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

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| COMPANION PROPERTY AND CASUALTY INSURANCE COMPANY,<br><br>Plaintiff,<br><br>v.<br><br>CHARLES DAVID WOOD, JR.; AMS STAFF LEASING, INC., d/b/a/ AMS Staff Leasing Corporation; BRECKENRIDGE ENTERPRISES, INC., d/b/a/ AMS Staff Leasing II; AMS Staff Leasing II, Inc.; HIGHPOINT RISK SERVICES, LLC; and ASPEN ADMINISTRATORS, INC.,<br><br>Defendants. | C/A No. 3:14-cv-03719-CMC<br><br>OPINION AND ORDER<br>NON-JURY ISSUES |

This matter is before the court for resolution of six issues that raise predominantly legal questions. The issues are as follows:

1. Whether Companion Property and Casualty Insurance Company ("Companion") is obligated to provide Defendants AMS Staff Leasing, Inc., Breckenridge Enterprises, Inc., and AMS Staff Leasing II, Inc. (collectively "AMS" or "AMS Defendants") with collateral statements, claims data, and updated claims records as to open claims and consult with AMS prior to settling workers' compensation claims using AMS funds;
2. Whether Defendant Charles David Wood Jr. ("Wood") is obligated to pay Companion unreimbursed and future below-deductible claims and collateral obligations of AMS, arising under the Coverage Agreement dated December 1, 2006 ("2006 Coverage Agreement"), as well as other liabilities and losses relating to those obligations, based on paragraph I ("Guaranty Provision") of the Guaranty and Indemnity Agreement Wood signed in favor of Companion ( "Wood Guaranty");

3. Whether Wood must indemnify Companion, based on paragraph II ("Indemnity Provision") of the Wood Guaranty, for any liability imposed on Companion in favor of AMS for unreimbursed above-deductible claims payments made on policies governed by the 2006 Coverage Agreement;
4. Whether Companion is entitled to all earnings, including reinvested earnings, accrued on assets deposited in the trust account at State Street Bank & Trust Company ("State Street Account") that is governed by a Trust Agreement between Companion, AMS, and State Street Bank and has an effective date of January 31, 2012 ("Trust Agreement");
5. Whether all funds held in the State Street Account are held solely for the benefit of AMS, regardless of the entity that deposited the funds (or other assets) or on whose behalf funds were deposited;
6. Whether Wood must indemnify Companion for all reasonable attorney's fees and expenses incurred in connection with this action.

The parties seek declaratory relief as to each of the issues listed above.[1]

Prior to filing their memoranda, the parties agreed Defendants would bear the burden of proof on the first issue and Companion would bear the burden of proof on the remaining five

[1] The first five questions correspond with items III.A, C, D, E, and F in the parties' Joint Submission (ECF No. 409-1). That submission was (1) provided to the court on or about April 17, 2017, (2) discussed during an April 18, 2017 teleconference (ECF No. 364, transcript), referenced in a May 8, 2017 docket text order (ECF No. 379), and subsequently filed (ECF Nos. 384-8, 409-1). As noted in the May 8, 2017 docket text order, other non-jury issues referenced in the parties joint pre-trial submission (items B and G) were mooted by prior agreement (settlement of two jury issues). ECF No. 379; s*ee also* ECF No. 376 (status report and proposed briefing schedule). The sixth issue addresses one aspect of a matter that is otherwise reserved for later determination (entitlement to attorney's fees and costs). *See* ECF No. 376 n.1.

issues. *See* ECF No. 409-1 Joint Submission; ECF No. 379 (docket text order noting agreement and setting briefing schedule).

## STANDARD

The parties have stipulated the court may resolve the non-jury issues on the written submissions even if it becomes necessary to determine a dispute of fact or draw inferences from the facts. ECF No. 409.

## FACTS[2]

1. The AMS Defendants are professional employer organizations ("PEOs"), entities that provide leased employees to other businesses, primarily in the construction industry. The AMS Defendants provide workers' compensation coverage for the leased employees.

2. Wood owns the AMS Defendants. Wood also owns Defendants Aspen Administrators, Inc. ("Aspen"), and Highpoint Risk Services, LLC ("Highpoint").[3] Wood previously owned an entity that was named Dallas National Insurance Company ("Dallas National"). Dallas National provided reinsurance for certain policies at issue in this action. It is, however, in receivership and no claims are asserted against it in this action.[4]

3. Companion is a business that provides, inter alia, workers' compensation insurance in a number of states including but not limited to Texas and Florida.

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[2] This section provides an overview of facts common to multiple issues discussed in this order. More detailed information, including quotation of relevant documents, is provided in the relevant sections of the Discussion.

[3] This order does not address claims by or against either Aspen or Highpoint.

[4] Wood sold Dallas National to a third-party in March 2013. Dallas National was renamed after the sale and was placed into receivership during or after April 2014.

4. Companion and AMS (as well as other entities) are parties to the 2006 Coverage Agreement (ECF No. 340-1 at 3-9). That agreement established a relationship through which Companion provided certain forms of insurance to AMS, including workers' compensation insurance for AMS employees. The insurance provided pursuant to the 2006 Coverage Agreement is governed by separate policies ("Policies"). The relationship established was not, however, a traditional insurance relationship. It was, instead, what the parties have described as a "fronting" arrangement, meaning Policies were issued in Companion's name but all risk was to be borne by the other contracting parties through a combination of high-deductibles, reinsurance, and other protections.[5] Wood signed the 2006 Coverage Agreement on behalf of all AMS Defendants (and some other "AMS Entities")[6] but is not, himself, a party to that agreement. *Id.* at 9.

5. Companion and Wood are parties to the Wood Guaranty. *Id.* at 28-46. The Wood Guaranty included both a Guaranty Provision and an Indemnity Provision. The Guaranty Provision (Wood Guaranty ¶ I) guaranteed performance under "Subject Agreements" that include the 2006 Coverage Agreement, Policies, and a related third-party claims administration agreement ("TPA Agreement").[7] *Id.* at 28. The Indemnity Provision (Wood Guaranty ¶ II) indemnified

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[5] Certain aspects of the fronting arrangement were later modified as to Policies covering Florida workers. *See infra* Facts ¶ 7.

[6] "AMS Entities" is a defined term in the 2006 Coverage Agreement. It includes the AMS Defendants, at least one other PEO, and Dallas National. 2006 Coverage Agreement ¶ 1.

[7] The TPA Agreement is between Companion and Aspen and required Aspen to provide third-party claims administration services for Policies issued pursuant to the 2006 Coverage Agreement. ECF No. 340-1 at 10-26. Aspen's role as third-party claims administrator was eliminated in 2011, at least as to Policies covering Florida workers. *See infra* Facts ¶ 7.

Companion for claims, losses, and liabilities related directly or indirectly to the Subject Agreements, including attorney's fees and costs. *Id.* at 29. Wood signed the Wood Guaranty on his own behalf. *Id.* at 45.

6. In general terms, the 2006 Coverage Agreement provided for establishment of two distinct accounts, a "Claims Operating Account" and a "Claims Reserve Fund."[8] 2006 Coverage Agreement ¶¶ 12, 13. The Claims Operating Account was to be controlled by Aspen as third-party claims administrator and funded by the AMS Entities who were to be invoiced on a periodic basis. *Id.* ¶ 12. All claims were to be paid from the Claims Operating Account. *Id.* The Claims Reserve Fund was to be established by Companion in its own name but funded by the AMS Entities. *Id.* ¶ 13. The 2006 Coverage Agreement called for quarterly audits to "determine the appropriate amount of the Required Reserve for the next quarter[.]" *Id.* The AMS Entities were to deposit additional amounts on a monthly basis to ensure "the Required Reserve is maintained in the Claims Reserve Fund at all times." *Id.*[9]

7. In mid-2011, Companion entered a consent order with the Florida Office of Insurance Regulation (respectively, "Florida Consent Order" and "Florida OIR"). ECF No. 310; *see also* ECF No. 384 at 3, 4 (Defendants' memorandum addressing changes resulting from Florida Consent Order). Certain aspects of the relationship established by the 2006 Coverage Agreement and TPA Agreement were modified as a result of the Florida Consent Order. Most critically, at

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[8] The summary judgment order refers to the "Claims Reserve Fund" as the "AMS collateral account." *See*, *e.g.*, Summary Judgment Order at 11, 14 n.10 (ECF No. 258).

[9] More specific terms of the 2006 Coverage Agreement are addressed in the sections of the Discussion corresponding to related disputes.

least as to Florida Policies, (1) Companion took over claims processing and payment duties for Aspen and (2) AMS's Claims Reserve Fund was moved from the Bank of America account where funds deposited by AMS were held in common with other collateral to a separate trust account at State Street Bank. *See, e.g., Id.* ¶¶ 6.(c), (d), (g); ECF No. 398-15 (Nov. 29, 2011 letter from Companion's president to Florida OIR); ECF No. 411-2 (Dec. 1, 2011 email from Florida OIR to Companion's vice-president and CEO advising a trust account was required).

8. In or around July 2013, Companion terminated AMS's authority to write new business or renew policies under the 2006 Coverage Agreement. The relationship between the parties was not, however, ended as claims continued to be processed and paid during the run-off period that followed ("Run-Off"). *See generally* ECF No. 258 at 3, 13-17 (Order on cross motions for partial summary judgment ("Summary Judgment Order") discussing handling of claims during Run-Off and resulting disputes); ECF No. 384 at 4-5 (Defendants' memorandum addressing Run-Off period).

9. In October 2013, AMS refused to continue making payments to Companion to cover claims as they were incurred. *See generally* ECF No. 258 at 11. AMS, instead, directed Companion to pay future claims from the Claims Reserve Fund. Companion, thereafter, paid (and continues paying) claims from the Claims Reserve Fund held in the State Street Account.

10. The present litigation ensued.[10] Allegations relevant to the issues addressed here include Companion's allegation AMS breached the 2006 Coverage Agreement by refusing to pay

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[10] Before this litigation was initiated, Highpoint filed suit against Companion in the Northern District of Texas ("Texas Court") seeking return of collateral held as to certain policies. *See* ECF No. 23-1 at 1 (motion to dismiss identifying *Highpoint Risk Services, LLC v. Companion Property & Casualty Insurance Company*, No. 3:14-cv-3398-L (N.D. Tex. filed Aug. 20, 2014) as first filed

claims as incurred, forcing Companion to pay claims from the Claims Reserve Fund. Companion contends this course of action resulted in significant underfunding of the Claims Reserve Fund. Companion seeks to recover for the underfunding from (1) AMS based on the 2006 Coverage Agreement and (2) Wood based on the Guaranty Provision of the Wood Guaranty. Defendants maintain the Claims Reserve Fund is overfunded and they are due a refund.

11. By agreement, whether the Claims Reserve Fund is over or underfunded, as well as certain related issues, will be resolved through independent accounting and actuarial review (collectively "Initial Review"). ECF No. 409-1. The Initial Review will cover the period ending April 30, 2017, and the initial report is due on or about July 31, 2017. *See* ECF Nos. 386, 387 (orders appointing experts). Thereafter, the independent experts are to conduct quarterly reviews ("Quarterly Reviews"). The parties have agreed to "abide by the Required Reserve determinations made by the independent actuarial firm" and that "the independent accounting firm shall calculate the amount of AMS collateral needed" based on the actuary's Required Reserve determinations. ECF No. 409-1 § IV.A & B. They further agree additional funds will be contributed if these determinations demonstrate underfunding or excess funds will be refunded if the Required Reserve is found to be overfunded based on the Initial Review and subsequent Quarterly Reviews. *Id.*

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action). That action (the "Texas Action") sought return of certain funds relating to what the court and parties have referred to as a "PayGo" line of business. Companion responded, in part, by filing the present action, on September 19, 2014, seeking a declaratory judgment as to the claims asserted in the Texas Action and asserting additional claims as to other lines of business. Companion also moved in the Texas Court to transfer venue of the Texas Action to this court, relying, in part, on an argument the PayGo line of business was governed by the 2006 Coverage Agreement and its forum selection clause. The Texas Court rejected Companion's initial and renewed motions to transfer venue based, in part, on its rejection of Companion's argument as to the scope of the 2006 Coverage Agreement. In deference to the first-filed status of the Texas Action, this court initially stayed and has now dismissed claims relating to the PayGo line of business.

## DISCUSSION

The six non-jury issues raised by the parties are addressed seriatim below.

### I. Companion's obligation to provide information and notification or consultation.

**Defendants' arguments.** Relying on an insurer's duty of good faith and fair dealing, Defendants seek a judicial declaration that Companion owes AMS a duty "to timely provide claims data, information regarding AMS collateral, and information regarding the administration of workers' compensation claims." ECF No. 384 at 1; *see also id.* at 10 (arguing Companion must "timely provide claims data, collateral statements, and updated claims records to AMS for open claims under the AMS policies"). Defendants, nonetheless, concede "Companion has already been ordered to produce, or has voluntarily agreed to provide, claims data, claims files, reserve information, and information regarding its use of AMS collateral." *Id.* at 8; *see also id.* at 9 (noting Companion's agreement, as part of a joint proposal for resolution of non-jury issues, to provide data simultaneously to Defendants and an independent actuarial firm). Defendants do not identify any document or category of information sought that Companion has not already agreed to provide or the court has not previously ordered be produced.

In their opening memorandum, Defendants also argue "Companion should be required [to] consult with AMS prior to settling any remaining claims using AMS funds." *Id.* at 10; see also *id.* at 9 (asserting "Companion must consult with AMS regarding the settlement of *any* AMS claims using AMS funds" (emphasis added)). Defendants modified their position on reply, explaining "AMS does not seek to insert itself into the resolution of open claims[.]" ECF No. 402 at 3. Defendants, instead, argue they are entitled to *notification* "prior to [Companion] entering into *a lump-sum (i.e., non-routine) settlement* using AMS funds[.]" *Id.* at 8 (emphasis added).

Defendants argue this notification as to non-routine settlements is appropriate because lump-sum settlements are outside the normal course and may pose a conflict of interest between Companion and AMS. *Id.* The potential conflict identified is the risk Companion may favor immediate payment of a higher amount within AMS's deductible over the risk of future payments that may become Companion's sole responsibility because they exceed the deductible. *Id.* AMS also argues immediate payment of an amount that might otherwise be paid over a period of years may harm AMS because of the effect on cash flow and a risk Companion may fail to reduce anticipated future payments to present value.

**Companion's response.** Companion responds to Defendants' opening arguments, first, by asserting AMS failed to plead any claim for declaratory relief, most critically any claim "seek[ing] prospective relief that would allow Defendants to stand alongside Companion as a forced 'consultant' in the settlement of workers' compensation claims[.]" *Id.* at 1, 2. While this argument at first blush appears to seek a ruling that *no* declaratory relief is proper because none was sought, in context it appears limited to the absence of any claim that Companion is *obligated to consult* AMS prior to settling claims. Thus, it focuses on an argument Defendants largely if not entirely abandoned through their reply. Companion's remaining arguments, likewise, are directed primarily to AMS's now-abandoned argument that Companion must consult with AMS before settling *any* claim.

Companion addresses Defendants' argument for entitlement to information (as opposed to a right of consultation), only in its concluding paragraph. As to this issue, Companion states it "remains willing to work with Defendants regarding providing closed claims data for auditing purposes, as has been done in the past." *Id.* at 9. It does not otherwise address what information might be covered by the requested declaration.

**Discussion.** As noted above, Defendants' reply abandons any argument Companion owes AMS a duty of consultation before settling claims in the ordinary course. Even were this argument not abandoned, the court would find imposition of such a duty inappropriate because no counterclaim predicted Defendants would seek such relief and because it is not supported by any language in the governing contracts or case law from a relevant jurisdiction.

Defendants' modified request for declaratory relief, seeking a declaration Companion owes a prior duty of notification before settling certain categories of claim, is denied for much the same reasons. No counterclaim predicts a request for such relief and it is not supported by any language in the governing contracts, certainly none that has been drawn to the court's attention. The argument for prior notification has, moreover, not been properly raised or adequately briefed because Defendants first raised this request on reply. For all of these reasons, the court denies Defendants' request for a declaration Companion must either consult or notify AMS prior to settlement of any claim, whether in the ordinary course or the lump-sum settlements addressed in Defendants' reply.

This leaves Defendants' request for a declaration Companion must "timely provide claims data, collateral statements, and updated claims records to AMS for open claims under the AMS policies." ECF No. 384 at 10. Defendants concede the requested relief has largely been resolved by agreement or prior order. *Id.* at 8 ("Companion has already been ordered to produce, or has voluntarily agreed to provide, claims data, claims files, reserve information, and information regarding its use of AMS collateral."). They fail to identify any specific information or document sought through their request for declaratory relief that is not covered by prior agreement or order and also fail to direct the court to the source of any duty of disclosure. This leaves the court with

a request for a declaration that lacks necessary specificity and support. The court, therefore, denies this aspect of Defendants' request for declaratory relief.

While the court denies the requested relief, it does not modify other orders or agreements that are in place. Most critically, as previously ordered and agreed by the parties, the court appointed both an independent accounting expert ("Independent Accountant") and an independent actuarial expert ("Independent Actuary") who will prepare reports covering a multiyear period ending April 30, 2017. ECF Nos. 386, 387. These reports will be based on extensive documentation compiled by the parties relating to claims and dealings between the parties through April 30, 2017. *See generally* ECF No. 396-1 (letters and attachments sent to experts explaining how to access documents and data, delineating tasks to be performed, and providing instructions for preparation of initial and final reports).

The data and documentation provided to the experts is and will be equally available to both sides. The experts' reports shall, likewise, be equally available. Indeed, the plan for preparation of final reports, developed jointly by the parties, anticipates each side will have an opportunity to provide feedback to the experts between preparation of the experts' initial and final reports. *Id.* Both experts will, moreover, prepare subsequent quarterly reports on an ongoing basis after the first report is final.[11] Information necessary to conduct the Initial Review and subsequent

[11] The requirement for ongoing Quarterly Reviews by the Independent Actuary addresses the 2006 Coverage Agreement's requirement for a quarterly "audit [of] claims experience in connection with the Policies [to] determine the appropriate amount of the Required Reserve for the next quarter." 2006 Coverage Agreement ¶ 13. While the 2006 Coverage Agreement does not expressly address whether the audit report is shared, the agreed procedures going forward require the Independent Actuary to prepare "quarterly actuarial audit reports using the same methodology *and [to] advise the parties and Court of the results* of the same, including the updated Required Reserve." *See* Joint Submission § IV.A. (emphasis added). The Independent Accountant,

Quarterly Reviews will, pursuant to prior order and agreement, be made available to Defendants prior to or at the same time it is made available to the Independent Actuary and Independent Accountant. Presumably at least some other information will be provided to Defendants by Companion in the ordinary course of business (e.g., invoices for claims paid or to be paid).[12]

In sum, Defendants' request for declaratory relief is denied because Defendants have failed to (1) specifically identify any documentation or information that Companion has not previously produced (including through discovery or pursuant to court order) or agreed to provide in the future (including in connection with the Initial Reviews and future Quarterly Reviews), or (2) identified the source of any duty to provide information or documentation beyond that already ordered or agreed to be produced. To the extent Defendants seek to impose any duty of consultation before claims are settled, the relief sought is also denied because it is not predicted by any counterclaim.

**II. Wood's guarantee of AMS's below-deductible payment and collateral obligations.**

**Companion's opening argument.** Companion seeks a judicial declaration Wood is obligated, under the Wood Guaranty, to fulfill various obligations AMS has failed to fulfill under the 2006 Coverage Agreement and related Policies. ECF No. 382 at 5-11. More specifically, Companion asks the court to declare Wood must "(i) promptly indemnify Companion for unreimbursed below-deductible claims paid by Companion to date under the AMS Policies, (ii)

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likewise, remains involved, calculating the amount of collateral needed "after each subsequent, updated actuarial report." *Id.* § IV.B. (further providing Independent Accountant "shall advise the parties and court of the same").

[12] For example, the 2006 Coverage Agreement indicates the claims administrator (now Companion) will send periodic invoices for claims incurred. Companion will, presumably, provide such invoices in the future, at least so long as Defendants are providing payments in a timely manner following receipt. *See* 2006 Coverage Agreement ¶ 12.

pay all such claims in the future as they come due, and (iii) fund any below-deductible collateral owed to Companion now and in the future." *Id.* at 11.

As a factual threshold, Companion asserts AMS has refused to pay or reimburse any below-deductible claims since October 28, 2013, forcing Companion to use collateral to pay claims, and "leaving the collateral account underfunded under the actuarial methodologies contractually approved by Companion." ECF No. 328 at 5, 6. As to the status of the collateral, Companion notes Defendants have taken the position since December 10, 2013, that the collateral is overfunded. *Id.* at 6. Companion further asserts it has demanded but Wood has refused to pay claims and make up the alleged collateral shortfall for a period of over two-and-a-half years. *Id.* at 10.[13]

Companion argues Wood should be directed to pay the claims as they come due and make up any collateral shortfall under the Wood Guaranty, which (1) defines "Subject Agreements" to include the 2006 Coverage Agreement and Policies issued pursuant to that agreement; (2) provides Wood "absolutely and unconditionally guarantees . . . full and prompt performance and payment when due, of all obligations of each OBLIGOR under the Subject Agreements[,]" (3) provides the guaranty "is direct and unconditional and may be enforced by [Companion] without first resorting to any right or remedy against any OBLIGOR or any other person[.]" and (4) also provides Wood

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[13] Except for whether the collateral is under or overfunded, the factual assertions are essentially undisputed. That is, it is undisputed Defendants insisted Companion use collateral to pay claims, Companion has done so resulting in a substantial reduction in collateral, and Wood has declined to pay claims or fund collateral despite one or more demands. Whether the reduction in collateral has resulted in underfunding is a disputed issue that will be resolved, by agreement, through the independent actuarial review and accounting currently in process. *See infra* this section (§ II) at "Discussion."

will "indemnify and hold harmless [Companion] . . . from and against any and all claims, suits, hearings, proceedings, actions, damages, liabilities, fines, penalties, losses, costs or expenses . . . arising out of or otherwise related to, directly or indirectly, the Subject Agreements." *Id.* at 9 (quoting 2006 Coverage Agreement ¶ 15 and Wood Guaranty, Background, ¶¶ 1.A. & B, II.A.). Companion notes the express purpose of the Wood Guaranty is to "ensure [Companion] incurs no pecuniary liability whatsoever in entering into the Subject Agreements." *Id.* at 10 (quoting Wood Guaranty, Background and noting 2006 Coverage Agreement characterizes the Wood Guaranty as an essential inducement).

**Defendants' response.** Defendants oppose Companion's requested declaratory relief, characterizing it as a "request for an across-the-board declaration" that violates rules against "issuing an advisory opinion on matters that are not yet ripe[.]" ECF No. 398 at 5.[14] Defendants also assert the declaration "would violate Wood's rights under the Guaranty Agreement because they would vitiate his express rights to notice and presentment." *Id.* Expanding on these arguments and characterizing Wood's obligations as "potential secondary obligations," Defendants argue no amount will be due from AMS (or Wood) until the "independent experts resolve the outstanding accounting disputes." *Id.* at 7, 8.

**Companion's reply.** On Reply, Companion notes Defendants "do not dispute that Wood must guaranty AMS's below-deductible claims payment and collateral funding obligations under the 2006 Coverage Agreement and the related AMS Policies." ECF No. 400 at 1. Rather, they rely on what are essentially arguments as to timing. *Id.*

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[14] Page numbers in citations to this document refer to the page number on the electronic case filing header, rather than the document's internal page numbering system.

Companion argues the relief sought is neither premature nor advisory. It relies in particular on the age and stage of the litigation. *Id.* (noting litigation has been pending for nearly three years). Companion notes the parties' agreed to submit this issue, among others, to the court for non-jury resolution. *Id.* at 2 (quoting Joint Submission). Finally, Companion notes the very purpose of declaratory relief is to clarify respective obligations going forward. *Id.* at 3.

Companion contends Defendants' argument that Wood is entitled to notice and presentment prior to incurring any obligation under the Wood Guaranty is inconsistent with the agreement as expressed in the Joint Submission (setting out agreement for resolution of jury and non-jury issues). *Id.* Relying on the Guaranty Provision's statement Wood's liability "is direct and unconditional and may be enforced . . . without first resorting to any right or remedy against any [AMS Entity] or any other person," Companion argues Wood's obligations are not secondary to those of AMS and, consequently, do not require prior demand. *Id.* at 4 (quoting Wood Guaranty ¶ I.B.). Finally, Companion points to evidence of prior demands, including one sent by counsel on September 29, 2014, addressing claims in this and related litigation. *Id.*[15]

**Discussion—Ripeness.** The dispute as to Defendants' liability for claims payments and collateral arose no later than October 28, 2013, when representatives of Defendants advised

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[15] The referenced letter (attached to Companion's opening memorandum) cites the Guaranty and Indemnity Provisions as well as other paragraphs of the Wood Guaranty. ECF No. 382-2 at 2 (citing ¶¶ I, II, III, and IX.B., and IX.D. of the Wood Guaranty). It quotes the Indemnity Provision in support of a demand Wood "indemnify and hold harmless Companion from any and all claims, suits, losses[,] hearings, proceedings, actions, damages, liabilities, fines, penalties, costs, or expenses, including without limitation reasonable attorney's fees, associated with the Claims, Deposits, TX Action and SC Action." *Id.* While this language may suggest only a demand for indemnification, subsequent subparagraphs refer to Wood's obligation to perform various contractual duties including rendering payments for premiums and funding collateral.

Companion they would no longer make payment for claims as incurred and, instead, directed Companion to pay claims from collateral. The dispute as to Woods' responsibility for claims payments and collateral arose no later than September 19, 2014, when this action was filed seeking, inter alia, relief from Wood based on the Wood Guaranty. ECF No. 1 at ¶¶ 65-69 (indemnification claim); *see also* ECF No. 382-2 (September 29, 2014 demand letter to Wood covering, inter alia, claims in this action). The matter has, since that time, proceeded through discovery, dispositive motions, jury selection, negotiation and agreement as to resolution of all remaining issues through a combination of jury trial, independent expert reviews, and non-jury ruling, settlement of jury issues on the eve of trial, appointment of experts, and full briefing on non-jury issues. This procedural history demonstrates any dispute as to interpretation of the Wood Guaranty is ripe for review as it applies to claims in this action.[16]

This is particularly true in light of the April 17, 2017 Joint Submission through which the parties agreed the court would resolve, non-jury, "whether, as a matter of law, under the Guaranty and Indemnity Agreement . . . Wood must pay deductibles *and/or* below deducible collateral, if any, owed by AMS to Companion in connection with the AMS Policies in the amount determined by the independent actuary and accountant." Joint Submission ¶ III.A. (ECF No. 409-1) (emphasis added). The same document addresses how the relative financial responsibilities will be determined. *See* Joint Submission § IV.A. (agreeing parties will "abide by the Required Reserve Determinations made by the independent actuarial firm"); *id.* § IV.B. (agreeing, "[b]ased on the independent accounting firm's examination, and the Required Reserve determined by the

[16] There are, in fact, no further proceedings contemplated that might address scope and intent of the Wood Guaranty.

independent actuarial firm . . . , the independent accounting firm shall calculate the amount of AMS collateral needed as of April 30, 2017, and shall advise the parties and court of the same."). It also addresses how the resulting financial responsibility will be resolved: "If additional collateral is needed for AMS, *AMS and Wood* will promptly assure that the collateral account is funded. On the other hand, if Companion is holding excess collateral on behalf of AMS, Companion will promptly assure that the excess collateral is refunded to AMS." *Id.* § IV.B. Finally, it provides the process will be repeated after future Quarterly Reviews, after which "the parties shall continue to fund (or refund) as described above." *Id.*

**Merits.** Defendants' only argument on the merits is that Wood's responsibility is secondary to that of AMS, arising only if AMS does not timely perform. ECF No. 398 at 10 (arguing declaration sought would violate Wood's right to presentment and demand). Companion counters the Wood Guaranty provides "Wood's liability 'is direct and unconditional and may be enforced by [Companion] without first resorting to any right or remedy against [AMS] or any other person.'" ECF No. 400 at 4 (quoting Wood Guaranty ¶ I.B.).

Both are, in some respects, correct. As Companion notes, Section I of the Wood Guaranty provides Wood "absolutely and unconditionally guarantees . . . the full and prompt performance and payment when due of all obligations of all OBLIGORS [*e.g.*, AMS] under the Subject Agreements [*e.g.*, 2006 Coverage Agreement]." Wood Guaranty ¶ I.A. It further provides the guaranty is "a guaranty of performance and of payment and not of collection, and the liability of [Wood] is direct and unconditional and may be enforced . . . without first resorting to any right or remedy against any OBLIGOR or any other person." *id.* ¶ I.B.; *see also* 2006 Coverage Agreement ¶ 15 (characterizing Wood Guaranty as an "essential inducement"). This, at the least, means Companion is not required to pursue collection or legal proceedings against AMS before invoking

its rights under the Wood Guaranty. Read in isolation, it might also suggest Companion may seek payment from Wood without first seeking payment from AMS. However, that reading is precluded by Section III of the Wood Guaranty ("Demand"), which reads as follows:

> A. [Wood], within thirty (30) days of receipt of [Companion's] written demand from time to time, shall (as applicable):
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> * * *
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> 2. Pay to [Companion] in full in cash or immediately available funds any amount due and owing to [Companion] from any OBLIGOR under any Subject Agreement *that has not been timely paid*.
>
> 3. Pay to [Companion] in cash or immediately available funds any and all amounts owing in respect of [Wood's] indemnity under Section I.B. hereunder.

Wood Guaranty ¶ III (emphasis added); *see also* Wood Guaranty ¶ I.A. (stating Wood guarantees "full and prompt performance and payment when due and defining "prompt" as "unconditionally, without request for extension, and within thirty (30) days of [Companion's] written demand for payment.").

The second subparagraph's reference to amounts owing "that ha[ve] not been timely paid," presumes a prior request to an Obligor for payment and failure of that Obligor (e.g. AMS) to make payment in a timely manner under the relevant contract. AMS's obligation to pay claims and fund collateral arises under the 2006 Coverage Agreement (and related Policies). The court, therefore, looks to the 2006 Coverage Agreement to determine what constitutes a failure of timely performance of either obligation.[17]

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[17] The parties have not directed the court to any provision of a Policy that addresses timeliness of payments.

As to claims payments, the 2006 Coverage Agreement provides the claims administrator "shall invoice the appropriate AMS Entity for all incurred claims on a periodic basis and terms acceptable to [Companion.] All invoice payments shall be deposited into the [claims administrator's] Claims Operating Account . . . *and all claims shall be paid from such account*." 2006 Coverage Agreement ¶ 12 (emphasis added). While this paragraph does not expressly state how quickly the invoices must be paid, it envisions claims payments will be made using AMS funds, thus, it envisions payments deposited *before* claims are paid. It follows that payment is due at some point prior to the earlier of when claims should be or actually are paid.

The collateral provision requires an initial deposit of $1,000,000 and provides for quarterly reviews to determine future reserve needs. Rather than indicating payments (or refunds) will be made based on those quarterly reviews, it provides for monthly contributions based on the value of incurred claims and calls for payment by the tenth of the month. *Id.* ¶ 13 ("As actual claims are incurred the AMS Entities shall deposit into the Claims Reserve Fund the amount of such claims on a monthly basis by the 10th day of the month."). While not explicit, this appears to envision a deposit within ten days of notification of claims incurred. Lacking any other guide, the court finds collateral deposits are timely if made within ten days of notification or invoicing of claims or collateral obligations (such as through quarterly reports).

**Claims and collateral obligations through April 30, 2017.** Since October 2013, AMS has refused to pay claims as incurred or make additional collateral contributions. It maintains this refusal is justified because existing collateral is more than sufficient to cover all current and reasonably anticipated future claims. Faced with AMS's refusal, Companion demanded Wood perform AMS's payment and funding obligations under the Wood Guaranty. This demand was clear no later than September 2014. Wood, like AMS, refused to perform. Both the demand and

refusals to perform are ongoing and have remained so throughout this litigation. Thus, any prerequisites of a failure of timely performance by AMS and demand to Wood are satisfied as to any obligations predating April 30, 2017.[18] The only issue is whether AMS's (and Wood's) refusal to make payment is excused because collateral was (and remains) overfunded or at least sufficient to cover current and future claims.

Sufficiency of collateral as of April 30, 2017, is being determined by the Initial Review by an the Independent Actuary and Independent Accountant. The Initial Review is being conducted by agreement and will take into account certain adjustments agreed to based on settlement of jury issues, claims that have been paid since October 2013, rulings in this order and certain other agreed adjustments. The parties have agreed to abide by the results of the Initial Review. If the Initial Review establishes the collateral account is underfunded, Wood will be responsible for the underfunded amount (jointly with AMS) because AMS's sole basis for refusing to pay claims will be resolved against it. For reasons explained above, there is no need for further demand of AMS and failure of timely payment before a demand may be made under the Wood Guaranty. The Initial Review itself, when final, will suffice as the demand and Wood will be jointly responsible with AMS for funding any deficiency that must be paid within thirty days of entry of judgment as contemplated by the Demand language quoted above.[19] Wood Guaranty ¶ III.A.

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[18] The court uses this date because it is the date through which claims and collateral funding needs will be determined by ongoing actuarial review and accounting.

[19] The Initial Review will be final upon the Independent Accountant's calculation of amounts due after receiving the final report of the Independent Actuary. *See* April 17, 2017, Joint Submission ¶ IV.B. As noted above, the parties will have an opportunity for comment before the Initial Review and related reports become final.

**Collateral going forward.** The parties have agreed to Quarterly Reviews of collateral going forward and to abide by the results of those reviews. Joint Submission ¶ IV.B. ("The independent accounting firm shall repeat this process after each subsequent, updated actuarial report, and the parties shall continue to fund (or refund) as described above."). As to these Quarterly Reviews, the court agrees the Wood Guaranty is triggered only if AMS fails to make timely payment. Nonetheless, in light of the parties' agreement to abide by the results of the Quarterly Reviews, those reviews will, themselves, be deemed the invoice or notice to AMS. If AMS does not satisfy the obligation within ten calendar days of receipt of a Quarterly Review, that failure shall automatically be deemed a demand on Wood following a failure of timely payment, triggering his duty to perform within thirty days of the expiration of AMS's ten-day period for performance. *See supra* pp. 18, 19 (addressing Wood Guaranty ¶ I.A. and 2006 Coverage Agreement ¶ 13).[20]

**Claims going forward.** The claims payment and collateral obligations are distinct, though related, obligations. *See* 2006 Coverage Agreement ¶¶ 12, 13. Therefore, in addition to the collateral funding procedures addressed above, Companion shall invoice AMS as claims are incurred and before they are paid. 2006 Coverage Agreement ¶ 12. If it does so, AMS shall fund the claims in sufficient time to allow for timely payment. *Id.* As noted above, the 2006 Coverage Agreement does not provide a specific timeframe for funding. However, drawing on the timeframe suggested for deposit of collateral (¶ 13), the court finds ten days is an appropriate period for "timely" payment to Companion. If AMS fails to fund claims payments within ten days of

[20] Companion's obligation to refund any overage is subject to the same period. Thus, if a Quarterly Review determines AMS's Claims Reserve Fund is overfunded, Companion must refund the excess within ten days of receipt of the Quarterly Review.

notification, Companion may make a demand for payment under the Wood Guaranty that must be satisfied within thirty days after demand.

**III. Wood's obligation to indemnify Companion for liability on above-deductible claims.**

**Companion's opening argument.** Companion seeks a declaration Wood must indemnify Companion for any liability Companion incurs for unreimbursed above-deductible claims payments made from AMS funds.[21] This relief is within the scope of Companion's fifteenth cause of action for recovery based on the Wood Guaranty.[22]

Companion relies on the first subparagraph of the Indemnity Provision of the Wood Guaranty (¶ II.A.). ECF No. 382 at 12-13. Companion notes this provision is broadly worded, promising to indemnify and hold Companion harmless "from and against any and all claims, suits hearings, proceedings, actions, damages, liabilities, fines, penalties, losses, costs or expenses, including without limitation reasonable attorney's fees, at any time arising out of or otherwise related to, directly or indirectly, the Subject Agreements[.]" *Id.* at 13 (quoting Wood Guaranty ¶

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[21] Companion will incur such liability only if AMS has not previously been reimbursed for all above-deductible claims payments. By agreement, whether there are any unreimbursed payments will be resolved by the Independent Accountant as part of the Initial Review. *See* ECF No. 409-1 (Joint Submission); ECF No. 387 (order appointing accounting expert); ECF No. 396-1 at 7 ("Instructions for Preparation of Court-Appointed Accountant Expert Report").

[22] The underlying issue of Companion's liability for unreimbursed above-deductible payments was raised both by a claim for declaratory relief and a counterclaim for damages. *See* ECF No. 88 ¶¶ 50-58 (Companion's second cause of action); ECF No. 90 ¶¶ 249-57 (Defendant's fifth counterclaim). The pleadings suggest the amount at issue exceeds $9 million. *Id.* However, shortly prior to the deadline for filing dispositive motions, Defendants stipulated the amount did not exceed $1,826,145. ECF No. 196.

II.A.).[23] Companion points to distinctions between the Guaranty and Indemnity Provisions, most critically that the Guaranty Provision (Wood Guaranty ¶ I) guarantees performance and payment of obligations of defined "OBLIGORS" (*i.e.* AMS Entities)[24] arising under the "Subject Agreements" (*e.g.*, 2006 Coverage Agreement), while the cited portion of the Indemnity Provision (¶ II.A.) is not limited as to the source of the claims or duties, instead, applying to "any and all claims . . . arising out of or otherwise related to, directly or indirectly" the Subject Agreements. ECF No. 382 at 14.

Companion relies on the legally recognized distinctions between a guaranty and an indemnity agreement, with the latter creating a "primary liability" protecting "the promisee against loss or liability to a third person." *Id.* (quoting 38 Am. Jur. 2d Guaranty § 11). It notes indemnity agreements, like other contracts, should be enforced based on the language chosen by the parties. *Id.*

Anticipating Defendants' argument that prior rulings on the parties' cross-motions for partial summary judgment foreclose the relief sought, Companion asserts the court has not previously addressed the Indemnity Provision of the Wood Guaranty. Thus, the court's prior ruling that Wood is not required to fulfill Dallas National's collateral-funding obligation and

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[23] The Wood Guaranty defines "Subject Agreements" to include "The [2006] Coverage Agreement, the Policies and the TCPA [Third Party Claims Administration Agreement between Companion and Aspen]." The 2006 Coverage Agreement defines "Policies" to include "high and low deductible workers' compensation and commercial general liability policies of insurance" as well as "Master Policies."

[24] "AMS Entities" is defined to include Dallas National. While that definition remains unchanged, subsequent events have changed the effective reach of certain aspects of the Wood Guaranty, most critically as they relate to Dallas National's obligations under the "Subject Agreements." *See infra* pp. 26, 27 ("Discussion—Issues not earlier resolved").

related ruling on Companion's motion for clarification are not dispositive. ECF No. 382 at 15 (citing ECF No. 258 at 39, ECF No. 286).

**Defendants' response.** Defendants respond the court has already, twice, "ruled that Wood is not liable under the Guaranty Agreement for Dallas National's above-deductible obligations with respect to the AMS Policies at issue." ECF No. 398 at 14. Defendants rely on the court's summary judgment ruling that Wood is "not obligated to cover any shortfall in Dallas National's collateral" and subsequent clarification that language in the summary judgment order did not allow Companion "to pursue recovery for any shortfall in Dallas National collateral from Wood as Guarantor of other AMS Entities' obligations under the 2006 Coverage Agreement." *Id.* at 15. Defendants characterize Companion's argument as an end-run around prior rulings, stating "[i]f Companion could just transform any guaranty obligation into an indemnity obligation . . . the guaranty provision . . . and the legal distinction between guaranty and indemnity, would be meaningless." *Id.* at 16.

On the merits, Defendants argue Companion's interpretation of the Indemnity Provision is "contrary to South Carolina law" because indemnity provisions "are presumed to only apply to third-party liability claims, not first- or second-party breach of contract claims." *Id.* (quoting *Laurens Emerg. Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 584 S.E.2d 375, 378 (S.C. 2003) ("*Laurens*") for proposition "the default rule of interpretation for indemnity clauses is that third party claims are a prerequisite to indemnification."). Defendants assert "Companion cannot credibly contend that AMS – which Companion named as a co-defendant in this case with Wood – is a 'third-party' to this dispute or the applicable agreements." *Id.* at 17.

Defendants also argue the court should reject Companion's argument because it would lead to an absurd result. *Id.* at 18. Defendants note the parties' intent "must be gathered from the

contents of the entire agreement" and the agreement should be interpreted "to give effect to all of [its] provisions, if practical." *Id.* at 18. They argue the intent drawn from the documents would be defeated and the benefit of the insurance arrangement would be illusory, if the Indemnity Provision was given the effect sought by Companion. More specifically, Defendants argue:

> There would be no reason to purchase an insurance policy – and pay premiums to Companion – if Wood were responsible for paying all amounts below and above the deductible. Likewise, there would be no reason for Companion to reinsure the policies with Dallas National if Wood was supposedly on the hook for all above-deductible payments by virtue of the indemnity provision in the Guaranty Agreement.

ECF No. 398 at 19, 20.

Finally, Defendants argue the court should reject Companion's argument because Companion has received more than enough collateral from Dallas National to cover all above-deductible obligations. Defendants assert Dallas National collateral was overfunded by approximately $8.6 million as of September 30, 2013, and Companion still held $17,897,436 in collateral as of June 30, 2015.

**Companion's reply.** On reply, Companion emphasizes the distinction between the Indemnity and Guaranty Provisions, arguing the court's prior rulings only addressed the latter. ECF No. 400 at 5, 7. It challenges Defendants' characterization of the Indemnity Provision, noting the various related agreements evidence an "undisputed, overarching purpose" of protecting Companion through "multiple layers of financial protection." *Id.* at 7, 8. Companion further asserts AMS *is* a third party to the Wood Guaranty because it is a legal entity distinct from Wood and Wood is the only party to the Wood Guaranty other than Companion. *Id.* at 9. It argues the language at issue is particularly broad, thus the type language that allows the court to reach beyond any general limitation to third-party claims. *Id.* (noting cases relied on by Defendants

acknowledge indemnity clauses are not limited to third-party claims if there is "language to the contrary").

As to existing collateral, Companion argues the collateral it holds is "irrelevant to the legal issue before the court." *Id.* at 10. It asserts Wood either is or is not "contractually obligated as a matter of law to indemnify Companion for allegedly unreimbursed above-deductible claims payments[.]" *Id.* ("This is a purely legal determination based on the parties' contracts and applicable law. The Wood indemnity does not turn on, and has nothing to do with, the amount of collateral Defendants say Companion holds, or for that matter, any other funding source[.]"). Companion asserts Dallas National collateral is, in any event, underfunded.

**Discussion–Issue not earlier resolved.** As Companion argues, the court has not previously construed or resolved any claim based on the Indemnity Provision (¶ II) of the Wood Guaranty. The court, instead, considered the Guaranty Provision (¶ I), concluding that provision did not require Wood to *fulfill* Dallas National's *obligation* to fund collateral. The court reached this result based on its conclusion the relationship between Dallas National and Companion was no longer governed by the 2006 Coverage Agreement (one of the agreements covered by the Wood Guaranty) at the relevant time. As a result, Dallas National's obligation to fund collateral was no longer an obligation under a "Subject Agreement" and, consequently, no longer an obligation to which the Wood Guaranty applied.

The court did not construe any other provision of the Wood Guaranty in ruling on Companion's subsequent motion for clarification. It did not, in fact, focus on the Wood Guaranty itself. Rather, the court considered whether the 2006 Coverage Agreement imposed all obligations of *any* AMS Entity on *all* AMS Entities, such that the AMS Entities still subject to the 2006 Coverage Agreement would remain responsible for Dallas National's collateral obligation. The

court rejected this interpretation and, consequently, held Wood was not obligated to fund Dallas National's collateral obligation as the collective obligation of all AMS Entities.

Companion did rely on the Indemnity Provision in one of its summary judgment arguments. Much as it does here, Companion argued the Indemnity Provision requires Wood to indemnify Companion if Companion is held liable to AMS for unreimbursed above-deductible claims. That argument was, however, raised as a *defense to AMS's claim* for reimbursement. The court declined to reach the merits of the argument because the AMS Entities are distinct legal entities from Wood. Thus, even if Wood is required to indemnify Companion for damages paid to AMS, the court held it would not provide a *defense* to AMS's claim. ECF No. 258 at 9 (concluding Companion's position "fails to recognize that, despite common ownership, Wood and AMS are separate entities. Thus, even if Wood must ultimately reimburse Companion for any amount Companion owes to AMS, it would not defeat this counterclaim.").

In sum, while the court has previously construed the Guaranty Provision of the Wood Guaranty, it has not construed the Indemnity Provision. The court, therefore, addresses the effect of the Indemnity Provision on a clean slate.

**Merits.** The Indemnity Provision reads as follows:

> A. GUARANTOR hereby agrees to indemnify and hold harmless COMPANY [Companion] and all shareholders, officers, directors, employees and other agents of COMPANY, from and against any and all claims, suits, hearings, proceedings, actions, damages, liabilities, fines, penalties, losses, costs or expenses, including without limitation reasonable attorney's fees, at any time arising out of or otherwise related to, directly or indirectly, the Subject Agreements.
>
> B. GUARANTOR shall further pay all reasonable expenses, including without limitation, attorney's fees and other legal expenses, paid or incurred by COMPANY in collecting amounts owed hereunder or otherwise enforcing this Agreement.

ECF No. 340-1 at 29 (Wood Guaranty ¶ II).

Language in the preceding "Background" section explains the intent of the Wood Guaranty as follows:

> COMPANY and GUARANTOR wish to ensure that C*OMPANY incurs no pecuniary liability whatsoever by entering into the Subject Agreements*. As a condition precedent to COMPANY's willingness to enter into the Subject Agreements, COMPANY has insisted upon GUARANTOR providing, and GUARANTOR is willing to provide, this Guaranty and Indemnity Agreement for the benefit of COMPANY.

*Id.* at 28 ("Background") (emphasis added).

**"Third-party" argument.** As noted above, Defendants argue the Indemnity Provision does not apply to claims by AMS against Companion because, under South Carolina law, indemnity provisions generally cover only third-party claims. ECF No. 398 at 16 (citing *Laurens*, 584 S.E.2d at 378). The difficulty with this argument is AMS, though a party to the "Subject Agreements" addressed by the Wood Guaranty, is not a party to the Wood Guaranty itself. Thus, AMS's claim against Companion for unreimbursed above-deductible claims payments is a third-party claim with respect to the Wood Guaranty.[25]

Given AMS's status as a third party to the Wood Guaranty, the court need not decide whether the broad indemnification language used in the Wood Guaranty would reach first-party claims. The court notes, nonetheless, that the indemnification language used in the Wood

[25] As noted above, the court relied on the separate legal existence of Wood and AMS, thus AMS's third-party status relative to the Wood Guaranty, in declining to address a similar argument raised by Companion in briefing on cross-motions for partial summary judgment. AMS has not challenged that ruling.

Guaranty is broader than that applied in *Laurens* (a case on which Defendants rely), particularly when read in the context of the Background's statement of intent (quoted *supra* at 28).[26]

**Not an "absurd" result.** The court is not persuaded that applying the Indemnity Provision to claims against Companion by Wood's Co-Defendants would either be "absurd" or render the insurance policies issued under the 2006 Coverage Agreement "completely illusory."[27] *See* ECF No. 398 at 19. Defendants' argument on this point presumes the underlying agreements created a typical insurer-insured relationship. *Id.* ("There would be no reason to purchase an insurance policy–and pay premiums to Companion–if Wood were responsible for paying all amounts below and above the deductible.").

The relationship created by the Subject Agreements was not a typical insurer-insured relationship. It was, instead, a "fronting" arrangement that allowed issuance of insurance policies on Companion's paper but contemplated claims would be processed and paid in full by the various Wood-owned entities.[28] The many layers of protection built into the arrangement and the Wood

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[26] In *Laurens*, the court construed an indemnity provision between a hospital ("Hospital") and an emergency medical services company ("EMS"). The key language provided "Hospital will indemnify and hold [EMS and its physicians] harmless from and against any and all claims[,] causes of action, or expenses . . . caused by or resulting from allegations of wrongful acts or omissions of Hospital employees [or agents]." *Laurens Emerg. Med. Specialists*, 584 S.E.2d at 378. The court found this language was a "typical indemnity agreement" and, consequently, did not apply to a claim by EMS against Hospital for a Hospital employee's theft from EMS. *Id.* (holding "the intended purpose of this indemnification clause was protection against third party claims, not reimbursement for claims between the parties themselves.").

[27] "Policies" written under the 2006 Coverage Agreement are within the definition of "Subject Agreements." Thus, the Indemnity Provision applies to claims arising out of or relating directly or indirectly to such Policies.

[28] Certain aspects of the relationship changed in and after 2011, in part due to the Florida OIR's objections to the fronting arrangement. However, at the time Wood signed the Guaranty, he owned

Guaranty's statement the parties intended Companion should "incur[] no pecuniary liability whatsoever by entering the Subject Agreements" further support this intent. ECF No. 340-1 at 28 (Wood Guaranty, Background). In light of the nature of the relationship, particularly when viewed in context of the various AMS Entities' responsibilities at the time the Wood Guaranty was signed, there is nothing absurd in Companion's interpretation. It, instead, gives effect to the plain meaning of the language.

This is particularly true because Defendants' counterclaim for unreimbursed above-deductible payments made from AMS funds and Companion's corresponding claim for declaratory relief do not require a determination that Companion was at fault for causing any improper payments or failure of reimbursement. For this reason, it does not raise a concern that the indemnification provision is being used to immunize a party from its own conduct.[29]

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the entities responsible for below-deductible amounts (including AMS), the party responsible for above-deductible payments (Dallas National), and the third-party claims administrator (Aspen). The above-deductible payments for which AMS seeks reimbursement in this action include payments dating back to 2005, thus they include payments made during the period when AMS, Dallas National and Aspen were all owned by Wood and Aspen handled the claims processing. In other words, the payments at issue were made, at least in part, during a period when the "fronting arrangement" operated as originally envisioned by the 2006 Coverage Agreement.

[29] Defendants rely on *Ashley II of Charleston LLC v. PCS Nitrogen*, 763 S.E.2d 19 (S.C. 2014) in arguing South Carolina follows a general rule an "indemnification provision does not immunize a party from its own conduct." ECF No. 398 at 18. As Defendants acknowledge in a footnote, however, the general rule addressed in *Ashley II* is specific to negligence claims and intended to deter negligent conduct. *Ashley II*, 763 S.E.2d at 20 (stating indemnity provisions are "not construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms"). The court held this underlying policy would not be served in the context of a federal environmental liability claim because such a claim was "fundamentally not a fault-based determination."

To the contrary, the Independent Accountant has been instructed to review claims for the duration of the parties' relationship, from 2005 through 2013, to determine the amount of any unreimbursed above-deductible payments made from AMS funds. For the majority of this period (through mid-2011), Defendants' affiliate Aspen handled claims processing for all Policies at issue. *See* ECF No. 241 at 7 (Defendants' response to Companion's motion for partial summary judgment, asserting Companion took over claims processing from Aspen for Florida policies in mid-2011). Also for the majority of the period (until June 2013), Defendants' affiliate Dallas National reimbursed AMS for the above-deductible payments. *See* ECF No, 241 at 14 (conceding Dallas National provided credits to reimburse AMS for above-deductible payments until June 2013, though suggesting not all payments were fully reimbursed during this period). This leaves only a portion of the period (from mid-2011 to October 2013), during which Companion might be "responsible" for paying above-deductible amounts from AMS funds and an even shorter period (June to October 2013), when no entity affiliated with Defendants was providing (or expected to provide) AMS with corresponding credits. *See id.* (asserting Companion continued the practice of making above-deductible payments from AMS funds from June to October 2013 and Dallas National did not provide credits during this period). As the period under review by the Independent Accountant is not limited to this shorter period, resolution of this issue is "fundamentally not a fault-based determination." *See Ashley II*, 763 S.E.2d at 20.[30]

[30] It is also of some significance that the issue will be resolved without determining Companion's estoppel defense. *See* ECF No. 273 at 19, 25 (unredacted version of Companion memorandum in support of partial summary judgment arguing, inter alia, Defendants are estopped from seeking reimbursement due to their long acquiescence in the practice and failure to raise a concern during a time Companion might have cured any error).

**Availability of Dallas National collateral.** Defendants argue Companion should not be allowed to rely on the Indemnity Provision because it has received and retains collateral from Dallas National intended to cover above-deductible claims.

Companion, in reply, argues the availability of collateral is irrelevant because the Indemnity Provision must be interpreted without regard to whether Companion might seek relief from a different source. It further argues the collateral is not sufficient to cover all of Dallas National's obligations intended to be secured by that collateral.

Because nothing in the Indemnity Provision requires Companion to resort to other means of satisfying a claim or liability before seeking indemnity from Wood, the court finds the possible existence of sufficient collateral does not avoid coverage under the Indemnity Provision. This is the natural result of the broad language the parties chose for the Indemnity Provision. It is also consistent with the obvious intent of the Indemnity Provision at the time the Wood Guaranty was signed, given Wood's control over all AMS Entities (including Dallas National).[31]

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[31] It is unlikely the present dispute would have arisen while Wood owned all "AMS Entities" as defined in the Wood Guaranty. This is because it would have been, in essence, a claim by one Wood-owned entity (AMS) for breach of duty by another Wood-owned entity (Dallas National) relating largely if not entirely to a claims-payment practice of a third Wood-owned entity (Aspen). Nonetheless, had this dispute arisen at that time, and had AMS sought recovery from Companion, Wood could not have argued it was absurd to construe the Indemnity Provision to cover the claim. The wrinkle of possible excess Dallas National collateral could, in that instance, have been resolved through a separate claim by Dallas National against Companion for return of excess collateral. Whatever settling up might occur later between Wood and Dallas National would not have involved Companion. Thus, the language of the Indemnity Provision, viewed in light of the facts as they existed at the time it was entered and stated intent of the Wood Guaranty, favors Companion's interpretation.
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While ownership of Dallas National and some responsibilities have changed, the Wood Guaranty has remained the same. Nothing in the subsequent changes persuades the court that it would be improper to construe the Indemnity Provision to cover Companion's liability for AMS's claim for unreimbursed above-deductible payments.[32]

Accordingly, the court grants Companion's request for a declaration that Wood must indemnify Companion for liability Companion incurs for unreimbursed above-deductible claims payments made from AMS funds.

**IV. Companion's entitlement to earnings on State Street Account.**

**Companion's opening argument.** Companion seeks a declaration it is entitled to all earnings, including reinvested earnings, accrued on the Claims Reserve Fund in the State Street Account. ECF No. 382 at 15-17. Companion relies on the following language from the 2006 Coverage Agreement in seeking this relief:

> During the Coverage Term of the Master Policies, [Companion] shall establish and maintain in its name with the Bank of America an account to serve as a claims reserve fund (the "Claims Reserve Fund"). . . . All earnings on the Claims Reserve Fund shall belong to [Companion] and no AMS Entity shall have any interest therein. . . . All earnings on funds held within the Claims Reserve Fund will inure to the benefit of [Companion].

2006 Coverage Agreement ¶ 13. Companion argues this language is unambiguous and, given its plain, ordinary and popular meaning, "makes clear that Companion is contractually entitled to all

[32] The two most significant subsequent changes are Companion's assumption of claim-processing duties with respect to Florida policies and Wood's sale of Dallas National. Defendants have not demonstrated either change warrants disregarding the plain language of the Indemnity Provision.

earnings—which necessarily include reinvested earnings" on funds held in the State Street Account. ECF No. 382 at 16 (citing, *e.g.*, *Blakely v. Rabon*, 221 S.E.2d 767, 769 (S.C. 1976)).[33]

In the alternative, Companion argues if AMS "successfully claims an interest in these earnings or otherwise demands that Companion must credit those earnings to AMS," Wood must indemnify Companion for "any such claim, liability or loss." ECF No. 382 at 17. This argument rests on the Indemnity Provision of Wood's Guaranty.

**Defendants' response.** Defendants argue the language on which Companion relies (2006 Coverage Agreement ¶ 13) "has no application to the AMS funds maintained in the State Street trust account" because the paragraph at issue refers to an account maintained at Bank of America. ECF No. 398 at 21, 22. They further argue Companion's position is "contrary to its own sworn financial statements and its representations regarding the amount of AMS funds held in the State Street trust account" because such statements and reports refer to the full balance of the State Street account "as collateral held in trust, not as 'earnings' that belonged to Companion." *Id.*

In support of the first argument, Defendants cite deposition testimony relating to Companion's ownership and control over the Bank of America collateral account ("Bank of America 4866 Account") and distinctions between that account and the State Street Account. *Id.* at 22, 23 n.65. Defendants note the State Street Account is "a separate account, at a separate institution, in which Companion holds funds in trust solely for AMS." *Id.* at 23 (citing Letter from

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[33] The portion of the account attributable to earnings will be determined by the Independent Accountant. Companion maintains the portion of the account attributable to earnings should be "subtracted from the current AMS collateral balance" as part of the determination whether the account is under or overfunded. ECF No. 382 at 17, n.45.

G. Reeth to A. Gillie dated Nov. 29, 2011).[34] Based on these distinctions, Defendants argue the State Street Account is not subject to the earnings provisions of paragraph 13 of the 2006 Coverage Agreement.[35]

In support of their second argument, Defendants rely on Companion's sworn financial statements. Those statements describe the State Street Account as "a segregated, off-balance sheet collateral account held in trust" and state "the trust account is used to settle paid losses associated with Florida large deductible workers' compensation policies." ECF No. 398 at 24 (quoting Companion's 2012 Annual Statement, ECF No. 398-1). Noting the same value is reported as the "balance of the trust account" in this Annual Statement and on the bank statement, Defendants assert "Companion reported all AMS funds in the State Street [A]ccount as collateral held in trust not as 'earnings' that belonged to Companion." ECF No. 398 at 24. Defendants note Companion used the same or similar language and followed the same reporting practice in its 2013 and 2014

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[34] The cited letter is signed by an officer of Companion and addressed to a representative of the "Office of Insurance Regulation" (presumably Florida, as the letter refers to the consent order). It states "Companion maintains a separate, segregated account for AMS Staff Leasing collateral," explaining as follows in a footnote:

> Companion created the account as a segregated custodial account as the most expedient method of maintaining the funds in a separate manner. Additionally, by acknowledging that it holds the funds in trust, Companion believes that this accomplishes the same purpose as a designated trust account."

ECF No. 398-15 (Companion letter dated Nov. 29, 2011). Other documents submitted with supplemental briefing (discussed below) indicate the State Street Account was established after the Florida OIR advised Companion a segregated custodial account did not satisfy the requirements of the consent order.

[35] In a footnote, Defendants refer to the absence of any "claim for 'earnings'" and argue "Companion's attempt to take AMS funds as 'earnings' should be seen for what it is – an argument manufactured by litigation counsel in an effort to reduce the amount of AMS funds held in the State Street trust account." ECF No. 398 at 22 n.62.

Annual Reports and has never withdrawn earnings from the account. *Id.* (citing ECF Nos. 398-2, 398-11). Defendants argue these and similar reports to Dallas National (reporting the full account value as "collateral" held) support their interpretation. ECF No. 398 at 25 (quoting *Farr v. Duke Power Co.*, 218 S.E.2d, 431, 433 (S.C. 1975) for proposition "[t]he practical interpretation of the contract by the parties to it for any considerable period of time before it becomes the subject of controversy is entitled to great, if not controlling, influence.").

Defendants oppose Companion's alternative indemnification argument, incorporating earlier arguments as to non-availability of indemnification (for unreimbursed above-deductible payments). In addition, Defendants argue there is nothing to indemnify because there is "nothing to change [in the account value] if the Court rejects Companion's request for declaratory relief."

**Companion's reply.** On reply, Companion characterizes the State Street Account as a "replacement" for the Bank of America account referenced in paragraph 13 of the 2006 Coverage Agreement. ECF No. 400 at 11. Based on this characterization, it argues the provisions of that paragraph are equally applicable to the State Street Account. *Id.* (acknowledging the State Street Account is governed by a Trust Agreement (ECF No. 383-9) but arguing this does not modify Companion's right to earnings under the 2006 Coverage Agreement ¶ 13).

Companion challenges Defendants' characterization of Companion's financial statements as contradicting its position on earnings. ECF No. 400 at 12. It asserts the only point made in those statements is "the collateral held in the State Street account is in fact collateral," but does "not disavow Companion's right to earnings[.]"

Finally, Companion argues its prior failure to withdraw funds is not probative. It relies on the 2006 Coverage Agreement's statement Companion has "the right to exercise its remedies in any order and forbearance in the exercise of any remedy shall not constitute a waiver of the right

to exercise such remedy at a future time or a waiver of the right to exercise any other remedy." *Id.* (quoting 2006 Coverage Agreement ¶ 16).

**Supplemental Briefs.** The court requested additional briefing on the import of Section 5 of the Trust Agreement and related topics including whether the parties followed the provisions of Section 5 and how income, dividends, and other earnings were reported for tax purposes. Section 5 reads as follows:

> SECTION 5. The Income Account
>
> > All payments of interest and dividends actually received in respect of Assets in the Trust Account shall be deposited by the Trustee, subject to deduction of the Trustee's compensation and expenses as provided in Section 8 of this Agreement, in a separate account (the "Income Account") established and maintained by the Beneficiary at an office of the Trustee. The Trustee shall treat the Beneficiary as tax owner of all Trust Account Income.

Trust Agreement § 5 (ECF No. 383-9 at 4). The parties' supplemental briefs on these issues are summarized below. ECF Nos. 410, 411.

**Companion's Supplemental Brief.** Companion responded that its understanding is State Street Bank did not deposit interest and dividends into a separate account, but retained those and other earnings in the State Street Account. ECF No. 410 at 5. It maintains the bank statements support this premise as they reflect transfers to principal. Relying on paragraphs 13 and 16 of the 2006 Coverage Agreement, Companion maintains it has the right to all earnings and its decision to defer withdrawing those earnings was not a waiver. *Id.* at 5, 6. It relies in particular on paragraph 16 which states Companion may "exercise [all] remedies" under the 2006 Coverage Agreement in any order and forbearance to exercise a remedy is not a waiver of the remedy. *Id.* at 6. Companion argues the Trust Agreement language treating Companion "as tax owner of all

Trust Account Income" is also consistent with application of the 2006 Coverage Agreement's earnings provisions to the State Street Account. *Id.* at 5.[36]

Responding to a related inquiry from the court, Companion states the Florida OIR has neither formally approved nor disapproved the Trust Agreement and was not required to do so by the Consent Order. ECF No. 410 at 5. It notes that office has been provided a fully executed copy of the Trust Agreement and did not lodge any subsequent objection. *Id.*[37]

**Defendants' Supplemental Brief.** Defendants first argue the court should not consider Section 5 of the Trust Agreement because Companion has not sought damages or relief based on that agreement and failed to address Section 5 in its earlier memoranda. ECF No. 411 at 2-3. Defendants expand their earlier reference to the belatedness of the claim for earnings, asserting the court should reject the "claim" for earnings as not timely raised. *Id.*

Turning to the merits, Defendants argue the requirement Companion establish a separate income account was a condition precedent to receiving interest and dividend payments. *Id.* at 4. Based on this premise, they argue *if* such an account was not established, and there is no evidence

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[36] Companion concedes it has not paid taxes on the earnings but agrees it bears the tax liability for any earnings on the State Street Account. *Id.* at 6,7; ECF No. 412 (Second Supplemental Memorandum indicating bank did not issue 1099s for earnings and "although Companion has not yet paid taxes on earnings . . . , Companion intends to appropriately account for and resolve any tax liability associated with such earnings . . . , including any tax liability for earnings on prior years").

[37] Companion also argues certain of Defendants' supplemental arguments (discussed below) are not properly raised because they go beyond the scope of the court's request, amounting to improper sur-reply. Specifically, Companion challenges Defendant's arguments (1) Companion has not pleaded a claim for relief under the Trust Agreement, and (2) Companion is seeking to avoid the plain language of paragraph 13 of the 2006 Coverage Agreement (because that paragraph refers to a Bank of America Account). ECF No. 410 at 2-4.

it was, the failure bars receipt of interest and dividends. *Id.* Alternatively, if an account was established but funds were not deposited, Companion's remedy is to seek recovery from State Street Bank directly, not through a reduction of assets in the State Street Account. *Id.* Rather than offering an interpretation of the account statements, Defendants suggest they are unclear as to whether funds were disbursed. *Id.* at 4-8.

As to the Florida OIR's approval or non-approval, Defendants cite communications demonstrating the Florida OIR responded to Companion' November 11, 2011 letter (ECF No. 398-15), advising that a trust account (rather than a segregated custodial account as proposed in Companion's letter) was required and requesting a copy of the trust agreement once the account was set up. ECF No. 411-2 (Dec. 1, 2011 email from Florida OIR to Companion). The Trust Agreement was entered into thereafter and was fully executed on March 5, 2012, on which date Companion sent a copy to the Florida OIR. ECF No. 411-3 (Mar. 5, 2012 email from Companion to Florida OIR). There is no indication the Florida OIR objected to the Trust Agreement despite acknowledging receipt in subsequent communications. ECF No. 411-4 (Oct. 10, 2012 email from Florida OIR referring to receipt of Trust Agreement in March 2012). Thus, the Florida OIR appears to have accepted the Trust Agreement as written.

**Discussion—Issue properly raised.** Companion's request for a judicial declaration as to its right to earnings on the State Street Account falls within Companion's first cause of action, which seeks a "judicial declaration regarding the rights of Defendants with respect to the Collateral and the obligations of Companion, if any, with respect to the return of that Collateral, if overfunded." ECF No. 88 ¶ 49. In order to determine AMS's rights to funds in the State Street Account (the only "Collateral" account now at issue) and whether that account is under or overfunded, the court must determine whether any portion of the funds belong to some other entity.

This requires a determination of whether "earnings" in the account belong to AMS or Companion.[38]

Companion is not asserting a "damages" claim or any claim "based on" the Trust Agreement. The Trust Agreement (like the Florida Consent Order) is, nonetheless, a document that must be considered in determining the effect of the transfer, at the insistence of the Florida OIR, of a portion of the Claims Reserve Fund previously held in the Bank of America 4866 Account to a separate trust account at State Street Bank.

**Paragraph 13 of 2006 Coverage Agreement.** It is undisputed paragraph 13 of the 2006 Coverage Agreement governed AMS's Claims Reserve Fund prior to entry of the Florida Consent Order. This paragraph provides "[a]ll earnings on the Claims Reserve Fund shall belong to [Companion] and no AMS Entity shall have any interest therein. . . . All earnings on funds held within the Claims Reserve Fund will inure to the benefit of [Companion]." 2006 Coverage Agreement ¶ 13. Thus, Companion clearly was entitled to earnings on the AMS Claims Reserve Fund before the Florida Consent Order was entered and AMS's funds were transferred from Bank of America 4866 Account to a separate trust account in compliance with that order. The question, then, is what effect the transfer had on paragraph 13 of the 2006 Coverage Agreement.

It is clear from the sequence of events (and no party disputes) the State Street Account was established to comply with the Florida Consent Order and the AMS Claims Reserve Fund

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[38] Companion argues the portion of the account available to secure AMS's obligations excludes both earnings (addressed in this section of the order) and funds or other assets contributed by or for the benefit of a different entity, PPS (addressed in § V below).

previously held in the Bank of America 4866 Account was transferred to the State Street Account as a result of that order. The Florida Consent Order includes the following relevant provision:

> The collateral funding received by COMPANION for large deductible policies shall not be reported on the company's balance sheet. The funds should be maintained in a trust account to be funded by the policyholder of the large deductible workers' compensation policy and only be used by Companion to settle paid losses. The notes to COMPANION's financial statements should disclose the existence of the trust and period-end balance.

Florida OIR Consent Order ¶ 6(c) (ECF No. 310 (signed and filed March 18, 2011). The State Street Account was opened and related Trust Agreement executed to comply with this paragraph. *See* ECF No. 398-15 (Nov. 29, 2011 letter from Companion to Florida OIR stating Companion was using a "segregated custodial account" rather than a "designated trust account" as the "most expedient method of maintaining the funds in a separate manner.");. ECF No. 411-2 (Dec. 1, 2011 email from Florida OIR to Companion responding that trust account was required and requesting a copy of the trust agreement once the account was established); ECF No. 411-3 (Mar. 5, 2012 email from Companion to Florida OIR enclosing copy of Trust Agreement); ECF No. 383-9 (Trust Agreement effective January 31, 2012, but fully executed on March 5, 2012).

Thus, as Companion argues, the State Street Account is, at least in part, a "replacement" for the Bank of America account referenced in paragraph 13 of the 2006 Coverage Agreement. *See* ECF No. 398-8 at 10, 11 (Simpson dep. at 73, 74 stating "I believe prior to the State Street account [Bank of America 4866 Account] held some of the below deductible Florida collateral" as well as collateral for other states and some Dallas National collateral). Given its status as a (partial) replacement account, the terms in paragraph 13 of the 2006 Coverage Agreement remain in effect as to the State Street Account *unless* modified by the Florida Consent Order, Trust Agreement, or some other controlling document.

The Florida Consent Order does not address how earnings will be treated. Its language as to funding and use of funds is ambiguous on whether earnings belong to Companion or the policyholder(s). For example, while the Consent Order states funds "shall only [be] used by COMPANION to settle paid losses," the preceding language states the account will "be funded by the policyholder," which may suggest the only "funds" restricted in use are those the policyholder contributes. *Id.* at 4. Because the language is ambiguous, it is not sufficient to overcome the clear language of the 2006 Coverage Agreement, at least absent some other indication of intent.

The only record evidence of the Consent Order's intent as to earnings is the Florida OIR's failure to object to any provision of the Trust Agreement.[39] As discussed below, Sections 4 and 5 of the Trust Agreement refer to AMS's rights to *principal* and Companion's rights to "*Trust Account Income*." Had the Florida OIR intended the Consent Order to preclude Companion from receiving earnings (thus modifying the earnings provision of the 2006 Coverage Agreement ¶ 13), it would have objected to these sections of the Trust Agreement.

Section 4(a) states "[t]he Trustee shall surrender for payment all maturing Assets and all Assets called for redemption and deposit *the principal amount* of the proceeds of any such payment to the Trust Account." Trust Agreement § 4(a). This supports the premise the Grantor (AMS) is entitled only to principal. Section 5 provides "[a]ll payments of interest and dividends actually received in respect of Assets in the Trust Account shall be deposited by the Trustee [subject to certain deductions] in a separate account (the "Income Account") established and maintained by

[39] In an October 2012 email, the Florida OIR acknowledged it received the Trust Agreement in March 2012. ECF No. 411-4. Nothing in this email or any other record evidence indicates the Florida OIR either disapproved or indicated a concern with any aspect of that agreement.

the Beneficiary at an office of the Trustee." Trust Agreement § 5. It also provides "[t]he Trustee shall treat the Beneficiary [Companion] as tax owner of all Trust Account Income." *Id.*

Defendants do not challenge Companion's right to interest and dividends under Section 5 *if the funds are transferred immediately to a separate account*. They, instead, argue Companion's failure to establish an Income Account and enforce this provision by immediate transfer constitutes a waiver of the right to earnings. The court disagrees. Defendants' position would work a forfeiture of Companion's rights and windfall to Defendants. Defendants point to no authority that would support such a result.

The court is, likewise, not persuaded by Defendants' argument Companion waived its present claim, or at least indicated a contrary intent, by listing the full account value of the State Street Account (which included earnings) on its annual reports as the value of the collateral account. The reports are accurate as to the value of the account, which is a collateral account, though arguably misleading or at least incomplete because they fail to disclose that some portion of the account is earnings Companion claims a right to withdraw. This may require a future correction of earlier reports or explanation of reduction in value when the funds are withdrawn, but does not warrant a finding of forfeiture.

In sum, (1) the 2016 Coverage Agreement provides Companion is entitled to all earnings on the Claims Reserve Fund; (2) the Florida Consent Order and subsequent directions from the Florida OIR required a portion of the Claims Reserve Fund be transferred to a trust account but did not address earnings; (3) the Trust Agreement subsequently entered establishing the required account gave Companion the right to "interest and dividends" as well as "trust account income," specified Companion was the owner for purposes of taxes on income, and indicated only principal would be returned to the account upon the sale of assets; and (4) the Florida OIR did not object to

any term in the Trust Agreement. Thus, the only documents addressing earnings support the conclusion Companion is entitled to earnings on funds deposited by or on behalf of AMS in the Claims Reserve Fund. While the Trust Agreement is most express as to interest and dividends, it may be read as entitling Companion to *all* earnings. At the least, it does not preclude that interpretation. Thus, it does not override the broad earnings provision in the 2006 Coverage Agreement. Accordingly, the court finds Companion is entitled to all earnings on AMS funds held in the State Street Account.[40]

**V. AMS's entitlement to funds held in the State Street Account.**

**Companion's opening argument.** In addition to seeking a declaration as to its own entitlement to earnings on the State Street Account, Companion seeks a declaration funds do not automatically become the property of AMS simply because they are deposited into this account. ECF 382 at 4, 18-22. It asserts some of the funds in the account belong to Professional Payroll Solutions ("PPS"), a separate entity from, though related to, AMS.[41] Companion seeks this ruling based on evidence some funds belonging to PPS were contributed to the State Street Account to

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[40] The court does not address whether Companion is entitled to earnings on any PPS funds that may be in the State Street Account. Such a determination must be made in litigation to which PPS is a party. The present determination is, however, sufficient for purposes of the remaining issues in this action as it establishes AMS is not entitled to any earnings on the account. Thus, in determining whether the AMS Claims Reserve Fund is under or overfunded, earnings should be excluded from the value of the account.

[41] PPS is not listed as a party to the 2006 Coverage Agreement. *See* 2006 Coverage Agreement ¶ 1. Companion describes PPS as a "separate entity with its own high-deductible policies written on Companion policy forms. ECF No. 382 at 4.

cover PPS's collateral obligations.[42] Companion asserts that, since their deposit, these funds have "been paid, tracked and accounted for separately." ECF No. 382 at 19.

Companion characterizes AMS's position, that all funds in the account belong to AMS, as based on a legal fiction the Trust Agreement between Companion, AMS, and State Street Bank converts PPS funds into AMS funds. *Id.* As Companion notes, the Trust Agreement defines "Assets" in Section I as follows:

> The Grantor shall transfer to the Trustee, for deposit in the Trust Account [specified categories of assets], and may transfer to the Trustee, for deposit to the Trust Account such other assets as it may from time to time desire (*all such assets actually received in the Trust Account are herein referred to individually as an "Asset" and collectively as the "Assets"*).

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[42] Companion relies on testimony of its employee, Laura Simpson, that some PPS funds were deposited to the State Street Account. Asked why the collateral funds of AMS and PPS were co-mingled, Simpson responded "I believe at the time it was unclear whether or not PPS was an AMS Entity." Simpson dep. at 128 (ECF No. 382-4 at 2). Simpson explained that, when "the funds were transferred into the AMS State Street account it was broken out between AMS and PPS[.]" *Id.* at 183 (ECF No. 382 at 4). Thus, this testimony suggests some PPS collateral funds were transferred, apparently by Companion, to the State Street Account based on a mistaken belief PPS was an AMS Entity as defined in the 2006 Coverage Agreement. Companion does not point to evidence of any later transfers.

Emails between employees of Wood-owned entities support Companion's position the parties treated PPS and AMS obligations relating to the underlying policies separately, at least in and after June 2013, although those emails refer to premium payments rather than collateral. *See* ECF No. 383 (June 21, 2013 email string between Kara Childress and Kristin Wynn distinguishing between premiums for AMS Florida and PPS Florida policies); ECF No. 383-1 (Kristin Wynn email from later the same day referring to spreadsheet prepared by Companion employee as the "better sheet to use" because it "breaks it down nicely into AMS and PPS."). On the other hand, communications between employees of Wood-owned entities may acknowledge the collective holding of AMS and PPS collateral. *See* ECF No. 383-4 (Wood-owned entity employee referring, in January 30, 2013 email, to various collateral accounts as falling into three buckets, one of which was "AMS/PPS"). These emails support both the separateness of AMS and PPS and the view they are at least affiliated entities if not co-owned as of January 30, 2013.

Trust Agreement § I (b) (emphasis added). Companion relies on this language to argue the Trust Agreement defines the "Assets" covered by the Trust Agreement as only those Assets Grantor (AMS) transferred to the Trustee. *Id.* at 21.

**Defendants' response.** Defendants oppose Companion's interpretation of the Trust Agreement, arguing that interpretation is contrary to its purpose and plain language. They also argue "Companion has failed to offer credible evidence . . . [PPS] actually deposited any collateral funds into the State Street trust account." ECF No. 398 at 26.

On the first point, Defendants point to events leading to establishment of the Trust Account, including Companion's concession in the Florida Consent Order that it had improperly co-mingled large deductible collateral funds from AMS with "other company funds." *See Id.* at 26, 27 (discussing Companion's November 29, 2011 letter to the Florida OIR stating Companion had established a separate segregated account for the AMS Staff Leasing collateral and indicating a belief this was sufficient to satisfy the trust account requirements of the Consent Order, and subsequent execution of the Trust Agreement governing the State Street Account).[43] Relying on the limited purposes for which the "Assets" may be used, Defendants argue all assets in the account must be used solely by or for the benefit of AMS. Defendants characterize Companion's requested relief as seeking a "declaration [Companion] may commingle PPS collateral in the AMS trust account" and asserting such relief would "contravene the purpose and plain terms of the Trust Agreement." *Id.*

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[43] As discussed above (Discussion § IV), the Florida OIR insisted in a December 1, 2011 email that Companion establish a trust account to hold collateral for Florida policies rather than relying on a segregated custodial account.

On their second point, Defendants argue Companion has failed to produce "any bank records, wire transfer receipts, or other original documentation to substantiate" its claim that the Trust Account includes PPS funds. Defendants assert the records on which Companion relies consist primarily of an actuary's report on collateral requirements and communications relating to premiums rather than collateral. *Id.* at 28. Defendants also point to evidence PPS collateral was deposited in the Bank of America 4866 Account and absence of evidence PPS has asserted any rights to the funds in the State Street Trust Account. Finally, Defendants point to documents in which Companion has referred to the State Street Account as holding AMS funds or as the "AMS State Street Account." *Id.*

**Companion reply.** In reply, Companion notes Defendants' failure to affirmatively state that AMS provided all collateral in the State Street Account and argues the court should allow the Independent Accountant to determine what portion of the collateral, if any, was contributed by or for the benefit of PPS. ECF No. 400 at 12. Companion argues Defendant's position, that funds deposited in the State Street Account automatically become AMS's collateral even if deposited by or on behalf of a third party ("either by design or by accident"), is "illogical, unfair, and not supported by the Trust Agreement on which they singularly rely." ECF No. 400 at 13. Companion points to both the absence of any express provision supporting this conversion argument and language indicating AMS has rights only to assets it transfers into the account. Finally, Companion asserts the result sought by AMS would be to the detriment of PPS, which is not a party to this action.

**Discussion.** The events leading to creation of the State Street Account and execution of the related Trust Agreement suggest this account was intended to hold only AMS collateral, not collateral for any non-AMS entity. That said, nothing in the Trust Agreement supports AMS's

position any funds deposited into the account automatically convert to AMS funds, regardless of the source of the funds or intended purpose at the time of the deposit.

To the extent any language addresses the source of funds, it is in defining "Assets" in a paragraph that refers to securities and other assets the "*Grantor shall transfer* to the Trustee, for deposit in the Trust Account[.]" This and other language relating to use of funds supports the conclusions (1) the account *should* have been used solely for AMS collateral and (2) PPS funds should *not* have been placed into the account. It does not address the proper remedy if non-AMS funds are deposited. Thus, it does not support the extraordinary remedy AMS proposes, conversion of funds, as opposed to the more routine remedy of return of the improperly deposited funds so that they might be deposited into the proper claims reserve account. AMS's preferred approach would, in any event, be improper without first joining the entity whose funds would be taken (PPS).

Though minimal, the evidence to which Companion points suggests PPS funds were or may have been deposited into the State Street Account due to Companion's mistaken belief PPS was an AMS entity. *See* Simpson dep. at 128 (ECF No. 382-4 at 2). While the source of this apparent confusion is unclear, emails between employees of Wood-owned entities indicate a level of common treatment at least in January 2013. *See* ECF No. 383-4 (stating "at the end of the day we should have 3 Entity Buckets" and listing "AMS/PPS" as one of three entities, the other two being Dallas National and Redwood, but noting there were "line of business buckets" within the entities). In contrast, emails in May and June 2013 address these entities' relative responsibilities referring to what may have been a recent division of clients between the entities *See, e.g.*, ECF Nos. 400-1 (email from Lisa Lott to Kristin Wynn stating "[t]his is the shortfall in collateral required related to the staff leasing AMS/PPS policies and we discussed that it was truly PPS

costs" and Wynn's response stating "[a]ll things for [PPS] should be in the related party account[.] . . . There is no money to be had at all. It simply will go into the what [R]ich owes [D]ave bucket[,]" explaining future "transactions" should be split based on who kept the clients, and indicating the relative responsibilities would be resolved by a future accounting between PPS and AMS); ECF No. 383-1 (June 2013 email from Wynn stating an attachment from Companion "breaks [premium obligations] down nicely into AMS and PPS").

Accordingly, the court grants Companion's request for declaratory relief that funds held in the State Street Account are not automatically the property of AMS simply by virtue of their deposit into that account. Funds in the account may, instead, be found to be improperly deposited funds belonging to a different entity. Whether funds were deposited on behalf of another entity and, if so, the amount of such funds will be resolved by the Independent Accountant.

**VI. Wood's obligation to indemnify Companion for attorney's fees and expenses.**

**Companion's opening argument.** Companion seeks a declaration Wood is obligated to indemnify Companion for all reasonable attorney's fees and expenses ("Fees and Expenses") incurred in connection with this case.[44] Companion argues an award of all Fees and Expenses is supported by both subparts of the Indemnity Provisions in the Wood Guaranty. *See* Wood Guaranty ¶ II.A. (listing "reasonable attorney's fees" as recoverable "costs and expenses" under subpart providing indemnification for claims, losses, etc. arising out of or relating directly or indirectly to the Subject Agreements); *Id.* ¶ II.B. (agreeing to "pay all reasonable expenses,

[44] Companion does not seek an award of Fees and Expenses at this juncture. It, instead, seeks a preliminary ruling as to the scope of Fees and Expenses covered by the Wood Guaranty.

including without limitation, attorney's fees and other legal expenses, paid or incurred by [Companion] in collecting amounts owed hereunder or otherwise enforcing" the Wood Guaranty).

Companion argues these provisions provide for broader relief than under a fee-shifting statute because they do not impose a requirement Companion be the prevailing party or incorporate any requirement Companion not be at fault for events giving rise to a claim for indemnification. Companion relies on the "expansive" language used, which covers claims, damages, and losses (etc.) "arising out of or otherwise relating to, directly or indirectly, the Subject Agreements." ECF No. 382 at 23, 24 (citing, *e.g.*, *Am Recovery Corp. v. Computerized Thermal Imaging*, 96 F.3d 88, 93 (4th Cir. 1996)). It argues the clause "directly or indirectly" supports a particularly broad reading. *Id.* at 24, 25 (citing *Chevron USA, Inc. v. Aker Maritime Inc.*, 689 F.3d 497, 506 (5th Cir. 2012) for proposition the word "indirectly" may reach the entire litigation if the Subject Agreements are "indirectly related to . . . actions that resulted in the obligation to indemnify"). Companion also points to the nature of the relationship (a fronting program) and the parties' stated intent in both the 2006 Coverage Agreement and the Wood Guaranty to protect Companion from all liabilities and expenses as a basis for construing the Fees and Expenses provisions broadly. *Id.* at 25, 26.

Companion maintains "all of its attorney's fees and expenses 'aris[e] out of or otherwise relate[] to, directly or indirectly,' the 2006 Coverage Agreement and/or the Policies, and/or have been 'paid or incurred by [Companion] in collecting amounts owed [under the Wood Guaranty] or otherwise enforcing'" the 2006 Coverage Agreement and Policies. *Id.* at 26-28. It also aserts each of the non-jury issues now before the court relates directly or indirectly to the 2006 Coverage Agreement or Policies and maintains the same is true for "any other claims made, liabilities incurred and losses suffered [that] have been substantially litigated in this case." *Id.*

Companion argues Fees and Expenses should be awarded, even for its claim for breach of fiduciary duty (seeking recovery from Highpoint and Wood for damages flowing from dual-coverage policies), which failed to survive summary judgment, because that claim arose out of or relates, directly or indirectly, to the Subject Agreements. *Id.* at 29. In furtherance of this argument, Companion asserts the below-deductible portions of these claims must be funded by AMS pursuant to ¶ 12 of the 2006 Coverage Agreement, collateral must be funded under ¶ 13, premiums must be remitted pursuant to ¶ 11, and fronting policy issuance fees must be paid pursuant to ¶¶ 9 and 10.[45]

Finally, Companion argues claims associated with PayGo Policies are covered, despite being stayed and ultimately dismissed. It asserts the Fees and Expenses relating to these claims "are relatively insignificant" as a result of the stay, but argues they are recoverable because they, also, arise from or relate to the 2006 Coverage Agreement. ECF No. 382 at 29, 30 n.63.

**Defendants' Response.** Defendants raise two arguments in opposition. First, they argue the indemnification provision in the Wood Guaranty cannot support fees because, under South Carolina law, indemnification (including for attorney's fees) applies only to third-party claims absent express language to the contrary. Defendants argue what Companion seeks here amounts to an automatic fee-shifting provision, which, they maintain, is not supported by any provision in the 2006 Coverage Agreement or indemnification language in the Wood Guaranty.

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[45] These arguments appear to correspond with a theory of recovery for certain losses resulting from the same dual-coverage policies Companion advanced, for the first time, shortly prior to the scheduled trial. The court addressed this theory at a conference held following jury selection, holding it would not be presented to the jury because it was not a part of this litigation. *See* Transcript of April 12, 2017, post-jury selection conference at 22-24, 31, 32.

Second, Defendants argue attorney's fees and expenses should not be awarded to the extent Companion was unsuccessful on its claims and defenses. Defendants assert "Companion exerted substantial time and energy . . . pursuing meritless claims against Wood and AMS" that were ultimately rejected including by adverse summary judgment rulings on Companion's attempt to recover for Dallas National collateral shortfall under the Wood Guaranty and breach of fiduciary duty action (for dual coverage) against Highpoint and Wood. They argue, in effect, that allowing recovery for failed claims would encourage pursuit of frivolous claims.

**Companion's reply.** In reply, Companion argues Defendants' position as to the availability of indemnification generally ignores the specific language of the Wood Guaranty, which includes a broad indemnification clause as to claims, losses, or liability arising from or relating directly or indirectly to the Subject Agreements as well as a fee-shifting provision for enforcement of the Wood Guaranty.

**Discussion.** The Wood Guaranty includes two distinct fee-shifting provisions that provide Companion with overlapping, though distinct protections. The first provision indemnifies Companion "from and against any and all claims, suits, hearings, proceedings, actions, damages, liabilities, fines, penalties, losses, costs or expenses, including without limitation reasonable attorney's fees, at any time arising out of or otherwise related to, directly or indirectly, the Subject Agreements." Wood Guaranty ¶ II.A. For reasons explained in Section III of this order, even if limited to third-party claims, this provision reaches claims between Companion and Defendants other than Wood, because no other Defendant is a party to the Wood Guaranty. While this subparagraph does not impose any requirement Companion be successful on the merits or faultless, the wording (protecting Companion "from and against" suits, damages, liabilities, etc.) presumes Companion is *defending* a claim. Thus, Companion may rely on this provision to the extent it

incurred Fees and Expenses in *defending* a counterclaim, regardless of whether it was successful in that defense (presuming reasonableness is otherwise satisfied), but may not rely on it to recover Fees and Expenses in claims it pursued.[46]

The second fee-shifting provision, found in paragraph II.B., requires Wood to "pay all reasonable expenses, including without limitation, attorney's fees and other legal expenses, paid or incurred by Company in collecting amounts owed hereunder or otherwise enforcing this Agreement." Unlike the first sub-paragraph, this paragraph presumes Companion is the party seeking relief rather than defending a claim and requires an element of success as it refers to expenses incurred "in collecting amounts owed" or "otherwise enforcing this Agreement." As "this Agreement" covers both the Guaranty Provision and Indemnity Provision, Companion may obtain Fees and Expenses from Wood under paragraph II.B. in two circumstances: (1) Companion successfully pursued a claim against Wood under the Guaranty Provision (with incorporated Fees and Expenses necessary to prove the underlying failure of an AMS Entity to perform its contractual obligations under the Subject Agreements); or (2) Companion successfully pursued enforcement of paragraph II.A. (thus, successfully pursued a claim for Fees and Expenses for defending a counterclaim in this action).[47]

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[46] While success on the merits is not necessarily a prerequisite to relief under paragraph II.A., the degree of success may be a factor in determining the reasonableness of the fees. *See generally Robinson v. Equifax Information Svcs, LLC*, 560 F.3d 235, 245 (4th Cir. 2009) (reaffirming use of twelve factors set out in *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 n. 28 (4th Cir. 1978)).

[47] The second of these (recovery under ¶ II.B. for Fees and Expenses allowed under II.A.) may be largely redundant of the relief available under paragraph II.A. itself, though it covers the Fees and Expenses incurred in enforcing, through paragraph II.B., the rights to Fees and Expenses otherwise available under II.A.

Neither subparagraph indemnifies Companion for Fees and Expenses it incurred *pursuing* claims that did not result in any recovery for Companion (at least absent a corresponding counterclaim). Thus, neither supports an award of Fees and Expenses in pursuing claims (without corresponding counterclaims) that were resolved against Companion on summary judgment.[48] The same is true for Companion's claims that were dismissed from this action.[49]

Beyond the limited rulings provided above, the court makes no ruling as to entitlement to Fees and Expenses here. That determination must await resolution of claims following receipt of the reports of the Independent Actuary and Independent Accountant.

**CONCLUSION**

For the reasons set forth above, the court:

1. Denies Defendants' request for declaratory relief as to Companion's obligation to provide information and notification or consultation;

2. Grants Companion's request for a declaration Wood is obligated to guarantee AMS's below-deductible payment and collateral obligations and to do so within the timeframes addressed in Section II of this order;

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[48] The court granted Defendants' motion for summary judgment on Companion's thirteenth cause of action for breach of fiduciary duty (dual coverage issues) in full, fourteenth cause of action for violation of the South Carolina Unfair Trade Practices Act to the extent it overlapped with the thirteenth cause of action, and fifteenth cause of action on the Wood Guaranty to the extent it related to Dallas National's collateral obligations. ECF No. 258 at 24-29, 32-42, 45, 46.

[49] This court first stayed and later dismissed multiple claims relating to Pay-Go policies, largely but not entirely in deference to the first-filed Texas Action. ECF No. 258 at 44, 45. The Texas Court denied at least two motions to transfer venue to this district based, in part, on a finding the Pay-Go policies were not governed by the 2006 Coverage Agreement (and its forum selection clause). This court deferred to the Texas Court as to that issue, which would also lead to the conclusion the claims are not subject to the Wood Guaranty.

3. Grants Companion's request for a declaration Wood is obligated under the Wood Guaranty to indemnify Companion for liability Companion incurs for unreimbursed above-deductible claims payments made from AMS funds;

4. Grants Companion's request for a declaration Companion is entitled to all earnings, including reinvested earnings, accrued on the Claims Reserve Fund in the State Street Account.

5. Grants Companion's request for a declaration funds in the State Street Account do not automatically become the property of AMS simply by virtue of their deposit into that account;[50]

6. Grants in part and denies in part Companion's request for a declaration Companion is entitled to attorney's fees and expenses incurred in this action, with the determination of the propriety and amount of any award being reserved until after completion of the Initial Reviews by the Independent Actuary and Independent Accountant.

**IT IS SO ORDERED.**

s/ Cameron McGowan Currie
CAMERON MCGOWAN CURRIE
Senior United States District Judge

Columbia, South Carolina
July 20, 2017

[50] Whether funds were deposited on behalf of another entity and, if so, the amount of such funds is an issue reserved for determination by the Independent Accountant.