response is required. To the extent a further response is required, Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 72, and therefore denies same

73. Paragraph 73 states legal conclusions to which no response is required. To the extent a further response is required, the remaining allegations are denied.

74. Paragraph 74 assumes a legal conclusion as to Travelers' contractual obligations to which no response is required. To the extent a further response is required, Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 74, and therefore denies same.

75. Paragraph 75 states legal conclusions to which no response is required. To the extent a further response is required, the remaining allegations are denied.

NINTH CAUSE OF ACTION
IMPOSITION OF A CONSTRUCTIVE TRUST

76. Admitted that Standard Fire Insurance Company issued policy number 25 AL 802646 CNS to Starr Davis for the policy period January 1, 1978 to January 1, 1979.

77. Travelers admits that the endorsement contains the quoted language, as well as other language. Travelers refers to policy number 25 AL 802646 CNS and to the referenced endorsement for a full and accurate description of their contents.

78. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 78, and therefore deniessame.

Travelers is further without knowledge or information sufficient to determine that Starr Davis failed to pay any premiums due for policy number 25 AL 802646 CNS.

79. Paragraph 79 assumes a legal conclusion to which no response is required. To the extent a further response is required, Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 79, and therefore denies same.

80. Paragraph 80 states legal conclusions to which no response is required. To the extent a further response is required, the remaining allegations are denied.

81. Paragraph 81 assumes a legal conclusion as to Travelers' contractual obligations to which no response is required. To the extent a further response is required, Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 81, and therefore denies same.

82. Paragraph 82 states a legal conclusion and contains a description of the relief sought by "plaintiff" as to which no response is required. To the extent a response is required, Travelers denies that the Receiver and/or Starr Davis are entitled to any relief whatsoever from Travelers.

TENTH CAUSE OF ACTION
DETERMINATION OF PARTNERSHIP BY OPERATION OF LAW

83. Travelers admits that the endorsement contains the quoted language, as well as other language. Travelers refers to policy number 25 AL 802646 CNS and to the referenced endorsement for a full and accurate description of their contents.

84. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 84, and therefore denies same.

Travelers is further without knowledge or information sufficient to determine that Starr Davis failed to pay any premiums due for policy number 25 AL 802646 CNS.

85. Paragraph 85 assumes a legal conclusion as to Travelers contractual obligations as to which no response is required. To the extent a further response is required, Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 85, and therefore denies same.

86. Paragraph 86 states legal conclusions and contains a description of the relief sought by “plaintiff” as to which no response is required. To the extent a response is required, Travelers denies that the Receiver and/or Starr Davis are entitled to any relief whatsoever from Travelers.

ELEVENTH CAUSE OF ACTION
DETERMINATION OF JOINT VENTURE ARRANGEMENT
BETWEEN STARR DAVIS AND TRAVELERS

87. Travelers admits that the endorsement contains the quoted language, as well as other language. Travelers refers to policy number 25 AL 802646 CNS and to the referenced endorsement for a full and accurate description of their contents.

88. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 88, and therefore denies same. Travelers is further without knowledge or information sufficient to determine that Starr Davis failed to pay any premiums due for policy number 25 AL 802646 CNS.

89. Paragraph 89 assumes a legal conclusion as to Travelers’ contractual obligations as to which no response is required. To the extent a further response is required, Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 89, and therefore denies same.

90. Paragraph 90 states legal conclusions and contains a description of the relief sought by “plaintiff” to which no response is required. To the extent a response is required, Travelers denies that the Receiver and/or Starr Davis are entitled to any relief whatsoever from Travelers. To the extent a further response is required, the remaining allegations are denied.

TWELFTH CAUSE OF ACTION
DETERMINATION OF EQUITABLE OWNERSHIP

91. Travelers admits that the endorsement contains the quoted language, as well as other language. Travelers refers to policy number 25 AL 802646 CNS and to the referenced endorsement for a full and accurate description of their contents.

92. Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 92, and therefore denies same. Travelers is further without knowledge or information sufficient to determine that Starr Davis failed to pay any premiums due for policy number 25 AL 802646 CNS.

93. Paragraph 93 assumes legal conclusions as to Travelers contractual obligations as to which no response is required. To the extent a further response is required, Travelers is without knowledge or information sufficient to form a reasonable belief regarding the truth and accuracy of the allegations in Paragraph 93, and therefore denies same. Paragraph 93 contains a description of the relief sought by “plaintiff” as to which no response is required. To the extent a response is required, Travelers denies that the Receiver and/or Starr Davis are entitled to any relief whatsoever from Travelers.

THIRTEENTH CAUSE OF ACTION
BREACH OF FIDUCIARY DUTIES

94. Paragraph 94 states legal conclusions to which no response is required. To the extent a further response is required, the remaining allegations are denied.

95. Paragraph 95 states legal conclusions to which no response is required. To the extent a further response is required, the remaining allegations are denied.

96. Paragraph 96 states legal conclusions to which no response is required. To the extent a further response is required, the remaining allegations are denied.

FOURTEENTH CAUSE OF ACTION
CONVERSION

97. Paragraph 97 states legal conclusions to which no response is required. To the extent a further response is required, the remaining allegations are denied.

98. Paragraph 98 states legal conclusions to which no response is required. To the extent a further response is required, the remaining allegations are denied.

99. Paragraph 99 states legal conclusions to which no response is required. To the extent a further response is required, the remaining allegations are denied.

100. Paragraph 100 states legal conclusions as to which no response is required. To the extent a further response is required, the remaining allegations are denied.

101. Paragraph 101 states legal conclusions as to which no response is required. To the extent a further response is required, the remaining allegations are denied.

102. Paragraph 102 states a legal conclusion and contains a declarative description of the relief sought by “plaintiff” as to which no response is required. To the extent a response is required, Travelers denies that the Receiver and/or Starr Davis are entitled to any relief whatsoever from Travelers.

RESERVATION OF RIGHTS AND GENERAL DENIAL

Travelers' Answer, as well as its Affirmative Defenses set forth below, are based on information currently available to Travelers. Travelers reserves the right to amend its pleadings in accordance with the South Carolina Rules of Civil Procedure or applicable law, and to the extent it learns of new or additional information during discovery or otherwise. Any allegation not specifically admitted above is denied. Travelers hereby asserts the following defenses and affirmative defenses in total and/or partial bar of the claims for relief and/or alleged damages sought in Starr Davis' Complaint. By including the following defenses or affirmative defenses, Travelers does not assume the burden of proof where such burden lies with Starr Davis or parties other than Travelers.

AFFIRMATIVE DEFENSES

1. Starr Davis fails to state a claim upon which relief can be granted.
2. Starr Davis's claims may be barred by accord and satisfaction.
3. Starr Davis's claims may be barred by the doctrine of ratification.
4. Starr Davis's claims may be barred or limited by the Interim Agreement dated November 19, 1985.
5. Starr Davis's claims may be barred by waiver.
6. Starr Davis's claims may be barred by estoppel.
7. Starr Davis's claims may be barred by misrepresentation.
8. Starr Davis's claims may be barred by unclean hands.
9. Starr Davis's claims may be barred by statutes of limitations.
10. Starr Davis's claims may be barred by the doctrine of laches.
11. Starr Davis's claims may be barred by payment.
12. Starr Davis's claims may be barred by the doctrine of unjust enrichment.

13. Starr Davis's claims may be barred by spoliation.

14. Travelers' obligations to Starr Davis, if any, are limited by the terms of the insurance policies it issued to Starr Davis, including, without limitation, conditions, exclusions, declarations, endorsements, limits of liability, per occurrence and aggregate limits, definitions, deductibles, self-insured retentions, policy periods, requirements of exhaustion of other insurance, and notice requirements. Travelers expressly reserves, and does not waive, its rights under all of the terms of the insurance policies it issued to Starr Davis.

15. Travelers asserts all available affirmative defenses that arise pursuant to the documents referenced herein, in the Complaint and/or executed by or on behalf of the parties.

16. Any punitive damages would violate Travelers' rights under the United States Constitution and the Constitution of South Carolina.

PRAYER FOR RELIEF

WHEREFORE, Travelers respectfully requests that the Complaint be dismissed in its entirety and with prejudice, and that Travelers be awarded its reasonable attorneys' fees, costs, and any such other and further relief as the Court deems just and proper.

COUNTERCLAIM FOR DECLARATORY JUDGMENT

For its Counterclaim against Starr Davis, Travelers states as follows:

1. An actual, justiciable controversy exists between Travelers and Starr Davis regarding their respective obligations and liabilities under, and the interpretation of, the liability insurance policies Travelers issued to Starr Davis (collectively, "Starr Davis Insurance Policies" or individually, "Starr Davis Insurance Policy"), as well as an agreement entered into by and between Travelers and Starr Davis dated November 19, 1985 (the "1985 Agreement").

2. Judicial declarations concerning the Starr Davis Insurance Policies and the 1985 Agreement are necessary and appropriate at this time so that the parties may ascertain their rights and obligations in defending and settling asbestos bodily injury claims and lawsuits brought against Starr Davis.

3. Therefore, Travelers requests that the Court make the following judicial declarations regarding the rights and responsibilities of Travelers and Starr Davis:

The 1985 Agreement

a. The 1985 Agreement is an independent contract between Travelers and Starr Davis and remains in full force and effect today.

b. Pursuant to the 1985 Agreement, Travelers and Starr Davis agreed that Travelers “has afforded products liability/completed operations insurance coverage to Starr Davis from January 1, 1959 to June 30, 1985,” but not for any other periods. Accordingly, Travelers has no responsibility under the Starr Davis Insurance Policies for liability associated with asbestos-related bodily injury prior to January 1, 1959 or after June 30, 1985.

c. Pursuant to the 1985 Agreement, Travelers and Starr Davis agreed that Starr Davis must “reimburse [Travelers] for the expense for any portion of [liability for alleged asbestos] occurring in a period of [Travelers’] policies that have been exhausted by the payment of indemnity.” Accordingly, Starr Davis must reimburse Travelers to the extent Travelers pays any portion of Starr Davis’s liability after Travelers has exhausted any Starr Davis Insurance Policy by payment of indemnity.

d. Pursuant to the 1985 Agreement, Travelers and Starr Davis agreed that Travelers’ “liability for the cost of defense will be limited to the same percentage of the total defense cost that the number of years of alleged exposure during [Travelers’] coverage

period [1959-1985] bears to the total number of years of alleged exposure to Starr Davis's products or completed operations." Accordingly, Travelers's liability for the cost of defense, if any, with respect to any asbestos bodily injury claim is limited to a percentage of the total defense cost, specifically, the percentage derived by taking the number of years of alleged exposure between 1959-1985, and dividing it by the total number of years of alleged exposure to Starr Davis's products or completed operations.

e. Pursuant to the 1985 Agreement, Travelers and Starr Davis agreed that Travelers' "liability for the cost of disposition of the asbestos claims will be limited to the same percentage of the total disposition cost that the number of years of exposure to Starr Davis' asbestos products or completed operations during [Travelers'] periods of coverage bears to the total number of years of exposure to Starr Davis' asbestos products or completed operations." Accordingly, Travelers's liability for the cost of disposition, if any, with respect to any asbestos bodily injury claim is limited to a percentage of the total defense cost, specifically, the percentage derived by taking the number of years of alleged exposure between 1959-1985, and dividing it by the total number of years of alleged exposure to Starr Davis's products or completed operations.

f. Pursuant to the 1985 Agreement, Travelers and Starr Davis agreed that "[n]otwithstanding any other provision of the" 1985 Agreement, Travelers "will not be responsible for any payment of expense or indemnity on any policy after the aggregate limits of such policy have been exhausted by payment of indemnity." Accordingly, Travelers will not be responsible for any payment of expense or indemnity associated with

any asbestos bodily injury claims on any Starr Davis Insurance Policy after the aggregate limits of such policy have been exhausted by payment of indemnity.¹

The Starr Davis Insurance Policies

g. With respect to asbestos-related bodily injury claims tendered to Travelers under the Starr Davis Insurance Policies where asbestos-related bodily injury is alleged to have taken place in more than one policy period, the liability associated with each such claim must be divided between all annual periods, including insured, uninsured and/or underinsured periods, from initial injurious exposure to manifestation of disease.

h. With respect to asbestos-related bodily injury claims tendered to Travelers under the Starr Davis Insurance Policies, the allocation between annual periods, including insured, uninsured and/or underinsured periods, from initial injurious exposure to manifestation of disease, must be based on the relative amount of injury that took place in each annual period; if there is insufficient evidence with which to specifically allocate the amount of injury to each annual period, the liability must be pro-rated equally to each annual period from initial injurious exposure to manifestation of disease, including insured, uninsured and/or underinsured periods.

i. With respect to asbestos-related bodily injury claims tendered to Travelers under the Starr Davis Insurance Policies, each Starr Davis Insurance Policy covers only the liability allocable to alleged bodily injury, as defined by the policy, that takes place during that particular policy's policy period; the policy does not cover any liability allocable to

¹ The 1985 Agreement is a contract cited by Travelers to enforce its terms. Travelers does not cite the 1985 Agreement in support of the meaning, intent or construction of the Starr Davis Insurance Policies.

bodily injury that takes place either before or after that particular policy period begins or ends.

j. With respect to asbestos-related bodily injury claims tendered to Travelers under the Starr Davis Insurance Policies, any Starr Davis Insurance Policy that spans multiple years is not subject to an annual limit of liability for liability associated with the product liability and/or completed operations hazards unless the policy explicitly so states.

k. With respect to asbestos-related bodily injury claims tendered to Travelers under the Starr Davis Insurance Policies, because no Starr Davis Insurance Policy that spans multiple years provides for an annual limit of liability for liability associated with any other type of injury other than injury that falls within the product liability and/or completed operations hazards, including so-called premises and/or operations injury, no annual limit of liability applies to such injury.

l. With respect to asbestos-related bodily injury claims tendered to Travelers under the Starr Davis Insurance Policies, there are no primary policies which cover the same risk for the same policy period; thus, Starr Davis may not “pick” between primary policies to respond to the liability associated with any particular policy period, and may not “stack” the limits of any policies with respect to any such claim.

m. With respect to asbestos-related bodily injury claims tendered to Travelers under the Starr Davis Insurance Policies, it is Starr Davis’s burden, as the insured, to prove that the injury falls outside the “products” or “completed operations” hazards, as those terms are defined in the Starr Davis Insurance Policies, if it seeks to avoid the aggregate limit applicable to such injury.

n. With respect to asbestos-related bodily injury claims tendered to Travelers under the Starr Davis Insurance Policies, Starr Davis’ liability for all such claims arises

from the continuous or repeated exposure to substantially the same general conditions; thus, all such claims are subject to a single per occurrence limit of liability.

o. With respect to asbestos-related bodily injury claims tendered to Travelers under the Starr Davis Insurance Policies, Starr Davis may not “stack” per occurrence or aggregate limits from different years.

p. With respect to asbestos-related bodily injury claims tendered to Travelers under the Starr Davis Insurance Policies, all liability associated with asbestos-related bodily injury during a policy period that happened after the claimant was no longer exposed to the relevant injury-causing Starr Davis operation or the injury-causing product has been relinquished by Starr Davis is subject to the aggregate limit applicable to the products and completed operations hazards.

q. With respect to asbestos-related bodily injury claims tendered to Travelers under the Starr Davis Insurance Policies, Travelers has no duty to defend Starr Davis under any Starr Davis Insurance Policy once Travelers has exhausted the applicable per occurrence and/or aggregate limit of that policy by payment of settlements or judgments.

WHEREFORE, Travelers demands judgment against Starr Davis for declaratory relief set forth above and for attorneys’ fees, litigation expenses, and any such other and further relief as the Court deems appropriate.

CROSS-CLAIMS

For its Cross-Claims, Travelers states as follows:

Count I – Indemnification

(Against All Defendants Other Than Travelers and St. Paul Fire and Marine Insurance Company)

1. Travelers repeats and incorporates by reference the foregoing allegations set forth in its Answer and Counterclaim as if fully set forth herein.

2. To the extent that Travelers's liability is fixed based upon the imputation of the acts or omissions of another Defendant, Travelers is entitled to implied indemnification for any amount paid towards any award to Starr Davis; its attorney fees; and its litigation expenses from any Defendant whose acts or omissions are imputed to Travelers.

Count II – Contribution

(Against All Defendants Other Than Travelers and St. Paul Fire and Marine Insurance Company)

3. Travelers repeats and incorporates by reference the foregoing allegations set forth in its Answer and Counterclaim as if fully set forth herein.

4. To the extent that Travelers is found to be jointly and severally liable to Starr Davis along with any other Defendant, Travelers is entitled to contribution from such Defendant to the extent of any amount paid towards any award to Starr Davis in excess of Travelers' pro tanto or pro rata share of any joint and several liability.

WHEREFORE, Travelers demands judgment against all Defendants other than Travelers and St. Paul Fire and Marine Insurance Company for compensatory damages, attorneys' fees, litigation expenses, and any such other and further relief as the Court deems appropriate.

Respectfully submitted,

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*Attorneys for United States Fidelity and Guaranty
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March 16, 2020
Columbia, South Carolina



Deposition of:

Hearing

January 25, 2021

In the Matter of:

**Finch, Ann Vs. US Fidelity and
Guaranty Co., Et Al.**

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1 STATE OF SOUTH CAROLINA

2 COUNTY OF RICHLAND

COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

3
4 ANN FINCH, Individually and as Executor
of the Estate of FRANKLIN FINCH,

5
6 Plaintiffs,

7 v. C/A NO. 2019-CP-42-03003

8
9 UNITED STATES FIDELITY AND GUARANTY
COMPANY; ZURICH AMERICAN INSURANCE
COMPANY; ENSTAR (US) INC.; PETER
10 PROTOPAPAS as Court Appointed Receiver
for COVIL CORPORATION; and WALL,
11 TEMPLETON & HALDRUP, P.A.,
12 Defendants.
13

(CAPTION CONTINUED ON PAGE 2...)

14
15
16 VIDEOTELECONFERENCE

HEARING: BEFORE CHIEF JUSTICE JEAN TOAL

17
18 DATE: January 25, 2021

19
20 TIME: 9:44 a.m.

LOCATION: Office of Judge Toal, via VTC

21
22 REPORTED BY: Susan M. Valsecchi, Registered
Professional Reporter, CRR
(Appearing by VTC)

23
24
25

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF RICHLAND FIFTH JUDICIAL CIRCUIT

STARR DAVIS COMPANY, INC. and
STARR DAVIS COMPANY OF S.C., INC., through
its Receiver, Peter D. Protopapas,
Plaintiffs,

v. C/A NO. 2019-CP-40-06243
TRAVELERS CASUALTY AND SURETY COMPANY f/k/a THE
AETNA CASUALTY AND SURETY COMPANY; THE STANDARD
FIRE INSURANCE COMPANY; ST. PAUL FIRE AND MARINE
INSURANCE COMPANY; THE EMPLOYERS' FIRE INSURANCE
COMPANY; SOUTHEASTERN AGENCY GROUP and M.I.A.
COMPANY, INC. individually and as successors to or
f/k/a MERRIMON INSURANCE AGENCY, INC.; ROBERT E.
ASPRAY; NELL ASHWORTH, individually and as personal
representative of the Estate of ROBERT J. ASHWORTH;
BETTY C. D'AMICO, individually and as Executor of
the Estate of JULIAN D'AMICO, JR.; KAYLA KEITH,
individually and as the personal representative
of the Estate of JERRY W. ARCHER, SR.; RICHARD L.
KNIGHT II, as personal representative of the Estate
of TEDDY L. KNIGHT, SR., and LINDA KNIGHT,
individually; DAVID D. ROLLINS; JAMES W. SMITH and
FRANCES R. SMITH; and LINDA J. WHITE, individually
and as Personal Representative of the Estate of
LUBERT F. WHITE, JR.,
Defendants.

-----X
STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF RICHLAND FIFTH JUDICIAL CIRCUIT

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

v. C/A NO. 2019-CP-40-02285
Wall, Templeton & Haldrup, P.A.;
United States Fidelity And Guaranty Company;
Zurich American Insurance Company,
Defendants.

-----X

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG SEVENTH JUDICIAL CIRCUIT

TRACY JOLLY PAVLISH, individually
and as Personal Representative of the
Estate of BEVERLY DALE JOLLY,
and BRENDA RICE JOLLY,
Plaintiffs,
v. C/A NO. 2019-CP-42-03968

COVIL CORPORATION, et al.,

Defendants.

-----X
STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF RICHLAND FIFTH JUDICIAL CIRCUIT

SANDRA S. HUTTO, individually and as
Personal Representative of the Estate of
DONALD L. HUTTO, and DONALD BRIAN HUTTO
AND CANDACE H. YOUNGBLOOD, Individually,
Plaintiffs,
v. C/A NO. 2019-CP-40-06956

COVIL CORPORATION; et al
Defendants.

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12 Christina Perry
13 Allyson Twilley
14 Moffatt G. McDonald
15 James Glenn
16 John P. Linton, Jr.
17 Robin S. Spitz
18 William P. Early

19 (INDEX AT REAR OF TRANSCRIPT)
20
21
22
23
24
25

1 THE COURT: All right.

2 Welcome, all.

3 The agenda today that I'm using is the
4 very latest one after we moved Starr Davis up
5 because of Mr. Smith's later commitments today.

6 Is everyone on board with the correct
7 agenda?

8 COLLECTIVE COUNSEL: Yes, Your Honor.

9 THE COURT: Excellent.

10 All right, well, the first matter
11 is -- let me just say something by way of
12 introduction to this whole affair.

13 I pride myself on reading everything
14 that is submitted to this court. But I must say,
15 particularly with some of the non-party carriers,
16 it has been brutal to receive things as late as
17 before eight o'clock this morning by delivery to my
18 front door while I was cooking breakfast and still
19 have time to read depositions of several hundred
20 pages and things of that nature that are referred
21 to.

22 There has got to be a better way of
23 doing business and part of it needs to be that we
24 didn't file so late. Most of these things have
25 been pending since the early part of last year and

1 all of these disputations have been around for a
2 good long time.

3 I want to try to think smartly about
4 how to better do this business of trying to zero in
5 on what we have to do with legacy policies. This
6 is no mystery to the companies and it's something
7 that just is very difficult for a senior judge with
8 a limited staff to try to navigate some of these
9 unnecessary confrontations.

10 And then when we finally, through some
11 independent secondary resources, get the
12 information and there's this
13 mountain -- avalanche -- of paper that comes in,
14 sometimes at the very last moment before hearings
15 on motions long pending.

16 So I just say that by way of a plea,
17 that in the future we not operate like this. I
18 have done the very best I can. I think I've got a
19 good fix on all of these matters but the Court
20 would appreciate your help in the future, as I'm
21 sure we will have a future, because with a long
22 latency period with the kind of disease which
23 coverage is sought and claims are made in these
24 mesothelioma cases, the landscape is full of legacy
25 policies now in the hands of large existing

1 insurance companies.

2 And there's got to be a way of -- a
3 better way of navigating what it takes to discuss
4 intelligently what kind of coverage, if any,
5 exists, rather than just the way we have been
6 operating for this past about two years. So that
7 is my plea as the presider.

8 And with that, the first matter on the
9 agenda this morning are various pending motions
10 with respect to the receiver of Starr Davis.

11 The first one I have on the list for
12 presentation is Receiver for Starr Davis 8/21/2020
13 Renewed Motion for Partial Summary Judgment against
14 Travelers and The Standard.

15 These motions were originally made in
16 the first part of the year. Pleadings have been
17 amended and motions have been amended, but the
18 outstanding motion I have is the one from August of
19 this year.

20 Counsel for the Receiver, Murrell
21 Smith. Mr. Smith, you may proceed.

22 MR. SMITH: Thank you, Your Honor,
23 first. Good morning. And good morning to everyone
24 out there.

25 I thank you, and sorry to disrupt the

1 agenda. When we got off our long call Friday, our
2 hearing, I got an e-mail telling me I had to have a
3 full committee hearing this afternoon, so I
4 appreciate everyone's accomodation and hope I
5 didn't put anyone out with moving it forward.

6 Chief, what we're going to do is I'm
7 going to give you a little bit of a background. I
8 know you have read this memorandum and we basically
9 incorporate all of these arguments into the
10 memorandum and I'll try to be as brief as possible.

11 I'm going to give you a background.
12 Mr. Zevnik is here and you've heard from him before
13 about these issues and he will handle more of the
14 complex insurance interpretations of this.

15 But let me just say, obviously we're
16 here on our Renewed Motion For Partial Summary
17 Judgment.

18 And, Chief, as you may remember, this
19 case was initially removed to the federal court and
20 Judge Anderson remanded it back here. And this is
21 a -- you know, an interpretation of the policy and
22 other relief that we've had.

23 So clearly this issue is squarely in
24 your court at this point, the interpretation of the
25 policy.

1 And so what we want to remind the Court
2 of is, as you know, we've got two orders with
3 similar issues, interpretation of the policies.
4 You issued one in January of 2020, January 8th, I
5 believe. And certainly we understand and recognize
6 that that is under reconsideration. But I think
7 the issues are -- the interpretation of the policy
8 are clearly not the issues that they're asking for
9 reconsideration on. I know they want it all
10 overturned, but you've been consistent with that.

11 And also in, I think, August of this
12 year, you issued another in the Covil case,
13 interpreted policies in the same way that we've had
14 now.

15 So clearly we're asking the Court to
16 apply the construction of these South Carolina
17 insurance policies as to South Carolina law and not
18 Maryland law or what the Fourth Circuit may believe
19 is Maryland law, and we just want to bring this to
20 your attention and move for summary judgment, which
21 we believe there is no genuine issue of material
22 fact as to the interpretation of these policies.

23 Chief, as you may recall, Starr Davis
24 began as an insulation contractor in 1946 and
25 worked all over the Southeast. Their charter was

1 in effect -- there was two companies, there was
2 Starr Davis, Inc., and then there was Starr Davis
3 South Carolina. They were the two companies here
4 that provided work. And both of their corporate
5 charters were revoked in 1996 and 1997 for failure
6 to pay the administrative documentation so the
7 Court, in February of 2019, appointed
8 Mr. Protopapas as the Receiver.

9 And the first thing he did when he
10 became Receiver is he sent out subpoenas to
11 Travelers for policies that he thought might have
12 existed at that point in time.

13 Travelers initially refused to respond,
14 they said we didn't serve them appropriately, and
15 we went through all of the iterations that we are
16 accustomed to in this case.

17 And so finally they told us and they
18 admitted that they had liability insurance coverage
19 with Starr Davis from 1959 to 1985, however, we
20 went and worked through some policy reconstruction,
21 as we're having to do with all of these
22 receivership cases, to verify what they told us.

23 And from what we can ascertain and we
24 allege, there's a 40-year period of time from
25 January of 1946 through April of 1986 of policies

1 that are Travelers.

2 Back then they were Aetna and Standard
3 Fire which now has become a part of Travelers.

4 So we have submitted those coverage
5 charts to you, and they're Exhibits 10, 11, 12 and
6 13. And there's also some associated schedules of
7 Exhibits 14 and 15 of insurance that demonstrate
8 what we believe exists there.

9 There's such an extensive history and
10 relationship between the predecessors of Travelers
11 and Starr Davis that it was interesting to note
12 that Starr Davis even got to enjoy some of the
13 earnings of Travelers.

14 So, you know, what we've also
15 determined, as we've seen in other cases, is
16 Travelers has destroyed some of their policies and
17 so we've had to deal with those issues, as you may
18 know in Covil.

19 And because of destruction of the
20 policies, we're asking that we enter the findings
21 that we request in our motion.

22 So that's sort of the background of
23 where we are and how we got here with Starr Davis.

24 Obviously these policies are similar to
25 the policies that you interpreted in January, as

1 well as in August of 2020. I don't think anything
2 changes. We're just asking you to reaffirm those
3 two orders.

4 And I will turn it over to Mr. Zevnik
5 and let him discuss in more detail the insurance
6 and he will certainly answer any questions that the
7 Court may have in that regard.

8 MR. ZEVRNIK: Your Honor, thank you very
9 much. This is Paul Zevnik, also for the Receiver.

10 Your Honor, the motion seeks
11 declarations as a matter of law. It's a partial
12 summary judgment motion.

13 There are five areas that I believe
14 Your Honor is very familiar with because these
15 policies are basically the same as Your Honor has
16 dealt with in other receivership cases.

17 There's nothing unique about either the
18 policies or the declarations that Starr Davis has
19 sought in connection with this case. They're very
20 simple and straightforward, the trigger of
21 coverage, the burden of proof on proving a
22 limitation or exclusion to coverage, the allocation
23 issues, which I know Your Honor is very familiar
24 with from prior cases, including the Crossmann
25 case, the duty to defend, and in this particular

1 case as well as other receivership cases, the
2 number of occurrences for the operations claims.

3 Again, I want to come back to the brief
4 introduction that Mr. Smith gave.

5 The allegations here as to Starr Davis
6 is that Starr Davis was an installer contractor,
7 installed and removed asbestos-related materials
8 over a period of years.

9 There are allegations also that Starr
10 Davis supplied that material, but, again, we're not
11 asking you to make a determination as to any
12 individual case, but rather just the rulings on the
13 law as to the number of occurrences we are seeking
14 a ruling that there are multiple occurrences when
15 there are operations claims involved here, which is
16 distinct from the products and completed operations
17 coverage part with which Your Honor is well
18 familiar.

19 The issues that Starr Davis has moved
20 on are the same issues that come up in every one of
21 these receivership cases where an asbestos
22 installer and historical insurance policies are
23 involved.

24 And with that introduction, I don't
25 think there's an awful lot that I need to add with

1 respect to these legal issues, because Your Honor
2 is well familiar with the issues, but I am
3 certainly available to answer any questions and
4 will certainly respond to anything that is raised
5 by Mr. Lee in response on behalf of the Aetna and
6 Travelers Casualty and Surety Company and Standard
7 Fire, which is a subsidiary of that company.

8 That's my presentation, Your Honor.

9 THE COURT: What you are requesting the
10 Court to do, as I understand the request, it
11 contained, beginning on Page 3 of your Amended or
12 Supplemental Motion for Partial Summary Judgment,
13 most specifically in pages 4 and 5, you've outlined
14 the declarations and judgment but incorporating the
15 declarations that you see.

16 And then you discuss the factual
17 findings and policy findings with respect to Aetna,
18 Standard Fire and then rulings on policies
19 provisions related thereto.

20 Am I summarizing correctly what I've
21 got before me from you?

22 MR. ZEVNIK: Yes, Your Honor. The
23 declarations that we seek are on Pages 4 and 5 of
24 the supplemental renewed motion. There are twelve
25 of them. They start with a declaration regarding

1 annual policy periods and they go through those
2 twelve just strict declarations, I think, that are
3 well phrased and completely in accordance with not
4 only your prior rulings but also with the law as it
5 exists in South Carolina.

6 I'm not going to address the choice of
7 law issue now, although I could. Maybe I will add
8 a bit about choice of law as we sit here. I
9 believe that South Carolina law applies to Your
10 Honor's rulings for at least six different reasons.

11 The first one is this is a court
12 sitting in South Carolina.

13 Number two, the Receiver has been
14 appointed in South Carolina and operates as a
15 court-appointed officer.

16 Many of the cases involve underlying
17 suits in the State of South Carolina. One of the
18 companies that is the insured here, Starr Davis of
19 South Carolina, Inc., was a South Carolina
20 corporation.

21 South Carolina, I believe, has the most
22 substantial interest in the outcome of this matter.
23 And while there certainly is another Starr Davis
24 company -- Starr Davis Company, Inc. -- which was a
25 North Carolina Corporation, I do not believe that

1 there is any conflict between South Carolina law
2 and North Carolina law, so it is a false conflict.

3 On these issues, South Carolina law
4 exists, North Carolina law does not. And so I
5 would like to address that choice of law issue and
6 say that Your Honor should apply South Carolina law
7 and apply the law that Your Honor has adjudicated
8 in the past with these similar circumstances.

9 THE COURT: Thank you, Mr. Zevnik.
10 And now for Travelers, Mr. Harry Lee.
11 Mr. Lee?

12 MR. LEE: Thank you, Your Honor. Good
13 morning and thank you for hearing us this morning.

14 I will try to be brief as well. I do
15 think that the papers do a good job of illuminating
16 all of the issues, but I do think it's important to
17 set the table with respect to what this case is
18 about and what it's not about.

19 First of all, the clients here are
20 Aetna and Standard Fire; they are not USF&G. At
21 the time these policies were issued, Aetna and
22 Standard Fire were completely different companies
23 than USF&G. They were competitors of each other.
24 They wrote different policies. And none of them
25 had anything to do with Travelers at the time,

1 which was back in the 1970s, 1980s and before.

2 Secondly, in this matter, Aetna and
3 Standard Fire have paid every dime of every
4 indemnity for every asbestos claim thusfar that has
5 been tendered to them. They have paid every
6 defense dollar. This is not a USF&G situation in
7 any form or fashion.

8 Third, with respect to production of
9 policies, Starr Davis goes to great length to
10 suggest that policies were not produced to them.
11 That's simply not true. Policies were produced to
12 them a year and a half ago, coming close to two
13 years ago; and although they've stated over and
14 over again in their motion that they were withheld,
15 that's not true.

16 In fact, based on the record, 40 years
17 ago in 1980, Starr Davis and Aetna and Standard
18 Fire had conversations about these policies. They
19 discussed the fact that asbestos claims were coming
20 in and that Aetna and Standard Fire had written
21 prior policies before and Aetna and Standard Fire
22 had kept -- their policy was to keep five years'
23 worth of policies.

24 So as of 1980, they had the policies
25 going back to 1975. For reasons unknown, Starr

1 Davis and its broker had thrown away all of their
2 policies and so there was a significant debate in
3 1980, 40 years ago, about what coverage existed and
4 what didn't exist.

5 In fact, Aetna and Standard Fire wrote
6 insurance policies to Starr Davis for another five
7 years, through 1985, and obviously all of those
8 policies exist and all of them have been turned
9 over.

10 In 1985 -- and this is a huge
11 difference in the USF&G matter and the Covil
12 matter -- there was a claims-handling agreement, a
13 contract signed by Starr Davis, Aetna and Standard
14 Fire, and the parties agreed on a number of key
15 themes. And that agreement is operative today,
16 even though we can't get the Receiver to admit it
17 or take a position on it. And it's a huge genuine
18 issue of fact in this case.

19 That 1985 agreement requires pro rata
20 allocation with respect to asbestos claims. It
21 requires pro rata allocation with respect to
22 asbestos claims. It is a contractual agreement
23 known at the time, with Starr Davis represented by
24 counsel at the time.

25 The suggestion that, therefore, Your

1 Honor should issue a declaration that ignores pro
2 rata allocation and comes up with all sums or joint
3 and several liability is directly contrary --
4 directly contrary -- to that agreement, which was
5 negotiated and signed 35 years ago by the parties.

6 That agreement also provided a
7 resolution of the dispute about how far back Aetna
8 and Standard Fire's coverage went for Starr Davis.
9 There were allegations it went back to 1946. There
10 was insufficient proof of that and the parties
11 agreed -- contractually agreed -- that the coverage
12 that Aetna and Standard Fire provided was from 1959
13 to 1985. And the agreement provides that outside
14 of those periods, before or after, Aetna and
15 Standard Fire did not provide coverage. Did not
16 provide coverage. A contractual agreement.

17 That agreement has been entirely
18 ignored as part of this motion. It totally changes
19 the declarations that are sought here. It is
20 enforceable, it is still in force, and the Receiver
21 won't say what its position is as to that
22 agreement. Significant discovery will need to be
23 taken, given that fact.

24 So, Your Honor, let me then go back to,
25 after setting the table, go back to the issues that

1 we believe preclude summary judgment. We believe
2 there are four reasons:

3 First, that the motion is premature.

4 Second, as I have discussed some, there
5 are genuine fact issues that preclude summary
6 judgement.

7 Third, the sanctions order that was
8 issued in the USF&G/Covil matter has no application
9 here, if there is a claim-handling agreement that
10 trumps it, number one, and number two, it involves
11 a different insurer, different policies, a
12 different policyholder, in our view potentially
13 different law, and there is no purge of documents.

14 The documents that were destroyed were
15 destroyed by Starr Davis, not be Aetna or by
16 Standard Fire.

17 And fourth, Your Honor, the
18 declarations that are sought are contrary to law in
19 our view.

20 Your Honor, I do not want to spend an
21 hour of your time, which I understand is precious
22 going through all of this, but I will try to hit
23 the highlights, if that's okay.

24 With respect to prematurity, as the
25 Court knows, there are two motions to dismiss that

1 are pending that have not been ruled upon.

2 There is necessarily written discovery
3 that Starr Davis has not responded to. There are
4 clearly going to need to be motions to compel. The
5 brokers have not responded fully to discovery
6 either.

7 There have been no fact depositions
8 whatsoever. There have been no expert reports nor
9 expert depositions. And clearly with all of these
10 missing policies there's going to have to be
11 somebody testifying about what's in those policies,
12 because even though there's an agreement that the
13 policies go from 1959 to 1985, you only have
14 policies from 1975 onward, not through anyone's
15 fault at all. And if there's any fault, it's Star
16 Davis's fault.

17 We put in a Rule 56 affidavit, Your
18 Honor, for Mr. Davis, and it explains that these
19 issues must be discovered, including the terms and
20 conditions of 16 years worth of policies, who
21 destroyed the policies, when and how individual
22 asbestos claimants were injured, was it through
23 failures of products, was it through work that was
24 done by Starr Davis.

25 And there's a significant set of facts

1 that have also been ignored by Starr Davis. The
2 record reflects from the 1970s to 1980s, when these
3 companies -- Starr Davis and Aetna and Standard
4 Fire -- were having significant interactions and
5 conversations with each other, that Starr Davis
6 advised Aetna that 90 percent of its work was
7 product sales, not operations work. So there is a
8 significant factual issue as to how the asbestos
9 claimants were injured.

10 Whether they were injured from a single
11 occurrence or a multiple occurrence, with respect
12 to Mr. Zevnik, who I know very well and respect
13 very well, that is an issue that is fact bound.

14 That is an issue as to who made what
15 decisions when, should all of these injuries rise
16 from a single occurrence or should they be deemed
17 multiple occurrences. There's a great deal of case
18 law that says when you're dealing with sales, that
19 a single occurrence tends to be the outcome. And
20 as I said, Starr Davis told us, back in 1981, that
21 90 percent of their work was sales.

22 And then whether the 1985
23 claims-handling agreement controls here, whether
24 there's going to be an attempt to abrogate it,
25 suggest that it's not enforceable, what those facts

1 are, we don't know.

2 Your Honor, turning to the genuine fact
3 issues, I've discussed some of them, the terms of
4 the policy, who is responsible for the lost
5 policies, whether Starr Davis engaged in sales or
6 work, when, where and how each claimant was
7 injured, which state's law applies, because that is
8 a fact-bound issue. That is something that must be
9 discovered. There are factual factors. Mr. Zevnik
10 talked about some of them, but there are factual
11 factors that go into that.

12 And one of those factual factors, Your
13 Honor, was these policies were issued to Starr
14 Davis North Carolina. They were issued in
15 Greensboro. They were not issued in South
16 Carolina. And that is one of the overwhelming
17 facts with respect to the applicable law.

18 Mr. Zevnik suggests that there is no
19 conflict between North Carolina and South Carolina
20 law. That issue has certainly not been briefed by
21 anybody at this point. There's not been any
22 argument made by Starr Davis that there's no
23 conflict, and I would suggest that's not true.

24 Your Honor, the third point was that
25 the Court's sanction order in the USF&G/Covil

1 matter doesn't apply here, and I ran through the
2 reasons. They are different policies, different
3 companies, different conduct.

4 That issue as to exceptions to
5 allocation rules was driven a lot by the fact that
6 USF&G, in Your Honor's view, did not cooperate.
7 That is not the case here. Aetna and Standard Fire
8 have paid every dime of every indemnity dollar and
9 every dime of every defense dollar for every claim
10 tendered by the Receiver to them.

11 Your Honor, with respect to the legal
12 issues, the declarations that are sought, there are
13 a number of them; Mr. Zevnik referred to most of
14 them but not all of them and I'm just going to run
15 through them quickly if that's all right.

16 With respect to trigger, whether a
17 particular policy can be implicated, the trigger
18 ruling that is sought by Starr Davis is simply
19 confined to the years when there are policies.
20 That is not South Carolina law.

21 For purposes of allocation, for
22 purposes of spreading of trigger, the South
23 Carolina law is that every year, insured or
24 uninsured, from first exposure to asbestos
25 claimant's manifestation of disease is trigger.

1 All of them. Insured or uninsured. That's
2 directly inconsistent with the declarations sought
3 by Starr Davis.

4 Second, with respect to allocation,
5 Crossmann, in our view, Your Honor, and with due
6 respect, is clear. Crossmann provides for pro rata
7 allocation, time on the risk. And there is no
8 exception -- none -- for a quote/unquote so-called
9 operations claim. There's no case law that
10 supports that. And, in fact, it contradicts the
11 cases on which Crossmann relies.

12 Crossmann relies on a few cases where
13 asbestos BI claims were operations claims. And
14 those courts found that there was no exception for
15 operations claims when it came to pro rata
16 time-on-the-risk allocation. You couldn't suddenly
17 turn it into all sums.

18 I most recently argued this in the high
19 court of Maryland, the Maryland Court of Appeals,
20 where plaintiffs lawyers argued that there should
21 be an exception to the allocation rule for pro rata
22 time on the risk, specifically when you had an
23 operations claim and that the policyholder should
24 be able to move all of the liability that results
25 from new injuries in, let's say, thirty years of

1 coverage, and move it all back to year number one
2 and make that carrier pay it all. And the court
3 expressly rejected that.

4 And, Your Honor, I would submit that
5 although there's been a lot of criticism of cases,
6 Fourth Circuit cases or Maryland cases or other
7 cases, because they're other laws, there is no
8 difference between the insurance principles in
9 those cases.

10 The underlying underpinning cases and
11 the principles about how contracts are read,
12 whether language is clear and unambiguous, there's
13 no difference between the law in those states and
14 the law in South Carolina. South Carolina is not
15 some sort of outlier, nor are those cases. So
16 there's simply no basis to create this exception,
17 in our view, with respect.

18 But even if it weren't the law, Your
19 Honor, it is the 1985 claim-handling agreement. It
20 is the contract we have with Starr Davis, which is
21 Exhibit 9 to the Motion for Summary Judgment filed
22 by Starr Davis which provides and requires
23 allocation, pro rata allocation.

24 In fact, to the extent that we pay any
25 claim outside of the years that we have coverage,

1 we are supposed to be reimbursed by Starr Davis.
2 We have a claim against them for overpaying under
3 that contract.

4 Your Honor, with respect to the issue
5 of the completed operations claim, this is actually
6 far more simple than anyone tries to make it out.

7 I argued this matter before Judge
8 Messitte in the Fourth Circuit in 2002 and it's
9 been consistently adopted and affirmed for 20
10 years.

11 And that is, that to the extent the
12 courts find that a progressive injury creates new
13 injury in successive policy years, it allows those
14 policies to be triggered to determine whether it
15 falls in the completed operations hazard and
16 therefore might be subject to an aggregate or might
17 be subject to an exclusion, but simply whether it
18 falls within the definition of that hazard is a
19 timing question, only a timing question.

20 The new injury in that policy period,
21 did that occur after the operation was complete?

22 So if Joe Jones was exposed to an
23 operation in 1970, that operation ended in 1970,
24 and Mr. Jones had new injury from 1970 all the way
25 to 1990 for 20 years, years 2 through 19, the only

1 reason those policies are triggered, the only
2 reason they have any opportunity or obligation to
3 pay is because something new happened in years 2
4 through 19.

5 If Joe Jones had broken his leg in
6 1970, if his leg was still broken in 1971, the 1971
7 policy is not triggered. Nothing new happened.

8 But with asbestos, something new
9 happens in '71 and something new happens in '72 and
10 something new happens in '73; and that's the only
11 reason those policies have to pay under the court's
12 rules.

13 Well, if they have to pay for what
14 happened during their policy period, you have to
15 compare that to when the operations ceased. And if
16 it ceased beforehand, then it's a completed
17 operations claim.

18 That is the logic that's been adopted
19 by numerous courts, California, Kansas, the Fourth
20 Circuit, Maryland. Lots of courts.

21 And what Mr. Zevnik and Mr. Smith want
22 to do is upend that for the purposes -- just for
23 the purposes of South Carolina, not based upon any
24 different principle, not based upon something
25 unique about South Carolina law, and completely

1 flying in the face of what those courts said was
2 clear and unambiguous policy language, the exact
3 same language that are in these policies, that's
4 their basis, and we submit that that's improper.

5 Your Honor, very quickly, with respect
6 to burden of proof, there's a requested declaration
7 that the burden of proving whether a claim falls
8 within the completed operations hazard would fall
9 on the insurers. That's not South Carolina, that's
10 not the law of any state.

11 The law of almost every state is that
12 with respect to coverage, with respect to whether a
13 claim falls within a definition, or injury falls
14 within a definition, which is what we're talking
15 about, the completed operations hazard definition,
16 that that is the burden of the policyholder, to
17 prove coverage, to prove what it falls within.

18 If the policyholder wants to argue that
19 it falls outside of the definition and therefore
20 they can take advantage of some other aspect of the
21 policy, that is their burden and that makes perfect
22 sense. They have the claim. They know what they
23 did and what they didn't do. They're the ones that
24 can investigate most easily as to whether a claim
25 falls within or outside of the completed operations

1 hazard definition.

2 And that's exactly what the Plant case
3 in California held, exactly what the federal court
4 in Porter Hayden held, that the burden on this
5 particular issue is not a limitation, it's not an
6 exclusion, it's a definition, and it is the burden
7 of the policyholder to prove.

8 Your Honor, finally, with respect to
9 the number of occurrences, I've touched on this.
10 First of all, we believe North Carolina likely
11 applies, not South Carolina.

12 Number two, South Carolina, if it does
13 apply, applies to the cause test, at least that's
14 what it has applied so far. The cause test tends
15 to lead to a single occurrence when there's one
16 basic activity that leads to the liability.

17 Here the basic activity seems to be 90
18 percent of Star Davis' activities were sales, not
19 operations, a significant fact issue. At the very
20 least, that needs to be explored before the issue
21 is decided.

22 Your Honor, I've been through a lot and
23 I'm happy to answer any questions, but thank the
24 Court for the time.

25 THE COURT: Mr. Lee, I wonder if you

1 could explain in slightly more detail your
2 insurer's position on the existence of the specific
3 policies and their provisions and what in this
4 record demonstrates exactly what was provided in
5 these contracts.

6 MR. LEE: Well, Your Honor, let me back
7 up to what I think is the beginning.

8 Back in -- as I was trying to explain,
9 back in 1980 when the first Starr Davis asbestos
10 claims rolled in, there were discussions between
11 Starr Davis and Aetna and Standard Fire about
12 coverage and whether the policies existed and how
13 far back they went.

14 And at that point, Aetna and Standard
15 Fire had policies from 1975 to 1980, because they
16 had a five-year document-retention policy.

17 Starr Davis had no policies. They
18 didn't keep any of the copies of any of their
19 policies. The broker had no policy. They didn't
20 keep copies of any of the policies. They're the
21 ones that get the originals.

22 We at Aetna and Standard Fire were able
23 to go back into their files and find the five
24 years. And they were able to find some secondary
25 evidence from years before 1975, but it could not

1 find the policies. And so they don't know, as we
2 sit here today, what they say.

3 Now, there can be supposition that
4 they're all the same, but I will tell you, from
5 having done this for 35 years, policies in the
6 1950s are not the same as the 1960s, are not the
7 same as the 1970s. There were iterations done,
8 there were changes to form, there were changes in
9 language and those changes make a difference.
10 Courts have made numerous, numerous rulings on the
11 differences in that language.

12 What we were able to determine, Your
13 Honor, is that we have the policies from '75 to
14 '80. We wrote policies from '80 to '85 and we
15 obviously have those; and we know what they say.

16 We were also able to agree, Your Honor,
17 that we wrote some kind of coverage from 1959 to
18 1985. There were debates about what that coverage
19 would say and so we came up with a claim-handling
20 agreement to help solve that problem and we signed
21 a contract as to how they would be handled, in
22 essence, Your Honor, taking care of the missing
23 policies issue and creating pro rata allocation law
24 and also --

25 THE COURT: Well, let me stop you

1 there, before you get to the pro rata issue.

2 Let me understand the basic issue of --
3 what you say is we don't have policies before 1980,
4 but our claim-handling agreement establishes what
5 was in those policies with respect to coverage,
6 right?

7 MR. LEE: No, it does not.

8 THE COURT: That's what I didn't think.
9 The claim-handling agreement certainly discusses
10 how to handle these claims, but --

11 MR. LEE: Right.

12 THE COURT: -- what do you contend is
13 the status with respect to the coverage? You admit
14 there was coverage from '59 to '85.

15 MR. LEE: Correct.

16 THE COURT: And what do you say about
17 how that coverage is established?

18 MR. LEE: The coverage between '59 to
19 '75 was established by agreement, but
20 without -- not agreement on the numerous terms that
21 are being debated here and that are being
22 speculated about. There's only certain aspects of
23 those policies that were agreed to from '59 to '75
24 and specifically pro rata allocation applies.

25 Secondly, from '75 to '85, we have the

1 policies and our arguments today are based upon the
2 '75 to '85 policies.

3 THE COURT: Well, if the
4 claims-handling agreement of 1980 does not
5 establish what's in the policies from '59 to '75,
6 what do you say about the coverage that is claimed
7 by Plaintiff?

8 MR. LEE: First we say there will have
9 to be discovery as to what they contend those
10 policy forms are and what they say, as well as what
11 those policies are and what they say. That's
12 first. That's what has to be done first.

13 THE COURT: Let me stop you right
14 there. I thought that's what we've been spending a
15 good deal of time on for this last several years,
16 is discovery focused on what's in those policies.

17 Am I wrong about that?

18 MR. LEE: Your Honor, there's been no
19 expert testimony, there's been no fact testimony,
20 no underwriter's depositions have been taken.

21 Starr Davis has not made any effort to
22 try to establish what those forms are. And they
23 haven't done anything to put any of that in front
24 of Your Honor.

25 To the extent that they believe they

1 know what's in those policies, they have not
2 offered a shred of proof.

3 THE COURT: All right, sir, I
4 understand your position.

5 Now, all right, you had something else
6 you wanted to add when I stopped you about what's
7 in the policies. And basically you're saying we
8 don't have anything about what's in the policies,
9 we have a claims-handling agreement that presumes
10 certain things are in the policies and then that
11 they are limited in coverage in ways that you have
12 recited. Am I right?

13 MR. LEE: I think that's fair, Your
14 Honor.

15 The claims-handling agreement generally
16 presumes that we will pay for asbestos claims from
17 '59 to '85. We'll obviously pay for them on the
18 basis of the policies from '75 to '85.

19 Prior to '75, we have only a few
20 general agreements. One of them, crystal clear, is
21 pro rata allocation for the entire period, '59 to
22 '85.

23 Number two, there are no policies that
24 Aetna or Standard Fire issued prior to '59. So to
25 the extent that there's any allegation that we

1 issued policies from '46 to '59, that has been
2 contractually put to bed.

3 After that, Your Honor, many of the
4 issues that are being discussed here today have to
5 be determined based on either the '75 to '85
6 policies we have and then prove when it's developed
7 of the '59 to '75 policies.

8 And to the extent they can't be found,
9 there will be expert testimony about what they
10 likely said. And then, eventually, the Court or a
11 jury will have to determine whether they were
12 issued -- not whether they were issued, because we
13 agree they were issued -- but what they say -- and
14 whether they're different than the '75 to '85
15 policies. And policies going back to 1959 are
16 almost certainly going to be different.

17 THE COURT: All right. I think I
18 understand your position.

19 Mr. Smith, in reply, or your colleague
20 in reply, or both?

21 MR. ZEVNIK: Your Honor, Paul Zevnik
22 replying for Mr. Smith.

23 Let me start by focusing on something
24 that I think is very important here, which is I
25 would say the bulk of Mr. Lee's argument --

1 And, again, we've dealt with each other
2 for three decades here on the other side, so I have
3 the ultimate respect for Mr. Lee, but the agreement
4 that he is referencing has two very, very important
5 provisions.

6 Paragraph 1 of that agreement states
7 that neither this interim agreement nor any part
8 thereof shall be offered in evidence or used for
9 any purpose in any court of law for the position
10 being asserted by either party hereto in connection
11 with the meaning, intent or construction of any
12 insurance policy, or policies, issued by Aetna or
13 purchased by Starr Davis, end quote.

14 That's a direct quotation from the
15 agreement.

16 Paragraph 2 states as follows: The
17 rights of Starr Davis and Aetna as against each
18 other, or others, to seek reimbursement for any
19 payments made in the defense and/or disposition of
20 Star Davis's asbestos claims are fully reserved,
21 end quote.

22 I won't read the last portion of that
23 sentence, but let me address, at the outset, the
24 notion that this interim agreement, number one, has
25 any impact on Your Honor's authority to make

1 rulings on the law and, number two, has any impact
2 on the construction of these policies.

3 The agreement was an interim agreement
4 for the purpose of having Aetna and Standard Fire,
5 these two Travelers companies, pay for the defense
6 and reimbursement of asbestos claims, and it
7 recognized coverage for those claims from 1959
8 through 1985, but that's all it did, and it was an
9 interim agreement; and as it states by its terms,
10 it does not provide a construction of the policies.

11 Let me say that we have gone through a
12 lot of discovery here and what the discovery has
13 demonstrated is that Aetna and Standard Fire issued
14 policies going back all the way to 1946 and the
15 policies extended until at least April 30, 1986.
16 Those are all issues of importance here.

17 What's also important is that the
18 declarations sought by Starr Davis do not depend in
19 any way upon proving each one of the terms of all
20 of those policies. The issue of trigger of
21 coverage is completely distinct from the issue of
22 allocation, which I know that Mr. Lee understands.

23 The declarations sought by Starr Davis
24 as to trigger of coverage is stated very clearly in
25 Paragraph 7 on Page 4, which is that all of the

1 Travelers liability insurance policies in effect
2 from a person's first exposure to asbestos through
3 manifestation of an asbestos-related disease or
4 condition, and ultimately to death, cover the
5 asbestos cases unless coverage is otherwise
6 excluded under a policy.

7 That is the trigger of coverage
8 declaration that is sought. It is the same
9 declaration that Mr. Lee has argued for. There is
10 no difference, if you will, between that
11 declaration and what Mr. Lee concedes is the law of
12 trigger of coverage in South Carolina and frankly
13 everywhere.

14 On that issue, there certainly is no
15 impediment to issuing the declaration that Starr
16 Davis has sought on trigger of coverage. It is
17 essential to the construction of the policies,
18 regardless of what the terms happen to be.

19 The issue of allocation is what the
20 difference is. And on the issue of allocation,
21 there are different rules that apply -- or should
22 apply -- to this particular case than any other
23 case, for a variety of reasons.

24 The declarations sought as to
25 allocation -- and this is very important -- is

1 Declaration Number 12 -- and I would like to read
2 it for Your Honor.

3 While product liability or completed
4 operations losses are subject to allocation on a
5 time-on-the-risk pro rata allocation method,
6 operations claims are allocated on an all-sums
7 basis. And in either case, in light of the
8 nonoperating defunct status of Starr Davis, no loss
9 may be allocated to Starr Davis as part of any
10 time-on-the-risk allocation scheme.

11 I really would like to focus on that,
12 because Mr. Lee spent an awful lot of time
13 contending that Starr Davis has attempted to walk
14 away from principles of law called time on the
15 risk. That's not the case.

16 The declaration is very clear in what
17 is being sought by Starr Davis. As to products and
18 completed operations, Starr Davis -- and I don't
19 see any disagreement by Mr. Lee -- is acknowledging
20 that Crossmann and the rule of time on the risk
21 should apply to that particular type of claim, with
22 the caveat that, in this particular case, where the
23 Receiver has no assets, allocating any loss to the
24 Receiver is simply not practical and this Court
25 should rule that in a case where a Receiver has no

1 assets and is essentially insolvent, attempting to
2 allocate a portion of a loss to the Receiver is
3 basically not appropriate.

4 And Your Honor has ruled to that effect
5 in prior receivership cases. There's no difference
6 between this receivership and other receiverships
7 in the sense that a receivership is established
8 when the policyholder doesn't have any assets other
9 than its insurance policies and a few other things;
10 and that's what the cases is with respect to Starr
11 Davis.

12 The allocation rule is very different
13 when it comes to operations claims, and I think
14 that Mr. Lee actually recognized that in his
15 argument.

16 His point really is that when you have
17 an operations claim -- and by that I mean that a
18 worker is injured through the conduct of
19 operations, the worker is on the job site when
20 Starr Davis was conducting operations, installing
21 or removing asbestos-containing materials and the
22 worker was injured while Starr Davis was there and
23 that's who how the liability arises as to Starr
24 Davis -- that is a different circumstance.

25 And Your Honor is very familiar with

1 the way in which mesothelioma cases are brought.
2 The declaration that has been sought by Starr Davis
3 is very simple. It is that there are -- and this
4 is Declaration Number 10.

5 The asbestos insulation contracting or
6 operations claim against Starr Davis have resulted
7 from multiple occurrences under the Travelers
8 policies, thus entitling Starr Davis to multiple
9 per-occurrence limits of liability to establish,
10 due to coverage, asbestos liability.

11 Again, when Mr. Lee is talking about
12 the cause test, well, we're talking about the same
13 thing. If a worker is injured during the conduct
14 of operations, meaning while Starr Davis is in the
15 process of removing or installing
16 asbestos-containing materials, the cause of that
17 asbestos-related disease is what Starr Davis did on
18 that job site. That is the cause. That is
19 different than conducting an operation at another
20 job site or another location or with another
21 worker.

22 And on that particular issue, meaning
23 operations claims, which is all that Starr Davis
24 has sought in its declaration, it is a
25 multiple-occurrence approach, because the same

1 cause cannot be the operations conducted in one
2 location as opposed to the operations conducted in
3 another location.

4 Now, at issue here are the cases that
5 come before the courts. Those allegations in those
6 cases will be governed by those particular facts of
7 those cases. That's not in front of the Court
8 right now; those particular cases are not.

9 But the general principle is that those
10 cases will trigger the policies in different ways.
11 And if it's an operations claim, then the
12 allocation of the loss should be only to those
13 policies in effect when Starr Davis was conducting
14 the operation that led to that particular claimant
15 bringing the case.

16 Let me also go on to the issue of the
17 burden of proof, because Mr. Lee spent some period
18 of time talking about that.

19 Let's go back to trigger of coverage.
20 A policy is triggered by allegations of bodily
21 injury during the policy period. And Mr. Lee is
22 not going to disagree with me on that proposition.
23 And that's certainly the declaration that is sought
24 by Starr Davis. It's garden variety, straight down
25 the middle of the pike.

1 Trigger of coverage deals with
2 allegations of bodily injury. If there is an
3 allegation of bodily injury within the policy
4 period, then these occurrence policies respond to
5 that and there's an obligation to defend. And
6 Mr. Lee acknowledges that. There is an obligation
7 to defend when a policy is triggered.

8 Once a policy is triggered and
9 Travelers is defending and has an obligation to
10 defend Starr Davis, then the burden shifts to
11 Travelers to prove that there is no coverage or
12 that there is a limitation on coverage.

13 And that is straight down the middle of
14 the pike, garden variety law. Mr. Lee is trying to
15 walk away from that premise by shifting the burden.

16 And the point of Starr Davis in its
17 declarations is to show and have the Court declare
18 that when these policies are invoked and there is a
19 defense going on, then the burden to prove that
20 it's a products and completed operations case, as
21 opposed to an operations case, is a limitation on
22 coverage that is the burden of the insurance
23 company, not Starr Davis.

24 And that's something that Your Honor
25 has faced several times and I think Your Honor has

1 always agreed with the position advanced by Starr
2 Davis which is that the burden is on the insurer to
3 demonstrate any limitation or exclusion to
4 coverage. And I don't think that Mr. Lee would
5 disagree with that.

6 It is important to note that a lot of
7 what Mr. Lee was arguing about allocation is a red
8 herring, because, as I've just said, as to products
9 and completed operations claims, there's no
10 difference in the positions that are taken by the
11 parties.

12 The issue with respect to the
13 declarations sought by Starr Davis go only to
14 operations claims, but of course those claims are
15 very important because there is no aggregate
16 limitation of liability.

17 Let me come back to the issue of what
18 we're talking about here, because I think there's a
19 fundamental disagreement as to what can be done
20 with this 1985 interim agreement which has taken on
21 immense importance, despite the fact that it is not
22 supposed to be used in support of any position
23 asserted by any party in litigation.

24 In this 1985 agreement, basically two
25 things have happened. Travelers has agreed that it

1 has coverage for these asbestos claims under
2 policies issued from 1959 to 1985 and has agreed to
3 cover those claims and has, apparently, according
4 to Mr. Lee, paid for the defense and
5 indemnification of those claims, although I must
6 state that that payment has been under a full
7 reservation of rights, which is treated as a denial
8 of coverage, as a matter of law.

9 So this Court's intervention and ruling
10 on these issues is terribly important, not just
11 because the interim agreement doesn't purport to
12 construe the policies, but because Travelers has
13 fully reserved its rights to deny the claims.

14 And, in fact, I got a letter -- or the
15 Receiver got a letter from Travelers on January 21,
16 2021, just a few days ago, reiterating that
17 Travelers is expressing, a quote, full reservation
18 and nonwaiver of rights with respect to available
19 limits and the coverage of these claims.

20 So, Your Honor, the interim agreement
21 is not any basis for Your Honor not to rule on this
22 matter. In fact, we need the rulings more than
23 ever because we just got another full reservation
24 of rights on these claims.

25 But let me come back to the real issue

1 here, is, from the results of discovery conducted
2 by the parties, it has become clear that there are
3 policies other than the policies that Travelers
4 admits from 1959 to 1985.

5 And, Your Honor, as a court-appointed
6 Receiver, it is incumbent upon the Receiver to try
7 to do what this Court ordered the Receiver to do,
8 which is to administer, locate and benefact all
9 assets that could be available -- and are
10 available -- to Starr Davis.

11 So the Receiver is not in a position to
12 walk away from the policies that apparently were
13 issued from 1946 to 1959 and is not in a position
14 not to bring that before the Court and try to
15 assure that the Receiver has done everything that
16 it can to maximize the assets available to Starr
17 Davis and Starr Davis of South Carolina in order to
18 meet these asbestos claims.

19 And so while the interim agreement is
20 certainly something that is important here, it
21 certainly does not bind Your Honor in terms of
22 making any ruling or providing full coverage for
23 Starr Davis.

24 Your Honor, with that, I believe I have
25 addressed all of the issues that Mr. Lee raised and

1 that concludes my presentation unless Your Honor
2 has some questions.

3 THE COURT: No questions on this end.

4 Mr. Lee, I don't want to reiterate and
5 reargue everything we have already argued, but I am
6 going to turn to you one more time if there's
7 something brief you would like to add.

8 I guess the biggest thing that I'm
9 concerned about that hasn't been addressed by you
10 yet is the provisions of the interim claims
11 agreement that indicate it's not to be used in
12 proceedings.

13 What do you say to that?

14 MR. LEE: Your Honor, again, I'll be
15 very brief and try to just focus on what Mr. Zevnik
16 said.

17 I don't read the 1985 agreement to
18 suggest that it can't be enforced.

19 There are agreements --

20 THE COURT: Wait a minute, wait a
21 minute.

22 Mr. Lee, I am not asking that question
23 at all.

24 MR. LEE: Okay.

25 THE COURT: They are not focusing on

1 the enforcement of the agreement. They are
2 focusing on the provision -- there's a provision in
3 that agreement. I have seen the agreement. It's
4 been submitted to me under seal. So I am familiar
5 with it.

6 There are provisions in it that speak
7 to whether this agreement can be used in court
8 proceedings against each other. And it says
9 essentially that the agreement is not to be used in
10 that way.

11 MR. LEE: Your Honor, I believe that
12 the agreement says that it cannot be used in court
13 proceedings with respect to construction of policy
14 terms. It obviously would have to be used in a
15 court proceeding, to enforce it.

16 That would be -- a reading that would
17 suggest that it can't be used in a court proceeding
18 to enforce it would make it a nullity.

19 THE COURT: Let me back up for a minute
20 and say I understand. I probably spoke too
21 broadly.

22 That's what's being fussed at about
23 today, is precisely that, the policy terms.

24 MR. LEE: Right.

25 THE COURT: And you've been using the

1 claims agreement by saying it doesn't matter that
2 we don't have these agreements, these actual
3 policies, and it's all Star Davis's fault that we
4 don't have them. The fact that the company may
5 have had a policy of destroying insurance policies
6 at a certain time doesn't make any difference; they
7 came to an agreement that construes the policy and
8 we're entitled to the benefit of that.

9 And what Mr. Zevnik is arguing on
10 behalf of Starr Davis, the other signatory of that
11 agreement, is based on a provision in the
12 agreement; and he asserts that the provision in the
13 agreement prevents it from being used to construe
14 the terms of the policy. It, rather, deals with
15 specifics about claims and allocations, if it deals
16 with anything about that. But it deals basically
17 with a procedure of handling and paying claims. It
18 does not deal with the coverage provided in the
19 policies. That's his position. And it
20 specifically says it's not to be used in that way
21 against each other in a court proceeding.

22 MR. LEE: Well, Your Honor, I think
23 Mr. Zevnik has tried to reframe what we're arguing,
24 so let me try to make it clear.

25 We are not saying that the agreement

1 should cause you to construe policy provisions from
2 1959 to 1975 in a particular way.

3 What we are saying is that agreement
4 says -- and there was a solid agreement from 1959
5 to 1985 -- that the claims associated with those
6 policies would be prorated.

7 No matter what they say, this is a new
8 agreement, and it says that's what we're going to
9 do and that's what we're agreeing to with each
10 other.

11 And I'm not asking Your Honor to
12 interpret anything from '59 to '75. I'm asking
13 Your Honor to enforce what the parties agreed about
14 '59 to '85.

15 So I think that there's an attempt by
16 the other to side to say that I'm trying to get
17 Your Honor to construe language that you don't
18 have.

19 What I'm simply trying to do is enforce
20 the agreement as to what it says. Claims as to
21 those policies must be prorated. And to the extent
22 that we make payments before or after that period,
23 we get reimbursement, because that's the proration.

24 THE COURT: And are you saying that's
25 claims for any kind of claim?

1 MR. LEE: Asbestos claims.

2 THE COURT: Asbestos claims for any
3 kind of coverage? That is, for operations coverage
4 as well as for products coverage?

5 MR. LEE: There is no such thing as
6 operations coverage in a policy, Your Honor.
7 There's no definition of operations coverage,
8 there's only definitions for products and completed
9 operations coverage, and it certainly applies to
10 those.

11 THE COURT: All right. Mr. Zevnik,
12 anything in reply?

13 MR. LEE: Your Honor, if I might, just
14 a couple other points that Mr. Zevnik raised very
15 briefly.

16 THE COURT: All right. I'm not going
17 to reargue this whole thing. I probably made a
18 mistake by coming back to you.

19 But this agreement, a copy of which I
20 have, was not something that you covered in detail
21 in your opening presentation, so let's kind of
22 concentrate on that, please, sir.

23 MR. LEE: All right, that's fine.

24 THE COURT: We're already approaching
25 eleven o'clock and we're just on one matter. I

1 can't go on like this forever.

2 MR. LEE: That's fine, Your Honor.

3 If you want to hear from Mr. Zevnik,
4 that's fine.

5 THE COURT: Mr. Zevnik, briefly.

6 MR. ZEVNIK: Yes, I will make it very,
7 very quick.

8 Mr. Lee is absolutely wrong. There is
9 a complete distinction between products and
10 completed operations claims and premises and
11 operations claims.

12 And this interim agreement, whatever
13 you want to call it, absolutely does not deal at
14 all with premises operations claims but only deals
15 with products and completed operations claims and
16 that is why the declarations that Starr Davis has
17 sought are appropriate.

18 Thank you.

19 THE COURT: All right. I'm going to
20 move on from this one. It's usually my process, as
21 all of you know, to rule on these things as they
22 are presented.

23 So let me just say something overall
24 and then tell you how I'm going to proceed.

25 I am going to grant the Renewed Motion

1 for Partial Summary Judgment against Travelers and
2 The Standard. I am going to specify exactly what
3 that will entail after I get the transcript of
4 these proceedings.

5 So I will tell you that I am going to
6 grant the motion for partial summary judgment and I
7 am going to do a little bit of specifying of the
8 provisions I'm going to declare after I have
9 received this transcript.

10 All right. The next thing we've got is
11 Travelers and The Standard's partial motion to
12 dismiss. Have we covered that? I believe we have
13 covered that. I construed that as Travelers and
14 The Standard's reply to the Renewed Motion for
15 Partial Summary Judgment.

16 So if that is so, we can proceed on;
17 that would be denied. But I want to check and make
18 sure that I'm not getting ahead of myself, because
19 I would next proceed to the Motion for Default
20 Judgment.

21 So Mr. Lee?

22 MR. LEE: Yes, Your Honor, with respect
23 to the motions to dismiss that have been filed by
24 Aetna and Standard Fire, there are two motions, and
25 they deal with different issues, and,

1 unfortunately, Your Honor, they don't deal with any
2 of the issues that we've been talking about so far.

3 THE COURT: Well, then, you may
4 proceed.

5 MR. LEE: Thank you.

6 With respect to the original motion to
7 dismiss that we failed on December 17th, 2019, that
8 was directed to two aspects of the Complaint.

9 The first aspect was asking Your Honor
10 to declare, now, that Travelers or the brokers for
11 Starr Davis must compensate the Receiver.

12 Your Honor, we don't believe that the
13 statute allows for a cause of action against
14 parties in an insurance coverage case or a DJ to
15 compensate the Receiver.

16 We certainly understand that the
17 statute allows Your Honor to provide a commission
18 to the Receiver, and Your Honor will do that, I'm
19 sure, at some point, but we don't believe there's a
20 cause of action against us for allowing a
21 declaration that we must pay the Receiver.

22 There are lots of reasons that we
23 believe it would be inappropriate for Standard Fire
24 or Aetna to be paying the Receiver. The Receiver
25 is not necessarily benefitting us. It's actually

1 trying to get money from us.

2 And with respect to the --

3 But I think the basic ground is there
4 isn't a cause of action in the statute against
5 parties for a DJ as to paying the Receiver.

6 Second, Your Honor, with respect to
7 Count 2 of the Complaint, the Receiver wants a
8 declaration that Aetna and Standard Fire must
9 provide him all of the policies that Aetna and
10 Standard Fire have.

11 And in the Complaint, it suggests that
12 we haven't done that, but, in fact, we did that
13 before the Complaint was filed. We've done it two
14 or three times, and there is no debate about that.
15 There's no need for a declaration because there's
16 no controversy. If we have a policy, we've
17 provided it. And the Receiver knows that. He
18 hasn't pointed to or alleged that there's anything
19 missing. And we all know from 40 years ago, when
20 this discussion happened in 1980, that the parties
21 had what they had. And Aetna and Standard Fire
22 have maintained what they've had since 1980 and
23 have produced it in this case.

24 Your Honor, that's the basis for that
25 motion to dismiss. It's relatively

1 straightforward.

2 If Your Honor would like, I can just
3 turn to the other motion to dismiss and explain it.

4 THE COURT: Turn to which motion?

5 MR. LEE: The motion to dismiss that
6 was filed on September 21, 2020.

7 THE COURT: All right. You have
8 covered a motion to dismiss that was dated when?

9 MR. LEE: December 17th, 2019.

10 THE COURT: All right. And now you're
11 going to the one that was filed on 9/21/20?

12 MR. LEE: Correct, Your Honor.

13 THE COURT: All right.

14 MR. LEE: Your Honor, this has to do
15 with an amendment that Starr Davis made to its
16 Complaint.

17 The amendment relates to one of the
18 numerous policies. It was issued by Standard Fire
19 in 1978. And attached to those policies is a
20 one-page endorsement that's called a participating
21 endorsement.

22 And, Your Honor, what that endorsement
23 is, is, in essence, a dividend program. It was
24 popular back in the '70s and '80s -- it's very
25 popular in the Worker's Compensation insurance

1 area -- where, to the extent that -- you know, as
2 an incentive to get folks to sign up for policies,
3 you say that, to the extent that the board of
4 directors declares a dividend in any given year or
5 any quarter, that the policyholder can share on it
6 based upon a small percentage of the premium they
7 paid.

8 You know, you have ExxonMobil stock and
9 the stock can go up or down, but you can also get a
10 dividend, a check for 100 dollars or 200 dollars,
11 that kind of thing that we're talking about.

12 There was this participating
13 endorsement on one of the policies, for some
14 reason. I don't know why, but it's there in 1978.

15 Starr Davis seized on that and created,
16 I think, nine causes of action everywhere from
17 trying to create a partnership with us, a joint
18 venture, unjust enrichment.

19 And their allegation is that, even
20 though we're talking about more than 40 years ago,
21 that somehow or another they didn't get a dividend,
22 that the Receiver can somehow divine that even
23 though they threw away their documents in the
24 1990s, that because of this endorsement, they can
25 make a claim that there was a breach of the

1 contract, a breach of the policy, and they weren't
2 paid a dividend in 1979.

3 Your Honor, we believe that that
4 allegation, number one, is totally fanciful. The
5 Receiver has no idea whether it was paid or wasn't
6 paid. There's no class action against Standard
7 Fire for not paying these dividends. There's no
8 lawsuits against them. Everybody seems to have
9 gotten their check, except the Receiver says he
10 didn't get his 200 dollar check 42 years ago and
11 that he somehow knows that.

12 As fanciful as that is, Your Honor,
13 it's barred by limitations on its face. The South
14 Carolina statute of limitations for breach of
15 contract expired long, long, long ago on this claim
16 if they supposedly did not get a dividend.

17 With respect to --

18 In addition, in that endorsement, there
19 is a condition precedent. The board of directors
20 has to actually declare a dividend. Every year,
21 ExxonMobil doesn't necessarily declare a dividend.
22 Lots of companies don't.

23 So there needs to be a declaration of
24 the dividend because it says, directly in the
25 endorsement, that a payment shall be made only to

1 the extent that the board of directors declares a
2 dividend. And the Receiver here has not alleged
3 that a dividend was declared.

4 And so for those reasons, Your Honor,
5 statute of limitations on its face, the speculative
6 nature of this, this is vexatious to the hilt.
7 We're talking about a claim that's likely worth
8 100, 200, 300 dollars, that arose 42 years ago, was
9 never pursued, and there's not a shred of evidence
10 that Starr Davis wasn't paid.

11 Thank you, Your Honor.

12 THE COURT: All right.

13 Thank you, Mr. Lee.

14 Mr. Zevnik, in reply?

15 MR. BARNWELL: Your Honor, this is
16 Brian Barnwell from Rikard and Protopapas Law Firm,
17 for the Receiver. I'm going to be arguing this, if
18 that's okay with you.

19 THE COURT: All right. Mr. Protopapas?
20 Who is responding now?

21 MR. BARNWELL: Brian Barnwell from
22 Rikard and Protopapas Law Firm.

23 THE COURT: All right, Brian.

24 MR. BARNWELL: Yes, Your Honor.

25 Just to begin, listening to Mr. Lee's

1 response to our summary judgment, which Your Honor
2 just heard, and I think no less than a dozen times
3 he said it should be denied because of issues of
4 fact and the need for significant discovery.

5 While our summary judgment was properly
6 supported, it surprises me that Travelers would
7 still prosecute a motion to dismiss when it
8 believes there's so many outstanding issues.

9 To briefly respond to that first motion
10 to dismiss that he referenced that was filed in
11 federal court, never properly filed, no motion fee
12 was paid to file in state court, which is why it
13 may not appear on your docket; it was filed as part
14 of the removal papers.

15 But that motion needs to be denied
16 simply for their attack on Count 1 which seeks
17 compensation for the Receiver. The Statute
18 15-65-100 allows the Court to set compensation for
19 the Receiver and the case law that we've cited in
20 our final brief shows that that is a viable cause
21 of action with South Carolina law.

22 As far as the attack on Count 2, which
23 in part seeks production of the policies, that
24 motion needs to be denied because we've alleged
25 multiple times that they have the policies, they've

1 failed to provide them to us.

2 As you heard earlier, Your Honor,
3 Mr. Lee admits that Travelers hasn't provided us
4 the pre-1959 policies that we have secondary
5 evidence for.

6 And he went -- well, kind of getting
7 into what discovery has revealed, which is improper
8 for a motion to dismiss, but we have a lot of
9 incomplete policies that have been produced. So
10 our allegations today are factually supported; we
11 stand by them. We've alleged them properly.
12 12(B)(6). He has no grounds to dismiss that part
13 for Claim 2.

14 Your Honor, moving into the crux of his
15 main motion to dismiss, Counts 6 through 14 which
16 regard the participating endorsement, the primary
17 argument, statute of limitations defense as an
18 affirmative defense, they've got to be able to
19 establish that on the face of the Complaint. They
20 cannot.

21 Mr. Lee stated he doesn't know why that
22 participating endorsement was in a 1978 policy. It
23 appears to be a very rare endorsement, especially
24 for those types of insurance policies. We do not
25 allege that it only required a payment in 1979. We

1 think that policy is still viable and still
2 providing coverage and then it's possible that
3 we're still entitled to profits from Travelers
4 today under that policy that's still alive.

5 So there's nothing in the Complaint
6 that says we were owed a one-time payment in 1979
7 that would support a statute of limitations
8 argument.

9 Additionally, Your Honor, at Paragraphs
10 39 through 43 and 66 through 67 of the Amended
11 Complaint, that's where we allege that we did
12 not -- Starr Davis didn't have the policies,
13 including this 1978 endorsement. We did not
14 receive them until discovery in this case, which is
15 why we did not bring these claims in our original
16 complaint. Starr Davis didn't know that it
17 existed. It was only after a lot of effort to get
18 a subpoena response and to get these policies -- in
19 this case this came to us in what they certified as
20 an incomplete policy -- that we learned about the
21 participating endorsement and then filed the claim
22 shortly after discovery. And so it's certainly
23 timely.

24 Again, it's their burden to be able to
25 prove, on the face of the Complaint, that the

1 statute has run. The Complaint does not establish
2 that. Instead, the allegations show we didn't
3 learn of the claim until 2019 after the Receiver's
4 appointment.

5 And we go on in detail in our brief,
6 Your Honor, but I will address the secondary
7 argument which is conditions precedent to getting
8 profits under that endorsement.

9 He said we haven't alleged that the
10 board authorized their distribution to us. That's
11 factually wrong and based on a flawed contract
12 construction theory.

13 First we allege in Paragraph 57 through
14 89 that we were entitled to money under that
15 endorsement. We put the language of the
16 endorsement in there. We allege that we're
17 entitled to it. Clearly it says they have failed
18 to give it to us. And all of the conditions
19 precedent to a breach of contract claim have been
20 met.

21 Additionally, the language of that
22 endorsement says that they shall make a
23 determination of the amount that we are owed and
24 that we shall participate in their profits. That's
25 mandatory language. They do not have the

1 discretion to decide not to make a determination.
2 They do not have the discretion to not allow us to
3 participate in their profits and therefore their
4 argument that we didn't allege that the board
5 authorized production is just factually and legally
6 wrong. It's not supported by the Amended
7 Complaint.

8 I believe our response addresses the
9 remainder of their argument, Your Honor, so unless
10 you have any other questions, I will stop there.

11 MR. ZEVRNIK: Your Honor, this is Paul
12 Zevnik for the Receiver.

13 I have one thing to add that's not in
14 our papers because Mr. Lee brought it up in
15 argument, contending that the allegations are,
16 quote, vexatious to the hilt, end quote, and I
17 would like to address that.

18 The Receiver is a court-appointed
19 officer. We saw this endorsement, which is an
20 important participating endorsement, as Mr. Lee
21 said, which was provided to Starr Davis as an
22 incentive for Starr Davis to buy those policies.

23 Now, we don't know all of the facts, as
24 Mr. Barnwell said, but one of the things that's
25 very important is that those allegations in those

1 claims were not brought in order to be, quote,
2 vexatious, end quote, but they were bought because
3 there's a participating endorsement in those
4 policies that requires a dividend to be paid. And
5 the Receiver is bound, by this Court's order and
6 otherwise, to do everything the Receiver can to
7 marshal the assets of this estate, if you will, of
8 Starr Davis and to maximize the amount of assets
9 available to the Claimants, and that is what the
10 Receiver is doing here.

11 And I did want to address that because
12 that was raised newly in oral argument, but I think
13 it's very important.

14 With that, thank you, Your Honor.

15 THE COURT: Mr. Zevnik, let me just ask
16 one question. Mr. Lee's vexatious argument is
17 basically this: This is an obligation, if any,
18 from 40 years ago that at maximum could have
19 afforded you a couple hundred dollars.

20 And he poo-poos the whole thing on that
21 basis, that, yeah you've got the requirement as a
22 Receiver to marshal the assets, but this one is so
23 de minimis that we've probably spent more attorneys
24 fees and time in arguing this thing than you could
25 possibly get if you were able to enforce the

1 obligation.

2 What do you say to that?

3 MR. ZEVNIK: I disagree with that, Your
4 Honor.

5 Policies that are written on an
6 occurrence form, such as this policy, have
7 continuing obligations. They go both ways.

8 If there were retrospective premium
9 obligations, for example, which appear in many of
10 the policies written in this period of time, those
11 retrospective premium obligations extend throughout
12 the period of time that claims are made, which, as
13 we know, are still the case.

14 There's nothing in that participating
15 endorsement, or any law that I'm aware of -- and
16 again I've been doing this a little bit longer than
17 Mr. Lee, about four decades -- and I know nothing
18 whatsoever that would terminate the obligation
19 under the participating endorsement, in that
20 particular year or otherwise.

21 To me, it was as the policies are.
22 They are continuing in effect. They continue to
23 pay claims. And they should be continuing in terms
24 of their ability and requirement to pay dividends
25 as well. They are participating, in quote,

1 throughout their existence, and I believe that
2 continues to now.

3 And I'm not aware of any authority
4 which would support Mr. Lee's argument.

5 THE COURT: All right. Mr. Lee, in
6 reply?

7 MR. LEE: Yes, Your Honor, thank you.
8 I will focus on the statute of limitations issue.

9 Starr Davis received the policy in
10 1978. They bought the policy, they got it, they're
11 charged with knowing its terms.

12 The fact that the Receiver didn't
13 receive it until 2019 doesn't make a difference for
14 purposes of limitations and doesn't create any
15 pull. With respect to the limitations, it's what
16 Starr Davis knew in 1978, it's rights were to
17 obtain it.

18 To the extent it didn't get paid -- and
19 I suspect, if we have to look into this, we'll find
20 out they did get paid, but -- because everybody
21 else got paid.

22 But to the extent by the early '80s
23 they hadn't gotten paid, they should have brought a
24 cause of action, a breach of contract cause of
25 action, and they should have done it again --

1 If the theory that Mr. Zevnik and
2 Mr. Barnwell have cooked up that we have to pay
3 them from now until the end of time based upon one
4 policy in 1978, then they should have known in 1984
5 that it had been breached, in 1985 that it had been
6 breached, in 1986 that it had been breached, and so
7 on, all the way to today.

8 So my argument, Your Honor, is this is
9 fanciful. And I think that Mr. Zevnik and
10 Mr. Barnwell are simply creating some notion that
11 they're owed millions of dollars somehow. And
12 nobody else got millions of dollars. And somehow
13 this works in some odd way that no one has ever
14 even heard of.

15 But the bottom line is, the Receiver
16 takes Starr Davis's knowledge. And with respect to
17 limitations, he's stuck with it. And it seems
18 quite obvious this is simply a made-up claim.

19 THE COURT: All right. Very well.

20 With respect to Travelers and the
21 Standards partial motions to dismiss, I will deny
22 them on the basis that to the extent they are
23 cognizable in this Court -- and there's some very
24 real question as to whether they are, since they
25 are basically carryovers, to some extent, from the

1 federal litigation when it was remanded on removal
2 back to me -- but to the extent that those partial
3 motions for summary judgment, either the earlier
4 one or the one on 9/21/2020 are now cognizable
5 before me, of course, the pleadings and all the
6 materials submitted are construed in the light most
7 favorable to the non-moving party. And on that
8 basis, I will deny the partial motions to dismiss
9 on all issues presented by the motions to dismiss.

10 And in that regard, a denial is not
11 immediately appealable, and therefore I'm not going
12 to do my usual thing of asking for orders drawn
13 that reflect this. It's a denial. It's something
14 very different from the activity I'm asked to
15 participate in with respect to the granting of a
16 motion for partial summary judgment, where some
17 sort of record needs to be made, despite the fact
18 that it may not be immediately appealable.

19 All right. So I think I have dealt
20 with all of the Starr Davis Receiver pending
21 motions.

22 Mr. Smith? Mr. Smith? Is Mr. Smith
23 still there?

24 THE COURT: Mr Zevnik?

25 MS. PERRY: Mr. Smith had to step away.

1 Mr. Barnwell, are you still doing the
2 motion for default judgment?

3 MR. BARNWELL: Yes.

4 Your Honor, there's one more Starr
5 Davis motion, and that's a Motion for Default
6 Judgment Against Employers Fire Insurance Company.

7 THE COURT: Yes.

8 All right. Are you doing that one,
9 Mr. Barnwell?

10 MR. BARNWELL: Yes, Your Honor.

11 THE COURT: All right.

12 All right. You may proceed.

13 MR. BARNWELL: Yes, Your Honor.

14 This is our Motion for Default Judgment
15 based on Employers Fire Insurance Company's failure
16 to respond to the Amended Complaint.

17 The Complaint was filed on August 6th
18 2020. Employers was served by the Department of
19 Insurance on 8/31/2020. They did not respond.

20 And on November 9th of 2020 the clerk
21 made an entry of default. We then moved for the
22 current Motion for Default Judgment on November
23 25th, 2020, and we are seeking -- there are three
24 claims asserted against Employers.

25 Claim 1 is a declaration that the

1 Receiver is entitled to compensation.

2 Claim 2 is a declaration ordering
3 Employers to produce all of its policies and to
4 defend Starr Davis.

5 And 3, to declare the applicable
6 principles of South Carolina law which Your Honor
7 took up in the motion for summary judgment earlier
8 today.

9 What we would ask from the Court, at
10 this stage all we can ask for are just granting
11 those declaratory judgments for equitable remedies.
12 We're not asking for any monetary recovery.

13 So it would be an order granting Count
14 1 for compensation of Receiver, Count 2, produce
15 all of your policies to the Receiver, and Count 3,
16 declare what the applicable principles of South
17 Carolina law are.

18 THE COURT: Okay.

19 MR. BARNWELL: That's what we're asking
20 for, Your Honor.

21 THE COURT: All right. Mr. Barnwell,
22 after the default -- the Notice of Default was
23 issued -- has there been any appearance by counsel
24 for Employers Fire Insurance Company?

25 MR. BARNWELL: Yes, Your Honor.

1 They have retained Edward Pritchard
2 from Charleston. He initially filed a motion to
3 dismiss, challenging service, on December 24th,
4 2020.

5 My understanding is they are no longer
6 pursuing that argument, because after he was
7 retained and able to look into the case, he
8 realized service was proper.

9 I believe over the weekend he did file
10 an opposition/motion to set aside default,
11 arguing -- and I haven't seen the affidavit; it
12 didn't come through to me.

13 But I think his argument was that there
14 was an internal miscommunication. And since
15 Mr. Pritchard is here, I will let him present that.
16 I don't want to misquote him.

17 But if that's all his argument is, then
18 I would refer the Court to White Oak Manor versus
19 Lexington Insurance, a 2014 case in the Supreme
20 Court where it held that losing a complaint is not
21 grounds for granting a motion to set aside.

22 In a case decided this year, Campbell
23 versus City of North Carolina, internal
24 miscommunication is also not grounds for setting
25 aside a default.

1 So I don't think they've got any
2 grounds for challenging the default or default
3 judgment.

4 THE COURT: Very good.

5 Mr. Pritchard? Is Mr. Pritchard still
6 participating?

7 (Off-the-record discussion regarding
8 technology.)

9 THE COURT: All right, Mr. Pritchard.
10 You may proceed.

11 MR. PRITCHARD: All right.

12 Mr. Barnwell is correct. We are withdrawing the
13 motion to dismiss for improper service. That was
14 filed in the very beginning when we didn't really
15 quite know what was going on and we didn't know
16 anything about the service.

17 We have since done our due diligence
18 and have determined that, in fact, what
19 occurred -- and there's an affidavit with
20 Ms. Taylor in there -- what occurred was that the
21 Receiver did send the Summons and Complaint to the
22 Department of Insurance who then forwarded it on to
23 the local registered agent who then sent it to the
24 corporate registered agent who then e-mailed it to
25 us.

1 Somehow or other, someone who is
2 responsible for receiving those things did not open
3 an e-mail and it was not discovered until it was
4 brought to our attention, they went back, they
5 found it, and there was no question but that we
6 just overlooked an e-mail where it was sent to us.
7 It was just a simple mistake. And there's really
8 not much more to say about it. I mean, the truth
9 is what the truth is.

10 But I do think that a default under
11 these circumstances is a relatively harsh result
12 because the only policy it appears that was issued
13 by Employers Fire -- which, as the name would
14 imply, is a worker's comp -- is a worker's comp
15 policy applicable to Tennessee during 1982.

16 The one thing I'm a little confused
17 about, though, in listening to those last
18 arguments, it looked like Aetna had -- or at least
19 it seemed like the argument was that Aetna had the
20 liability coverage during the applicable policy
21 period, which would make sense, because I don't
22 think we -- we don't have any evidence we ever
23 issued a CGL policy, so it seems sort of harsh to
24 hold us in default and treat us as a liability
25 carrier when in fact there's no evidence that we

1 ever were.

2 And I just don't see any prejudice to
3 the Receiver to have to prove its case just because
4 some clerk overlooked an e-mail.

5 And, frankly, I think that's -- I don't
6 know what more to say. I can answer any questions
7 you've got, but I think that's pretty much it.

8 THE COURT: Thank you, Mr. Pritchard.
9 Mr. Zevnik in reply?

10 MR. ZEVNIK: Your Honor, Mr. Barnwell
11 will take this.

12 MR. BARNWELL: Brian Barnwell again.
13 We've addressed that.

14 And we've served subpoenas on Employers
15 in the past and they've responded saying no
16 documents found.

17 They're related to another company,
18 Bedivere Insurance Company that we'll be talking
19 about later today. They also admit they insured us
20 but always tell us they can't find documents on
21 insurance policies.

22 It's ironic, when we first approached
23 Employers Fire, when they did retain counsel, is
24 that we've looked, we find nothing about you at
25 all.

1 Then we say, Well, we have at least one
2 worker's comp policy for you and if we've provided
3 a worker's comp policy from you, its likely you
4 provided general liability.

5 When we talk about that policy, lo and
6 behold they're able to find the worker's comp
7 policy. Ironically, it's not the one I have in my
8 hands right here. The one he cites is an '84
9 policy in Tennessee. I've got one here from '78 or
10 '79 in Georgia.

11 Clearly they had an insuring
12 relationship to us and they're not searching their
13 records to find those policies and give us a full
14 accurate answer about what that relationship was.

15 So to simplify this, Your Honor, all we
16 would ask for today is an order against Employers
17 Fire saying, Go search your records, produce every
18 policy you have regarding Starr Davis, I would say
19 within 14 to 30 days of the order.

20 And if they come back to us and they
21 give us policies, then we can come to you and have
22 you interpret the terms. If they tell us they
23 still don't have anything, we can then do almost
24 like supplemental proceedings in discovery to see
25 what their search looked like and then come back to

1 you and present you with those findings if there's
2 anything for you to decide.

3 So really at this point we're just
4 asking for an order to give us the information you
5 have so the Receiver can do its job.

6 And if it turns out there isn't a
7 policy, then it's not going to be a policy where
8 we're going to ask you to provide any kind monetary
9 damages recovery, which is what I began by saying,
10 is that we're not asking for money today.

11 We're just asking for an order
12 requiring Employers to produce its policies to us
13 as we request in Count 2 of our Amended Complaint.

14 THE COURT: All right. Let me ask you
15 this, Mr. Barnwell: Are you asking me to defer a
16 ruling on the default and simply direct that they
17 search for the policy at this time, or are you
18 asking to go on and default them and require them
19 to search their records for the policy?

20 MR. BARNWELL: I would ask for a
21 default against them. I think you can just limit
22 that to Count 2 asking for a default judgment for
23 failure to produce their policies.

24 And then that way I believe that would
25 be the stakes necessary to get them to do that

1 search. And if they comply with that order, then
2 we can see what other steps are needed.

3 THE COURT: All right. I understand
4 the request.

5 The ruling of the Court is that
6 Employers Fire Insurance Company will be -- a
7 default judgment will be rendered against them on
8 the count which would require that Employers Fire
9 Insurance Company search their records and divulge
10 their policy. All other matters held in abeyance
11 at this time.

12 MR. BARNWELL: Thank you, Your Honor.

13 THE COURT: All right. Let me go back
14 to Starr Davis one more time.

15 I'm sitting here while I'm listening to
16 you all thinking I'm not going to create a monster
17 here. I'm not going to get a transcript and then
18 try to give some directions and then that's going
19 to be a flurry of motions back and forth about my
20 order and what should be in it and what should not
21 be in it.

22 I'm going to do like I've done before.
23 I'm going to request that the prevailing party in
24 Starr Davis's Renewed Motion for Partial Summary
25 Judgement against Travelers and Standard, which is

1 the Receiver for Starr Davis, prepare a proposed
2 order for the declarations that have been sought
3 and granted the other relief that is sought and
4 submit it to me within ten days.

5 And Mr. Lee, on behalf of the insurers,
6 will have five days to make any response. And then
7 I will examine the proposed order and responses and
8 enter an order.

9 Does everyone understand?

10 Very good.

11 MR. BARNWELL: Thank you.

12 THE COURT: Does that complete
13 everything that has to do with Starr Davis?

14 MR. BARNWELL: Yes, Your Honor.

15 THE COURT: Very good. It is now 11:20
16 just about or 11:22. Let's take a ten-minute
17 comfort break and resume back here at -- well,
18 let's just resume back at 20 minutes of 12. Court
19 will be in recess.

20 (A recess transpired.)

21 THE COURT: All right. The hearing
22 will recommence and at this time these are Covil
23 Receiver motions, the first of which is Protopapas
24 against Wall Templeton, 2019-CP-40-02285.

25 The first is a joint motion to approve

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

STARR DAVIS COMPANY, INC. and STARR
DAVIS COMPANY OF S.C., INC, through its
Receiver, Peter D. Protopapas,

Plaintiff,

v.

HARTFORD ACCIDENT AND
INDEMNITY COMPANY; TWIN CITY
FIRE INSURANCE COMPANY;
TRAVELERS CASUALTY AND
SURETY COMPANY f/k/a THE AETNA
CASUALTY AND SURETY
COMPANY; THE STANDARD FIRE
INSURANCE COMPANY;
SOUTHEASTERN AGENCY
GROUP and M.I.A. COMPANY, INC.
individually and as successors to or f/k/a
MERRIMON INSURANCE AGENCY,
INC.; ROBERT E. ASPRAY; NELL
ASHWORTH, individually and as
personal representative of the Estate of
ROBERT J. ASHWORTH; BETTY C.
D'AMICO, individually and as Executor
of the Estate of JULIAN D'AMICO, JR.;
KAYLA KEITH, individually and as the
personal representative of the Estate of
JERRY W. ARCHER, SR.; RICHARD L.
KNIGHT II, as personal representative of
the Estate of TEDDY L. KNIGHT, SR.,
and LINDA KNIGHT, individually;
DAVID D. ROLLINS; JAMES W.
SMITH and FRANCES R. SMITH; and
LINDA J. WHITE, individually and as
Personal Representative of the Estate of
LUBERT F. WHITE, JR.,

Defendants.

Civil Action No.:

NOTICE OF REMOVAL

PLEASE TAKE NOTICE that Defendant Travelers Casualty and Surety Company f/k/a
The Aetna Casualty and Surety Company ("Travelers") and Defendant The Standard Fire
Insurance Company ("Standard Fire"), a subsidiary of Travelers (together, the "Travelers

Defendants”), hereby remove this action from the South Carolina Court of Common Pleas, Fifth Judicial Circuit, County of Richland, to the United States District Court for the District of South Carolina, Columbia Division, pursuant to 28 U.S.C. §§ 1332, 1441 and 1446.

In support of this Notice of Removal, the Travelers Defendants state as follows:

I. This Court Has Jurisdiction Under 28 U.S.C. §§ 1332 and 1441

1. Removal of this lawsuit is authorized by 28 U.S.C. §1441(a) because this Court has original jurisdiction over this civil action under 28 U.S.C. § 1332.

2. On or about November 6, 2019, Plaintiff filed a civil action against the Travelers Defendants and various other parties in the South Carolina Court of Common Pleas, Fifth Judicial Circuit, County of Richland. A copy of Plaintiff’s Complaint is attached hereto as Exhibit A.

3. This is a civil action which, upon proper realignment of certain parties and/or dismissal of certain fraudulently joined Defendants, will be between citizens of different states.

4. Peter D. Protopapas is a South Carolina citizen suing as the Receiver of Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. As alleged, Starr Davis Company, Inc. is a former North Carolina corporation whose principal place of business was in North Carolina, and Starr Davis Company of S.C., Inc. is a former South Carolina corporation. (Compl. ¶¶ 1-3.) Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. are together referred to herein and in the Complaint as “Starr Davis.”

5. Plaintiff alleges that Defendant Hartford Accident and Indemnity Company (“Hartford”) is a Connecticut corporation with its headquarters in Connecticut. (Compl. ¶ 4.)

6. Plaintiff alleges that Defendant Twin City Fire Insurance Company (“Twin City”) is an Indiana corporation with its headquarters in Connecticut. (Compl. ¶ 5.)

7. Plaintiff alleges that Defendant Travelers is a Minnesota corporation with its headquarters in Connecticut. (Compl. ¶ 6.)

8. Plaintiff alleges that Defendant Standard Fire is a Connecticut corporation with its headquarters in Connecticut. (Compl. ¶ 7.)

9. Defendants Hartford, Twin City, Travelers, and Standard Fire are collectively referred to herein as the four “Defendant-Insurers.”

10. Plaintiff alleges that Defendant Merrimon Insurance Agency Inc. (“Merrimon”) is “upon information and belief a North Carolina Corporation that has either maintained its status as a North Carolina Company as MIA COMPANY, INC. and/or as SOUTHEASTERN AGENCY GROUP, INC. . . .” (Compl. ¶ 8.) As explained further below, the Court can and should disregard Merrimon’s citizenship under the doctrine of fraudulent joinder and/or after Merrimon is properly realigned as a plaintiff.

11. Plaintiff alleges that Defendants Robert E. Aspray, Nell Ashworth (individually and as personal representative of the Estate of Robert J. Ashworth), Betty C. D’Amico (individually and as Executor of the Estate of Julian D’Amico, Jr.), Kayla Keith (individually and as the personal representative of the Estate of Jerry W. Archer, Sr.), Richard L. Knight II (as personal representative of the Estate of Teddy L Knight, Sr., and Linda Knight, individually), David D. Rollins, James W. Smith, Frances R. Smith, and Linda J. White (individually and as personal representative of the Estate of Lubert F. White, Jr.) are citizens are residents of North Carolina and/or South Carolina. (Compl. ¶¶ 9-16.) These Defendants are collectively referred to herein as “Claimants.” The Court can and should disregard their citizenship under the doctrine of fraudulent joinder and/or because they should be realigned as plaintiffs.

12. Thus, although it appears on the face of the Complaint that complete diversity of the parties is lacking, diversity jurisdiction exists nonetheless because: (i) Merrimon was not properly joined as a Defendant in this action and/or it should be realigned as a plaintiff, and (ii)

Claimants were not properly joined as Defendants in this action and/or they should be realigned as plaintiffs.

13. Upon the dismissal and/or proper realignment of Merrimon and Claimants as plaintiffs, complete diversity of citizenship will exist between Plaintiff, which is allegedly a citizen of North Carolina and South Carolina, and the Defendant-Insurers, which are citizens of Connecticut, Indiana, and Minnesota.

14. The amount in controversy exceeds \$75,000, exclusive of interest and costs, because Plaintiff's Complaint is seeking, among other things, a declaration that millions of dollars of insurance is available with respect to the underlying asbestos lawsuits against Starr Davis.

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

16. Venue is proper in this Division in accordance with 28 U.S.C. §§ 121(2) and 1441(a).

II. The Requirements of 28 U.S.C. § 1446 are Satisfied

17. Plaintiff filed this action on or around November 6, 2019, in the South Carolina Court of Common Pleas, Fifth Judicial Circuit, County of Richland. This Notice is being filed less than one year after commencement of this action.

18. Travelers was served with a copy of the Complaint on or around November 13, 2019, by service on the South Carolina Department of Insurance. *See Exhibit A* hereto at pp. 1-2. Travelers received a copy of the Complaint on or around November 15, 2019. *See id.* at 1. Travelers timely filed this Notice of Removal within 30 days of service in accordance with 28 U.S.C. § 1446(b).

19. As previewed above and set forth more fully below, the Defendant-Insurers are the only Defendants that have been properly joined and served. Pursuant to 28 U.S.C. § 1446(b)(2)(A), the Defendant-Insurers other than Travelers do not need to consent to removal. Specifically, Hartford and Twin City are not proper parties because they have informed counsel for Travelers that they have settled in principle with Starr Davis, and thus they have been or will be dismissed from this case given the lack of any case or controversy. Moreover, Claimants and Merrimon (even if they have been served) were not properly joined as Defendants and/or should be realigned as plaintiffs. *See, e.g., Gressette v. Sunset Grille, Inc.*, 447 F. Supp. 2d 533, 537 n. 6 (D.S.C. 2006) (“[B]ecause the court has realigned Defendant Sunset as a Plaintiff for purposes of diversity jurisdiction, Sunset’s lack of consent for removal is of no moment.” (citing *Ohio Cas. Ins. Co. v. RLI Ins. Co.*, 2005 WL 2574150, *4 (M.D.N.C. Oct.12, 2005) (“If a defendant is disregarded or is realigned for jurisdictional purposes, that defendant need not consent to removal, and the Court will evaluate jurisdiction based on the positions of the parties after the realignment.”))).

20. Contemporaneous with the filing of this Notice, Travelers is serving a copy of this Notice on counsel for Plaintiff and is filing a copy of this Notice with the Clerk of the South Carolina Court of Common Pleas, Fifth Judicial Circuit, County of Richland, where this action was originally filed, as required by 28 U.S.C. §1446(d).

III. Merrimon was Fraudulently Joined

21. In evaluating citizenship for purposes of determining whether complete diversity exists, the Court considers only the citizenship of real and substantial parties to the litigation and does not take into account nominal or formal parties that have no real interest in the litigation. *See Navarro Sav. Ass’n v. Lee*, 446 U.S. 458, 460-61 (1980).

22. The “fraudulent joinder” doctrine permits the exercise of jurisdiction where the citizenship of the parties dictates otherwise. *See Mayes v. Rapoport*, 198 F.3d 457, 464 (4th Cir. 1999).

The doctrine “effectively permits a district court to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and thereby retain jurisdiction.” *Johnson v. Am. Towers, LLC*, 781 F.3d 693, 704 (4th Cir. 2015) (quoting *Mayes*, 198 F.3d at 461). The party alleging fraudulent joinder “must show that the plaintiff cannot establish a claim even after resolving all issues of law and fact in the plaintiff’s favor.” *Id.* (quoting *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 424 (4th Cir.1999)). The removing party must show either “outright fraud in the plaintiff’s pleading of jurisdictional facts or that there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court.” *Id.* (citing *Hartley*, 187 F.3d at 424) (emphasis in original) (internal quotation marks omitted). When reviewing an assertion of fraudulent joinder, “the court is not bound by the allegations of the pleadings, but may instead ‘consider the entire record, and determine the basis of joinder by any means available.’” *AIDS Counseling & Testing Ctrs. v. Group W Telev., Inc.*, 903 F.2d 1000, 1004 (4th Cir. 1990) (quotation omitted).

23. Here, Plaintiff joined Merrimon in an effort to defeat federal diversity jurisdiction inasmuch as Plaintiff has not asserted, and cannot assert, a viable cause of action against Merrimon.

24. Plaintiff alleges vaguely that Merrimon “is upon information and belief a North Carolina corporation that has either maintained its status as a North Carolina company as MIA COMPANY, INC. and/or as SOUTHEASTERN AGENCY GROUP, INC. . . .” (Compl. ¶ 8.) According to Plaintiff, Merrimon “served as the insurance broker to Starr Davis from at least 1964 through 1986.” (Compl. ¶ 21.) Plaintiff alleges “[u]pon information and belief” that “Starr Davis relied upon Merrimon [] to provide advice to Starr Davis on the best insurance options for its needs,” and that Starr Davis purchased various insurance policies based on Merriman’s advice. (Compl. ¶ 22.) Plaintiff does not allege any specific facts regarding the

relationship between Starr Davis and Merrimon, including the terms of any potential contracts or other agreements entered into between Starr Davis and Merrimon.

25. Under South Carolina law, “[t]he Court must determine, as a matter of law, whether the law recognizes a particular duty.” *Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co.*, 586 S.E.2d 586, 588 (S.C. 2003) (citation omitted). “An affirmative legal duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance.” *Id.* (citation omitted). “[T]he respective duties and obligations arising from the relationship of a principal and his agent in the procurement of insurance must be determined in the light of the fact that the agent was an expert dealing in a highly specialized business, with knowledge and means of knowledge not possessed by the average applicant for insurance.” *Riddle-Duckworth, Inc. v. Sullivan*, 171 S.E.2d 486, 490 (S.C. 1969). The courts “have long recognized the general rule that insurance agents and brokers are required to exercise due care in placing insurance and would be personally liable for the neglect of that duty.” *Id.* (internal quotation marks and citation omitted). “If the agent or broker fails, because of his fault or neglect, to procure the insurance, or does not follow instructions, or if the policy is void or materially deficient, or does not provide the coverage he undertook to supply, he is liable to his principal for the loss sustained thereby in the amount that would have been due under the insurance policy if it had been obtained and provided the desired coverage.” *Id.* “[T]he burden is upon the insured to show with reasonable certainty the terms and conditions of the agreement. Generally, a valid contract to procure insurance exists where there is established a promise by the insured to take a policy of insurance and an undertaking on the part of the agent or broker to procure it, with sufficient information provided upon which to procure the policy.” *Id.* at 491 (citation omitted).

26. Starr Davis directly or indirectly mentions Merrimon in five of its causes of action:

- Count I is a declaratory judgment claim in which Plaintiff seeks a declaration that “each Defendant Asbestos Claimant and Defendant Insurer must fairly compensate the Receiver” or “declare which Defendants [presumably including Merrimon] are responsible for compensating the Receiver for the substantial time, effort, and expenses the Receiver put towards his responsibilities as Receiver of Starr Davis.” (Compl. ¶¶ 36-37.)
- Count II is a declaratory judgment claim in which Plaintiff seeks a declaration that Plaintiff is “entitled to copies of all Defendant Insurance policies,” “that if Defendant Insurers did not issue the policies containing their names and specifically through Merrimon [] that the Court find Defendant Merrimon [] responsible for the defense and indemnification of Plaintiff during those respective years,” that “Defendants have a duty to defend the Asbestos Claimants lawsuits,” and that “Merrimon breached its obligation to maintain Starr Davis policies.” (Compl. ¶¶ 42-47.)
- Count III is a declaratory judgment claim in which Plaintiff seeks a declaration “as to the interpretation and meaning of the insurance policies, including those for years for which Merrimon [] is responsible (Compl. ¶ 48.)
- Count IV is a “failure to procure insurance” claim ostensibly against Merrimon. (Compl. ¶¶ 50-61.)
- Count V is a breach of contract claim ostensibly against Merrimon. (Compl. ¶¶ 62-65.)

27. With respect to Plaintiff’s declaratory judgment claims (Counts I, II, and III), even construing all applicable facts and law in Plaintiff’s favor, the claims necessarily fail as a matter of law because Plaintiff cannot establish the requisite adversity between Plaintiff and Merrimon that would render declaratory relief appropriate and, in any event, the claims are time-barred on their face.

28. Under the South Carolina Declaratory Judgements Act, S.C. Code Ann. § 15-53-10, *et seq.*, “the existence of an actual controversy is essential to jurisdiction to render a declaratory judgment.” *Power v. McNair*, 177 S.E.2d 551, 552 (S.C. 1970) (citation and internal quotation marks omitted); *see also City of Columbia v. Sanders*, 97 S.E.2d 210, 213 (S.C. 1957) (“The Uniform Declaratory Judgment[s] Act . . . does not require the Court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when the occasion might arise . . . or license litigants to fish in judicial ponds for legal advice.”

(citations and internal quotation marks omitted)). Further, “South Carolina’s declaratory judgment law makes clear that, ‘[t]he court may refuse to render or enter a declaratory judgment or decree when such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.’” *Dombek v. Adler*, No. 2:18-cv-391, 2019 WL 459019, at * 2 (D.S.C. Feb. 5, 2019) (quoting S.C. Code Ann. § 15-53-70) (other citation omitted).

29. Here, Plaintiff lacks an actual, justiciable controversy with Merrimon that would entitle Plaintiff to declaratory relief, let alone a declaration that would or could “terminate the uncertainty or controversy giving rise to the proceeding.” *Id.* The gravamen of Plaintiff’s Complaint is a claim that Plaintiff is entitled to a declaration of insurance coverage, *i.e.*, a declaration that the Defendant-Insurers must defend or reimburse Plaintiff in connection with the underlying asbestos suits. Plaintiff has no cause of action against Merrimon for declaratory judgment because Merrimon is not an insurance company, it did not (and could not) issue any insurance contracts, and it has no possible obligation to defend or indemnify Plaintiff. Accordingly, there is no possibility that Plaintiff would be entitled to a declaratory judgment against Merrimon.

30. Plaintiff’s declaratory judgment claims are also facially time-barred. South Carolina law provides for a three-year statute of limitations for declaratory judgment claims sounding in contract. *See Am. Tower Asset Sub, LLC v. Pta-Fla, Inc.*, No. 6:15-03700, 2016 WL 3981225, at *2 (D.S.C. July 25, 2016); S.C. Code Ann. § 15-3-530 (providing that “an action upon a contract, obligation, or liability, express or implied,” shall be brought within three years). Plaintiff’s declaratory judgment claims are plainly rooted in contract, specifically, the insurance policies issued to Starr Davis and, to a lesser extent, any supposed contract(s) between Starr Davis and Merrimon. “[U]nder South Carolina law, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered, ‘not when advice of counsel

is sought or a full-blown theory of recovery developed.” *Am. Tower Asset Sub, LLC*, 2016 WL 3981225, at *3 (quoting *Epstein v. Brown*, 610 S.E.2d 816, 818 (S.C. 2005)). Starr Davis concedes in its Complaint that its relationship with Merrimon ended decades ago. In the interim, Starr Davis raised no concerns or issues with the insurance policies delivered by Merrimon. Starr Davis cannot assert decades later that somehow the policies procured by Merrimon were not what Starr Davis wanted.

31. With respect to Plaintiff’s failure to procure insurance claim against Merrimon (Count IV), it also is time-barred on its face. “[A] claim for failure to procure insurance is governed by South Carolina’s three-year statute of limitations.” *Russell v. Gill*, No. 2:10-cv-00816, 2010 WL 11646852, at *5 (D.S.C. Oct. 1, 2010) (citing S.C. Code. Ann. § 15-3-530). Plaintiff’s Complaint alleges that the failure to procure occurred in or around 1972—more than 40 years ago, and certainly more than three years before the instant Complaint was filed. (*See* Compl. ¶ 55 (“Merrimon [] was instructed by Starr Davis to place its primary general liability policies with Aetna for the years 1972 through 1973”).)

32. Plaintiff’s other allegations in Count IV fail to make out a cognizable failure to procure insurance claim because, aside from the alleged request for a 1972-1973 policy that Merrimon allegedly failed to procure, the Complaint is devoid of any allegations that Starr Davis requested, and Merrimon promised to procure, a specific insurance policy. *See Riddle-Duckworth*, 253 S.C. at 421; *cf. Sullivan Co., Inc. v. New Swirl, Inc.*, 437 S.E.2d 30, 31 (S.C. 1993) (“The duty of an insurance agent to procure the represented coverage does not create a duty to obtain coverage at any particular rate, absent an express promise to do so. . . . The record before us evinces no evidence of any agreement to secure insurance at the best possible terms. Hence, we affirm the finding of the trial judge that no obligation exists on the part of an agent or broker to secure insurance at the most favorable prices—absent a promise to do so.”).

33. Finally, with respect to Plaintiff's breach of contract claim against Merrimon (Count V), Plaintiff alleges generally that "Starr Davis contracted for valuable consideration with Merrimon [] for Merrimon [] to secure appropriate insurance for Starr Davis," and that "Defendant [presumably, Merrimon] breached the terms of the contract" by "[f]ailing to procure sufficient insurance coverage as requested by Plaintiff," "failing to provide services in accordance with the terms of the contract," and "such other and further particulars as may be developed during the course of discovery and proven at trial." (Compl. ¶¶ 62-63.) These allegations do not come close to alleging facts sufficient to state a plausible breach of contract claim against Merrimon. For example, Plaintiff fails to provide any information whatsoever regarding the terms of any alleged contract(s) between Starr Davis and Merrimon, when they allegedly entered into the contract(s), and what services Merrimon allegedly agreed to provide to Starr Davis. In addition, Plaintiff's breach of contract claim is time-barred for the same reasons its failure to procure insurance claim is time-barred: It is clear as a matter of law that Starr Davis knew or should have known many years ago that Merrimon allegedly failed to procure certain insurance coverage.

34. In sum, there is no possibility that Plaintiff would be able to establish a cause of action against Merrimon.

IV. In the Alternative, Merrimon Should Be Realigned as a Plaintiff

35. Even if a cause of action has been properly stated against Merrimon, the company should be realigned as a plaintiff, because its overwhelming interests in the lawsuit are aligned with those of Starr Davis.

36. The United States Supreme Court held in *Indianapolis v. Chase Nat. Bank*, 314 U.S. 63, 69 (1941), that "[d]iversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to 'look beyond the pleadings, and arrange the parties according

to their sides in the dispute.’ . . . Whether the necessary ‘collision of interest’ exists, is therefore not to be determined by mechanical rules. It must be ascertained from the ‘*principal purpose of the suit*’ and the ‘primary and controlling matter in dispute.’” (emphasis added) (internal citations omitted).

37. Contrary to other circuits which follow the “substantial controversy” test, the Fourth Circuit has specifically adopted the “principal purpose” test in deciding how to properly align parties. *See United States Fid. and Guar. Co. v. A & S Mfg. Co.*, 48 F.3d 131, 133 (4th Cir. 1995). Applying the “principal purpose” test entails two steps: “First, the court must determine the primary issue in the controversy. Next, the court should align the parties according to their positions with respect to the primary issue.” *Id.* If the court determines that the parties should be realigned based on the “principal purpose” test, then the court must determine whether complete diversity exists based on the realignment of the parties. *Id.*

38. The principal purpose of this action is Starr Davis’ goal of establishing that the Defendant-Insurers’ policies provide defense and indemnity for the claims brought by Claimants against Starr Davis for asbestos personal injuries. *See, e.g., Nationwide Mut. Ins. Co. v. 1400 Hampton Blvd., LLC*, No. 2:10cv310, 2010 WL 5476748, at *2 (E.D. Va. Dec. 2, 2010) (“In a declaratory relief action requesting judicial determination of an insurer’s duties under an insurance contract ... the primary issue presented in the pleadings is the dispute over an insurer’s duty to defend and indemnify.” (citations omitted)).

39. As alleged, Merrimon was Starr Davis’s broker, not the Defendant-Insurers’ agent. (Compl. ¶ 21 (“Merrimon [] served as the insurance broker to Starr Davis from at least 1964 through 1986”).) Merrimon is not a party to the subject insurance policy contracts and it has no potential duties under those contracts.

40. Any dispute between Starr Davis and Merrimon is secondary to the primary issue of whether the Defendant-Insurers have a duty to defend or indemnify Starr Davis against the

Claimants' claims against Starr Davis in the underlying asbestos cases. Moreover, any liability of Merrimon is merely hypothetical until the Defendant-Insurers' liability, if any, is determined. Merrimon's nominal interest in this case is simply not aligned with that of the Defendant-Insurers.

41. As such, in the event Merrimon is not dismissed as a fraudulently joined Defendant, it should be realigned as a plaintiff.

V. The Claimants Were Fraudulently Joined

42. Plaintiff's sixth cause of action for declaratory judgment alleges that "[t]he claims Defendant Asbestos Claimants will likely outstrip the insurance policies and Starr Davis has no other assets," and that "[c]ertain of the Starr Davis Policies may have aggregate limits of liability for product liability claims." (Compl. ¶¶ 66-67.) Based on these two assertions, "Starr Davis seeks a declaration and order that certain rights and interests of the individually-named defendants [*i.e.*, the Claimants] be limited and curtailed as follows: (i) that any judgment obtained against Starr Davis in a asbestos suits [*sic*] be limited to all sums that may be collected from defendant Insurers, individually or collectively; (ii) that punitive or exemplary damages are not awardable against the Receiver or the Receiver acting on behalf of Starr Davis pursuant to South Carolina Code § 15-65-10; and (iii) that any judgment obtained against Starr Davis that is or may be subject to an aggregate limit of any insurance policy or policies issued to Starr Davis must fairly and equitably take into account such other judgments or claims that may be outstanding." (Compl. ¶ 68.) Importantly, Plaintiff does not allege that any of the Claimants have obtained a judgment against Starr Davis.

43. Particularly where, as here, the Claimants are not judgment creditors, any action against them at this juncture is premature. Plaintiff's claims turn on the existence of insurance coverage or lack thereof, yet the Claimants are strangers to those insurance contracts. In analogous settings, courts have recognized that injured third parties who are strangers to the

insurance contracts lack standing to sue insurers. Indeed, “[i]t is well settled that injured third parties who are strangers to the insurance contract may not sue insurers directly for claims against the insured.” *Smith, et al. v. CBS Corp., et al.*, No. 2015-CP-46-02155, Order Granting USF&G’s Mot. for Summary Judgment (April 4, 2018) (citing *Kleckley v. Northwestern Nat’l Cas. Co.*, 338 S.C. 131, 135-36, 526 S.E.2d 218, 220 (2000) (Toal, C.J.); *Trancikv. USAA Ins. Co.*, 354 S.C. 549, 554, 581 S.E.2d 858, 861 (Ct. App. 2003); and *Major v. Nat’l Indem. Co.*, 267 S.C. 517, 520, 229 S.E.2d 849, 850 (1976) (“[a]t common law, no right to maintain suit directly against the insurer existed absent privity of contract between the claimant and the insured”)).

44. If claimants lack standing to sue insurers directly for claims relating to potential insurance coverage on hypothetical judgments that they have yet to obtain, it follows that insureds may not sue the Claimants for what would amount to advisory opinions on these same issues. The only reason Claimants were added here was a transparent effort to defeat this Court’s diversity jurisdiction.

VI. In the Alternative, Claimants Should Be Realigned as Plaintiffs

45. In the alternative, Claimants have been misaligned and should be realigned as plaintiffs, as their principal purpose in this action is aligned with that of Starr Davis. That is, Starr Davis and all of the Claimants want to establish coverage under the Defendant-Insurers’ insurance policies for the claims in the underlying asbestos cases, and to satisfy any potential judgments in the underlying cases.

46. As noted above, the principal purpose of this action is to establish that the Defendant-Insurers’ policies provide coverage for any judgment that the Claimants may recover against Starr Davis for asbestos personal injuries. Starr Davis, as the alleged insured in the underlying cases, has virtually the same interest as the Claimants, because a finding in favor of

the Defendant-Insurers would mean that they have no duty to defend or indemnify Starr Davis against the Claimants' claims against Starr Davis in the underlying actions.

47. Because the Claimants share the same interest in holding the Defendant-Insurers liable to pay any judgments entered against Starr Davis in the underlying actions, the Claimants must be realigned as plaintiffs along with Starr Davis.

48. Once the Claimants are realigned as plaintiffs, or dismissed as fraudulently joined, their South Carolina and North Carolina citizenships do not destroy this Court's diversity jurisdiction. *See Gressette*, 447 F. Supp. 2d at 536 (realigning defendant as plaintiff and denying original plaintiff's motion to remand).

49. After dismissing or realigning the parties according to their interest in the principal purpose of this action, there will be complete diversity of citizenship between Plaintiff, allegedly a citizen of South Carolina and North Carolina, on one side, and the Defendant-Insurers, which are citizens of Connecticut, Indiana, and Minnesota, on the other.¹

WHEREFORE, Defendant Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company and Defendant The Standard Fire Insurance Company respectfully remove this action from the South Carolina Court of Common Pleas, Fifth Judicial Circuit, County of Richland, to the United States District Court for the District of South Carolina, Columbia Division

Respectfully submitted,

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¹ As noted above, the Travelers Defendants deny that Claimants have standing to assert claims directly against insurers under the insurers' alleged insurance contracts. By seeking, in the alternative, realignment, the Travelers Defendants do not waive any right, claim or defense to any claim that may be asserted by Claimants against the Travelers Defendants.

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December 13, 2019
Columbia, South Carolina

ELECTRONICALLY FILED - 2019 Dec 13 4:21 PM - RICHLAND - COMMON PLEAS - CASE#2019CP4006243

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

STARR DAVIS COMPANY, INC. and STARR
DAVIS COMPANY OF S.C., INC, through its
Receiver, Peter D. Protopapas,
Plaintiff,

v.

HARTFORD ACCIDENT AND
INDEMNITY COMPANY; TWIN CITY
FIRE INSURANCE COMPANY;
TRAVELERS CASUALTY AND SURETY
COMPANY f/k/a THE AETNA CASUALTY
AND SURETY COMPANY; THE
STANDARD FIRE INSURANCE
COMPANY; SOUTHEASTERN AGENCY
GROUP and M.I.A. COMPANY, INC.
individually and as successors to or f/k/a
MERRIMON INSURANCE AGENCY,
INC.; ROBERT E. ASPRAY; NELL
ASHWORTH, individually and as personal
representative of the Estate of ROBERT J.
ASHWORTH; BETTY C. D'AMICO,
individually and as Executor of the Estate of
JULIAN D'AMICO, JR.; KAYLA KEITH,
individually and as the personal representative
of the Estate of JERRY W. ARCHER, SR.;
RICHARD L. KNIGHT II, as personal
representative of the Estate of TEDDY L.
KNIGHT, SR., and LINDA KNIGHT,
individually; DAVID D. ROLLINS; JAMES
W. SMITH and FRANCES R. SMITH; and
LINDA J. WHITE, individually and as
Personal Representative of the Estate of
LUBERT F. WHITE, JR.,

Defendants.

Civil Action No.: 3:19-3481-JFA

**MOTION TO REALIGN AND
MEMORANDUM IN SUPPORT**

Defendant Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company (“Travelers”) and Defendant The Standard Fire Insurance Company (“Standard Fire”), a subsidiary of Travelers (together, the “Travelers Defendants”), respectfully move this Court, pursuant to Rule 21 of the Federal Rules of Civil Procedure, for an Order realigning as plaintiffs certain parties that are currently named as Defendants in this action.

I. BACKGROUND

On or about November 6, 2019, Plaintiff filed a civil action against the Travelers Defendants and various other parties in the South Carolina Court of Common Pleas, Fifth Judicial Circuit, County of Richland. A copy of Plaintiff’s Complaint is attached hereto as Exhibit A. Concurrently herewith, the Travelers Defendants are filing a Notice of Removal in which they demonstrate that, upon proper realignment of certain parties named as Defendants and/or the dismissal of certain fraudulently joined Defendants, there will be complete diversity of citizenship between the parties.

Plaintiff Peter D. Protopapas is a South Carolina citizen suing as the Receiver of Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. As alleged, Starr Davis Company, Inc. is a former North Carolina corporation whose principal place of business was in North Carolina, and Starr Davis Company of S.C., Inc. is a former South Carolina corporation. (Compl. ¶¶ 1-3.) Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. are together referred to herein and in the Complaint as “Starr Davis” or “Plaintiff.”

Plaintiff alleges that (i) Defendant Hartford Accident and Indemnity Company (“Hartford”) is a Connecticut corporation with its headquarters in Connecticut, that (ii) Defendant Twin City Fire Insurance Company (“Twin City”) is an Indiana corporation with its headquarters in Connecticut, that (iii) Defendant Travelers is a Minnesota corporation with its

headquarters in Connecticut, and (iv) that Defendant Standard Fire is a Connecticut corporation with its headquarters in Connecticut. (Compl. ¶¶ 4-7.) These four insurance company Defendants are collectively referred to herein as the “Defendant-Insurers.” Plaintiff also alleges that Defendant Merrimon Insurance Agency Inc. (“Merrimon”) is “upon information and belief a North Carolina Corporation that has either maintained its status as a North Carolina Company as MIA COMPANY, INC. and/or as SOUTHEASTERN AGENCY GROUP, INC. . . .” (Compl. ¶ 8.)

In addition, Plaintiff alleges that Defendants Robert E. Aspray, Nell Ashworth (individually and as personal representative of the Estate of Robert J. Ashworth), Betty C. D’Amico (individually and as Executor of the Estate of Julian D’Amico, Jr.), Kayla Keith (individually and as the personal representative of the Estate of Jerry W. Archer, Sr.), Richard L. Knight II (as personal representative of the Estate of Teddy L Knight, Sr., and Linda Knight, individually), David D. Rollins, James W. Smith, Frances R. Smith, and Linda J. White (individually and as personal representative of the Estate of Lubert F. White, Jr.) are citizens are residents of North Carolina and/or South Carolina. (Compl. ¶¶ 9-16.) These Defendants are collectively referred to herein as “Claimants.”

As explained in the Travelers Defendants’ Notice of Removal and discussed further below, the Court can and should (i) disregard Merrimon’s citizenship under the doctrine of fraudulent joinder and/or after Merrimon is properly realigned as a plaintiff and (ii) disregard the citizenship of Claimants under the doctrine of fraudulent joinder and/or because they should be realigned as plaintiffs. Thus, although it appears on the face of the Complaint that complete diversity of the parties is lacking, diversity jurisdiction exists because (i) Merrimon was not properly joined as a Defendant in this action and/or it should be realigned as a plaintiff, and (ii)

Claimants were not properly joined as Defendants in this action and/or they should be realigned as plaintiffs.

Upon the dismissal and/or proper realignment of Merrimon and Claimants as plaintiffs, complete diversity of citizenship will exist between Plaintiff, which is allegedly a citizen of North Carolina and South Carolina, and the Defendant-Insurers, which are citizens of Connecticut, Indiana, and Minnesota.

II. ARGUMENT¹

A. Merrimon Should be Realigned as a Plaintiff in the Event the Court Finds It Was Not Fraudulently Joined

The United States Supreme Court held in *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 69 (1941), that:

Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to 'look beyond the pleadings, and arrange the parties according to their sides in the dispute.' . . . Whether the necessary 'collision of interest' exists, is therefore not to be determined by mechanical rules. It must be ascertained from the 'principal purpose of the suit' and the 'primary and controlling matter in dispute.'

(emphasis added) (internal citations omitted). "These familiar doctrines governing the alignment of parties for purposes of determining diversity of citizenship have consistently guided the lower federal courts" and the Supreme Court. *Id.* at 70 (citations omitted). "For the purpose of removal, the federal law determines who is plaintiff and who is defendant." *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 580 (1954).

¹ The Travelers Defendants' accompanying Notice of Removal discusses both fraudulent joinder and realignment, whereas the instant motion to realign is limited to realignment, *i.e.*, only in the event the Court finds Merrimon and Claimants were not fraudulently joined should they be realigned as plaintiffs.

To fulfill this duty, the Fourth Circuit has specifically adopted the “principal purpose” test in deciding how to properly align parties. *See United States Fid. and Guar. Co. v. A & S Mfg. Co.*, 48 F.3d 131, 133 (4th Cir. 1995). Applying the “principal purpose” test entails two steps: “First, the court must determine the primary issue in the controversy. Next, the court should align the parties according to their positions with respect to the primary issue.” *Id.* If the court determines that the parties should be realigned based on the “principal purpose” test, then the court must determine whether complete diversity exists based on the realignment of the parties. *Id.*

Here, the analysis is straightforward: (1) the primary issue in the case is whether the Defendant-Insurers’ policies provide coverage for any judgment that the Claimants may recover against Starr Davis for asbestos personal injuries; and, in that regard, (2) Merrimon’s and Claimants’ interests are plainly more closely aligned with Starr Davis’ interests than they are with the interests of the Defendant-Insurers.

By way of further background, in its Complaint, Plaintiff alleges vaguely that Merrimon “is upon information and belief a North Carolina corporation that has either maintained its status as a North Carolina company as MIA COMPANY, INC. and/or as SOUTHEASTERN AGENCY GROUP, INC. . . .” (Compl. ¶ 8.) According to Plaintiff, Merrimon “served as the insurance broker to Starr Davis from at least 1964 through 1986.” (Compl. ¶ 21.) Plaintiff alleges “[u]pon information and belief” that “Starr Davis relied upon Merrimon [] to provide advice to Starr Davis on the best insurance options for its needs,” and that Starr Davis purchased various insurance policies based on Merriman’s advice. (Compl. ¶ 22.) Plaintiff does not allege any specific facts regarding the relationship between Starr Davis and Merrimon, including the

terms of any potential contracts or other agreements entered into between Starr Davis and Merrimon.

Starr Davis directly or indirectly mentions Merrimon in five of its causes of action:

- Count I is a declaratory judgment claim in which Plaintiff seeks a declaration that “each Defendant Asbestos Claimant and Defendant Insurer must fairly compensate the Receiver” or “declare which Defendants [presumably including Merrimon] are responsible for compensating the Receiver for the substantial time, effort, and expenses the Receiver put towards his responsibilities as Receiver of Starr Davis.” (Compl. ¶¶ 36-37.)
- Count II is a declaratory judgment claim in which Plaintiff seeks a declaration that Plaintiff is “entitled to copies of all Defendant Insurance policies,” “that if Defendant Insurers did not issue the policies containing their names and specifically through Merrimon [] that the Court find Defendant Merrimon [] responsible for the defense and indemnification of Plaintiff during those respective years,” that “Defendants have a duty to defend the Asbestos Claimants lawsuits,” and that “Merrimon breached its obligation to maintain Starr Davis policies.” (Compl. ¶¶ 42-47.)
- Count III is a declaratory judgment claim in which Plaintiff seeks a declaration “as to the interpretation and meaning of the insurance policies, including those for years for which Merrimon [] is responsible (Compl. ¶ 48.)
- Count IV is a “failure to procure insurance” claim ostensibly against Merrimon. (Compl. ¶¶ 50-61.)
- Count V is a breach of contract claim ostensibly against Merrimon. (Compl. ¶¶ 62-65.)

Each of these claims fails as a matter of law, and thus there is no possibility that Plaintiff would be able to establish a cause of action against Merrimon. *See generally* Notice of Removal filed herewith. If, however, the Court determines that a cognizable cause of action could be asserted stated against Merrimon, Merrimon should be realigned as a plaintiff because its overwhelming interests in this case are aligned with those of Starr Davis, rather than the Defendant-Insurers.

Indeed, the principal purpose of this action is Starr Davis' goal of establishing that the Defendant-Insurers' policies provide defense and indemnity for the claims brought by Claimants against Starr Davis for asbestos personal injuries. *See, e.g., Nationwide Mut. Ins. Co. v. 1400 Hampton Blvd., LLC*, No. 2:10cv310, 2010 WL 5476748, at *2 (E.D. Va. Dec. 2, 2010) ("In a declaratory relief action requesting judicial determination of an insurer's duties under an insurance contract ... the primary issue presented in the pleadings is the dispute over an insurer's duty to defend and indemnify." (citations omitted)); *Crout v. United Financial Cas. Co.*, 2010 WL 2998500 (D.S.C. July 28, 2010) (realigning insured from defendant to plaintiff in coverage action filed by injured party against insured and insurer); *Marsh v. Cincinnati Ins. Co.*, 2008 WL 4614289 (Oct. 15, 2008) (realigning injured tort claimant from defendant to plaintiff in coverage action filed by purported insureds against their insurer).

As alleged, Merrimon was Starr Davis's broker, not the Defendant-Insurers' agent. (Compl. ¶ 21 ("Merrimon [] served as the insurance broker to Starr Davis from at least 1964 through 1986").) Merrimon is not a party to the subject insurance policy contracts and it has no potential duties under those contracts. Any dispute between Starr Davis and Merrimon is secondary to the primary issue of whether the Defendant-Insurers have a duty to defend or indemnify Starr Davis against the Claimants' claims against Starr Davis in the underlying asbestos cases. Moreover, any liability of Merrimon is merely hypothetical until the Defendant-Insurers' liability, if any, is determined. Merrimon's nominal interest in this case is simply not aligned with that of the Defendant-Insurers.

As such, in the event Merrimon is not dismissed as a fraudulently joined Defendant, it should be realigned as a plaintiff.

B. Claimants Should Be Realigned as Plaintiffs in the Event the Court Finds They Were Not Fraudulently Joined

Plaintiff's sixth cause of action for declaratory judgment alleges that "[t]he claims Defendant Asbestos Claimants will likely outstrip the insurance policies and Starr Davis has no other assets," and that "[c]ertain of the Starr Davis Policies may have aggregate limits of liability for product liability claims." (Compl. ¶¶ 66-67.) Based on these two assertions, "Starr Davis seeks a declaration and order that certain rights and interests of the individually-named defendants [*i.e.*, the Claimants] be limited and curtailed as follows: (i) that any judgment obtained against Starr Davis in a asbestos suits [*sic*] be limited to all sums that may be collected from defendant Insurers, individually or collectively; (ii) that punitive or exemplary damages are not awardable against the Receiver or the Receiver acting on behalf of Starr Davis pursuant to South Carolina Code § 15-65-10; and (iii) that any judgment obtained against Starr Davis that is or may be subject to an aggregate limit of any insurance policy or policies issued to Starr Davis must fairly and equitably take into account such other judgments or claims that may be outstanding." (Compl. ¶ 68.) Importantly, Plaintiff does not allege that any of the Claimants have obtained a judgment against Starr Davis.

For the reasons explained in the Travelers Defendants' accompanying Notice of Removal, Claimants have been fraudulently joined. In the alternative, Claimants have been misaligned and should be realigned as plaintiffs, as their principal purpose in this action is aligned with that of Starr Davis.² That is, Starr Davis and all of the Claimants want to establish

² The Travelers Defendants deny that Claimants have standing to assert claims directly against insurers under the insurers' alleged insurance contracts. By seeking, in the alternative, realignment, the Travelers Defendants do not waive any right, claim or defense to any claim that may be asserted by Claimants against the Travelers Defendants.

coverage under the Defendant-Insurers' insurance policies for the claims in the underlying asbestos cases, and to satisfy any potential judgments in the underlying cases.

Again, the principal purpose of this action is to establish that the Defendant-Insurers' policies provide coverage for any judgment that the Claimants may recover against Starr Davis for asbestos personal injuries. Starr Davis, as the alleged insured in the underlying cases, has virtually the same interest as the Claimants, because a finding in favor of the Defendant-Insurers would mean that they have no duty to defend or indemnify Starr Davis against the Claimants' claims against Starr Davis in the underlying actions.

Because the Claimants share the same interest in holding the Defendant-Insurers liable to pay any judgments entered against Starr Davis in the underlying actions, the Claimants must be realigned as plaintiffs along with Starr Davis. Once the Claimants are realigned as plaintiffs, their South Carolina and North Carolina citizenships do not destroy this Court's diversity jurisdiction. *See Gressette*, 447 F. Supp. 2d at 536 (realigning defendant as plaintiff and denying original plaintiff's motion to remand).

After dismissing or realigning the parties according to their interest in the principal purpose of this action, there will be complete diversity of citizenship between Plaintiff, allegedly a citizen of South Carolina and North Carolina, on one side, and the Defendant-Insurers, which are citizens of Connecticut, Indiana, and Minnesota, on the other.

III. CONCLUSION

Accordingly, for the foregoing reasons, the Travelers Defendants respectfully request that the Court enter an Order (i) realigning Merrimon as a party plaintiff, in the event the Court finds Merrimon was not fraudulently joined, and (ii) realigning Claimants as plaintiffs, in the event the Court finds Claimants were not fraudulently joined.

Undersigned counsel affirms that he attempted to confer with plaintiffs' counsel concerning this motion prior to its filing, but was unable to do so due to time constraints.

Respectfully submitted,

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December 13, 2019
Columbia, South Carolina

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

STARR DAVIS COMPANY, INC. and STARR
DAVIS COMPANY OF S.C., INC, through its
Receiver, Peter D. Protopapas,

Plaintiffs,

v.

HARTFORD ACCIDENT AND
INDEMNITY COMPANY; TWIN CITY
FIRE INSURANCE COMPANY;
TRAVELERS CASUALTY AND SURETY
COMPANY f/k/a THE AETNA
CASUALTY AND SURETY COMPANY;
THE STANDARD FIRE INSURANCE
COMPANY; SOUTHEASTERN AGENCY
GROUP and M.I.A. COMPANY, INC.
individually and as successors to or f/k/a
MERRIMON INSURANCE AGENCY,
INC.; ROBERT E. ASPRAY; NELL
ASHWORTH, individually and as personal
representative of the Estate of ROBERT J.
ASHWORTH; BETTY C. D'AMICO,
individually and as Executor of the Estate of
JULIAN D'AMICO, JR.; KAYLA KEITH,
individually and as the personal
representative of the Estate of JERRY W.
ARCHER, SR.; RICHARD L. KNIGHT II,
as personal representative of the Estate of
TEDDY L. KNIGHT, SR., and LINDA
KNIGHT, individually; DAVID D.
ROLLINS; JAMES W. SMITH and
FRANCES R. SMITH; and
LINDA J. WHITE, individually and as
Personal Representative of the Estate of
LUBERT F. WHITE, JR.,

Defendants.

District Court Action No.: 3:19-cv-03481
State Court Action No.: 2019-CP-40-06243

**MOTION TO DISMISS AND
MEMORANDUM IN SUPPORT**

Defendants Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company (“Travelers”) and The Standard Fire Insurance Company (“Standard Fire”), a subsidiary of Travelers (together, the “Travelers Defendants”), respectfully move this Court, pursuant to Rules 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure, for an Order dismissing Counts I and II of the Complaint as against the Travelers Defendants.

I. PRELIMINARY STATEMENT

A. Procedural Background

On November 6, 2019, Plaintiff filed a civil action against the Travelers Defendants and various other parties in the South Carolina Court of Common Pleas, Fifth Judicial Circuit, County of Richland. On December 13, 2019, the Travelers Defendants removed the action to this Court because, upon proper realignment of certain parties named as Defendants and/or the dismissal of certain fraudulently joined Defendants, there is complete diversity of citizenship between the parties and the amount in controversy exceeds the jurisdictional threshold.

The Complaint was filed by Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc., through Peter D. Protopapas, acting in his capacity as their Receiver. Mr. Protopapas is not a named Plaintiff. As alleged, Plaintiff Starr Davis Company, Inc. is a former North Carolina corporation whose principal place of business was in North Carolina, and Plaintiff Starr Davis Company of S.C., Inc. is a former South Carolina corporation. (Compl. ¶¶ 1-3.) Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. are together referred to herein, and in the Complaint, as “Starr Davis” or “Plaintiff.”

Plaintiff alleges that (i) Defendant Hartford Accident and Indemnity Company is a Connecticut corporation with its headquarters in Connecticut, (ii) Defendant Twin City Fire Insurance Company is an Indiana corporation with its headquarters in Connecticut, (iii) Defendant Travelers is a Minnesota corporation with its headquarters in Connecticut, and (iv)

Defendant Standard Fire is a Connecticut corporation with its headquarters in Connecticut. (Compl. ¶¶ 4-7.) These four insurance company Defendants are collectively referred to herein as the “Defendant-Insurers.” In addition to the Defendant-Insurers, Plaintiff also named as a Defendant Merrimon Insurance Agency Inc. (“Merrimon”)—an insurance broker. Plaintiff alleges that Merrimon is “upon information and belief a North Carolina Corporation that has either maintained its status as a North Carolina Company as MIA COMPANY, INC. and/or as SOUTHEASTERN AGENCY GROUP, INC. . . .” (Compl. ¶ 8.)

Plaintiff also named certain individuals and/or their estates as Defendants, namely, Robert E. Aspray, Nell Ashworth (individually and as personal representative of the Estate of Robert J. Ashworth), Betty C. D’Amico (individually and as Executor of the Estate of Julian D’Amico, Jr.), Kayla Keith (individually and as the personal representative of the Estate of Jerry W. Archer, Sr.), Richard L. Knight II (as personal representative of the Estate of Teddy L Knight, Sr., and Linda Knight, individually), David D. Rollins, James W. Smith, Frances R. Smith, and Linda J. White (individually and as personal representative of the Estate of Lubert F. White, Jr.). (Compl. ¶¶ 9-16.) These Defendants are collectively referred to herein as “Claimants.”

As explained in the Travelers Defendants’ notice of removal and accompanying motion to realign, this Court can and should (i) disregard Merrimon’s citizenship under the doctrine of fraudulent joinder or realign it as a Plaintiff, and (ii) disregard the citizenship of Claimants under the doctrine of fraudulent joinder or also realign them as Plaintiffs. Upon the dismissal or realignment of Merrimon and Claimants, complete diversity of citizenship exists between Starr Davis, which is allegedly a citizen of North Carolina and South Carolina, and the Defendant-Insurers, which are citizens of Connecticut, Indiana, and Minnesota.

B. Allegations of the Complaint

Plaintiff's Complaint asserts three declaratory judgment causes of action against the Travelers Defendants:

- Count I seeks a declaration that “each Defendant Asbestos Claimant and Defendant Insurer must fairly compensate the Receiver” or “declare which Defendants are responsible for compensating the Receiver for the substantial time, effort, and expenses the Receiver put towards his responsibilities as Receiver of Starr Davis.” (Compl. ¶¶ 36-37.)
- Count II seeks in relevant part a declaration that the Receiver is “entitled to copies of all Defendant Insurance policies” (Compl. ¶¶ 42-47.)
- Count III seeks a declaration “as to the interpretation and meaning of the insurance policies” (Compl. ¶ 48.)

Counts I and II must be dismissed as a matter of law for failure to state a cognizable claim for declaratory relief against the Travelers Defendants. As explained below, Plaintiff has not adequately pled a claim for declaratory relief against the Travelers Defendants concerning (i) compensation that is or may be owed to the Receiver (Count I), or (ii) the Receiver's alleged right to obtain copies of certain insurance policies (Count II). Any supposed controversy is non-existent or, at best, not of “sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 127 (2007).¹

II. LEGAL STANDARDS

¹ Federal Rule of Civil Procedure 12(a)(4) states that a Rule 12 motion tolls the time period within which a defendant must file a responsive pleading. The majority of courts interpreting Rule 12(a)(4) have held that the filing of a motion to dismiss, like the instant motion to dismiss, automatically suspends the time to answer or otherwise respond to all claims, even claims that are not the subject of the motion to dismiss. *See generally* Motion to Enlarge Time to Answer, filed herewith. In other words, a party does not need to file an answer while a “partial” motion to dismiss is pending. *See id.* Thus, although the Travelers Defendants are presently moving to dismiss only two of the three causes of action against them, they need not file an answer at this time. *See id.* Out of an abundance of caution, however, the Travelers Defendants are filing a motion to extend the time by which they must file an answer until 14 days after the Court rules on the instant motion to dismiss. *See id.*

A Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted tests the legal sufficiency of a complaint. *See Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991). To survive a motion to dismiss, the complaint must contain “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Twombly*, 550 U.S. at 556. A plaintiff must show “more than a sheer possibility” that a defendant is liable. *Iqbal*, 556 U.S. at 678. Thus, where a complaint pleads facts that are merely consistent with a defendant’s liability, it fails to sufficiently allege a claim for relief. *Id.*

In testing the sufficiency of the complaint, the court need only accept as true the complaint’s well-pleaded factual allegations. *See id.* “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* The court is also “not bound to accept as true a legal conclusion couched as a factual allegation,” *Twombly*, 550 U.S. at 555, and “unwarranted inferences, unreasonable conclusions, or arguments” may be disregarded. *Giarrantano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008). Where the factual allegations fail to satisfy the applicable pleading standards, the claim should be dismissed. *See Iqbal*, 556 U.S. at 679.

In a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), “all the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration.”” *Nationwide Ins. Co. of Am. v. Owens*, No. 6:17-2680, 2017 WL 11458025, at *1 (D.S.C. Nov. 30, 2017) (quotation omitted). It is the plaintiff’s burden to prove jurisdiction, and the court is to

“regard the pleadings’ allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.”

Richmond, Fredericksburg & Potomac R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991) (citations omitted).

A federal court should exercise jurisdiction in a declaratory judgment proceeding when three requirements are met: “(1) the complaint alleges an actual controversy between the parties of sufficient immediacy and reality to warrant issuance of a declaratory judgment; (2) the court possesses an independent basis for jurisdiction over the parties (*e.g.*, federal question or diversity jurisdiction); and (3) the court does not abuse its discretion in its exercise of jurisdiction.” *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 592 (4th Cir. 2004) (internal quotation marks and citation omitted). The Fourth Circuit has made clear that “although declaratory judgments are frequently sought in advance of the full harm expected, they must still present a justiciable controversy rather than abstract, hypothetical or contingent questions.” *Miller v. Augusta Mut. Ins. Co.*, 157 Fed. Appx. 632 (4th Cir. 2005) (citing *St. Thomas–St. John Hotel & Tourism Ass’n v. United States Virgin Islands*, 218 F.3d 232, 240 (3d Cir.2000) (internal quotation marks omitted)).

The Article III case-or-controversy requirement is satisfied when “the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interest, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (citation omitted). The controversy must be “definite and concrete, touching the legal relations of parties having adverse legal interests.” *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937); *see also Johnson v. Cty. of Horry*, No. 4:09-cv-01758-JMC, 2012 U.S. Dist. LEXIS 110877, at *6

(D.S.C. Aug. 8, 2012) (quoting *White v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 913 F.2d 165, 167 (4th Cir. 1990)). A justiciable controversy is distinguishable from “a difference or dispute of a hypothetical or abstract character” or from a dispute that is “academic or moot.” *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937). In this context, an actual controversy requires a concrete dispute between parties with adverse legal interests, and the plaintiff must seek “specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” *Id.* at 241. The burden of establishing the existence of an actual controversy rests with the party seeking the declaratory judgment. *See Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 95 (1993).

III. ARGUMENT

A. Count I Should be Dismissed Because Plaintiff Fails to Allege Facts Demonstrating an Actual Justiciable Controversy Regarding the Receiver's Compensation

Plaintiff's first cause of action seeks a judicial declaration that the Travelers Defendants and others “must fairly compensate the Receiver,” or, “[i]f that is not possible, [a declaration as to] which Defendants are responsible for compensating the Receiver for the substantial time, effort, and expenses the Receiver put towards his responsibilities as Receiver of Starr Davis.” (Compl. ¶¶ 36-37.) Plaintiff does not allege any specific facts regarding what the Receiver (Mr. Protopapas) has done to warrant compensation from the Travelers Defendants at this time, let alone how or why the Travelers Defendants are obligated to compensate the Receiver for such unspecified conduct. Plaintiff simply alleges that the Receiver “dedicated a substantial amount of time and incurred substantial expenses in his role as Receiver for Starr Davis,” and that the “Defendant Asbestos Claimants and Defendant Insurers had claims processed and suits defended

that otherwise would not have been processed or defended, but for the diligent work of Plaintiff as Receiver.” (*Id.* ¶¶ 32, 34.) These allegations are insufficient to create a justiciable controversy justifying declaratory relief.

As an initial matter, the Receiver is not a party to the litigation. As the Complaint’s caption reflects, the named Plaintiffs are “STARR DAVIS COMPANY, INC. and STARR DAVIS COMPANY OF S.C., INC. through its [sic] Receiver, Peter D. Protopapas.” (Compl. at 1.) While the Receiver no doubt caused Starr Davis to file the Complaint, Plaintiffs do not allege that the Receiver brought this suit in his individual capacity or that the Receiver himself has suffered any injury-in-fact. Unless named as a party, the Receiver has no individual right to relief—declaratory or otherwise—from any actually named party. This deficiency alone warrants dismissal of Count I.

More critically, the Complaint does not allege how or why the Travelers Defendants owe reimbursement/compensation obligations to the Receiver; and, even assuming such an obligation existed, the Complaint does not allege with any specificity what the Travelers Defendants would be compensating the Receiver for and why such compensation is imminently needed. Indeed, Plaintiff’s threadbare allegations do not allege the existence of any contract between the Travelers Defendants and the Receiver; nor does the Complaint any other basis on which the Receiver has a legal right to compensation from the Travelers Defendants, or that a declaration would resolve any supposed controversy.

On the limited facts alleged, this Court simply cannot and should not enter a sweeping declaration “that each Defendant Asbestos Claimant and Defendant Insurer must fairly compensate the Receiver.” (Compl. ¶ 36.) Plaintiff appears to acknowledge as much by seeking the following relief from the Court in the alternative: “If that is not possible [i.e., the declaration

requested in ¶ 36], declare which Defendants are responsible for compensating the Receiver for the substantial time, effort, and expenses the Receiver put towards his responsibilities as Receiver of Starr Davis.” (Compl. ¶ 37 (emphasis added).) This claim, too, is untenable, because it fails to give rise to a real and immediate controversy justifying such relief. Again, Plaintiff points to no specific rights or obligations that supposedly have been or will be violated as between the Receiver and the Travelers Defendants, and thus there is not a justiciable controversy at this time.

An actual justiciable controversy requires a concrete dispute between parties with adverse legal interests, and the plaintiff must seek “specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” *Haworth*, 300 U.S. at 241; *see also Centennial Life Ins. Co. v. Poston*, 88 F.3d 255, 256 (4th Cir. 1996) (“[A] declaratory judgment action is appropriate ‘when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.’” (quoting *Aetna Cas. & Sur. Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937))). Plaintiff has not and cannot satisfy this standard, as there is no concrete dispute at this time and, even if there was, Plaintiff does not seek specific relief of a conclusive character that would resolve the dispute.

Count I, therefore, must be dismissed for failure to state a claim. *See, e.g., Jones v. Sears Roebuck & Co.*, 301 Fed. Appx. 276, 282-83 (4th Cir. 2008) (affirming the district court’s dismissal of Count I of plaintiff’s complaint and holding that “in the absence of an injury and with no ‘real and substantial’ dispute, the court properly declined to entertain Count I upon removal.”); *Holmes*, 2012 U.S. Dist. LEXIS 119212, at *20-21 (dismissing declaratory judgment

claim where “[n]one of the contracts which are the bases for the declaratory judgment claims create any rights or responsibilities on the part of [the defendant].”); *Vincent v. Lindsey Mgmt. Co.*, No. 12-CV-210-JED-PJC, 2013 U.S. Dist. LEXIS 178117, at *24 (N.D. Okla. Dec. 19, 2013) (“To assert a declaratory judgment action against a defendant, that defendant must have a concrete stake in the subject matter of the action Because LMC is not a party to the lease agreement, it lacks a sufficient stake in the Court’s determination of the agreement to permit a declaratory judgment action to proceed against it.”); *McInnes v. Lord Balt. Empl. Ret. Income Account Plan*, 823 F. Supp. 2d 360, 363 n.2 (D. Md. 2011) (“Plaintiff appears to argue that the Court has jurisdiction over his demand for a declaratory judgment simply because he and Defendants disagree about whether he is entitled to retain the distributions. That is incorrect. An ‘actual controversy’ for declaratory judgment purposes exists only where a plaintiff has asserted an independent basis for Article III standing, including the requisite injury in fact.”) (citation omitted); *Owens*, 2017 WL 11458025, at *2 (“Nationwide is essentially asking the court to issue an advisory opinion regarding whether there is coverage under the Nationwide Policy. There is no immediate threat of litigation in this case because coverage under the Nationwide Policy has not been sought by Movants.”).

B. Count II Also Must Be Dismissed for Failure to State a Cognizable Claim for Declaratory Relief and Because There is No Justiciable Controversy

For its second cause of action, Plaintiff seeks in part a declaration that the Receiver is “entitled to copies of all Defendant Insurance policies” (Compl. ¶ 42.) This portion of Count II should be dismissed as against the Travelers Defendants because the requested relief—a declaration that the Receiver is “entitled to copies of all Defendant Insurance policies”—is essentially a request for an injunction, not a cognizable claim for declaratory relief. Put

differently, this Count is actually a “prayer” for a type of relief—it is not an independent cause of action.

As explained above, courts may not make wide-ranging declarations about the relative rights of parties. Instead, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a specific declaratory judgment. *See, e.g., MedImmune, Inc.*, 549 U.S. at 127; *CLM Equip. Co.*, 386 F.3d at 592. To the extent Plaintiff is able to bring a standalone claim for declaratory relief regarding the Receiver’s alleged right to copies of certain insurance policies, however, the claim must fail unless there is a justiciable controversy for the Court to settle. Here, Plaintiff does not allege that it has requested copies of the Travelers Defendants’ insurance policies. Nor does it allege that the Travelers Defendants have refused to provide them to Starr Davis or to the Receiver. There is thus no alleged dispute at all, let alone an actual controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Even if there was a dispute as to whether the Receiver is entitled to copies of the Travelers Defendants’ insurance policies issued to Starr Davis (assuming Starr Davis does not actually have them already), the declaration Plaintiff seeks would not resolve the dispute (assuming there is any dispute). If there is any dispute here at all, it is not that the Travelers Defendants refused to provide Starr Davis or the Receiver with insurance policies, it is whether those policies exist and/or can be located. Thus, the declaratory judgment claim alleged here will serve no purpose and must be dismissed, because it would be appropriate only when the judgment sought “will serve a useful purpose in clarifying and settling the legal relations in issue, and ... when it will terminate and afford relief from the uncertainty, insecurity and

controversy giving rise to the proceeding.” *Centennial Life Ins. Co. v. Poston*, 88 F.3d 255, 256 (4th Cir. 1996).

In short, the facts alleged here simply do not “show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826 (1941) (citation omitted); *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126 (2007) (“[T]he dispute [must] be ‘definite and concrete, touching the legal relations of parties having adverse legal interests.’”) (quotation omitted). Accordingly, Count II should be dismissed for failure to state a claim under Rule 12(b)(6) and/or for lack of subject matter jurisdiction under Rule 12(b)(1) because there exists no justiciable case or controversy regarding the provision of certain insurance policies to the Receiver.

IV. CONCLUSION

For all of the foregoing reasons, the Travelers Defendants respectfully request that the Court grant their motion to dismiss Counts I and II of Plaintiff’s Complaint as against the Travelers Defendants.

(Signature block on follow page)

Respectfully submitted,

s/William P. Davis

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Pro Hac Vice Application Forthcoming

December 27, 2019

Columbia, South Carolina

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

STARR DAVIS COMPANY, INC. and STARR
DAVIS COMPANY OF S.C., INC, through its
Receiver, Peter D. Protopapas,

Plaintiffs,

v.

HARTFORD ACCIDENT AND
INDEMNITY COMPANY; TWIN CITY
FIRE INSURANCE COMPANY;
TRAVELERS CASUALTY AND SURETY
COMPANY f/k/a THE AETNA CASUALTY
AND SURETY COMPANY; THE
STANDARD FIRE INSURANCE
COMPANY; SOUTHEASTERN AGENCY
GROUP and M.I.A. COMPANY, INC.
individually and as successors to or f/k/a
MERRIMON INSURANCE AGENCY,
INC.; ROBERT E. ASPRAY; NELL
ASHWORTH, individually and as personal
representative of the Estate of ROBERT J.
ASHWORTH; BETTY C. D'AMICO,
individually and as Executor of the Estate of
JULIAN D'AMICO, JR.; KAYLA KEITH,
individually and as the personal representative
of the Estate of JERRY W. ARCHER, SR.;
RICHARD L. KNIGHT II, as personal
representative of the Estate of TEDDY L.
KNIGHT, SR., and LINDA KNIGHT,
individually; DAVID D. ROLLINS; JAMES
W. SMITH and FRANCES R. SMITH; and
LINDA J. WHITE, individually and as
Personal Representative of the Estate of
LUBERT F. WHITE, JR.,

Defendants.

Civil Action No.: 3:19-cv-03481-JFA

**REPLY TO CLAIMANTS'
OPPOSITION TO MOTION
TO REALIGN**

ELECTRONICALLY FILED - 2020 Jan 31 3:07 PM - RICHLAND - COMMON PLEAS - CASE#2019CP4006243

Defendants Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company (“Travelers”) and The Standard Fire Insurance Company (“Standard Fire”), a subsidiary of Travelers (together, “Travelers”), submit this reply to Claimants’¹ opposition to Travelers’ motion to realign.

I. PRELIMINARY STATEMENT

On November 6, 2019, Plaintiffs Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. (together, “Starr Davis”), through Peter D. Protopapas, acting in his capacity as their Receiver, filed a civil action against Travelers and other parties in the South Carolina Court of Common Pleas, Fifth Judicial Circuit, County of Richland. Travelers removed the action to this Court because, upon proper realignment of the parties and/or the dismissal of certain fraudulently joined Defendants, there is complete diversity of citizenship between the parties and the amount in controversy exceeds the jurisdictional threshold. Along with its notice of removal, Travelers filed a motion to realign Claimants and Defendant Merrimon Insurance Agency Inc. (“Merrimon”), an insurance broker, as plaintiffs. Claimants and Starr Davis filed separate responses in opposition to the motion to realign; Merrimon did not oppose the motion. This reply brief addresses Claimants’ opposition to the motion to realign.

As an initial matter, Claimants’ opposition is premised on a falsehood: that the Receiver, Mr. Protopapas, is himself a party-plaintiff adverse to Claimants. *See* Dkt. No. 14, Claimants’

¹ Claimants are Defendants Robert E. Aspray, Nell Ashworth (individually and as personal representative of the Estate of Robert J. Ashworth), Betty C. D’Amico (individually and as Executor of the Estate of Julian D’Amico, Jr.), Kayla Keith (individually and as the personal representative of the Estate of Jerry W. Archer, Sr.), Richard L. Knight II (as personal representative of the Estate of Teddy L Knight, Sr., and Linda Knight, individually), David D. Rollins, James W. Smith, Frances R. Smith, and Linda J. White (individually and as personal representative of the Estate of Lubert F. White, Jr.). *See* Dkt. No. 1-1, Summons and Complaint (hereafter, “Compl.”), at ¶¶ 9-16.

Response in Opposition to Motion to Realign (hereafter, “Opp.”), at 2 (“In this action the Receiver[] now seeks to add insult to injury by seeking to recover his fees from the Asbestos Victims [*i.e.*, Claimants]. . . . Specifically, the Receiver seeks a declaratory judgment finding that the Asbestos Victims are responsible for his fees and expenses. . . . It is difficult to imagine a more adversarial position between parties.”); *id.* at 3 (“Starr Davis’ court appointed Receiver seeks to recover actual money from the Asbestos Victims. . . . Travelers cannot . . . justify realignment in the fact [sic] of such a clear adversarial position between the Asbestos Victims and the Receiver.”). But Mr. Protopapas is not a party—Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. are the only two parties named as plaintiffs. The caption of Starr Davis’s Complaint and the CM/ECF docket confirm as much. As a result, Claimants’ primary argument as to why Claimants should not be realigned as plaintiffs—*i.e.*, that the Receiver *himself* is adverse to Claimants—has no basis. As a non-party, the Receiver is not entitled to any relief of any kind.

Although this fact should be dispositive, Claimants also fail to show how or why they should not be realigned as plaintiffs under the “principal purpose test.” The primary issue or principal purpose of this action is indisputably aimed at establishing that Travelers and the other defendant-insurers’ (collectively, “Defendant-Insurers”) insurance policies provide coverage for any judgments that Claimants may recover against Starr Davis, *i.e.*, the insured. Starr Davis’s principal purpose is unmistakable—it seeks to obtain as much money as possible from the Defendant-Insurers under their policies in the form of insurance benefits, money that will then be used to pay Claimants, who are plaintiffs in the underlying asbestos cases. The interests of Starr Davis and Claimants are plainly aligned, as they all want to establish as much coverage as possible under the policies so as to satisfy all potential judgments in the underlying cases.

Indeed, a finding in favor of the Defendant-Insurers would mean that they have no duty to defend or indemnify or indemnify Starr Davis against Claimants' claims in the underlying actions. Because they share the same interest in holding the Defendant-Insurers liable to pay any judgments entered against Starr Davis in the underlying actions, Claimants must be realigned as plaintiffs with Starr Davis.

II. ARGUMENT

A. The Receiver is Not a Party and is Therefore Not Entitled to Any Relief

In their opposition brief, Claimants argue that because "the Receiver seeks a declaratory judgment finding that the Asbestos Victims are responsible for his fees and expenses," Opp. at 2, "[i]t is difficult to imagine a more adversarial position between parties." *Id.* According to Claimants, "Travelers cannot, and therefore does not, justify realignment in the fact [sic] of such a clear adversarial position between the Asbestos Victims and the Receiver." *Id.* at 3. Claimants' argument misses the point. The Receiver is not a party to this litigation, and thus Claimants cannot rely on his supposed adversity to justify their position.

As previewed above, and as the Complaint's caption and the docket reflect, the named Plaintiffs are Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. While the Receiver no doubt caused Starr Davis to file the Complaint, the Receiver is not named as a plaintiff, and the Complaint does not allege that the Receiver brought this suit in his individual capacity or that he has suffered any cognizable injury-in-fact. As a non-party, the Receiver is not entitled to any relief—declaratory or otherwise—from any of the Defendants. *See, e.g., McKenzie v. Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) (a court lacks jurisdiction to grant relief to non-parties); *Goldstein v. Home Depot U.S.A., Inc.*, 609 F. Supp. 2d 1340, 1349 (N.D. Ga. 2009) ("Injunctions may not be issued to provide relief for non-parties." (citation omitted));

Talbert v. Smith, No. 7:05CV736, 2007 WL 773910, at *1 (W.D. Va. Mar. 9, 2007) (“It is well settled that except in limited circumstances, which are not alleged here, a court may not order injunctive relief against non-parties.”); 11A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2956 (3d ed. 1998) (“A court ordinarily does not have power to issue an order against a person who is not a party and over whom it has not acquired in personam jurisdiction.”) (footnote omitted)).

Even if he were a party-plaintiff (and he is not), the Receiver is not actually adverse to Claimants in this action. According to the Receiver, the state court appointment order authorized him to “fully administer all assets of Starr Davis, accept service on behalf of Starr Davis, engage counsel on behalf of Starr Davis and take any and all steps necessary to protect the interests of Starr Davis whatever they may be.” Compl. at Ex. A. The appointment order did not *create* an adversarial relationship between the Receiver and Claimants as respects insurance coverage, and the Complaint does not allege that one exists.

B. The Principal Purpose of This Case is to Establish Insurance Coverage

With regard to the realignment of parties in a diversity action, the United States Supreme Court has explained:

To sustain diversity jurisdiction there must exist an actual, substantial controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. Diversity jurisdiction cannot be conferred upon the federal courts by the parties’ own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to look beyond the pleadings and arrange the parties according to their sides in the dispute. . . . Whether the necessary collision of interest exists, is therefore not to be determined by mechanical rules. It must be ascertained from the principal purpose of the suit and the primary and controlling matter in dispute.

Indianapolis v. Chase Nat’l Bank, 314 U.S. 63, 69 (1941) (emphasis added) (citations and internal quotation marks omitted).

The Fourth Circuit has adopted this “principal purpose test” for evaluating how parties should be aligned. “Application of the principal purpose test entails two steps. First, the court must determine the primary issue in the controversy. Next, the court should align the parties according to their positions with respect to the primary issue.” *U.S. Fid. & Guar. Co. v. A & S Mfg. Co.*, 48 F.3d 131, 133 (4th Cir. 1995). “If the alignment differs from that in the complaint, the court must determine whether complete diversity continues to exist.” *Id.* Here, the analysis is straightforward: (1) the primary issue in the case is whether the Defendant-Insurers’ policies provide coverage for any judgment that the Claimants may recover against Starr Davis for asbestos personal injuries; and, in that regard, (2) Claimants’ interests are aligned with Starr Davis’ interests and adverse to those of the Defendant-Insurers.

In their reply brief, Claimants conspicuously avoid making any statement about the principal purpose of this lawsuit. They instead focus almost entirely on the supposed adversarial posture as between Claimants *and the Receiver*, even though the Receiver is not a party to the litigation. Try as they might to muddy the waters, Claimants’ opposition does nothing to show that the principal purpose of this litigation is anything other than to establish the availability and amount of potential insurance coverage under the insurance policies the Defendant-Insurers allegedly issued to Starr Davis, and which Claimants want to access.

In *Covil Corp. by Protopapas v. Zurich Am. Ins. Co.*, No. 7:18-3291-BHH, 2019 WL 2482382, at *3-4 (D.S.C. June 14, 2019), a recent decision in this District that involved facts substantially similar to those at issue here, the court realigned individual asbestos claimants as plaintiffs along with the insured. The court held that “the scope of the primary issue in this declaratory judgment action is narrow, and [] the parties are rightly aligned by their respective positions on whether they desire insurance coverage to apply *vel non* to any judgments resulting

from the underlying asbestos actions.” *Covil*, 2019 WL 2482382, at *4. The court noted that “whatever clash of interests exists between Covil and the [Claimants] within the instant declaratory judgment action[] is ancillary to the primary issue in the case, which is whether insurance coverage exists to satisfy any judgments the [Claimants] may obtain against Covil in the underlying asbestos actions.” *Id.* (emphasis omitted). So too here—whatever clash of interests may exist between Starr Davis and Claimants in the instant declaratory judgment action is ancillary to the primary issue of whether insurance policies exist that will satisfy any potential judgment Claimants may obtain against Starr Davis in the underlying asbestos actions.²

Here, as in *Covil*, the primary issue in dispute plainly centers on the Defendant-Insurers’ insurance policies, and Starr Davis and Claimants are aligned in that regard—they all want coverage to exist under the policies for the claims brought by Claimants against Starr Davis for asbestos personal injuries. Claimants should thus be realigned as plaintiffs. *See Covil*, 2019 WL 2482382, at *4; *see also, e.g., Beaufort Rentals LLC v. Westchester Fire Ins. Co.*, No. 9:18-CV-02658-DCN, 2018 WL 6248770, at *2 (D.S.C. Nov. 29, 2018) (realigning a defendant as a plaintiff in a declaratory judgment action related to a duty to defend and noting that “[i]n a declaratory judgment action involving an insurance company’s duty to defend, the parties’ interests are aligned based on whether they believe the insurance company has a duty to

² That Starr Davis and Claimants are adverse in the underlying asbestos actions is “immaterial” to this insurance coverage action. *See id.* (citing *Marsh v. Cincinnati Ins. Co.*, 2008 WL 4614289, *2 (Oct. 15, 2008) (granting insurers motion to realign injured tort claimants from defendants to plaintiffs in coverage action filed by purported insured against insurer; stating, “The relevant inquiry is to determine the parties’ positions with respect to the primary issue *in this case*, not whether the parties are adversaries in another pending before another court.” (emphasis in original)); *see also Vestavia Hills*, 676 F.3d at 1314 (“Where the parties’ interests are the same” in a particular action “those parties must be aligned together..., even where the parties’ interests were in opposition outside of the issues raised in the subject action.” (citing *Weller v. Navigator Marine, Inc.*, 737 F.2d 1547, 1548 (11th Cir. 1984))).

defend.”); *Nationwide Mut. Ins. Co. v. 1400 Hampton Blvd., LLC*, No. 2:10cv310, 2010 WL 5476748, at *2 (E.D. Va. Dec. 2, 2010) (“In a declaratory relief action requesting judicial determination of an insurer’s duties under an insurance contract ... the primary issue presented in the pleadings is the dispute over an insurer’s duty to defend and indemnify.” (citations omitted)); *Crout v. United Financial Cas. Co.*, 2010 WL 2998500 (D.S.C. July 28, 2010) (realigning insured from defendant to plaintiff in coverage action filed by injured party against insured and insurer); *Marsh v. Cincinnati Ins. Co.*, 2008 WL 4614289 (Oct. 15, 2008) (realigning injured tort claimant from defendant to plaintiff in coverage action filed by purported insureds against their insurer); *Vestavia Hills*, 676 F.3d at 1314 (“[T]he normal alignment of parties in a suit seeking a declaratory judgment of non-coverage is Insurer versus Insured and Injured Party.”).

C. Starr Davis’s Declaratory Judgment Claims Against Claimants are Not Cognizable and are Ancillary to the Principal Purpose of This Case

In ascertaining the principal purpose of a case and aligning parties according to their positions with respect to the primary issue, the mere existence of antagonism on a few ancillary issues is insignificant. Diversity is determined based on “the principal purpose of the suit and the primary and controlling matter in dispute.” *City of Indianapolis*, 314 U.S. at 69. Courts do not allow “window-dressing” or “illusive artifices” to avoid or create diversity jurisdiction. *Id.* at 72, 76. Aligned parties do not have to be on the same side on every issue. In fact, in *U.S. Fidelity and Guaranty Co.*, the Fourth Circuit recognized that the insurers had “potentially substantial” disputes among themselves, but those disputes were not the principal controversy. 48 F.3d 131, 134. The court held that those “ancillary” disputes were “subsumed in the primary issue of the insurers’ liability” and, as to the primary issue, the insurers shared the primary goal of avoiding obligations to the insured. *Id.* Similarly, in *Covil*, this court (Hendricks, J.) held that “whatever clash of interests exists between Covil and the Individual Defendants within the

instant declaratory judgment action[] is ancillary to the primary issue in the case, which is whether insurance coverage exists to satisfy any judgments the Individual Defendants may obtain against Covil in the underlying asbestos actions.” *Covil*, 2019 WL 2482382, at *4 (emphasis omitted).

In their opposition brief, Claimants focus on Starr Davis’s first cause of action in a misguided attempt to manufacture adversity. Claimants argue that the “Receiver seeks to recover actual money from the Asbestos Victims,” which gives rise to a “clear adversarial position between the Asbestos Victims and the Receiver.” Opp. at 3. This is simply not true. Starr Davis’s first cause of seeks a declaratory judgment; it is not a money damages claim and it does not seek to recover any “actual money” from Claimants. Nor could it because, as noted above, the Receiver is not a party and thus he is not entitled to “actual money” or other relief from Claimants.

More specifically, Count I seeks a judicial declaration that Claimants and the Defendant-Insurers “must fairly compensate the Receiver,” or, “[i]f that is not possible, [a declaration as to] which Defendants are responsible for compensating the Receiver for the substantial time, effort, and expenses the Receiver put towards his responsibilities as Receiver of Starr Davis.” Compl. ¶¶ 36-37. Starr Davis does not allege any specific facts regarding what the Receiver has done to warrant compensation from Claimants at this time, let alone any legal basis on which Claimants are obligated to compensate the Receiver for such unspecified conduct and/or why such compensation is imminently needed. Starr Davis alleges simply that the Receiver “dedicated a substantial amount of time and incurred substantial expenses in his role as Receiver for Starr Davis,” and that the “Defendant Asbestos Claimants and Defendant Insurers had claims processed and suits defended that otherwise would not have been processed or defended, but for

the diligent work of Plaintiff as Receiver.” *Id.* ¶¶ 32, 34. These threadbare allegations are insufficient to create a justiciable controversy between the non-party Receiver, on the one hand, and Claimants, on the other.

Indeed, the Fourth Circuit has made clear that “although declaratory judgments are frequently sought in advance of the full harm expected, they must still present a justiciable controversy rather than abstract, hypothetical or contingent questions.” *Miller v. Augusta Mut. Ins. Co.*, 157 Fed. Appx. 632 (4th Cir. 2005) (citation and internal quotation marks omitted)). The Article III case-or-controversy requirement is satisfied only when “the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interest, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (citation omitted). The controversy must be “definite and concrete, touching the legal relations of parties having adverse legal interests.” *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937); *see also Johnson v. Cty. of Horry*, No. 4:09-cv-01758-JMC, 2012 U.S. Dist. LEXIS 110877, at *6 (D.S.C. Aug. 8, 2012) (citation omitted). A justiciable controversy is distinguishable from “a difference or dispute of a hypothetical or abstract character” or from a dispute that is “academic or moot.” *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937). In this context, an actual controversy requires a concrete dispute between parties with adverse legal interests, and the plaintiff must seek “specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” *Id.* at 241.

The purported dispute over the Receiver’s compensation is nothing more than “window-dressing” or an “illusive artifice.” It is far from a real and concrete justiciable controversy

between parties with adverse legal interests. The real, primary, and controlling matter in dispute is the existence and amount of available coverage under the Defendant-Insurers' insurance policies. As explained above, with respect to this primary and controlling matter, Starr Davis and Claimants are perfectly aligned, as they all want there to be as much insurance coverage as possible.

In an apparent effort to counter this unassailable fact, Claimants argue:

[T]he Asbestos Victims have found coverage, it belongs to Travelers and others and others [sic]. The Asbestos Victims [sic] interest is in taking that coverage from Starr Davis by obtaining liability findings, but unless Starr Davis is prepared to confess liability in each of the Asbestos Victims' claims, the Asbestos Victims [sic] interest in Covil's [sic] insurance coverage is purely hypothetical. It is exactly this kind of hypothetical claim that the Fourth Circuit has found insufficient for the purposes of realigning the parties. *U.S. Fidelity and Guar. Co.*, 48 F.3d at 134; see also *Germond v. Maskin Management Corp.*, No. 4:14-cv-02099-PMD, 2014 WL 12774953 (D.S.C. Oct. 15, 2014) (Duffy, J.) (declining to realign the plaintiff and individual tort defendants on motion of insurance carriers and granting Plaintiff's motion to remand).

Opp. at 3. This argument is not only a bit bizarre and confusing, it is completely without merit for at least two reasons.

First, for the reasons explained above, Claimants' primary interest in this case is in establishing coverage under the Defendant-Insurers' policies, not in "taking [] coverage" from Starr Davis. Opp. at 3. Nor could they, because the subject policies are the Defendant-Insurers' policies, and the payment obligations, if any, under those policies are the Defendant-Insurers' obligations.

Second, the case law on which Claimants rely in no way supports their argument. In *U.S. Fidelity & Guar. Co.*, the district court applied the principal purpose test and aligned three insurers as plaintiffs, leaving the insured as the sole defendant. 48 F.3d at 134. This realignment destroyed diversity, and the district court dismissed the action. See *id.* In affirming the decision,

the Fourth Circuit found that the primary issue was whether the insurers owed a duty to defend and indemnify the insured, and further found that the dispute among the insurers was secondary to the primary issue of liability to the insured:

The dispute among the insurers is secondary to whether the insurers are liable to A & S and is hypothetical until the insurers' liability is determined. The potentially substantial, though not principal, controversies that USF & G raises are subsumed in the primary issue of the insurers' liability to A & S. The insurers share the primary goal of avoiding obligations to A & S, and the district court properly realigned them as plaintiffs opposite the defendant A & S.

Id. The instant case is no different—the Defendant-Insurers should be placed opposite Starr Davis and Claimants. Any dispute between Claimants and Starr Davis is at best secondary to the primary issue of whether and to what extent the Defendant-Insurers are liable to Starr Davis. Moreover, the existence of any insurance coverage-related dispute between Starr Davis and Claimants is purely hypothetical until any underlying liability is established.

Claimants' reliance on *Germond v. Maksin Management Corp.*, No. 4:14-CV-02099-PMD, 2014 WL 12774953 (D.S.C. Oct. 15, 2014) is also misplaced. There, the plaintiff seeking coverage named a non-diverse school district, Florence School District One ("FSD"), as a party defendant. The court denied a motion to realign FSD as a plaintiff because "the primary issue in controversy is the alleged misrepresentation of the Policy's coverage" and, in that regard, FSD was adverse to the plaintiff because it allegedly participated in the procurement of the policy and made "precisely the same misrepresentation to Plaintiff as the remaining Defendants" regarding the scope of coverage provided by the policy. *Germond*, 2014 WL 12774953, at *6-7. In other words, the primary issue was not whether the policy provided insurance coverage, but whether FSD and the insurer made material misrepresentations to the plaintiff-policyholder about what the benefits the policy would provide. Here, by contrast, there are no allegations of any joint

misrepresentation by the Defendant-Insurers and Claimants concerning the scope of insurance coverage.³

III. CONCLUSION

Because Claimants share the same interest as Starr Davis in establishing coverage and holding the Defendant-Insurers liable to pay any judgment entered against Starr Davis in the underlying asbestos actions, Claimants must be realigned as plaintiffs along with Starr Davis. Once the Claimants are realigned as plaintiffs, their citizenships do not destroy this Court's diversity jurisdiction. Accordingly, for the foregoing reasons, Travelers respectfully requests that the Court enter an Order granting Travelers' motion to realign and realigning Claimants as plaintiffs in the event the Court finds they were not fraudulently joined.

Respectfully,

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³ If there were any doubt that Claimants are aligned with Starr Davis and adverse to the Defendant-Insurers on the principal coverage issue, it should be noted that, in state court, Claimants filed a Cross-Claim against the Defendant-Insurers. The Cross-Claim was included as part of Claimants' Answer to the Starr Davis Complaint. Travelers just recently became aware of the Cross-Claim—it was never served on Travelers but was included as an exhibit to Starr Davis's motion to remand. *See* Dkt. No. 15-1 at 5-6. Tellingly, Claimants filed their Answer and Cross-Claim a mere *one day* after Starr Davis filed its state court Complaint, a fact that makes crystal clear that Starr Davis and Claimants were working together to initiate this litigation. Claimants' counsel cannot credibly suggest that they did not have advance notice of the lawsuit—otherwise how could they have been in a position to respond to the allegations in the Complaint within 24 hours? If there is any doubt on this point, the Court should consider discovery directed to pre-suit communications between Starr Davis and Claimants.

File No.: 7746.2238

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Pro Hac Vice Application Forthcoming

January 17, 2020

Columbia, South Carolina

ELECTRONICALLY FILED - 2020 Jan 31 3:07 PM - RICHLAND - COMMON PLEAS - CASE#2019CP4006243

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

STARR DAVIS COMPANY, INC. and STARR
DAVIS COMPANY OF S.C., INC, through its
Receiver, Peter D. Protopapas,

Plaintiffs,

v.

HARTFORD ACCIDENT AND
INDEMNITY COMPANY; TWIN CITY
FIRE INSURANCE COMPANY;
TRAVELERS CASUALTY AND SURETY
COMPANY f/k/a THE AETNA CASUALTY
AND SURETY COMPANY; THE
STANDARD FIRE INSURANCE
COMPANY; SOUTHEASTERN AGENCY
GROUP and M.I.A. COMPANY, INC.
individually and as successors to or f/k/a
MERRIMON INSURANCE AGENCY,
INC.; ROBERT E. ASPRAY; NELL
ASHWORTH, individually and as personal
representative of the Estate of ROBERT J.
ASHWORTH; BETTY C. D'AMICO,
individually and as Executor of the Estate of
JULIAN D'AMICO, JR.; KAYLA KEITH,
individually and as the personal representative
of the Estate of JERRY W. ARCHER, SR.;
RICHARD L. KNIGHT II, as personal
representative of the Estate of TEDDY L.
KNIGHT, SR., and LINDA KNIGHT,
individually; DAVID D. ROLLINS; JAMES
W. SMITH and FRANCES R. SMITH; and
LINDA J. WHITE, individually and as
Personal Representative of the Estate of
LUBERT F. WHITE, JR.,

Defendants.

Civil Action No.: 3:19-cv-03481-JFA

**REPLY TO STARR DAVIS
COMPANY, INC AND STARR
DAVIS COMPANY OF S.C., INC'S
OPPOSITION TO MOTION TO
REALIGN**

ELECTRONICALLY FILED - 2020 Jan 31 3:06 PM - RICHLAND - COMMON PLEAS - CASE#2019CP4006243

Defendants Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company (“Travelers”) and The Standard Fire Insurance Company (“Standard Fire”), a subsidiary of Travelers (together, “Travelers”), submit this reply to the memorandum in opposition to Travelers’ motion to realign filed by Peter D. Protopapas in his capacity as the Receiver for Plaintiffs Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. (collectively, “Starr Davis”),

I. PRELIMINARY STATEMENT

On November 6, 2019, Starr Davis, through its Receiver, Peter D. Protopapas, filed a civil action against Travelers and other parties in the South Carolina Court of Common Pleas, Fifth Judicial Circuit, County of Richland. Travelers removed the action to this Court because, upon proper realignment of the parties and/or the dismissal of certain fraudulently joined Defendants, there is complete diversity of citizenship between the parties and the amount in controversy exceeds the jurisdictional threshold. Along with its notice of removal, Travelers filed a motion to realign Claimants’¹ and Defendant Merrimon Insurance Agency Inc. (“Merrimon”), an insurance broker, as plaintiffs. Claimants and Starr Davis filed separate responses in opposition to the motion to realign; Merrimon did not oppose the motion. This reply brief addresses Starr Davis’s opposition to the motion to realign. In its opposition, Starr

¹ Claimants are Defendants Robert E. Aspray, Nell Ashworth (individually and as personal representative of the Estate of Robert J. Ashworth), Betty C. D’Amico (individually and as Executor of the Estate of Julian D’Amico, Jr.), Kayla Keith (individually and as the personal representative of the Estate of Jerry W. Archer, Sr.), Richard L. Knight II (as personal representative of the Estate of Teddy L Knight, Sr., and Linda Knight, individually), David D. Rollins, James W. Smith, Frances R. Smith, and Linda J. White (individually and as personal representative of the Estate of Lubert F. White, Jr.). *See* Dkt. No. 1-1, Summons and Complaint (hereafter, “Compl.”), at ¶¶ 9-16.

Davis makes three main arguments as to why the motion to realign should be denied. Each of Starr Davis's arguments is without merit.

As an initial matter, for the reasons explained in Travelers' notice of removal (Dkt. No. 1) and in its opposition to Starr Davis's motion to remand (filed herewith), removal was procedurally proper. The Court can and should disregard Claimants' and Merrimon's citizenship under the doctrine of fraudulent joinder or realign them as plaintiffs. Upon the dismissal or realignment of Claimants and Merrimon, complete diversity of citizenship exists between the parties.

Second, Starr Davis incorrectly argues that, if Claimants and Merrimon are not found to have been fraudulently joined, then "the Court need not address the question of alignment at all." Dkt. No. 20, Starr Davis's Response to Motion to Realign and Memorandum in Support (hereafter, "Opp."), at 6 (citation omitted). To the extent this bizarre argument can be understood, it mischaracterizes the record and misstates the law. Starr Davis appears to conflate the fraudulent joinder doctrine with the realignment of parties under the principal purpose test. These are two distinct legal theories, and Travelers properly raised them in the alternative.

Third, Starr Davis fails to show how or why Claimants and Merrimon should not be realigned as plaintiffs under the principal purpose test. The principal purpose of this action is indisputably aimed at establishing that Travelers and the other defendant-insurers' (collectively, "Defendant-Insurers") insurance policies provide coverage for any tort judgments Claimants may recover against Starr Davis, the insured in the underlying asbestos cases. The interests of Starr Davis and Claimants are plainly aligned, because they all want to establish as much coverage as possible under the policies so as to satisfy any potential judgments in the underlying cases. As for Merrimon, which has not filed an opposition to Traveler's realignment motion, it too is far

more closely aligned with Starr Davis than with the Defendant-Insurers. Any dispute between Starr Davis and Merrimon is secondary to the primary issue of whether the Defendant-Insurers have a duty to defend or indemnify Starr Davis.²

II. ARGUMENT

A. Removal Was Not Statutorily Defective

In its opposition brief, Starr Davis initially argues that “removal itself was defective because 1) complete diversity does not exist, 2) only two of the defendants consented, and 3) even if complete diversity did exist, removal cannot occur because there are South Carolina defendants in this case.” Opp. at 4. Starr Davis is wrong. Removal was procedurally proper, and this matter need not and should not be remanded to state court.

First, with respect to Starr Davis’s argument that complete diversity is lacking, Opp. at 4, Starr Davis relies solely on the current alignment of the parties. For the reasons explained in Travelers’ notice of removal (Dkt. No. 1), its motion to realign (Dkt. No. 3), and its opposition to Starr Davis’s motion to remand (filed herewith), the Court can and should disregard Claimants’

² In its Complaint, Starr Davis alleges that “Defendant MERRIMON INSURANCE AGENCY INC. is upon information and belief a North Carolina corporation that has either maintained its status as a North Carolina company as MIA COMPANY, INC. and/or as SOUTHEASTERN AGENCY GROUP, INC. (hereinafter collectively referred to as Merrimon Insurance).” Compl. ¶ 8. On January 17, 2020, “M.I.A. Company, Inc. f/k/a Merrimon Insurance Agency, Inc.” and “Southeastern Agency Group, Inc.” filed separate Answers to the Complaint. See Dkt. Nos. 34-36. In its Answer, “M.I.A. Company, Inc. f/k/a Merrimon Insurance Agency, Inc.” states in pertinent part: “Paragraph 8 is denied as stated. MIA admits only that it was a North Carolina Corporation that was dissolved in 2003. Further answering, MIA specifically denies that it, at any time, has maintained its status as Southeastern Agency Group, Inc.” Dkt. No. 34 ¶ 4. In its Answer (Dkt. No. 35) and Amended Answer (Dkt. No. 36), “Southeastern Agency Group, Inc.” states in pertinent part: “Southeastern denies the allegations contained in Paragraph Eight (8) of the Complaint.” Dkt. No. 35 ¶ 5; Dkt. No. 36 ¶ 5. Regardless of whether the “MERRIMON INSURANCE AGENCY INC.” referenced in paragraph 8 of the Complaint is in fact two separate entities, the outcome is the same—the entity or entities referred to herein and in the Complaint as “Merrimon” must realigned as plaintiffs or, alternatively, their citizenship must be disregarded for diversity jurisdiction purposes.

and Merrimon's citizenship under the doctrine of fraudulent joinder, or realign them as party-plaintiffs. Starr Davis refers to and incorporates those filings herein. Upon the dismissal or realignment of Claimants and Merrimon as party-plaintiffs, complete diversity of citizenship exists between the parties.

Second, with respect to Starr Davis's argument that only two of the defendants consented to the removal, Opp. at 5, Travelers was not required to obtain the consent of the other parties named as defendants. 28 U.S.C. § 1446(b)(2)(A) provides that "all defendants who have been properly joined and served must join in or consent to the removal of the action." For the reasons explained in Travelers' notice of removal and its opposition to the motion to remand, Defendant Hartford Accident and Indemnity Company and Defendant Twin City Fire Insurance Company are not proper parties because they have informed counsel for Travelers that they have settled in principle with Starr Davis, a fact Starr Davis does not dispute, and thus they must be dismissed from this case given the lack of any case or controversy. As for Claimants and Merrimon, their consent was also unnecessary because they were fraudulently joined and/or should be realigned as plaintiffs. *See, e.g., Gressette v. Sunset Grille, Inc.*, 447 F. Supp. 2d 533, 537 n. 6 (D.S.C. 2006) ("[B]ecause the court has realigned Defendant Sunset as a Plaintiff for purposes of diversity jurisdiction, Sunset's lack of consent for removal is of no moment." (citing *Ohio Cas. Ins. Co. v. RLI Ins. Co.*, 2005 WL 2574150, *4 (M.D.N.C. Oct. 12, 2005) ("If a defendant is disregarded or is realigned for jurisdictional purposes, that defendant need not consent to removal, and the Court will evaluate jurisdiction based on the positions of the parties after the realignment.")); *Lott v. Scottsdale Ins. Co.*, 811 F. Supp. 2d 1220, 1223 (E.D. Va. 2011) ("The first question presented—whether post-removal party realignment to create diversity is

permissible—is easily answered in the affirmative based on settled authority in this circuit and elsewhere.” (collecting cases)).

Third, Starr Davis incorrectly argues that “[t]here are defendants from South Carolina in the lawsuit [*i.e.*, certain Claimants], so removal to the District Court of South Carolina is not permissible” under 28 U.S.C. § 1441(b)(2). Opp. at 5. This argument fails for the reasons outlined above—Claimants should be dismissed under the doctrine of fraudulent joinder and/or realigned as plaintiffs, at which point none of the defendants will be citizens of South Carolina.

B. Travelers Properly Argued in the Alternative That Claimants and Merrimon Were Fraudulently Joined and/or That They Should be Realigned as Plaintiffs

Starr Davis contends that “[t]he reason for realignment, where appropriate, is to address situations where a party is alleged to have ‘fraudulently manufacture[d] diversity jurisdiction.’” Opp. at 5 (quoting *Jackson v. Home Depot U.S.A, Inc.*, 880 F.3d 165, 172-173 (4th Cir. 2018)). According to Starr Davis, “Travelers filed this motion as an alternative to its Notice of Removal and accompanying arguments that certain defendants were improperly joined,” and, “[i]n doing so, Travelers specifically noted that the Court should realign only if it finds the defendants were not fraudulently joined.” *Id.* at 6 (emphasis and footnote omitted). Thus, Starr Davis argues, “for this Court to consider Travelers’ Motion to Realign, it must necessarily have concluded already that the parties were, in fact, properly joined as defendants,” such that the Court “need not address the question of alignment at all.” *Id.* This circular argument is completely without merit.

Starr Davis appears to conflate the fraudulent joinder doctrine with the realignment of parties under the principal purpose test. These are two distinct legal theories. Travelers properly argued them in the alternative, and the Court can of course consider them both. Indeed, they are typically argued in the alternative, and courts in the Fourth Circuit and elsewhere often realign

parties in lieu of finding that they had been fraudulently joined. *See, e.g., Grand China Buffet & Grill, Inc. v. State Auto Prop & Cas. Co.*, No. 1:16CV159, 2016 WL 6078343, at *3 (N.D. W. Va. Oct. 17, 2016) (“[T]here is no fraudulent joinder in this case. Nevertheless, the Court concludes that Ullom should be realigned as a plaintiff, and that abstention is not warranted under the facts of this case.”).

The fraudulent joinder doctrine permits the exercise of jurisdiction where the citizenship of the parties dictates otherwise. *See Mayes v. Rapoport*, 198 F.3d 457, 464 (4th Cir. 1999). The doctrine “effectively permits a district court to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and thereby retain jurisdiction.” *Johnson v. Am. Towers, LLC*, 781 F.3d 693, 704 (4th Cir. 2015) (quoting *Mayes*, 198 F.3d at 461). The party alleging fraudulent joinder “must show that the plaintiff cannot establish a claim even after resolving all issues of law and fact in the plaintiff’s favor.” *Id.* (quoting *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 424 (4th Cir. 1999)). The removing party must show either “outright fraud in the plaintiff’s pleading of jurisdictional facts or that there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court.” *Id.* (citing *Hartley*, 187 F.3d at 424) (emphasis in original) (internal quotation marks omitted). When reviewing an assertion of fraudulent joinder, “the court is not bound by the allegations of the pleadings, but may instead ‘consider the entire record, and determine the basis of joinder by any means available.’” *AIDS Counseling & Testing Ctrs. v. Group W Telev., Inc.*, 903 F.2d 1000, 1004 (4th Cir. 1990) (quotation omitted).

In its notice of removal, Travelers did not argue that there is “outright fraud” in the pleadings, but rather that there is “no possibility” that Starr Davis is able to establish a viable

cause of action against Claimants and Merrimon. Travelers also argued in the alternative that, even if a cognizable cause of action has been properly stated against Claimants and Merrimon (and thus they cannot be disregarded for diversity purposes under the fraudulent joinder doctrine), they should be realigned as plaintiffs because their principal interests in this lawsuit are aligned with those of Starr Davis and adverse to those of the Defendant-Insurers. These alternative arguments are entirely appropriate.

C. The Parties are Not Properly Aligned Around the Principal Purpose of This Case, Which is to Establish Insurance Coverage

With regard to the realignment of parties in a diversity action, the United States Supreme Court has stated:

To sustain diversity jurisdiction there must exist an actual, substantial controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to look beyond the pleadings and arrange the parties according to their sides in the dispute. . . . Whether the necessary collision of interest exists, is therefore not to be determined by mechanical rules. It must be ascertained from the principal purpose of the suit and the primary and controlling matter in dispute.

Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69 (1941) (emphasis added) (citations and internal quotation marks omitted).

The Fourth Circuit has adopted the "principal purpose test" for evaluating how parties should be aligned. "Application of the principal purpose test entails two steps. First, the court must determine the primary issue in the controversy. Next, the court should align the parties according to their positions with respect to the primary issue." *U.S. Fid. & Guar. Co. v. A & S Mfg. Co.*, 48 F.3d 131, 133 (4th Cir. 1995). "If the alignment differs from that in the complaint, the court must determine whether complete diversity continues to exist." *Id.* Here, the analysis

is straightforward: (1) the primary issue in the case is whether the Defendant-Insurers' policies provide coverage for any judgment that the Claimants may recover against Starr Davis for asbestos personal injuries; and, in that regard, (2) Claimants' and Merrimon's interests are more closely aligned with Starr Davis' interests than they are with the interests of the Defendant-Insurers.

In its opposition brief, Starr Davis argues that "[t]he principal purpose of this case is to determine who has responsibility for the liabilities of Starr Davis," and then gratuitously adds "including payment of the Receiver." Opp. at 6. Starr Davis says that "[a]s part of that process, the Receiver seeks a number of declarations as to the terms, including applicable limits, of insurance available to cover the liabilities of Starr Davis." *Id.* at 6-7. Starr Davis fails to make any effort to establish that the *principal purpose* of this litigation is anything other than to establish the availability and amount of potential insurance coverage under the insurance policies the Defendant-Insurers allegedly issued to Starr Davis. The interests of Starr Davis and the Claimants are plainly aligned in that regard, as they all wish to establish as much coverage as possible under the policies and to satisfy any potential judgments in the underlying cases. As for Merrimon, Starr Davis not only fails to state a cognizable claim against Merrimon, but also any dispute between it and Starr Davis is at best secondary to the primary issue of whether the Defendant-Insurers have a duty to defend or indemnify Starr Davis against the Claimants' claims against Starr Davis in the underlying asbestos cases. Moreover, any liability of Merrimon is merely hypothetical until the Defendant-Insurers' liability, if any, is determined.

1. Claimants Should be Realigned as Plaintiffs

Starr Davis, as the alleged insured in the underlying cases, has virtually the same interest as Claimants, because a finding in favor of the Defendant-Insurers would mean that they have no

duty to defend or indemnify Starr Davis in the underlying actions, including no duty to pay Claimants. Under circumstances substantially similar to those at issue here, courts in this District and elsewhere have held that individual asbestos claimants should be realigned as plaintiffs with the insured.

In particular, in *Covil Corp. by Protopapas v. Zurich Am. Ins. Co.*, No. 7:18-3291-BHH, 2019 WL 2482382, at *3-4 (D.S.C. June 14, 2019), a recent decision in this District, the court held that “the scope of the primary issue in this declaratory judgment action is narrow, and [] the parties are rightly aligned by their respective positions on whether they desire insurance coverage to apply *vel non* to any judgments resulting from the underlying asbestos actions.” *Covil*, 2019 WL 2482382, at *4. The court noted that “whatever clash of interests exists between Covil and the Individual Defendants within the instant declaratory judgment action[] is ancillary to the primary issue in the case, which is whether insurance coverage exists to satisfy any judgments the Individual Defendants may obtain against Covil in the underlying asbestos actions.” *Id.* (emphasis omitted). So too here—whatever clash of interests may exist between Starr Davis and Claimants in the instant declaratory judgment action is ancillary to the primary issue of whether insurance coverage exists to satisfy any judgment Claimants may obtain against Starr Davis in the underlying asbestos actions.³

³ That Starr Davis and Claimants are adverse in the underlying asbestos actions is “immaterial” in this action. *See id.* (citing *Marsh v. Cincinnati Ins. Co.*, 2008 WL 4614289, *2 (Oct. 15, 2008) (granting insurers motion to realign injured tort claimants from defendants to plaintiffs in coverage action filed by purported insured against insurer; stating, “The relevant inquiry is to determine the parties' positions with respect to the primary issue *in this case*, not whether the parties are adversaries in another pending before another court.” (emphasis in original)); *see also Vestavia Hills*, 676 F.3d at 1314 (“Where the parties' interests are the same” in a particular action “those parties must be aligned together..., even where the parties' interests were in opposition outside of the issues raised in the subject action.” (citing *Weller v. Navigator Marine, Inc.*, 737 F.2d 1547, 1548 (11th Cir. 1984))).

Here, as in *Covil*, the primary issue in dispute plainly centers on the Defendant-Insurers' insurance policies, and Starr Davis and Claimants are aligned in that regard—they all want coverage to exist under the policies for the claims brought by Claimants against Starr Davis for asbestos personal injuries. Claimants should thus be realigned as plaintiffs. *See Covil*, 2019 WL 2482382, at *4; *see also, e.g., Beaufort Rentals LLC v. Westchester Fire Ins. Co.*, No. 9:18-CV-02658-DCN, 2018 WL 6248770, at *2 (D.S.C. Nov. 29, 2018) (realigning a defendant as a plaintiff in a declaratory judgment action related to a duty to defend and noting that “[i]n a declaratory judgment action involving an insurance company’s duty to defend, the parties’ interests are aligned based on whether they believe the insurance company has a duty to defend.”); *Nationwide Mut. Ins. Co. v. 1400 Hampton Blvd., LLC*, No. 2:10cv310, 2010 WL 5476748, at *2 (E.D. Va. Dec. 2, 2010) (“In a declaratory relief action requesting judicial determination of an insurer’s duties under an insurance contract ... the primary issue presented in the pleadings is the dispute over an insurer’s duty to defend and indemnify.” (citations omitted)); *Crout v. United Financial Cas. Co.*, 2010 WL 2998500 (D.S.C. July 28, 2010) (realigning insured from defendant to plaintiff in coverage action filed by injured party against insured and insurer); *Marsh v. Cincinnati Ins. Co.*, 2008 WL 4614289 (Oct. 15, 2008) (realigning injured tort claimant from defendant to plaintiff in coverage action filed by purported insureds against their insurer); *Vestavia Hills*, 676 F.3d at 1314 (“[T]he normal alignment of parties in a suit seeking a declaratory judgment of non-coverage is Insurer versus Insured and Injured Party.”).

In ascertaining the principal purpose of a case and aligning parties according to their positions with respect to the primary issue, the mere existence of antagonism on some ancillary issues is insignificant. Diversity is determined based on “the principal purpose of the suit and the primary and controlling matter in dispute.” *City of Indianapolis*, 314 U.S. at 69. Courts do

not allow “window-dressing” or “illusive artifices” to avoid or create diversity jurisdiction. *Id.* at 72, 76. Indeed, aligned parties do not have to be on the same side on every issue. In *U.S. Fidelity and Guaranty Co.*, the Fourth Circuit recognized that the insurers had “potentially substantial” disputes among themselves, but those disputes were not the principal controversy. 48 F.3d 131, 134. The court held that those “ancillary” disputes were “subsumed in the primary issue of the insurers’ liability” and, as to the primary issue, the insurers shared the primary goal of avoiding obligations to the insured. *Id.* Similarly, in *Covil*, this court (Hendricks, J.) held that “whatever clash of interests exists between Covil and the Individual Defendants within the instant declaratory judgment action[] is ancillary to the primary issue in the case, which is whether insurance coverage exists to satisfy any judgments the Individual Defendants may obtain against Covil in the underlying asbestos actions.” *Covil*, 2019 WL 2482382, at *4 (emphasis omitted).

Starr Davis argues that it sued Claimants “because the Receiver seeks to receive payment from [them] for his services,” and because Claimants “will seek to recover the maximum amount of damages possible, in spite of any potentially applicable insurance limits.” Opp. at 7. Starr Davis also makes the cryptic, confusing suggestion that Claimants “will not willingly be governed by Starr Davis’ insurance,” which supposedly makes Claimants “adverse to Starr Davis.” *Id.* But these arguments do not affect the outcome of the principal purpose test here.

Starr Davis’s first cause of action seeks a judicial declaration that Claimants and the Defendant-Insurers “must fairly compensate the Receiver,” or, “[i]f that is not possible, [a declaration as to] which Defendants are responsible for compensating the Receiver for the substantial time, effort, and expenses the Receiver put towards his responsibilities as Receiver of Starr Davis.” Compl. ¶¶ 36-37. Starr Davis does not allege any specific facts regarding what the

Receiver has done to warrant compensation from Claimants at this time, let alone how or why Claimants are obligated to compensate the Receiver for such unspecified conduct and why such compensation is imminently needed. Starr Davis alleges simply that the Receiver “dedicated a substantial amount of time and incurred substantial expenses in his role as Receiver for Starr Davis,” and that the “Defendant Asbestos Claimants and Defendant Insurers had claims processed and suits defended that otherwise would not have been processed or defended, but for the diligent work of Plaintiff as Receiver.” *Id.* ¶¶ 32, 34. These threadbare allegations are insufficient to create a justiciable controversy between the non-party Receiver, on the one hand, and Claimants, on the other.

Indeed, the Fourth Circuit has made clear that “although declaratory judgments are frequently sought in advance of the full harm expected, they must still present a justiciable controversy rather than abstract, hypothetical or contingent questions.” *Miller v. Augusta Mut. Ins. Co.*, 157 Fed. Appx. 632 (4th Cir. 2005) (citation and internal quotation marks omitted)). The Article III case-or-controversy requirement is satisfied when “the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interest, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (citation omitted). The controversy must be “definite and concrete, touching the legal relations of parties having adverse legal interests.” *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937); *see also Johnson v. Cty. of Horry*, No. 4:09-cv-01758-JMC, 2012 U.S. Dist. LEXIS 110877, at *6 (D.S.C. Aug. 8, 2012) (citation omitted). A justiciable controversy is distinguishable from “a difference or dispute of a hypothetical or abstract character” or from a dispute that is “academic or moot.” *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937). In this

context, an actual controversy requires a concrete dispute between parties with adverse legal interests, and the plaintiff must seek “specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” *Id.* at 241.

The purported dispute over the Receiver’s compensation is nothing more than “window-dressing” or an “illusory artifice.” It is far from a real and concrete justiciable controversy between parties with adverse legal interests. The real, primary, and controlling matter in dispute is the existence and amount of available coverage under the Defendant-Insurers’ insurance policies. With respect to this primary and controlling matter, Starr Davis and Claimants are perfectly aligned, as they all want there to be as much coverage as possible.

2. Merrimon Should Be Realigned as a Plaintiff

In its opposition brief, Starr Davis asserts that, “The Receiver seeks a number of declarations as to the terms, including applicable limits, of insurance available to cover the liabilities of Starr Davis. As such, Defendant Merrimon is essential to the resolution of the principal purpose of this case.” *Opp.* at 6-7. Starr Davis argues that “[i]f the facts ultimately show that the Defendant Insurers did not provide coverage to Starr Davis during 1972-1973, as Travelers has alleged, then Merrimon would be liable for that time period due to its failure to procure the coverage requested by Starr Davis.” *Id.* at 7. Starr Davis says that “[b]ecause Merrimon will undoubtedly oppose being ordered to pay for a failure to procure responsive insurance, Merrimon is clearly adverse to Starr Davis and the Receiver on this issue.” *Id.* These allegations, even if they have any factual or legal basis, which they do not for the reasons stated above, do not alter the principal purpose analysis.

“Litigation is the pursuit of practical ends, not a game of chess.” *City of Indianapolis*, 314 U.S. at 69. Therefore, diversity jurisdiction is based on “the principal purpose of the suit and the primary and controlling matter in dispute.” *Id.* at 69-70 (citations omitted). “These familiar doctrines govern the alignment of parties for purposes of determining diversity of citizenship” *Id.* Thus, the Court looks to the primary and controlling matter in dispute, and the Court does not allow “window-dressing” or “illusive artifices” to avoid or create diversity jurisdiction. *Id.* at 72, 76. For these reasons, the Fourth Circuit has made clear that a court aligning the parties must first identify the primary issue in the case and align the parties based on their respective positions on that issue. *See U.S. Fid. & Guar. Co.*, 48 F.3d at 133.

As explained above, the principal purpose of this action is to establish that the Defendant-Insurers’ policies provide coverage for any judgment that the Claimants may recover against Starr Davis for asbestos personal injuries. In declaratory judgment actions such as this, involving disputes over coverage under an insurance policy, a party’s alignment of interest relates to the interest in how the coverage determination is resolved. The dispute, if any, between Starr Davis and Merrimon is at best secondary and ancillary to the primary issue of coverage. Merrimon was Starr Davis’s broker, not an insurer or an agent of the Defendant-Insurers. Compl. ¶ 21 (“Merrimon [] served as the insurance broker to Starr Davis from at least 1964 through 1986”). Merrimon is not a party to the subject insurance policy contracts and it has no potential duties under those contracts. With respect to the primary issue here—the scope of insurance coverage—Starr Davis’s interests and Merrimon’s interests are perfectly aligned and adverse to those of the Defendant-Insurers. Indeed, Merrimon will surely argue that the single missing insurance policy, amongst many years of confirmed other policies, exists, not that it failed to procure that one policy. In other words, Merrimon will stand shoulder-to-shoulder with

Starr Davis in effort to establish full coverage. It is likely for this reason that Merrimon has not opposed realignment.

Regardless, aligned parties do not have to be on the same side on every issue. In fact, in *U.S. Fidelity and Guar. Co.*, the Fourth Circuit recognized that the insurers had “potentially substantial” disputes among themselves, but those disputes were not the principal controversy. 48 F.3d 131, 134. The court held that those “ancillary” disputes were “subsumed in the primary issue of the insurers’ liability” and, as to the primary issue, the insurers shared the primary goal of avoiding obligations to the insured. *Id.* Similarly, in *Covil*, this court (Hendricks, J.) held that “whatever clash of interests exists between Covil and the Individual Defendants within the instant declaratory judgment action[] is ancillary to the primary issue in the case, which is whether insurance coverage exists to satisfy any judgments the Individual Defendants may obtain against Covil in the underlying asbestos actions.” *Covil*, 2019 WL 2482382, at *4 (emphasis omitted).

Here, Starr Davis and Merrimon share the primary goal of establishing coverage, and they are aligned on that primary issue. Starr Davis’s side-show allegations against Merrimon cannot override this primary purpose. They are ancillary to the case and to its primary purpose, which is to establish coverage in which Starr Davis’s interests are aligned Claimants and Merrimon. *See USF&G v. Thomas Solvent Co.*, 955 F.2d 1085, 1089 (6th Cir. 1992) (courts ignore “actual and substantial ancillary or secondary issues” in determining proper alignment).

III. CONCLUSION

Accordingly, for the foregoing reasons, Travelers respectfully requests that the Court enter an Order realigning Claimants and Merrimon as plaintiffs in the event the Court finds they were not fraudulently joined.

Respectfully,

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January 17, 2020
Columbia, South Carolina

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

STARR DAVIS COMPANY, INC. and STARR
DAVIS COMPANY OF S.C., INC, through its
Receiver, Peter D. Protopapas,

Plaintiffs,

v.

HARTFORD ACCIDENT AND
INDEMNITY COMPANY; TWIN CITY
FIRE INSURANCE COMPANY;
TRAVELERS CASUALTY AND SURETY
COMPANY f/k/a THE AETNA CASUALTY
AND SURETY COMPANY; THE
STANDARD FIRE INSURANCE
COMPANY; SOUTHEASTERN AGENCY
GROUP and M.I.A. COMPANY, INC.
individually and as successors to or f/k/a
MERRIMON INSURANCE AGENCY,
INC.; ROBERT E. ASPRAY; NELL
ASHWORTH, individually and as personal
representative of the Estate of ROBERT J.
ASHWORTH; BETTY C. D'AMICO,
individually and as Executor of the Estate of
JULIAN D'AMICO, JR.; KAYLA KEITH,
individually and as the personal representative
of the Estate of JERRY W. ARCHER, SR.;
RICHARD L. KNIGHT II, as personal
representative of the Estate of TEDDY L.
KNIGHT, SR., and LINDA KNIGHT,
individually; DAVID D. ROLLINS; JAMES
W. SMITH and FRANCES R. SMITH; and
LINDA J. WHITE, individually and as
Personal Representative of the Estate of
LUBERT F. WHITE, JR.,

Defendants.

Civil Action No.: 3:19-cv-03481-JFA

**REPLY IN SUPPORT OF
MOTION TO DISMISS**

Defendants Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company and The Standard Fire Insurance Company (together, “Travelers”) submit this reply in support of Travelers’ motion to dismiss Count I and portions of Count II as against Travelers pursuant to Rules 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure.

I. PRELIMINARY STATEMENT

In its partial motion to dismiss, Travelers demonstrated that Plaintiffs Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. (together, “Starr Davis”) have failed to state a legitimate claim for declaratory relief against Travelers concerning (i) compensation that may be owed to Starr Davis’s Receiver, Peter D. Protopapas (Count I), or (ii) the Receiver’s alleged right to obtain copies of certain insurance policies (the pertinent relief requested in Count II). Starr Davis is not entitled to declaratory relief sought by the Receiver, a non-party to this action, because even construing the allegations in the light most favorable to Starr Davis, the Complaint fails to state a cognizable claim for declaratory relief under Rule 12(b)(6) and does not present a justiciable controversy under Rule 12(b)(1). The alleged controversy is nonexistent or, at best, not of “sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007).

Starr Davis’s opposition brief does little more than recycle the same baseless arguments made in its motion to remand and its opposition to Travelers’ motion to realign. Specifically, Starr Davis argues that the Court should deny Travelers’ motion to dismiss because (1) the motion is “moot” because removal was not proper, (2) Starr Davis is entitled to a declaratory judgment that Travelers must “pay the Receiver’s fees” in Count I, and (3) Count II states a cognizable claim and presents an actual, justiciable controversy. *See* Dkt. No. 30, Response to

Motion to Dismiss and Memorandum in Support (hereafter, “Opp.”), at 2. Each of Starr Davis’s arguments is without merit.

First, for the reasons explained in Travelers’ notice of removal (Dkt. No. 1), its opposition to Starr Davis’s motion to remand (Dkt. No. 37), and its reply to Starr Davis’ opposition to Travelers’ motion to realign (Dkt. No. 38), removal was procedurally proper. The Court can and should disregard Claimants’¹ and Merrimon’s² citizenship under the doctrine of fraudulent joinder or, alternatively, realign them as plaintiffs. Upon the dismissal or realignment of Claimants and Merrimon, complete diversity of citizenship exists, and this Court possesses jurisdiction over this matter. Starr Davis’s argument that “[t]here are defendants from South Carolina in the lawsuit [*i.e.*, certain Claimants], so removal to the District Court of South Carolina is not permissible” under 28 U.S.C. § 1441(b)(2), Opp. at 4, fails for the same reason—

¹ Claimants are Defendants Robert E. Aspray, Nell Ashworth (individually and as personal representative of the Estate of Robert J. Ashworth), Betty C. D’Amico (individually and as Executor of the Estate of Julian D’Amico, Jr.), Kayla Keith (individually and as the personal representative of the Estate of Jerry W. Archer, Sr.), Richard L. Knight II (as personal representative of the Estate of Teddy L Knight, Sr., and Linda Knight, individually), David D. Rollins, James W. Smith, Frances R. Smith, and Linda J. White (individually and as personal representative of the Estate of Lubert F. White, Jr.). See Dkt. No. 1-1, Summons and Complaint (hereafter, “Compl.”), at ¶¶ 9-16.

² In its Complaint, Starr Davis alleges that “Defendant MERRIMON INSURANCE AGENCY INC. is upon information and belief a North Carolina corporation that has either maintained its status as a North Carolina company as MIA COMPANY, INC. and/or as SOUTHEASTERN AGENCY GROUP, INC. (hereinafter collectively referred to as Merrimon Insurance).” Compl. ¶ 8. On January 17, 2020, “M.I.A. Company, Inc. f/k/a Merrimon Insurance Agency, Inc.” and “Southeastern Agency Group, Inc.” filed separate Answers to the Complaint. See Dkt. Nos. 34-36. In its Answer, “M.I.A. Company, Inc. f/k/a Merrimon Insurance Agency, Inc.” states in pertinent part: “Paragraph 8 is denied as stated. MIA admits only that it was a North Carolina Corporation that was dissolved in 2003. Further answering, MIA specifically denies that it, at any time, has maintained its status as Southeastern Agency Group, Inc.” Dkt. No. 34 ¶ 4. In its Answer (Dkt. No. 35) and Amended Answer (Dkt. No. 36), “Southeastern Agency Group, Inc.” states in pertinent part: “Southeastern denies the allegations contained in Paragraph Eight (8) of the Complaint.” Dkt. No. 35 ¶ 5; Dkt. No. 36 ¶ 5. Regardless of whether the “MERRIMON INSURANCE AGENCY INC.” referenced in paragraph 8 of the Complaint is in fact two separate entities, the outcome is the same—the entity or entities referred to herein and in the Complaint as “Merrimon” must realigned as plaintiffs or, alternatively, their citizenship must be disregarded for diversity jurisdiction purposes.

Claimants should be dismissed or disregarded under the doctrine of fraudulent joinder and/or realigned as plaintiffs, at which point none of the defendants will be citizens of South Carolina. Further, contrary to Starr Davis's argument that Travelers was required to but "did not obtain the consent of the other defendants to this suit," Opp. at 4, Travelers was not actually required to obtain their consent because they were and are improperly joined as defendants.

Second, with respect to Starr Davis's argument that it "properly brought a cause of action for payment of the Receiver's fees" in Count I, Opp. at 2, Starr Davis is simply wrong. The Receiver, Peter D. Protopapas, is not a party-plaintiff and, as such, he is not entitled to any relief of any kind. But assuming *arguendo* that this fact were not fatal to Count I (which it is), Count I should nonetheless be dismissed as against Travelers for failure to state a cognizable claim for declaratory relief, and because there is no actual justiciable controversy regarding the Receiver's compensation.

Third, in Count II, Starr Davis fails to state a cognizable claim for a declaration that the Receiver is "entitled to copies of all Defendant Insurance policies," Compl. ¶ 42, and there is no justiciable controversy regarding the declaratory relief sought. Again, the Receiver is not a party-plaintiff, but, even if he was, there is no legitimate, justiciable case or controversy regarding the provision of insurance policies to the Receiver.

II. ARGUMENT

A. Removal Was Not Statutorily Defective

In its opposition brief, Starr Davis initially argues that "removal itself was defective because (1) complete diversity does not exist, (2) only two of the defendants consented, and (3) even if complete diversity did exist, removal cannot occur because there are South Carolina

defendants in this case.” Opp. at 3.³ Removal was procedurally proper, however, and thus this matter should not be remanded to state court.

First, with respect to Starr Davis’s argument that complete diversity is lacking, Opp. at 3, Starr Davis relies solely on the current alignment of the parties. For the reasons explained in Travelers’ notice of removal (Dkt. No. 1), its motion to realign (Dkt. No. 3), its opposition to Starr Davis’s motion to remand (Dkt. No. 37), and its reply to Starr Davis’ opposition to the motion to realign (Dkt. No. 38), the Court can and should disregard Claimants’ and Merrimon’s citizenship under the doctrine of fraudulent joinder, or realign them as party-plaintiffs. Travelers refers to and incorporates those filings herein. Upon the dismissal or proper realignment of Claimants and Merrimon, complete diversity of citizenship exists between the parties.

Second, with respect to Starr Davis’s argument that only two of the defendants consented to removal, Opp. at 4, Travelers was not required to obtain the consent of the other parties named as defendants. 28 U.S.C. § 1446(b)(2)(A) provides that “all defendants who have been properly joined and served must join in or consent to the removal of the action.” As explained in Travelers’ prior briefing, the other defendant-insurers, namely, Hartford Accident and Indemnity Company and Twin City Fire Insurance Company, are not proper parties because they have informed counsel for Travelers that they have settled in principle with Starr Davis, a fact Starr Davis does not dispute, and thus they must be dismissed from this case given the lack of any case or controversy. As for Claimants and Merrimon, their consent was also unnecessary because they were fraudulently joined and/or should be realigned as plaintiffs. *See, e.g., Gressette v. Sunset Grille, Inc.*, 447 F. Supp. 2d 533, 537 n. 6 (D.S.C. 2006) (“[B]ecause the court has realigned Defendant Sunset as a Plaintiff for purposes of diversity jurisdiction, Sunset’s lack of

³ This is substantially the same argument Starr Davis made in its motion to remand and its opposition to Travelers’ motion to realign.

consent for removal is of no moment.” (citing *Ohio Cas. Ins. Co. v. RLI Ins. Co.*, 2005 WL 2574150, *4 (M.D.N.C. Oct. 12, 2005) (“If a defendant is disregarded or is realigned for jurisdictional purposes, that defendant need not consent to removal, and the Court will evaluate jurisdiction based on the positions of the parties after the realignment.”)); *Lott v. Scottsdale Ins. Co.*, 811 F. Supp. 2d 1220, 1223 (E.D. Va. 2011) (“The first question presented—whether post-removal party realignment to create diversity is permissible—is easily answered in the affirmative based on settled authority in this circuit and elsewhere.” (collecting cases))).

Third, Starr Davis incorrectly argues that “[t]here are defendants from South Carolina in the lawsuit [*i.e.*, certain Claimants], so removal to the District Court of South Carolina is not permissible” under 28 U.S.C. § 1441(b)(2). Opp. at 4. This argument fails for the reasons outlined above—Claimants’ citizenship should be disregarded under the doctrine of fraudulent joinder and/or they should be realigned as plaintiffs, at which point none of the defendants will be citizens of South Carolina.

In short, removal was procedurally proper, and complete diversity jurisdiction exists once the Court disregards the citizenship of Claimants and Merrimon under the fraudulent joinder doctrine and/or realigns them as plaintiffs. The Court should, therefore, address Travelers’ motion to dismiss on the merits.

B. Count I Must be Dismissed for Failure to State a Cognizable Claim for Declaratory Relief and Because There is No Justiciable Controversy Regarding Compensation Allegedly Due to the Receiver

1. The Receiver is Not a Party and is Therefore Not Entitled to Any Relief

Starr Davis’s first cause of action seeks a judicial declaration that “each Defendant Asbestos Claimant and Defendant Insurer must fairly compensate the Receiver,” or, “[i]f that is not possible, [a declaration as to] which Defendants are responsible for compensating the

Receiver for the substantial time, effort, and expenses the Receiver put towards his responsibilities as Receiver of Starr Davis.” Compl. ¶¶ 36-37. The “Receiver” referenced in the Complaint is Peter D. Protopapas, who is not a party to this action. Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. are the only two party-plaintiffs. The caption of Starr Davis’s Complaint and the CM/ECF docket confirm this fact. As a non-party, the Receiver is not entitled to any relief, declaratory or otherwise. *See, e.g., McKenzie v. Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) (a court lacks jurisdiction to grant relief to non-parties); *Goldstein v. Home Depot U.S.A., Inc.*, 609 F. Supp. 2d 1340, 1349 (N.D. Ga. 2009) (“Injunctions may not be issued to provide relief for non-parties.” (citation omitted)); *Talbert v. Smith*, No. 7:05CV736, 2007 WL 773910, at *1 (W.D. Va. Mar. 9, 2007) (“It is well settled that except in limited circumstances, which are not alleged here, a court may not order injunctive relief against non-parties.”); 11A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2956 (3d ed. 1998) (“A court ordinarily does not have power to issue an order against a person who is not a party and over whom it has not acquired in personam jurisdiction.”) (footnote omitted)).

In its opposition brief, Starr Davis argues that “[t]he Receiver, appointed by Chief Justice Toal [ret.], named himself as a plaintiff in the complaint, and seeks compensation for his efforts in processing and defending suits.” Opp. at 6 (footnotes omitted). To support this proposition, Starr Davis cites to paragraph 1 of the Complaint, which states in full:

Peter D. Protopapas was appointed Receiver of STARR DAVIS COMPANY, INC and STARR DAVIS COMPANY OF S.C., INC. (collectively hereinafter “Starr Davis”) on February 21, 2019, by Order of the Honorable Jean H. Toal of the Fifth Judicial Circuit Court, in the case of *Charles T. Hopper and Rebecca Hopper v. Air & Liquid Systems Corporation, et al.*, case number 2019-CP-4000076. See Exhibit A. Plaintiff’s primary place of business is Richland County South Carolina.

Compl. ¶ 1. These allegations do not make the Receiver a party. As the Complaint’s

caption reflects, the named Plaintiffs are “STARR DAVIS COMPANY, INC. and STARR DAVIS COMPANY OF S.C., INC. through its [sic] Receiver, Peter D. Protopapas.” Compl. at 1. While the Receiver no doubt caused Starr Davis to file the Complaint, the Complaint does not allege that the Receiver brought this suit in his individual capacity or that the Receiver himself has suffered any cognizable injury-in-fact. The non-party Receiver has no individual right in this case to relief—declaratory or otherwise—from Travelers or any of the other parties named as defendants. This deficiency alone warrants dismissal of Count I.

2. *Count I Fails to State a Cognizable Claim for Declaratory Relief and There is No Justiciable Controversy Regarding the Receiver’s Compensation*

Setting aside the fact that the Receiver is not a party-plaintiff, which should be dispositive, Starr Davis does not allege any specific facts regarding what the Receiver has done to warrant compensation from Travelers at this time, let alone how or why Travelers is supposedly obligated to compensate the Receiver for such unspecified conduct or why such compensation is imminently needed. Starr Davis simply alleges that the Receiver “dedicated a substantial amount of time and incurred substantial expenses in his role as Receiver for Starr Davis,” and that the “Defendant Asbestos Claimants and Defendant Insurers had claims processed and suits defended that otherwise would not have been processed or defended, but for the diligent work of Plaintiff as Receiver.” Compl. ¶¶ 32, 34. These allegations are insufficient to state a cognizable claim for declaratory relief or to create a justiciable controversy between the Receiver, on the one hand, and Travelers, on the other.

The Fourth Circuit has made clear that “although declaratory judgments are frequently sought in advance of the full harm expected, they must still present a justiciable controversy rather than abstract, hypothetical or contingent questions.” *Miller v. Augusta Mut. Ins. Co.*, 157 Fed. Appx. 632 (4th Cir. 2005) (citation and internal quotation marks omitted)). The federal

Article III case-or-controversy requirement is satisfied when “the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interest, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *MedImmune, Inc.*, 549 U.S. at 127 (citation omitted). The controversy must be “definite and concrete, touching the legal relations of parties having adverse legal interests.” *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937); *see also Johnson v. Cty. of Horry*, No. 4:09-cv-01758-JMC, 2012 U.S. Dist. LEXIS 110877, at *6 (D.S.C. Aug. 8, 2012) (citation omitted). A justiciable controversy is distinguishable from “a difference or dispute of a hypothetical or abstract character” or from a dispute that is “academic or moot.” *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937). In this context, an actual controversy requires a concrete dispute between parties with adverse legal interests, and the plaintiff must seek “specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” *Id.* at 241.

Similarly, under the South Carolina Declaratory Judgements Act, S.C. Code Ann. § 15-53-10, *et seq.*, “the existence of an actual controversy is essential to jurisdiction to render a declaratory judgment.” *Power v. McNair*, 177 S.E.2d 551, 552 (S.C. 1970) (citation and internal quotation marks omitted); *see also City of Columbia v. Sanders*, 97 S.E.2d 210, 213 (S.C. 1957) (“The Uniform Declaratory Judgment[s] Act . . . does not require the Court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when the occasion might arise . . . or license litigants to fish in judicial ponds for legal advice.” (citations and internal quotation marks omitted)). Further, “South Carolina’s declaratory judgment law makes clear that, [t]he court may refuse to render or enter a declaratory judgment or decree when such judgment or decree, if rendered or entered, would not terminate the uncertainty or

controversy giving rise to the proceeding.” *Dombek v. Adler*, No. 2:18-cv-391, 2019 WL 459019, at * 2 (D.S.C. Feb. 5, 2019) (quoting S.C. Code Ann. § 15-53-70) (other citation omitted).

Here, the purported dispute over the Receiver’s compensation is far from a real and concrete justiciable controversy between parties with adverse legal interests. Any supposed controversy is, at best, not of “sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *MedImmune, Inc.*, 549 U.S. at 127. On the limited facts alleged, this Court simply cannot and should not enter a sweeping declaration “that each Defendant Asbestos Claimant and Defendant Insurer must fairly compensate the Receiver.” Compl. ¶ 36. Starr Davis appears to acknowledge as much by seeking the following relief from the Court in the alternative: “If that is not possible [*i.e.*, the declaration requested in ¶ 36], declare which Defendants are responsible for compensating the Receiver for the substantial time, effort, and expenses the Receiver put towards his responsibilities as Receiver of Starr Davis.” Compl. ¶ 37 (emphasis added). This, too, is untenable as a matter of law, because it fails to give rise to a real and immediate controversy justifying such relief. Again, Starr Davis points to no specific rights or obligations that supposedly have been or will be violated as between the non-party Receiver and Travelers, and thus there is not a justiciable controversy at this time.

In its opposition brief, Starr Davis cites a case from 1910 for the proposition that “the court appointing a receiver has the authority to provide for the payment of his expenses, including reasonable attorney’s fees.” Opp. at 5 (quoting *Thames v. Rouse*, 85 S.C. 71, 67 S.E. 139, 140 (1910)). Starr Davis also cites S.C. Code. Ann. § 15-65-100 (“Receivers of the property within this state of foreign or other corporations shall be allowed such commissions as may be fixed by the court appointing them”), and *Ex Parte Simons*, 289 S.C. 1, 344 S.E.2d 151,

152 (1986) (“the fixing of the compensation for a receiver is left to the sound discretion of the trial judge”). Opp. at 5. This authority fails to account for the fact that the Receiver is not a party to this case and that this Court did not appoint him. It also fails to establish the existence of an actual justiciable controversy between the Receiver and Travelers sufficient to warrant the declaratory relief sought. The state court order appointing the Receiver authorized him to “fully administer all assets of Starr Davis, accept service on behalf of Starr Davis, engage counsel on behalf of Starr Davis and take any and all steps necessary to protect the interests of Starr Davis whatever they may be.” Compl. at Ex. A. But the mere existence of the appointment order did not and cannot create a justiciable controversy regarding the Receiver’s compensation.

Starr Davis argues that “[t]o set forth the facts to demonstrate an exact amount owed to the Receiver at this time would be both inappropriate and entirely premature.” Opp. at 6. Starr Davis goes on to argue that a well-pleaded complaint need only allege facts sufficient to state the elements of a claim, and that the Complaint here “sufficiently states the elements of a request for a declaration that the Receiver is owed fees by the Insurers and the Underlying Asbestos Claimants.” *Id.* (citation omitted). Starr Davis’s simplistic argument misses a critical point—while the allegations are indeed deficient under Rule 12(b)(6) for the reasons discussed above and in Travelers’ motion to dismiss,⁴ Starr Davis has failed to satisfy its burden to establish the

⁴ To survive a motion to dismiss under Rule 12(b)(6), the complaint must contain “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Twombly*, 550 U.S. at 556. A plaintiff must show “more than a sheer possibility” that a defendant is liable. *Iqbal*, 556 U.S. at 678. Thus, where a complaint pleads facts that are merely consistent with a defendant’s liability, it fails to sufficiently allege a claim for relief. *See id.* In testing the sufficiency of the complaint, the court need only accept as true the complaint’s well-pleaded factual allegations— “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* The court is also “not bound to accept as true a legal conclusion couched as a factual allegation,” *Twombly*, 550 U.S. at 555, and “unwarranted inferences, unreasonable conclusions, or arguments” may be disregarded. *Giarrantano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008).

existence of an actual justiciable controversy, *i.e.*, subject matter jurisdiction under Rule 12(b)(1). *See Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 95 (1993) (burden of establishing the existence of an actual controversy rests with the party seeking the declaratory judgment). Starr Davis does not make any meaningful effort in its opposition brief to establish an actual justiciable controversy regarding the Receiver's compensation. Nor could it.

Again, an actual justiciable controversy requires a concrete dispute between parties with adverse legal interests, and the plaintiff must seek "specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Haworth*, 300 U.S. at 241; *see also Centennial Life Ins. Co. v. Poston*, 88 F.3d 255, 256 (4th Cir. 1996) ("[A] declaratory judgment action is appropriate 'when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.'" (quoting *Aetna Cas. & Sur. Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937))). Starr Davis cannot satisfy this standard, as there is no concrete dispute between Starr Davis and Travelers (or any of the parties named as Defendants) concerning the Receiver's compensation, *i.e.*, there is no dispute of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment," *MedImmune, Inc.*, 549 U.S. at 127; and, even if there were, Starr Davis does not seek specific relief of a conclusive character that would resolve the dispute. Count I, therefore, must be dismissed in full as against Travelers.

C. The Portion of Count II Regarding the Provision of Insurance Policies to the Non-Party Receiver Must Be Dismissed for Failure to State a Cognizable Claim for Declaratory Relief and Because There is No Justiciable Controversy

For its second cause of action, Starr Davis seeks in part a declaration that the Receiver is "entitled to copies of all Defendant Insurance policies" Compl. ¶ 42. As an initial matter,

this claim has the same party-related defect as Count I. It is premised on the suggestion that the Receiver is entitled to relief. But as discussed above, the Receiver is not a party to this case and thus has no right to declaratory relief.

Further, to the extent Starr Davis is able to bring a standalone claim for declaratory relief regarding the Receiver's alleged right to receive copies of certain insurance policies, the claim must fail unless there is a real, justiciable controversy for the Court to settle. There is no such controversy here.

In its opposition brief, Starr Davis argues that, "contrary to Travelers' assertions [in its motion to dismiss], Plaintiff specifically alleged in its Complaint that it was both entitled to the policies and that the Defendant Insurers, including Travelers, had not provided Plaintiff with complete copies of the Starr Davis policies." Opp. at 8 (citing Compl. ¶ 45). But Travelers correctly noted in its motion that Starr Davis did not allege that it had requested copies of the policies or that Travelers refused to provide them; paragraph 45 of the Complaint simply alleges in pertinent part that "none of the Defendant Insurers have provided Plaintiff with complete copies of Starr Davis' Insurance Policies." Compl. ¶ 45. Starr Davis also argues that "Travelers and Starr Davis have exchanged multiple letters on this issue, and Travelers is well aware of Plaintiff's position of its own failure to produce complete policies." Opp. at 8. The Complaint does not contain such allegations;⁵ but, regardless, Travelers has already provided the Receiver with copies of all of the pertinent insurance policies Travelers has been able to locate to date. To the extent Travelers locates additional policies, it will provide them to the Receiver as well. There is thus no dispute at all, let alone an actual controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

⁵ In testing the sufficiency of a complaint under Rule 12(b)(6), the court need only accept as true the complaint's well-pleaded factual allegations. *See, e.g., Iqbal*, 556 U.S. at 678.

Even if there was a dispute as to whether the Receiver is entitled to copies of the insurance policies Travelers issued to Starr Davis (assuming Starr Davis does not have them already), the declaration sought here would not resolve the manufactured dispute. The dispute, if any, is not that Travelers has refused to provide Starr Davis or the Receiver with insurance policies; it is whether those policies exist and/or can be located. Thus, the declaratory judgment sought will serve no purpose and must be dismissed, because it would be appropriate only when the judgment sought “will serve a useful purpose in clarifying and settling the legal relations in issue, and ... when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding.” *Centennial Life Ins. Co. v. Poston*, 88 F.3d 255, 256 (4th Cir. 1996).

Starr Davis argues that “[w]hether the policies exist is not relevant to the question of whether Plaintiff is entitled to receive those policies in the first instance,” and that “[t]he existence or ability to produce the policies is actually an argument for a later date.” Opp. at 8. To the extent Travelers is able to understand this argument, it appears to undermine, rather than support, Starr Davis’s position that a justiciable controversy exists. Indeed, if Starr Davis’s request for a declaratory judgment is in fact limited to determining “whether Plaintiff is entitled to receive” the insurance policies, then there clearly is no justiciable controversy, as such a declaration would serve no purpose at all given that, as noted above, Travelers has already provided the Receiver with copies of all of the policies Travelers has been able to locate.⁶

⁶ In a footnote, Starr Davis says that “Travelers’ argument here seems to be a veiled attempt to prevent this Court from ultimately learning of the spoliation issues that have plagued it in other, similar matters.” Opp. at 8 n.18. Starr Davis cites to an order from Chief Justice Toal in a separate state court matter in an apparent attempt to suggest that Travelers spoliated evidence. *See id.*; *see also id.* at 8-9. Starr Davis’s argument is a distraction, not anything of substance, and appears to have been made in bad faith. The referenced state court order has nothing to do with the instant case and involves a separate subsidiary, United States Fidelity and Guaranty Company, not Aetna Casualty and Surety Company, the Travelers subsidiary that issued policies to Starr Davis.

In sum, Starr Davis has failed to state a claim for declaratory relief, and the facts alleged do not “show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941) (citation omitted); *Medimmune, Inc.*, 549 U.S. at 126 (“[T]he dispute [must] be ‘definite and concrete, touching the legal relations of parties having adverse legal interests.’”) (quotation omitted). Accordingly, Count II should be dismissed in part for failure to state a claim under Rule 12(b)(6) and/or for lack of subject matter jurisdiction under Rule 12(b)(1).

III. CONCLUSION

For the foregoing reasons, as well as those set forth in its motion to dismiss, Travelers respectfully requests that the Court grant Travelers’ motion to dismiss and enter and order (i) dismissing Count I of the Complaint in full as against Travelers and (ii) dismissing the portion of Count II in which Starr Davis requests a declaration that the Receiver is “entitled to copies of all Defendant Insurance policies” (Compl ¶ 42).

Respectfully,

s/William P. Davis

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Pro Hac Vice Application Forthcoming

January 24, 2020
Columbia, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

STARR DAVIS COMPANY, INC. and
STARR DAVIS COMPANY OF S.C.,
INC., through its Receiver, Peter D.
Protopapas,

Case Number: 2019-CP-40-06243

Plaintiffs,

vs.

**STARR DAVIS' MOTION FOR PARTIAL
SUMMARY JUDGMENT AS TO ITS
DECLARATORY JUDGMENT ACTION
AGAINST TRAVELERS CASUALTY
AND SURETY COMPANY AND
MEMORANDUM IN SUPPORT**

HARTFORD ACCIDENT AND
INDEMNITY COMPANY; TWIN CITY
FIRE INSURANCE COMPANY;
TRAVELERS CASUALTY AND SURETY
COMPANY f/k/a THE AETNA CASUALTY
AND SURETY COMPANY; THE
STANDARD FIRE INSURANCE
COMPANY; SOUTHEASTERN AGENCY
GROUP and M.I.A. COMPANY, INC.,
individually and as successors to or f/k/a
MERRIMON INSURANCE AGENCY,
INC.; ROBERT E. ASPRAY; NELL
ASHWORTH, individually and as personal
representative of the Estate of ROBERT J.
ASHWORTH; BETTY C. D'AMICO,
individually and as the Executor of the
Estate of JULIAN D'AMICO, JR.; KAYLA
KEITH, individually and as the personal
representative of the Estate of JERRY W.
ARCHER, SR.; RICHARD L. KNIGHT II,
as personal representative of the Estate of
TEDDY L. KNIGHT, SR., and LINDA
KNIGHT, individually; DAVID D.
ROLLINS; JAMES W. SMITH and
FRANCES R. SMITH; and LINDA J.
WHITE, individually and as Personal
Representative of the Estate of LIBERT E.
WHITE, JR.,

Defendants.

Starr Davis Company, Inc. and Starr Davis Company Of South Carolina, Inc.

(hereinafter collectively referred to as “Starr Davis”), by and through their duly-appointed Receiver, Peter D. Protopapas (the “Receiver”), move this Court for partial summary judgment as to Starr Davis’ cross-claims for declaratory judgment against Defendant Travelers Casualty and Surety Company, formerly known as The Aetna Casualty and Surety Company and the Standard Fire Insurance Company (collectively referred to herein as “Travelers”). In support of its motion for partial summary judgment (the “Motion”), Starr Davis demonstrates as follows:

NATURE OF THE CASE

Starr Davis began business operations as an insulation contractor in 1949 in South Carolina. Over the course of the next forty years, the company grew to become a major regional insulation contractor – installing, removing and repairing asbestos-containing insulation in a variety of heavy industrial facilities throughout the southeastern United States. Over the course of the company’s existence, Starr Davis paid premiums to purchase significant amounts of liability insurance from Travelers, among other insurers.

This Court appointed Peter Protopapas as the Receiver of Starr Davis on February 21, 2019. The Court vested the Receiver with the “power and authority to fully administer all assets of Starr Davis,” which is “inclusive of, but not limited to, the right and obligation to administer any insurance assets of Starr Davis as well as any claims related to the actions or failure to act of Starr Davis’ insurance carriers.”¹

In its role as the Receivership Court for another South Carolina insulation contractor, Covil Corporation, this Court has already considered similar insurance

¹ See Exhibit 1, Order Appointing Receiver.

coverage issues, and unequivocally determined that South Carolina law—not Fourth Circuit law derived from an *Erie* guess of how a federal court in Maryland would apply and interpret Maryland law—governs the novel issues of South Carolina insurance law giving rise to Covil’s insurance claims. Starr Davis respectfully asks this Court to recognize and adopt its prior order in full and enter a declaration consistent with the Court’s prior order as follows:²

- All of the Travelers’ liability insurance policies in effect from a person’s first exposure to asbestos through manifestation of an asbestos-related disease or condition, and, ultimately, to death cover the asbestos cases unless coverage is otherwise excluded under a policy;
- The “completed operations hazard” described in Travelers’ policies, and the corresponding aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos products *after* Starr Davis completed its installation or removal operations or work at a particular jobsite;
- As to any individual asbestos lawsuit, it is Travelers’ burden to prove that the suit seeks the recovery of damages that are subject to the aggregate limits of liability applicable to the “completed operations” provisions in their policies;
- The asbestos insulation contracting, or “operations,” claims against Starr Davis have resulted from multiple “occurrences” under the Insurers’ policies, thus entitling Starr Davis to multiple “per occurrence” limits of liability to satisfy its asbestos liabilities; and
- As to the asbestos “operations” claims against Starr Davis, Travelers is obligated independently to pay those claims “in full” up to its “per occurrence” limits of liability subject to their right to allocate responsibility equitably amongst the Starr Davis insurance policies, but not to Starr Davis.

Based on this Court’s clear pronouncement of South Carolina law in its January 8, 2020 Order (the “Covil Order”), Starr Davis respectfully requests that this Court enter summary judgment in its favor on these issues.

² See Exhibit 2, January 8, 2020 Order for Rule to Show Cause in the Covil Corporation receivership action (the “Covil Order”).

I. FACTUAL BACKGROUND

Starr Davis was formed in South Carolina in 1949, and engaged in the installation, removal, and repair of insulation in various facilities across South Carolina for several decades.³ Starr Davis' operations involved the installation, removal, and disturbance of insulation materials, typically supplied, required, or acquired by other parties.⁴ At pertinent times, insulation materials contained asbestos, and Starr Davis' operations allegedly resulted in bodily injury to South Carolina citizens

The state of South Carolina rescinded Starr Davis Company, Inc.'s corporate charter in 1996, and rescinded Starr Davis Company of S.C., Inc.'s corporate charter in 1997, for failure to file the appropriate documentation with the Secretary of State. See Exhibit 4.

Travelers has always been, and continues to be, aware of the nature of Starr Davis' prior operations. Travelers also understands the widely known fact that most of the asbestos contracting claims against Starr Davis invoke the "operations" coverage portion of their policies because the claims did not result from Starr Davis' "completed operations," as discussed in detail below.

In its authority as the Receivership Court for Starr Davis, counsel for the Receiver issued subpoenas to Travelers, seeking copies of insurance policies issued by Aetna and Standard Fire (Travelers' companies) to Starr Davis, as well as multiple other categories of documents, including underwriting and claims documents. See Exhibits 5 and  Travelers categorically refused to produce the requested documents on the grounds that it did not believe the subpoenas were served properly. Travelers claimed, "A subpoena

³ See Exhibit 3, Complaint, at 6.

⁴ See *id.*

duces tecum to Travelers is only proper if issued by the Connecticut Superior Court in the judicial district in which Travelers is located.” See Exhibit 7.

Despite Travelers’ failure to comply with the subpoenas, Travelers has admitted that it issued liability insurance coverage to Starr Davis for the period 1959 to 1985. In a previous filing in this action while it was still pending in federal court, however, Travelers admitted that it had “discovered secondary evidence of 1959-1985 liability insurance coverage issued to Starr Davis by Travelers.”⁵ Travelers attached to the motion a document entitled “Interim Agreement,” which appears to be an agreement between Starr Davis and Aetna, dated November 19, 1985. See Exhibit 8 at 5-8.⁶

II. ARGUMENT AND AUTHORITIES

“Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law.” *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a genuine issue of material fact exists, “the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.” *Sauner v. Pub. Serv. Auth. Of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

⁵ See Exhibit 8, Travelers’ Supplemental Opposition to Motion to Remand and Memorandum in Support, filed in the South Carolina District Court, Civil Action No. 3:19-cv-03841-JFA, Rec. Doc. 42.

⁶ Starr Davis notes that paragraph 1 of the agreement specifies, “Neither this Interim Agreement nor any part thereof shall be offered in evidence or used for any purpose in any court of law as support for the position being asserted by either party hereto in connection with the meaning, intent or construction of any insurance policy or policies issued by Aetna or purchased by Starr Davis.” See *id.* at 5 (Once again, Travelers has filed something that it should not have filed. See Exhibit 9, this Court’s Mediation Email Sanction Order.) The document also appears to indicate that it was prepared as a result of asbestos claims filed against Starr Davis. See Exhibit 8 at 5 (“to provide for the effective management of Starr Davis’ asbestos claims.”). Starr Davis offers the document only as evidence of the existence of the insurance policies.

“[T]he party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004). “Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial.” *Id.*, 607 S.E.2d at 364. The nonmoving party’s response “must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial.” *Moody v. McLellan*, 295 S.C. 157, 367 S.E.2d 449, 454 (Ct. App. 1988). If the nonmoving party does not so respond, the motion for summary judgment should be granted. *Id.* at 454.

This Court has *already* determined the insurance issues relevant to this matter. The Covil Order directly addresses the matters at issue in Starr Davis’ claims for declaratory judgment against Travelers. There is no issue as to any material fact, and Starr Davis is entitled to judgment as a matter of law pursuant to Rule 56(c), SCRPC. Therefore, Starr Davis respectfully requests that this Court acknowledge and adopt in full its prior holdings within its January 8, 2020 Covil Order and enter the declarations sought within this Motion in a manner consistent with the law of South Carolina as was recently delineated.

A. Travelers Insured Starr Davis from 1959 to 1985

Travelers has admitted in a filing in this coverage action that it insured Starr Davis between 1959 and 1985. See Exhibit 8.

B. South Carolina Law Establishes the Scope of Travelers’ Coverage of Starr Davis.

In seeking to limit its obligations to Starr Davis, Travelers will rely on the Fourth Circuit’s decision in *In re Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004), which decided

issues of insurance law based on an *Erie* guess of how a state court in Maryland would apply and interpret undecided issues of Maryland state law. More specifically, the *In re Wallace & Gale* court adopted the view that general liability claims transform into completed operations claims where there is continuing injury post-dating completion of the installation. *In re Wallace & Gale*, 385 F.3d at 833-34.

If Maryland law governed this case, *Wallace & Gale* would perhaps have some relevance. But this is a South Carolina case, and the law of Maryland is not the law of South Carolina. Because *Wallace & Gale* interpreted only Maryland law, under basic principles of federalism, it established no state law precedent relevant to the outcome of this South Carolina case. The unique insurance issues present here turn only on the interpretation of South Carolina law, which requires a wholly independent analysis. As this Court's recent order unambiguously shows, after undertaking that analysis, the outcome must be different.

This Court previously made clear that *Wallace & Gale* "is not the law of South Carolina." Exhibit 2, Covil Order, at 16. Therefore, this Court "reconstruct[ed] the nature and scope of Covil's historic insurance program (without the cooperation of the Insurers) so as to facilitate the management of the South Carolina asbestos docket." *Id.* at 14. In doing so, this Court applied and made the findings and holdings described below based on principles of South Carolina insurance law, which the Receiver asks this Court to apply in deciding this case.

1. *Trigger of Coverage.*

In the Covil Order, this Court ruled that Covil's liability insurance policies in effect from a person's *first* exposure to asbestos through manifestation of an asbestos disease

and, ultimately, to death cover the asbestos cases unless coverage is otherwise excluded under a policy. Specifically, this Court held:

The policies at issue respond to suits when bodily injury takes place during the policy period, regardless of when the event causing the injury took place and regardless of when the injury becomes known or knowable. All of an insured's policies in effect from a person's first exposure to asbestos through manifestation of an asbestos disease and, ultimately, to death cover the asbestos cases unless coverage is otherwise excluded. This approach is called a "continuous trigger of coverage" or an "injury in fact trigger of coverage" inasmuch as medical science established long ago that asbestos injuries begin upon first inhalation of asbestos fibers and continue progressively thereafter. As respects asbestos injury and death suits, the "continuous trigger of coverage" and the "injury in fact trigger of coverage" yield the same result such that the court need not choose between these conceptually similar approaches.

Exhibit 2, Covil Order, at 14–15 (citing *Armstrong World Indus., Inc., v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 45 (1996)). Based on its holding, this Court should hold that all of Starr Davis' policies in effect from a person's first exposure to asbestos through death cover the asbestos claims against Starr Davis unless coverage is otherwise excluded, which it is not.

2. The Distinction between "Operations" and "Completed Operations."

The *Wallace & Gale* court adopted the view that general liability claims somehow change into completed operations claims where there is continuing injury post-dating completion of the installation. No insurance coverage decision prior to *Wallace & Gale* ever reached such a conclusion because it is antithetical to the nature of a "hazard" against which insurance policies cover insureds. At issue here is the construction of the "completed operations hazard" in Starr Davis' general liability insurance policies.

At its most fundamental level, a "hazard" in an insurance policy "is the source from which an accident may arise, or 'a danger or risk lurking in a situation which by chance

or fortuity develops into an active agency of harm.” *Ketona Chem. Corp. v. Globe Indem. Co.*, 404 F.2d 181, 185 (5th Cir. 1968) (quoting *Hough v. Contributory Ret. Appeal Bd.*, 36 N.E.2d 415, 418 (Mass. 1941)); see also *Serv. Welding & Mach. Co. v. Mich. Mut. Liab. Co. of Detroit*, 311 F.2d 612, 617 (6th Cir. 1962) (“The word ‘hazard’ as used in the policy must mean ‘the source of a risk.’ . . . Thus, a ‘hazard’ is a danger or risk lurking in a situation or place.”). “Along with other meanings, the standard dictionary defines the noun ‘hazard’ as exposure to the chance of loss or injury.” *Caminetti v. Guaranty Union Life Ins. Co.*, 52 Cal. App. 2d 330, 334 (1942). The Merriam-Webster Online Dictionary defines “hazard” to include “a source of danger.” *Hazard*, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/hazard> (last visited Jan. 17, 2020); see also *Travelers Cas. & Sur. Co. v. Emp’rs Ins. of Wausau*, 130 Cal. App. 4th 99, 114 n.6 (2005) (“Examples of injuries covered under the premises-operations coverage include injuries suffered by a shipyard worker while installing insulation at the insured’s facility and injuries caused by a subcontractor’s negligent construction of a wall that fell on a worker while the job was in progress.”). Or, in other words, the “completed operations hazard” protects Starr Davis from the risk of loss caused by its *completed* operations. The source of the “danger” against which the coverage protects Starr Davis is its *completed* insulation work, not its ongoing insulation work.

This Court properly declined to adhere to the Fourth Circuit’s decision, holding that that the “completed operations hazard” described in the Insurers’ policies, and the corresponding aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos *after* Covil completed its installation or removal operations or work at a particular jobsite. In so holding, this Court noted:

The insurers contend that aggregate limits of liability apply to any third party's claim against Covil involving exposure to asbestos that took place before the *inception date* of their policies. The policies are not written in that manner, however. There is nothing in the definition of "completed operations" that focuses on the inception date of a policy. The Court is aware that, in seeking to limit their obligations to Covil, the insurers would prefer to rely exclusively on federal decisions attempting to "guess" the view the Maryland Court of Appeals would take if the issue of interpreting the "completed operations" provisions of the policies were presented to it. The insurers take the position that the Fourth Circuit has "spoken" definitively on this issue. However, this Court finds that federal decisions attempting to predict the interpretation of policy language under Maryland law are not pertinent to the determination of South Carolina law. This Court specifically finds that *In re Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004) is not the law of South Carolina.

Exhibit 2, Covil Order, at 15–16. This Court further held that "[n]o aggregate limits of liability apply to suits seeking the recovery of damages for bodily injury where the plaintiff was exposed to asbestos while Covil was performing work at a particular jobsite." *Id.* Starr Davis respectfully requests that this Court apply this ruling to the insurance policies Travelers issued to Starr Davis.

3. Burden of Proof.

This Court held that "[i]nsurers bear the burden of demonstrating that aggregate limits in their policies, if any, apply to any particular asbestos suits." See Exhibit 2, Covil Order, at 17. Travelers has not met its burden.

4. Occurrences.

The policies at issue provide coverage for legal liabilities resulting from an "occurrence." An "occurrence" is typically defined as an accident, including exposure to substantially similar conditions, that results in bodily injury during the policy period. See Exhibit 2, Covil Order, at 18. This Court held that Covil faces allegations in numerous lawsuits that multiple asbestos injury and wrongful death "occurrences" have resulted

from its “operations,” entitling Covil to multiple “per occurrence” limits of liability to resolve the asbestos suits. See *id.*

This Court reasoned that:

[t]he asbestos insulation operations suits against Covil are not repetitive products liability suits alleging exposure to asbestos from the same defective product. Instead, these suits allege that Covil’s operations exposed workers and other bystanders to asbestos. Courts have held that the type of asbestos operations claims against Covil resulted from multiple ‘occurrences’ under the standard definition of ‘occurrence’ used during the time of the insurers’ policies.

Id. (citing *Travelers Cas. & Sur. Co. v. Gerling Global Reinsurance Corp. of Am.*, 419 F.3d 181, 184 (2d Cir. 2005)). Starr Davis respectfully requests that this Court apply this ruling to the insurance policies Travelers issued to Starr Davis.

5. Allocation of Losses to Starr Davis’ Policies.

This Court noted that “the language of the policies typically requires the insurers to pay ‘all sums’—meaning everything—for which the insure[r] is legally obligated to pay if a claimant sustains bodily injury during the period of the policy.” See Exhibit 2, Covil Order, at 18. This Court further held that:

each individual insurer will nevertheless be protected fully against the possibility that it paid too much on a single asbestos claim by its right to seek contribution from any other insurer, but not from Covil, whose policy also was triggered by the asbestos suit. This approach ‘ensures that [Covil] is indemnified by one [or more] insurer for the full extent of the loss up to the policy’s limits, but apportions liability among all insurers whose policies were triggered by the claimant’s asbestos-related bodily injury.

Id. at 19 (citing *Armstrong*, 45 Cal. App. 4th at 55). Starr Davis is a defunct company in receivership. It lacks the funds necessary for it to absorb a portion of the company’s asbestos liability in conjunction with the insurers as part of a “pro rata” allegation regime. *Id.* Starr Davis respectfully requests that this Court apply this ruling to the insurance

policies Travelers issued to Starr Davis.

Finally, after significant document productions by the Insurers, this Court found that “no aggregate limit of liability for product liability or completed operations claims has been proven or can be proven, and therefore no aggregate limit for product liability or completed operations claims exists” for the Covil insurance policies in effect between April 21, 1964 and March 31, 1978. *Id.* at 1920. Here, Travelers has failed to produce documentation to establish an aggregate limit for product liability or completed operations claims for the policies it issued to Starr Davis between 1968 and 1972. Starr Davis respectfully requests that this Court find that no aggregate limit of liability for product liability or completed operations claims has been proven or can be proven, and therefore no aggregate limit for product liability or completed operations claims exists for the Starr Davis insurance policies in effect between 1968 and 1972.

V. CONCLUSION

For the foregoing reasons, Starr Davis, by and through its duly appointed Receiver, requests that this Court hold that the law of South Carolina as set forth in this Court’s January 8, 2020 Covil Order applies to Travelers’ policies issued to Starr Davis; grant Starr Davis’ motion for partial summary judgment on its claims for declaratory judgment against Travelers; and grant Starr Davis all relief at law or equity to which it is justly entitled.

Signature on following page

s/ Jescelyn Spitz
Jescelyn T. Spitz (SC Bar 101880)
Rikard & Protopapas, LLC
1329 Blanding St
Columbia, SC 29201
803.978.6111
jspitz@rplegalgroup.com

This 28th Day of February, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
CHARLES T. HOPPER and	)	CASE NO. 2019-CP-4000076
REBECCA HOPPER	)	
	)	
Plaintiffs,	)	In Re:
	)	Asbestos Personal Injury Litigation
v.	)	Coordinated Docket
	)	
AIR & LIQUID SYSTEMS	)	
CORPORATION, et al.	)	
	)	
Defendants.	)	

ORDER GRANTING MOTION TO APPOINT A RECEIVER AND APPOINTING RECEIVER

CAME ON February 21, 2019 to be heard the Plaintiffs Motion for Appointment of a Receiver. This Court finds that the application is meritorious under the applicable statute because Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. (collectively, "Starr Davis"). Starr Davis Company of S.C. has dissolved and Starr Davis Company, Inc., a North Carolina Corporation, has forfeited its right to transact business in the State of South Carolina. Starr Davis has further failed to answer this case and therefore, Plaintiffs request for an expedited ruling on this motion is appropriate and also granted.

Therefore, this Court hereby appoints Peter Protopapas, Esq., a member of the South Carolina Bar, be and hereby is appointed Receiver in this case pursuant to the South Carolina Law with the power and authority fully administer all assets of Starr Davis, accept service on behalf of Starr Davis, engage counsel on behalf of Starr Davis and take any and all steps necessary to protect the interests of Starr Davis whatever they may be. This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Starr Davis as well as any claims related to the actions or failure to act of Starr Davis' insurance carriers.

In addition to the powers of the Receiver set forth herein, the Receiver shall have the following rights, authority and powers with respect to the Respondent's property, to: 1) collect all accounts receivable

of Respondent and all rents due to the Respondent from any tenant; 2) to change locks to all premises at which any property is situated; 3) open any mail addressed to the defendant and addressed to any business owned by the Respondent; redirect the delivery of any mail addressed to the Respondent or any business of the Respondent, so that the mail may come directly to the receiver; 4) endorse and cash all checks and negotiable instruments payable to Respondent, except paychecks for current wages; 5) hire a real estate broker to sell any real property and mineral interest belonging to the Respondents; 6) hire any person or company to move and store the property of Respondent; 7) to insure any property belonging to the Respondents (but not the obligation); 8) obtain from any financial institution, bank, credit union, savings and loan or title company, credit bureau or any other third party, any financial records belonging to or pertaining to the Defendants; 9) obtain from any landlord, building owner or building manager where the Respondent or the Respondent's business is a tenant, copies of the Respondent's lease, lease application, credit application, payment history and copies of Respondent's checks for rent or other payments; 10) hire any person or company necessary to accomplish any right or power under this Order; and 11) take all action necessary to gain access to all storage facilities, safety-deposit boxes, real property, and leased premises wherein any property of Respondent may be situated, and to review and obtain copies of all documents related to same.

SIGNED this _____ day of _____, 2019.

Jean H. Toal, Chief of the Supreme
 Court of South Carolina (Retired),
 Acting as Circuit Court Judge



Richland Common Pleas

Case Caption: Charles T Hopper , plaintiff, et al vs Air & Liquid Systems Corporation , defendant, et al
Case Number: 2019CP4000076
Type: Order/Appointment of Receiver

IT IS SO ORDERED.

s/ Jean H. Toal #2758

Electronically signed on 2019-02-22 10:21:14 page 3 of 3

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

STARR DAVIS COMPANY, INC. and
STARR DAVIS COMPANY OF S.C., INC.,
through its Receiver, Peter D.
Protopapas,

Case Number: 2019-CP-40-06243

Plaintiffs,

vs.

**STARR DAVIS'S SUPPLEMENTAL
MOTION FOR PARTIAL SUMMARY
JUDGMENT AGAINST TRAVELERS
CASUALTY AND SURETY
COMPANY AND THE STANDARD
FIRE INSURANCE COMPANY;
MEMORANDUM IN SUPPORT**

HARTFORD ACCIDENT AND INDEMNITY
COMPANY; TWIN CITY FIRE INSURANCE
COMPANY; TRAVELERS CASUALTY AND
SURETY COMPANY f/k/a THE AETNA
CASUALTY AND SURETY COMPANY; THE
STANDARD FIRE INSURANCE COMPANY;
SOUTHEASTERN AGENCY GROUP and
M.I.A. COMPANY, INC., individually and as
successors to or f/k/a MERRIMON
INSURANCE AGENCY, INC.; ROBERT E.
ASPRAY; NELL ASHWORTH, individually
and as personal representative of the
Estate of ROBERT J. ASHWORTH; BETTY
C. D'AMICO, individually and as the
Esecutor of the Estate of JULIAN D'AMICO,
JR.; KAYLA KEITH, individually and as the
personal representative of the Estate of
JERRY W. ARCHER, SR.; RICHARD L.
KNIGHT II, as personal representative of
the Estate of TEDDY L. KNIGHT, SR., and
LINDA KNIGHT, individually; DAVID D.
ROLLINS; JAMES W. SMITH and FRANCES
R. SMITH; and LINDA J. WHITE,
individually and as Personal
Representative of the Estate of LIBERT E.
WHITE, JR.,

Defendants.

Starr Davis Company, Inc. and Starr Davis Company Of South Carolina, Inc. (Starr

Davis Company, Inc. is referred to as "Starr Davis Co.", Starr Davis of South Carolina, Inc. is referred to as "Starr Davis of South Carolina," and the two companies are collectively referred to as "Starr Davis"), by and through their duly-appointed Receiver, Peter D. Protopapas (the "Receiver"), move this Court for partial summary judgment as to Covil's cross-claims for declaratory judgment against defendants Travelers Casualty and Surety Company, formerly known as The Aetna Casualty and Surety Company and referred to herein individually as "Aetna," and The Standard Fire Insurance Company, referred to individually as "Standard Fire" (collectively "Travelers"). In support of its supplemental motion for partial summary judgment, Starr Davis demonstrates as follows:

I. NATURE OF THE CASE AND REQUESTED RULINGS

Starr Davis began business operations as an insulation contractor in or about 1946 in South Carolina. Over the course of the next forty years, the company grew to become a major regional insulation contractor – installing, removing, replacing and repairing insulation, including at pertinent times asbestos-containing insulation – in a variety of industrial facilities throughout the southeastern United States, principally in South Carolina, North Carolina, Georgia, Alabama, Virginia and Tennessee. Over the course of the company's existence, Starr Davis paid premiums to purchase significant amounts of liability insurance from Travelers.

This Court appointed Peter Protopapas as the Receiver of Starr Davis on February 21, 2019. The Court vested the Receiver with the "power and authority to fully administer all assets of Starr Davis," which is "inclusive of, but not limited to, the right and obligation to administer any insurance assets of Starr Davis as well as any claims related to the

actions or failure to act of Starr Davis' insurance carriers."¹

In its role as the Receivership Court for another South Carolina insulation contractor, Covil Corporation, this Court has considered certain similar insurance coverage issues, and has determined that South Carolina law governs the construction of South Carolina-issued insurance policies. Travelers has now finally produced policies and evidence of policies issued to Starr Davis which has led to the need to bring a supplemental motion for partial summary judgment on multiple aspects of the policies, as well as the legal principles governing these policies and the insuring relationship between Starr Davis and Travelers. Based on the foregoing and this Court's rulings and principles of insurance law, Starr Davis seeks the following declarations and judgment incorporating these declarations:

1. Multiple-year policies and policies that were subject to annual renewal provide for a full separate limit of liability for product liability and completed operations claims and a full per occurrence limit for premises and operations claims separately for each annual period or portion thereof;
2. Primary insurance policies issued by Travelers have an unlimited supplemental duty to pay or reimburse defense costs;
3. The duty to pay or reimburse defense costs is "triggered" whenever there is any obligation that could potentially involve the policy coverage;
4. The duty to pay or reimburse defense costs is triggered by the allegations of a complaint asserted against Starr Davis;

¹ See Exhibit 1, Order Appointing Receiver.

5. In the unique case of Starr Davis where multiple primary policies were issued for the same policy year, and these multiple policies provide coverage for the same claim, Starr Davis may select one or both of the policies to respond to the claim and may also "stack" the limits of such policies for each and every such claim;
6. The burden of proving any limitation or exclusion to coverage is on the insurer, here Travelers;
7. All of the Travelers liability insurance policies in effect from a person's first exposure to asbestos through manifestation of an asbestos-related disease or condition, and, ultimately, to death, cover the asbestos cases unless coverage is otherwise excluded under a policy;
8. The "completed operations hazard" described in the Travelers policies, and the corresponding aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos products *after* Starr Davis completed its installation or removal operations or work at a particular jobsite;
9. As to any individual asbestos lawsuit, it is Travelers' burden to prove that the suit seeks the recovery of damages that are subject to any aggregate limits of liability applicable to the "products" or "completed operations" provisions in its policies;
10. The asbestos insulation contracting, or "operations," claims against Starr Davis have resulted from multiple "occurrences" under the Travelers policies, thus entitling Starr Davis to multiple "per occurrence" limits of

liability to satisfy its asbestos liabilities;

11. As to the asbestos "operations" claims against Starr Davis, Travelers is obligated to pay those claims "in full" up to its "per occurrence" limit of liability; and
12. While product liability or completed operations losses are subject to allocation on a "time-on-the-risk" pro rata allocation method, "operations" claims are allocated on an "all sums" basis, and, in either case, in light of its non-operating defunct status, no loss may be allocated to Starr Davis as part of any "time-on-the-risk" allocation scheme.

Based on this Court's clear pronouncement of South Carolina law in its January 8, 2020 Order (the "Covil Order"), ² and on the evidence presented herein, and principles of insurance law and contract construction, Starr Davis respectfully requests that this Court enter summary judgment in its favor on these issues.

II. FACTUAL AND POLICY FINDINGS AND RULINGS

Starr Davis was formed in South Carolina in or about 1946, and engaged in the installation, removal, replacement and repair of insulation in various facilities across South Carolina and in the neighboring states of North Carolina, Tennessee and Georgia, as well as Alabama and Virginia, for over four decades. Starr Davis's operations involved the installation, removal, replacement, repair and disturbance of insulation materials, typically supplied, required, or acquired by other parties. At pertinent times, insulation materials

² See Exhibit 2, January 8, 2020 Order for Rule to Show Cause in the Covil Corporation receivership action.

contained asbestos, and Starr Davis's operations allegedly resulted in bodily injury to South Carolina citizens.

The State of South Carolina rescinded Starr Davis Company, Inc.'s corporate charter in 1996, and rescinded Starr Davis Company of South Carolina, Inc.'s corporate charter in 1997, for failure to file the appropriate documentation with the Secretary of State. *See* Exhibit 3.

Travelers has always been, and continues to be, aware of the nature of Starr Davis's prior operations.³ Travelers also understands that many of the asbestos contracting claims against Starr Davis invoke the "operations" coverage portion of their policies because the claims did not result from Starr Davis' "completed operations," as discussed in detail below.

In its authority as the Receivership Court for Starr Davis, this Court issued a subpoena to Travelers pursuant to a request by the Receiver, seeking copies of insurance policies issued by Aetna and Standard Fire (both Travelers companies) to Starr Davis, as well as multiple other categories of documents, including underwriting and claims

³ As late as the policy issued for the period January 1, 1978, through January 1, 1979, Standard Fire listed Starr Davis's business as including:

"Steam Pipe or Boiler Insulation –
Applying Cork, Asbestos or Other
Non Conducting Materials"

See policy materials attached as Exhibit 5, comprising an "Incomplete Policy" for Policy No. 25 AL 802646 CN5, issued for the policy period January 1, 1978 to January 1, 1979 by The Standard Fire Insurance Company, and Exhibit 4, comprising an "Incomplete Policy" for Policy No. 25 AL 801362 CMA for the same policy period issued by The Aetna Casualty and Surety Company.

documents. *See* Exhibits 6 and 7. Initially, Travelers categorically refused to produce the requested documents on the ground that it did not believe the subpoena was served properly: "[REDACTED]

[REDACTED] *See* Exhibit 8.

Travelers' failure to comply with this Court's subpoena came despite the fact that Travelers had previously admitted that it issued liability insurance coverage to Starr Davis for the period 1959 to 1985. In a previous filing in this action while it was still removed to federal court, Travelers admitted that it had "discovered secondary evidence of 1959-1985 liability insurance coverage issued to Starr Davis by Travelers."⁴ Travelers attached to the motion a document entitled "Interim Agreement," which appears to be an agreement between Starr Davis and Aetna, dated November 19, 1985. *See* Exhibit 9 at 5-8.⁵

Starr Davis now understands why Travelers refused to provide its insured with

⁴ *See* Exhibit 9, Travelers' Supplemental Opposition to Motion to Remand and Memorandum in Support, filed in the South Carolina District Court, Civil Action No. 3:19-cv-03841-JFA, Rec. Doc. 42.

⁵ Starr Davis notes that paragraph 1 of the agreement specifies, "Neither this Interim Agreement nor any part thereof shall be offered in evidence or used for any purpose in any court of law as support for the position being asserted by either party hereto in connection with the meaning, intent or construction of any insurance policy or policies issued by Aetna or purchased by Starr Davis." *See id.* At 5 (Once again, Travelers has filed something that it should not have filed. *See* Exhibit 9, this Court's Mediation Email Sanction Order.) The document also appears to indicate that it was prepared as a result of asbestos claims filed against Starr Davis. *See* Exhibit 9 at 5 ("to provide for the effective management of Starr Davis asbestos claims.") Starr Davis offers the document only as evidence of the existence of the insurance policies.

policies it issued to Starr Davis, why Travelers refused to comply with subpoenas sought by the Receiver and issued by this Court, and why it took Travelers more than a year to “come clean” as to the scope of coverage that it issued to Starr Davis. While most of the policy documentation sought by the Receiver has apparently been destroyed – at this point something this Court has grown accustomed to seeing when Travelers is involved – there is sufficient secondary evidence, including partial or incomplete policies, to reveal an extraordinary multi-decade relationship between Travelers and Starr Davis. Through painstaking policy reconstruction and analysis based on documents finally produced by Travelers, a 40-year uninterrupted relationship has been revealed, from January 1, 1946 to April 30, 1986, during which Travelers insured Starr Davis for asbestos-related bodily injury suits and claims. This coverage is depicted in the charts attached as Exhibits 10, 11, 12 and 13 and in the associated schedules of insurance attached as Exhibits 14 and 15.⁶ The relationship was so extensive and Travelers and Starr Davis so intertwined that Starr Davis was issued an endorsement such that Starr Davis was, and is, entitled to participate in the earnings of Travelers:

[REDACTED]

[REDACTED]

⁶The Aetna policies providing products/completed operations coverage are depicted in Exhibit 10. The Aetna policies providing premises/operations coverage are depicted in Exhibit 11. The Standard Fire policies providing products/completed operations for North Carolina are depicted in Exhibit 11. The Standard Fire policies providing premises/operations coverage for North Carolina are depicted in Exhibit 12. The products/completed operations coverage is detailed in the schedule attached as Exhibit 14, which also references documentary evidence. The premises/operations coverage is detailed in the schedule attached as Exhibit 15, which also includes references to documents produced by Travelers.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Exhibit 4, p. 34.

Because essentially all of the Travelers policies were destroyed by Travelers, this Court has been called upon by Starr Davis to render partial summary judgment on several issues relating to policy issuance by Travelers. Partial summary judgment is appropriate based on discovery to date, Travelers' admissions and legal principles implied or imposed by law. The documents and admissions by Travelers demonstrate the following:

A. The Aetna Casualty and Surety Asbestos Coverage

The Aetna Casualty and Surety Company issued primary coverage that was renewed annually on an uninterrupted basis for 40 years which provides defense and indemnity coverage for asbestos-related bodily injury suits. These policies were issued from January 1, 1946 through April 30, 1986. This primary coverage covers bodily injury as the result of both products and completed operations claims subject to an aggregate limit for settlement or judgment costs only ("products/completed operations") and operations claims that are subject to a per occurrence limit ("premises/operations claims"). This primary coverage issued by Aetna alone provides

at least \$11,900,000 in products/completed operations limits and \$11,900,000 per occurrence in premises/operations limits, with no limit to the number of occurrences. Aetna also issued umbrella coverage to Starr Davis for 11 policy years, from January 1, 1974 to May 1, 1983. Based on the documents produced by Travelers in response to the Starr Davis subpoenas, this motion requests that this Court declare that Aetna issued the following coverage to Starr Davis:

- Primary coverage with a supplemental unlimited defense obligation and aggregate products/completed coverage with separate annual limits of \$100,000 for each of the 18 policy years 1946 to 1964;
- Primary coverage with a supplemental unlimited defense obligation for premises/operations claims and annual per occurrence limits of \$100,000 for each of the 18 policy years 1946 to 1964, with no limit to the number of occurrences;
- Primary coverage with a supplemental unlimited defense obligation and aggregate products/completed operations coverage with separate annual limits of \$300,000 for each of the 12 policy years from 1964 to 1976;
- Primary coverage with a supplemental unlimited defense obligation for premises/operations claims and annual per occurrence limits of \$300,000 with no limit to the number of occurrences for each of the 12 policy years 1964 to 1976;
- Primary coverage with a supplemental unlimited defense obligation and aggregate products/completed operations coverage with separate annual

limits of \$500,000 for each of the 11 policy years from 1976 through April 30, 1986;

- Primary coverage with a supplemental unlimited defense obligation and aggregate products/completed operations coverage with separate annual limits of \$500,000 for each of the 11 policy years from 1976 through April 30, 1986, and no limit to the number of occurrences;
- Umbrella coverage for each of the two policy years January 1, 1974 to January 1, 1975 and January 1, 1975 to August 4, 1975 with separate annual limits of \$1,000,000 in the aggregate for products/completed operations claims and \$1,000,000 per occurrence for premises/operations claims; and
- Umbrella coverage for each of the nine separate policy years from August 4, 1975 to May 1, 1983 with separate annual limits of \$2,000,000 in the aggregate for products/completed operations claims and \$2,000,000 per occurrence for premises/operations claims.

With the exception of the primary policies from January 1, 1974 to May 1, 1980, which do not cover North Carolina claims, the Aetna policies described above, depicted in Exhibits 10 and 11 and detailed in Exhibit 14, cover all asbestos-related suits asserted against Starr Davis Co. or Starr Davis of South Carolina.⁷

⁷ An incomplete Aetna policy produced by Travelers is attached as Exhibit 4. Travelers and Aetna routinely destroyed policies such as those issued to Starr Davis and Starr Davis of South Carolina.

B. The Standard Fire Insurance Company Coverage

The Standard Fire Insurance Company issued primary policies to Starr Davis Co. and Starr Davis of South Carolina with an unlimited supplemental defense obligation and separate annual products/completed operations limits for each of the two annual periods January 7, 1974 to January 7, 1976 with separate annual limits of \$300,000 per occurrence and in the aggregate and \$500,000 in limits for each of the five annual periods January 7, 1976 to May 1, 1980, per occurrence and in the aggregate, with no limit to the number of occurrences. These Standard Fire policies were issued to Starr Davis Co. and Starr Davis of South Carolina but cover operations only in North Carolina.

The Standard Fire limits are depicted in Exhibits 13 and 14 and are detailed in the schedule attached as Exhibit 16. An incomplete Standard Fire policy is attached as Exhibit 5.

C. Rulings As To Policy Provisions

Based on the policy evidence produced by Travelers, Starr Davis Co. and Starr Davis of South Carolina respectfully request that the following findings and rulings be entered as a judgment with respect to the foregoing policies depicted in Exhibits 10, 11, 12 and 13 and detailed in Exhibits 14 and 15:

1. All of the Travelers policies listed in Exhibits 10, 11, 12 and 13 and detailed in Exhibits 14 and 15 are either multiple-year policies or policies that were subject to annual renewal and all such policies issued by Travelers provide for a full separate limit of liability for product liability and completed operations claims and for premises/operations claims on a per occurrence basis for each annual period or portion thereof;

2. All of the primary insurance policies issued by Travelers listed in Exhibits 10, 11, 12 and 13 and detailed in Exhibits 14 and 15 have an unlimited supplemental duty to pay or reimburse defense costs;
3. The duty to pay or reimburse defense costs in these policies is "triggered" whenever there is any obligation that could potentially involve the policy coverage;
4. The duty to pay or reimburse defense costs is triggered by the allegations of a complaint asserted against Starr Davis;
5. In the unique case of Starr Davis where multiple primary policies were issued for the same policy year, and multiple policies provide coverage for the same claim, Starr Davis may select one or both of the policies to respond to the claim and may "stack" the limits of such policies for each and every such claim;
6. The burden of proving any limitation or exclusion to coverage is on the insurer, here Travelers;
7. All of the Travelers liability insurance policies in effect from a person's first exposure to asbestos through manifestation of an asbestos-related disease or condition, and, ultimately, to death, cover the asbestos cases unless coverage is otherwise excluded under a policy;
8. The "completed operations hazard" described in Travelers' policies, and the corresponding aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos products *after* Starr Davis completed its installation or

- removal operations or work at a particular jobsite;
9. As to any individual asbestos lawsuit, it is Travelers' burden to prove that the suit seeks the recovery of damages that are subject to the aggregate limits of liability applicable to the "completed operations" provisions in their policies;
 10. The asbestos insulation contracting, or "operations," claims against Starr Davis have resulted from multiple "occurrences" under the Travelers policies, thus entitling Starr Davis to multiple "per occurrence" limits of liability to satisfy its asbestos liabilities;
 11. As to the asbestos "operations" claims against Starr Davis, Travelers is obligated to pay those claims "in full" up to its "per occurrence" limit of liability; and
 12. While product liability or completed operations losses are subject to allocation on a "time-on-the-risk" pro rata allocation method, in light of its non-operating defunct status, no loss may be allocated to Starr Davis as part of any "time-on-the-risk" allocation scheme.

* * *

The documents that Travelers has produced are represented to comprise all that Travelers has in terms of the Starr Davis policies. Travelers – which is known for its deliberate destruction of insurance policies of its insureds – has admitted its insuring relationship with Starr Davis Co. and Starr Davis of South Carolina. Starr Davis Co. and Starr Davis of South Carolina submit that, as to the foregoing, it has met its burden and, accordingly, Travelers "must come forward with specific facts that show there is a genuine issue of fact remaining for

trial." *Id.*, 607 S.E.2d at 364. Travelers' response "must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial." *Moody v. McLellan*, 295 S.C. 157, 367 S.E.2d 449, 454 (Ct. App. 1988). Travelers cannot do so, because the foregoing are based on its own documents and it destroyed all remaining evidence.

As to the matters of insurance policy construction, this Court has *already* determined the insurance issues relevant to this matter. The Covil Order directly addresses the matters at issue in Starr Davis's claims for declaratory judgment against Travelers. There is no issue as to any material fact, and Starr Davis is entitled to judgment as a matter of law pursuant to Rule 56(c), SCRCP. Therefore, Starr Davis respectfully requests that this Court acknowledge and adopt in full its prior holdings within its January 8, 2020 Covil Order and enter the declarations sought within this Motion in a manner consistent with the law of South Carolina, as set forth above and in more detail below.

III. LEGAL RULINGS AS TO POLICY INTERPRETATION

Starr Davis was engaged for more than four decades in the insulation contracting business. This business involved installing, removing, replacing, repairing and distributing insulation materials in premises that were not owned or controlled by Starr Davis. Nor do the Starr Davis cases or involve products supplied or sold by Starr Davis. Starr Davis was not an insulation manufacturer or supplier. It was a contractor, as Travelers' policies make clear, and, given the four-decade relationship with Starr Davis, Travelers certainly was aware of Starr Davis's operations. Travelers also knew that Starr Davis was a major business with operations conducted in at least the states of South Carolina, North Carolina, Georgia, Alabama, Tennessee and the Commonwealth of Virginia.

While Travelers issued a vast quantity of products/completed operations

coverage,⁸ each asbestos suit can result in seven or even eight figure damages⁹ and, given the extensive operations conducted by Starr Davis, both temporally and geographically, it is incumbent upon this Court to assure that there is no unwarranted limitation put on the obligations of Travelers. This Court is aware from its extensive experience and briefing on these issues in other matters before this Court that Travelers (and other insurers) seek to rely on the decision of the United States Court of Appeals for the Fourth Circuit in *In re Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004), which purported to apply Maryland law. More specifically, *Wallace & Gale* adopted the view that operations claims transform into completed operations claims where there is continuing injury post-dating completion of the installation. *In re Wallace & Gale*, 385 F.3d at 833-34.

This is a South Carolina case. Because *Wallace & Gale* purported to interpret only Maryland law, under basic principles of federalism, it established no state law precedent relevant to the outcome of this South Carolina case. The unique insurance issues present here turn on the interpretation of South Carolina law, which requires a wholly independent analysis. As this Court's recent order unambiguously shows, after undertaking that analysis, the outcome must be different.

⁸ The requested rulings and documents demonstrate primary limits for products/completed operations claims of \$15,000,000, plus an unlimited supplemental defense obligation, and umbrella limits of \$21,000,000, for total products/completed operations limits of \$36,000,000, plus an unlimited supplemental defense obligation.

⁹ The judgment in the *Finch* case involving Covil, a products/completed operations case, currently exceeds these limits of \$36,000,000. It is thus essential for this Court to delineate the scope of coverage available to Starr Davis.

This Court made clear that *Wallace & Gale* “is not the law of South Carolina.” Exhibit 2, Order, at 16. Therefore, this Court “reconstruct[ed] the nature and scope of Covil’s historic insurance program (without the cooperation of the Insurers) so as to facilitate the management of the South Carolina asbestos docket.” *Id.* at 14. In doing so, this Court applied and made the findings and holdings described below based on principles of South Carolina insurance law, which the Receiver asks this Court to apply in deciding this case.

A. Continuous Injury Trigger of Coverage.

In the Covil Order, this Court ruled that Covil’s liability insurance policies in effect from a person’s *first* exposure to asbestos through manifestation of an asbestos disease and, ultimately, to death cover the asbestos cases unless coverage is otherwise excluded under a policy. Specifically, this Court held:

The policies at issue respond to suits when bodily injury takes place during the policy period, regardless of when the event causing the injury took place and regardless of when the injury becomes known or knowable. All of an insured’s policies in effect from a person’s first exposure to asbestos through manifestation of an asbestos disease and, ultimately, to death cover the asbestos cases unless coverage is otherwise excluded. This approach is called a “continuous trigger of coverage” or an “injury in fact trigger of coverage” inasmuch as medical science established long ago that asbestos injuries begin upon first inhalation of asbestos fibers and continue progressively thereafter. As respects asbestos injury and death suits, the “continuous trigger of coverage” and the “injury in fact trigger of coverage” yield the same result such that the court need not choose between these conceptually similar approaches.

Exhibit 2, Order, at 14–15 (citing *Armstrong World Indus., Inc., v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 45 (1996)). Based on this holding, this Court should here hold that all of Starr Davis’s policies in effect from a person’s first exposure to asbestos through

death cover the asbestos claims against Starr Davis unless coverage is otherwise excluded.

B. The Distinction between "Operations" and "Completed Operations."

The *Wallace & Gale* court adopted the view that operations claims somehow are transmuted into completed operations claims where there is continuing injury post-dating completion of the installation. No insurance coverage decision prior to *Wallace & Gale* ever reached such a conclusion because it is antithetical to the nature of a "hazard" against which insurance policies cover insureds. At issue here is the construction of the "completed operations hazard" in Starr Davis's general liability insurance policies.

At its most fundamental level, a "hazard" in an insurance policy "is the source from which an accident may arise, or 'a danger or risk lurking in a situation which by chance or fortuity develops into an active agency of harm.'" *Ketona Chem. Corp. v. Globe Indem. Co.*, 404 F.2d 181, 185 (5th Cir. 1968) (quoting *Hough v. Contributory Ret. Appeal Bd.*, 36 N.E.2d 415, 418 (Mass. 1941)); *see also Serv. Welding & Mach. Co. v. Mich. Mut. Liab. Co. of Detroit*, 311 F.2d 612, 617 (6th Cir. 1962) ("The word 'hazard' as used in the policy must mean 'the source of a risk.' . . . Thus, a 'hazard' is a danger or risk lurking in a situation or place."). "Along with other meanings, the standard dictionary defines the noun 'hazard' as exposure to the chance of loss or injury." *Caminetti v. Guaranty Union Life Ins. Co.*, 52 Cal. App. 2d 330, 334 (1942). The Merriam-Webster Online Dictionary defines "hazard" to include "a source of danger." *Hazard*, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/hazard> (last visited Jan. 17, 2020); *see also Travelers Cas. & Sur. Co. v. Emp'rs Ins. of Wausau*, 130 Cal. App. 4th 99,

114 n.6 (2005) ("Examples of injuries covered under the premises-operations coverage include injuries suffered by a shipyard worker while installing insulation at the insured's facility and injuries caused by a subcontractor's negligent construction of a wall that fell on a worker while the job was in progress."). Or, in other words, the "completed operations hazard" protects Starr Davis from the risk of loss caused by its *completed* operations. The source of the "danger" against which the coverage protects Starr Davis is its *completed* insulation work, not its ongoing insulation work.

This Court properly declined to adhere to the decision in *Wallace & Gale*, holding that that the "completed operations hazard" described in the Travelers (and other insurers') policies, and the corresponding aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos *after* Covil completed its installation or removal operations or work at a particular jobsite. In so holding, this Court noted:

The insurers contend that aggregate limits of liability apply to any third party's claim against Covil involving exposure to asbestos that took place before the *inception date* of their policies. The policies are not written in that manner, however. There is nothing in the definition of "completed operations" that focuses on the inception date of a policy. The Court is aware that, in seeking to limit their obligations to Covil, the insurers would prefer to rely exclusively on federal decisions attempting to "guess" the view the Maryland Court of Appeals would take if the issue of interpreting the "completed operations" provisions of the policies were presented to it. The insurers take the position that the Fourth Circuit has "spoken" definitively on this issue. However, this Court finds that federal decisions attempting to predict the interpretation of policy language under Maryland law are not pertinent to the determination of South Carolina law. This Court specifically finds that *In re Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004) is not the law of South Carolina.

Exhibit 2, Order, at 15–16. This Court further held that "[n]o aggregate limits of liability apply to suits seeking the recovery of damages for bodily injury where the plaintiff was

exposed to asbestos while Covil was performing work at a particular jobsite.” *Id.* Starr Davis respectfully requests that this Court apply this ruling to the insurance policies Travelers issued to Starr Davis.

C. The Burden of Proof For Demonstrating A Contract Limitation or Exclusions Is On The Insurer.

This Court has held that “[i]nsurers bear the burden of demonstrating that aggregate limits in their policies, if any, apply to any particular asbestos suits.” *See* Exhibit 2, Order, at 17. This ruling applies equally in this case, and should be included in a judgment.

D. Number of Occurrences.

The policies at issue provide coverage for legal liabilities resulting from an “occurrence.” An “occurrence” is typically defined as an accident, including exposure to substantially similar conditions, that results in bodily injury during the policy period. *See* Exhibit 2, Order, at 18. This Court held that Covil faces allegations in numerous lawsuits and that multiple asbestos injury and wrongful death “occurrences” have resulted from its “operations,” entitling Covil to multiple “per occurrence” limits of liability to resolve the asbestos suits. *See id.*

This Court reasoned that:

[t]he asbestos insulation operations suits against Covil are not repetitive products liability suits alleging exposure to asbestos from the same defective product. Instead, these suits allege that Covil’s operations exposed workers and other bystanders to asbestos. Courts have held that the type of asbestos operations claims against Covil resulted from multiple ‘occurrences’ under the standard definition of ‘occurrence’ used during the time of the insurers’ policies.

Id. (citing *Travelers Cas. & Sur. Co. v. Gerling Global Reinsurance Corp. of Am.*, 419 F.3d

181, 184 (2d Cir. 2005)). Starr Davis respectfully requests that this Court apply this ruling to the insurance policies Travelers issued to Starr Davis.

E. *Allocation of Losses to Starr Davis' Policies.*

This Court noted that “the language of the policies typically requires the insurers to pay ‘all sums’—meaning everything—for which the insure[r] is legally obligated to pay if a claimant sustains bodily injury during the period of the policy.” For premises/operations claims such an “all sums” rule is appropriate. But for products/completed operations, a pro rata “time-on-the-risk” approach can be applied, if properly qualified or limited. *See* Exhibit 2, Covil Order, at 18. This Court has held that:

each individual insurer will nevertheless be protected fully against the possibility that it paid too much on a single asbestos claim by its right to seek contribution from any other insurer, but not from Covil, whose policy also was triggered by the asbestos suit. This approach ‘ensures that [Covil] is indemnified by one [or more] insurer for the full extent of the loss up to the policy’s limits, but apportions liability among all insurers whose policies were triggered by the claimant’s asbestos-related bodily injury.

Id. at 19 (citing *Armstrong*, 45 Cal. App. 4th at 55). Thus, for products/completed operations claims, this Court has applied a pro rata “time-on-the-risk” approach. *See Crossman Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011). Starr is a defunct company in receivership. It lacks the funds necessary for it to absorb a portion of the company’s asbestos liability in conjunction with the insurers as part of a “pro rata” allegation regime. *Id.* Therefore, Starr Davis respectfully requests that this Court apply the above ruling to the insurance policies Travelers issued to Starr Davis.

CONCLUSION

For the foregoing reasons, Starr Davis, by and through its duly appointed Receiver, requests that this Court hold that the law of South Carolina as set forth in this Court's January 8, 2020 Covil Order applies to the Travelers policies issued to Starr Davis; grant Starr Davis' motion for partial summary judgment on its claims for declaratory judgment against Travelers; and grant Starr Davis all relief at law or equity to which it is justly entitled.

s/ Jescelyn Spitz
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June 22^{3rd} , 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

PETER D. PROTOPAPAS, as Receiver for
STARR DAVIS COMPANY, INC. and
STARR DAVIS COMPANY OF S.C., INC.,

Case Number: 2019-CP-40-06243

Plaintiff,

In Re:

Asbestos Personal Injury Litigation
Coordinated Docket

vs.

TRAVELERS CASUALTY AND SURETY
COMPANY f/k/a THE AETNA CASUALTY
AND SURETY COMPANY; THE
STANDARD FIRE INSURANCE
COMPANY; ST. PAUL FIRE AND MARINE
INSURANCE COMPANY; THE
EMPLOYERS' FIRE INSURANCE
COMPANY; SOUTHEASTERN AGENCY
GROUP and M.I.A. COMPANY, INC.
individually and as successors to or f/k/a
MERRIMON INSURANCE AGENCY, INC.;
ROBERT E. ASPRAY; NELL ASHWORTH,
individually and as personal representative of
the Estate of ROBERT J. ASHWORTH;
BETTY C. D'AMICO, individually and as
Executor of the Estate of JULIAN D'AMICO,
JR.; KAYLA KEITH, individually and as the
personal representative of the Estate of
JERRY W. ARCHER, SR.; RICHARD L.
KNIGHT II, as personal representative of the
Estate of TEDDY L. KNIGHT, SR., and
LINDA KNIGHT, individually; DAVID D.
ROLIINS; JAMES W. SMITH and FRANCES
R. SMITH; and LINDA J. WHITE,
individually and as Personal Representative of
the Estate of LUBERT F. WHITE, JR.,

Defendants.

STARR DAVIS' RENEWED
SUPPLEMENTAL MOTION FOR
PARTIAL SUMMARY JUDGMENT
AGAINST TRAVELERS CASUALTY
AND SURETY COMPANY AND THE
STANDARD FIRE INSURANCE
COMPANY; MEMORANDUM IN
SUPPORT

Starr Davis Company, Inc. and Starr Davis Company Of South Carolina, Inc. (Starr Davis Company, Inc. is referred to as “Starr Davis Co.”, Starr Davis of South Carolina, Inc. is referred to as “Starr Davis of South Carolina,” and the two companies are collectively referred to as “Starr Davis”), by and through their duly-appointed Receiver, Peter D. Protopapas (the “Receiver”), move this Court for partial summary judgment as to their claims for declaratory judgment against defendants Travelers Casualty and Surety Company, formerly known as The Aetna Casualty and Surety Company and referred to herein individually as “Aetna,” and The Standard Fire Insurance Company, referred to individually as “Standard Fire” (collectively “Travelers”).

Starr Davis initially moved for partial summary judgment on February 28, 2020. On June 23, 2020, Starr Davis filed a supplemental motion to address information produced by Travelers after Starr Davis filed its original motion. On August 6, 2020, Starr Davis filed its First Amended Complaint for Declaratory Judgment, Breach of Contract, and Accounting, and Other Legal and Equitable Relief. Starr Davis filed its amended pleading as a matter of right under Rule 15(a), SCRCP, because Travelers has not yet filed a responsive pleading in this action.¹ Because it filed an amended complaint, Starr Davis is filing this renewed motion for partial summary judgment. Therefore, the Court need not review the motion for partial summary judgment filed on February 28, 2020, or the supplemental motion for partial summary judgment filed on August 6, 2020, and it may treat this renewed motion as the operative motion. In support of its renewed supplemental

¹ During its failed removal attempt, Travelers filed a motion to dismiss in federal court. (Case No. 3-19-cv-03481, Dkt. No. 6.) Travelers did not file an answer in any court either before or after the case was remanded. Importantly, a motion to dismiss filed under Rule 12(b) is not a “responsive pleading” as defined by Rule 7, SCRCP. *See* Rule 7(a), SCRCP (excluding motions to dismiss from the definition of a pleading and stating “[n]o other pleadings shall be allowed”). Therefore, because Travelers has not yet filed a responsive pleading, Starr Davis retained its ability to amend as a matter of right under Rule 15(a). *Bowers v. Robinson*, 311 S.C. 412, 414, 429 S.E.2d 799, 800 (1993) (“We agree the motion to amend was not necessary. Rule 15(a) allows parties to amend their pleadings once as a matter of course at any time before or within thirty days after a responsive pleading is served. The motion to dismiss did not alter the time allowed to the plaintiff to amend his complaint as a matter of right. Rule 7(a). Therefore, leave of court was not necessary.” (citations omitted)).

motion for partial summary judgment, Starr Davis demonstrates as follows:

I. NATURE OF THE CASE AND REQUESTED RULINGS

Starr Davis began business operations as an insulation contractor in or about 1946 in South Carolina. Over the course of the next forty years, the company grew to become a major regional insulation contractor – installing, removing, replacing and repairing insulation, including at pertinent times asbestos-containing insulation – in a variety of industrial facilities throughout the southeastern United States, principally in South Carolina, North Carolina, Georgia, Alabama, Virginia and Tennessee. Over the course of the company’s existence, Starr Davis paid premiums to purchase significant amounts of liability insurance from Travelers.

This Court appointed Peter Protopapas as the Receiver of Starr Davis on February 21, 2019. The Court vested the Receiver with the “power and authority to fully administer all assets of Starr Davis,” which is “inclusive of, but not limited to, the right and obligation to administer any insurance assets of Starr Davis as well as any claims related to the actions or failure to act of Starr Davis’ insurance carriers.”²

In its role as the Receivership Court for another South Carolina insulation contractor, Covil Corporation, this Court has considered certain similar insurance coverage issues, and has determined that South Carolina law governs the construction of South Carolina-issued insurance policies. Travelers has now finally produced policies and evidence of policies issued to Starr Davis which has led to the need to bring a supplemental motion for partial summary judgment on multiple aspects of the policies, as well as the legal principles governing these policies and the insuring relationship between Starr Davis and Travelers. Based on the foregoing and this Court’s rulings

² See Exhibit 1, Order Appointing Receiver.

and principles of insurance law, Starr Davis seeks the following declarations and judgment incorporating these declarations:

1. Multiple-year policies and policies that were subject to annual renewal provide for a full separate limit of liability for product liability and completed operations claims and a full per occurrence limit for premises and operations claims separately for each annual period or portion thereof;
2. Primary insurance policies issued by Travelers have an unlimited supplemental duty to pay or reimburse defense costs;
3. The duty to pay or reimburse defense costs is “triggered” whenever there is any obligation that could potentially involve the policy coverage;
4. The duty to pay or reimburse defense costs is triggered by the allegations of a complaint asserted against Starr Davis;
5. In the unique case of Starr Davis where multiple primary policies were issued for the same policy year, and these multiple policies provide coverage for the same claim, Starr Davis may select one or both of the policies to respond to the claim and may also “stack” the limits of such policies for each and every such claim;
6. The burden of proving any limitation or exclusion to coverage is on the insurer, here Travelers;
7. All of the Travelers liability insurance policies in effect from a person’s first exposure to asbestos through manifestation of an asbestos-related disease or condition, and, ultimately, to death, cover the asbestos cases unless coverage is otherwise excluded under a policy;
8. The “completed operations hazard” described in the Travelers policies, and the

corresponding aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos products *after* Starr Davis completed its installation or removal operations or work at a particular jobsite;

9. As to any individual asbestos lawsuit, it is Travelers' burden to prove that the suit seeks the recovery of damages that are subject to any aggregate limits of liability applicable to the "products" or "completed operations" provisions in its policies;
10. The asbestos insulation contracting, or "operations," claims against Starr Davis have resulted from multiple "occurrences" under the Travelers policies, thus entitling Starr Davis to multiple "per occurrence" limits of liability to satisfy its asbestos liabilities;
11. As to the asbestos "operations" claims against Starr Davis, Travelers is obligated to pay those claims "in full" up to its "per occurrence" limit of liability; and
12. While product liability or completed operations losses are subject to allocation on a "time-on-the-risk" pro rata allocation method, "operations" claims are allocated on an "all sums" basis, and, in either case, in light of its non-operating defunct status, no loss may be allocated to Starr Davis as part of any "time-on-the-risk" allocation scheme.

Based on this Court's clear pronouncement of South Carolina law in its January 8, 2020 Order (the "Covil Order"),³ which the Court recently applied in granting summary judgment in another similar asbestos case,⁴ the evidence presented herein, and principles of insurance law and contract construction, Starr Davis respectfully requests that this Court enter summary judgment in its favor

³ See Exhibit 2, January 8, 2020 Order for Rule to Show Cause in the Covil Corporation receivership action.

⁴ See Exhibit 2.A, Order granting partial summary judgment in *Covil Corp. v. Penn. Nat'l Mut. Caus. Ins. Co.*, No. 2020-CP-40-01226 (S.C. Cir. Ct. Aug. 13, 2020) (hereinafter referred to as the Penn. National Order).

on these issues.

II. FACTUAL AND POLICY FINDINGS AND RULINGS

Starr Davis was formed in South Carolina in or about 1946, and engaged in the installation, removal, replacement and repair of insulation in various facilities across South Carolina and in the neighboring states of North Carolina, Tennessee and Georgia, as well as Alabama and Virginia, for over four decades. Starr Davis's operations involved the installation, removal, replacement, repair and disturbance of insulation materials, typically supplied, required, or acquired by other parties. At pertinent times, insulation materials contained asbestos, and Starr Davis's operations allegedly resulted in bodily injury to South Carolina citizens.

The State of South Carolina rescinded Starr Davis Company, Inc.'s corporate charter in 1996, and rescinded Starr Davis Company of South Carolina, Inc.'s corporate charter in 1997, for failure to file the appropriate documentation with the Secretary of State. *See* Exhibit 3.

Travelers has always been, and continues to be, aware of the nature of Starr Davis's prior operations.⁵ Travelers also understands that many of the asbestos contracting claims against Starr Davis invoke the "operations" coverage portion of their policies because the claims did not result from Starr Davis' "completed operations," as discussed in detail below.

In its authority as the Receivership Court for Starr Davis, this Court issued a subpoena to

⁵ As late as the policy issued for the period January 1, 1978, through January 1, 1979, Standard Fire listed Starr Davis's business as including:

"Steam Pipe or Boiler Insulation –
Applying Cork, Asbestos or Other
Non Conducting Materials"

See policy materials attached as Exhibit 5, comprising an "Incomplete Policy" for Policy No. 25 AL 802646 CN5, issued for the policy period January 1, 1978 to January 1, 1979 by The Standard Fire Insurance Company, and Exhibit 4, comprising an "Incomplete Policy" for Policy No. 25 AL 801362 CMA for the same policy period issued by The Aetna Casualty and Surety Company. As set forth in Starr Davis's Motion to Seal filed on June 23, 2020, which is incorporated herein and renewed by reference, Starr Davis is seeking to file these and several other exhibits under seal due to confidentiality concerns.

Travelers pursuant to a request by the Receiver, seeking copies of insurance policies issued by Aetna and Standard Fire (both Travelers companies) to Starr Davis, as well as multiple other categories of documents, including underwriting and claims documents. *See* Exhibits 6 and 7. Initially, Travelers categorically refused to produce the requested documents on the ground that it did not believe the subpoena was served properly: [REDACTED]

[REDACTED]” *See* Exhibit 8.

Travelers’ failure to comply with this Court’s subpoena came despite the fact that Travelers had previously admitted that it issued liability insurance coverage to Starr Davis for the period 1959 to 1985. In a previous filing in this action while it was still removed to federal court, Travelers admitted that it had “discovered secondary evidence of 1959-1985 liability insurance coverage issued to Starr Davis by Travelers.”⁶ Travelers attached to the motion a document entitled “Interim Agreement,” which appears to be an agreement between Starr Davis and Aetna, dated November 19, 1985. *See* Exhibit 9 at 5-8.⁷

Starr Davis now understands why Travelers refused to provide its insured with policies it issued to Starr Davis, why Travelers refused to comply with subpoenas sought by the Receiver and issued by this Court, and why it took Travelers more than a year to “come clean” as to the scope of coverage that it issued to Starr Davis. While most of the policy documentation sought by

⁶ *See* Exhibit 9, Travelers’ Supplemental Opposition to Motion to Remand and Memorandum in Support, filed in the South Carolina District Court, Civil Action No. 3:19-cv-03841-JFA, Rec. Doc. 42.

⁷ Starr Davis notes that paragraph 1 of the agreement specifies, “Neither this Interim Agreement nor any part thereof shall be offered in evidence or used for any purpose in any court of law as support for the position being asserted by either party hereto in connection with the meaning, intent or construction of any insurance policy or policies issued by Aetna or purchased by Starr Davis.” *See id.* At 5 (Once again, Travelers has filed something that it should not have filed. *See* Exhibit 9, this Court’s Mediation Email Sanction Order.) The document also appears to indicate that it was prepared as a result of asbestos claims filed against Starr Davis. *See* Exhibit 9 at 5 (“to provide for the effective management of Starr Davis asbestos claims.”) Starr Davis offers the document only as evidence of the existence of the insurance policies.

the Receiver has apparently been destroyed – at this point something this Court has grown accustomed to seeing when Travelers is involved – there is sufficient secondary evidence, including partial or incomplete policies, to reveal an extraordinary multi-decade relationship between Travelers and Starr Davis. Through painstaking policy reconstruction and analysis based on documents finally produced by Travelers, a 40-year uninterrupted relationship has been revealed, from January 1, 1946 to April 30, 1986, during which Travelers insured Starr Davis for asbestos-related bodily injury suits and claims. This coverage is depicted in the charts attached as Exhibits 10, 11, 12 and 13 and in the associated schedules of insurance attached as Exhibits 14 and 15.⁸ The relationship was so extensive and Travelers and Starr Davis so intertwined that Starr Davis was issued an endorsement such that Starr Davis was, and is, entitled to participate in the earnings of Travelers:

“ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ”

Exhibit 4, p. 34.

Because essentially all of the Travelers policies were destroyed by Travelers, this Court

⁸The Aetna policies providing products/completed operations coverage are depicted in Exhibit 10. The Aetna policies providing premises/operations coverage are depicted in Exhibit 11. The Standard Fire policies providing products/completed operations for North Carolina are depicted in Exhibit 11. The Standard Fire policies providing premises/operations coverage for North Carolina are depicted in Exhibit 12. The products/completed operations coverage is detailed in the schedule attached as Exhibit 14, which also references documentary evidence. The premises/operations coverage is detailed in the schedule attached as Exhibit 15, which also includes references to documents produced by Travelers.

has been called upon by Starr Davis to render partial summary judgment on several issues relating to policy issuance by Travelers. Partial summary judgment is appropriate based on discovery to date, Travelers' admissions, and legal principles implied or imposed by law. The documents and admissions by Travelers demonstrate the following:

A. The Aetna Casualty and Surety Asbestos Coverage

The Aetna Casualty and Surety Company issued primary coverage that was renewed annually on an uninterrupted basis for 40 years which provides defense and indemnity coverage for asbestos-related bodily injury suits. These policies were issued from January 1, 1946 through April 30, 1986. This primary coverage covers bodily injury as the result of both products and completed operations claims subject to an aggregate limit for settlement or judgment costs only ("products/completed operations") and operations claims that are subject to a per occurrence limit ("premises/operations claims"). This primary coverage issued by Aetna alone provides at least \$11,900,000 in products/completed operations limits and \$11,900,000 per occurrence in premises/operations limits, with no limit to the number of occurrences. Aetna also issued umbrella coverage to Starr Davis for 11 policy years, from January 1, 1974 to May 1, 1983. Based on the documents produced by Travelers in response to the Starr Davis subpoenas, this motion requests that this Court declare that Aetna issued the following coverage to Starr Davis:

- Primary coverage with a supplemental unlimited defense obligation and aggregate products/completed coverage with separate annual limits of \$100,000 for each of the 18 policy years 1946 to 1964;
- Primary coverage with a supplemental unlimited defense obligation for premises/operations claims and annual per occurrence limits of \$100,000 for each of the 18 policy years 1946 to 1964, with no limit to the number of occurrences;

- Primary coverage with a supplemental unlimited defense obligation and aggregate products/completed operations coverage with separate annual limits of \$300,000 for each of the 12 policy years from 1964 to 1976;
- Primary coverage with a supplemental unlimited defense obligation for premises/operations claims and annual per occurrence limits of \$300,000 with no limit to the number of occurrences for each of the 12 policy years 1964 to 1976;
- Primary coverage with a supplemental unlimited defense obligation and aggregate products/completed operations coverage with separate annual limits of \$500,000 for each of the 11 policy years from 1976 through April 30, 1986;
- Primary coverage with a supplemental unlimited defense obligation and aggregate products/completed operations coverage with separate annual limits of \$500,000 for each of the 11 policy years from 1976 through April 30, 1986, and no limit to the number of occurrences;
- Umbrella coverage for each of the two policy years January 1, 1974 to January 1, 1975 and January 1, 1975 to August 4, 1975 with separate annual limits of \$1,000,000 in the aggregate for products/completed operations claims and \$1,000,000 per occurrence for premises/operations claims; and
- Umbrella coverage for each of the nine separate policy years from August 4, 1975 to May 1, 1983 with separate annual limits of \$2,000,000 in the aggregate for products/completed operations claims and \$2,000,000 per occurrence for premises/operations claims.

With the exception of the primary policies from January 1, 1974 to May 1, 1980, which do not cover North Carolina claims, the Aetna policies described above, depicted in Exhibits 10 and 11

and detailed in Exhibit 14, cover all asbestos-related suits asserted against Starr Davis Co. or Starr Davis of South Carolina.⁹

B. The Standard Fire Insurance Company Coverage

The Standard Fire Insurance Company issued primary policies to Starr Davis Co. and Starr Davis of South Carolina with an unlimited supplemental defense obligation and separate annual products/completed operations limits for each of the two annual periods January 7, 1974 to January 7, 1976 with separate annual limits of \$300,000 per occurrence and in the aggregate and \$500,000 in limits for each of the five annual periods January 7, 1976 to May 1, 1980, per occurrence and in the aggregate, with no limit to the number of occurrences. These Standard Fire policies were issued to Starr Davis Co. and Starr Davis of South Carolina but cover operations only in North Carolina.

The Standard Fire limits are depicted in Exhibits 13 and 14 and are detailed in the schedule attached as Exhibit 16. An incomplete Standard Fire policy is attached as Exhibit 5.

C. Rulings As To Policy Provisions

Based on the policy evidence produced by Travelers, Starr Davis Co. and Starr Davis of South Carolina respectfully request that the following findings and rulings be entered as a judgment with respect to the foregoing policies depicted in Exhibits 10, 11, 12 and 13 and detailed in Exhibits 14 and 15:

1. All of the Travelers policies listed in Exhibits 10, 11, 12 and 13 and detailed in Exhibits 14 and 15 are either multiple-year policies or policies that were subject to

⁹ An incomplete Aetna policy produced by Travelers is attached as Exhibit 4. Travelers and Aetna routinely destroyed policies such as those issued to Starr Davis and Starr Davis of South Carolina.

annual renewal and all such policies issued by Travelers provide for a full separate limit of liability for product liability and completed operations claims and for premises/operations claims on a per occurrence basis for each annual period or portion thereof;

2. All of the primary insurance policies issued by Travelers listed in Exhibits 10, 11, 12 and 13 and detailed in Exhibits 14 and 15 have an unlimited supplemental duty to pay or reimburse defense costs;
3. The duty to pay or reimburse defense costs in these policies is “triggered” whenever there is any obligation that could potentially involve the policy coverage;
4. The duty to pay or reimburse defense costs is triggered by the allegations of a complaint asserted against Starr Davis;
5. In the unique case of Starr Davis where multiple primary policies were issued for the same policy year, and multiple policies provide coverage for the same claim, Starr Davis may select one or both of the policies to respond to the claim and may “stack” the limits of such policies for each and every such claim;
6. The burden of proving any limitation or exclusion to coverage is on the insurer, here Travelers;
7. All of the Travelers liability insurance policies in effect from a person’s first exposure to asbestos through manifestation of an asbestos-related disease or condition, and, ultimately, to death, cover the asbestos cases unless coverage is otherwise excluded under a policy;
8. The “completed operations hazard” described in Travelers’ policies, and the corresponding aggregate limits of liability, apply *only* when a plaintiff is exposed

to asbestos products *after* Starr Davis completed its installation or removal operations or work at a particular jobsite;

9. As to any individual asbestos lawsuit, it is Travelers' burden to prove that the suit seeks the recovery of damages that are subject to the aggregate limits of liability applicable to the "completed operations" provisions in their policies;
10. The asbestos insulation contracting, or "operations," claims against Starr Davis have resulted from multiple "occurrences" under the Travelers policies, thus entitling Starr Davis to multiple "per occurrence" limits of liability to satisfy its asbestos liabilities;
11. As to the asbestos "operations" claims against Starr Davis, Travelers is obligated to pay those claims "in full" up to its "per occurrence" limit of liability; and
12. While product liability or completed operations losses are subject to allocation on a "time-on-the-risk" pro rata allocation method, in light of its non-operating defunct status, no loss may be allocated to Starr Davis as part of any "time-on-the-risk" allocation scheme.

* * *

The documents that Travelers has produced are represented to comprise all that Travelers has in terms of the Starr Davis policies. Travelers – which is known for its deliberate destruction of insurance policies of its insureds – has admitted its insuring relationship with Starr Davis Co. and Starr Davis of South Carolina. Starr Davis Co. and Starr Davis of South Carolina submit that, as to the foregoing, it has met its burden and, accordingly, Travelers "must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Id.*, 607 S.E.2d at 364. Travelers' response "must set forth specific facts, admissible in evidence, showing there is a

genuine issue for trial.” *Moody v. McLellan*, 295 S.C. 157, 367 S.E.2d 449, 454 (Ct. App. 1988). Travelers cannot do so, because the foregoing are based on its own documents and it destroyed all remaining evidence.

As to the matters of insurance policy construction, this Court has *already* determined the insurance issues relevant to this matter. The Covil Order directly addresses the matters at issue in Starr Davis’s claims for declaratory judgment against Travelers, and this Court recently cited it as support for granting summary judgment in a similar matter. *See* Ex. 2.A, New Penn Order at 4. There is no issue as to any material fact, and Starr Davis is entitled to judgment as a matter of law pursuant to Rule 56(c), SCRCF. Therefore, Starr Davis respectfully requests that this Court acknowledge and adopt in full its prior holdings within its January 8, 2020 Covil Order and enter the declarations sought within this Motion in a manner consistent with the law of South Carolina, as set forth above and in more detail below.

III. LEGAL RULINGS AS TO POLICY INTERPRETATION

Starr Davis was engaged for more than four decades in the insulation contracting business. This business involved installing, removing, replacing, repairing and distributing insulation materials in premises that were not owned or controlled by Starr Davis. Nor do the Starr Davis cases involve products supplied or sold by Starr Davis. Starr Davis was not an insulation manufacturer or supplier. It was a contractor, as Travelers’ policies make clear, and, given the four-decade relationship with Starr Davis, Travelers certainly was aware of Starr Davis’s operations. Travelers also knew that Starr Davis was a major business with operations conducted in at least the states of South Carolina, North Carolina, Georgia, Alabama, Tennessee and the Commonwealth of Virginia.

While Travelers issued a vast quantity of products/completed operations coverage,¹⁰ each asbestos suit can result in seven or even eight figure damages¹¹ and, given the extensive operations conducted by Starr Davis, both temporally and geographically, it is incumbent upon this Court to assure that there is no unwarranted limitation put on the obligations of Travelers. This Court is aware from its extensive experience and briefing on these issues in other matters before this Court that Travelers (and other insurers) seek to rely on the decision of the United States Court of Appeals for the Fourth Circuit in *In re Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004), which purported to apply Maryland law. More specifically, *Wallace & Gale* adopted the view that operations claims transform into completed operations claims where there is continuing injury post-dating completion of the installation. *In re Wallace & Gale*, 385 F.3d at 833-34.

This is a South Carolina case. Because *Wallace & Gale* purported to interpret only Maryland law, under basic principles of federalism, it established no state law precedent relevant to the outcome of this South Carolina case. The unique insurance issues present here turn on the interpretation of South Carolina law, which requires a wholly independent analysis. As this Court's recent order unambiguously shows, after undertaking that analysis, the outcome must be different.

This Court made clear that *Wallace & Gale* "is not the law of South Carolina." Exhibit 2, Order, at 16. Therefore, this Court "reconstruct[ed] the nature and scope of Covil's historic insurance program (without the cooperation of the Insurers) so as to facilitate the management of the South Carolina asbestos docket." *Id.* at 14. In doing so, this Court applied and made the

¹⁰ The requested rulings and documents demonstrate primary limits for products/completed operations claims of \$15,000,000, plus an unlimited supplemental defense obligation, and umbrella limits of \$21,000,000, for total products/completed operations limits of \$36,000,000, plus an unlimited supplemental defense obligation.

¹¹ The judgment in the *Finch* case involving Covil, a products/completed operations case, currently exceeds these limits of \$36,000,000. It is thus essential for this Court to delineate the scope of coverage available to Starr Davis.

findings and holdings described below based on principles of South Carolina insurance law, which the Receiver asks this Court to apply in deciding this case.

A. Continuous Injury Trigger of Coverage.

In the Covil Order, this Court ruled that Covil’s liability insurance policies in effect from a person’s *first* exposure to asbestos through manifestation of an asbestos disease and, ultimately, to death cover the asbestos cases unless coverage is otherwise excluded under a policy. Specifically, this Court held:

The policies at issue respond to suits when bodily injury takes place during the policy period, regardless of when the event causing the injury took place and regardless of when the injury becomes known or knowable. All of an insured’s policies in effect from a person’s first exposure to asbestos through manifestation of an asbestos disease and, ultimately, to death cover the asbestos cases unless coverage is otherwise excluded. This approach is called a “continuous trigger of coverage” or an “injury in fact trigger of coverage” inasmuch as medical science established long ago that asbestos injuries begin upon first inhalation of asbestos fibers and continue progressively thereafter. As respects asbestos injury and death suits, the “continuous trigger of coverage” and the “injury in fact trigger of coverage” yield the same result such that the court need not choose between these conceptually similar approaches.

Exhibit 2, Order, at 14–15 (citing *Armstrong World Indus., Inc., v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 45 (1996)). Based on this holding, this Court should here hold that all of Starr Davis’s policies in effect from a person’s first exposure to asbestos through death cover the asbestos claims against Starr Davis unless coverage is otherwise excluded.

B. The Distinction between “Operations” and “Completed Operations.”

The *Wallace & Gale* court adopted the view that operations claims somehow are transmuted into completed operations claims where there is continuing injury post-dating completion of the installation. No insurance coverage decision prior to *Wallace & Gale* ever reached such a conclusion because it is antithetical to the nature of a “hazard” against which insurance policies cover insureds. At issue here is the construction of the “completed operations

hazard” in Starr Davis’s general liability insurance policies.

At its most fundamental level, a “hazard” in an insurance policy “is the source from which an accident may arise, or ‘a danger or risk lurking in a situation which by chance or fortuity develops into an active agency of harm.’” *Ketona Chem. Corp. v. Globe Indem. Co.*, 404 F.2d 181, 185 (5th Cir. 1968) (quoting *Hough v. Contributory Ret. Appeal Bd.*, 36 N.E.2d 415, 418 (Mass. 1941)); see also *Serv. Welding & Mach. Co. v. Mich. Mut. Liab. Co. of Detroit*, 311 F.2d 612, 617 (6th Cir. 1962) (“The word ‘hazard’ as used in the policy must mean ‘the source of a risk.’ . . . Thus, a ‘hazard’ is a danger or risk lurking in a situation or place.”). “Along with other meanings, the standard dictionary defines the noun ‘hazard’ as exposure to the chance of loss or injury.” *Caminetti v. Guaranty Union Life Ins. Co.*, 52 Cal. App. 2d 330, 334 (1942). The Merriam-Webster Online Dictionary defines “hazard” to include “a source of danger.” *Hazard*, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/hazard> (last visited Jan. 17, 2020); see also *Travelers Cas. & Sur. Co. v. Emp’rs Ins. of Wausau*, 130 Cal. App. 4th 99, 114 n.6 (2005) (“Examples of injuries covered under the premises-operations coverage include injuries suffered by a shipyard worker while installing insulation at the insured’s facility and injuries caused by a subcontractor’s negligent construction of a wall that fell on a worker while the job was in progress.”). Or, in other words, the “completed operations hazard” protects Starr Davis from the risk of loss caused by its *completed* operations. The source of the “danger” against which the coverage protects Starr Davis is its *completed* insulation work, not its ongoing insulation work.

This Court properly declined to adhere to the decision in *Wallace & Gale*, holding that that the “completed operations hazard” described in the Travelers (and other insurers’) policies, and the corresponding aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos *after* Covil completed its installation or removal operations or work at a particular jobsite. In so

holding, this Court noted:

The insurers contend that aggregate limits of liability apply to any third party's claim against Covil involving exposure to asbestos that took place before the *inception date* of their policies. The policies are not written in that manner, however. There is nothing in the definition of "completed operations" that focuses on the inception date of a policy. The Court is aware that, in seeking to limit their obligations to Covil, the insurers would prefer to rely exclusively on federal decisions attempting to "guess" the view the Maryland Court of Appeals would take if the issue of interpreting the "completed operations" provisions of the policies were presented to it. The insurers take the position that the Fourth Circuit has "spoken" definitively on this issue. However, this Court finds that federal decisions attempting to predict the interpretation of policy language under Maryland law are not pertinent to the determination of South Carolina law. This Court specifically finds that *In re Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004) is not the law of South Carolina.

Exhibit 2, Order, at 15–16; *see also* Exhibit 2.A, Penn. National Order, at 4. This Court further held that "[n]o aggregate limits of liability apply to suits seeking the recovery of damages for bodily injury where the plaintiff was exposed to asbestos while Covil was performing work at a particular jobsite." Exhibit 2, Order, at 15–16. Starr Davis respectfully requests that this Court apply these rulings to the insurance policies Travelers issued to Starr Davis.

C. The Burden of Proof For Demonstrating A Contract Limitation or Exclusions Is On The Insurer.

This Court has held that "[i]nsurers bear the burden of demonstrating that aggregate limits in their policies, if any, apply to any particular asbestos suits." *See* Exhibit 2, Covil Order, at 17.

This ruling applies equally in this case, and should be included in a judgment.

D. Number of Occurrences.

The policies at issue provide coverage for legal liabilities resulting from an "occurrence." An "occurrence" is typically defined as an accident, including exposure to substantially similar conditions, that results in bodily injury during the policy period. *See* Exhibit 2, Covil Order, at 18. This Court held that Covil faces allegations in numerous lawsuits and that multiple asbestos

injury and wrongful death “occurrences” have resulted from its “operations,” entitling Covil to multiple “per occurrence” limits of liability to resolve the asbestos suits. *See id.*

This Court reasoned that:

[t]he asbestos insulation operations suits against Covil are not repetitive products liability suits alleging exposure to asbestos from the same defective product. Instead, these suits allege that Covil’s operations exposed workers and other bystanders to asbestos. Courts have held that the type of asbestos operations claims against Covil resulted from multiple ‘occurrences’ under the standard definition of ‘occurrence’ used during the time of the insurers’ policies.

Id. (citing *Travelers Cas. & Sur. Co. v. Gerling Global Reinsurance Corp. of Am.*, 419 F.3d 181, 184 (2d Cir. 2005)). Starr Davis respectfully requests that this Court apply this ruling to the insurance policies Travelers issued to Starr Davis.

E. Allocation of Losses to Starr Davis’ Policies.

This Court noted that “the language of the policies typically requires the insurers to pay ‘all sums’—meaning everything—for which the insure[r] is legally obligated to pay if a claimant sustains bodily injury during the period of the policy.” Exhibit 2, Covil Order, at 18. For premises/operations claims such an “all sums” rule is appropriate and should be applied here. *Id.*; *see also* Exhibit 2.A, Penn National Order, at 4. But for products/completed operations, a pro rata “time-on-the-risk” approach can be applied, if properly qualified or limited. *See* Exhibit 2, Covil Order, at 18. This Court has held that:

each individual insurer will nevertheless be protected fully against the possibility that it paid too much on a single asbestos claim by its right to seek contribution from any other insurer, ***but not from Covil***, whose policy also was triggered by the asbestos suit. This approach ‘ensures that [Covil] is indemnified by one [or more] insurer for the full extent of the loss up to the policy’s limits, but apportions liability among all insurers whose policies were triggered by the claimant’s asbestos-related bodily injury.

Id. at 19 (citing *Armstrong*, 45 Cal. App. 4th at 55) (emphasis added). Thus, for products/completed operations claims, this Court has applied a pro rata “time-on-the-risk”

approach. See *Crossman Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011). However, due to the “impracticability of allocation of loss” to a company in receivership, the Court has refused to allocate loss to such companies in receivership for “policy years when [the company] does not have any available or responsive coverage.” Exhibit 2, Covil Order, at 19. The court has thus recognized that allocating loss from a judgment or settlement to an insured which cannot pay any portion of the judgment or settlement – especially when there is abundant insurance to pay for the loss but for a judicially-created allocation formula – is unproductive, as well as inequitable. The supposed reason for a “time on the risk” allocation is to accomplish an “equitable” allocation. However, there is no “equity” in either driving an insured further into insolvency through a formulistic allocation method or by leaving a portion of a settlement or judgment unpaid. Nor is it “equitable” to apportion any loss to an insured in receivership when there is any responsive insurance.

Starr is a defunct company in receivership. It lacks the funds necessary for it to absorb a portion of the company’s asbestos liability in conjunction with the insurers as part of a “pro rata” allegation regime. *Id.* Therefore, Starr Davis respectfully requests that this Court apply the above ruling to the insurance policies Travelers issued to Starr Davis.

CONCLUSION

For the foregoing reasons, Starr Davis, by and through its duly appointed Receiver, requests that this Court hold that the law of South Carolina as set forth in this Court’s January 8, 2020 Covil Order applies to the Travelers policies issued to Starr Davis; grant Starr Davis’ motion for partial summary judgment on its claims for declaratory judgment against Travelers; and grant Starr Davis all relief at law or equity to which it is justly entitled.

s/ Brian M. Barnwell
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August 21, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
CHARLES T. HOPPER and	)	CASE NO. 2019-CP-4000076
REBECCA HOPPER	)	
	)	
Plaintiffs,	)	In Re:
	)	Asbestos Personal Injury Litigation
v.	)	Coordinated Docket
	)	
AIR & LIQUID SYSTEMS	)	
CORPORATION, et al.	)	
	)	
Defendants.	)	

ORDER GRANTING MOTION TO APPOINT A RECEIVER AND APPOINTING RECEIVER

CAME ON February 21, 2019 to be heard the Plaintiffs Motion for Appointment of a Receiver. This Court finds that the application is meritorious under the applicable statute because Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. (collectively, "Starr Davis"). Starr Davis Company of S.C. has dissolved and Starr Davis Company, Inc., a North Carolina Corporation, has forfeited its right to transact business in the State of South Carolina. Starr Davis has further failed to answer this case and therefore, Plaintiffs request for an expedited ruling on this motion is appropriate and also granted.

Therefore, this Court hereby appoints Peter Protopapas, Esq., a member of the South Carolina Bar, be and hereby is appointed Receiver in this case pursuant to the South Carolina Law with the power and authority fully administer all assets of Starr Davis, accept service on behalf of Starr Davis, engage counsel on behalf of Starr Davis and take any and all steps necessary to protect the interests of Starr Davis whatever they may be. This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Starr Davis as well as any claims related to the actions or failure to act of Starr Davis' insurance carriers.

In addition to the powers of the Receiver set forth herein, the Receiver shall have the following rights, authority and powers with respect to the Respondent's property, to: 1) collect all accounts receivable

of Respondent and all rents due to the Respondent from any tenant; 2) to change locks to all premises at which any property is situated; 3) open any mail addressed to the defendant and addressed to any business owned by the Respondent; redirect the delivery of any mail addressed to the Respondent or any business of the Respondent, so that the mail may come directly to the receiver; 4) endorse and cash all checks and negotiable instruments payable to Respondent, except paychecks for current wages; 5) hire a real estate broker to sell any real property and mineral interest belonging to the Respondents; 6) hire any person or company to move and store the property of Respondent; 7) to insure any property belonging to the Respondents (but not the obligation); 8) obtain from any financial institution, bank, credit union, savings and loan or title company, credit bureau or any other third party, any financial records belonging to or pertaining to the Defendants; 9) obtain from any landlord, building owner or building manager where the Respondent or the Respondent's business is a tenant, copies of the Respondent's lease, lease application, credit application, payment history and copies of Respondent's checks for rent or other payments; 10) hire any person or company necessary to accomplish any right or power under this Order; and 11) take all action necessary to gain access to all storage facilities, safety-deposit boxes, real property, and leased premises wherein any property of Respondent may be situated, and to review and obtain copies of all documents related to same.

SIGNED this _____ day of _____, 2019.

Jean H. Toal, Chief of the Supreme
Court of South Carolina (Retired),
Acting as Circuit Court Judge



Richland Common Pleas

Case Caption: Charles T Hopper , plaintiff, et al vs Air & Liquid Systems Corporation , defendant, et al

Case Number: 2019CP4000076

Type: Order/Appointment of Receiver

IT IS SO ORDERED.

s/ Jean H. Toal #2758

Electronically signed on 2019-02-22 10:21:14 page 3 of 3

EXHIBIT 2

COUNTY OF YORK

Plaintiffs,

CBS Corporation, et al.,

Defendants.

COUNTY OF YORK

Plaintiffs,

Air & Liquid Systems Corporation, et al.,

Defendants.

ORDER FOR RULE TO SHOW CAUSE HEARING

ELECTRONICALLY FILED - 2020 Jan 08 11:39 AM - YORK - COMMON PLEAS - CASE#2015CP4602155
ELECTRONICALLY FILED - 2020 Aug 21 9:36 AM - RICHLAND - COMMON PLEAS - CASE#2019CP4006243

Defendants.

Defendants.

ORDER FOR RULE TO SHOW CAUSE HEARING

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	C/A NO.: 2018-CP-40-04940
	)	
DENVER D. TAYLOR and JANICE	)	
TAYLOR,	)	
	)	
Plaintiffs,	)	ORDER FOR RULE TO SHOW CAUSE
	)	HEARING
vs.	)	
	)	
Air & Liquid Systems Corporation, et al.,	)	
	)	
Defendants.	)	
	)	
	)	

This matter comes before this Court by way of a Motion for a Rule to Show Cause initiated by Peter D. Protopapas, as the duly appointed Receiver of Covil Corporation (“Receiver”). The Receiver’s Motion for a Rule to Show Cause against United States Fidelity and Guaranty Company (“USF&G”), Zurich American Insurance Company (“Zurich”), and Sentry Insurance, a Mutual Company (“Sentry”) (collectively “Insurers”) seeks an order holding these Insurers in contempt for violating this Court’s (1) November 2, 2018 Order Appointing a Receiver for Covil Corporation;¹ (2) February 28, 2019 Order requiring Covil’s Insurers to attend mediation;² (3) September 19, 2019 Order requiring Covil’s Insurers to respond and produce required documents before September 30, 2019;³ and (4) October 28, 2019 Order for Rule to Show Cause.⁴

¹ See November 2, 2018, Order Appointing Receiver in *Taylor v. Air & Liquid, et al.* (C/A No. 2018-CP-40-04940).

² See February 28, 2019, Order Granting Plaintiff’s Motion to Compel Attendance at Mediation in *Nolen v. Daniel, et al.* (C/A No. 2016-CP-40-04184); *Greene v. Armstrong, et al.* (C/A No. 2016-CP-40-00173); *Thompson v. Armstrong, et al* (2016-CP-40-2498); and *Taylor v. Air & Liquid, et al.* (C/A No. 2018-CP-04940).

³ See September 19, 2019, Order for Rule to Show Cause in *Hopper v. Air & Liquid, et al.* (C/A/No. 2019-CP-40-00076).

⁴ See October 28, 2019, Order for Rule to Show Cause in *Hopper v. Air & Liquid, et al.* (C/A/No. 2019-CP-40-00076).

The South Carolina Supreme Court appointed the undersigned to serve as the Chief Judge of Administrative Purposes over all asbestosis and asbestos litigation filed within the state court system. The asbestos litigation in South Carolina constitutes a significant number of complex multi-party cases. A typical case will include an injured plaintiff alleging that an asbestos-related cancer was caused by dozens of different defendants.

This Court has worked diligently to manage this docket and to organize this complicated statewide litigation into an orderly process whereby cases are assigned for trial in a predictable fashion. This process is designed to allow the litigants to participate in discovery in an orderly fashion to facilitate the evaluation of litigation positions well before trial, and to try the cases as necessary.

The Supreme Court's charge to this Court includes facilitating meaningful mediations of asbestos cases consistent with the South Carolina Rules of Alternative Dispute Resolution. The Rules mandate attendance at mediation of "a representative of the insurance carrier who is not the carrier's outside counsel and who has full authority to settle the claim" on behalf of any insured party against whom a claim is made. SCRADR 6(b)(4).

Although this Court manages a large asbestos docket involving scores of different defendants, the matters associated with defendant Covil Corporation have required a very significant amount of this Court's time and attention for the reasons explained in more detail below.

From the time of its original formation in or about 1954, Covil Corporation was engaged in the installation and removal of insulation in various industrial facilities across South Carolina. Covil's operations involved the installation, removal and disturbance of insulation materials, typically supplied, required or acquired by other parties. At pertinent times insulation materials contained asbestos and Covil's operations are alleged to have resulted in bodily injury to South Carolina citizens. In 1991, Covil's business failed and it ceased operations. Thereafter, in 1993 the State of South Carolina rescinded Covil's corporate charter for failing to file the appropriate documentation with the Secretary of State.

Despite Covil's failure as a going concern and its subsequent forfeiture of its corporate charter, it continued to be sued in numerous asbestos cases. Through the management of the South Carolina asbestos docket, this Court observed several irregularities in the way that Covil conducted itself in its litigation. In the fall of 2018, Covil inexplicably defaulted on two mesothelioma asbestos cases pending before this Court, and shortly thereafter on November 2, 2018, the undersigned appointed Peter D. Protopapas to serve as a Receiver for Covil Corporation to manage its affairs according to South Carolina law.

During the ensuing months, this Court conducted numerous hearings regarding issues related to Covil. Over time, it became clear to this Court that certain of Covil's primary insurers (USF&G, Zurich, and Sentry) were operating an otherwise defunct Covil for purposes of managing Covil's asbestos litigation and had been doing so for over two decades without any apparent involvement from the insured – Covil Corporation. For over two decades, these primary Insurers pretended to be Covil. The primary insurers never sought the appointment of a receiver to represent Covil's interests in the defense of its asbestos cases. In fact, despite numerous opportunities to do so, at no time did any of Covil's Insurers even disclose to this Court their scheme to operate Covil as an undisclosed alter ego of these insurance companies.

As Covil's Receiver began to undertake his responsibilities, it became evident to this Court that Covil's Insurers would not willingly cooperate with the Receiver.⁵ In fact, several of these Insurers went to great lengths to thwart the Receiver's efforts to understand the basic nature and amount of the asbestos insurance coverage available to Covil. As a result of the insurers' refusal to cooperate, the Receiver began to seek this Court's intervention to determine the nature and amount of insurance available to Covil for its asbestos litigation. This information is critical to the Receiver's ability to manage Covil's asbestos

⁵ The Court's discussion of Covil's Insurers does not apply to TIG Insurance Company, as successor in interest to Fairmont Specialty Company, formerly known as Ranger Insurance Company ("TIG"). Unlike Covil's other insurers, TIG has cooperated with this Court and the Receiver. After producing the requisite materials, TIG acknowledged its responsibilities and reached an amicable settlement with Covil's Receiver. The Court commends TIG and its counsel for their cooperation and professionalism throughout this process. The Court also dissolved its Order to Show Cause as it related to Hartford and notes that Hartford also has reached an agreement to resolve its differences with Covil's Receiver.

litigation and, specifically, to participate meaningfully in mediation sessions scheduled for Covil's asbestos cases as required by the South Carolina Rules of Alternative Dispute Resolution.

Proceedings before this Court on the issue of Covil's participation in mediation exercises have demonstrated a lack of clarity regarding what constitutes "full authority" for claims filed against Covil Corporation. This lack of clarity continually delays settlement, stalls negotiations, and slows the ability of this Court to manage the South Carolina asbestos docket. An inquiry into the insurance coverage of Covil Corporation is warranted to fully determine the amount of authority available for settlement of asbestos personal injury actions filed against Covil Corporation.

Over time, this Court entered a series of escalating orders designed to require the Insurers to produce relevant insurance information to Covil's Receiver and to participate in asbestos mediations as scheduled on the South Carolina docket. Although several asbestos cases have been resolved under this system, except as noted above in note 5, the Insurers have yet to comply with this Court's Orders regarding the full production of the relevant insurance information to Covil's Receiver. These Insurers' defiance of this Court's lawful orders has impeded Covil's Receiver in his work under this Court's mandate, has interrupted this Court's ability to manage the numerous asbestos cases pending on its docket, and has required this Court unnecessarily to expend valuable time and resources in numerous hearings designed to encourage these Insurers to conduct themselves in accordance with the basic tenets of well-established South Carolina law. The Court has experienced problems with these Insurers when they were animating an otherwise defunct Covil and controlling its behavior in asbestos litigation before the appointment of the Receiver. *See* Order Granting Plaintiff's Motion for New Trial in *Crawford v. Ceeleanese Corp.*, C/A No. 2017-CP-42-04429 (where this Court found that Covil's insurers had been improperly operating, controlling, and abusing Covil for many years).

Unfortunately, this Court's persistence and patience have been unsuccessful in causing these Insurers fully to disclose and produce the insurance information or the details concerning their respective insuring relationship with Covil to the Receiver for their insured, Covil. After numerous attempts to achieve

compliance, this Court scheduled a show cause hearing on November 12, 2019, where the Insurers were directed to appear to discuss by policy and annual period (or portion thereof) the original and remaining limits of Covil's insurance policies under all applicable coverage parts, including separately as to the product liability/completed operations coverage part and the operations/premises coverage part and to provide an accounting of the amounts paid in settlement for each claim paid or settled, who authorized payment, under what coverage parts of the policies settlements or judgments were paid, documentation or other evidence supporting the analysis and characterization of claims as products/completed operations or operations/premises claims, method of allocation of settlements or judgments paid among Insurers, policies and policy years and if no payment was made because of a denial of coverage, the stated basis at the time of settlement for such denial. With the exceptions noted above in note 5, the Insurers failed and refused to comply with this order.

In sum, after months of work by this Court and its Receiver, it appears to this Court that these Insurers have refused to provide complete policy limits and settlement authority information to their insured's Receiver, even after this Court ordered the Insurers to provide the information by September 30, 2019, under penalty of perjury, and again in a show cause hearing scheduled on November 12, 2019. Despite their assertions in their memoranda submitted to this Court following the November 12, 2019 hearing, the Court has given the Insurers ample opportunity to respond to Receiver's arguments and explain to the Court why they should not be held in contempt for failing to abide by this Court's September 19, 2019 Order. Despite these Insurers not complying with the clear terms of the September 19, 2019 Order to respond to the areas of inquiry under the penalty of perjury by September 30, 2019, the Court allowed these Insurers to submit additional affidavits and evidence after the November 12, 2019 hearing. However, as the Court noted at the hearing, these Insurers were already in contempt of this Court's order by not providing proper responses under perjury by the September 30, 2019 deadline, and the supplemental submissions, although potentially helpful to the Court in making this ruling, do not necessarily cure the Insurers' contempt. The Court has diligently reviewed and considered the extensive filings submitted by both the

Receiver and these Insurers after the November 12, 2019 hearing. The Court finds the submissions by these Insurers are not relevant to, and do not cure, their contemptuous conduct. Rather, these filings have consumed additional countless hours of this Court's time while these Insurers continue to play games rather than comply with this Court's orders.

The Court is particularly concerned with the fact that these Insurers continue to claim ignorance surrounding their responsibility to their insured and their obligations under this Court's orders. The Court has held multiple hearings wherein the Court has allowed the Receiver and the Insurers to present arguments pertaining to these issues, and the Receiver has been trying to obtain the requested information since his appointment, well over a year ago. These Insurers cannot continue to plead ignorance in order to avoid the consequences of their own conduct and prolong the much-needed resolution of pending asbestos cases. The Insurers have continuously attempted to impede the Receiver's ability to determine the amounts of coverage available to Covil and have violated the South Carolina Alternative Dispute Resolution Rules by refusing to provide the Receiver with the necessary coverage information to fully participate in the mediation of these claims. In fact, because of these Insurers' obstinate refusal to comply with this Court's order and their past conduct, the Receiver has been forced to go to great lengths in order to present evidence to this Court and piece together the secondary evidence of insurance. While the Insurers have produced thousands of pages of documents, the production does not satisfy this Court's order as these Insurers have still not produced full coverage information or policies to the Receiver or fully disclosed the nature and extent of their insuring relationship.

During these hearings, the Court has been presented with evidence in the form of documents and sworn testimony indicating that Covil purchased products liability and completed operations liability insurance from USF&G (now a part of Travelers) from 1954 to 1964. Specifically, Palmer Covil (the founder of Covil Corporation) testified in a deposition in 1977 that Covil purchased USF&G general liability insurance coverage from 1954 to 1964. Moreover, Palmer Covil identified the Goldsmith Agency as the broker responsible for selling USF&G coverage to Covil. Former Lieutenant Governor Nick

Theodore provided an affidavit, as a former employee and partner of this agency, that he recalled selling USF&G insurance to Covil during this time period (until his agency lost the business to an agent selling insurance issued by Sentry). The Court finds this evidence and testimony to be persuasive, credible, and consistent with other known facts in this case.

On the other hand, USF&G reports only that it has been unable to locate these insurance policies. However, the Court has also been presented with evidence that USF&G undertook a systematic corporate program to destroy or discard its historical insurance policies which included policies and other related documentation from the period of time for which policies were issued to Covil as demonstrated by the evidence before this Court. In its arguments before the Court on November 12, 2019, and its memorandum submitted after the hearing, USF&G argues the Court should disregard its historical conduct because past conduct cannot be the basis of a finding of contempt. However, USF&G failed to inform the Court of the systematic destruction of policies until the Receiver brought the matter to the attention of the Court at the most recent hearing. The Court is concerned by the Insurers' failure to fully represent facts to the Court regarding the insurance coverage issued to Covil, especially considering that the Insurers acted as the alter ego of Covil for numerous years. The Court has given the Insurers ample opportunity to inform the Court of the necessary facts surrounding these coverage issues, and the Insurers have continuously refused to provide full information, misrepresented information, and attempted to prevent this Court from ruling on these issues.

The Court is deeply troubled by USF&G's historical behavior, including the widespread destruction of its insureds' insurance policies in an effort to evade liability under these policies. The Court is even more troubled by the fact that USF&G never mentioned, in numerous hearings on this very topic, that its policy destruction "purge" was the reason that USF&G is now unable to produce Covil's policies to the receiver. In this regard, USF&G has flagrantly defied this Court's orders and attempted to make a mockery of this Court's important work. Rarely, if ever, has this Court encountered such a degree of corporate

dishonesty as has been on display from USF&G during these proceedings. USF&G owes this Court a duty of candor, and should have been forthright.

The spoliation of evidence is the intentional, reckless, or negligent withholding, hiding, altering, fabricating, or destroying of evidence relevant to a current or reasonably anticipated legal proceeding. If proven, spoliation may be used to establish that the evidence was unfavorable to the party responsible. *Black's Law Dictionary* (8th Ed. 2004). The theory behind imposing sanctions for spoliation of evidence is that when a party destroys evidence, it is reasonable to infer that the party had “consciousness of guilt” or other motivations to avoid the evidence being heard or introduced to the jury.

A party bringing a motion for sanctions based on spoliation bears the burden of establishing three (3) independent elements before the Court may determine which sanction, if any, is appropriate. These elements are:

- (1) that the party having control over the evidence had a duty to preserve it at the time it was destroyed;
- (2) that the evidence was destroyed with a culpable state of mind; and
- (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Hawkins v. College of Charleston, 2013 WL 6050324, *2 (4th Cir. 2013) (quoting *Cytec Carbon Fibers, LLC v. Hopkins*, No. 2:11-cv-0217, 2012 WL 6044778 (D.S.C. Oct. 22, 2012)).

As to the first element, USF&G had a duty to preserve this evidence. “A party has a duty to preserve evidence during litigation and at any time ‘before the litigation when a party reasonably should know that evidence may be relevant to anticipated litigation.’” *Id.* at *3 (quoting *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)). There is a common law duty to preserve evidence, and a party can only be sanctioned for destroying evidence it had a duty to preserve. That duty arises when a party has notice that the party possesses evidence that is relevant to litigation or when a party should have known the evidence may be relevant to future litigation. Pre-litigation discussions or requests to inspect can also trigger a duty to preserve relevant evidence and it can be said that the obligation to preserve evidence

runs first to counsel, who then has an ethical obligation to notify and advise their client on its obligations to safeguard and preserve the evidence relevant to the litigation on a continuing basis.

Covil is unable to identify a specific date on which USF&G's duty to preserve records arose. However, by 1976, USF&G had received correspondence from Covil requesting USF&G to respond to an asbestos case, and by June 1983, USF&G had received correspondence from Covil serving as Covil's final written demand that USF&G afford a defense to Covil in an asbestos case. As a result of this exchange of correspondence, USF&G knew by at least June 1983 that its insurance policies issued to Covil would be highly relevant documents for years to come. Despite this fact, USF&G reports that it has been unable to locate the early policies issued to Covil – policies that it denies having issued – or an actual copy of a later policy that it admits to having issued to Covil.

The evidence demonstrates that USF&G cannot locate the early policies USF&G issued to Covil, or the later policy it admits having issued to Covil, because USF&G destroyed the policies. In 1984, the year after Covil's counsel demanded a defense from USF&G, which was facing a growing number of long-tail claims like the asbestos claims here, USF&G deliberately began purging old policies and policy information, including information on policy limits. To support its contentions regarding the destruction of policies, the Receiver submitted documents from the *Western MacArthur* litigation; most importantly the Pillsbury Report, which USF&G Filed in *Western MacArthur* litigation (*Western MacArthur Company v. General Accident Insurance Company of America*, Case No. 721595-7, In the Superior Court for Alameda County, California).⁶

⁶ The Pillsbury Report is an 85-page document, filed in *United States Fidelity & Guaranty Company, et al. v. American Re-Insurance Company, et al.* Index No. 604517/2002, in the Supreme Court of the State of New York, County of New York. An expert witness, Philip L. Pillsbury, Jr., of the New York law firm, Pillsbury and Levinson, was retained by the reinsurers of USF&G to evaluate, in the context of California bad faith and insurance practice, the potential exposure for damages, which USF&G faced in a jury trial in 2002. This material was presented by Covil, at the November 12, 2019 hearing to describe the significant corporate misconduct leading to USF&G's contention that it was unable to locate copies of Covil's early insurance policies, which the Receiver found highly probative of the key issues in the proceeding. There was no objection regarding the Court's consideration of the documents, and Defendant

As stated in the Pillsbury report, an April 30, 1984 memorandum from Charles Watson, then a Vice President of USF&G, the new document destruction policy mandated the “purging of *each* file, not just files that can be discarded in entirety,” required that doubts should be resolved “in favor of discarding unless there are legal restraints,” and admonished that “we must be absolutely sure that we have thoroughly cleaned existing files.” Similarly, a March 16, 1984 Department Circular detailing the Records Management Program noted: “All existing departmental files are to be in full compliance including having been completely purged of all obsolete and duplicate material.”

As detailed in the expert report of Philip Pillsbury, which USF&G filed on February 21, 2017 as an exhibit to its opposition to a motion in the *Western MacArthur* reinsurance matter then pending in New York, USF&G’s employees were given just two months to comply with the document destruction. Relying on USF&G’s historical records, Mr. Pillsbury also described the deposition testimony of Randolph Rohrbaugh, the USF&G Vice President of Quality Assurance, who testified that, at a meeting concerning the USF&G document destruction program among USF&G management and attorneys in 1984, “there was a discussion as to whether USF&G should retain its records information about insureds’ policies given that insureds would bear the burden of proof as to those policies.” *See* Pillsbury Report at 18.

In short, the evidence shows that USF&G plainly undertook its purge of policy-related materials in anticipation of litigation. Having destroyed its policy records, USF&G then could require its policyholders to provide copies of their policies to USF&G in order for USF&G to provide coverage. Beginning in the late 1980s, however, USF&G realized that policyholders could prove coverage for long-tail liability claims with secondary evidence, even if USF&G had destroyed the actual historical policy records in its possession. In his report in the reinsurance matter, Mr. Pillsbury describes the USF&G decision to reverse course on the document destruction policy. *See* Pillsbury Report at 18–19. Summarizing the deposition of Kenneth Ford, the USF&G in-house counsel in the Claims Legal Division, Mr. Pillsbury notes that Ford

USF&G and others requested the court allow them to submit further documentation. The court has considered the report and the additional insurers’ submissions in drafting this order.

“testified at deposition that USF&G decided to ‘stop the destruction’ after policyholders began to prove coverage for the long-tail claims with ‘partial information concerning a policy,’ and the burden was shifted to the insurer to prove there wasn’t a policy or at least to prove the policy terms, and USF&G was not able to rebut some of that information.” *Id.* at 19. The reversal of course apparently occurred after USF&G destroyed evidence of the coverage it had provided to Covil between 1954 and 1964 and the actual policy it admits to having issued to Covil in the 1976 to 1978 periods.

Recently produced documents from USF&G itself further support that had USF&G not destroyed its historical policies, it would have been able to locate coverage it issued to Covil in the 1950s and 1960s and the actual policy it admits to having issued to Covil in 1976 to 1978. USF&G Claims Register documents⁷ produced to the Receiver by USF&G on November 22, 2019, and December 5, 2019, over two months after this Court’s deadline for production, show USF&G paid claims on Covil policies made by third-party business entities such as Daniel Construction, Tennessee Eastman, Raburn Mills, First Baptist Church and Hicks & Ingle Company during the period from 1955 to 1962, further supporting the fact that USF&G issued general liability insurance coverage to Covil during this timeframe and, due to its conduct, has been unable to produce full and complete coverage information. Furthermore, although it claims to have what it calls a “certified” copy of the 1976 to 1978 primary policy it admits having issued to Covil, USF&G has not been transparent with either Covil or the court. This so-called “policy” is a collection of forms, not an actual insurance policy, and there is no competent proof of an aggregate limit for products or completed operations claims. USF&G’s use of the word “certified” is also misleading since the documents have no independent verification of their source or accuracy.

⁷ The Court understands that USF&G utilized Claims Registers to maintain an index of all paid claims, and specifically that an entry was not placed on a claims register until a clerk had reviewed the relevant insurance policy to ensure that there was coverage for the loss. An April 1947 booklet entitled “Claim Department Clerical Instructions” detailed USF&G’s instructions to clerical staff regarding entry of claims in the claims register: “After the clerk has checked the policy or bond information to determine if there is coverage for the loss, she enters it on the claim register as provided on that form. She assigns the number next in order to the last one used. A separate sheet is used on each class of claims for each month. A carbon copy of the claim register is sent to the Home Office on the first of each month on AL [Automobile Bodily Injury], L [Other Bodily Injury], C [Compensation], and MP [Miscellaneous Property Damage] claims.”

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

The "culpable" state of mind requirement does not require willful destruction. Rather, the moving party need only show that the evidence was destroyed "knowingly, even without intent [to breach the duty to preserve it], or negligently." *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107–12 (2d Cir. 2001). "[T]he Fourth Circuit requires only a showing of fault, with the degree of fault impacting the severity of the sanctions." *Sampson v. City of Cambridge, Maryland*, 251 F.R.D. 172, 179 (D. Md. 2008) (citing *Silvestri*, 271 F.3d at 590).

Here, the evidence before the Court shows that USF&G's conduct of destroying or losing relevant documents satisfies the required minimum level of culpability needed for spoliation sanctions to be imposed. Because culpability encompasses everything from ordinary negligence to willful conduct, the culpable standard merely requires USF&G to have some degree of fault, which is the case in this matter. Whether the Court finds that USF&G was negligent, grossly negligent, or willful in destroying the evidence, the Court concludes that USF&G had a culpable state of mind when it spoliated the evidence at issue.

The last of the three independent elements, relevance to the party's claims, is also clearly present on these facts. Under Rule 401 of the South Carolina Rules of Evidence, "relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." "Evidence is relevant if it tends to establish or make more or less probable some matter at issue upon which it directly or indirectly bears." *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986). Thus, any evidence which assists a jury at arriving at the truth of an issue is relevant. The determination of the relevancy of evidence is largely

within the trial judge's discretion. *Strickland v. Coastal Design Assocs., Inc.*, 294 S.C. 421, 425, 365 S.E.2d 226, 228 (Ct. App. 1987).

Here, Covil has met its burden of showing the spoliated evidence is highly relevant to its case. The fact that USF&G destroyed or lost such evidence is extremely damaging to Covil's ability to reconstruct its insurance policies. As such, USF&G should not profit or benefit from its failure to preserve this evidence. Of course, Covil has no way of knowing precisely what has been destroyed. However, there is reason to believe that the destroyed evidence would have aided Covil's position, which has suffered irreparable prejudice due to USF&G's spoliation. USF&G is hereby ORDERED to produce ALL documents related to these issues, including all transcripts, from the *Western Asbestos* litigation, including the subsequent re-insurance litigation, to Covil's Receiver by January 13, 2020.

By destroying relevant evidence, USF&G has succeeded in hiding significant evidence of its insurance coverage and attempted to deprive Covil of the opportunity to present critical evidence of insurance coverage. Thus, the Court finds that USF&G spoliated relevant evidence and will issue an appropriate sanction to deter such conduct in the future and attempt to re-level the now uneven evidentiary playing field.

When a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party. *Gathers ex rel. Hutchinson v. S.C. Elec. & Gas Co.*, 311 S.C. 81, 83, 427 S.E.2d 687, 689 (Ct. App. 1993) (citing *Kershaw Cty. Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990)). Over the years, courts have found numerous sanctions to be appropriate for the spoliation of evidence. Courts have allowed adverse inferences to be drawn from the loss or destruction of relevant evidence, dismissed cases or stricken pleadings, issued fines plus attorney's fees and applied almost every other sanction available for the failure to provide discovery.

Among the tools that judges may use to combat spoliation is the adverse inference jury instruction/presumption. Giving the finder of fact the ability to decide what weight to place on the spoliation is the preferred practice in South Carolina. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 489 S.E.2d

679 (Ct. App. 1997). The presumption does not arise from the failure to present the evidence, but rather from the role that the spoliating party had in preventing it from being reviewed by the jury or court. When a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party. *Gathers v. S.C.E.&G. Co.*, 427 S.E.2d 687, 689 (S.C. Ct. App. 1993) (citing *Kershaw Cty. Bd. of Educ.*, 302 S.C. 390, 396 S.E.2d 369). Based on the evidence established by Covil's Receiver regarding the existence of Covil insurance coverage issued by USF&G, and based on the evidence demonstrating USF&G's spoliation of evidence regarding the existence of the coverage, this Court holds that USF&G's issued general liability insurance coverage to Covil Corporation on an annual basis, including products and completed operations coverage, between 1954 and 1964, without an aggregate limit of liability for damages paid for bodily injury or property damage. The court also makes a similar finding as to the 1976 to 1978 policy, SMP 490049.

Further, necessitated by the Supreme Court's charge to this Court to manage the South Carolina statewide asbestos litigation cases and as a direct result of these Insurers' recalcitrance in refusing to cooperate with this process, this Court and its Receiver are now left to discharge their respective duties by reconstructing the nature and scope of Covil's historical insurance program (without the cooperation of the Insurers) so as to facilitate the management of the South Carolina asbestos docket. In this effort, the Court will apply the following principles of South Carolina insurance law.

1. "Trigger of Coverage." The term "trigger of coverage" describes the necessary events for a liability policy to respond to a suit seeking damage because of bodily injury. The Court rules that the policies at issue respond to suits when bodily injury takes place during the policy period, regardless of when the event causing the injury took place and regardless of when the injury becomes known or knowable. All of an insured's policies in effect from a person's first exposure to asbestos through manifestation of an asbestos disease and, ultimately, to death cover the asbestos cases unless coverage is otherwise excluded. This approach is called a "continuous trigger of coverage" or an "injury in fact trigger of coverage" inasmuch as medical science established long ago that asbestos injuries begin upon first inhalation of

asbestos fibers and continue progressively thereafter. As respects asbestos injury and death suits, the “continuous trigger of coverage” and the “injury in fact trigger of coverage” yield the same result such that the court need not choose between these conceptually similar approaches. *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 45 (1996) (“We find no error in the trial court’s use of an injury-in-fact analysis to apply a continuous trigger.”).

2. The Distinction Between “Operations” and “Completed Operations.” The Court finds that the policies at issue contain separate and distinct coverage parts for “operations” and “completed operations.” As a general matter, the policies contain no aggregate limit of liability for the operations coverage part, although the Court has also held that the USF&G policies issued to Covil between 1954 and 1964 also contain no aggregate limit of liability for the products and completed operations coverage part as well. The operations coverage part for each one of the policies at issue in this case responds repeatedly to each and every “occurrence” without a total “cap” on the insurers’ liability to pay, subject only to a “per occurrence” limit of liability. The same is true of products and completed operations claims covered under the 1954 to 1964 USF&G policies. Most of the asbestos contracting claims against Covil invoke the operations coverage part because they did not result from its “completed operations.”

The insurers have conflated the separate “operations” coverage part with the “completed operations” coverage part and have applied their policies in a manner that has not been adopted by the state courts in South Carolina. The Court is aware that the insurers contend that aggregate limits of liability apply to any third party’s claim against Covil involving exposure to asbestos that took place before the *inception date* of their policies. The policies are not written in that manner, however. There is nothing in the definition of “completed operations” that focuses on the inception date of a policy.

This Court is aware that, in seeking to limit their obligations to Covil, the insurers would prefer to rely exclusively on federal decisions attempting to “guess” the view the Maryland Court of Appeals would take if the issue of interpreting the “completed operations” provisions of the policies were presented to it. The insurers take the position that the Fourth Circuit has “spoken” definitively on this issue. However,

this Court finds that federal decisions attempting to predict the interpretation of policy language under Maryland law are not pertinent to the determination of South Carolina law. This Court specifically finds that *In re Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004) is not the law of South Carolina.

This Court finds that the “completed operations hazard” described in the insurers’ policies, and the corresponding aggregate limits of liability in the policies that contain such aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos *after* Covil completed its installation or removal operations or work at a particular jobsite.

The Court holds that any aggregate limit of liability in the insurers’ policies applies only to suits seeking the recovery of damages for bodily injury where the plaintiff was exposed to asbestos attributed to Covil *after* Covil completed its work at a particular jobsite. No aggregate limits of liability apply to suits seeking the recovery of damages for bodily injury where the plaintiff was exposed to asbestos while Covil was performing work at a particular jobsite.⁸ See, e.g., *Travelers Cas. & Sur. Co. v. Gerling Global Reinsurance Corp. of Am.*, 419 F.3d 181, 184 (2d Cir. 2005) (“*Gerling*”) (“Operations” coverage “protected [the insured] from claims for asbestos-related injuries resulting from asbestos exposure on [the insured’s] premises or during its business operations, for example, injuries occurring during the installation or removal of asbestos products”); *Travelers Cas. & Sur. Co. v. Employers Ins. of Wausau*, 130 Cal. App. 4th 99, 114 n.6 (2005) (“Examples of injuries covered under the premises-operations coverage include injuries suffered by a shipyard worker while installing insulation at the insured’s facility and injuries caused by a subcontractor’s negligent construction of a wall that fell on a worker while the job was in progress.”).

⁸ Covil contends that policies in addition to those issued by USF&G between 1954 and 1964 do not contain any aggregate limits of liability at all. The court has not reached any conclusion as to this contention, except to conclude, in accordance with well-settled South Carolina law, that the burden is on the insurer to prove any limitation on coverage, including a limitation such as an aggregate limit of liability.

3. Burden Of Proof. The Insurers bear the burden of proving any exclusion or limitation of coverage, including the application of aggregate limits to particular suits and the “exhaustion” of the aggregate limits of liability in their policies.

The South Carolina Supreme Court has recognized that insurers bear the burden of proving the applicability of a coverage provision that limits their liability to their insured: “Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion’s applicability.” *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560 614 S.E.2d 611, 614 (2004) (citing *Boggs v. Aetna Cas. and Sur. Co.*, 272 S.C. 460, 252 S.E.2d 565 (1979)); *see also Auto Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 144–48, 781 S.E.2d 137, 141–44 (2015) (upholding circuit court decision to construe an ambiguous terms in favor of coverage, and noting that “ambiguous terms are to be construed strictly against the insurer”). Courts have held that this basic principle also applies to “limitations” on coverage. *Ins. Co. of N. Am. v. Kayser-Roth Corp.*, 770 A.2d 403 (R.I. 2001) (“[o]nce the insured makes a prima facie showing of coverage, ‘the insurer then bears the burden of proving the applicability of policy exclusions and limitations in order to avoid an adverse judgment.’” (quoting *Gen. Accident Ins. Co. v. Am. Nat’l Fireproofing, Inc.*, 770 A.2d 403, 416 (R.I. 1998))); *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1446 (3d Cir. 1996) (“[T]he insurer bears the burden of proving the applicability of any exclusions or limitations on coverage, since disclaiming coverage on the basis of an exclusion is an affirmative defense”).

Consequently, as to any individual asbestos lawsuit, it is the Insurers’ burden to prove that the suit seeks the recovery of damages that are subject to the aggregate limits of liability, if any, applicable to the “completed operations” provisions in their policies, where such aggregate limits have been proven by each particular Insurer as to each specific policy or policy period. By definition, aggregate limits restrict coverage. Accordingly, the insurers bear the burden of demonstrating that aggregate limits in their policies, if any, apply to any particular asbestos suits.

4. Occurrences. The policies at issue provide coverage for legal liabilities resulting from an

“occurrence.” An “occurrence” is typically defined as an accident, including exposure to substantially similar conditions, that results in bodily injury during the policy period. Covil faces allegations in numerous lawsuits that multiple asbestos injury and wrongful death “occurrences” have resulted from its asbestos “operations.” Covil is therefore entitled to multiple “per occurrence” limits of liability to resolve each of the asbestos suits.

The asbestos insulation operations suits against Covil are not repetitive products liability suits alleging exposure to asbestos from the same defective product. Instead, these suits allege that Covil’s operations exposed workers and other bystanders to asbestos. Courts have held that the type of asbestos operations claims against Covil resulted from multiple “occurrences” under the standard definition of “occurrence” used during the time of the insurers’ policies. *See, e.g., Gerling*, 419 F.3d at 184 (“[I]f claims arising from multiple occurrences triggered [operations] coverage, then Travelers was exposed to unlimited liability; each occurrence was subject to a \$1 million limit on liability, but there was no cap on total liability. Regardless of how much Travelers had paid for previous non-products occurrences under a single policy, each additional non-products occurrence under that policy subjected Travelers to liability anew.”).

5. Allocation of Losses to Covil’s Policies. Exposure to asbestos results in progressive injury spanning many years, thereby triggering coverage under multiple policies. Exposure to asbestos during the conduct of operations that results in bodily injury during the policy period or periods during which the operations were conducted also presents an allocation issue. And, here, Covil is in a Receivership, with no assets other than its insurance policies and proceeds, which also affects any allocation of loss since Covil itself cannot absorb any allocation of loss. Finally, the Court notes that the language of the policies typically requires the insurers to pay “all sums” – meaning everything – for which the insured is legally obligated to pay if a claimant sustains bodily injury during the period of the policy.

The Court is mindful of the South Carolina Supreme Court’s decision in *Crossman Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), and notes that it speaks generally to allocation of loss in a continuous injury situation such as asbestos-related disease but does not

address the particular circumstances presented by this Receivership, *i.e.*, the applicability of operations coverage and the impracticability of allocation of loss to Covil itself. Therefore, the Court will apply the rule of *Crossman Communities of N.C., Inc.* except in the case of operations claims where the policies in effect during the conduct of the operations will apply on an “all sums” basis. The Court also interprets *Crossman* such that allocation of loss will not be made to policy years when Covil does not have any available or responsive coverage.

Finally, each individual insurer will nevertheless be protected fully against the possibility that it paid too much on a single asbestos claim by its right to seek contribution from any other insurer, but not from Covil, whose policy also was triggered by the asbestos suit. This approach “ensures that [Covil] is indemnified by one [or more] insurer for the full extent of the loss up to the policy’s limits, but apportions liability among all insurers whose policies were triggered by the claimant’s asbestos-related bodily injury.” *Armstrong*, 45 Cal. App. 4th at 55.

This Court further finds that no aggregate limit of liability for product liability or completed operations claims has been or can be proven, and therefore no aggregate limit for product liability or completed operations claims exists, for the following Covil insurance policies:

<u>Policy Period</u>	<u>Insurer</u>	<u>Policy Number</u>
April 21, 1964 – April 21, 1965	Hardware Mutual Casualty Co.	39 04132 02 01
April 21, 1965 – April 1, 1966	Hardware Mutual Casualty Co.	39 04132 02 01
April 21 1966 – March 31, 1967	Hardware Mutual Casualty Co.	39 04132 02
March 31, 1967 – March 31, 1968	Hardware Mutual Casualty Co./Sentry	39 04132 07
March 31, 1968 – March 31, 1969	Hardware Mutual Casualty Co./Sentry	39 04132 07
March 31, 1969 - March 31, 1970	Hardware Mutual Casualty Co./Sentry	39 04132 07
March 31, 1974 – March 31, 1975	Maryland Casualty Company	41-206393
March 31, 1975 – March 31, 1976	Maryland Casualty Company	41-206393

March 31, 1976 – March 31, 1977	USF&G	SMP 490049
March 31, 1977 – March 31, 1978	USF&G	SMP 490049

This Court further orders that this Order be forwarded to the South Carolina Attorney General and to the South Carolina Department of Insurance for their consideration and further action, as they may deem appropriate.

AND IT SO ORDERED this 8 day of January, 2020.

Jean H. Toal, Chief Justice of the Supreme
Court, Retired, acting as Circuit Court Judge

Columbia, South Carolina.



York Common Pleas

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

Case Number: 2015CP4602155

Type: Order/Other

IT IS SO ORDERED.

s/ Jean H. Toal #2758

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EXHIBIT 2.A

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CASE NO.: 2020-CP-40-01226

COVIL CORPORATION, by and
through its duly appointed Receiver,
Peter D. Protopapas,

Plaintiff,

v.

PENNSYLVANIA NATIONAL
MUTUAL CASUALTY
INSURANCE COMPANY,

Defendant.

**ORDER GRANTING COVIL
CORPORATION'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

On February 28, 2020, the Receiver for Covil Corporation filed this lawsuit, *Covil Corporation v. Pennsylvania National Mutual Insurance Co.*, in the Court of Common Pleas for the Fifth Judicial Circuit against Pennsylvania National Mutual Insurance Company ("Penn National"). Covil alleges that Penn National breached one of the two insurance contracts it has with Covil when it refused to participate in the settlement of the *David D. Rollins* matter pending against Covil. Complaint at ¶¶ 11-18.

On April 22, 2020, the Receiver moved for partial summary judgment on the ground that Penn National breached its insurance contract with Covil that it issued and which was in effect during the relevant time period, Penn National policy number 515 5028 537, for the policy period March 31, 1986 to March 31, 1987, when it attended the court-ordered mediation in the *Rollins* case, but declined to contribute any dollar amount to settle *Rollins*, even though the \$50,000 required to settle the case was within the limits of the insurance policy Penn National issued to

Covil. Penn National opposed the motion, arguing that an exclusion in its policy, the “completed operations hazard” and the “products hazard,” bars coverage for *Rollins*.

Viewing the Motion for Partial Summary Judgment in the light most favorable to the non-moving party, it is evident that it must be granted, as there is no genuine issue as to any material fact, and it is clear that the moving party is entitled to judgment as a matter of law. Having considered the plaintiff’s motion and the applicable response and reply, together with the exhibits submitted with these pleadings, 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. *See Re: Operation of the Trial Courts During the Coronavirus Emergency*, S.C. Sup. Ct. Order dated Apr. 3, 2020. In the Order, the Supreme Court noted the impossibility of continuing the practice of conducting hearings on virtually all motions during this unprecedented time. *Id.* 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.” *Id.*

The Court finds these motions have been fully and comprehensively briefed, and after reviewing all submissions, the Court further finds that hearings on these motions are not necessary and the motions may readily be decided without further input from the lawyers.

II. LEGAL ANALYSIS

1. Jurisdiction

Preliminarily, this case is properly before this court because not only did this Court supervise the *Rollins* case, but also this Court has jurisdiction over a breach of contract case involving an

amount in controversy of \$50,000. Furthermore, as is clear from the face of the insurance contract, the Penn National policy was issued to Covil at its address in Greenville, South Carolina. The exposure took place in South Carolina. The *Rollins* case was brought in this Court and settled in South Carolina. There is no dispute that South Carolina substantive law applies to this action, and Penn National does not suggest otherwise.

Penn National attempts to benefit from the protection of an injunction established by the federal district court for the District of South Carolina in a proceeding to which it is not a party. The Receiver for Covil has not been enjoined from seeking the construction of policies issued to Covil and this Court faces no impediment in deciding any issue of fact or law related to the insurance policies that Penn National issued to Covil. There is no just cause to delay the Receiver's right to adjudicate this dispute with Penn National in this Court.

2. The Receiver's Motion for Summary Judgment

This breach of contract case arises out of the asbestos personal injury action against Covil and others in the case styled *David D. Rollins v. Air & Liquid Systems Corp.*, C/A No. 2019-CP-25-00118 pending in Hampton County, South Carolina. Neither party disputes that the *Rollins* case involves bodily injury to David D. Rollins, which took place between March 11, 1986 and January 25, 1987, when Covil was performing operations at the Bowater paper mill in Catawba, South Carolina. The parties agree that the exposure to asbestos resulting from Covil's operations took place during the period of Penn National's policy number 515 5028 537, in effect during the policy period of March 31, 1986 to March 31, 1987. The parties further agree that the policy covers bodily injury resulting from the conduct of Covil's operations, with a \$1,000,000 policy limit for each "occurrence."

The principal dispute between Covil and Penn National is whether an exclusion in the Penn National policy applies to bar coverage for the *Rollins* action. This Court already has considered the application of the “product liability hazard” and the “completed operations hazard” in the specific context of Covil and this Court’s supervision of the Receiver and the Receivership. Rulings made in this Court’s Order for Rule to Show Cause of January 8, 2020 apply equally here and govern the disposition of this case.

In the January 8, 2020 Order, this Court made the following determinations regarding South Carolina insurance law, which govern this case and which are hereby declared and entered as rulings in this case:

1. The “completed operations hazard” and “product liability hazard” apply *only* when a plaintiff is exposed to asbestos products *after* Covil completed its installation or removal operations or work at a particular jobsite;
2. As to this individual asbestos law suit, it is Penn National’s burden to prove that the suit seeks the recovery of damages that are subject to the exclusion applicable to the “completed operations” or “product liability” provisions of the policy;
3. Every asbestos insulation contracting, or “operations,” claim against Penn National results from a separate “occurrence”, thus entitling Covil to multiple “per occurrence” limits of liability to satisfy its asbestos liabilities;
4. As to this asbestos “operations” claim against Covil, Penn National is obligated to pay “in full” up to its “per occurrence” limit of liability; and
5. Penn National bears the burden of proving the applicability of its exclusion for product liability and completed operations claims.

As to the issue of burden of proof, the South Carolina Supreme Court has recognized that insurers bear the burden of proving the applicability of a coverage provision that limits their liability to their insured: “Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion’s applicability.” *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560 614 S.E.2d 611, 614 (2004) (citing *Boggs v. Aetna*

Cas. and Sur. Co., 272 S.C. 460, 252 S.E.2d 565 (1979)); see also *Auto Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 144–48, 781 S.E.2d 137, 141–44 (2015) (upholding circuit court decision to construe an ambiguous terms in favor of coverage, and noting that “ambiguous terms are to be construed strictly against the insurer”). Courts have held that this basic principle also applies to “limitations” on coverage. *Ins. Co. of N. Am. v. Kayser-Roth Corp.*, 770 A.2d 403 (R.I. 2001) (“[o]nce the insured makes a prima facie showing of coverage, ‘the insurer then bears the burden of proving the applicability of policy exclusions and limitations in order to avoid an adverse judgment.’” (quoting *Gen. Accident Ins. Co. v. Am. Nat’l Fireproofing, Inc.*, 770 A.2d 403, 416 (R.I. 1998))); *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1446 (3d Cir. 1996) (“[T]he insurer bears the burden of proving the applicability of any exclusions or limitations on coverage, since disclaiming coverage on the basis of an exclusion is an affirmative defense”).

Penn National has not met its burden in this case. Having agreed that the insurance policy it issued to Covil covers the injury at the center of the *Rollins* action, Penn National asserts that bodily injury resulting from Covil’s operations at Bowater in 1986 and 1987 is excluded under the insurance contract because Covil must have supplied asbestos-containing materials to Bowater. To establish this position, Penn National points to language in a 1986 subcontract that required Covil to “[f]urnish all supervision, labor, equipment and tools, materials (except as noted), and incidentals required to supply and install all insulation on requiring piping systems.” Although the argument is not clearly articulated, it appears that Penn National takes the position that this language indicates that Covil itself supplied the asbestos insulation to which Mr. Rollins was exposed.

This allegation was never established in the *Rollins* action, and Penn National has done nothing more than imply that it was the case. Instead, the evidence from the *Rollins* action

demonstrates that while Mr. Rollins' stepfather, Robert Ashworth, performed pipefitting work at the Bowater facility between 1986 and 1987, Covil employees also were at the site at the same time performing insulation work. Covil's operations at the Bowater facility were not complete at the time that Mr. Ashworth worked at Bowater—they were ongoing, and happening simultaneously with, Mr. Ashworth's work.

Additionally, no evidence in this case or in the underlying *Rollins* action suggests that Covil supplied asbestos insulation to the Bowater facility between 1986 and 1987. As a result, this case cannot be characterized as a "product liability" exposure that would exclude it from coverage under the insurance policy Penn National issued to Covil.

Indeed, the undisputed facts in this case confirm the position asserted by Covil. It is undisputed that Mr. Rollins alleged "take home" exposure to asbestos via his stepfather, Robert Ashworth, with whom he lived between 1980 and 1991; that Mr. Ashworth came home from work covered in dust; that the dust filled the family home and family vehicles; that Mr. Ashworth performed pipe, pump and boiler work at Bowater between 1986 and 1988; and that Mr. Ashworth died of asbestos-related cancer in November 2018. Penn National has not disputed any of these facts.

Covil performed insulation work at Bowater when Mr. Ashworth worked at the facility. On February 26, 1986, Covil entered a subcontract with BE&K Construction Company, denominated as "Contract No. 4192-F-6410," to "[f]urnish all supervision, labor, equipment and tools, materials (except as noted), and incidentals required to supply and install all insulation on required piping systems" at Bowater, as Penn National concedes. The contract required Covil to maintain at least \$1,000,000 in liability insurance coverage to respond to claims seeking the

recovery of damages for bodily injury and property damage during Covil's work. Covil worked on the Bowater pipe insulation project at least between March 11, 1986 and January 25, 1987.

Penn National does not dispute these facts, nor does it dispute that Mr. Rollins' exposure to asbestos took place during the period of Penn National's policy number 515 5028 537, in effect during the policy period of March 31, 1986 to March 31, 1987. The parties agree that the Penn National policy indemnifies Covil against the payment of damages when bodily injury happens during the period of the policy, subject to a \$1,000,000 per occurrence limit of liability.

The parties also agree that there is a "products hazard" exclusion and a "completed operations hazard" exclusion in the policy. Although the two exclusions may apply in different factual scenarios depending upon the individual case, it is established that the risk insured by the "products hazard" and the "completed operations hazard" is "the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than the product or completed work itself" Roger C. Henderson, *Insurance Protection For Products Liability And Completed Operations – What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971). Penn National asserts that it need not cover the *Rollins* action because exposure to asbestos during the policy period took place after Covil either completed its work on the Bowater contract or after Covil relinquished possession of the products it installed at Bowater.

The undisputed evidence, however, is that Rollins was exposed to asbestos *during* the period in which Covil performed Contract No. 4192-F-6410 at Bowater. Penn National acknowledges this undisputed fact. It argues instead that Covil "relinquished possession" of the products it installed at Bowater *as they were installed during Covil's work*, as opposed to at the time that Covil completed its work at Bowater in or about January 1987. Penn National therefore

asserts that Rollins' exposure during the period of the Penn National policy took place after Covil relinquished possession of each of its individually installed products at Bowater such that the products hazard in the policy bars coverage for the *Rollins* action.

Courts have rejected this argument. The case law holds that the products hazard exclusion applies in a contracting situation only if bodily injury or property damage first occurs after the insured completed *all of its work* under the contract:

Regardless of the involvement of the insured's products, so long as an accident occurs on the insured's business premises or away from his premises, but while he has the jobsite under his control, the premises operations clause obtains and coverage is afforded thereunder. It is only after he has relinquished control of a jobsite that the products hazard or completed operations hazard exclusions will operate to deny coverage.

Friestad v. Travelers Indem. Co., 260 Pa.Super. 178, 186, n.5 (1978). Other courts have held similarly that the "products hazard" applies only when an injury is caused after a defective product has been placed into the stream of commerce. See, e.g., *B & R Farm Servs., Inc. v. Farm Bureau Mutual Ins. Co.*, 483 N.E.2d 1076, 1077 (Ind.1985). A federal decision applying South Carolina law held more than sixty years ago that an exclusion for "Products Liability" did not apply because the insured had not completed *all of its work* on a construction project, even though the insured previously completed all of its work on the occupied unit where an explosion occurred. *Heyward v. American Cas. Co. of Reading, Pa.*, 129 F.Supp. 4, 10 (E.D. S.C. 1955).

Most importantly, Penn National has not proven that any of the materials subject to the 1986 contract contained asbestos. By 1986 asbestos was not found in pipe insulation. Penn National has not suggested otherwise, let alone proven its case. Penn National has not met its burden of establishing that this action falls within either the "product liability hazard" or the "completed operations hazard." The Receiver's partial motion for summary judgment is granted.

3. Penn National's Late Notice Defense

Finally, Penn National asserts that it is not responsible for breach of its insurance contract with Covil because it did not receive timely notice of the *Rollins* action. Penn National argues that because Covil did not make Penn National aware of the *Rollins* action until close to the time of the mediation, Covil breached its obligations to Penn National. As a result, Penn National did not believe that it had to participate in, or indemnify Covil for, the *Rollins* action.

At the same time, however, Penn National admits that “a representative of Penn National attended the mediation and expressed a willingness to contribute toward settlement on behalf of Covil.” Defendant Penn National’s Memorandum of Law in Opposition to Covil’s Motion for Partial Summary Judgment at 17. Penn National engaged the same defense counsel as all other Covil insurers to defend Covil’s interests for Penn National in the *Rollins* action and other Covil asbestos personal injury claims. *Id.* at 7. It had access to all of the same materials as the insurers that elected to resolve the *Rollins* action at mediation. Yet, Penn National alone states that “Penn National was not in a position to contribute the amount requested by Covil at the mediation.” *Id.* at 17.

Penn National had access to all available information related to the *Rollins* action, attended the *Rollins* mediation with a “willingness to contribute toward settlement,” and then made the deliberate decision not to resolve *Rollins*, presumably because it believe that its policy exclusion barred coverage. Penn National’s deliberate choice to decline to settle the *Rollins* action within its policy limit is not equivalent to the late notice defenses established in the cases it cites. Penn National’s alleged late notice of the *Rollins* action is not a valid defense to breach of its insurance contract with Covil.

* * *

The Receiver has set forth that Penn National issued a contract of insurance with coverage that applies directly to the facts of the *Rollins* action against Covil. Penn National could not overcome the burden of proving the applicability of policy exclusions to create a bar to coverage in this case. Construing the facts in the light most favorable to the nonmoving party, the Court finds that there is no triable issue that Penn National was required to defend Covil against the *Rollins* action, and is required to indemnify Covil against the settlement of the *Rollins* action.

III. RULING

For the reasons stated above, the Court hereby **GRANTS** The Receiver's Motion for Partial Summary Judgment.

AND IT IS SO ORDERED this ____ day of _____, 2020.

Jean H. Toal, Chief Justice of the Supreme
Court, Retired, acting as Circuit Court Judge

Columbia, South Carolina.



Richland Common Pleas

Case Caption: Covil Corporation , plaintiff, et al vs Pennsylvania National Mutual
Casualty Insurance Co
Case Number: 2020CP4001226
Type: Order/Summary Judgment

So Ordered

Jean H. Toal

Electronically signed on 2020-08-13 11:09:35 page 11 of 11

Business Entities Online

File, Search, and Retrieve Documents Electronically

EXHIBIT 3-A

STARR DAVIS COMPANY, INC.

Corporate Information

Entity Type: Corporation

Status: Forfeited

Domestic/Foreign: Foreign

Incorporated State: North Carolina

Important Dates

Effective Date: 09/12/1963

Expiration Date: N/A

Term End Date: N/A

Dissolved Date: 02/23/1996

Registered Agent

Agent: C T CORPORATION SYSTEM

Address: 75 BEATTIE PLACE TWO SHELTER CENTRE
GRNVL S C
, To Be Decided

Official Documents On File

Filing Type	Filing Date
Forfeiture	02/23/1996
Change of Agent or Office	06/23/1980
Change of Agent or Office	07/09/1969
Incorporation	09/12/1963

For filing questions please contact us at 803 734-2158

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ELECTRONICALLY FILED - 2020 Aug 21 9:36 AM - RICHLAND - COMMON PLEAS - CASE#2019CP4006243

South Carolina Secretary of State Mark Hammond Business Entities Online

File, Search, and Retrieve Documents Electronically

EXHIBIT 3B

Electronically Filed - 2020 Aug 21 9:36 AM - RICHLAND - COMMON PLEAS - CASE#2019CP4006243

STARR DAVIS COMPANY OF S.C., INC.

Corporate Information

Entity Type: Corporation

Status: Forfeited

Domestic/Foreign: Domestic

Incorporated State: South Carolina

Important Dates

Effective Date: 08/30/1962

Expiration Date: N/A

Term End Date: N/A

Dissolved Date: 08/19/1997

Registered Agent

Agent: AGENT RESIGNED

Address:
 , South Carolina

Official Documents On File

Filing Type	Filing Date
Forfeiture	08/19/1997
Resignation of Agent or Office	03/01/1995
Change of Agent or Office	06/23/1980
Amendment	04/14/1976
Merger/Share Exchange	03/06/1972
Incorporation	08/30/1962

For filing questions please contact us at 803-734-2158

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EXHIBIT 4

FILED UNDER

SEAL

INCOMPLETE POLICY

This notification is affixed to a policy that is missing forms and/or endorsements, including the one(s) listed below, which may have been included in the originally-issued policy. After a diligent search of company records available as of this date, we could not locate these forms and/or endorsements.

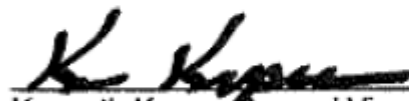
No additional insurance is afforded by this copy.

Name of Insuring Company(ies)

Policy Number(s)

Policy Period(s)

Date



Kenneth Kupec, Second Vice President
BI Document Management

AGENCY BROKER	CODE 6000	NAME MERRIMON	COUNTY STATE	AUTO 200	CGL 183	PAYMENT	TAX DISTRICT	TRANSACTION TYPE	C A P	NO FAC	CMORP	BIRTH DATE	DATE TYPED & INITIALS
COUNTERSIGNED STAT 5 COMB		C/S ISSUED BY AGENT		PLATO 200	CGL			NEW RENEWAL	7			ACCOUNT NUMBER-1	

EDMONT

JAN 19 1978

THE AETNA CASUALTY AND SURETY COMPANY

25AL801362CMA 8

COMPREHENSIVE LIABILITY POLICY

For
**STARR DAVIS CO., INC. AND STARR
DAVIS CO. OF S.C. INC.
PO DRAWER 19145, 7600 BOEING DR.
GREENSBORO NC 27410**

1. NAMED INSURED

POLICY NUMBER (Office Code—Symbol—Serial No.—Suffix)

XXXXXXXXXXXXXXXXXXXX

2. POLICY PERIOD

From 1-1-78 to 1-1-79 12:01 A.M.
Standard Time at the address of the named insured as stated herein.

AUDIT PERIOD

Annual, unless otherwise stated:

(Show Number and Street or RFD, City, County, State and Zip Code)

THE NAMED INSURED IS ☐ Individual ☐ Partnership ☒ Corporation
☐ Joint Venture ☐ Other:

BUSINESS OF NAMED INSURED

ENGAGED IN STEAM PIPE OR

BUTLER INSU.

3. The insurance afforded is only with respect to such of the following Parts and Coverages as are indicated by specific premium charge or charges. The limit of the Company's liability against each such Coverage shall be as stated herein, subject to all the terms of this policy having reference thereto.

PART	COVERAGES	LIMITS OF LIABILITY				ADVANCE PREMIUM
		Each Person	Each Occurrence	Each Accident	Aggregate	
CAL	COMPREHENSIVE AUTOMOBILE LIABILITY INSURANCE					
	Bodily Injury Liability	\$ 500 ,000	\$ 1000 ,000			AA \$ 269.
	Property Damage Liability		\$ 500 ,000			AP \$ 165.
CGL	COMPREHENSIVE GENERAL LIABILITY INSURANCE (Except Automobile)					
	Bodily Injury Liability		\$ 500 ,000		\$ 500 ,000	\$ 517.
	Property Damage Liability		\$ SEE ENDT 200		\$ SEE ENDT 200	\$ 895.
AMP	AUTOMOBILE MEDICAL PAYMENTS INSURANCE					
	Automobile Medical Payments	\$ 5000				AA \$ 23.
UM	INSURANCE AGAINST UNINSURED MOTORISTS					
	Damages for Bodily Injury	\$ 100 ,000		\$ 100 ,000		AA \$ 3.
PHF	AUTOMOBILE PHYSICAL DAMAGE INSURANCE					A0 \$ 115.
	1 Comprehensive	Insurance is afforded only with respect to such covered automobiles as are designated in the attached Automobile Schedule, subject to the limits of liability indicated therein.				A0 \$
	2 Fire, Lightning or Transportation					A0 \$
	3 Theft					A0 \$
	4 Windstorm, Hail, Earthquake or Explosion					A0 \$
	5 Combined Additional Coverage					A0 \$
	6 Collision					AC \$ 302.
	7 Towing					A0 \$
CGL .60 CAL MOD 1.08 AMD 1.14		FLEET AUTOMATIC ☐ Yes ☒ No				
GAR	GARAGE INSURANCE					
	Coverages and Limits as stated in separate declarations					

ENDORSEMENTS MADE PART OF THE POLICY (designated by ☒ or Endorsement number)

K ☐ Contractual Liability, CC—
MP ☐ Premises Medical Payments
PI ☐ Personal Injury Liability

SEE SCHEDULE

INTERIM ADJUSTMENT

RECEIVED

JAN 19 1978

N 81

C. C. P.

4. The declarations are completed on the attached General Liability and Automobile Schedules. The Automobile Schedule contains a complete list of (a) all automobiles and trailers owned by the named insured and (b) all persons within the definition of Class 1 persons, at the effective date of this policy, unless otherwise stated herein. The General Liability Schedule discloses all hazards insured hereunder known to exist at the effective date of this policy, unless otherwise stated herein.
5. During the past three years no insurer has cancelled insurance, issued to the named insured, similar to that afforded hereunder, unless otherwise stated herein:

PAYMENT METHOD	1 Year Policy Total Advance Premium	\$ 2289.
	Deposit Premium	\$
	3 Year Prepaid Total Adv. Premium	\$
	3 Year Policy Installments	
	Total Advance Premium	\$
	Automobile Installments	\$
	Other Installments 1st Anniversary	\$
	2nd Anniversary	\$
	"TBD" Means to be Determined	

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JAN 19 1978

HOME OFFICE COPY 3

**DESCRIPTION OF TERMS
USED AS PREMIUM BASES:**

When used as a premium basis:

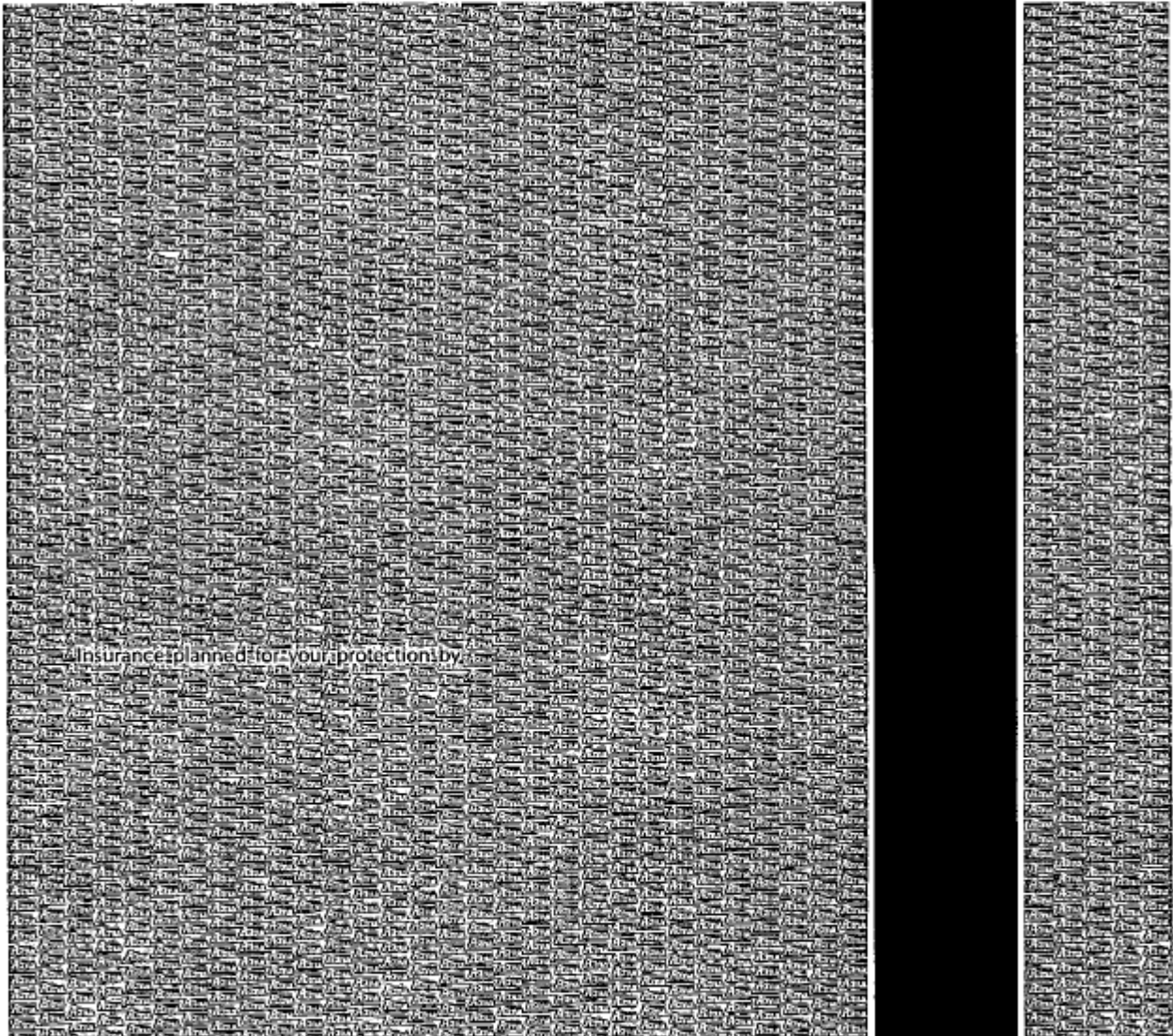
1. "admissions" means the total number of persons, other than employees of the **named insured**, admitted to the event insured or to events conducted on the premises whether on paid admission tickets, complimentary tickets or passes;
2. "cost" means the total cost to the **named insured** with respect to operations performed for the **named insured** during the policy period by independent contractors of all work let or sublet in connection with each specific project, including the cost of all labor, materials and equipment furnished, used or delivered for use in the execution of such work, whether furnished by the owner, contractor or subcontractor, including all fees, allowances, bonuses or commissions made, paid or due;
3. "receipts" means the gross amount of money charged by the **named insured** for such operations by the **named insured** or by others during the policy period as are rated on a receipts basis other than receipts from telecasting, broadcasting or motion pictures, and includes taxes, other than taxes which the **named insured** collects as a separate item and remits directly to a governmental division;
4. "remuneration" means the entire remuneration earned during the policy period by proprietors and by all employees of the **named insured**, other than chauffeurs (except operators of mobile equipment) and aircraft pilots and co-pilots, subject to any overtime earnings or limitation of remuneration rule applicable in accordance with the manuals in use by the company;
5. "sales" means the gross amount of money charged by the **named insured** or by others trading under his name for all goods and products sold or distributed during the policy period and charged during the policy period for installation, servicing or repair, and includes taxes, other than taxes which the **named insured** and such others collect as a separate item and remit directly to a governmental division;
6. A. "cost of hire" means the amount incurred for (a) the hire of automobiles, including the entire remuneration of each employee of the **named insured** engaged in the operation of such automobiles subject to an average weekly maximum remuneration of \$100, and for (b) pick-up, transportation or delivery service of property or passengers, other than such services performed by motor carriers which are subject to the security requirements of any motor carrier law or ordinance. The rates for each \$100 of "cost of hire" shall be 5% of the applicable hired automobile rates, provided the owner of such hired automobile has purchased automobile Bodily Injury Liability and Property Damage Liability insurance covering the interest of the **named insured** on a direct primary basis as respects such automobile and submits evidence of such insurance to the **named insured**;
- B. "Class 1 persons" means the following persons, provided their usual duties in the business of the **named insured** include the use of non-owned automobiles: (a) all employees, including officers, of the **named insured** compensated for the use of such automobiles by salary, commission, terms of employment, or specific operating allowance of any sort; (b) all direct agents and representatives of the **named insured**;
- C. "Class 2 employees" means all employees, including officers, of the **named insured**, not included in Class 1 persons;
7. "cost" (as respects Contractual Liability Insurance) means the total cost to any indemnitee with respect to any contract which is insured of all work let or sublet in connection with each specific project, including the cost of all labor, materials and equipment furnished, used or delivered for use in the execution of such work, whether furnished by the owner, contractor or the subcontractor, including all fees, allowances, bonuses or commissions made, paid or due.

THE AETNA CASUALTY AND SURETY COMPANY

(A stock insurance company, herein called the **company**)

In consideration of the payment of the premium, in reliance upon the statements in the declarations made a part hereof and subject to all of the terms of this policy, agrees with the **named insured** as follows:

The Aetna Casualty and Surety Company
The Standard Fire Insurance Company
Hartford, Connecticut 06115



.(90985) 3-70

Cat. 821829
Printed in U.S.A.

*Trademark of
The Aetna Casualty and Surety Company
and its associated companies

In Witness Whereof, we have caused this policy to be executed and attested, but this policy shall not be valid unless countersigned by our authorized representative.


Secretary


President



GENERAL PROVISIONS FOR LIABILITY POLICIES

AG-00-01

DEFINITIONS

When used in this policy (including endorsements forming a part hereof):

"automobile" means a land motor vehicle, trailer or semi-trailer designed for travel on public roads, (including any machinery or apparatus attached thereto), but does not include **mobile equipment**;

"bodily injury" means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom;

"collapse hazard" includes "structural property damage" as defined herein and **property damage** to any other property at any time resulting therefrom. "Structural property damage" means the collapse of or structural injury to any building or structure due to (1) grading of land, excavating, borrowing, filling, back-filling, tunneling, pile driving, cofferdam work or caisson work or (2) moving, shoring, underpinning, raising or demolition of any building or structure or removal or rebuilding of any structural support thereof. The **collapse hazard** does not include **property damage** (1) arising out of operations performed for the **named insured** by independent contractors, or (2) included within the **completed operations hazard** or the **underground property damage hazard**, or (3) for which liability is assumed by the **insured** under an **incidental contract**;

"completed operations hazard" includes **bodily injury** and **property damage** arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the **bodily injury** or **property damage** occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the **named insured**. "Operations" include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:

- (1) when all operations to be performed by or on behalf of the **named insured** under the contract have been completed,
- (2) when all operations to be performed by or on behalf of the **named insured** at the site of the operations have been completed, or
- (3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.

The **completed operations hazard** does not include **bodily injury** or **property damage** arising out of

- (a) operations in connection with the transportation of property, unless the **bodily injury** or **property damage** arises out of a condition in or on a vehicle created by the loading or unloading thereof,
- (b) the existence of tools, uninstalled equipment or abandoned or unused materials, or-
- (c) operations for which the classification stated in the policy or in the **company's** manual specifies "including completed operations";

"elevator" means any hoisting or lowering device to connect floors or landings, whether or not in service, and all appliances thereof including any car, platform, shaft, hoistway, stairway, runway, power equipment and machinery, or any hydraulic or mechanical hoist used for raising or lowering **automobiles** for lubricating and servicing or for dumping material from trucks; but does not include an **automobile** servicing hoist, or a hoist without a platform outside a building if without mechanical power or if not attached to building walls, or a hoist or material hoist used in alteration, construction or demolition operations, or an inclined conveyor used exclusively for carrying property or a dumbwaiter used exclusively for carrying property and having a compartment height not exceeding four feet;

"explosion hazard" includes **property damage** arising out of blasting or explosion. The **explosion hazard** does not include **property damage** (1) arising out of the explosion of air or steam vessels, piping under pressure, prime movers, machinery or power transmitting equipment, or (2) arising out of operations performed for the **named insured** by independent contractors, or (3) included within the **completed operations hazard** or the **underground property damage hazard**, or (4) for which liability is assumed by

the **insured** under an **incidental contract**;

"incidental contract" means any written (1) lease of premises, (2) easement agreement, except in connection with construction or demolition operations on or adjacent to a railroad, (3) undertaking to indemnify a municipality required by municipal ordinance, except in connection with work for the municipality, (4) sidetrack agreement, or (5) **elevator** maintenance agreement;

"insured" means any person or organization qualifying as an insured in the "Persons Insured" provision of the applicable insurance coverage. The insurance afforded applies separately to each **insured** against whom claim is made or suit is brought, except with respect to the limits of the **company's** liability;

"mobile equipment" means a land vehicle (including any machinery or apparatus attached thereto), whether or not self-propelled, (1) not subject to motor vehicle registration, or (2) maintained for use exclusively on premises owned by or rented to the **named insured**, including the ways immediately adjoining, or (3) designed for use principally off public roads, or (4) designed or maintained for the sole purpose of affording mobility to equipment of the following types forming an integral part of or permanently attached to such vehicle: power cranes, shovels, loaders, diggers and drills, concrete mixers (other than the mix-in-transit type), graders, scrapers, rollers and other road construction or repair equipment; air-compressors, pumps and generators, including spraying, welding and building cleaning equipment; and geophysical exploration and well servicing equipment;

"named insured" means the person or organization named in Item 1, of the declarations of this policy;

"named insured's products" means goods or products manufactured, sold, handled or distributed by the **named insured** or by others trading under his name, including any container thereof (other than a vehicle), but **"named insured's products"** shall not include a vending machine or any property other than such container, rented to or located for use of others but not sold;

"occurrence" means an accident, including continuous or repeated exposure to conditions, which results in **bodily injury** or **property damage** neither expected nor intended from the standpoint of the **insured**;

"policy territory" means:

- (1) the United States of America, its territories or possessions, or Canada, or
- (2) international waters or air space, provided the **bodily injury** or **property damage** does not occur in the course of travel or transportation to or from any other country, state or nation; or
- (3) anywhere in the world with respect to damages because of **bodily injury** or **property damage** arising out of a product which was sold for use or consumption within the territory described in paragraph (1) above, provided the original suit for such damages is brought within such territory;

"products hazard" includes **bodily injury** and **property damage** arising out of the **named insured's products** or reliance upon a representation or warranty made at any time with respect thereto, but only if the **bodily injury** or **property damage** occurs away from premises owned by or rented to the **named insured** and after physical possession of such products has been relinquished to others;

"property damage" means (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an **occurrence** during the policy period;

"underground property damage hazard" includes underground property damage as defined herein and **property damage** to any other property at any time resulting therefrom. "Underground property damage" means **property damage** to wires, conduits, pipes, mains, sewers, tanks, tunnels, any similar property, and any apparatus in connection therewith, beneath the surface of the ground or water, caused by and occurring during the use of mechanical equipment for the purpose of grading land, paving, excavating, drilling, borrowing, filling, back-filling or pile driving. The **underground property damage hazard** does not include **property damage** (1) arising out of operations performed for the **named insured** by independent contractors, or (2) included within the **completed operations hazard**, or (3) for which liability is assumed by the **insured** under an **incidental contract**.

SUPPLEMENTARY PAYMENTS

The **company** will pay, in addition to the applicable limit of liability;

- (a) all expenses incurred by the **company**, all costs taxed against the **insured** in any suit defended by the **company** and all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before the **company** has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the **company's** liability thereon;
- (b) premiums on appeal bonds required in any such suit, premiums on bonds to release attachments in any such suit for an amount not in excess of the applicable limit of liability of this

policy, and the cost of bail bonds required of the **insured** because of accident or traffic law violation arising out of the use of any vehicle to which this policy applies, not to exceed \$250 per bail bond, but the **company** shall have no obligation to apply for or furnish any such bonds;

- (c) expenses incurred by the **insured** for first aid to others at the time of an accident, for **bodily injury** to which this policy applies;
- (d) reasonable expenses incurred by the **insured** at the **company's** request in assisting the **company** in the investigation or defense of any claim or suit, including actual loss of earnings not to exceed \$25 per day.

NUCLEAR ENERGY LIABILITY EXCLUSION (Broad Form)

I. This policy does not apply:

A. Under any Liability Coverage, to **bodily injury** or **property damage**

- (1) with respect to which an **insured** under this policy is also an **insured** under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an **insured** under any such policy but for its termination upon exhaustion of its limit of liability; or
- (2) resulting from the **hazardous properties** of **nuclear material** and with respect to which (a) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (b) the **insured** is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

B. Under any Medical Payments Coverage, or under any Supplementary Payments provision relating to first aid, to expenses incurred with respect to **bodily injury** resulting from the **hazardous properties** of **nuclear material** and arising out of the operation of a **nuclear facility** by any person or organization.

C. Under any Liability Coverage, to **bodily injury** or **property damage** resulting from the **hazardous properties** of **nuclear material**, if

- (1) the **nuclear material** (a) is at any **nuclear facility** owned by, or operated by or on behalf of, an **insured** or (b) has been discharged or dispersed therefrom;
- (2) the **nuclear material** is contained in **spent fuel** or **waste** at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an **insured**; or
- (3) the **bodily injury** or **property damage** arises out of the furnishing by an **insured** of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any **nuclear facility**, but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (3) applies only to **property damage** to such

nuclear facility and any property threat.

II. As used herein:

"**hazardous properties**" include radioactive, toxic or explosive properties.

"**nuclear material**" means **source material**, **special nuclear material** or **byproduct material**;

"**source material**", "**special nuclear material**", and "**byproduct material**" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof.

"**spent fuel**" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a **nuclear reactor**;

"**waste**" means any waste material (1) containing **byproduct material** and (2) resulting from the operation by any person or organization of any **nuclear facility** included within the definition of **nuclear facility** under paragraph (a) or (b) thereof.

"**nuclear facility**" means

- (a) any **nuclear reactor**,
- (b) any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing **spent fuel**, or (3) handling, processing or packaging **waste**,
- (c) any equipment or device used for the processing, fabricating or alloying of **special nuclear material** if at any time the total amount of such material in the custody of the **insured** at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235,
- (d) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of **waste**,

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations.

"**nuclear reactor**" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material;

"**property damage**" includes all forms of radioactive contamination of property.

CONDITIONS

1. Premium

All premiums for this policy shall be computed in accordance with the **company's** rules, rates, rating plans, premiums and minimum premiums applicable to the insurance afforded herein.

Premium designated in this policy as "advance premium" is a deposit premium only which shall be credited to the amount of the earned premium due at the end of the policy period. At the close of each period (or part thereof terminating with the end of the policy period) designated in the declarations as the audit period the earned premium shall be computed for such period and, upon notice thereof to the **named insured**, shall become due and payable. If the total earned premium for the policy period is less than the premium previously paid, the **company** shall return to the **named insured** the unearned portion paid by the **named insured**.

The **named insured** shall maintain records of such information as is necessary for premium computation, and shall send copies of such records to the **company** at the end of the policy period and at such times during the policy period as the **company** may direct.

2. Inspection and Audit

The **company** shall be permitted but not obligated to inspect the **named insured's** property and operations at any time. Neither the **company's** right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking, on behalf of or for the benefit of the **named insured** or others, to determine or warrant that such property or operations are safe or healthful, or are in compliance with any law, rule or regulation.

The **company** may examine and audit the **named insured's** books and records at any time during the policy period and extensions thereof and within three years after the final termination of this policy, as far as they relate to the subject matter of this insurance.

3. Financial Responsibility Laws

When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law, such insurance as is afforded by this policy for **bodily injury** liability or for **property damage** liability shall comply with the provisions of such law to the extent of the coverage and limits of liability required by such law. The **insured** agrees to reim-

CONDITIONS (Continued)

burse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

4. Insured's Duties in the Event of Occurrence, Claim or Suit

- (a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable.
- (b) If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.
- (c) The insured shall cooperate with the company and, upon the company'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 for first aid to others at the time of accident.

5. Action Against Company

No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or organization shall have any right under this policy to join the company as a party to any action against the insured to determine the insured's liability, nor shall the company be impleaded by the insured or his legal representative. Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

6. Other Insurance

The insurance afforded by this policy is primary insurance, except when stated to apply in excess of or contingent upon the absence of other insurance. When this insurance is primary and the insured has other insurance which is stated to be applicable to the loss on an excess or contingent basis, the amount of the company's liability under this policy shall not be reduced by the existence of such other insurance.

When both this insurance and other insurance apply to the loss on the same basis, whether primary, excess or contingent, the company shall not be liable under this policy for a greater proportion of the loss than that stated in the applicable contribution provision below:

- (a) **Contribution by Equal Shares.** If all of such other valid and collectible insurance provides for contribution by equal shares, the company shall not be liable for a greater proportion of such loss than would be payable if each insurer contributes an equal share until the share of each insurer equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid, and with respect to any amount of loss not so

paid the remaining insurers then continue to contribute equal shares of the remaining amount of the loss until each such insurer has paid its limit in full or the full amount of the loss is paid.

- (b) **Contribution by Limits.** If any of such other insurance does not provide for contribution by equal shares, the company shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

7. Subrogation

In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

8. Changes

Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy, nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy.

9. Assignment

Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; if, however, the named insured shall die, such insurance as is afforded by this policy shall apply (1) to the named insured's legal representative, as the named insured, but only while acting within the scope of his duties as such, and (2) with respect to the property of the named insured, to the person having proper temporary custody thereof, as insured, but only until the appointment and qualification of the legal representative.

10. Three Year Policy

If this policy is issued for a period of three years, any limit of the company's liability stated in this policy as "aggregate" shall apply separately to each consecutive annual period thereof.

11. Cancellation

This policy may be cancelled by the named insured by mailing to the company written notice stating when thereafter the cancellation shall be effective. This policy may be cancelled by the company by mailing to the named insured at the address shown in this policy, written notice stating when not less than ten days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The effective date of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.

If the named insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.

12. Declarations

By acceptance of this policy, the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

COMPREHENSIVE GENERAL LIABILITY INSURANCE

I. BODILY INJURY LIABILITY COVERAGE PROPERTY DAMAGE LIABILITY COVERAGE

The company will pay on behalf of the **insured** all sums which the **insured** shall become legally obliged to pay as damages because of

**bodily injury or
property damage**

to which this insurance applies, caused by an **occurrence**, and the company shall have the right and duty to defend any suit against the **insured** seeking damages on account of such **bodily injury or property damage**, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

Exclusions

This insurance does not apply:

- (a) to liability assumed by the **insured** under any contract or agreement except an **incidental contract**; but this exclusion does not apply to a warranty of fitness or quality of the **named insured's products** or a warranty that work performed by or on behalf of the **named insured** will be done in a workmanlike manner;
- (b) to **bodily injury or property damage** arising out of the ownership, maintenance, operation, use, loading, or unloading of
 - (1) any **automobile** or aircraft owned or operated by or rented or loaned to any **insured**, or
 - (2) any other **automobile** or aircraft operated by any person in the course of his employment by any **insured**;
 but this exclusion does not apply to the parking of an **automobile** on premises owned by, rented to or controlled by the **named insured** or the ways immediately adjoining, if such **automobile** is not owned by or rented or loaned to any **insured**;
- (c) to **bodily injury or property damage** arising out of
 - (1) the ownership, maintenance, operation, use, loading or unloading of any **mobile equipment** while being used in any prearranged or organized racing, speed or demolition contest or in any stunting activity or in practice or preparation for any such contest or activity or
 - (2) the operation or use of any snowmobile or trailer designed for use therewith;
- (d) to **bodily injury or property damage** arising out of and in the course of the transportation of **mobile equipment** by an **automobile** owned or operated by or rented or loaned to any **insured**;
- (e) to **bodily injury or property damage** arising out of the ownership, maintenance, operation, use, loading or unloading of
 - (1) any watercraft owned or operated by or rented or loaned to any **insured**, or
 - (2) any other watercraft operated by any person in the course of his employment by any **insured**;
 but this exclusion does not apply to watercraft while ashore on premises owned by, rented to or controlled by the **named insured**;
- (f) to **bodily injury or property damage** arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental;

- (g) to **bodily injury or property damage** due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing, with respect to
 - (1) liability assumed by the **insured** under an **incidental contract**, or
 - (2) expenses for first aid under the Supplementary Payments provision;

- (h) to **bodily injury or property damage** for which the **insured** or his indemnitee may be held liable
 - (1) as a person or organization engaged in the business of manufacturing, distributing, selling or serving alcoholic beverages, or
 - (2) if not so engaged, as an owner or lessor of premises used for such purposes,

if such liability is imposed

- (i) by, or because of the violation of, any statute, ordinance or regulation pertaining to the sale, gift, distribution or use of any alcoholic beverage, or
 - (ii) by reason of the selling, serving or giving of any alcoholic beverage to a minor or to a person under the influence of alcohol or which causes or contributes to the intoxication of any person;
- but part (ii) of this exclusion does not apply with respect to liability of the **insured** or his indemnitee as an owner or lessor described in (2) above;
- (i) to any obligation for which the **insured** or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law;
 - (j) to **bodily injury** to any employee of the **insured** arising out of and in the course of his employment by the **insured**, or to any obligation of the **insured** to indemnify another because of damages arising out of such injury; but this exclusion does not apply to liability assumed by the **insured** under an **incidental contract**;
 - (k) to **property damage** to
 - (1) property owned or occupied by or rented to the **insured**,
 - (2) property used by the **insured**, or
 - (3) property in the care, custody or control of the **insured** or as to which the **insured** is for any purpose exercising physical control;
 but parts (2) and (3) of this exclusion do not apply with respect to liability under a written sidetrack agreement and part (3) of this exclusion does not apply with respect to **property damage** (other than to **elevators**) arising out of the use of an **elevator** at premises owned by, rented to or controlled by the **named insured**;
 - (l) to **property damage** to premises alienated by the **named insured** arising out of such premises or any part thereof;
 - (m) to loss of use of tangible property which has not been physically injured or destroyed resulting from
 - (1) a delay in or lack of performance by or on behalf of the **named insured** of any contract or agreement, or
 - (2) the failure of the **named insured's products** or work performed by or on behalf of the **named insured** to meet the level of performance, quality, fitness or durability warranted or represented by the **named insured**;
 but this exclusion does not apply to loss of use of other tangible property resulting from the sudden and accidental physical injury to or destruction of the **named insured's products** or work performed by or on behalf of the **named insured** after such products or work have been put to use by any person or organization other than an **insured**;

- (n) to **property damage** to the **named insured's products** arising out of such products or any part of such products;
- (o) to **property damage** to work performed by or on behalf of the **named insured** arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith;
- (p) to damages claimed for the withdrawal, inspection, repair, replacement, or loss of use of the **named insured's products** or work completed by or for the **named insured** or of any property of which such products or work form a part, if such products, work or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein;
- (q) to **property damage** included within:
 - (1) the **explosion hazard** in connection with operations identified in this policy by a classification code number which includes the symbol "X";
 - (2) the **collapse hazard** in connection with operations identified in this policy by a classification code number which includes the symbol "C";
 - (3) the **underground property damage hazard** in connection with operations identified in this policy by a classification code number which includes the symbol "U".

II. PERSONS INSURED

Each of the following is an **insured** under this insurance to the extent set forth below:

- (a) if the **named insured** is designated in the declarations as an individual, the person so designated but only with respect to the conduct of a business of which he is the sole proprietor, and the spouse of the **named insured** with respect to the conduct of such a business;
- (b) if the **named insured** is designated in the declarations as a partnership or joint venture, the partnership or joint venture so designated and any partner or member thereof but only with respect to his liability as such;
- (c) if the **named insured** is designated in the declarations as other than an individual, partnership or joint venture, the organization so designated and any executive officer, director or stockholder thereof while acting within the scope of his duties as such;
- (d) any person (other than an employee of the **named insured**) or organization while acting as real estate manager for the **named insured**; and
- (e) with respect to the operation, for the purpose of locomotion upon a public highway, of **mobile equipment** registered under any motor vehicle registration law,
 - (i) an employee of the **named insured** while operating any such equipment in the course of his employment, and
 - (ii) any other person while operating with the permission of the **named insured** any such equipment registered in the name of the **named insured** and any person or organization legally responsible for such operation, but only if there is no other valid and collectible insurance available, either on a primary or excess basis, to such person or organization;

provided that no person or organization shall be an **insured** under this paragraph (e) with respect to:

- (1) **bodily injury** to any fellow employee of such person injured in the course of his employment, or
- (2) **property damage** to property owned by, rented to, in charge of or occupied by the **named insured** or the employer of any person described in subparagraph (ii).

This insurance does not apply to **bodily injury** or **property damage** arising out of the conduct of any partnership or joint venture of which the **insured** is a partner or member and which is not designated in this policy as a **named insured**.

III. LIMITS OF LIABILITY

Regardless of the number of

- (1) **insureds** under this policy,
- (2) persons or organizations who sustain **bodily injury** or **property damage**, or
- (3) claims made or suits brought on account of **bodily injury** or **property damage**,

the company's liability is limited as follows:

Bodily Injury Liability Coverage The total liability of the company for all damages, including damages for care and loss of services, because of **bodily injury** sustained by one or more persons as the result of any one occurrence shall not exceed the limit of **bodily injury liability** stated in the declarations as applicable to "each occurrence".

Subject to the above provisions respecting "each occurrence", the total liability of the company for all damages because of

- (1) all **bodily injury** included within the **completed operations hazard** and
- (2) all **bodily injury** included within the **products hazard** shall not exceed the limit of **bodily injury liability** stated in the declarations as "aggregate".

Property Damage Liability Coverage The total liability of the company for all damages because of all **property damage** sustained by one or more persons or organizations as the result of any one occurrence shall not exceed the limit of **property damage liability** stated in the declarations as applicable to "each occurrence".

Subject to the above provision respecting "each occurrence", the total liability of the company for all damages because of all **property damage** to which this coverage applies and described in any of the numbered subparagraphs below shall not exceed the limit of **property damage liability** stated in the declarations as "aggregate".

- (1) all **property damage** arising out of premises or operations rated on a remuneration basis or contractor's equipment rated on a receipts basis, including **property damage** for which liability is assumed under any **incidental contract** relating to such premises or operations, but excluding **property damage** included in subparagraph (2) below;
- (2) all **property damage** arising out of and occurring in the course of operations performed for the **named insured** by independent contractors and general supervision thereof by the **named insured**, including any such **property damage** for which liability is assumed under any **incidental contract** relating to such operations, but this subparagraph (2) does not include **property damage** arising out of maintenance or repairs at premises owned by or rented to the **named insured** or structural alterations at such premises which do not involve changing the size of or moving buildings or other structures;
- (3) all **property damage** included within the **products hazard** and all **property damage** included within the **completed operations hazard**.

Such aggregate limit shall apply separately to the **property damage** described in subparagraphs (1), (2) and (3) above, and under subparagraphs (1) and (2), separately with respect to each project away from premises owned by or rented to the **named insured**.

Bodily Injury Property Damage Liability Coverage For the purpose of determining the limit of the company's liability, all **bodily injury** and **property damage** arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence.

IV. POLICY TERRITORY

This insurance applies only to **bodily injury** or **property damage** which occurs within the **policy territory**.



GENERAL LIABILITY SCHEDULE

(Office Code-Symbol-Serial No.-Suffix)

Policy No.

Page No.

Description of Hazards (First Column) - including

1. Location of all premises owned, rented, or controlled by the named insured. 2. Interest of named insured in such premises (Owner, General Lessee or Tenant). 3. Part occupied by the named insured. The absence of any typewritten entry relating to Hazard (A), (B), (C), (D), (E), or (F) indicates no known exposure thereunder.

The rating classifications stated herein, except as specifically provided elsewhere in this policy, do not modify any of the other provisions of this policy.

- A. PREMISES-OPERATIONS
- B. ESCALATORS
- C. INDEPENDENT CONTRACTORS
-LET OR SUBLET WORK
- D. COMPLETED OPERATIONS
- E. PRODUCTS
- F. CONTRACTUAL

CODE
NUMBERSPREMIUM
BASES:

RATES

ADVANCE PREMIUM

BI

PD

BI

PD

- 1. Area sq. ft. Per 100 sq. ft.
- 2. Frontage Per linear ft.
- 3. Payroll Per \$100
- 4. Flat charge
- 5. Units Per each
- 6. Receipts Per \$100
- 7. Number Per landing
- 8. Cost Per \$100
- 9. Receipt Per \$1000
- 10. Sales Per \$1000
- 11.
- 12.

DESIGNATES
MINIMUM
PREMIUM

If location same as address in Item 1 of the declarations, check ☐

Double space between entries to allow for coding.

STATE PLAN #	PAY- MENT	TERRITORY STATE RATE	TAX DIST.	TERRITORY RATING	COMM. RATE	LIMITS DF PD	LINE DESIG	CLASS	EXPOSURE

01 00 STARR DAVIS CO. INC.
ALABAMA

(A)
STEAM PIPE OR BOILER INSULATION
APPLYING CORK, ASBESTOS OR OTHER
NON-CONDUCTING MATERIALS-INCLUDING
SHOP.

M 17141 3 IF ANY .428 .733
(97778)

CONTRACTORS-CONSTRUCTION OR
ERECTION EXECUTIVE SUPERVISORS
EXERCISING SUPERVISION THROUGH
SUPERINTENDENT AND FOREMEN-
NO DIRECT SUPERVISION

M 15192 3 IF ANY .906 .215
(97778)

(D)
STEAM PIPE OR BOILER INSULATION

P 73911 9 IF ANY .501 .545

(E)
SALES OF INSULATION MATERIALS
RATED AS BUILDING MATERIALS
EXCLUDING LADDERS AND INSTALLATION

P 52111 10 IF ANY .401 .127

Increased Limits Basic Charges

*Designates location to which Landlord's Protective Liability Endorsement applies.
ICC-5023-2-A) 5-74

As described

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GENERAL LIABILITY SCHEDULE

(Office Code-Symbol-Serial No.-Suffix)

Policy No. _____

Page No. _____

Description of Hazards (First Column) - including

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- A. PREMISES-OPERATIONS
B. ESCALATORS
C. INDEPENDENT CONTRACTORS
-LET OR SUBLET WORK
D. COMPLETED OPERATIONS
E. PRODUCTS
F. CONTRACTUAL

CODE
NUMBERS

PREMIUM BASES:		RATES		ADVANCE PREMIUM	
		BI	PD	BI	PD
1.	Area sq. ft.	Per 100 sq. ft.		*** DESIGNATES MINIMUM PREMIUM	
2.	Frontage	Per linear ft.			
3.	Payroll	Per \$100			
4.	Flat charge				
5.	Units	Per each			
6.	Receipts	Per \$100			
7.	Number	Per landing			
8.	Cost	Per \$100			
9.	Receipt	Per \$1000			
10.	Sales	Per \$1000			
11.					
12.					

If location same as address in Item 1 of the declarations, check ☐

Double space between entries to allow for coding.

STATE	PLAN	TERRITORY	TAX DIST.	TERRITORY	COMM.	LINE	LINE	CLASS	EXPOSURE
S	MENT	STATE	RATE	AN	RATE	SI	PD	DESIG	

01 00 STARR DAVIS CO. OF
SC

ALABAMA

(A)

STEAM PIPE OR BOILER INSULATION-
APPLYING CORK, ASBESTOS OR OTHER
NON CONDUCTING MATERIALS-
INCLUDING SHOPM 17141 3 IF ANY .428 .733
(97778)CONTRACTORS-CONSTRUCTION OR
ERECTION-EXECUTIVE SUPERVISORS
EXERCISING SUPERVISION THROUGH
SUPERINTENDENT AND FOREMEN-
NO DIRECT SUPERVISION.M 15192 3 IF ANY .906 .215
(97778)

(D)

STEAM PIPE OR BOILER INSULATION

P 73911 9 IF ANY .501 .545

(E)

SALES OF INSULATION MATERIALS
RATED AS BUILDING MATERIALS-
EXCLUDING LADDERS AND INSTALLTION

P 52111 10 IF ANY .401 .127

Increased Limits Basic Charges

*Designates location to which Landlord's Protective Liability Endorsement applies.
ICC-5023-2-A) 5-74

†As described

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GENERAL LIABILITY SCHEDULE

(Office Code-Symbol-Serial No.-Suffix)

Policy No.

Page No.

Description of Hazards (First Column) - including

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	PREMIUM BASES [†]	RATES		ADVANCE PREMIUM	
		BI	PD	BI	PD
A. PREMISES-OPERATIONS	CODE NUMBERS	1. Area sq. ft.	Per 100 sq. ft.	*** DESIGNATES MINIMUM PREMIUM	
B. ESCALATORS		2. Frontage	Per linear ft.		
C. INDEPENDENT CONTRACTORS -LET OR SUBLET WORK		3. Payroll	Per \$100		
D. COMPLETED OPERATIONS		4. Flat charge			
E. PRODUCTS		5. Units	Per each		
F. CONTRACTUAL		6. Receipts	Per \$100		
		7. Number	Per landing		
		8. Cost	Per \$100		
		9. Receipt	Per \$1000		
		10. Sales	Per \$1000		
		11.			
		12.			

If location same as address in Item 1 of the declarations, check ☐

Double space between entries to allow for coding.

STATE	PAY- MENT	TERRITORY	STARR DAVIS CO. OF	LINE	CLASS	EXPOSURE
0		STATE RATE	SOUTH CAROLINA	DESIG		

41.00 TENNESSEE

(A)
STEAM PIPE OR BOILER INSULATION-
APPLYING CORK, ASBESTOS OR OTHER
NON CONDUCTING MATERIALS-
INCLUDING SHOP

M 17141 3 IF ANY .453 .456
(97778)

CONTRACTORS-CONSTRUCTION OR
ERECTION-EXECUTIVE SUPERVISORS
EXERCISING SUPERVISION THROUGH
SUPERINTENDENT AND FOREMEN-
NO DIRECT SUPERVISION

M 15192 3 IF ANY .636 .179
(97778)

(D)
STEAM PIPE OR BOILER INSULATION

P 73911 9 IF ANY .501 .704

(E)
SALES OF INSULATION MATERIALS
RATED AS BUILDING MATERIALS-
EXCLUDING LADDERS AND INSTALLATION

P 52111 10 IF ANY .401 .164

Increased Limits Basic Charges

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(CC-9025-2-A) 5-74

† As described

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GENERAL LIABILITY SCHEDULE

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B. ESCALATORS
C. INDEPENDENT CONTRACTORS
- LET OR SUBLET WORK
D. COMPLETED OPERATIONS
E. PRODUCTS
F. CONTRACTUAL

CODE
NUMBERSPREMIUM
BASES:

RATES

BI PD

ADVANCE PREMIUM

BI PD

1. Area sq. ft. Per 100 sq. ft.
2. Frontage Per linear ft.
3. Payroll Per \$100
4. Flat charge
5. Units Per each
6. Receipts Per \$100
7. Number Per landing
8. Cost Per \$100
9. Receipt Per \$1000
10. Sales Per \$1000
11.
12.

"M"
DESIGNATES
MINIMUM
PREMIUM

If location same as address in Item 1 of the declarations,
check ☐

Double space between entries to allow for coding.

STATE	PLAN	DAY	TERRITORY	TAX	DISC	A	G	COMM.	INSUR.	LINE
41	00		TENNESSEE							

(A)
STEAM PIPE OR BOILER INSULATION-
APPLYING CORK, ASBESTOS OR OTHER
NON CONDUCTING MATERIALS-
INCLUDING SHOP.

M

17141 3
(97778)

IF ANY

.453

.456

CONTRACTORS-CONSTRUCTION OR
ERECTION-EXECUTIVE SUPERVISORS
EXERCISING SUPERVISION THROUGH
SUPERINTENDENT AND FOREMEN-
NO DIRECT SUPERVISION.

M

15192 3
(97778)

IF ANY

.636

.179

(D)
STEAM PIPE OR BOILER INSULATION

P

73911 9

IF ANY

.501

.704

(E)
SALES OF INSULATION MATERIALS
RATED AS BUILDING MATERIALS-
EXCLUDING LADDERS AND INSTALLATION

P

52111 10

IF ANY

.401

.164

Increased Limits Basic Charges

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ICC-5023-2-A) 5-74

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B. ESCALATORS
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- LET OR SUBLET WORK
D. COMPLETED OPERATIONS
E. PRODUCTS
F. CONTRACTUAL

CODE
NUMBERSPREMIUM
BASES†

RATES

ADVANCE PREMIUM

BI

PD

BI

PD

1. Area sq. ft.

Per 100 sq. ft.

2. Frontage

Per linear ft.

3. Payroll

Per \$100

4. Flat charge

5. Units

Per each

6. Receipts

Per \$100

7. Number

Per landing

8. Cost

Per \$100

9. Receipt

Per \$1000

10. Sales

Per \$1000

11.

12.

DESIGNATES
MINIMUM
PREMIUM

If location same as address in Item 1 of the declarations,
check ☐

Double space between entries to allow for coding.

PLAN	PAY-	TERRITORY	STARR	DAVIS	CO.	INC.	CLASS	EXPOSURE
9	MENT	STATE	RAVE	DI	PD	DESIG		

10 00 GA.

(A)
STEAM PIPE OR BOILER INSULATION
APPLYING CORK, ASBESTOS OR OTHER
NON-CONDUCTING MATERIALS-
INCLUDING SHOP.

M

17141 3
(97778)

IF ANY

.257

.483

CONTRACTORS-CONSTRUCTION OR
ERECTION-EXECUTIVE SUPERVISORS
EXERCISING SUPERVISION THROUGH
SUPERINTENDENT AND FOREMEN-
NO DIRECT SUPERVISION

M

15192 3
(97778)

IF ANY

.306

.134

(D)
STEAM PIPE OR BOILER INSULATION

P

73911 9

IF ANY

.501

.704

(E)
SALES OF INSULATION MATERIALS
RATED AS BUILDING MATERIALS
EXCLUDING LADDERS AND INSTALLTION

P

52111 10

IF ANY

.401

.164

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	PREMIUM BASES†	RATES		ADVANCE PREMIUM	
		BI	PD	BI	PD
A. PREMISES-OPERATIONS	CODE NUMBERS	1. Area sq. ft.	Per 100 sq. ft.	*** DESIGNATES MINIMUM PREMIUM	
B. ESCALATORS		2. Frontage	Per linear ft.		
C. INDEPENDENT CONTRACTORS		3. Payroll	Per \$100		
- LET OR SUBLET WORK		4. Flat charge			
D. COMPLETED OPERATIONS		5. Units	Per each		
E. PRODUCTS		6. Receipts	Per \$100		
F. CONTRACTUAL		7. Number	Per landing		
		8. Cost	Per \$100		
		9. Receipt	Per \$1000		
		10. Sales	Per \$1000		
		11.			
		12.			

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Double space between entries to allow for coding.

STATE	PAY- MENT	TERRITORY	CLASS	EXPOSURE	BI	PD	BI	PD
9		STATE RATE	STARR DAVIS CO. OF					
		10 00	SOUTH CAROLINA					
			GA.					
(A)								
STEAM PIPE OR BOILER INSULATION- APPLYING CORK, ASBESTOS OR OTHER NON-CONDUCTING MATERIALS- EXCLUDING SHOP.								
M	17141	3	IF ANY	.257	.483			
	(97778)							
M	15192	3	IF ANY	.306	.134			
	(97778)							
(D)								
STEAM PIPE OR BOILER INSULATION								
P	73911	9	IF ANY	.501	.704			
(E)								
SALES OF INSULATION MATERIALS RATED AS BUILDING MATERIALS- EXCLUDING LADDERS AND INSTALLATION								
P	52111	10	IF ANY	.401	.164			

Increased Limits Basic Charges

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† As described

(C-9023.2-A) 8-74

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C. INDEPENDENT CONTRACTORS
-LET OR SUBLET WORK
D. COMPLETED OPERATIONS
E. PRODUCTS
F. CONTRACTUAL

CODE
NUMBERS

PREMIUM BASES:		RATES		ADVANCE PREMIUM	
		BI	PD	BI	PD
1.	Area sq. ft.	Per 100 sq. ft.		*** DESIGNATES MINIMUM PREMIUM	
2.	Frontage	Per linear ft.			
3.	Payroll	Per \$100			
4.	Flat charge				
5.	Units	Per each			
6.	Receipts	Per \$100			
7.	Number	Per landing			
8.	Cost	Per \$100			
9.	Receipt	Per \$1000			
10.	Sales	Per \$1000			
11.					
12.					

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STAT PLAN 9	PAY- MENT	TERRITORY STATE	TAX RATE	STARR DAVIS CO. OF SOUTH CAROLINA, INC. SOUTH CAROLINA	CLASS	EXPOSURE	BI	PD	BI	PD
		39	00							
(A)				STEAM PIPE OR BOILER INSULATION- APPLYING CORK, ASBESTOS OR OTHER NON-CONDUCTING MATERIALS- INCLUDING SHOP	M 17141 (97778)	3 42,800.	.171	.375	73.	161.
				CONTRACTORS-CONSTRUCTION OR ERECTION-EXECUTIVE SUPERVISORS EXERCISING SUPERVISION THROUGH SUPERINTENDENT AND FOREMEN- NO DIRECT SUPERVISION.	M 15192 (97778)	3 IF ANY	.282	.080		
(D)				STEAM PIPE OR BOILER INSULATION	P 73911	9 39,500.	.438	.355	61.M	71.M
MIN PREM										
BI	61.									
PD	71.									
(E)				SALES OF INSULATION MATERIALS RATED AS BUILDING MATERIALS- EXCLUDING LADDERS AND INSTALLATION	P 52111	10 IF ANY	.350	.083		

Increased Limits Basic Charges

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ICC-5029-2-A1 8-74

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GENERAL LIABILITY SCHEDULE

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-LET OR SUBLET WORK
D. COMPLETED OPERATIONS
E. PRODUCTS
F. CONTRACTUAL

CODE
NUMBERS

PREMIUM BASES:		RATES		ADVANCE PREMIUM	
		BI	PD	BI	PD
1.	Area sq. ft.	Per 100 sq. ft.		*** DESIGNATES MINIMUM PREMIUM	
2.	Frontage	Per linear ft.			
3.	Payroll	Per \$100			
4.	Flat charge				
5.	Units	Per each			
6.	Receipts	Per \$100			
7.	Number	Per landing			
8.	Cost	Per \$100			
9.	Receipt	Per \$1000			
10.	Sales	Per \$1000			
11.					
12.					

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STATE PLAN #	PAY- MENT	TERRITORY STATE	T. STATE	COMM. #	LIMITS #	LINE DESIG.	CLASS	EXPOSURE				
		39	00									
		SOUTH CAROLINA										
(A)		STEAM PIPE OR BOILER INSULATION										
		APPLYING CORK, ASBESTOS, OR OTHER										
		NON-CONDUCTING MATERIALS-										
		INCLUDING SHOP.										
						M	17141 3	IF ANY	.171	.375		
							(97778)					
		CONTRACTORS-CONSTRUCTION OR										
		ERECTION-EXECUTIVE SUPERVISORS										
		EXERCISING SUPERVISION THROUGH										
		SUPERINTENDENT AND FOREMEN-										
		NO DIRECT SUPERVISION.										
						M	15192 3	IF ANY	.282	.080		
							(97778)					
(D)		STEAM PIPE OR BOILER INSULATION										
						P	73911 9	IF ANY	.438	.355		
(E)		SALES OF INSULATION MATERIALS										
		RATED AS BUILDING MATERIALS										
		EXCLUDING LADDERS AND INSTALLTION										
						P	52111 10	IF ANY	.350	.083		

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B. ESCALATORS
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- LET OR SUBLET WORK
D. COMPLETED OPERATIONS
E. PRODUCTS
F. CONTRACTUAL

CODE
NUMBERSPREMIUM
BASES:

RATES

BI

PD

ADVANCE PREMIUM

BI

PD

DESIGNATES
MINIMUM
PREMIUM

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STAT PLAN G	PAY- MENT	TERRITORY STATE RATE	TOTAL R	STARR DAVIS CO. INC.	LIMIT BI PD	LINE DESIG	CLASS	EXPOSURE				
		45 00 VA.										
AM PIPE OR BOILER INSULATION LYING CORK, ASBESTOS OR OTHER -CONDUCTING MATERIALS- LUDING SHOP.					M 17141 (97778)	3	80,100.	.122	.429	98.	344.	
TRACTORS-CONSTRUCTION OR CTION-EXECUTIVE SUPERVISORS RCISING SUPERVISION THROUGH ERINTENDENT AND FOREMEN- DIRECT SUPERVISION.					M 15192 (97778)	3	IF ANY	.392	.215			
AM PIPE OR BOILER INSULATION					P 73911	9	117,250.	.501	.704	70.M	141.M	
PREM 70. 141.												
ES OF INSULATION MATERIALS ED AS BUILDING MATERIALS- LUDING LADDERS AND INSTALLATION					P 52111	10	253,500.	.461	.164	117.	41.	
ERIENCE CREDIT 40%												
					Z 99901					10.	15.	

Increased Limits Basic Charges

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100-5023-2-A) 6-74

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- LET OR SUBLET WORK
D. COMPLETED OPERATIONS
E. PRODUCTS
F. CONTRACTUAL

CODE
NUMBERS

PREMIUM BASES†		RATES		ADVANCE PREMIUM	
		BI	PD	BI	PD
1.	Area sq. ft.	Per 100 sq. ft.		*** DESIGNATES MINIMUM PREMIUM	
2.	Frontage	Per linear ft.			
3.	Payroll	Per \$100			
4.	Flat charge				
5.	Units	Per each			
6.	Receipts	Per \$100			
7.	Number	Per landing			
8.	Cost	Per \$100			
9.	Receipt	Per \$1000			
10.	Sales	Per \$1000			
11.					
12.					

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Double space between entries to allow for coding.

STAT PLAN	PAY- MENT	TERRITORY		TAX DISE	TRAH	SIGN	COMM. RATE	LIMITS		LINE DESIG	CLASS
		STATE	RAFF					BI	PD		



AUTOMOBILE SCHEDULE

Description of Hazards:

Owned Automobile (Liability); Covered Automobiles (Physical Damage)

POLICY NO. OFFICE CODE-SYMBOL-SER. NO.-SUFFIX PAGE NO.

Entry of a specific premium charge indicates the insurance afforded for each described vehicle. The insurance for any described vehicle applies also to its replacement, subject to all the terms of the policy having reference thereto:

VEHICLE INFORMATION				RATING INFORMATION				PREMIUMS					
ENTRY NO.	YR. OF MOD.	TRADE NAME	BODY TYPE & MODEL	STATE	TERR.	DED. COMP.	DED. COLL.	BI LIABILITY	PD LIABILITY	MED. PAYMT.	UN. MTRST.	**	
INS'D. PURCH. VEH. NO.	MO. YR.	TOWN & STATE WHERE PRINCIPALLY GARAGED		CLASS CODE		RATE COMP. FIRE	THEFT**	BASIC NO FAULT	ADDITIONAL NO FAULT	COMBINED ADD'L. COV.		TOWING	
ORIGINAL COST NEW	IDENTIFICATION NUMBER		STATE EXCP. CODE	PIP RAT. BASIS	RESID. RAT. BASIS	C/MaRP	VALUE OF VEH. IF OTHER THAN ACV*	FIRE	THEFT	COMP.	COLL.		
1	77	CHEV 3/4 T TRK		10	01		100.	AA 269.	AP 165.	AA/AV 23.	AA/AF 3.	AO	
		ATLANTA, GA.		1.40	031917			AL 14.	AL AG	AO		AO	
6800.		CCL237A114035						AO	AO	AO 115.	AC/AW	302.	
								AA	AP	AA/AV	AA/AF	AO	
								AL	AL AG	AO		AO	
								AO	AO	AO	AC/AW		
								AA	AP	AA/AV	AA/AF	AO	
								AL	AL AG	AO		AO	
								AO	AO	AO	AC/AW		
								AA	AP	AA/AV	AA/AF	AO	
								AL	AL AG	AO		AO	
								AO	AO	AO	AC/AW		
								AA	AP	AA/AV	AA/AF	AO	
								AL	AL AG	AO		AO	
								AO	AO	AO	AC/AW		
If Physical Damage is indicated in the Declarations as "Fleet Automatic," coverage is afforded as follows for newly acquired vehicles (other than replacements) :													
FOR FLEET AUTOMATIC Maximum Limit of Liability for Physical Damage. Any one covered automobile. \$ _____ All covered automobiles at any one location. \$ _____ All covered automobile. \$ _____								1. Entry of one or more of the following code numbers indicates the coverages applicable to any newly acquired vehicle: (other than replacements) : 2. All registered covered automobiles. 3. All covered automobiles of the private passenger type. 4. All covered automobiles of the commercial type. 5. Excluding, under Collision Coverage, any vehicle not having an Actual Cash Value of at least \$500. 6. Excluding vehicles leased short term to the named insured.				Report of Changes shall be submitted: ☐ Monthly ☐ Quarterly ☐ Semi-Annually ☐ Annually	
*Value of Vehicle is Actual Cash Value: (a) For Collision; (b) As respect newly acquired vehicles and (c) For other Coverages unless otherwise indicated.								**Enter "W" for Windstorm, Hail, Earthquake or Explosion if afforded. † \$25 per dismemberment.				Rating Information:	(CC-1035-1)Ed. 7-75
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ENDORSEMENT SCHEDULE

DESCRIPTION	ENDORSEMENT NO.
1. DEFINITIONS	CC-5022
2. CGL PART	CC-5295
3. PREMIUM DISCOUNT ENDORSEMENT NC	C-1657-1A-2F
4. BROAD FORM COMPREHENSIVE GENERAL LIABILITY	G-222
5. EXCLUSION-ENGRS. ARCHITECTS OR SURVEYORS	SPECIAL CC-605
6. LIMITATION OF COVERAGE	SPECIAL NO. 1
7. LIMITATION OF COVERAGE	T-403
8. AMENDED CANCELLATION CONDITION	CC-211
9. DEDUCTIBLE LIABILITY INSURANCE	G-604
10. COUNTERSIGNATURE ENDORSEMENT	AA-242
11. NON CANCELLATION ENDORSEMENT	55339
12. PREDETERMINED INTERIM ADJ. OF PREMIUM	13690

PREMIUM DISCOUNT ENDORSEMENT - NORTH CAROLINA

(Automobile and General Liability Insurance)

It is agreed that the premium pertaining to North Carolina for Liability and Medical Payments insurance is subject to discount in accordance with the following procedure:

1. North Carolina Standard Premium. Such premium pertaining to North Carolina compute in accordance with the provisions of the policies designated in paragraph 4 hereof, other than this endorsement and exclusive of the application of any retrospective rating plan and exclusive of any premium under any Automobile Liability Policy applicable with respect to automobiles classified as "Livery", "Buses", or "Long Haul Truckmen", shall be known as the North Carolina Standard Premium.
2. Total Standard Premium For All States. The Liability and Medical Payments premium computed in accordance with the provisions of the policies designated in paragraph 4 hereof, other than this endorsement and exclusive of the application of any retrospective rating plan, any Automatic Premium Adjustment Endorsement, any Premium Return Plan Endorsement, or other Premium Discount Endorsement, shall be known as the Total Standard Premium.
3. Premium Discount - North Carolina
 - (a) For policy periods of one year or less - The North Carolina Standard Premium, exclusive of any premium subject to any retrospective rating plan, shall be subject to the applicable discount percentages for the Total Standard Premium obtained from the Table of "North Carolina Premium Discounts."
 - (b) For policy periods of more than one year - The North Carolina Standard Premium, exclusive of any premium subject to any retrospective rating plan, shall be subject to the applicable discount percentages stated in said Table of "North Carolina Premium Discounts" opposite the total standard premium for the policies for each annual period or portion thereof during the policy period.
 - (c) If retrospective rating is applicable to a part of the premium pertaining to North Carolina, the amount of premium discount applicable to the North Carolina Standard Premium, exclusive of any premium subject to any retrospective rating plan, shall be the difference between (1) the discount determined by applying to the North Carolina Standard Premium the applicable percentages stated in said Table opposite the Total Standard Premium and (2) the discount determined by applying to that portion of the North Carolina Standard Premium which is subject to retrospective rating the applicable percentages stated in said Table opposite so much of the Total Standard Premium as is subject to retrospective rating.

4.	<u>Policy Numbers</u>	<u>Estimated Standard Premium</u>
	25AL802646CNS	_____
	25AL801362CMA	_____
	25SM802646ZPS	_____
		Total

- 1 -

5. Table - North Carolina Premium Discounts - B

Premium Discount Percentages Applicable
to North Carolina Standard Premium

Column (1) - Total Standard Premium for all States.
 " (2) - Discount Percentage for General Liability.
 " (3) - Discount Percentage for Automobile Liability - Garages.
 " (4) - Discount Percentage for Automobile Liability - Taxis.
 " (5) - Discount Percentage for all other Automobile Liability
 (except Livery, Buses, Other Than School Buses and
 Long Haul Truckmen)

(1)	(2)	(3)	(4)	(5)	(1)	(2)	(3)	(4)	(5)
\$1,000 or less	0.0%	0.0%	0.0%	0.0%	6,200	11.1	6.1	2.2	5.6
1,050	0.7	0.3	0.1	0.3	6,400	11.4	6.3	2.3	5.9
1,100	1.2	0.6	0.1	0.5	6,600	11.7	6.5	2.5	6.1
1,150	1.6	0.7	0.1	0.7	6,800	12.0	6.8	2.6	6.3
1,200	1.9	0.9	0.2	0.8	7,000	12.3	7.0	2.8	6.5
1,250	2.3	1.1	0.2	1.0	7,200	12.5	7.2	2.9	6.7
1,300	2.6	1.2	0.2	1.1	7,400	12.8	7.3	3.0	6.9
1,350	2.9	1.4	0.3	1.2	7,600	13.0	7.5	3.1	7.1
1,400	3.1	1.5	0.3	1.3	7,800	13.2	7.7	3.3	7.2
1,450	3.4	1.6	0.3	1.4	8,000	13.4	7.8	3.4	7.4
1,500	3.6	1.7	0.3	1.5	8,200	13.6	8.0	3.5	7.5
1,550	3.8	1.8	0.4	1.6	8,400	13.8	8.1	3.6	7.7
1,600	4.0	1.9	0.4	1.7	8,600	14.0	8.3	3.6	7.8
1,650	4.2	2.0	0.4	1.8	8,800	14.1	8.4	3.7	7.9
1,700	4.4	2.1	0.4	1.9	9,000	14.3	8.5	3.8	8.1
1,750	4.6	2.2	0.4	2.0	9,200	14.5	8.6	3.9	8.2
1,800	4.7	2.3	0.5	2.0	9,400	14.6	8.7	4.0	8.3
1,850	4.9	2.3	0.5	2.1	9,600	14.7	8.8	4.0	8.4
1,900	5.0	2.4	0.5	2.2	9,800	14.9	8.9	4.1	8.5
1,950	5.2	2.5	0.5	2.2	10,000	15.1	9.1	4.2	8.7
2,000	5.4	2.6	0.5	2.3	10,500	15.4	9.3	4.4	8.9
2,100	5.6	2.7	0.5	2.4	11,000	15.7	9.6	4.5	9.1
2,200	5.8	2.8	0.6	2.5	11,500	15.9	9.7	4.6	9.3
2,300	6.0	2.9	0.6	2.6	12,000	16.2	9.9	4.8	9.5
2,400	6.2	3.0	0.6	2.7	12,500	16.4	10.1	4.9	9.6
2,500	6.4	3.0	0.6	2.7	13,000	16.6	10.2	5.0	9.8
2,600	6.5	3.1	0.6	2.8	13,500	16.8	10.4	5.1	9.9
2,700	6.7	3.2	0.6	2.9	14,000	16.9	10.5	5.1	10.0
2,800	6.8	3.2	0.6	2.9	14,500	17.1	10.6	5.2	10.1
2,900	6.9	3.3	0.7	3.0	15,000	17.3	10.8	5.3	10.3
3,000	7.1	3.4	0.7	3.0	16,000	17.5	11.0	5.5	10.5
3,100	7.2	3.4	0.7	3.1	17,000	17.8	11.1	5.6	10.7
3,200	7.3	3.5	0.7	3.1	18,000	18.0	11.3	5.7	10.8
3,300	7.4	3.5	0.7	3.2	19,000	18.1	11.4	5.8	11.0
3,400	7.5	3.6	0.7	3.2	20,000	18.3	11.6	5.9	11.1
3,500	7.5	3.6	0.7	3.2	21,000	18.5	11.7	5.9	11.2
3,600	7.6	3.6	0.7	3.3	22,000	18.6	11.8	6.0	11.3
3,700	7.7	3.7	0.7	3.3	23,000	18.7	11.9	6.1	11.4
3,800	7.8	3.7	0.7	3.3	24,000	18.8	12.0	6.1	11.5
3,900	7.8	3.7	0.7	3.4	25,000	19.0	12.1	6.2	11.6
4,000	7.9	3.8	0.8	3.4	27,500	19.2	12.3	6.3	11.8
4,200	8.1	3.8	0.8	3.5	30,000	19.5	12.5	6.5	12.0
4,400	8.2	3.9	0.8	3.5	32,500	19.8	12.7	6.8	12.3
4,600	8.3	3.9	0.8	3.5	35,000	20.1	13.0	7.1	12.5
4,800	8.4	4.0	0.8	3.6	37,500	20.4	13.2	7.3	12.7
5,000	8.7	4.2	0.9	3.8	40,000	20.6	13.3	7.5	12.8
5,200	9.1	4.6	1.2	4.2	42,500	20.8	13.5	7.7	13.0
5,400	9.6	4.9	1.4	4.5	45,000	21.0	13.6	7.8	13.1
5,600	10.0	5.2	1.6	4.8	47,500	21.1	13.7	8.0	13.3
5,800	10.4	5.5	1.8	5.1	50,000	21.3	13.9	8.1	13.4
6,000	10.8	5.8	2.0	5.4	52,500	21.4	14.0	8.2	13.5
					55,000	21.5	14.0	8.3	13.6

(Cont'd)

(1)	(2)	(3)	(4)	(5)	(1)	(2)	(3)	(4)	(5)
\$57,500	21.6	14.1	8.4	13.6	200,000	25.6	17.3	11.7	16.8
60,000	21.7	14.2	8.5	13.7	212,500	25.8	17.4	11.8	16.9
62,500	21.8	14.3	8.6	13.8	225,000	25.9	17.5	12.0	17.0
65,000	21.9	14.3	8.6	13.8	237,500	26.1	17.6	12.1	17.1
67,500	- 22.0	- 14.4	- 8.7	- 13.9	250,000	- 26.2	- 17.7	- 12.2	- 17.2
70,000	22.0	14.5	8.8	14.0	262,500	26.3	17.8	12.2	17.3
72,500	22.1	14.5	8.8	14.0	275,000	26.4	17.9	12.3	17.4
75,000	22.2	14.6	8.9	14.1	287,500	26.5	17.9	12.4	17.4
80,000	22.3	14.7	9.0	14.2	300,000	26.6	18.0	12.5	17.5
85,000	- 22.4	- 14.7	- 9.1	- 14.2	312,500	- 26.6	- 18.1	- 12.5	- 17.6
90,000	22.5	14.8	9.2	14.3	325,000	26.7	18.1	12.6	17.6
95,000	22.6	14.9	9.2	14.4	337,500	26.8	18.2	12.6	17.7
100,000	22.7	15.0	9.4	14.5	350,000	26.8	18.2	12.7	17.7
105,000	23.0	15.2	9.6	14.7	362,500	26.9	18.3	12.7	17.8
110,000	- 23.3	- 15.4	- 9.8	- 14.9	375,000	- 27.0	- 18.3	- 12.8	- 17.8
115,000	23.5	15.6	10.0	15.1	387,500	27.0	18.3	12.8	17.8
120,000	23.7	15.7	10.1	15.2	400,000	27.0	18.4	12.8	17.9
125,000	23.9	15.9	10.3	15.4	412,500	27.1	18.4	12.9	17.9
130,000	24.0	16.0	10.4	15.5	425,000	27.1	18.4	12.9	17.9
135,000	- 24.2	- 16.2	- 10.6	- 15.7	437,500	- 27.2	- 18.5	- 12.9	- 18.0
140,000	24.4	16.3	10.7	15.8	450,000	27.2	18.5	13.0	18.0
145,000	24.5	16.4	10.8	15.9	462,500	27.2	18.5	13.0	18.0
150,000	24.7	16.6	11.0	16.1	475,000	27.3	18.5	13.0	18.0
162,500	25.0	16.8	11.2	16.3	487,500	27.3	18.6	13.0	18.1
175,000	- 25.2	- 17.0	- 11.4	- 16.5	500,000	- *	*	*	*
187,500	25.5	17.1	11.6	16.6	& Over				

If the Total Standard Premium is between two of the amounts shown in Column (1), the premium discount percentage applicable is that shown for the lower of such amounts.

*If the Total Standard Premium is \$500,000 or over, the discount percentage for each kind of insurance shall be determined as the weighted average of the percentage shown in (b) for the first \$500,000 of Total Standard Premium and the percentage shown in (c) for the portion of Total Standard Premium over \$500,000:

Kind of Insurance (a)	First \$500,000 (b)	Portion over \$500,000 (c)
General Liability	27.3%	28.5%
Automobile Liability - Garages	18.6	19.5
Taxis	13.1	14.0
All Other Automobile Liability (except Livery, Buses, Other Than School Buses and Long Haul Truckmen)	18.1	19.0

For attachment to and forming part of policy No.

issued to

The Aetna Casualty and Surety Company
Hartford, Connecticut

William O. Bailey
President

SPECIAL

CC-605

EXCLUSION

(ENGINEERS, ARCHITECTS OR SURVEYORS PROFESSIONAL LIABILITY)

**IT IS AGREED THAT THE INSURANCE DOES NOT APPLY TO BODILY INJURY
OR PROPERTY DAMAGE-ARISING OUT OF ANY PROFESSIONAL SERVICES
PERFORMED BY OR FOR THE NAMED INSURED, INCLUDING:**

- 1. THE PREPARATION OR APPROVAL OF MAPS, PLANS OPINIONS,
REPORTS SURVEYS, DESIGNS IN SPECIFICATIONS AND**
- 2. SUPERVISORY, INSPECTION OR ENGINEERING SERVICES.**

SPECIAL NO. 1

LIMITATION OF COVERAGE

IT IS AGREED THAT THIS POLICY DOES NOT APPLY TO BODILY INJURY OR PROPERTY DAMAGE FOR WHICH INSURANCE IS AFFORDED UNDER CGL POLICY NO. 25AL802646CNS OR ANY RENEWAL THEREOF; NOR DOES THIS POLICY APPLY TO ANY EXPOSURE TO WHICH SUCH CGL POLICY IS INAPPLICABLE SOLELY BECAUSE OF THE EXHAUSTION OF THE LIMITS OF LIABILITY PROVIDED THEREIN.

This endorsement modifies such insurance as is afforded by the provisions of the policy relating to the following:

COMPREHENSIVE GENERAL LIABILITY INSURANCE

LIMITATION OF COVERAGE

It is agreed that the policy does not apply to BODILY INJURY or PROPERTY DAMAGE for which insurance is afforded under Section II of SMP Policy No. 25SM401768FCA or any renewal thereof; nor does the policy apply to any premises or operations to which such SMP Policy is inapplicable solely because of the exhaustion of the limits of liability provided therein.

AL

This endorsement forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective	Policy No.	Endorsement No.
Named Insured		
Additional Premium \$	Return Premium \$	In Adv. \$
		1st Anniv. \$
		2nd Anniv. \$
T-403		CAT. 318698

This endorsement modifies such insurance as is afforded by the provisions of the policy relating to the following:

**COMPREHENSIVE GENERAL LIABILITY INSURANCE
MANUFACTURERS' AND CONTRACTORS' LIABILITY INSURANCE
OWNERS', LANDLORDS' AND TENANTS' LIABILITY INSURANCE**

AMENDED CANCELLATION CONDITION

It is agreed that the first sentence of the Cancellation Condition of the policy is amended to read as follows:
This policy may be cancelled by the named Insured by mailing written notice to the Company stating when, not less than 35 days thereafter, such cancellation shall be effective.

Note: The number of days typed in above must always be at least 5 days more than the time required for notification to parties other than the Insured.

This endorsement forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective

Policy No.

Endorsement No.

Named Insured

Countersigned by _____ (Authorized Representative)

CAT. 444758
PRINTED IN U.S.A.

ALPS-05
(CC-211)



G604
(Ed. 7-66)

This endorsement forms a part of the policy to which attached, effective on the inception date of the policy unless otherwise stated herein.

(The following information is required only when this endorsement is issued subsequent to preparation of policy.)

Endorsement effective

Policy No.

Endorsement No.

Named Insured

Additional Premium \$ _____

Countersigned by _____
(Authorized Representative)

This endorsement modifies such insurance as is afforded by the provisions of the policy relating to the following:

**COMPREHENSIVE GENERAL LIABILITY INSURANCE
MANUFACTURERS AND CONTRACTORS LIABILITY INSURANCE
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY INSURANCE
OWNERS, LANDLORDS AND TENANTS LIABILITY INSURANCE
SMP LIABILITY INSURANCE**

DEDUCTIBLE LIABILITY INSURANCE

It is agreed that:

1. The company's obligation under the Bodily Injury Liability and Property Damage Liability Coverages to pay damages on behalf of the insured applies only to the amount of damages in excess of any deductible amounts stated in the schedule below as applicable to such coverages.
2. The deductible amounts stated in the schedule apply as follows:
 - (a) **PER CLAIM BASIS**—If the deductible is on a "per claim" basis, the deductible amount applies under the Bodily Injury Liability or Property Damage Liability Coverage, respectively, to all damages because of bodily injury sustained by one person, or to all property damage sustained by one person or organization, as the result of any one occurrence.
 - (b) **PER OCCURRENCE BASIS**—If the deductible is on a "per occurrence" basis, the deductible amount applies under the Bodily Injury Liability or Property Damage Liability Coverage, respectively, to all damages because of all bodily injury or property damage as the result of any one occurrence.
3. The terms of the policy, including those with respect to (a) the company's rights and duties with respect to the defense of suits and (b) the insured's duties in the event of an occurrence apply irrespective of the application of the deductible amount.
4. The company may pay any part or all of the deductible amount to effect settlement of any claim or suit and, upon notification of the action taken, the named insured shall promptly reimburse the company for such part of the deductible amount as has been paid by the company.

SCHEDULE

Coverage	Amount and Basis of Deductible
Bodily Injury Liability	\$ per claim \$ per occurrence
Property Damage Liability	\$ 50 per claim \$ per occurrence

APPLICATION OF ENDORSEMENT (Enter here any limitations on the application of this endorsement. If no limitation is entered, the deductibles apply to all loss however caused):—

**DOES NOT APPLY TO D COMPLETED OPERATIONS
E. PRODUCTS OR G CONTRACTUAL**

CM

G604 (Ed. 7-66)

**AMENDATORY ENDORSEMENT
CANCELLATION AND NONRENEWAL PROVISIONS**

It is agreed that:

- A. The provisions in the policy relating to cancellation are replaced by the following:

CANCELLATION BY INSURED

This policy may be cancelled at any time at the request of the insured named in Item 1 of the Declarations.

CANCELLATION BY COMPANY

Subject to the Limitation On The Right Of Cancellation By The Company as provided below, this policy may be cancelled by the Company by mailing to the insured named in Item 1 of the Declarations at the address shown in this policy, written notice stating when, not less than thirty (30) days after the mailing date, such cancellation shall be effective, except that if the insured fails to discharge, within the time allotted by the Company, any of his obligations in connection with the payment of any premium for this policy, or if there is the occurrence of incendiarism on the part of any insured, such effective date of cancellation shall not be less than ten (10) days after the mailing date of such notice.

COMPUTATION OF EARNED PREMIUM

If the insured cancels this policy, earned premium shall be computed in accordance with the customary short rate table and procedure and the Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the earned premium for the expired time. If the Company cancels, earned premium shall be computed pro rata. Premium adjustment and refund of any excess of paid premium above the earned premium for the expired time may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

- B. The following provisions are added to the policy:

POLICY PERIOD

If this policy is written for a term of more than one year or without a fixed expiration date, it shall, for purposes of these added provisions, be considered as if written for successive policy periods of one year.

LIMITATION ON THE RIGHT OF CANCELLATION BY THE COMPANY

After this policy has been in effect for sixty (60) days, or, if this policy is a renewal, effective immediately, the Company shall not exercise its right to cancel this policy unless such cancellation is based on:

1. the failure of the insured to discharge, within the time allotted by the Company, any of his obligations in connection with the payment of any premium for this policy, or
2. the occurrence, after the effective date of this policy, of one or more of the following:
 - (a) Incendiarism on the part of any insured.
 - (b) A substantial change in the risk assumed by the Company.

NONRENEWAL BY THE COMPANY

If the Company elects not to renew this policy, or to condition its renewal upon a reduction in amount of insurance or limits of liability or the elimination of coverage, it shall mail to the insured named in Item 1 of the Declarations, at the address shown in this policy, written notice of such election not less than forty-five (45) days prior to the effective date of such nonrenewal, provided that, notwithstanding the failure of the Company to comply with the foregoing provisions of this paragraph, the policy shall terminate on its expiration date

- (a) if the insured has failed to discharge, within the time allotted by the Company, any of his obligations in connection with the payment of any premium for this policy, or
- (b) if the Company has by any means manifested to the insured or his representative its willingness to renew the policy.

NOTICE OF CANCELLATION OR ELECTION NOT TO RENEW

The mailing of any notice of cancellation or election not to renew as required herein shall be sufficient proof of notice. Delivery of any such notice shall be equivalent to mailing.

Any notice of cancellation or election not to renew required of the Company shall state or be accompanied by a statement of the reasons for such cancellation or election not to renew.

This endorsement forms a part of the policy to which attached effective on the inception date of the policy.



MEMORANDUM TO:

SUBJECT: PREDETERMINED INTERIM ADJUSTMENT OF PREMIUM

INSURED

POLICY NUMBER (OFFICE CODE-SYMBOL-SERIAL NO.-SUFFIX)

STARR DAVIS CO. INC AND STARR DAVIS CO. OF SC, INC

25AL801362CMA 8

Your policy requires you to make periodic reports to the Company for the purpose of interim premium computation and adjustment. Such report may be required only at the end of the policy period provided interim premium adjustments are made by payments billed in accordance with the following schedule.

STAT PLAN 9	CAP CODE 7	PREM STATE VRS.	INTERIM PAYMENTS ARE PAYABLE		
POLICY EFFECTIVE DATE			MONTHLY ☒	QUARTERLY ☐	SEMI-ANNUAL ☐

H.O. USE ONLY			SCHEDULE OF INTERIM PREMIUM ADJUSTMENTS								
PAYMENT CODE	TR	EXPIRATION DATE	PAYMENT DUE DATES	WORKMEN'S COMPENSA- TION	MISC. LIABILITY		AUTO LIABILITY		AUTO PHYSICAL DAMAGE		TOTAL OF PREMIUM ADJUST- MENTS
					B.I.	P.D.	B.I.	P.D.	COMP.	COLL.	
			1-1-78		132.	224.	75.	44.	27.	71.	573.
			2-1-78		35.	61.	20.	11.	8.	21.	156.
			3-1-78		35.	61.	20.	11.	8.	21.	156.
			4-1-78		35.	61.	20.	11.	8.	21.	156.
			5-1-78		35.	61.	20.	11.	8.	21.	156.
			6-1-78		35.	61.	20.	11.	8.	21.	156.
			7-1-78		35.	61.	20.	11.	8.	21.	156.
			8-1-78		35.	61.	20.	11.	8.	21.	156.
			9-1-78		35.	61.	20.	11.	8.	21.	156.
			10-1-78		35.	61.	20.	11.	8.	21.	156.
			11-1-78		35.	61.	20.	11.	8.	21.	156.
			12-1-78		35.	61.	20.	11.	8.	21.	156.
AL PREMIUMS					517.	895.	295.	165.	115.	302.	2289.

Include odd dollars and fixed charges in the first payment.

HOME OFFICE USE ONLY

Agent's Code _____

Commission _____

HOME OFFICE COPY

3

CAT. 238082
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(13690-1-D) 6-71

