DIRECT TESTIMONY AND EXHIBITS OF

DAWN M. HIPP

ON BEHALF OF

THE SOUTH CAROLINA OFFICE OF REGULATORY STAFF

DOCKET NO. 2021-324-WS

Q. PLEASE STATE YOUR NAME, BUSINESS ADDRESS AND OCCUPATION.

A. My name is Dawn M. Hipp. My business address is 1401 Main Street, Suite 900, Columbia, South Carolina, 29201. I am employed by the State of South Carolina as the Chief Operating Officer of the Office of Regulatory Staff ("ORS").

Q. PLEASE STATE YOUR EDUCATIONAL BACKGROUND AND EXPERIENCE.

A. I received my bachelor's degree in political science from Minnesota State University - Moorhead. Prior to my employment with ORS, I managed the financial, operations, and regulatory aspects for an environmental company that provided turn-key hazardous waste consulting services for the United States Department of Defense.

In 2004, I joined ORS as a Program Specialist for the Water and Wastewater Department. I became a Director in 2007, and in 2018, was promoted to the position of Chief Operating Officer with responsibility for all ORS operational functions within the following divisions: Energy Office; Utility Rates and Services; Broadband; Communications; and Safety. During my employment with ORS, I have attended and completed specific regulatory and technical training related to water, wastewater, electric, natural gas, telecommunications, regulatory law and regulatory accounting including, but not limited to, the National Association of Regulatory Utility Commissioners ("NARUC")

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Rate School, Michigan State University Institute of Public Utilities studies programs, New Mexico State University Practical Regulatory Training, and National Regulatory Research Institute ("NRRI") trainings including Regulating Public Utility Performance. I am a member of the following National Association of State Utility Consumer Advocates ("NASUCA") standing committees: Consumer Protection, Water, Electric and Natural Gas.

Q. HAVE YOU TESTIFIED BEFORE THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA ("COMMISSION")?

A. Yes. I have testified on numerous occasions before the Commission relating to general rate cases, consumer complaints, and other regulatory proceedings.

Q. WHAT IS THE MISSION OF THE OFFICE OF REGULATORY STAFF?

A. ORS represents the public interest as defined by the South Carolina General Assembly in S.C. Code Ann. § 58-4-10(B) (Supp. 2020) as follows:

> [T]he concerns of the using and consuming public with respect to public utility services, regardless of the class of customer, and preservation of continued investment in and maintenance of utility facilities so as to provide reliable and high-quality utility services.

Q. WHAT IS THE PURPOSE OF YOUR DIRECT TESTIMONY IN THIS PROCEEDING AND HOW DOES YOUR DIRECT TESTIMONY REPRESENT THE PUBLIC INTEREST?

A. The purpose of my Direct Testimony is to set forth ORS's findings and recommendations resulting from ORS's examination of the rate increase application ("Application") submitted by Kiawah Island Utility, Inc. ("KIU" or "Company"). ORS has the sole responsibility to make inspections, audits and examinations of public utilities. My

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Direct Testimony and resulting ORS recommendations are designed to provide all classes of customers with high quality, reliable water and sewer service through improved utility performance and reasonable rates. Specifically, my Direct Testimony focuses on the following areas:

1. ORS's recommendation to remove $2.4 million of Gross Plant in Service, the associated depreciation expense, and accumulated depreciation attributed to a settlement reached in 2020 with a third-party contractor and recorded by KIU as additional costs for the Secondary Pipeline Project.
2. ORS's recommendation to remove 50% of the amounts related to base salary, benefits and taxes for the four (4) highest compensated SouthWest Water Company ("SWWC") executives.
3. ORS's recommendation to remove the SWWC Corporate Overhead Allocation expenses associated with a newly established SWWC Corporate Development Team ("Team").

Q. ARE THE FINDINGS OF YOUR REVIEW CONTAINED IN THIS TESTIMONY?

A. Yes. My testimony details ORS's findings and recommendations.

Q. WAS THE REVIEW PERFORMED BY YOU OR UNDER YOUR SUPERVISION?

A. Yes. The review to which I testify was performed by me or under my supervision.

<u>ORS Recommendation: Adjustment for the Settlement with Third-Party Contractor</u>

Q. WHAT IS ORS'S ADJUSTMENT TO REMOVE ADDITIONAL COST RELATED TO THE SECONDARY PIPELINE PROJECT?

A. ORS proposes to remove $2.4 million recorded by the Company to Gross Plant in Service, the corresponding depreciation expense, and the corresponding accumulated

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depreciation. The adjustment is reflected in ORS Witness Herpel's Exhibit DMH-4 as part of ORS Adjustments #3, #15, and #16.

Q. WHAT COSTS COMPRISE THE $2.4 MILLION AMOUNT?

A. The $2.4 million corresponds to the amount KIU paid to settle litigation in 2020 with KIU's horizontal directional drill ("HDD") contractor, Mears Group, Inc. ("Mears"), as well as KIU's and Mears' insurers ("Mears Settlement"). The litigation arose from the Company's construction of the second water supply line to Kiawah Island which was completed and in-service to customers in 2017 ("Secondary Pipeline Project").

Q. PLEASE DESCRIBE THE ORIGINS OF THE LITIGATION AND THE RESULTING MEARS SETTLEMENT.

A. KIU initially solicited bids for the construction of the Secondary Pipeline Project in 2011. At that time, the technical capabilities to undertake the Secondary Pipeline Project were not available due to the existing state of HDD technology.[1] In 2016, KIU contracted with Mears to install approximately 7,000 feet of a water line under the Kiawah River from Johns Island to Kiawah Island using HDD technology. KIU did not secure insurance specifically for the Secondary Pipeline Project.

According to the information supplied to ORS by the Company, Mears' initial attempt to bore an underground hole and pull pipe through the hole failed as the pipe got stuck in the borehole. As a result, Mears had to drill a second borehole, order and install replacement pipe through the borehole, and the second attempt was successful.[2] The Secondary Pipeline Project was completed and put in service on February 6, 2017.

[1] Docket No. 2016-222-WS Direct Testimony of Becky Dennis page 5, lines 13-22.
[2] Corrected Direct Testimony of Becky Dennis page 4, lines 9-11 and Company Response to ORS Request 4-13.

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Mears and KIU subsequently disputed which party was responsible for procuring primary builders risk insurance. In September 2017, Mears filed a lawsuit against KIU, seeking more than $7 million in damages for the costs resulting from the failed drill attempt. After the court issued a summary judgment order finding that the contract required KIU to obtain primary builder's risk insurance, KIU filed a separate declaratory judgment lawsuit in May 2019, against its insurer and Mears' insurers, all of whom had denied KIU's claims. The global settlement required KIU to pay Mears $2.4 million, KIU's insurer to pay Mears $700,000, and Mears' insurers to pay Mears $900,000 as well as to not raise Mears' premiums.[3] The total paid to Mears under the settlement is $4 million. [4] A copy of the Mears Settlement is attached as Exhibit Hipp-1.[5]

Q. WHAT IS THE BASIS FOR ORS'S PROPOSED ADJUSTMENT TO REMOVE THE ADDITIONAL COST RELATED TO THE SECONDARY PIPELINE PROJECT?

A. In the Test Year, the Company recorded to Account 304.2 an asset description of "Secondary Pipeline (addl cost) – St. John – Kiawah" for $2.4 million. ORS recommends removal of the $2.4 million, the associated depreciation expense, and the associated accumulated depreciation for the following reasons which are explained more fully in my Direct Testimony:

1. The $2.4 million in additional costs is not used and useful.

[3] KIU has since changed insurers.
[4] Company Response to ORS Request 6-12.
[5] Exhibit Hipp-1 is the Mears Settlement, which was originally designated as Confidential by the Company. On February 14, 2022, the Company agreed to **withdraw** the designation of Confidential for, among other things, the Mears Settlement, which was provided by the Company as an attachment in response to ORS Request 6-12.

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2. The Company failed to mitigate the risk to the customers and its shareholders.

3. The Company should bear the risk of the litigation and settlement outcome.

Q. PLEASE EXPLAIN WHY THE $2.4 MILLION IN ADDITIONAL COSTS ARE NOT USED AND USEFUL.

A. The Secondary Pipeline Project was completed and put in service on February 6, 2017. ORS verified the capital costs for the Secondary Pipeline Project in Docket No. 2016-222-WS and the Commission approved rates in Order No. 2017-277(A) that included verified cost through January 31, 2017 of $9,048,994 for the Secondary Pipeline Project. In Docket No. 2018-257-WS, the Company requested recovery of "[s]ome trailing costs associated with the secondary supply pipeline project which included contractor retainage and restoration wor[k]."[6] Again, ORS verified the additional costs and Commission approved rates inclusive of the additional costs in Order No. 2019-288. The total capital costs for the Secondary Pipeline Project are reflected in current customer rates and the total value of the used and useful Secondary Pipeline Project recorded to Account 304.2 is $9,742,848.83. In the Test Year, the Company booked $2.4 million as a Fixed Asset Acquisition in Account 304.2 with a Reference Note of Mears Settlement.[7]

KIU's settlement payment to Mears of $2.4 million does not represent a capital investment in utility plant that is used to provide water and sewer service to KIU's customers. In fact, customers currently pay for and receive the full benefit of the Company's investment of $9,742,848.83 in the Secondary Pipeline Project. In Docket No.

[6] Docket No. 2018-257-WS Direct Testimony of Craig Sorensen page 4, lines 8-12.
[7] Company Response to ORS Request 4-13 and 4-17.

2018-257-WS, KIU Witness Craig Sorensen stated in Direct Testimony that "[c]onstruction of the second pipeline is finished. However, KIU is in litigation with the directional drilling contractor regarding the project. No expenses associated with the litigation are included in this filing."[8] There are no additional contractor services, site restoration or physical infrastructure received by the Company from Mears in exchange for the settlement payment of $2.4 million. Therefore, the Mears Settlement amount of $2.4 million is not used and useful and ORS recommends an adjustment to remove the $2.4 million from Gross Plant in Service, the associated depreciation expense, and the associated accumulated depreciation.

Q. BESIDES THE SETTLEMENT PAYMENT NOT BEING USED AND USEFUL, WHY SHOULD THE MEARS SETTLEMENT NOT BE RECOVERED FROM KIU CUSTOMERS?

A. The Company did not meet its obligation to identify and mitigate risks associated with its operations and projects.

Q. DOES THE COMPANY RECOGNIZE IT HAS THE OBLIGATION TO IDENTIFY AND MITIGATE RISKS ASSOCIATED WITH COMPANY PROJECTS AND OPERATIONS?

A. Yes. KIU Witness Mujeeb Hafeez stated in his Direct Testimony that "SouthWest has identified risks to its assets, income, employees, information systems, and management, as well as the environment and third parties. To mitigate the potential financial loss associated with these risks, SouthWest has chosen to transfer a portion of the

[8] Docket No. 2018-357-WS Direct Testimony of Craig Sorensen page 6, lines 11-14.

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risks to the insurance marketplace."[9] The Company's Direct Testimony acknowledges that KIU has the responsibility to mitigate risk of potential financial loss through the procurement of the appropriate insurance coverage. KIU Witness Hafeez discusses the gained efficiencies from SWWC obtaining consolidated insurance coverage for affiliates and that the insurance premium allocations can be based on KIU's specific property values. The Company's Direct Testimony makes clear that identification of risks and procurement of insurance are the responsibility of KIU and the costs associated with obtaining appropriate insurance coverage, if found to be prudent by the Commission, are paid by KIU customers. This is consistent with the Company's duty as a regulated utility to seek to minimize costs.

Q. DESCRIBE ORS'S REVIEW OF THE COMPANY'S RISK MITIGATION EFFORTS IN CONNECTION WITH THE SECONDARY PIPELINE PROJECT.

A. In an effort to more fully understand the Company's actions to fulfill its obligation to identify risks and mitigate potential financial losses related to the Secondary Pipeline Project, ORS requested the Company provide information on the following topics related to the Secondary Pipeline Project, the Mears Settlement, Mears litigation, and insurance coverage:

- Secondary Pipeline Project - contractor supervision and monitoring, request for proposal, subcontractor contracts and contract clauses, contractor performance, insurance requirements.
- Cost allocation information – manual, supporting documentation, general ledger.
- Mears litigation – status, description, court orders, judgements, copies of motions, legal/consulting expenses, expert reports/opinions, detailed cost breakdown, etc.

[9] Direct Testimony of Mujeeb Hafeez pages 20-21.

- Mears Settlement – copies of documents, payment information, Company rationale.
- Insurance – coverage, cost.

From ORS's review of the information provided by the Company, ORS determined that the Company had an obligation to identify and mitigate risk on the Secondary Pipeline Project, which is in accordance with the Federal District Court ruling, and the Company did not meet its obligation.[10]

Q. PLEASE EXPLAIN WHY ORS DETERMINED THE COMPANY DID NOT MEET ITS OBLIGATION TO IDENTIFY AND MITIGATE RISK ON THE SECONDARY PROJECT PIPELINE.

A. KIU did not obtain the necessary insurance coverage to mitigate all the construction risks associated with the Secondary Project Pipeline. I have reviewed the information provided by KIU in response to ORS' discovery in which ORS requested a copy of the final order as well as any orders issued on any motions of summary judgement. In Civil Action 2:17-cv-02418-DCN in the U.S. District Court of the District of South Carolina, Charleston Division ("Federal District Court"), Mears filed a lawsuit alleging KIU breached the insurance terms of the contract by failing to obtain builders risk insurance and seeking a declaratory judgement that KIU failed to comply with its insurance coverage obligations. In the Order issued March 8, 2019, Judge David Norton found that the contract between Mears and KIU "[u]nambiguously requires KIU to obtain primary builders risk insurance and grant[ed] summary judgement as to Mears's declaratory

[10] In Civil Action 2:17-cv-02418-DCN in the U.S. District Court of the District of South Carolina, Charleston Division ("Federal District Court"), Mears filed a lawsuit alleging KIU breached the insurance terms of the contract. Judge David Norton found that the contract between Mears and KIU "[u]nambiguously requires KIU to obtain primary builders risk insurance and grant[ed] summary judgement as to Mears's declaratory judgement claim." See Exhibit Hipp-2 page 9.

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1 judgement claim." See Exhibit Hipp-2 page 9. Subsequent to the Federal District Court
2 Order, KIU filed a motion for reconsideration and a motion for certificate of appealability.
3 The Federal District Court declined to grant reconsideration or certify an appeal in an Order
4 filed May 30, 2019. See Exhibit Hipp-3.

5 In ORS Request 6-5, ORS asked if KIU obtained any estimates of the costs of
6 securing builders risk insurance related to the Secondary Pipeline Project. Despite the
7 Federal District Court order rejecting the positions of KIU, the Company responded in
8 January 2022 by still claiming that the Mears contract required Mears, not KIU, to procure
9 and maintain builders risk insurance for the Secondary Pipeline Project. In addition, KIU
10 could not provide estimated costs for KIU to procure builders' risk insurance for the
11 Secondary Pipeline Project because KIU asserts that the contract required Mears to provide
12 that type of insurance – not KIU.[11] In response to ORS Request 6-14, KIU asserted that the
13 Company complied with all insurance requirements under the Mears Contract.[12] According
14 to the Federal District Court's Order, KIU's contract with Mears required KIU to obtain
15 primary builders risk insurance and name Mears as a loss payee. The Federal District Court
16 ruled that KIU did not obtain the necessary primary builders risk insurance as required by
17 the contract with Mears.

18 Independent of its contractual obligations, however, KIU had an obligation to
19 mitigate potential financial loss, in this instance by securing appropriate insurance

[11] Company Response to ORS Request 6-6.
[12] See Exhibit Hipp-4 for ORS Sixth Information Request and the Company Responses. The final page of Exhibit Hipp-4 is KIU's "Attachment a" to KIU's response to ORS Request 6-15, which attachment was originally designated as Confidential by KIU. On February 14, 2022, the Company agreed to withdraw the designation of Confidential for, among other things, "Attachment a" to KIU's response to ORS Request 6-15, as well as the responses discussed in KIU's response to Request 6-12.

coverage. In this case, KIU did not demonstrate it took necessary steps to identify and address potential and foreseeable losses involving the Secondary Pipeline Project. While KIU indicated in response to ORS discovery that "KIU relied on in-house counsel as well as outside counsel to review and negotiate the terms of the KIU-Mears contract[,]" KIU's responses to ORS and Direct Testimony do not demonstrate that the Company took necessary steps to understand and mitigate the risks from a potential loss on the Secondary Pipeline Project.[13] The fact that the Secondary Pipeline Project could experience a loss was a known possible pipeline construction outcome.

The testimony of KIU Witness Hafeez confirms that KIU's management has an obligation to take action to mitigate potential financial loss whenever possible. KIU could have secured primary builders risk insurance coverage but failed to take reasonable steps to secure that coverage. KIU failed to secure any additional insurance coverage before, or after signing contractual construction documents and failed to read and understand the express terms in the contracts after the contracts were signed. KIU now seeks to have customers pay for its failure to secure important loss mitigation coverage. KIU, not its customers, should be responsible for KIU's mitigation failure.

Q. IS IT LIKELY THE PRIMARY BUILDERS RISK INSURANCE REQUIRED BY THE MEARS CONTRACT WOULD HAVE MITIGATED THE RISK ASSOCIATED WITH THE FAILURE EXPERIENCED BY KIU AND MEARS?

[13] *See* KIU Response to ORS Request 6-4 ("Please fully describe whether and why KU believes its efforts were reasonable and prudent to ensure builders risk insurance had been secured prior to the commencement of the Project"), ORS Request 6-7 ("Please fully describe KIU's efforts to ensure that the Mears Contract was clear regarding the obligations, or lack thereof, of the parties to the Mears Contract to procure builders risk insurance related to the Project.")

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A. According to KIU, it is unclear whether a builders risk insurance policy would have extended coverage to damages claimed by Mears in the amount of $7 million.[14] However, it is clear that KIU failed to take steps to secure the necessary coverage to mitigate potential financial losses and comply with the insurance terms in the contract with Mears.

The additional costs for the Secondary Pipeline Project of $2.4 million (Mears Settlement) can be directly attributed to KIU's failure to secure necessary insurance and to understand, adhere to, and mitigate risk in connection with its contract with the third-party contractor. KIU's request to recover the $2.4 million for the Mears Settlement "substitutes" the captive KIU customers for the primary builders risk insurance the Company could have secured, and thereby KIU is essentially requesting this Commission to use KIU's customers as liability insurance. Meanwhile, under the Application filed with the Commission, KIU's shareholders and/or owners are insulated from the financial risk of the KIU management decision that yielded a Federal District Court finding that the Company did not comply with the insurance terms of its contract and required a settlement payment of $2.4 million to Mears. The resulting Mears Settlement cannot be treated as a mere "project cost" to be shifted to the KIU customers.

Q. DO KIU CUSTOMERS BENEFIT FROM THE COMPANY'S SETTLEMENT OF THE MEARS LITIGATION?

A. The customers did not receive direct benefit from the Mears Settlement, because the Mears Settlement stems from the Company's failure to appropriately comply with its

[14] Company Response to ORS Request 6-16.

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1 risk mitigation obligations. Furthermore, any indirect benefit to customers is speculative,
2 at best. The KIU witnesses Direct Testimony offer no justification as to why the ultimate
3 cost of the Mears Settlement should be funded by KIU customers. In response to ORS
4 Request 6-15, the Company provided the following response:

5 Please fully explain why KIU asserts that the approximately $2.4M that KIU paid
6 to Mears., as a result of the settlement agreement regarding the Mears litigation
7 should be included for recovery in this rate case.

8 **KIU Response**:

KIU maintains its position in the Mears Litigation as set forth in its Cross-Motion for Summary Judgment dated September 10, 2018 (please see attachment b):

> The Contract requires Mears, not KIU, to provide builder's risk insurance. First, as a matter of law, the Special Conditions take precedence over the Standard General Conditions, and SC-7 controls. Second, even if the Contract is deemed to be ambiguous because of the Contract's potentially conflicting provisions, the only extrinsic evidence is that Mears intended to and did provide that insurance; Mears resolved any ambiguity through its own words and actions. Third, by operation of the Contract and Mears' inaction, Mears waived any potential right to demand that KIU provide the builder's risk insurance for the Project. Each of these grounds provides an independent basis to grant KIU summary judgment as to Mears' causes of action for breach of contract and declaratory judgment.

Nevertheless, after almost 2-1/2 years of litigating against Mears and insurers at significant cost, KIU opted to settle the lawsuits against Mears and the insurers in accordance with the terms of the settlement agreement, which included KIU's $2.4 million payment and the insurers' $1.6 million payment to Mears in settlement of Mears' $7+ million claims, as partial reimbursement of Mears' costs in completing the Project.

KIU decided to settle all disputes relating to the Project for a variety of reasons, including: (1) the significant cost of continuing to litigate the cases, which would have included trials in both the Mears litigation and the Insurance litigation, as well as likely appeals; (2) the significant additional time it would take for the litigation to conclude to final judgments, including appeals; (3) the uncertainty inherent in any litigation, including the possibility that, after additional years of litigation, KIU could ultimately be held liable for all of Mears' $7+ million in claimed damages, with no insurance coverage afforded under any of the policies at issue. Given these considerations, KIU's decision to settle the disputes by agreeing to contribute $2.4 million to partially reimburse Mears' costs incurred to complete the Project was reasonable and prudent. Accordingly, KIU is entitled to recover the $2.4 million in additional costs for the Project.

9

The Company's rationale for the asserted entitlement to recover the $2.4 million Mears Settlement from KIU customer contains vague generalizations that appear to be the calculus for why the Company decided to settle the various lawsuits. However, the Company's responses to ORS discovery and the Federal District Court order do not support the Company's claims that it took the steps necessary to carefully identify risk and mitigate potential financial losses by securing necessary insurance coverage. Inclusion of the Company's payment to Mears under the global settlement as an allowable expense, forces customers to pay for KIU's management failure to identify potential and foreseeable financial risks of the Secondary Pipeline Project.

Q. YOU HAVE EXPLAINED WHY THE SETTLEMENT AMOUNT IS NOT PROPER FOR RECOVERY FROM CUSTOMERS. DOES ORS RECOMMEND THE COMMISSION CONSIDER ANY OTHER ADJUSTMENTS RELATED TO THE SECONDARY PIPELINE PROJECT?

A. No. KIU customers should have been afforded the necessary insurance coverage to protect from the potential and foreseeable financial risks of the Secondary Pipeline Project. If KIU had exercised prudent management to mitigate potential losses and complied with the terms of the Mears contract, KIU customers would have likely paid additional insurance expense for the primary builders risk insurance coverage in the form of additional premiums. The inclusion of the cost of such insurance could be considered by the Commission to encourage the Company to improve its future performance related to identification and mitigation of financial risk.

However, I am not an insurance expert and I cannot reasonably estimate the expense to the KIU associated with the necessary additional insurance coverage.

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Furthermore, even when pressed, the Company provided no information or documents regarding the estimated cost of securing builders risk insurance related to the Secondary Pipeline Project.[15] The Company stated in response to ORS Request 6-16 "[t]here is no uniform, standard form of a builders risk policy." The Company also stated "[b]uilders risk policies are customized, individually negotiated policies."[16]

ORS Recommendation: Adjustment to Base Salary, Benefits and Taxes of SWWC Executives

Q. PLEASE EXPLAIN ORS'S ADJUSTMENTS TO EXECUTIVE COMPENSATION, BENEFITS, AND TAXES.

A. The Company and ORS both propose adjustments to remove all incentives tied to the Company and SWWC financial metrics. Financial-based incentives benefit KIU's shareholders more than they do KIU customers. In addition, ORS proposes to remove 50% of the amounts related to base salary, benefits and taxes for the four highest compensated SWWC executives. ORS proposes to remove ($52,685) of expenses allocated from SWWC. This adjustment was calculated by ORS Witness Rabon and is reflected in ORS Witness Herpel's Exhibit DMH-4 as part of ORS Adjustment #2G.

Q. WHAT IS THE BASIS FOR ORS'S PROPOSED ADJUSTMENT TO REMOVE AMOUNTS RELATED TO THE FOUR HIGHEST PAID SWWC EXECUTIVES?

A. Executives and officers hold a fiduciary duty to the company's shareholders and owners. The fiduciary duty produces a tension between maximizing returns for shareholders and/or owners and minimizing the financial impact of utility operations and

[15] Company Response to ORS Request 6-6.
[16] Company Response to ORS Request 6-16.

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management decisions on the customers who are entitled to reliable service at the lowest reasonable rates. ORS recognizes that executives have responsibilities to meet the needs of both shareholders and customers. Executive level positions do not exist with the sole purpose to benefit customers and therefore should not be funded solely by customers. High-level executives often interact with shareholders and the Board of Directors, which is directly responsible to and appointed by shareholders. Because executive compensation provides benefits to both shareholders and customers, a cost sharing is appropriate. It is not reasonable that customers should contribute 100% of the revenue requirement for executive compensation costs. Therefore, ORS's adjustment to remove 50% of the salary, benefits, and taxes for the four highest paid executives is reasonable.

Q. HAVE THIS COMMISSION AND OTHER STATES COMMISSIONS FOUND THAT A SHARING OF THE COST FOR EXECUTIVE COMPENSATION TO BE REASONABLE AND EQUITABLE?

A. Yes. The utility and its Board of Directors determine the amount and methodology used by a regulated utility to compensate its executives. However, the Commission has a goal to ensure that the regulatory process results in fair and reasonable outcomes. It is neither fair nor reasonable to require KIU customers to shoulder 100% of the cost for the four highest paid executives of SWWC because of the tension between maximizing returns for shareholders and minimizing the cost of utility service. Some commissions do not permit utilities to charge customers for incentive plans and payments designed to drive earnings.[17] Commissions who have addressed these issues often employ a 50/50 sharing of the costs

[17] See "Incentive Compensation Survey of the 24 Western States", Appendix MG-3 to the testimony of Mark E. Garrett, dated August 20, 2019 in Cause No. 45235 before the Indiana Utility Regulatory Commission, available at: https://www.in.gov/oucc/files/45235MarkGarrett.pdf.

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between shareholders and customers or disallow a portion of the costs that are tied to financial performance.[18] This Commission and other commissions have determined that there should be a sharing of costs between the customer and the shareholders and/or owners.

Specifically, the Commission accepted ORS's recommendation to remove 50% of the base pay and benefits paid to Dominion Energy South Carolina's ("DESC") four highest compensated executives in the 2019 DESC Application under the Rate Stabilization Act ("RSA"). The Commission specifically noted on page 3 of Order No. 2019-729 that "[t]his adjustment recognizes that these executives advance the sometimes divergent interest of both shareholders and customers, and that expenses associated with their compensation should therefore be shared."

In both the Duke Energy Carolinas ("DEC") and the Duke Energy Progress ("DEP" collectively "Duke Energy") general rate proceedings, the Commission ordered adjustments to remove seventy-five percent of the compensation paid to Duke Energy's highest executive and fifty percent of the compensation paid to the Duke Energy's next three highest executives.[19] Further, the Commission noted on page 86 of Order No. 2019-341 that "[a]fter review of the record and consideration of all aspects of the benefits and costs to be allocated between the shareholders and ratepayers, it is just, equitable, and of sound regulatory discretion to disallow for recovery 75% of the South Carolina allocation of Duke Energy CEO Lynn Good's compensation, and 50% of the compensation of the Company's next three highest executives."

[18] See Testimony of Mark E. Garrett in Cause No. 45235 before Indiana Utility Regulatory Commission p. 19 and Incentive Compensation Survey at Appendix MG-3, available at: https://www.in.gov/oucc/files/45235MarkGarrett.pdf

[19] DEC Docket No. 2018-319-E, Order No. 2019-323 and DEP Docket No. 2018-318-E, Order No. 2019-341

For these reasons, ORS recommends an adjustment to remove from the calculation of customer rates 50% of the amounts related to base salary, benefits, and taxes for the four highest compensated SWWC executives.

ORS Recommendation: Adjustment to SWWC Corporate Overhead Allocation

Q. PLEASE EXPLAIN ORS'S ADJUSTMENT TO REMOVE EXPENSES RELATED TO THE SWWC CORPORATE DEVELOPMENT TEAM.

A. ORS proposes to remove $46,930 of expenses allocated from SWWC associated with a newly established SWWC Corporate Development Team ("Team"). The Company specified that the focus of the Team is to identify and act on the Company's acquisition opportunities as a means for SWWC business growth.[20]

Q. WHAT IS THE BASIS FOR ORS'S PROPOSED ADJUSTMENT TO REMOVE AMOUNTS RELATED TO THE SWWC CORPORATE DEVELOPMENT TEAM?

A. In general, customers of KIU should not pay for the Company's acquisition efforts including the personnel employed to seek out and evaluate new opportunities and negotiate purchase agreements and utility acquisition closings. ORS proposes the removal of the expenses related to the Team because the customers of KIU would bear 100% of the costs and financial risks associated with the Company's speculative acquisition efforts, and such efforts are simply not related to or necessary for the continued provision of safe and reliable service to KIU customers.

However, there is financial risk for KIU customers that the efforts of the Team do not result in acquisitions or result in acquisitions that do not provide a benefit to KIU's

[20] Direct Testimony of Mujeeb Hafeez page7 line 13.

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customers. The efforts of the Team may yield little in the way of quantifiable net benefits and savings to KIU customers. As KIU Witness Hafeez stated, the benefits of customer growth, if the acquisitions pursued by the Team are successful, are not easily quantifiable.[21] Furthermore, the Team was established by SWWC after the Test Year ended on December 21, 2020 and the potential benefits that may accrue to the KIU customers due to the actions of the new Team are speculative, at best. After the Test Year, SWWC closed several acquisitions that were not included in the Three-Factor Methodology allocation calculations. The ORS adjustment, as calculated by ORS Witness Rabon, to update the SWWC allocation for the newly acquired utilities only reduced the allocation of KIU corporate allocations by $27,794.

But even assuming that the acquisitions pursued by the Team do ultimately provide some net benefit to KIU customers, which KIU has not shown, there is no reason to believe that the efforts of the Team are directly related to or necessary for providing utility service for KIU customers such that the costs of the Team are appropriately borne by KIU customers. In general, it is ORS's position that utility customers should not pay for acquisition premium (or goodwill) costs, transition costs or transaction costs associated with the sale of assets, facilities, territories and certificates of public convenience and necessity, or any costs incurred in connection with the consummation of any resulting purchase agreement, or any costs related to the process of developing or obtaining the necessary legal and regulatory approvals. The allocation of expenses from SWWC to KIU for the Team are costs associated with initiating acquisitions (e.g. are merger transaction

[21] Direct Testimony of Mujeeb Hafeez page 7, lines 21-23, and page 8, lines 1-4.

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costs) and with the sale of assets, facilities, territories, and certificates and should be disallowed for ratemaking purposes. The Commission has prohibited the inclusion of merger transaction expenses in customers rates as a customer protection.[22] These costs are incurred for the benefit of shareholders and are not necessary to the provision of safe and reliable service to KIU's customers.

ORS proposes an adjustment of ($46,930) to remove allocated expenses related to the Team as calculated by ORS Witness Rabon. The adjustment is reflected in ORS Witness Herpel's Exhibit DMH-4 as part of ORS Adjustment #2G.

Q. WILL YOU UPDATE YOUR DIRECT TESTIMONY BASED ON INFORMATION THAT BECOMES AVAILABLE?

A. Yes. ORS fully reserves the right to revise its recommendations via supplemental testimony should new information become available not previously provided by the Joint Applicants, or other sources, become available.

Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?

A. Yes, it does.

[22] SCE&G Docket No. 2017-370-E, Order No. 2018-804 at page. 98 and Order Exhibit 1; CUC, Inc. and SCWU-CUC, Inc. Docket No. 2020-225-WS, Order No. 2021-93; and Synergy Utilities, L.P. and SCWU, Inc. Docket No. 2021-130-S, Order No. 2022-122.

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CONFIDENTIAL

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SETTLEMENT AND RELEASE AGREEMENT

This Settlement and Release Agreement ("AGREEMENT") is entered by and between KIAWAH ISLAND UTILITY, INC. ("KIU"); MEARS GROUP, INC. ("MEARS"); WESTPORT INSURANCE CORPORATION ("WESTPORT"); SWISS RE INTERNATIONAL SE ("SWISS RE") and CHUBB UNDERWRITING AGENCIES LIMITED FOR AND ON BEHALF OF SYNDICATE 2488, THE SUCCESSOR OF SYNDICATE 1882 ("CHUBB") effective as of the EXECUTION DATE.

RECITALS AND DEFINITIONS

1. **"KIU"** means KIAWAH ISLAND UTILITY, INC. and any of its employees, officers, directors, parents, subsidiaries, affiliates, including but not limited to Southwest Water Company, agents, attorneys, representatives and any of its respective predecessors, successors and assigns; and any KIU parent, subsidiary, or affiliated entities who are insured, or claim to be insured, under the WESTPORT POLICY and/or INSURERS' POLICY as more fully defined below.

2. **"MEARS"** means MEARS GROUP, INC. and any of its employees, officers, directors, parents, subsidiaries, affiliates, including but not limited to Quanta Services, Inc., agents, attorneys, representatives and any of its respective predecessors, successors and assigns; and any MEARS parent, subsidiary, or affiliated entities who are insured, or claim to be insured, under the WESTPORT POLICY and/or INSURERS' POLICY as more fully defined below.

3. **"WESTPORT"** means WESTPORT INSURANCE CORPORATION and its employees, officers, directors, correspondents, parents, subsidiaries, affiliates, agents, attorneys, representatives and any of its predecessors, successors or assigns.

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4. **"SWISS RE"** means SWISS RE INTERNATIONAL SE and its employees, officers, directors, correspondents, parents, subsidiaries, affiliates, agents, attorneys, representatives and any of its predecessors, successors or assigns.

5. **"CHUBB"** means CHUBB UNDERWRITING AGENCIES LIMITED FOR AND ON BEHALF OF SYNDICATE 2488, THE SUCCESSOR OF SYNDICATE 1882 and its underwriting entities, employees, officers, names, directors, correspondents, parents, subsidiaries, affiliates, agents, attorneys, representatives and any of its predecessors, successors or assigns.

6. **"PARTY"** means KIU, MEARS, WESTPORT, SWISS RE or CHUBB.

7. **"PARTIES"** means KIU, MEARS, WESTPORT, SWISS RE and CHUBB, collectively.

8. **"EXECUTION DATE"** means the date of the last signature hereon on behalf of a PARTY.

9. **"LOSS"** means any liability, costs, claims, damages and/or claims for insurance coverage or proceeds under the WESTPORT POLICY and INSURERS' POLICY arising out of and/or in connection with the problems encountered at the PROJECT and involved pipeline on or about June 30, 2016, which ultimately led to the MEARS ACTION.

10. KIU was the owner of the Kiawah Island Redundant Water Supply Main Division 2 – Kiawah River construction project for the horizontal directional drilling and installation of a PVC pipeline ("pipeline") under the Kiawah River in South Carolina (the "PROJECT"). KIU entered into a construction contract (the "Construction Contract") on January 7, 2016 with MEARS to perform the PROJECT.

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11. During construction, the pipeline at the PROJECT suffered damage and LOSS. On Monday, July 11, 2016, KIU met with representatives of MEARS and Thomas & Hutton (KIU's engineers) to discuss the damaged pipeline that MEARS had contracted to complete. At that meeting, MEARS presented KIU with three options for the Kiawah River recovery drill. Among those options, MEARS implemented "Option 1", which was to re-drill, replace lost pipe, and install approximately 6,900 feet of 16" DR14 pipe, the same size and thickness originally required by the Construction Contract. The estimated cost of Option 1 at that time was $2,146,497, which included labor, equipment, and materials required to complete the pipeline and reimbursement of consumables. When the work was actually performed by MEARS, the cost increased because the second drill took longer than had been anticipated at the time of the estimate. By this AGREEMENT, KIU is agreeing to reimburse MEARS a portion of the cost MEARS incurred to complete the pipeline.

12. WESTPORT issued a property insurance policy to Southwest Water Company, Policy No. NAP 2000078 02, with effective dates of September 1, 2015 to September 1, 2016, subject to its terms, conditions, exclusions and endorsements ("WESTPORT POLICY"). KIU is a wholly-owned subsidiary of Southwest Water Company, and is insured under the WESTPORT POLICY.

13. SWISS RE and CHUBB (hereinafter collectively "INSURERS") issued a Master Builder's Risk, Contractor's Equipment & Property for Rigging and Real & Personal Property insurance policy to Quanta Services, Inc., Policy No. B0180ME1504780, with effective dates of April 30, 2015 to May 1, 2018, subject to its terms, conditions, exclusions and endorsements ("INSURERS' POLICY"). MEARS is a wholly-owned subsidiary of Quanta Services, Inc., and

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is insured under the INSURERS' POLICY. The WESTPORT POLICY and the INSURERS' POLICY are collectively defined as the "POLICIES."

14. KIU submitted claims to WESTPORT under the WESTPORT POLICY and made claims against INSURERS as an alleged additional insured (which was disputed by INSURERS) under the INSURERS' POLICY for losses arising from and associated with the PROJECT allegedly incurred on or about June 30, 2016 (the "CLAIMS").

15. Following a dispute between MEARS and KIU regarding the terms of the Construction Contract, MEARS commenced a civil action, on or about September 8, 2017, against KIU, in the United States District Court for the District of South Carolina, Charleston Division, styled: *Mears Group, Inc. v. Kiawah Island Utility, Inc., Civil Action No. 2:17-cv-02418-DCN.* MEARS filed a Supplemental Complaint alleging KIU wrongfully withheld retention as liquidated damages (the "MEARS ACTION").

16. KIU commenced a civil action, on or about May 9, 2019, against WESTPORT, INSURERS and MEARS in the United States District Court for the District of South Carolina, Charleston Division, styled: *Kiawah Island Utility, Inc. v. Westport Insurance Corporation; Swiss Re International SE; Lloyd's Syndicate 1882 CHB; and Mears Group, Inc., Civil Action No. 2:19-cv-01359-DCN* (the "KIU ACTION").

17. On or about June 14, 2019, INSURERS filed a Motion to Dismiss and Compel Arbitration, or Alternatively, to Transfer to the Southern District of New York to Compel Arbitration against KIU, which was subsequently granted on October 22, 2019.

18. On or about October 23, 2019, KIU's case against INSURERS was transferred to the United States District Court for the Southern District of New York, styled: *Kiawah Island*

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Utility, Inc. v. Westport Insurance Corporation; Swiss Re International SE; Lloyd's Syndicate 1882 CHB; and Mears Group, Inc., Civil Action No. 1:19-cv-09775-JGK. By stipulation and order entered by the Court in the action on January 22, 2020, the case style was changed to *"Kiawah Island Utility, Inc. v. Swiss Re International SE and Chubb Underwriting Agencies Limited on Behalf of Syndicate 1882, Civil Action No. 1:19-cv-09775-JGK"* (the "ARBITRATION ACTION"). Arbitration was subsequently commenced between KIU and INSURERS pursuant to an Arbitration Procedure Agreement executed by KIU and INSURERS in January 2020, with each party appointing an arbitrator but the third arbitrator having not yet been appointed in light of this AGREEMENT (the "ARBITRATION").

19. The PARTIES to this AGREEMENT now wish to fully and finally resolve and settle on a global basis their differences as set forth in this AGREEMENT, including these RECITALS AND DEFINITIONS which are a material part thereof.

UNDERTAKINGS

NOW, THEREFORE, in consideration of the respective promises and covenants recited herein and other good and valuable consideration, KIU, MEARS, WESTPORT and INSURERS intending to be legally bound agree as follows:

1. **Payments.**

a) KIU, MEARS, WESTPORT and INSURERS agree to a full and final global settlement of the LOSS, CLAIMS, MEARS ACTION, KIU ACTION, ARBITRATION ACTION and the ARBITRATION, with payment being made to MEARS in the amount of FOUR MILLION DOLLARS and zero cents (US$4,000,000.00), of which TWO MILLION FOUR HUNDRED THOUSAND DOLLARS and zero cents (US$2,400,000.00) shall be paid by KIU to MEARS; of

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which NINE HUNDRED THOUSAND DOLLARS and zero cents (US$900,000.00) shall be paid by INSURERS (half by SWISS RE and half by CHUBB) to MEARS; and of which SEVEN HUNDRED THOUSAND DOLLARS and zero cents (US$700,000.00) shall be paid by WESTPORT to MEARS (collectively, the "SETTLEMENT PAYMENTS"). For clarity, the SETTLEMENT PAYMENTS are further described in Exhibit "A," and it is understood that INSURERS and WESTPORT shall have no obligation or responsibility under this AGREEMENT or otherwise to make any SETTLEMENT PAYMENTS for any other PARTY to this AGREEMENT. In other words, KIU is solely responsible for payment of its US$2,400,000.00, WESTPORT is solely responsible for payment of its US$700,000.00, and INSURERS are solely responsible for payment of their US$900,000.00. The payment instructions for making the SETTLEMENT PAYMENTS by check or wire transfer are set forth in Exhibit "B." Should any PARTY fail to pay the amount of the SETTLEMENT PAYMENTS allocated to it in accordance with this AGREEMENT and Exhibit "A" attached hereto, this AGREEMENT may be declared null and void by MEARS, with all PARTIES to revert to their respective financial and legal positions and actions as if this AGREEMENT was not entered into, with MEARS promptly returning to the paying PARTY any SETTLEMENT PAYMENTS received.

b) The SETTLEMENT PAYMENTS, as specifically set forth in Exhibit "A," shall be paid by KIU, INSURERS and WESTPORT to MEARS pursuant to their respective payment allocations set forth above and as set forth in Exhibit "A" in immediately available funds by overnight mail or wire transfer using best efforts to make said SETTLEMENT PAYMENTS within 14 business days after the EXECUTION DATE, which in no event will exceed 30 calendar days after the EXECUTION DATE.

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c) The PARTIES represent and warrant that this AGREEMENT, including any payment made by KIU, INSURERS and/or WESTPORT pursuant to the terms of this AGREEMENT, is made as a good faith and binding compromise and in full and final settlement of all issues and/or disagreements between and among the PARTIES related to the subject matter of this AGREEMENT and shall not be used as precedent with respect to the application of the WESTPORT POLICY or INSURERS' POLICY to any other claim against either INSURERS or WESTPORT. Similarly, INSURERS will not use the AGREEMENT for premium calculation purposes for property or builder's risk insurance policies issued to Quanta Services, Inc., and any subsidiary or affiliated companies.

d) The PARTIES agree that this AGREEMENT includes, but is not limited to, all causes of action, claims, rights, obligations, demands, liabilities, costs, expenses, damages, penalties, fees, claims for coverage or proceeds under the POLICIES in connection with the LOSS, or relief of any kind which were asserted or sought in the MEARS ACTION, KIU ACTION, ARBITRATION ACTION and/or the ARBITRATION, or which could have been asserted or sought in the MEARS ACTION, KIU ACTION, ARBITRATION ACTION and/or the ARBITRATION or which could have been asserted or sought in connection with or arising out of the LOSS, MEARS ACTION, KIU ACTION, ARBITRATION ACTION and/or the CLAIMS including, but not limited to, any and all claims for consequential losses, extra contractual damages, statutory claims or penalties and any claims based on unfair claims handling or insurer "bad faith."

e) The PARTIES further agree that no PARTY shall have any right of subrogation or similar action with respect to the SETTLEMENT PAYMENTS, LOSS, CLAIMS, MEARS ACTION, KIU ACTION, ARBITRATION ACTION and/or the ARBITRATION.

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2. **Mutual Release.** In exchange for and upon receipt of the SETTLEMENT PAYMENTS from KIU, INSURERS and WESTPORT, MEARS, on its own behalf and on behalf of all of its respective subsidiary and parent companies (including but not limited to Quanta Services, Inc.) and all of its predecessors, successors and assigns, together with its respective members, officers, managers, principals, partners, employees, and agents, shall release and forever discharge KIU, INSURERS and WESTPORT, along with all of their respective subsidiary and parent companies and all of their predecessors, successors and assigns, together with their respective investors, stockholders, officers, directors, principals, partners, employees, correspondents, agents, experts, adjusters, attorneys, accountants, investigators, indemnitors and any other representatives, from and on account of any and all claims or demands of any nature whatsoever, whether in law or in equity, whether based in tort, contract, statute or any other theory of recovery, and whether for general, special, compensatory, consequential, punitive or any other damages (including, without limitation, for any recovery arising from or relating in any way to claim handling or payment), whether or not presently known or unknown, asserted or unasserted, suspected or unsuspected, foreseeable or unforeseeable, arisen, now arising or which may hereafter arise with respect to the LOSS, CLAIMS, MEARS ACTION, KIU ACTION, ARBITRATION ACTION and/or ARBITRATION.

Further, KIU (including but not limited to Southwest Water Company), INSURERS and WESTPORT, on their own behalf and on behalf of all of their respective subsidiary and parent companies and all of their predecessors, successors and assigns, together with their respective members, officers, managers, principals, partners, employees, and agents, shall release and forever discharge each other and MEARS, along with all of their subsidiary and parent companies and all of their predecessors, successors and assigns, together with their respective investors, stockholders,

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officers, directors, principals, partners, employees, correspondents, agents, experts, adjusters, attorneys, accountants, investigators, indemnitors and any other representatives, from and on account of any and all claims or demands of any nature whatsoever, whether in law or in equity, whether based in tort, contract, statute or any other theory of recovery, and whether for general, special, compensatory, consequential, punitive or any other damages (including, without limitation, for any recovery arising from or relating in any way to claim handling or payment), whether or not presently known or unknown, asserted or unasserted, suspected or unsuspected, foreseeable or unforeseeable, arisen, now arising or which may hereafter arise with respect to the LOSS, CLAIMS, MEARS ACTION, KIU ACTION, ARBITRATION ACTION, and/or the ARBITRATION. This AGREEMENT does not release any future potential claims against MEARS arising after this AGREEMENT in favor of KIU under the Construction Contract. KIU represents and warrants that it is not aware of any existing factual basis for any future potential claim against MEARS under the Construction Contract.

3. **Absence of Admissions.** Except for the mutual undertakings set forth in this AGREEMENT, which are fully enforceable as written, KIU, MEARS, WESTPORT and INSURERS do not have any further obligation or liability to each other with respect to the LOSS, CLAIMS, MEARS ACTION, KIU ACTION, ARBITRATION ACTION and/or the ARBITRATION and, upon full performance under the AGREEMENT, each specifically denies any wrongdoing to each other in connection with those matters.

4. **Disclaimer of Prejudice.** Except as expressly incorporated in and as necessary to performance under this AGREEMENT, neither the SETTLEMENT PAYMENTS as allocated and paid by KIU, WESTPORT and INSURERS nor any statement made nor event occurring during negotiations for this settlement, nor any statement or communication made in connection

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therewith, by KIU, MEARS, WESTPORT or INSURERS or their respective adjusters, attorneys, accountants or representatives shall prejudice any PARTY and cannot be used by any PARTY against another PARTY.

5. **Full Settlement.** KIU, MEARS, WESTPORT and INSURERS agree and acknowledge that this AGREEMENT is the full and final settlement of all claims, questions, issues, duties, obligations and responsibilities between or among the PARTIES, except as otherwise expressly stated in and necessary to performance under this AGREEMENT, relating to the LOSS, CLAIMS, MEARS ACTION, KIU ACTION, ARBITRATION ACTION and/or ARBITRATION.

6. **Termination of the Actions.** Upon MEARS' receipt in full of the SETTLEMENT PAYMENTS, MEARS shall file in the MEARS ACTION a motion to dismiss with prejudice, with each of the PARTIES to bear its own costs and attorneys' fees, and KIU shall file or cause to be filed in the KIU ACTION, and the ARBITRATION ACTION motions dismissing all claims in the KIU ACTION and the ARBITRATION ACTION against the PARTIES with prejudice, with each of the PARTIES to bear its own costs and attorneys' fees. With respect to the ARBITRATION ACTION, INSURERS and KIU will notify their respective arbitrators that the CLAIMS and ARBITRATION ACTION have been settled and the PARTIES agree that, upon MEARS' receipt in full of the SETTLEMENT PAYMENTS, the ARBITRATION ACTION AND ARBITRATION are dismissed with prejudice. To be clear, the actions to be terminated and dismissed with prejudice upon MEARS' receipt of the SETTLEMENT PAYMENTS include the following:

1. *Mears Group, Inc. v. Kiawah Island Utility, Inc.*; United States District Court for the District of South Carolina, Case No. 2:17-cv-02418-DCN;

2. *Kiawah Island Utility, Inc. v. Westport Insurance Corporation*; United States District Court for the District of South Carolina, Case No. 2:19-cv-01359-DCN;

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3. *Kiawah Island Utility, Inc. v. Swiss Re International SE and Chubb Underwriting Agencies Limited on Behalf of Syndicate 1882*; United States District Court for the Southern District of New York, Case No. 1:19-cv-09775-JGK; and

4. *Kiawah Island Utility, Inc. v. Swiss Re International SE and Chubb Underwriting Agencies Limited for and on Behalf of Syndicate 2488, the Successor of Syndicate 1882* – Arbitration.

7. **Representations of KIU and Mears.** This AGREEMENT and a material condition of settlement is to provide complete peace and resolution to INSURERS and WESTPORT as if the LOSS, CLAIMS, MEARS ACTION, KIU ACTION, ARBITRATION ACTION and ARBITRATION, never occurred or came into existence. KIU and MEARS, individually, on behalf of themselves and their respective parents, Southwest Water Company and Quanta Services, Inc., represents and warrants that they, nor any of their respective agents, employees, representatives and/or assigns will ever pursue, file, or maintain any claim, action, and/or proceeding against INSURERS, WESTPORT and/or the POLICIES for any liability, claims, costs and/or damages with respect to the LOSS and/or any claims that are the subject of this AGREEMENT. KIU and MEARS, individually, further represent and warrant to the best of their respective knowledge, information, and belief that no other person or entity, including without limitation, liability or other insurers, has any basis in law, fact or otherwise to file or pursue a claim, complaint, or action against INSURERS and/or WESTPORT in connection with the LOSS, POLICIES, CLAIMS, MEARS ACTION, KIU ACTION, ARBITRATION ACTION and/or the ARBITRATION.

8. **Effect of Agreement.** This AGREEMENT is binding upon and inures to the benefit of KIU, MEARS, WESTPORT and INSURERS, their respective predecessors, parents, successors, assigns, employees, agents and any corporation or other entity to which or with which

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any party to this AGREEMENT may merge or consolidate. Notwithstanding any other statement or provision herein, this AGREEMENT does not create any rights or benefits for any other insurer of KIU or MEARS or any other insured of INSURERS or WESTPORT. The PARTIES understand and agree that this AGREEMENT shall operate as a full, final and complete release as set forth herein for the LOSS, CLAIMS, MEARS ACTION, KIU ACTION, ARBITRATION ACTION and the ARBITRATION, but does not otherwise cancel, buyback or eliminate the INSURERS' POLICY or WESTPORT POLICY with respect to matters not covered by this AGREEMENT.

9. **Applicable Law, Covenant Not to Sue, and Jurisdiction.** This AGREEMENT is governed by and shall be construed in accordance with the laws of the State of South Carolina. Except as necessary to enforce this AGREEMENT, the PARTIES covenant not to sue with respect to the LOSS, CLAIMS, MEARS ACTION, KIU ACTION, ARBITRATION ACTION and/or the ARBITRATION. Any action necessary to enforce the AGREEMENT between KIU, MEARS, WESTPORT and INSURERS shall be brought in the United States District Court for the District of South Carolina, Charleston Division. It is understood, however, that nothing herein shall waive or otherwise alter or impair the arbitration clause contained in INSURERS' POLICY and/or INSURERS' rights of arbitration under said clause.

10. **Preparation of Release and Settlement Agreement.** KIU, MEARS, WESTPORT and INSURERS specifically acknowledge and concur that this AGREEMENT has been prepared, reviewed, studied and executed without compulsion, fraud, duress or undue influence and without circumstances which would overcome the free will of the signatories, and that it is expressly entered into by KIU, MEARS, WESTPORT and INSURERS with the requisite experience, each party acting with the advice of counsel as an equal to the other party in bargaining

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the terms of this AGREEMENT and, accordingly, the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in interpreting this AGREEMENT or any amendment of it.

11. **Authority.** KIU, MEARS, WESTPORT and INSURERS represent and warrant that no other person or entity has any interest in the claims, demands, obligations or causes of action released under this AGREEMENT, and MEARS represents that it has the sole right and exclusive authority to execute this AGREEMENT and to receive the sums specified herein as set forth above; and that it has not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations or causes of action released under this AGREEMENT.

12. **Execution Authorized.** The undersigned PARTIES severally represent that they have been duly authorized to execute this AGREEMENT by the respective PARTY they represent and that when so executed, this AGREEMENT is a valid and legally binding obligation on the PARTIES, and enforceable against each of them in accordance with its terms.

13. **Counterparts.** KIU, MEARS, WESTPORT and INSURERS stipulate that this AGREEMENT may be executed by facsimiles or scanned versions of signatures transmitted via electronic mail, and in one or more counterparts, with each version containing copies of all duly executed signature pages deemed an original of the entire AGREEMENT.

14. **Entire Agreement.** This AGREEMENT constitutes the entire agreement between KIU, MEARS, WESTPORT and INSURERS relating to the LOSS, CLAIMS, MEARS ACTION, KIU ACTION, ARBITRATION ACTION and/or the ARBITRATION. This AGREEMENT supersedes and replaces any and all prior or contemporaneous agreements or understandings, whether written or oral, with regard to the matters set forth herein.

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15. **Amendment, Change or Modification.** No amendment, change or modification of this AGREEMENT shall be valid unless it is contained in writing and signed by all PARTIES.

16. **Miscellaneous.** Provided that the SETTLEMENT PAYMENTS are made as required by this AGREEMENT, if any portion of this AGREEMENT is declared to be invalid or unenforceable, such portion shall be deemed severed from this AGREEMENT, and the remaining parts shall remain in full force and effect as if the invalid or unenforceable portion had not been part of this AGREEMENT.

17. **Agreement Voluntary.** The PARTIES acknowledge that they have carefully read this AGREEMENT and that they execute this AGREEMENT of their own free will, after having a reasonable period of time to review, study and deliberate regarding its meaning and effect, and after being advised to and in fact consulting with an attorney, and without reliance on any representation of any kind or character not expressly set forth herein. Finally, they execute this AGREEMENT fully knowing its effect and voluntarily for the considerations stated above.

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KIAWAH ISLAND UTILITY, INC.

By: KB Michael

Name: KIRK B. MICHAEL

Title: CHIEF FINANCIAL OFFICER

Date: MARCH 16, 2020

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MEARS GROUP, INC.

By: _____

Name: Steven J. Wilhelm

Title: Executive Vice President

Date: March 12, 2020

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WESTPORT INSURANCE CORPORATION

By: _____

Name: ZENON PEREZ

Title: PROPERTY CLAIMS EXPERT

Date: MAR/12/20

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SWISS RE INTERNATIONAL SE

By:		
Name:	DEBRA WOODS	JONATHAN SARGENT
Title:	CLAIMS EXPERT	HEAD CLAIMS UK
Date:	11/3/2020	11/3/2020

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CHUBB UNDERWRITING AGENCIES LIMITED FOR AND ON BEHALF OF SYNDICATE 2488, THE SUCCESSOR OF SYNDICATE 1882

By: Scampbell-Clark

Name: SUSAN CAMPBELL-CLARK

Title: TECHNICAL CLAIMS MANAGER - LONDON PROPERTY.

Date: 12/3/2020.

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EXHIBIT "A"

Parties	Policy Numbers (if applicable)	Payment in USD
Kiawah Island Utility, Inc.		$2,400,000.00
Swiss Re International SE	B0180ME1504780	$450,000.00
Chubb Underwriting Agencies Limited for and on behalf of Syndicate 2488, the successor of Syndicate 1882	B0180ME1504780	$450,000.00
Westport Insurance Corporation	NAP200007802	$700,000.00
TOTAL		**$4,000,000.00**

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EXHIBIT B

Payee Name:	Mears Group, Inc.
Bank Name:	Bank of America
Bank Address:	Dallas, Texas
Bank Contact person:	Ricardo Aguirre
Bank Telephone Number:	888-715-1000 ext 20772
SWIFT:	BOFAUS3N
Routing ABA#:	[redacted]
Account:	[redacted]

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

MEARS GROUP, INC.,	)	
	)	
Plaintiff,	)	
	)	No. 2:17-cv-02418-DCN
vs.	)	
	)	**ORDER**
KIAWAH ISLAND UTILITY, INC.,	)	
	)	
Defendant.	)	
	)	

The following matter is before the court on plaintiff Mears Group, Inc.'s ("Mears") partial motion for summary judgment, ECF No. 18, and defendant Kiawah Island Utility, Inc's ("KIU") cross-motion for summary judgment, ECF No. 25. For the reasons set forth below, the court grants in part and denies in part Mears's partial motion for summary judgment and denies KIU's cross-motion for summary judgment.

I. BACKGROUND

This case arises out of the construction of a pipeline running from Kiawah Island to Johns Island ("the Project"). KIU, the owner of the Project, entered into a contract ("the Contract") with Mears to construct the pipeline. The Project consisted of using horizontal directional drilling to bore an underground hole and then pulling pipe through the hole. During this process, the pipe got stuck in the borehole, and Mears's work was lost. As a result, Mears had to drill a second borehole and install a new section of pipeline.

Mears presented a claim for the lost work to KIU to be submitted to KIU's builder's risk insurance carrier. Mears contends that the Contract required KIU to obtain builder's risk insurance and name Mears as a loss payee. KIU disputes whether the

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Contract required KIU to provide builder's risk insurance for the Project, but regardless, KIU submitted Mears's claim under a property insurance policy held by KIU's parent, SouthWest Water Company. That policy is supplied by Westport Insurance Corporation ("Westport"). KIU also demanded that Mears submit a claim to its own builder's risk insurance carrier, which KIU claims that Mears still has not done. KIU explains that Westport denied the claim, saying that (1) the Contract required Mears, not KIU, to obtain builder's risk insurance, and (2) the cause of the lost work was a result of Mears's faulty workmanship, which is excluded from coverage. Westport determined that KIU's policy was "excess to" any of Mears's insurance policies, meaning KIU's policy would not pay until Mears's insurance policies limits are exhausted. ECF No. 18 at 9. Mears alleges that as a result of KIU's failure to procure builder's risk insurance, Mears was not provided the builder's risk insurance coverage it bargained for and has now suffered over $7 million of damages, the amount of money it cost Mears to re-drill the second borehole and obtain additional pipe.

The dispute in this case centers around the Contract itself. The parties used a standard Engineers Joint Contract Documents Committee ("EJCDC") form to draft the Contract. The Contract consists of, among other documents, (1) General Conditions, (2) Supplementary Conditions, and (3) Special Conditions. The General Conditions contain form contract language, while the Supplementary Conditions amend or supplement the General Conditions. The Special Conditions provide additional conditions to the Contract, but whether they supersede the General Conditions or merely add to them is at issue here.

EXCERPTS OF PLAINTIFF'S SUPPLEMENTAL PRODUCTION 2022-March 30 April 1 2022 AM MS SPS CD 2021-3 2017 MS 32 Page 44 of 179

The first set of clauses relevant here are in the General Conditions. Article 5.06, with emphasis added by Mears, states:

5.06. Property Insurance

A. Unless otherwise provided in the Supplementary Conditions, **Owner shall purchase and maintain property insurance upon the Work at the Site in the amount of the full replacement cost thereof** (subject to such deductible amounts as may be provided in the Supplementary Conditions or required by Laws and Regulations). **This insurance shall:**

1. include the interests of Owner, Contractor, Subcontractors, and Engineer, and any other individuals or entities identified in the Supplementary Conditions, and the officers, directors, members, partners, employees, agents, consultants, and subcontractors of each and any of them, **each of whom is deemed to have an insurable interest and shall be listed as a loss payee;**

2. **be written on a Builder's Risk "all-risk" policy form that shall at least include insurance for physical loss or damage to the Work,** temporary buildings, falsework, and materials and equipment in transit, and shall insure against at least the following perils or causes of loss: fire, lightning, extended coverage, theft, vandalism and malicious mischief, earthquake, collapse, debris removal, demolition occasioned by enforcement of Laws and Regulations, water damage (other than that caused by flood), and such other perils or causes of loss as may be specifically required by the Supplementary Conditions.

3. **include expenses incurred in the repair or replacement of any insured property (including but not limited to fees and charges of engineers and architects);**

4. **cover materials and equipment stored at the Site or at another location that was agreed to in writing by Owner prior to being incorporated in the Work,** provided that such materials and equipment have been included in an Application for Payment recommended by Engineer; . . . .

ECF No. 18-1 at 73. The second relevant provision in the General Conditions, with emphasis added by Mears, is as follows:

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5.07 Waiver of Rights

> A. **Owner and Contractor intend that all policies purchased in accordance with Paragraph 5.06 will protect Owner, Contractor,** Subcontractors, and Engineer, and all other individuals or entities identified in the Supplementary Conditions as loss payees (and the officers, directors, members, partners, employees, agents, consultants, and subcontractors of each and any of them) in such policies and **will provide primary coverage for all losses and damages caused by the perils or causes of loss covered thereby.** All such policies shall contain provisions to the effect that in the event of payment of any loss or damage the insurers will have no rights of recovery against any of the insureds or loss payees thereunder. Owner and Contractor waive all rights against each other and their respective officers, directors, members, partners, employees, agents, consultants and subcontractors of each and any of them for all losses and damages caused by, arising out of or resulting from any of the perils or causes of loss covered by such policies and any other property insurance applicable to the Work; and, in addition, waive all such rights against Subcontractors and Engineer, and all other individuals or entities identified in the Supplementary Conditions as loss payees (and the officers, directors, members, partners, employees, agents, consultants, and subcontractors of each and any of them) under such policies for losses and damages so caused. None of the above waivers shall extend to the rights that any party making such waiver may have to the proceeds of insurance held by Owner as trustee or otherwise payable under any policy so issued.

Id. at 74. Mears also cited to Section 5.04 of the General Conditions at the hearing on the motions, which provides:

5.04 Contractor's Insurance

> A. Contractor shall purchase and maintain such insurance as is appropriate for the Work being performed and as will provide protection from claims set forth below which may arise out of or result from Contractor's performance of the Work and Contractor's other obligations . . .
>
> 5. claims for damages, **other than to the Work itself**, because of injury to or destruction of Tangible property wherever located, including loss of use resulting therefrom . . . .

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Id. at 72 (emphasis added by the court). Mears explained that "the Work itself" falls under the coverage of builder's risk insurance. Hearing Tr. 7:11–17. The final General Conditions clause relevant here is relied upon by KIU and is as follows:

> 5.03 Certificates of Insurance
>
> A. Contractor shall deliver to Owner, with copies to each additional insured and loss payee identified in the Supplementary Conditions, certificates of insurance (and other evidence of insurance requested by Owner or any other additional insured) which Contractor is required to purchase and maintain.
>
> B. Owner shall deliver to Contractor, with copies to each additional insured and loss payee identified in the Supplementary Conditions, certificates of insurance (and other evidence of insurance requested by Contractor or any other additional insured) which Owner is required to purchase and maintain.
>
> C. Failure of Owner to demand such certificates or other evidence of Contractor's full compliance with these insurance requirements or failure of Owner to identify a deficiency in compliance from the evidence provided shall not be construed as a waiver of Contractor's obligation to maintain such insurance.

Id. at 71.

The Supplementary Conditions contain additional insurance coverage requirements for Mears. Specifically, they require that Mears provide and maintain commercial general liability insurance, business automobile liability insurance, worker's compensation insurance, and umbrella excess liability insurance, as well as requiring Mears to provide certificates of insurance and the required endorsements to KIU. Id. at 125–26.

The only Special Condition discussed by the parties requires Mears to obtain certain insurance. It states as follows:

> SC-7 CONTRACTOR'S AND SUBCONTRACTOR'S INSURANCE: The Contractor shall not commence work under this contract until obtaining all

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> the insurance required under this paragraph and such insurance has been accepted by the Owner, nor shall the Contractor allow any Subcontractor to commence work on a subcontract until the insurance required of the Subcontractor has been so obtained and accepted.
>
> a. Builder's Risk Insurance (Fire and Extended Coverage): The Contractor shall have adequate fire and standard extended coverage, with a company or companies acceptable to the Owner, in force on the project. The provisions with respect to Builder's Risk Insurance shall in no way relieve the Contractor of its obligation of completing the work covered by the Contract.
>
> b. Proof of Carriage of Insurance: The Contractor shall furnish the Owner with certificates showing the type, amount, class of operations, effective dates, and date of expiration of policies. Whenever possible, such certificates shall contain substantially the following statement: "The insurance covered by this certification shall not be cancelled or materially altered, except after ten (10) days written notice has been received by the Owner."
>
> c. Other insurance requirements are listed in the supplementary conditions.

Id. at 118. Finally, as a general matter, the Contract indicates that it "is to be governed by the law of the state in which the Project is located," which is South Carolina. Id. at 116.

Mears filed the instant suit on September 8, 2017 alleging KIU breached the Contract by failing to obtain builder's risk insurance and seeking a declaratory judgment that KIU failed to comply with its insurance obligations. Mears subsequently filed its motion for partial summary judgment[1] on its claim for declaratory judgment and breach of contract claim on August 3, 2018. ECF No. 18. KIU responded to the motion on August 31, 2018, ECF No. 21, to which Mears replied on September 14, 2018, ECF No. 26. KIU separately filed a cross-motion for summary judgment on September 10, 2018. ECF No. 25. Mears responded to KIU's cross-motion on September 24, 2018, ECF No.

[1] Mears titles its motion as one for "partial" summary judgment, but it seeks summary judgment on both of its two causes of action—breach of contract and declaratory judgment.

33, and KIU replied on October 4, 2018, ECF No. 36. The court held a hearing on the motions on January 16, 2019. The motions are now ripe for the court's review.

II. STANDARD

Summary judgment shall be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. at 248. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249. The court should view the evidence in the light most favorable to the non-moving party and draw all inferences in its favor. Id. at 255.

III. DISCUSSION

The arguments made in the briefing on Mears's motion for partial summary judgment and the briefing on KIU's cross-motion for summary judgment are largely the same. In Mears's motion for partial summary judgment, Mears argues that the Contract clearly requires KIU to obtain primary builder's risk insurance naming Mears as a loss

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payee. Mears notes that this requirement, found in the General Conditions, is subject to additional Supplementary Conditions, but it then explains that none of the Supplementary Conditions in the Contract alter KIU's obligation to obtain primary builder's risk insurance. Moreover, Mears asserts that while the Special Conditions do require Mears to obtain a type of builder's risk insurance, the requirement only applies to fire and extended coverage builder's risk insurance and does not supersede the General Condition requirement that KIU obtain primary builder's risk insurance.

KIU responds with an alternative interpretation of the Contract. KIU contends that while the General Conditions do contain a clause requiring KIU to obtain primary builder's risk insurance, the Special Condition clause either (1) supersedes the clause requiring KIU to obtain builder's risk insurance, meaning Mears was the only party required to obtain builder's risk insurance, or (2) contradicts the General Conditions clause, leaving the Contract ambiguous and allowing introduction of parol evidence, which shows that Mears was the party required to obtain builder's risk insurance. KIU also asserts that Mears waived its right to demand insurance coverage because Mears did not demand that KIU provide Mears with certificates of insurance prior to beginning work on the Project. Finally, KIU argues that regardless of KIU's insurance obligation under the Contract, Mears cannot succeed in this action because Mears's $7 million worth of damage was a result of Mears's faulty workmanship, which is excluded from KIU's insurance coverage.

KIU's cross-motion for summary judgment reiterates its contract interpretation and waiver arguments in its response to Mears's partial motion for summary judgment. Namely, KIU argues that the Special Conditions supersede the General Conditions.

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Alternatively, KIU contends that because the Special Conditions and General Conditions conflict, the Contract is ambiguous and extrinsic evidence proves Mears intended to provide builder's risk insurance. Finally, KIU argues that Mears waived its right to demand that KIU provide builder's risk insurance. In response, Mears incorporates the responses it made to these arguments in previous briefing. Mears also argues that KIU improperly discusses extrinsic evidence because the Contract is unambiguous, but that if the court finds that the Contract is ambiguous, then the matter is not proper for summary judgment.

Because the issues in both the motion for partial summary judgment and cross-motion for summary judgment are the same, the court will consider the two motions together, asking whether full or partial summary judgment in favor of either party is currently appropriate. The court finds that the Contract unambiguously requires KIU to obtain primary builder's risk insurance and grants summary judgment as to Mears's declaratory judgment claim. The court denies summary judgment as to Mears's breach of contract claim because there is a genuine issue of material fact as to whether KIU's contract breach caused Mears to be damaged, and the court denies KIU's cross-motion for summary judgment.

A. Relationship between Special Conditions and General Conditions

The key issue in this dispute is the relationship between the General Conditions and the Special Conditions. Unfortunately, the Contract does not explain the relationship between the General Conditions and the Special Conditions. Mears asserts that Article 5.06 of the General Conditions unambiguously establishes that KIU is responsible for obtaining primary builder's risk insurance, and that Special Condition SC-7 ("SC-7")

provides an additional requirement that Mears obtain adequate fire and standard extended builder's risk insurance coverage. In opposition, KIU argues that Special Condition SC-7 supersedes the General Conditions, making Mears the sole party responsible for obtaining builder's risk insurance. Alternatively, KIU contends that SC-7 and the General Conditions conflict, making the Contract ambiguous. Therefore, the question before the court is whether the Special Conditions add to the General Conditions, supersede the General Conditions, or conflict with the General Conditions. The court finds the Special Conditions add to the General Conditions, meaning that under the Contract, KIU was responsible for obtaining primary builder's risk insurance, and Mears was required to obtain additional fire and extended coverage builder's risk insurance.

A federal court sitting in diversity should use the federal summary judgment standard involving contract interpretation and ambiguity. See World-Wide Rights Ltd. P'ship v. Combe Inc., 955 F.2d 242, 245 (4th Cir. 1992); Monsanto Co. v. ARE-108 Alexander Road, LLC, 632 F. App'x 733, 736 (4th Cir. 2015); Keystone Ne., Inc. v. Keystone Retaining Wall Sys., LLC, 2015 WL 1186398, at *6 (D.S.C. March 16, 2015), amended on reconsideration on other grounds, 2015 WL 1400102 (D.S.C. March 25, 2015). "A court faces a conceptually difficult task in deciding whether to grant summary judgment on a matter of contract interpretation." World-Wide Rights Ltd. P'ship, 955 F.2d at 245. The court must first determine if the contract at issue is ambiguous. Id. If "the contract is unambiguous on the dispositive issue," it may grant summary judgment. Id. However, if the court determines that the contract is ambiguous, "it may yet examine evidence extrinsic to the contract that is included in the summary judgment materials, and, if that evidence is, as a matter of law, dispositive of the interpretive issue, grant

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summary judgment on that basis." Id. (citing Jaftex Corp. v. Aetna Cas. and Surety Co., 617 F.2d 1062, 1063 (4th Cir. 1980)).[2] But if the review of the extrinsic evidence still "leaves genuine issues of fact respecting the contract's proper interpretation, summary judgment must of course be refused and interpretation left to the trier of fact." Id. "Therefore, summary judgment is appropriate when the contract in question is unambiguous or when an ambiguity can be definitively resolved by reference to extrinsic evidence." Washington Metro. Area Transit Auth. v. Potomac Inv. Properties, Inc., 476 F.3d 231, 235 (4th Cir. 2007).

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[2]This is the opposite of South Carolina law. Under South Carolina law, if a court finds a contract to be ambiguous within the four corners of the contract, it must deny summary judgment. S.C. Dep't of Nat. Res. v. Town of McClellanville, 550 S.E.2d 299, 303 (S.C. 2001). The parties disagree on whether federal or state law should be used, and the District Court of South Carolina has been inconsistent in which law it applies on this issue. Some cases use the federal standard and consider extrinsic evidence when the contract is ambiguous. Seventeen S., LLC v. D.R. Horton, Inc., 2016 WL 2610075, at *3 (D.S.C. May 6, 2016); Keystone Ne., Inc., 2015 WL 1186398, at *6; Hansa Meyer Transport GMBH & Co. v. Norfolk S. Ry. Co., 2008 WL 341541, at *9–10 (D.S.C. Feb. 5, 2008). Other cases use South Carolina law to deny summary judgment when the contract is ambiguous and do not consider extrinsic evidence. Osborn v. Univ. Med. Assocs. of Med. Univ. of S.C., 278 F. Supp. 2d 720, 738 (D.S.C. 2003); Seventeen S., LLC v. D.R. Horton, Inc., 2015 WL 337639, at *12 (D.S.C. Jan. 26, 2015); Harbour Town Yacht Club Boat Slip Owners' Ass'n v. Safe Berth Mgmt., Inc., 421 F. Supp. 2d 908, 913 (D.S.C. 2006). In particular, Osborn, 278 F. Supp. 2d 720, was decided by this court.

The court believes this inconsistency arises because it is unclear whether the automatic denial of summary judgment with ambiguous contracts is substantive or procedural under Erie principles. Despite this inconsistency, the court finds this standard to be procedural, and therefore it is proper to use the federal standard articulated by the Fourth Circuit and consider extrinsic evidence if such evidence definitively resolves the ambiguity. Moreover, the Fourth Circuit has continued to employ federal law on this specific issue. See Washington Metro. Area Transit Auth. v. Potomac Inv. Props., Inc., 476 F.3d 231, 235 (4th Cir. 2007) ("[S]ummary judgment is appropriate when the contract in question is unambiguous or when an ambiguity can be definitively resolved by reference to extrinsic evidence."); Sheridan v. Nationwide Ret. Sols., 313 F. App'x 615, 619 (4th Cir. 2009) (vacating summary judgment because the contract at issue was ambiguous and noting while the court may consider extrinsic evidence, it declined to do so here because the parties both took the position that the contract was unambiguous).

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1. Ambiguity

The Contract is governed by South Carolina law, which is used to determine whether a contract is ambiguous. "A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation." S.C. Dep't of Nat. Res. v. Town of McClellanville, 550 S.E.2d 299, 302 (S.C. 2001). Ambiguity exists when considering multiple provisions of a contract together leads to multiple reasonable interpretations. See Hardy v. Aiken, 631 S.E.2d 539, 541–42 (S.C. 2006) (finding a restrictive covenant to be ambiguous because its amendment provision permitted any changes to the covenant while the restrictive covenant itself clearly stated that it expired in twenty-five years and contained no express provision allowing to extend the duration); Cmty. Servs. Assocs., Inc. v. Wall, 808 S.E.2d 831, 836 (S.C. Ct. App. 2017) (finding that the meaning of two paragraphs in a restrictive covenant was ambiguous because they could reasonably be interpreted together to have two different meanings); W. Anderson Water Dist. v. City of Anderson, 790 S.E.2d 204, 208 (S.C. Ct. App. 2016) (finding that "two provisions, considered together, render[ed] the contract reasonably susceptible to at least two interpretations," making the contract ambiguous).

Additional principles of South Carolina contract interpretation dictate that contracts "will be interpreted so as to give effect to all of their provisions, if practical." Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime, 494 S.E.2d 465, 468 (S.C. Ct. App. 1997) (citing 17A Am. Jur. 2d Contracts § 385 (1991)). As such, "[i]t is fundamental that, in the construction of the language of a contract, it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning." Bluffton

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Towne Ctr., LLC v. Gilleland-Prince, 772 S.E.2d 882, 890 (S.C. Ct. App. 2015) (quoting Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 649 S.E.2d 494, 498–99 (S.C. Ct. App. 2007)). "In construing and determining the effect of a written contract, the intention of the parties and the meaning are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument." Silver v. Aabstract Pools & Spas, Inc., 658 S.E.2d 539, 542 (S.C. Ct. App. 2008) (quoting McPherson v. J.E. Sirrine & Co., 33 S.E.2d 501, 509 (S.C. 1945)). If a contract is unambiguous, a court must enforce it "according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." S.C. Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 667 S.E.2d 7, 13 (S.C. Ct. App. 2008).

KIU first argues that SC-7, which contains Mears's requirement to obtain builder's risk insurance, supersedes Article 5.06 of the General Conditions, which requires KIU to obtain primary builder's risk insurance. It is not apparent by the text of SC-7 that it is meant to supersede the General Conditions because there is no language in SC-7 explicitly saying so. KIU argues that "[a] reading of the Special Conditions establishes that the Special Conditions are meant to alter, and take precedence over, the General Conditions." ECF No. 21 at 5. KIU points to SC-8, which is a hold-harmless provision that states that the indemnification clause in the General Conditions "shall exclusively govern," to show that the Special Conditions instruct when General Conditions are meant to control. Id. KIU notes that SC-7 does not refer to Article 5.06. As such, KIU argues that because there is no indication that Article 5.06 takes precedence over SC-7, the inverse is true and SC-7 takes precedence over Article 5.06. However,

there is a third possibility—that the SC-7 and Article 5.06 should be considered together. Indeed, just as KIU argues that Article 5.06 does not take precedence over SC-7 because it does not explicitly say so, it is equally plausible that SC-7 cannot take precedence over Article 5.06 without explicitly stating so.

To support its interpretation that SC-7 supersedes Article 5.06, KIU argues that the Special Conditions modify the Supplementary Conditions, which modify the General Conditions. Applying this theory to this case, KIU argues that SC-7 modifies the insurance requirements in the Supplementary Conditions. The problem with this theory is that the insurance requirements in the Supplementary Conditions do not modify or even address the requirement that KIU obtain primary builder's risk insurance in the General Conditions. The Supplementary Conditions that relate to Mears's insurance obligations require Mears to have commercial general liability insurance, business automobile liability insurance, worker's compensation insurance, and umbrella excess liability insurance, as well as requiring Mears to provide certificates of insurance and the required endorsements to KIU prior to commencing work. ECF No. 18-1 at 124–26. But none of these requirements alter KIU's obligation to obtain builder's risk insurance pursuant to Article 5.06. Indeed, KIU's modification theory supports the finding that KIU is required to obtain primary builder's insurance, in addition to Mears obtaining the insurance listed in the Supplementary Conditions and the fire and extended coverage builder's risk insurance per SC-7.

In arguing that SC-7 supersedes Article 5.06, KIU interprets SC-7 to require builder's risk insurance <u>including</u> fire and extended coverage in an attempt to show that

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SC-7 isn't just an additional requirement that Mears obtain a specific type of builder's risk insurance. The court disagrees with this interpretation. SC-7 states:

> Builder's Risk Insurance (Fire and Extended Coverage): The Contractor shall have adequate fire and standard extended coverage, with a company or companies acceptable to the Owner, in force on the project.

ECF No. 18-1 at 118. KIU's interpretation may be reasonable when viewing the title of the clause in isolation. However, the language of the clause provides clarification of the title. The clause states "[t]he Contractor shall have adequate fire and standard extended coverage, with a company or companies acceptable to the Owner, in force on the project." This language is specific to fire and standard extended coverage, not builder's risk insurance in general.

Reviewing other related General Conditions and Special Conditions together indicates that there may be instances where the Special Conditions provide a more specific requirement that supersedes a general requirement in the General Conditions, which is what KIU argues occurs between Article 5.06 and SC-7. For example, Article 2.03 in the General Conditions, titled "Commencement of Contract Times; Notice to Proceed" explains that the Contract Times will begin "to run on the thirtieth day after the Effective Date of the Agreement, or, if a Notice to Proceed is given, on the day indicated in the Notice to Proceed." ECF No. 18-1 at 60. Article 2.04 explains that "Contractor shall start to perform the Work on the date when the Contract Times commence to run." Id. at 61. The corresponding Special Condition, SC-2, states that "[t]he Contractor shall commence work when the Notice of Proceed is issued." Id. at 117. The more general Article 2.03 provided several options for when Contract Times begin, resulting in the Contractor starting the Work, and the more specific SC-2 provides a precise indication of when the Contractor should begin work. As such, the Contractor could not argue that it

was to start work on the thirtieth day after the Effective Date of the Agreement, as provided in the General Conditions, because the Special Conditions more narrowly require that the Contractor must begin work when the Notice of Proceed is issued.

Another example of the relationship between the General Conditions and Special Conditions relates to the definition of the work to be done under the Contract. Article 1.01(a)(50) defines "Work" as:

> The entire construction or the various separately identifiable parts thereof required to be provided under the Contract Documents. Work includes and is the result of performing or providing all labor, services, and documentation necessary to produce such construction, and furnishing, installing, and incorporating all materials and equipment into such construction, all as required by the Contract Documents.

Id. at 58. Given the vagueness of this description, SC-1 provides that "[t]he work consists of installation of approximately 6,300 linear foot 16-inch water main (DIP and PVC), one master metering station and associated appurtenance, incidental construction in accordance with the plans and specifications, and coordination with the directional drill contractor." Id. at 117. Here, the Special Conditions provide greater specificity about the work to be completed under the Contract. It does not necessarily supersede the description of Work in the General Conditions but instead provides more detail as to the type of Work required by the Contract.

While these particular Special Conditions appear to narrow their corresponding General Conditions or provide more specific detail, they do not completely contradict or entirely replace the General Conditions as KIU claims that SC-7 does with Article 5.06. Indeed, at the hearing on the motions, counsel for KIU admitted that there are no other Special Conditions that completely negate a General Condition.

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KIU also argues that it would be illogical for two parties on a construction project to each purchase builder's risk insurance. As such, KIU argues that giving effect to both SC-7 and Article 5.06 would be unreasonable. However, as counsel for Mears clarified at the hearing, both parties generally have builder's risk insurance, and the purpose of contracting about the issue is to determine which party's builder's risk insurance is primary, and which is secondary. Hearing Tr. 5:4–20. Therefore, it is possible to give effect to both SC-7 and Article 5.06, which would require both KIU and Mears to obtain some sort of builder's risk insurance but designates KIU's builder's risk insurance as primary.

KIU also argues about the process of the contract formation. It explains that the General Conditions are in a PDF format, and that parties edit the General Conditions through the editable Microsoft Word versions of the Supplementary Conditions and Special Conditions, meaning that the Special Conditions should control over the General Conditions. However, when determining whether a contract is ambiguous, the court may only look at the four corners of the contract. See Silver, 658 S.E.2d at 542. Therefore, the court cannot consider this process and must only look to the Contract itself.

In conclusion, the court finds that the Contract can only reasonably be interpreted in one manner—requiring KIU to obtain primary builder's risk insurance through Article 5.06 and additionally requiring Mears to obtain builder's risk insurance for fire and extended coverage through SC-7. Therefore, the court grants summary judgment on Mears's declaratory judgment claim.

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B. Whether Mears Waived its Right to Demand Insurance Coverage

KIU also argues that Mears waived any potential right it had to demand insurance coverage from KIU. To support its argument, KIU cites to language in the Contract that requires Mears and KIU to deliver certificates of insurance to each other and that states that KIU's failure to demand insurance certificates from Mears does not waive Mears's obligation to maintain insurance. See ECF No. 18-1 at 71. KIU highlights that there is no similar clause protecting Mears if it fails to demand KIU's insurance certificates. KIU never produced a certificate of insurance to Mears, and given the absence of such provision, KIU claims that Mears's failure to demand KIU's insurance certificate waived Mears's right to demand coverage in the instant case.

Mears disagrees with this interpretation. First, Mears explains that the Contract did not require Mears to demand insurance certificates from KIU nor did it entitle Mears to demand such certificates. Mears then points out that KIU breached the contract by not delivering its insurance certificates to Mears and claims that KIU is now trying to benefit from its breach by "impos[ing] an implicit duty on Mears to demand a [certificate of insurance] from KIU." ECF No. 26 at 10. Moreover, Mears explains that the law of waiver requires the voluntary and intentional abandonment of a known right, but KIU provides no evidence that Mears voluntarily and intentionally abandoned its right to enforce the Contract.

KUI's argument asks the court to infer Mears's waiver based on the absence of contractual language. In essence, KIU argues that because there is no clause stating that Mears's failure to demand KIU's insurance certificates shall not be construed as a waiver, then Mears's failure to demand KIU's certificates must be construed as a waiver. The

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language of the Contract simply does not support this conclusion. As such, the court denies summary judgment as to this issue.

C. Whether Builder's Risk Insurance Covers the Loss Claimed by Mears

KIU's final argument is that the loss at issue here was caused by Mears's faulty workmanship, which is not covered by KIU's builder's risk insurance policy. As such, KIU claims that Mears has not suffered damage from KIU failing to obtain builder's risk insurance, because even if KIU provided coverage, Mears's loss would not be covered. Mears's response to this argument makes clear that it does not agree that faulty workmanship was the cause of the loss, but Mears also explains that this issue is not pertinent to its partial motion for summary judgment specifically on the issue of contract interpretation.

This issue relates to Mears's breach of contract claim. The elements of an action for breach of contract are (1) the existence of a contract; (2) the contract's breach; and (3) damages caused by such breach. Allegro, Inc. v. Scully, 791 S.E.2d 140, 146 (S.C. 2016). KIU is arguing that Mears has failed at establishing the third element because Mears's damage was caused by Mears's faulty workmanship, not by a breach of the Contract. Mears was damaged because Westport, the insurance company of KIU's parent company, refused primary coverage for the $7 million loss. Westport denied coverage for two reasons. Westport determined that (1) KIU was not obligated to provide builder's risk insurance under the Contract; and (2) the loss was caused by Mears's faulty workmanship, which is not covered by KIU's insurance policy. Based on the parties' arguments about contract interpretation, the court finds that KIU did breach the Contract

by failing to procure primary builder's risk insurance. But that only addresses the first reason why Westport denied coverage, which resulted in Mears's damage.

Indeed, Mears's breach of contract claim is only premised on KIU's failure to procure insurance, not on Westport's decision to deny coverage. Mears alleges that "KIU breached the Contract with Mears by failing to procure a primary builder's risk 'all risk' policy to cover the loss." Compl. ¶ 39. Mears then alleges that "[a]s a result of KIU's breach of contract, Mears has been damaged in the amount of $7,040,105 or such other amount as may be proved at trial." Id. ¶ 40 (emphasis added). However, Mears was damaged because Westport denied coverage for two reasons, one of which being that Westport found that the pipeline loss was caused by Mears's faulty workmanship. Here, there is still an issue of material fact as to whether Westport properly denied coverage due to Mears's faulty workmanship. There is a possibility that even if KIU procured primary builder's risk insurance, the insurance would not have covered the $7 million damage because it was caused by Mears's faulty workmanship. If that were the case, then Mears's damage would not be caused by KIU's breach of contract but instead by Mears's faulty workmanship.

Mears explains that for the purposes of its motion, "[w]hether such a policy would have included an exclusion for faulty workmanship, the scope of any such exclusion, whether Mears engaged in faulty workmanship, and the extent of Mears' damages" are separate and irrelevant issues. ECF No. 26 at 12. However, these issues are relevant to the breach of contract claim on which Mears seeks summary judgment, because they go to show what caused Mears to be damaged.

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KIU presents evidence that Mears's workmanship was faulty and therefore not covered by insurance, but it does so only in its response to Mear's motion and in arguing that Mears is not entitled to summary judgment on the breach of contract claim. Because KIU did not argue that Mears's damage was caused by faulty workmanship in its motion for summary judgment, the court cannot grant KIU summary judgment on the breach of contract claim based on the cause of Mears's damage. In response to KIU's argument that Mears's workmanship was faulty, Mears states that it "disagrees with much of what KIU argues" but nevertheless Mears's workmanship is a factual issue "that has nothing to do with Mears' motion." ECF No. 26 at 12. Therefore, there is a genuine issue of material fact as to whether Mears engaged in faulty workmanship that would not have been covered by insurance and caused the $7 million of damage. Mears asks the court to "decide the narrow issue of contractual interpretation," id., so the court will do just that and only hold that the Contract required KIU to procure primary builder's risk insurance. As such, the court denies summary judgment for the breach of contract claim.

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IV. CONCLUSION

For the reasons set forth above, the court **GRANTS IN PART** and **DENIES IN PART** Mears's motion for partial summary judgment and **DENIES** KIU's cross-motion for summary judgment.

AND IT IS SO ORDERED.

DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

March 8, 2019
Charleston, South Carolina

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

KIAWAH ISLAND UTILITY, INC.,	)	
	)	
Plaintiff,	)	
	)	No. 2:19-cv-1359-DCN
vs.	)	
	)	**ORDER**
WESTPORT INSURANCE CORPORATION, SWISS RE INTERNATIONAL SE, LLOYD'S SYNDICATE 1882 CHB, and MEARS GROUP INC.,	)	
	)	
Defendants.	)	

This matter is before the court on defendant Westport Insurance Corporation's ("Westport") motion to dismiss, ECF No. 23. For the reasons set forth below, the court denies the motion to dismiss.

I. BACKGROUND

Westport provided property and business interruption insurance coverage to plaintiff Kiawah Island Utility, Inc. ("KIU") from September 1, 2015 to September 1, 2016. KIU entered into a contract ("the Contract") with defendant Mears Group Inc. ("Mears") to install an underground pipeline running from Kiawah Island to Johns Island ("the Project"). The Project consisted of using horizontal directional drilling to bore an underground hole and then pulling pipe through the hole. During this process, the pipe got stuck in the borehole, and Mears's work was lost. As a result, Mears had to drill a second borehole and install a new section of pipeline. Mears informed KIU that it incurred approximately $7 million to repair and/or replace the damaged pipeline and asked KIU to submit a claim for the loss to KIU's builder's risk insurer. KIU disagreed

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that the Contract required KIU to provide builder's risk insurance for the Project but nevertheless submitted the claim to Westport. Westport denied coverage for the claim.[1]

On September 8, 2017, Mears filed suit against KIU seeking a declaration that KIU was responsible under the Contract for obtaining primary builder's risk insurance and alleging that KIU breached the Contract for failing to do so, causing Mears to suffer $7 million of damages ("the Mears action"). Mears subsequently filed a motion for summary judgment in the Mears action, and in response, KIU raised the argument that even if KIU did breach the Contract by failing to procure builder's risk insurance, Mears was not damaged by the breach because the damage to the pipeline was incurred by Mears's faulty workmanship, which is excluded from coverage under the Policy and under builder's risk insurance policies. The court granted summary judgment on the declaratory judgment cause of action in favor of Mears, holding that the Contract did require KIU to obtain primary builder's risk insurance. The court denied summary judgment as to the breach of contract cause of action, finding that there was a genuine issue of material fact as to whether Mears engaged in faulty workmanship and thus had been damaged by KIU's breach.

[1] The court notes that at the hearing, counsel for Westport sought to clarify the reason why Westport denied coverage. In an order in the Mears action, the court stated that Westport denied coverage because (1) Westport determined that the Westport Policy was excess to any of Mears's insurance policies, and (2) Mears engaged in faulty workmanship, which was excluded from coverage. In its motion to reconsider the court's order, KIU argued that this was a misstatement, but the court rejected the argument based on the arguments that were before it at that time. Westport now asks the court to clarify that Westport solely denied coverage based on faulty workmanship. Because consideration of the issue is not necessary to the court's resolution of the instant motion, the court declines to address the issue now. Counsel can raise the issue again when it becomes relevant to an issue before the court.

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KIU then filed this declaratory judgment action on May 9, 2019 seeking, as to Westport, declarations that the Policy provides coverage for the pipeline damage, that the Policy must provide coverage up to the amount of available coverage, and that any of KIU's liability in the Mears action is covered by the "Insured's Liability" provision of the Policy ("the KIU action"). Westport filed its motion to dismiss on June 25, 2019. ECF No. 23. KIU responded on July 23, 2019, ECF No. 40, and Westport replied on August 6, 2019, ECF No. 52. The court held a hearing on the motion on September 12, 2019. The motion is now ripe for review.

II. STANDARD

A Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted "challenges the legal sufficiency of a complaint." Francis v. Giacomelli, 588 F.3d 186, 192 (4th Cir. 2009) (citations omitted); see also Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992) ("A motion to dismiss under Rule 12(b)(6) . . . does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses."). To be legally sufficient, a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A Rule 12(b)(6) motion should not be granted unless it appears certain that the plaintiff can prove no set of facts that would support his claim and would entitle him to relief. Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993). When considering a Rule 12(b)(6) motion, the court should accept all well-pleaded allegations as true and should view the complaint in a light most favorable to the plaintiff. Ostrzenski v. Seigel, 177 F.3d 245, 251 (4th Cir.1999); Mylan Labs., Inc., 7 F.3d at 1134. "To survive a motion to dismiss, a complaint must contain sufficient factual matter,

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accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

III. DISCUSSION

Westport bases its motion to dismiss on the doctrine of judicial estoppel. Westport argues that in the Mears action, KIU has maintained that Mears engaged in faulty workmanship, and that KIU cannot now switch positions and argue that it is entitled to coverage under the Westport policy because Mears did not engage in faulty workmanship. KIU first responds that Westport's assertions of judicial estoppel is inappropriate at the Rule 12(b)(6) stage of litigation and then argues that judicial estoppel does not apply here. The court addresses each in turn, finding that judicial estoppel generally may be applicable at this stage of litigation but ultimately concluding that it does not apply here. The court then briefly discusses another argument raised by Westport but declines to consider it for procedural reasons.

A. Rule 12(b)(6) Standard

Westport first argues that judicial estoppel is an affirmative defense and can serve as a basis for dismissal under Rule 12(b)(6). KIU disagrees, arguing that judicial estoppel is inappropriate at this early stage of litigation. The question of whether judicial estoppel can be applied when considering a motion to dismiss simply requires the court to refer back to the basic standard of Rule 12(b)(6), namely, that "courts are limited to considering the sufficiency of allegations set forth in the complaint and the 'documents

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attached or incorporated into the complaint.'" Zak v. Chelsea Therapeutics Int'l, Ltd., 780 F.3d 597, 606 (4th Cir. 2015) (quoting E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 448 (4th Cir. 2011). In light of this standard of review, some courts have declined to apply judicial estoppel when considering a 12(b)(6) motion because the court needs more information than can be found in the complaint to determine whether judicial estoppel applies. See, e.g., Brown v. Lieutenant Governor's Office on Aging, 697 F. Supp. 2d 632, 639 (D.S.C. 2010) (finding the issue of judicial estoppel at 12(b)(6) stage of litigation to be inappropriate because it could not be resolved by consideration of the complaint alone). However, other courts have considered judicial estoppel in a 12(b)(6) motion to dismiss when the limited information before the court is sufficient to determine whether judicial estoppel should apply. See, e.g., Briggs v. Newberry Cty. Sch. Dist., 838 F. Supp. 232, 237 (D.S.C. 1992), aff'd, 989 F.2d 491 (4th Cir. 1993) (finding that, while not necessary for disposition of the motion to dismiss, judicial estoppel could be applied).

Here, Westport argues for judicial estoppel using the complaint in this action and various filings in the Mears action. The court can clearly consider the complaint, and Westport contends that the court can consider filings in the Mears action because they are public records. Indeed, at the 12(b)(6) stage, "a court may consider official public records" such as court records. Witthohn v. Fed. Ins. Co., 164 F. App'x 395, 396 (4th Cir. 2006). At the hearing on the motion, KIU agreed that the court can consider the filings in the Mears action in making its determination at this stage of litigation. As such, because the court only needs to consider the complaint and court records from the Mears

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action to determine whether judicial estoppel applies, the court can conduct a judicial estoppel analysis even at this early stage of litigation.

B. Judicial Estoppel

Westport next argues that KIU should be judicially estopped from arguing that Mears did not engage in faulty workmanship because in the Mears action, KIU argued that Mears did engage in faulty workmanship. In response, KIU contends that judicial estoppel is not warranted here because it has merely asserted as Westport's coverage denial based on faulty workmanship as a legal defense in the Mears action, meaning that it is Westport and not KIU's position that Mears engaged in faulty workmanship.

"Judicial estoppel, an equitable doctrine that prevents a party who has successfully taken a position in one proceeding from taking the opposite position in a subsequent proceeding, is recognized to protect the integrity of the judicial system." King v. Herbert J. Thomas Mem'l Hosp., 159 F.3d 192, 196 (4th Cir. 1998). "[T]he doctrine is invoked to prevent a party from 'playing fast and loose with the courts,' from 'blowing hot and cold as the occasion demands,' or from attempting 'to mislead the [courts] to gain unfair advantage.'" Id. (quoting Lowery v. Stovall, 92 F.3d 219, 223, 225 (4th Cir. 1996)). However, "courts must apply the doctrine with caution." John S. Clark Co. v. Faggert & Frieden, P.C., 65 F.3d 26, 29 (4th Cir. 1995). "[I]t has long been the law of this circuit that a court must consider each case's 'specific facts and circumstances' before holding a claim barred by judicial estoppel." Martineau v. Wier, 934 F.3d 385, 394 (4th Cir. 2019). In order for judicial estoppel to apply,

> (1) the party sought to be estopped must be seeking to adopt a position that is inconsistent with a stance taken in prior litigation; (2) the position sought to be estopped must be one of fact rather than law or legal theory; (3) the prior inconsistent position must have been accepted by the court; and (4)

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> the party sought to be estopped must have intentionally misled the court to gain unfair advantage.

Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assur. Co., Inc., 867 F.3d 449, 458 (4th Cir. 2017), cert. denied sub nom. Applied Underwriters Captive Risk Assur. Co. v. Minnieland Private Day Sch., Inc., 138 S. Ct. 926 (2018). The Fourth Circuit has "characterized the final element as 'determinative.'" Id. The court addresses each element in turn, finding that while KIU has taken inconsistent factual positions, judicial estoppel does not apply because the court has not accepted KIU's position in the Mears action.

a. Inconsistent Positions

Westport first argues that KIU is adopting a position in the KIU action that is inconsistent with the position it adopted in the Mears action. Specifically, Westport contends that KIU is now arguing that Mears did not engage in faulty workmanship in order to obtain coverage from Westport when KIU previously argued in the Mears action that Mears did engage in faulty workmanship. In response, KIU argues that it has not taken inconsistent positions because Westport was the party responsible for denying coverage based on faulty workmanship, not KIU. KIU claims that its argument about Mears's faulty workmanship was based on Westport's denial of coverage due to faulty workmanship. KIU maintains that in the Mears action, it "has cited as a legal defense to Mears' allegations of breach of [the Contract] that Westport (not [KIU]) denied coverage . . . based on a faulty workmanship exclusion." ECF No. 40 at 18. To be sure, it was Westport who determined that there was no coverage because Mears engaged in faulty workmanship. And both Mears and KIU both initially challenged that determination,

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with KIU submitting an expert report to Westport that stated that "Mears acted in a prudent manner consistent with the industry standard of care." Compl. ¶ 42.

However, the issue is that KIU took the position that Mears engaged in faulty workmanship on as its own instead of couching its arguments in terms of abiding by Westport's coverage determination. For example, in its opposition to Mears's motion for summary judgment, KIU argued that even if KIU had to obtain builder's risk insurance, the damage would not have been covered by the insurance because "builder's risk insurance does not cover claims where the cause of the damage is faulty workmanship, which is the case here." Def. Opp. To Pl.'s Mot. Partial Summ. J., Mears action, 2:17-cv-02418 (D.S.C. Aug. 31, 2018), ECF No. 21 at 4. KIU did not qualify that assertion with an explanation that it is Westport's position that the cause of damage is faulty workmanship. Similarly, in providing a background of the dispute, KIU explained that "Mears applied excessive pull force on the PVC pipe and broke the pipe while pulling it through the borehole." Id. at 2. Again, this is an assertion by KIU that Mears engaged in faulty workmanship. KIU also claimed that "faulty workmanship caused Mears' alleged damage [and] [a]s a result, whether KIU obtained builder's risk insurance in inconsequential" and that "[b]ecause Mears' own negligence caused the damage it suffered, and because faulty workmanship is excluded from insurance coverage, it is inconsequential whether KIU obtained primary builder's risk coverage on the Project." Id. at 5, 11. These statements are not accompanied with clarification that it is Westport's position that Mears's own negligence caused the damage. As such, the court finds that these assertions belong to KIU.

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Moreover, KIU hired its own expert to form an opinion on whether Mears's workmanship was faulty. The expert, Dr. Bennett, opined that "Mears made mistakes and failed to use good practices in some aspects of its operations on the Kiawah Island Utilities project which caused the failure of the nominal 16-inch diameter DR 14 FPVC pipe." Dr. Bennett Expert Report at 3, Mears action, 17-cv-2418, ECF No. 71-2 at 3. Dr. Bennett concluded that "Mears' mistakes were a breach of the ordinary standard of care in the industry." Id. KIU argues that there is a distinction between whether Mears engaged in faulty workmanship and whether Mears breached the industry standard of care; however, the court is unconvinced by this purported distinction. Both determinations go to the question of whether Mears properly completed its work on the Project. Moreover, KIU equates the issues of standard of care and workmanship in its complaint, stating that KIU "delivered to Westport an expert report from Mears stating Mears acted in a prudent manner consistent with the industry standard of care and, on that basis, asserted the faulty workmanship exclusion did not apply." Compl. ¶ 42 (emphasis added). Thus, KIU's own complaint contradicts its argument. In sum, the record in the Mears action indicates that KIU went beyond simply relying on Westport's determination and instead sought out an expert to opine that Mears did engage in faulty workmanship.

Now, in its complaint in the instant action, KIU alleges that "no exclusion bars coverage" under the Policy, Compl. ¶ 40, meaning that KIU alleges that the faulty workmanship exclusion does not apply. The clear implication of this allegation is that KIU now takes the position that Mears did not engage in faulty workmanship. KIU argues that because its allegation that "no exclusion bars coverage" is "[b]ased on the terms, conditions and definitions of the Westport Policy and information provided by

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Mears", KIU's allegation that the faulty workmanship exclusion does not apply was based on information provided by Mears and Mears's arguments. Regardless, in seeking a declaration that the Westport Policy provides coverage, KIU will have to assert that the faulty workmanship exclusion does not apply, meaning that Mears did not engage in faulty workmanship.

Westport relies on two cases in support of its argument that KIU has taken inconsistent positions. First, in Allen v. Zurich Ins. Co., a plaintiff sought to recover for injuries he sustained while working with the insured. 667 F.2d 1162, 1163–64 (4th Cir. 1982). The defendant's defense was that the plaintiff could not recover under the insured's policy because there was an exclusion for injuries sustained by the insured's employees. The Fourth Circuit held that the plaintiff was judicially estopped from claiming that he was not the insured's employee, which would make the insurance policy's exclusion inapplicable, when the plaintiff previously asserted in a state court case that he was the insured's employee. Id. at 1166–67.

In the second case, Nat'l Union Fire Ins. Co. of Pittsburgh v. Manufacturers & Traders Tr. Co., a former employee of the plaintiff's insured perpetrated a fraudulent scheme in which the employee submitted fraudulent invoices and induced the insured to pay three entities. 137 F. App'x 529, 529 (4th Cir. 2005). The plaintiff insurance company was judicially estopped from asserting that these three entities were "fictitious entities" under section 3-404(b) of the Maryland Commercial Code because the insured "consistently alleged" that the entities were real entities in a state court action "after significant investigation and across multiple amendments to the complaints." Id. at 531.

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Both of these cases provide examples of factually inconsistent positions that are akin to KIU's positions here.

KIU first tries to distinguish these cases by arguing that the finding of judicial estoppel was made either on a motion for summary judgment or after trial. As discussed above, the court has everything before it now to determine whether judicial estoppel applies, meaning that the court can make its finding now. KIU then tries to substantively distinguish the cases, but it does so in a rather conclusory manner by arguing that the cases contain clearly inconsistent positions while KIU's positions are not inconsistent. Based on the discussion above, the court finds that the positions are inconsistent.

b. Fact vs. Law

Next, Westport argues that KIU's inconsistent position is based in fact, not law, because determining whether Mears engaged in faulty workmanship is a question of fact. Westport specifically points to the court's holding in the Mears action that there is a genuine issue of material fact as to whether Mears engaged in faulty workmanship. KIU disagrees, arguing that the issue of whether an insurance policy exclusion applies is a question of law.

Both parties are correct. Whether Mears engaged in faulty workmanship is a factual issue, and whether Westport properly denied coverage is a legal issue. The problem is how the parties are characterizing KIU's position for the purposes of judicial estoppel. Because Westport characterizes the difference in positions as relating to whether Mears engaged faulty workmanship, Westport argues that the issue is a factual one. Because KIU frames the issue as one as to whether Westport properly denied coverage based on the faulty workmanship exclusion, KIU contends that the issue is a

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legal one. The court agrees with Mears's framing of the issue, as the question is whether Mears engaged in faulty workmanship. Therefore, KIU's inconsistent position is one based in fact.

c. Accepted by Court

Westport next argues that this court accepted KIU's position that Mears engaged in faulty workmanship, meaning that KIU must be estopped now from asserting that Mears did not engage in faulty workmanship. "[J]udicial acceptance means only that the first court has adopted the position urged by the party[, either as a preliminary matter or] as part of a final disposition." Lowery, 92 F.3d at 224–25 (quoting Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 n.5 (6th Cir. 1982)). "[A]lthough the party against whom estoppel is being invoked need not have prevailed on the ultimate merits of its case, it must have convinced the judicial or quasi-judicial body to adopt its position." Scott v. Land Span Motor, Inc., 781 F. Supp. 1115, 1120 (D.S.C. 1991). "The insistence upon a court having accepted the party's prior inconsistent position ensures that judicial estoppel is applied in the narrowest of circumstances." Lowery, 92 F.3d at 224.

Westport argues that the court accepted KIU's position that Mears engaged in faulty workmanship by finding that there was a genuine issue of material fact as to whether Mears engaged in faulty workmanship. As Westport points out, the only reason why the court denied summary judgment to Mears's breach of contract claim was because the court found that there was a genuine issue of material fact as to whether Mears was damaged, which is dictated by whether Mears engaged in faulty workmanship.

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The court finds that it has not accepted KIU's position in the sense that is required to apply judicial estoppel here. To be sure, the court gave credence to KIU's position in that the court acknowledged that KIU was arguing that Mears engaged in faulty workmanship, which created a genuine issue of material fact. However, the court did not accept the position because the court did not find that Mears did actually engage in faulty workmanship. To show that the court's "acceptance" of KIU's position for the purpose of finding a genuine issue of material fact is sufficient to invoke judicial estoppel, Westport points to the fact that "the party against whom estoppel is being invoked need not have prevailed on the ultimate merits of its case." Scott, 781 F. Supp. at 1120. However, in Scott, the court discussed adopting a position in terms of adopting the merits of the position, not just the fact that the party was arguing for the position. Moreover, the Scott court ultimately declined to invoke judicial estoppel because the prior proceeding was settled without any determination of the merits, meaning that the plaintiff's position was not "successfully maintained." Id. at 1120. This suggests that the court must adopt the merits of a position, not simply the fact that the position is being argued for.

In addition, the cases cited by Scott discuss judicial estoppel as being "designed to prevent a party from convincing unconscionably one judicial body to adopt factual contentions only to tell another judicial body that those contentions [are] false." Id. (emphasis added) (quoting M. Kramer Manufacturing Company v. Andrews, 783 F.2d 421, 448 n.23 (4th Cir. 1986)); see also id. ("It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter . . . assume a contrary position" (quoting Davis v. Wakelee, 156 U.S. 680, 689 (1895))). These cases suggest that in order for a

court to adopt a position, for the purposes of judicial estoppel, the court must have adopted the merits or facts of the position and not just the fact that the party was taking the position. Indeed, the court has been unable to find any instance in which a court applied judicial estoppel in part because it found that the party's position created a genuine issue of material fact without actually considering the merits of the position.

Westport also relies on language from Scott that explains the judicial estoppel "precludes a contradictory position without examining the truth of either statement." 781 F. Supp. at 1119 (quoting Teledyne Indus., Inc. v. N.L.R.B., 911 F.2d 1214, 1218 (6th Cir.1990)). Westport argues that this language indicates that the court may still find that judicial estoppel applies even though it did not consider the truth of whether or not Mears engaged in faulty workmanship. However, a review of the case quoted by Scott for this proposition reveals that this language simply cautions against the use of judicial estoppel and explains how the requirement of judicial acceptance mitigates a negative aspect of judicial estoppel. In Teledyne Indus., Inc., the Sixth Circuit explained that "[j]udicial estoppel is applied with caution to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement." 911 F.2d at 1218. The court continued, stating that "[f]or example, before the doctrine of judicial estoppel may be invoked, the prior argument must have been accepted by the court" and "[a]lthough this limit allows parties to contradict themselves in court, it threatens only the integrity of the parties, not of the court." Id. As such, "[r]equiring prior judicial acceptance protects the truth-seeking function of the court, while preserving the court's integrity." Id.

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In other words, when judicial estoppel is applied, a court does not have the opportunity to determine which inconsistent position is true. This means that a court may judicially estop a party from asserting a position that is true only because it has already accepted the first position. For this reason, a court's acceptance of a position is required to protect the court's truth-seeking function because once the court accepts one position, judicial estoppel prevents the court from later being faced with another position that casts doubt on the truth of the judicially accepted position. As applied here, judicial estoppel would apply to preclude KIU from asserting that Mears did not engage in faulty workmanship without the court examining the truth of whether or not Mears did in fact engage in faulty workmanship, which provides reason for judicial estoppel being applied with caution. But in doing so, the court still would need to accept KIU's first position, that Mears did engage in faulty workmanship, and the court finds that it has not done so.

Because the requirement of a court's acceptance of an inconsistent position "ensures that judicial estoppel is applied in the narrowest of circumstances," Lowery, 92 F.3d at 224, and because the court is unconvinced here that it has accepted KIU's position as contemplated by the doctrine of judicial estoppel, the court declines to apply judicial estoppel here.

d. Intentionally Misleading

The final, and determinative, element of judicial estoppel is whether KIU intentionally misled the court to gain an unfair advantage. "Without bad faith, there can be no judicial estoppel." Zinkand v. Brown, 478 F.3d 634, 638 (4th Cir. 2007). Because the court finds that judicial estoppel does not apply based on the third element, the court need not consider this element.

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C. Insured's Liability Provision

In a footnote at the end of its motion to dismiss, Westport also argues that judicial estoppel applies to KIU's allegation that any liability of KIU in the Mears action is covered by the "Insured's Liability" provision of the Policy. In response, KIU contends that Westport fails to identify any legal argument as to why judicial estoppel would apply to this claim. Westport then argues in reply that the court should dismiss KIU's claim regarding the "Insured's Liability" provision as not being ripe for adjudication.

Because the court finds that judicial estoppel does not apply here, the court can easily dispose of the argument that judicial estoppel should also apply to KIU's claim about the "Insured's Liability" provision. As to whether the "Insured's Liability" claim is ripe for adjudication, Westport raised this argument for the first time in its reply brief. "The ordinary rule in federal courts is that an argument raised for the first time in a reply brief or memorandum will not be considered." Clawson v. FedEx Ground Package Sys., Inc., 451 F. Supp. 2d 731, 734 (D. Md. 2006). As such, the court declines to consider this argument.

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IV. CONCLUSION

For the foregoing reasons the court **DENIES** Westport's motion to dismiss.

AND IT IS SO ORDERED.

DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

October 22, 2019
Charleston, South Carolina

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

KIAWAH ISLAND UTILITY, INC.,	)	
	)	
Plaintiff,	)	
	)	No. 2:19-cv-1359-DCN
vs.	)	
	)	**ORDER**
WESTPORT INSURANCE CORPORATION, SWISS RE INTERNATIONAL SE, LLOYD'S SYNDICATE 1882 CHB, and MEARS GROUP INC.,	)	
	)	
Defendants.	)	

This matter is before the court on defendants Swiss Re International SE's and Lloyd's Syndicate 1882 CHB's[1] ("collectively, "the Insurers") motion to dismiss and compel arbitration, ECF No. 10, and the Insurers' motion to stay discovery pending a ruling on the motion to dismiss, ECF No. 11. For the reasons set forth below, the court grants the motion to compel arbitration and transfers KIU's case against the Insurers to the Southern District of New York. Additionally, the court finds the motion to stay discovery pending a ruling on the motion to dismiss to be moot.

I. BACKGROUND

The Insurers issued a builder's risk insurance policy to defendant Mears Group Inc. ("Mears") for the period of May 1, 2015 to May 1, 2018 ("Swiss Re Policy"). The Swiss Re Policy contains the following arbitration provision:

[1] Lloyd's Syndicate 1882 CHB clarifies that it is misidentified as "Lloyd's Syndicate 1882 CB" and that its proper name is "Syndicate 1882."

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Arbitration

2. Notwithstanding any provision as to jurisdiction herein, including any stipulation as to service of suit, the parties have agreed as follows:

   Reference to Arbitration
   (a) Any question or dispute arising out of or in connection with this policy, including any question regarding its validity, existence, formation or termination, shall be referred to and finally determined by arbitration as set out below.

   Legal seat of the Arbitration
   (b) Unless the parties herein expressly agree otherwise, the seat, or legal place, of the arbitration shall be New York.

ECF No. 10-3 at 78 ("Arbitration Clause").

Plaintiff Kiawah Island Utility, Inc. ("KIU") entered into a contract ("the Contract") with Mears to install an underground pipeline running from Kiawah Island to Johns Island ("the Project"). The Project consisted of using horizontal directional drilling to bore an underground hole and then pulling pipe through the hole. During this process, the pipe got stuck in the borehole, and Mears's work was lost. As a result, Mears had to drill a second borehole and install a new section of pipeline. Mears informed KIU that it incurred approximately $7 million to repair and/or replace the damaged pipeline. The parties disputed the insurance obligations imposed by the Contract on each party. Mears provided Insurers with notice of a potential claim related to this damage but has not formally submitted any claim for reimbursement.

On September 8, 2017, Mears filed suit against KIU seeking a declaration that KIU was responsible under the Contract for obtaining primary builder's risk insurance and alleging that KIU breached the Contract for failing to do so, causing Mears to suffer $7 million of damages ("the Mears action"). Mears subsequently filed a motion for summary judgment in the Mears action. The court granted summary judgment on the

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PACER MERIDIAN LEGAL PROCESS SERVICES (MSPS)

declaratory judgment cause of action in favor of Mears, holding that the Contract did require KIU to obtain primary builder's risk insurance. The court denied summary judgment as to the breach of contract cause of action, finding that there was a genuine issue of material fact as to whether Mears engaged in faulty workmanship and thus had been damaged by KIU's breach.

KIU filed this action on May 9, 2019 seeking, in part, declarations that: (1) KIU is an Additional Insured for the Swiss Re Policy; (2) the Swiss Re Policy provides coverage to KIU for the damage to the pipeline up to a limit of liability of $75 million; and (3) the Wrap Around coverage of the Swiss Re Policy provides coverage subject to a limit of liability of $75 million. KIU also seeks declarations that the Swiss Re Policy must provide coverage to KIU for any amount not covered by KIU's insurance policy issued by defendant Westport Insurance Corporation ("Westport"), and that KIU is not subject to the Arbitration Clause. On June 14, 2019, the Insurers filed a motion to dismiss and compel arbitration, ECF No. 10. KIU responded on July 12, 2019, ECF No. 33, and the Insurers replied on July 19, 2019, ECF No. 37. On June 18, 2019, the Insurers filed a motion to stay discovery pending the ruling on their motion to dismiss. ECF No. 18. KIU responded on July 16, 2019, ECF No. 34, and the Insurers replied on July 22, 2019, ECF No. 38. The court held a hearing on the motions on September 12, 2019. The motions are now ripe for review.

II. STANDARD

The Federal Arbitration Act ("FAA") provides that a written agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at

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law or in equity for the revocation of any contract." 9 U.S.C. § 2. A court shall compel arbitration pursuant to the FAA if a party demonstrates:

> (1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of [a party] to arbitrate the dispute.

Adkins v. Labor Ready, Inc., 303 F.3d 496, 500–01 (4th Cir. 2002). If a court compels arbitration, the FAA requires the court to stay the action pending arbitration. 9 U.S.C. § 3. However, the Fourth Circuit has held that "[n]otwithstanding the terms of § 3 . . . dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable." Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707, 709–10 (4th Cir. 2001).

III. DISCUSSION

The Insurers ask the court to compel arbitration in New York for KIU's claims against them. The Insurers argue that the Arbitration Clause requires arbitration of KIU's claims under the FAA and the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"),[2] and that even though KIU is not a signatory to the Swiss Re Policy, it is still bound to the Arbitration Clause through direct benefits estoppel because it is seeking direct benefits under the Swiss Re

[2] To enforce the Convention, Congress enacted chapter 2 of the FAA (the Convention Act), which "clarifies that arbitration agreements and awards arising out of commercial relationships, unless they are entirely between United States citizens and have no 'reasonable relation with one or more foreign states,' fall under the Convention." ESAB Grp., Inc. v. Zurich Ins. PLC, 685 F.3d 376, 382 (4th Cir. 2012). The Insurers explain that they are not United States citizens, and as such, the Convention applies to the Arbitration Clause. ECF No. 10-1 at 7. KIU does not dispute this point.

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Policy. The Insurers argue in the alternative that the case should be transferred to the Southern District of New York, where that district court will compel arbitration.

KIU does not dispute the validity of the Arbitration Clause. Instead, it argues that (1) it is the role of the court, not an arbitrator, to initially determine whether KIU, as an Additional Insured to the Swiss Re Policy, agreed to arbitrate; (2) it is also the role of the court to initially determine whether a dispute falls within the scope of the Arbitration Clause, and because the Insurers have yet to make a coverage determination, there is no dispute to arbitrate; and (3) the Insurers failed to establish that direct benefits estoppel applies here. The court will address each in turn and finds that KIU is bound by the Arbitration Clause through the doctrine of direct benefits estoppel and that KIU's claims fall within the scope of the Arbitration Clause. The court then considers the question of whether the forum selection clause within the Arbitration Clause requiring arbitration to take place in New York is enforceable and determines that it is, requiring the court to transfer KIU's case against the Insurers to the Southern District of New York for arbitration to be compelled.

While the parties first focus their arguments on the determination of whether KIU is an Additional Insured and whether KIU agreed to arbitrate, the court begins with the direct benefits estoppel analysis. This is because regardless of whether KIU is an Additional Insured and agreed to arbitrate, KIU is still seeking benefits under the Swiss Re Policy and thus cannot avoid the Arbitration Clause.

A. Direct Benefits Estoppel

The Insurers argue that even if KIU is not an Additional Insured to the Swiss Re Policy, KIU is still subject to the Arbitration Clause because it is seeking benefits from

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the Swiss Re Policy, i.e., coverage for the pipeline loss and/or damage. In response, KIU argues that there is a factual dispute over whether direct benefits estoppel can be applied here because KIU has alleged that even if KIU is an Additional Insured, KIU and the Insurers did not agree to arbitrate. Specifically, KIU has alleged that: (1) KIU did not require arbitration of disputes for the builder's risk insurance that Mears was required to provide; (2) Mears failed or refused to provide a copy of the Swiss Re Policy before it began work on the Project; (3) KIU had no knowledge of the Arbitration Clause before Mears began work on the Project; and (4) the Certificate of Insurance that KIU relied upon in approving Mears's work did not identify or require arbitration. KIU argues that this factual dispute prevents the court from resolving this issue at this stage of litigation.

"Whether an arbitration agreement may be enforced against nonsignatories, and under what circumstances, is an issue controlled by state law." Wilson v. Willis, 827 S.E.2d 167, 173–74 (S.C. 2019). The parties agree that South Carolina law applies here. "Under direct benefits estoppel, '[a] nonsignatory is estopped from refusing to comply with an arbitration clause when it receives a direct benefit from a contract containing an arbitration clause.'" Id. at 175 (quoting Pearson v. Hilton Head Hosp., 733 S.E.2d 597, 601 (S.C. Ct. App. 2012)). Direct benefits estoppel "recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him." Id. (quoting Pearson, 733 S.E.2d at 601).

Here, KIU is not a signatory to the Swiss Re Policy. KIU seeks a declaration that it is entitled to coverage under the Swiss Re Policy, meaning that it seeks to benefit from

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the Swiss Re Policy. Therefore, direct benefits estoppel applies, and KIU cannot avoid the Arbitration Clause in the Swiss Re Policy. KIU contends that it is not bound by the Arbitration Clause because it never agreed to arbitrate, but this argument misses the point of direct benefits estoppel. Direct benefits estoppel requires a party to arbitrate, even when it did not agree to do so or was not a signatory on the contract containing the arbitration clause, because it would be inequitable for the party to seek a benefit under a contract without complying with that contract's arbitration clause. As such, direct benefits estoppel can, and in most cases does, apply even if a party did not agree to arbitrate.

To be sure, the Wilson court considered the fact that the nonsignatory parties did not know about the existence of the contract containing the arbitration clause in finding that direct benefits estoppel did not apply; however, it did so in determining whether the nonsignatory parties benefitted from the contract. Id. at 176. In Wilson, the plaintiffs, who were insureds and competitor insurance agents, sued various insurance companies, an insurance agent, and an insurance broker for violations of the Unfair Trade Practices Act, common law unfair trade practices, fraud, and conversion. Id. at 170. Three of the defendant insurance companies sought to compel arbitration of the plaintiffs' claims based on an arbitration clause found in an agency contract between several of the defendant insurance companies and argued that the plaintiffs were bound by the arbitration clause because they were third-party beneficiaries of the contract or equitably estopped from asserting a nonparty status. Id. at 170–171. In considering whether the plaintiffs benefitted from the contract, the court noted that the plaintiffs were not aware of the existence of the contract until the lawsuit was initiated. Id. at 176. The court

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ultimately found that the nonsignatories were not receiving or seeking a direct benefit from the contract, explaining that plaintiffs "have not attempted to procure any direct benefit from the [contract] itself while attempting to avoid its arbitration provision." Id. at 177. As such, direct benefits estoppel did not apply. Id. at 177. Here, KIU is clearly seeking a direct benefit from the Swiss Re Policy by seeking a declaration that KIU is entitled to coverage from the Swiss Re Policy. The court need not examine whether KIU knew about the Arbitration Clause because that factual question only relates to whether KIU is seeking a benefit from the Swiss Re Policy, and KIU clearly is seeking a benefit by seeking coverage.

KIU also argues that the doctrine of equitable estoppel involves questions of fact, and that the factual dispute cannot be determined on a motion to dismiss. However, the facts relevant to the direct benefits estoppel issue are not in dispute. KIU is seeking a benefit from the Swiss Re Policy—coverage—while trying to avoid the Arbitration Clause. As discussed above, there may be a factual dispute as to whether KIU agreed to arbitrate, but that issue is irrelevant to the direct benefits estoppel issue. As such, the court finds that direct benefits estoppel applies here, which binds KIU to the Arbitration Clause regardless of whether KIU agreed to arbitrate.

B. Scope of the Arbitration Clause

After finding that KIU is bound to the Arbitration Clause through direct benefits estoppel, the court must next determine whether the scope of the Arbitration Clause encompasses the claims presented here. The parties agree that it is the role of the court to determine whether a dispute falls within the scope of the Arbitration Clause. KIU argues that there is no dispute between the parties other than KIU's status of an additional

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insured. KIU explains that the only reason provided thus far by the Insurers as to why they denied coverage is that KIU is not an additional insured, and that otherwise the Insurers have simply "reserve[d] all rights under the [Mears] policy." ECF No. 10-1 at 10 n.6. As such, KIU argues that there is no pending dispute over whether the Swiss Re Policy provides coverage for the pipeline damage, meaning that arbitration cannot be compelled.

The Insurers provide further explanation on this issue, explaining that they have yet to complete a full investigation of Mears's claim because they first need to determine whether KIU is an additional insured. Once that determination is made, the Insurer will then dive into "the secondary coverage issues triggered by the loss circumstances." ECF No. 37 at 10. The Insurers argue that the question of whether KIU is an additional insured will send the entirety of KIU's claims to arbitration, and that the arbitral tribunal will then decide any remaining issues.

The parties clearly dispute whether KIU is an Additional Insured, and the court finds the issue falls within the scope of the Arbitration Clause. The scope of the Arbitration Clause includes "[a]ny question or dispute arising out of or in connection with this policy," and whether KIU is an Additional Insured is a question arising out of the Swiss Re Policy. As for KIU's argument that no other dispute yet exists because the Insurers have not yet made a coverage determination, KIU fails to account for the dispute that is relevant to the court's determination here—this lawsuit. By filing suit, KIU has created a dispute over whether the Swiss Re Policy provides coverage for the Project's pipeline loss or damage. While the Insurers have yet to complete a full investigation of the claim pending a decision as to whether KIU is an Additional Insured, a dispute still

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exists by nature of KIU filing this lawsuit. To be sure, if an arbitral tribunal determines that KIU is an Additional Insured under the Swiss Re Policy, then the Insurers may determine that coverage is available, which would resolve the dispute. But even so, the dispute would have still existed in the first place due to the filing of this lawsuit.

The court's finding that a dispute was created by the filing of this suit is supported by the fact that courts look to a complaint to determine whether a dispute falls within the scope of an arbitration clause. The Fourth Circuit has explained that "[t]o decide whether an arbitration agreement encompasses a dispute a court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim." J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 319 (4th Cir. 1988). As such, courts examine the causes of action in a complaint to determine which, if any, fall within the scope of an arbitration clause. See, e.g., Stone v. Wells Fargo Bank, N.A., 361 F. Supp. 3d 539, 556 (D. Md. 2019); Montgomery v. Credit One Bank, NA, 848 F. Supp. 2d 601, 607 (S.D.W. Va. 2012). KIU even seems to acknowledge this by seeking a declaration that KIU "did not agree to arbitration and/or none of the disputes in this Complaint are subject to arbitration under the Swiss Re Policy." Compl. ¶ 65 (emphasis added).

Therefore, the court looks to KIU's claims against the Insurers in the complaint to determine whether they fall within the scope of the Arbitration Clause. First, KIU seeks a declaration that KIU is an Additional Insured for the Swiss Re Policy. As discussed above, the court finds that this falls within the scope of the Arbitration Clause. Next, KIU seeks declarations that the Swiss Re Policy provides coverage to KIU for the pipeline loss or damage up to a limit of liability of $75 million and that the Wrap Around

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coverage of the Swiss Re Policy provides coverage subject to a limit of liability of $75 million. Both of these disputes arise out of the Swiss Re Policy as they seek to obtain coverage under the policy. For the same reason, the dispute of whether KIU is entitled to a declaration that the Swiss Re Policy must provide coverage to KIU for any amount not covered by KIU's insurer also arises out of the Swiss Re Policy. Therefore, these disputes fall within the scope of the Arbitration Clause. The next dispute, whether KIU must arbitrate its disputes, is resolved by the court with this order. The final dispute is whether any provision of the Swiss Re Policy that requires KIU to bring a legal proceeding outside of South Carolina is void and unenforceable. Both parties make substantive arguments to the court on this issue, suggesting that neither believes it is an issue for arbitration. As such, the court now considers the argument.

C. Enforceability of Forum Selection Clause in Arbitration Clause

The Arbitration Clause requires arbitration to take place in New York. ECF No. 10-3 at 78. In KIU's complaint, KIU references a Dispute Resolution Clause in the Swiss Re Policy that states that "questions, disputes, causes of action or proceedings arising out of or in connection with" the Swiss Re Policy "shall be referred to the following exclusive jurisdiction of the courts of New York." Compl. ¶ 48. KIU then alleges that "S.C. Code Ann § 15-7-120 establishes that South Carolina has a strong public policy against forum selection clauses that require a South Carolina insured that has suffered a loss or damage in South Carolina to bring an action in a court outside of South Carolina." Compl. ¶ 50. As such, KIU seeks a declaration that any provision of the Swiss Re Policy purporting to require KIU to bring a legal proceeding outside of South Carolina is void and unenforceable.

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In its motion to compel, the Insurers argue that the Arbitration Clause requiring arbitration to take place in New York is enforceable. First, the Insurers explain that the language cited by KIU in the complaint appears in the "Jurisdiction" provision of the Dispute Resolution Clause, which is inapplicable here. Instead, the provision at issue is in the Arbitration Clause. Indeed, the provision quoted by KIU begins by stating that it is "[s]ubject always to paragraph 2 hereof (Arbitration)." ECF No. 10-3 at 78. Moreover, the Arbitration Clause begins with "[n]otwithstanding any provision as to jurisdiction herein." Id. As such, the language quoted by KIU in the complaint is inapplicable, and the provision in the Arbitration Clause that states "[u]nless the parties herein expressly agree otherwise, the seat, or legal place, of the arbitration shall be New York" applies here. Id.

Despite citing S.C. Code Ann. § 15-7-120 in its complaint, KIU makes no argument regarding the statute in its response to the Insurer's motion. Out of an abundance of caution, the court briefly addresses the statute and its application here. Section 15-7-120 provides that "[a] provision in an arbitration agreement that arbitration proceedings must be held outside this State is not enforceable with respect to a cause of action, which, but for the arbitration agreement, is triable in the courts of this State." However, the Court of Appeals of South Carolina has held that "[w]here a contract evidencing interstate commerce contains an arbitration clause, the FAA preempts conflicting state arbitration law," making § 15-7-120 inapplicable. Tritech Elec., Inc. v. Frank M. Hall & Co., 540 S.E.2d 864, 866 (S.C. Ct. App. 2000). The Insurers argue that the Swiss Re Policy involves interstate commerce, and KIU does not seem to dispute this

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point. Therefore, the FAA controls here, and § 15-7-120 has no bearing on the enforceability of the forum selection clause in the Arbitration Clause.

KIU argues that a party may not seek to enforce a forum selection clause when the case has been brought in an appropriate venue, and that the District of South Carolina is an appropriate venue because the events giving rise to KIU's claims occurred in South Carolina. KIU also relies on S.C. Code Ann. § 38-61-10, which provides that "[a]ll contracts of insurance on property, lives, or interests in this State are considered to be made in the State and all contracts of insurance the applications for which are taken within the State are considered to have been made within this State and are subject to the laws of this State." Pursuant to this statute, KIU argues that the Swiss Re Policy is considered to be made within South Carolina, providing further support that South Carolina is the proper venue for these claims.

The court is unconvinced by these arguments. A distinction that KIU fails to make is the distinction between mandatory and permissive forum selection clauses. "A mandatory clause requires litigation to occur in a specified forum; a permissive clause permits litigation to occur in a specified forum but does not bar litigation elsewhere." BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin., 884 F.3d 463, 470 (4th Cir.), as amended (Mar. 27, 2018). To be sure, as KIU argues, "[a] permissive forum selection clause does not justify dismissal on the grounds that the plaintiff filed suit in a forum other than the one specified in the clause." Id. But courts generally enforce mandatory forum selection clauses unless it would be unreasonable to do so. Id. Here, the Arbitration Clause mandates that "the seat, or legal place, of the arbitration shall be New York." ECF No. 10-3 at 78 (emphasis added). The

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court interprets this to be a mandatory clause, as it requires arbitration to take place in New York, and KIU does not argue that it would be unreasonable to enforce the clause. Therefore, the fact that South Carolina may be proper venue has no bearing on whether or not the court should enforce this forum selection clause contained in the Arbitration Clause.

KIU makes no other argument as to why this provision of the Arbitration Clause is unenforceable. As such, the court finds that arbitration should be compelled in New York. However, this court cannot compel the parties to arbitrate in New York because only courts in the jurisdiction where arbitration is required can compel the parties to arbitration. See, e.g., Elox Corp. v. Colt Indus., Inc., 952 F.2d 395 (4th Cir. 1991) (unpublished) ("The district court must [ ] apply a forum selection clause contained in the agreement if such a clause exists . . . [and] if a court orders arbitration, the arbitration must be held in the same district as the court"); Developers Sur. & Indem. Co. v. Carothers Constr., Inc., 2017 WL 3054646, at *1 (D.S.C. July 18, 2017) ("Where a valid arbitration agreement covering the issues in a case exists but the agreement specifies an arbitral venue outside the district, transfer is the appropriate remedy, because if the forum selection clause is mandatory, then, the interest of justice would weigh toward transfer."); Am. Int'l Specialty Lines Ins. Co. v. A.T. Massey Coal Co., 628 F. Supp. 2d 674, 683 (E.D. Va. 2009) (finding that although the Fourth Circuit has not ruled directly on whether a district court may compel arbitration outside of its geographic jurisdiction, "the majority view holds that, where the parties have agreed to arbitrate in a particular forum, only a district court in that forum has the authority to compel arbitration under § 4 of the FAA"). This is consistent with the language of § 4 of the FAA, which provides that

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"[t]he [arbitral] hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed." As such, "[w]here the parties have elected to arbitrate a matter in a particular forum, and where § 4 directs that arbitration may be compelled only in forum in which the district court is located, it logically follows that the petition must brought in the arbitration forum to comport with § 4." Arctic Glacier U.S.A., Inc. v. Principal Life Ins. Co., 2017 WL 2629043, at *8 (D. Md. June 19, 2017). Courts resolve this issue by using their discretionary powers under 28 U.S.C. § 1404 and transferring the dispute subject to arbitration to the district court in the location where arbitration is mandated. Mitchell, 2018 WL 5297815, at *12; Arctic Glacier U.S.A., Inc., 2017 WL 2629043, at *8. Because the Arbitration Clause requires arbitration to take place in New York, the court finds that transfer is warranted.

The Insurers argue that the case should be transferred to the Southern District of New York. The Arbitration Clause simply requires that the arbitration take place in New York, and the Insurers provide no explanation as to why the court should transfer the case to the Southern District of New York as opposed to another district in New York. However, absent any argument from KIU on this issue, the court will treat the Southern District of New York as the transferee court. As such, the court transfers KIU's claims against the Insurers to the Southern District of New York to compel arbitration.

Additionally, the Insurers filed a motion to stay discovery pending the court's ruling on the motion to dismiss. Because the court is now ruling on their motion to dismiss, the court finds the motion to stay discovery to be moot.

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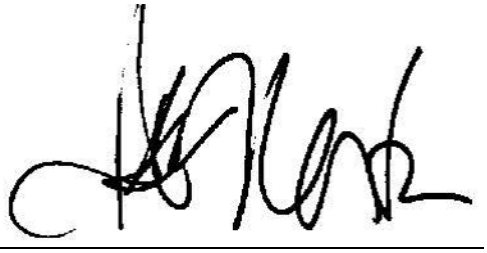
IV. CONCLUSION

For the foregoing reasons, the court **GRANTS** the motion to compel arbitration and **TRANSFERS** the case against the Insurers to the Southern District of New York. Additionally, the court finds the motion to stay discovery pending a ruling on the motion to dismiss to be **MOOT**.

AND IT IS SO ORDERED.



DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

October 22, 2019
Charleston, South Carolina

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KIAWAH ISLAND UTILITY, INC.,

Plaintiff,

v.

SWISS RE INTERNATIONAL SE AND CHUBB UNDERWRITING AGENCIES LIMITED ON BEHALF OF SYNDICATE 1882

Defendants.

Civil Action No. 1:19-cv-09775-JGK

SO-ORDERED STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, Plaintiff Kiawah Island Utility, Inc. and Defendants Swiss Re International SE and Chubb Underwriting Agencies Limited on Behalf of Syndicate 1882 (now known as Chubb Underwriting Agencies Limited for and on Behalf of Syndicate 2488, the successor of Syndicate 1882) hereby stipulate to the dismissal of the captioned action and all claims asserted or that could have been asserted therein or in arbitration, with full prejudice, with each party bearing its own respective costs, attorneys' fees, arbitrator fees, or expenses of any nature.

Dated: April 6, 2020.

/s/

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ACCEPTED FOR FILING PROOF OF SERVICE
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SO ORDERED:

/s/ John G. Koeltl April 7, 2020
Hon. John G. Koeltl
United States District Court Judge

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was electronically filed with the Clerk of Court on this 6th day of April 2020 by using the CM/ECF system which sent notification of such filing to all counsel.

/s/
Michael R. Gordon (MG-7838)

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

Mears Group, Inc.,	)	C/A No. 2:17-cv-2418 DCN
	)	
Plaintiff,	)	**ORDER OF DISMISSAL**
	)	
-vs-	)	
	)	
Kiawah Island Utility, Inc.,	)	
	)	
Defendant.	)	
	)	

The court having been advised by counsel for the parties that the above action has been settled,

IT IS ORDERED that this action is hereby dismissed without costs and without prejudice. If settlement is not consummated within sixty (60) days, either party may petition the Court to reopen this action and restore it to the calendar. Rule 60(b)(6), F.R.Civ.P. In the alternative, to the extent permitted by law, either party may within sixty (60) days petition the Court to enforce the settlement. Fairfax Countywide Citizens v. Fairfax County, 571 F.2d 1299 (4th Cir. 1978).

AND IT IS SO ORDERED.

David C. Norton
United States District Judge

February 14, 2020
Charleston, South Carolina

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

MEARS GROUP, INC.,	)	Civil Action No. 2:17-CV-02418-DCN
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
KIAWAH ISLAND UTILITY, INC.,	)	
	)	
Defendant.	)	
	)	

STIPULATION OF DISMISSAL, WITH PREJUDICE

Pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, Plaintiff Mears Group, Inc. and Defendant Kiawah Island Utility, Inc. hereby stipulate to the dismissal of the captioned action and all claims asserted or that could have been asserted therein, with prejudice, with each party bearing its own respective costs, attorneys' fees, or expenses of any nature.

Respectfully submitted,

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Attorneys for Defendant Mears Group, Inc.

Charleston, South Carolina
April 2, 2020

SO ORDERED:

_____

Hon. David C. Norton
United States District Court Judge

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

MEARS GROUP, INC.,	)	
	)	
Plaintiff,	)	
	)	No. 2:17-cv-02418-DCN
vs.	)	
	)	**ORDER**
KIAWAH ISLAND UTILITY, INC.,	)	
	)	
Defendant.	)	
	)	

This matter is before the court on defendant Kiawah Island Utility, Inc.'s ("KIU") motion to reconsider, ECF No. 50, and KIU's motion for certificate of appealability, ECF No. 51. For the reasons set forth below, the court denies the motion to reconsider and denies the motion for certificate of appealability.

I. BACKGROUND

This case arises out of the construction of a pipeline running from Kiawah Island to Johns Island ("the Project"). KIU, the owner of the Project, entered into a contract ("the Contract") with plaintiff Mears Group, Inc. ("Mears") to construct the pipeline. The Project consisted of using horizontal directional drilling to bore an underground hole and then pulling pipe through the hole. During this process, the pipe got stuck in the borehole, and Mears's work was lost. As a result, Mears had to drill a second borehole and install a new section of pipeline.

Mears presented a claim for the lost work to KIU to be submitted to KIU's builder's risk insurance carrier. Mears contends that the Contract required KIU to obtain builder's risk insurance and name Mears as a loss payee. KIU disputes whether the

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Contract required KIU to provide builder's risk insurance for the Project, but regardless, KIU submitted Mears's claim under a property insurance policy held by KIU's parent, SouthWest Water Company. That policy is supplied by Westport Insurance Corporation ("Westport"). KIU also demanded that Mears submit a claim to its own builder's risk insurance carrier, which KIU claims that Mears still has not done. Westport denied the claim. Mears alleges that as a result of KIU's failure to procure builder's risk insurance, Mears was not provided the builder's risk insurance coverage it bargained for and has now suffered over $7 million of damages, the amount of money it cost Mears to re-drill the second borehole and obtain additional pipe.

The dispute in this case centers around the Contract itself. The parties used a standard Engineers Joint Contract Documents Committee ("EJCDC") form to draft the Contract. The Contract consists of, among other documents, (1) General Conditions, (2) Supplementary Conditions, and (3) Special Conditions. The court's March 8, 2019 order ("the Order") provides greater detail on the contractual clauses at issue here, but for the purposes of this order, the court will briefly review the relevant clauses. The first is Article 5.06 in the General Conditions, which requires KIU to "purchase and maintain property insurance upon the Work at the Site in the amount of the full replacement cost thereof." ECF No. 18-1 at 73. Article 5.06 further requires that "[t]his insurance shall . . . be written on a Builder's Risk 'all-risk' policy form that shall at least include insurance for physical loss or damage to the Work . . . ." Id. Article 5.07 of the General Conditions then states that "Owner and Contractor intend that all policies purchased in accordance with Paragraph 5.06 will protect Owner, Contractor . . . and will provide

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primary coverage for all losses and damages caused by the perils or causes of loss covered thereby." Id. at 74.

The only Special Condition discussed by the parties, SC-7, requires Mears to obtain certain insurance. The portions relevant here state:

> SC-7 CONTRACTOR'S AND SUBCONTRACTOR'S INSURANCE: The Contractor shall not commence work under this contract until obtaining all the insurance required under this paragraph and such insurance has been accepted by the Owner, nor shall the Contractor allow any Subcontractor to commence work on a subcontract until the insurance required of the Subcontractor has been so obtained and accepted.
>
> > a. Builder's Risk Insurance (Fire and Extended Coverage): The Contractor shall have adequate fire and standard extended coverage, with a company or companies acceptable to the Owner, in force on the project. The provisions with respect to Builder's Risk Insurance shall in no way relieve the Contractor of its obligation of completing the work covered by the Contract.

Id. at 118. Finally, as a general matter, the Contract indicates that it "is to be governed by the law of the state in which the Project is located," which is South Carolina. Id. at 116.

Mears filed the instant suit on September 8, 2017 alleging KIU breached the Contract by failing to obtain builder's risk insurance and seeking a declaratory judgment that KIU failed to comply with its insurance obligations. Mears subsequently filed its motion for partial summary judgment on its claims for declaratory judgment and breach of contract on August 3, 2018. ECF No. 18. KIU responded to the motion on August 31, 2018, ECF No. 21, to which Mears replied on September 14, 2018, ECF No. 26. KIU separately filed a cross-motion for summary judgment on September 10, 2018. ECF No. 25. Mears responded to KIU's cross-motion on September 24, 2018, ECF No. 33, and KIU replied on October 4, 2018, ECF No. 36. The court held a hearing on the summary judgment motions on January 16, 2019.

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The court denied KIU's cross-motion for summary judgment and granted in part and denied in part Mears's motion for summary judgment. The Order denied Mears's motion as to the breach of contract claim but granted the motion as to the declaratory judgment claim, holding that the Contract unambiguously required KIU to obtain primary builder's risk insurance. As a result, KIU filed a motion for reconsideration of the Order, ECF No. 50, and a motion for certificate of appealability of the Order, ECF No. 51, on March 18, 2019. Mears responded to both on April 1, 2019. ECF Nos. 52–53. KIU did not file a reply in support of either motion. Therefore, the motions are ripe for review.

II. STANDARDS

A. Motion to Reconsider

Rule 54(b) states, in relevant part:

> [A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

A motion brought under Rule 54(b) is judged by similar standards as a motion brought under Rule 59(e), which may only be granted for the following reasons: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." Grayson Consulting, Inc. v. Cathcart, 2014 WL 587756, at *1 (D.S.C. Feb. 14, 2014) (quoting Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998)); Slep-Tone Entm't Corp. v. Garner, 2011 WL 6370364, at *1 (W.D.N.C. Dec. 20, 2011). The Fourth Circuit has "noted on more than one occasion, 'a prior decision does not qualify for the third exception by being just maybe or probably wrong; it must strike [the court] as wrong with the force of a five-week-old, unrefrigerated dead fish. It must be

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dead wrong.'" U.S. Tobacco Coop. Inc. v. Big S. Wholesale of Virginia, LLC, 899 F.3d 236, 258 (4th Cir. 2018) (quoting TFWS, Inc. v. Franchot, 572 F.3d 186, 194 (4th Cir. 2009)).

B. Certification of Interlocutory Appeal

"[28 U.S.C. §]1292(b) provides a mechanism by which litigants can bring an immediate appeal of a non-final order upon the consent of both the district court and the court of appeals." Lynn v. Monarch Recovery Mgmt., Inc., 953 F. Supp. 2d 612, 623 (D. Md. 2013) (quoting In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982)). Pursuant to 28 U.S.C. § 1292(b), an interlocutory appeal may be sought for an order that is not otherwise appealable when the district court is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." As such, a district court may certify an order for interlocutory appeal when: "1) such order involves a controlling question of law, 2) as to which there is substantial ground for difference of opinion, and 3) an immediate appeal from that order may materially advance the ultimate termination of the litigation." Mun. Ass'n of S.C. v. Serv. Ins. Co., Inc., 2011 WL 13253448, at *3 (D.S.C. Sept. 21, 2011) (internal quotations omitted). All three requirements must be met. Id.

In addition, Rule 54(b) of the Federal Rules of Civil Procedure permits a district court to "direct entry of a final judgment as to one or more, but fewer that all, claims" when an action involves multiple claims as long as "the court expressly determines that there is no just reason for delay." "The burden is on the party endeavoring to obtain Rule

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54(b) certification to demonstrate that the case warrants certification." Braswell Shipyards, Inc. v. Beazer E., Inc., 2 F.3d 1331, 1335 (4th Cir. 1993).

III. DISCUSSION

A. Motion to Reconsider

KIU argues that the court should reconsider the Order because (1) new evidence reveals that Mears concedes that the Contract is ambiguous; (2) the Order misapplied the law related to ambiguous contracts; and (3) the Order results in manifest injustice to KIU. KIU also argues that the court misstated a fact regarding Westport's insurance coverage determination. The court addresses each in turn and finds that none of KIU's arguments warrant the court's reconsideration of the Order.

a. New Evidence

KIU first argues that the Order should be reconsidered in light of new evidence that was unavailable prior to the summary judgment briefings and hearing. The new evidence is deposition testimony from John Best ("Best"), the Mears attorney who negotiated the Contract on behalf of Mears, and Steven Coombs ("Coombs"), Mears's insurance expert. The depositions were taken on February 15, 2019 and February 14, 2019, respectively, which was approximately one month after the hearing on the motions for summary judgment. KIU argues that this deposition testimony indicates that Best and Coombs believe that the Contract is ambiguous, and because Mears's own witnesses conceded that the Contract is ambiguous, the court should reconsider the Order and also find the Contract to be ambiguous.

In opposition, Mears argues that the court should not consider extrinsic evidence because the court determined that the Contract unambiguously requires KIU to obtain

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primary builder's risk insurance. The court agrees. As explained in the Order, when a court interprets a contract, it first looks within the four corners of the contract. ECF No. 49 at 13 (citing Silver v. Aabstract Pools & Spas, Inc., 658 S.E.2d 539, 542 (S.C. Ct. App. 2008)). If, in doing so, the court determines that the contract is unambiguous, then the court's inquiry ends there, and the court does not consider extrinsic evidence. Id. at 17 (citing Silver, 658 S.E.2d at 542). Here, the court interpreted the language of the Contract and determined that, within the four corners of the Contract, the Contract unambiguously required KIU to obtain primary builder's risk insurance. Therefore, the court need not and cannot consider extrinsic evidence of Best's and Coombs's deposition testimony.[1]

b. Law on Ambiguous Contracts

Next, KIU argues that the court misapplied the law related to ambiguous contracts. KIU contends that the Order correctly stated that contracts "will be interpreted so as to give effect to all of their provisions, if practical." ECF No. 49 at 12 (emphasis added by KIU) (citing Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime, 494 S.E.2d 465, 468 (S.C. Ct. App. 1997)). KIU argues that the court clearly erred in its application of this law because it is not practical for both KIU and

[1] In addition, the court strongly discourages motions to reconsider based on new evidence that arises from discovery conducted after the filing of a motion for summary judgment. This practice hinders the finality of rulings on summary judgment and creates the potential for relitigating issues already decided by the court based on the record before the court at the time of the motion. While the court acknowledges that Mears was the party who first filed the motion for summary judgment prior to the close of discovery, necessitating KIU's response, KIU also filed a cross-motion for summary judgment before discovery ended. If a party chooses to file a motion for summary judgment prior to the close of discovery, it must accept the risk that new and potentially useful evidence could arise after the motion has been filed, and that it forfeited its ability to use that information in its motion.

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Mears to be required to obtain builder's risk insurance. KIU claims that having two builder's risk policies covering the same project is "contrary to both common sense and industry practice." ECF No. 50-1 at 8.

In reading and interpreting the language of the Contract, the court determined that the General Conditions and SC-7 were to be read together to require KIU to obtain primary builder's risk insurance and to require Mears to obtain builder's risk insurance for fire and extended coverage. "A clear and explicit contract must be construed according to the terms the parties have used, with the terms to be taken and understood in their plain, ordinary, and popular sense." Gilbert v. Miller, 586 S.E.2d 861, 864 (S.C. Ct. App. 2003). "Language which is perfectly clear determines the full force and effect of the document." Gilstrap v. Culpepper, 320 S.E.2d 445, 447 (S.C. 1984). The language of the Contract clearly requires KIU to obtain "primary" builder's risk insurance in Articles 5.06 and 5.07, ECF No. 18-1 at 73–74, and requires Mears to obtain builder's risk insurance that just provides "adequate fire and standard extended coverage" in SC-7, id. at 118. Again, the court's job is to read the language within the four corners of the Contract and determine whether the Contract can be interpreted to give effect to both the General Conditions and SC-7, and the court determined that it could be. As the Order explained, the court is obligated to enforce the terms of the Contract "regardless of [the Contract's] wisdom or folly, apparent unreasonableness, of the parties' failure to guard their rights carefully." ECF No. 49 at 13 (citing S.C. Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 667 S.E.2d 7, 13 (S.C. Ct. App. 2008)). Whether it is

unwise or apparently unreasonable to require both parties to obtain some form of builder's risk insurance does not factor into the court's consideration.

Moreover, KIU already raised the argument that requiring both primary and secondary insurance is illogical in its reply in support of its cross-motion for summary judgment, see ECF No. 36 at 1–2, and the court rejected it, ECF No. 49 at 17. "[A] motion to reconsider an interlocutory order should not be used to rehash arguments the court has already considered merely because the movant is displeased with the outcome." South Carolina v. United States, 232 F. Supp. 3d 785, 793 (D.S.C. 2017). Indeed, KIU is asking the court "to rethink what the [c]ourt had already thought through—rightly or wrongly." Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983). The court declines to do so.

c. Manifest Injustice

KIU argues that the Order results in manifest injustice to KIU because KIU may have to personally bear the cost of Mears redoing its work, which Mears estimates to be about $7 million. KIU contends that this is particularly unjust because Mears appears to have obtained a builder's risk policy that would allegedly cover the work but has refused to tender a claim. KIU then asks the court to amend the Order to require Mears to submit the claim to Mears's own insurance carrier because that was a term of the Contract. In response, Mears argues that the Order determined that KIU breached the Contract by failing to provide primary builder's risk insurance, and that requiring KIU to pay the cost is a remedy for breach of contract, not manifest injustice. Moreover, Mears argues that KIU's request for the court ordering Mears to submit the claim to its own insurance carrier is a request for an injunction, and that KIU has not filed a motion for an injunction

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nor has it established the elements of an injunction. Moreover, Mears argues that the Contract does not require Mears to submit the claim to its insurance carrier.

KIU is correct that it could be liable for the $7 million. However, KIU does not explain how the Order results in manifest injustice other than the fact that the Order's finding may result in KIU being required to pay $7 million. This is simply the remedy here and an outcome that has been within the realm of possibility from the outset of the case. The case is a dispute over who must pay for the $7 million of work, and as such, someone will be required to pay that amount.

Moreover, KIU's request for the court to order Mears to tender the claim to Mears's insurance provider is a request for injunctive relief. KIU has not filed a motion for an injunction nor has it cited to any law in support of its request; therefore, the court cannot grant KIU's request.

d. Misstatement of Fact

Finally, KIU argues that the Order misstated a fact regarding Westport's insurance coverage determination. The Order stated that Westport denied the claim in part because the Contract required Mears to obtain builder's risk insurance, and Westport determined that KIU's policy was excess to any of Mears's policies. KIU argues that this statement is incorrect. KIU explains that this reasoning was an initial determination made in Engle Martin & Associates's ("Engle Martin")[2] September 30, 2016 letter when Westport had not yet made any coverage determination, and that the official determination of coverage is found in Engle Martin's May 18, 2018 letter that denied

[2] Engle Martin is an independent adjustment firm that Westport retained as its claim adjuster.

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coverage solely due to Mears's faulty workmanship and errors or omissions. However, in KIU's response to Mears's motion for summary judgment, KIU stated that "KIU's insurer [Westport] denied the claim, because, 1) per the contract between KIU and Mears, Mears was the party responsible for obtaining builder's risk insurance for the Project, and 2) the cause of the broken pipeline was Mears's faulty workmanship, which is excluded from coverage." ECF No. 21 at 2 (emphasis added). The Order stated these two reasons, almost word-for-word. ECF No. 49 at 2. Therefore, KIU is faulting the court for relying on KIU's own statement that it made in its response to Mears's motion for summary judgment.

To be sure, the September 30, 2016 letter does explain that Westport had not yet made a coverage determination. ECF No. 18-1 at 304. However, Engle Martin's May 18, 2018 letter explains that "Westport incorporates herein all prior reservations of rights, including but not limited to those referenced in our letters dated September 30, 2016 and July 3, 2017." ECF No. 21-7 at 5. Therefore, the final coverage determination in the May 18, 2018 letter incorporates the September 30, 2016 letter, which discusses the determination that Mears was the party responsible for obtaining primary builder's risk insurance. Therefore, it was not a misstatement for the court to state that "Westport determined that KIU's policy was 'excess to' any of Mears's insurance policies, meaning

EXCERPTS FROM PRELIMINARY PROCEEDINGS 2022-March 30, April 1, 2022 AM MS SPS CD 2021-3 2021 WS 32 Page 1-12 Page 194 of 179

KIU's policy would not pay until Mears's insurance policies limits are exhausted," ECF No. 49 at 2, which was information found in the September 30, 2016 letter.

In conclusion, none of KIU's arguments convince the court that it should reconsider the Order. Therefore, the court denies KIU's motion to reconsider.

B. Petition for Certificate of Appealability

KIU also asks the court to certify an interlocutory appeal of the Order pursuant to 28 U.S.C. § 1292(b) and Rule 54(b) of the Federal Rules of Civil Procedure. In doing so, KIU requests that the court effectuate the appeal by amending the Order to include the necessary findings and to stay the case pending the Fourth Circuit's disposition of the appeal. The court declines to certify an interlocutory appeal under 28 U.S.C. § 1292(b) and under Rule 54(b).

a. 28 U.S.C. § 1292(b)

KIU first argues that the court should certify an interlocutory appeal of the Order because the Order involves a controlling question of law on which a substantial ground for difference of opinion exists. KIU then argues that an immediate appeal of the Order will materially advance the ultimate termination of the litigation. Mears disagrees, arguing that the Order does not involve a controlling question of law and that KIU's disagreement with the Order is not a substantial ground for difference of opinion.

"A controlling question of law is a narrow question of pure law whose resolution would be completely dispositive of the litigation, either as a legal or practical matter." In re TD Bank, N.A. Debit Card Overdraft Fee Litig., 2016 WL 7320864, at *5 (D.S.C. July 18, 2016) (quoting Michelin N. Am., Inc. v. Inter City Tire & Auto Ctr., Inc., 2013 WL 5946109, at *3 (D.S.C. Nov. 6, 2013)). However, "[e]ven where the question presented

is a legal one, if resolution of that issue is rooted in the facts of a particular case, the question is not proper for interlocutory review." Randolph v. ADT Sec. Servs., Inc., 2012 WL 273722, at *5 (D. Md. Jan. 30, 2012). "As a result, § 1292(b) is not 'appropriate for securing early resolution of disputes concerning whether the trial court properly applied the law to the facts.'" Michelin N. Am., Inc., 2013 WL 5946109, at *3 (quoting City of Charleston, S.C. v. Hotels.com, LP, 586 F.Supp.2d 538, 548 (D.S.C. 2008)).

Here, KIU argues that the "controlling question of law" in the Order is the determination of whether the Contract is ambiguous. While determining whether a contract is ambiguous is a legal issue, the resolution of the issue here is rooted in that facts of this case. Indeed, KIU is not arguing that there is some controlling question of law with regard to the law on ambiguous contracts. Instead, it is contesting the court's application of the law to the facts of this case. This is clearly not a "controlling question of law." Because the determination of whether the Contract is ambiguous is not a "controlling question of law," the court denies KIU's petition for certificate of appealability pursuant to § 1292(b).

b. Fed. R. Civ. P. 54(b)

KIU also seeks a certificate of appealability through Rule 54 of the Federal Rules of Civil Procedure. KIU contends that because the court has fully adjudicated Mears's declaratory judgment claim, the claim is ripe for appellate review. Under Fed. R. Civ. P. 54(b), the court engages in a two-step inquiry to determine whether an individual claim may be appealed prior to the court's adjudication of all claims. First, the court must "determine that it is dealing with a 'final judgment.'" Curtiss-Wright Corp. v. Gen. Elec.

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Co., 446 U.S. 1, 7, (1980). "It must be a 'judgment' in the sense that it is a decision upon a cognizable claim for relief, and it must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" Id. (quoting Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 437 (1956)). If the court is dealing with a final judgment, then it must determine whether there is any just reason for delaying the appeal until all claims are fully adjudicated. Id. at 8. As the Supreme Court explained, "[n]ot all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims." Id.

Under Rule 54(b), the court's role is "to act as a 'dispatcher.'" Curtiss-Wright Corp., 446 U.S. at 8. "It is left to the sound judicial discretion of the district court to determine the 'appropriate time' when each final decision in a multiple claims action is ready for appeal. This discretion is to be exercised 'in the interest of sound judicial administration.'" Id. Nevertheless, both the Supreme Court and the Fourth Circuit have recognized that Rule 54(b) certification is an exceptional procedure and should not be granted routinely. Id. at 10; Braswell Shipyards, Inc., 2 F.3d at 1335.

As to the first step in a 54(b) inquiry, rulings on declaratory judgments are generally considered a "final judgment." For example, in Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B, the court certified its declaratory judgment ruling as final pursuant to Rule 54(b) despite other pending claims. 225 F.R.D. 171, 173 (D. Md. 2004). The plaintiff alleged that the defendants violated the Securities Exchange Act of 1934, and the defendants filed counterclaims seeking declaratory relief under several claims, some of which related to whether the plaintiffs' adoption of a

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poison pill during a partial acquisition was illegal. The court determined that the poison pill was not illegal, and the defendants sought the court's declaration that this judgment was final. The court found that its declaratory judgment was final because it was "an ultimate disposition" of the poison pill claims. Id. at 174. The court reasoned that the declaratory judgment claims "sought no other relief than a declaration that the poison pill was illegal;" therefore, the court's declaration that the poison pill was not illegal "finished the litigation on the merits" of those claims. Id.

The procedural posture of Mears's claims is similar to the claims in Neuberger. In Mears's declaratory judgment claim, Mears sought "a declaration that KIU failed to comply with its insurance obligations and the damages which resulted from such failure to comply."[3] Compl. ¶ 45. In the Order, the court granted summary judgment on Mears's declaratory judgment claim, finding that the Contract required KIU to obtain primary builder's risk insurance and failed to do so. This is all that the declaratory judgment claim sought; therefore, the court's declaration was the "ultimate disposition" of the declaratory judgment claim, meaning the claim is a final judgment.

Mears argues that there is no final judgment here because the court has only adjudicated liability and not damages. Mears contends that "KIU seeks to appeal the Court's finding that KIU breached the Contract" and "[a]s specifically recognized in the Court's Order, whether such breach was a cause of damages and the amount of damages still need to be determined." ECF No. 52 at 7. While it is true that the court did not

[3] Counsel for Mears has clarified that Mears is not seeking a declaration of damages which results from KIU's failure to comply with the contract. Therefore, the court interprets Mears's declaratory judgment claim to solely seek a declaration that KIU failed to comply with its insurance obligations under the Contract.

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consider damages in the Order, Mears's argument relates to the breach-of-contract claim, which is not the claim on which KIU seeks appellate review. Instead, KIU seeks an appeal of the declaratory judgment claim, which does not seek a declaration regarding damages and which the court fully and finally decided.

Having determined that the court's grant of summary judgment on the declaratory judgment constitutes a "final judgment," the court must next determine whether there is any just reason for delay in certifying appeal of the Order. To determine whether there is any just reason for delay, the court should consider:

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

Braswell Shipyards, Inc., 2 F.3d at 1335–36.

KIU argues that if it cannot appeal the declaratory judgment claim now, it will be forced to do so after the conclusion of the jury trial, and if the Fourth Circuit finds error in the Order, then the parties will have to relitigate the entire case because the question of whether the Contract is ambiguous is central to the case. As an initial matter, "[t]he burden is on the party endeavoring to obtain Rule 54(b) certification to demonstrate that the case warrants certification." Braswell Shipyards, Inc., 2 F.3d at 1335. Here, the burden is on KIU to show that there is no just reason for delaying the appeal of the Order; however, KIU does not even discuss the factors listed above. Instead, KIU simply argues that certification is warranted because delaying the appeal could delay the final resolution of this case. However, all appeals necessarily delay the final resolution of cases, and this

argument does nothing to persuade the court as to why it should take the exceptional procedure of certifying an appeal.

Even considering the factors enumerated by the Fourth Circuit, the court is still unconvinced that certification of an appeal is appropriate here. First, the relationship between the adjudicated claim, the declaratory judgment, and the unadjudicated claim, the breach-of-contract claim, is a close relationship. Indeed, by finding that KIU was required by the Contract to obtain primary builder's risk insurance, part of the breach-of-contract claim is resolved because KIU's failure to obtain primary builder's risk insurance, as required by the Contract, is a breach of contract. As the court explained in the Order, the remaining issue is whether Mears was damaged by KIU's failure to obtain primary builder's risk insurance. Therefore, the claims are not distinct and separate claims but are in fact quite intertwined, weighing against certification of an appeal of the declaratory judgment claim. The court notes that Mears has also brought a new claim in its supplemental complaint that is unrelated to the substance of the declaratory judgment or breach of contract claim. However, this additional claim does not alter the close relationship between the declaratory judgment and breach of contract claims.

As to the next factor, there is a possibility that future proceedings before this court could moot the ambiguity issue. If a jury found that Mears was not damaged by KIU's failure to obtain primary builder's risk insurance and therefore could not prove its breach-of-contract claim, then the issue of whether the Contract is ambiguous would be mooted

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because Mears would not recover anything from KIU. This also weighs against certification of an appeal.

If the ambiguity issue were to be appealed now, it would be unlikely that the Fourth Circuit would have to consider the Contract's ambiguity a second time. If the Fourth Circuit affirms the Order and agrees that the Contract is unambiguous, future trial proceedings would solely be related to damages, and any appeal from those proceedings would only relate to damages. If the Fourth Circuit held that the Contract was ambiguous, future trial proceedings would be related to both the parties' intent as to the meaning of the Contract as well as damages. Any findings at the trial level about the parties' intent does not require another determination about whether the Contract is ambiguous. However, if the Fourth Circuit considered the appeal of the declaratory judgment claim now and then considered another appeal of damages after the conclusion of trial, it would be forced to reconsider the same facts related to the same dispute between the same parties. This tends to weigh against certifying an interlocutory appeal.

There are no claims or counterclaims that could "set off" the judgment on the declaratory judgment, because no damages were awarded through the resolution of this claim. As for miscellaneous factors, which is really the only thing that KIU discusses in arguing for certification, it may be more expedient to permit the appeal of the Order now. If the court denies certification, the case will go forward to trial, where the only issue will be damages and Mears's claim in its supplemental complaint. KIU would then appeal the court's finding that the Contract is unambiguous, and if the Fourth Circuit reversed and remanded the case, then the parties would have to retry the case with the added issue of the parties' intent behind the ambiguous Contract. The trial would be substantially

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different from a trial purely based on damages and Mears's supplemental complaint claim. However, the court also recognizes the importance of "prevent[ing] piecemeal appeals in cases which should be reviewed only as single units." Curtiss-Wright Corp., 446 U.S. at 10. Here, it would be hard to view Mears's declaratory judgment and breach-of-contract claim as anything but a single unit given how interrelated they are. Moreover, "the fact the parties on appeal remain contestants below militates against the use of Rule 54(b)," Braswell, 2 F.3d at 1336, and here, the parties in the declaratory judgment claim and breach-of-contract claim are the same.

Based on KIU's arguments and the court's own weighing of the factors articulated in Braswell Shipyards, Inc., the court finds that there are convincing and just reasons for delaying the appeal of the final judgment on Mears's declaratory judgment claim. Certifying an interlocutory appeal is an exceptional procedure, and the court finds that it is not warranted here. Therefore, the court denies KIU's motion for certificate of appealability.

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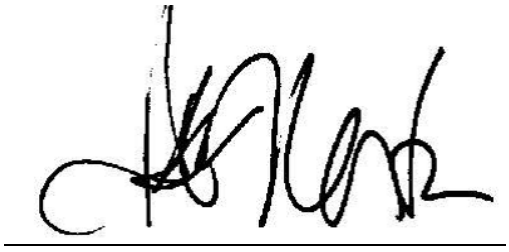
IV. CONCLUSION

For the foregoing reasons the court **DENIES** the motion to reconsider and **DENIES** the motion for certificate of appealability.

AND IT IS SO ORDERED.



DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

May 30, 2019
Charleston, South Carolina

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

MEARS GROUP, INC., Plaintiff, vs. KIAWAH ISLAND UTILITY, INC., Defendant.	No. 2:17-cv-2418-DCN **ORDER**
KIAWAH ISLAND UTILITY, INC., Plaintiff, vs. WESTPORT INSURANCE CORPORATION, SWISS RE INTERNATIONAL SE, LLOYD'S SYNDICATE 1882 CHB, and MEARS GROUP INC., Defendants.	No. 2:19-cv-1359-DCN **ORDER**

The following matter is before the court on Kiawah Island Utility's ("KIU) motion to stay, ECF No. 84, in Mears Group, Inc. v. Kiawah Island Utility, 17-2418 ("Mears action"), and KIU's motions to consolidate in both the Mears action, ECF No. 98, and Kiawah Island Utility v. Westport Insurance Corporation, 19-1359 ("KIU action"), ECF No. 42. For the reasons set forth below, the court denies the motion to stay and denies the motions to consolidate.

I. BACKGROUND

This case arises out of the construction of a pipeline running from Kiawah Island to Johns Island ("the Project"). KIU, the owner of the Project, entered into a contract

("the Contract") with Mears Group, Inc. ("Mears") to construct the pipeline. The Project consisted of using horizontal directional drilling to bore an underground hole and then pulling pipe through the hole. During this process, the pipe got stuck in the borehole, and Mears's work was lost. As a result, Mears had to drill a second borehole and install a new section of pipeline.

Mears presented a claim for the lost work to KIU to be submitted to KIU's builder's risk insurance carrier. Mears contends that the Contract required KIU to obtain primary builder's risk insurance and name Mears as a loss payee. KIU disputes whether the Contract required KIU to provide builder's risk insurance for the Project, but regardless, KIU submitted Mears's claim under a property insurance policy held by KIU's parent, SouthWest Water Company. Westport Insurance Corporation ("Westport") supplied that policy ("Westport Policy"). Westport denied coverage for the claim. KIU also demanded that Mears submit a claim to its own builder's risk insurance carrier, which KIU contends that Mears still has not done. Swiss Re International SE and Lloyd's Syndicate 1882 CB[1] (collectively, "the Insurers") issued that policy to Mears ("the Swiss Re Policy"), which Mears allegedly presented to KIU prior to beginning work on the Project. Both Mears and the Insurers clarify that Mears has provided the Insurers with notice of a potential claim but has not formally submitted a claim for reimbursement under the Policy.

Mears filed the Mears action on September 8, 2017 seeking a declaration that KIU was required by the Contract to procure primary builder's risk insurance and alleging that

[1] Lloyd's Syndicate 1882 CB clarifies that it is misidentified as "Lloyd's Syndicate 1882 CB" and that its proper name is "Syndicate 1882."

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KIU breached the Contract by failing to do so. After a round of summary judgment briefing, the court denied KIU's cross-motion for summary judgment and granted in part and denied in part Mears's motion for summary judgment. Specifically, the court denied Mears's motion as to the breach of contract claim but granted the motion as to the declaratory judgment claim, holding that the Contract unambiguously required KIU to obtain primary builder's risk insurance.

KIU filed a motion to reconsider and a motion for certificate of appealability, both of which the court denied on May 30, 2019. Then on June 6, 2019, KIU filed a motion to stay, ECF No. 84, to which Mears responded, ECF No. 92, and KIU replied, ECF No. 97. Mears then sought leave to file a sur-reply, which the court granted, so Mears filed a sur-reply. ECF No. 111. Additionally, on July 23, 2019, KIU filed a motion to consolidate the Mears action and KIU action. ECF No. 98. Mears responded, ECF No. 99, and KIU replied, ECF No. 105.

In the meantime, on May 9, 2019, KIU filed the KIU action against Westport, the Insurers, and Mears. In that action, KIU action seeks declarations that: (1) the Westport Policy provides coverage to KIU for damage to the Project; (2) KIU is an Additional Insured under the Swiss Re Policy; (3) the Swiss Re Policy provides coverage to KIU for damage to the Project; (4) the Wrap Around coverage of the Swiss Re Policy provides coverage to KIU; (5) the Westport Policy must provide coverage to KIU up to the amount of available coverage; (6) the Swiss Re Policy must provide coverage to Kiawah for any amount not covered by the Westport Policy; (7) any provision in the Swiss Re Policy that requires KIU to bring a legal proceeding outside of South Carolina is void and

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unenforceable; and (8) KIU did not agree to arbitrate any disputes under the Swiss Re Policy and none of the disputes in this action are subject to arbitration.

KIU filed the same motion to consolidate in the KIU action as it did in the Mears action on July 24, 2019. ECF No. 42. All defendants responded, ECF Nos. 53, 54, and 59, and KIU replied, ECF Nos. 62–64. The court held a hearing on the motions in both the Mears action and KIU action on September 12, 2019. These motions are now all ripe for review.

II. STANDARD

A. Motion to Stay

"A court has the power to stay proceedings, which is 'incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" Doe v. Bayer Corp., 367 F. Supp. 2d 904, 914 (M.D.N.C. 2005) (quoting Landis v. N. Am. Co., 299 U.S. 248, 254 (1936)). In exercising its authority to grant a discretionary stay, the court "must weigh competing interests and maintain an even balance." Landis, 299 U.S. at 254, 255 (internal quotation omitted). Furthermore, "[t]he party seeking a stay must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative." Williford v. Armstrong World Indus., Inc., 715 F.2d 124, 127 (4th Cir. 1983). "When considering a motion to stay, the district court should consider three factors: '(1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; and (3) potential prejudice to the non-moving party.'" Impulse Monitoring, Inc. v. Aetna Health, Inc., 2014 WL 4748598, at *1 (D.S.C. Sept. 23, 2014)

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(quoting Johnson v. DePuy Orthopaedics, Inc., 2012 WL 4538642, at *2 (D.S.C. Oct.1, 2012)).

B. Motion to Consolidate

Pursuant to Rule 42 of the Federal Rules of Civil Procedure, "[i]f actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay." Fed. R. Civ. P. 42(a). "As the rule states, a motion to consolidate must meet the threshold requirement of involving 'a common question of law or fact.' If that threshold requirement is met, then whether to grant the motion becomes an issue of judicial discretion." Pariseau v. Anodyne Healthcare Mgmt., Inc., 2006 WL 325379, at *1 (W.D.N.C. Feb. 9, 2006) "District courts have broad discretion under F[ed]. R. Civ. P. 42(a) to consolidate causes pending in the same district." A/S J. Ludwig Mowinckles Rederi v. Tidewater Const. Co., 559 F.2d 928, 933 (4th Cir. 1977). In determining whether consolidation is appropriate, courts consider "whether the specific risks of prejudice and possible confusion were overborne" by (1) "the risk of inconsistent adjudications of common factual and legal issues"; (2) "the burden on parties, witnesses and available judicial resources posed by multiple lawsuits"; (3) "the length of time required to conclude multiple suits as against a single one"; and (4) "the relative expense to all concerned of the single-trial, multiple-trial alternatives." Arnold v. Eastern Airlines, Inc., 681 F.2d 186, 193 (4th Cir.1982)) ("the Arnold factors").

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III. DISCUSSION

This dispute arises from the parties' differing interpretations of the court's summary judgment order in the Mears action. As such, the court takes this opportunity to review the summary judgment arguments that were before it and to explain and to clarify what exactly it held in its order based on those arguments. The court then turns to its consideration of the motion to stay and motions to consolidate.

A. Summary Judgment Briefing and Rulings in the Mears Action

a. The Parties' Arguments

The court begins with the parties' summary judgment arguments about the root of the issue here—Mears's breach of contract claim. Mears filed a motion for summary judgment seeking "summary judgment on its claim for a declaratory judgment that KIU had the obligation to provide primary 'all-risk' Builder's Risk coverage and to name Mears as a loss payee, and summary judgment on its breach of contract claim on the grounds that KIU breached that obligation." ECF No. 18 at 2. With regard to its breach of contract claim, in a section titled "KIU Breached Its Obligation by Failing to Provide Primary Builder's Risk Coverage and by Failing to Name Mears as a Loss Payee," Mears argued:

> KIU's insurer, Westport, has determined that KIU's Builder's Risk policy is excess to Mears' policy. See Exhibit 2 to the Affidavit of Stephen L. Gude, attached as Exhibit A, Letter from Engle Martin. The Westport policy does not list Mears as a loss payee, only Southwest Water Company. See Westport Policy, Exhibit B, at pg. 10. Because KIU did not provide primary Builder's Risk insurance, and did not name Mears as a loss payee, partial summary judgment is proper as to KIU's breach of these contractual requirements.

ECF No. 18 at 12–13. Mears did not mention any argument related to faulty workmanship in its motion.

KIU did not respond by arguing that it did not breach the Contract, nor did it argue that, in the event the court found the Contract to require KIU to obtain primary builder's risk insurance, the Westport Policy fulfilled KIU's contractual obligation. Instead, KIU argued that Mears's breach of contract claim must fail because even if KIU breached the Contract, Mears was not damaged by the breach because Mears engaged in faulty workmanship, which is excluded from coverage. KIU contended that "Mears cannot prevail in this action – much less on its Motion – because builder's risk insurance does not cover the loss at issue in this case; therefore, even if KIU was obligated to provide builder's risk coverage, Mears has suffered no damages resulting from a failure to do so." ECF No. 21 at 10. KIU explained that "[b]uilder's risk insurance policies typically contain exclusions for faulty workmanship" and "[s]imilarly, SWWC's Westport policy specifically excludes loss or damage resulting from 'faulty workmanship, material, construction, or design.'" Id. KIU then explained that Westport's claims adjuster determined Mears engaged in faulty workmanship that was excluded from coverage, provided technical background on why Mears's work was faulty, and concluded that "[b]ecause Mears' own negligence caused the damage it suffered, and because faulty workmanship is excluded from insurance coverage, it is inconsequential whether KIU obtained primary builder's risk coverage on the Project." Id. at 10–11.

In reply, Mears contended that KIU's faulty workmanship argument was not relevant to Mears's motion because Mears sought "summary judgment only as to the

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questions of whether KIU was required by contract to purchase primary builders risk insurance which named Mears as loss payee, and whether KIU breached the contract by failing to do so." ECF No. 26 at 12. Mears explained that it disagreed with KIU's reasoning as to why Mears engaged in faulty workmanship but emphasized that these were factual issues that were unrelated to Mears's motion. Id. The parties did not bring up faulty workmanship or substantive arguments on whether KIU breached the Contract in the briefing on KIU's cross motion for summary judgment.

Notably, both parties consistently argued in the briefings and at the hearing on the motions that Westport denied coverage because (1) Westport's adjustor concluded that Mears, not KIU, had the obligation to provide builder's risk insurance, and therefore, the Westport Policy was excess; and (2) Westport determined that Mears engaged in faulty workmanship. In KIU's response to Mears's motion for summary judgment, KIU stated that "KIU's insurer [Westport] denied the claim, because, 1) per the contract between KIU and Mears, Mears was the party responsible for obtaining builder's risk insurance for the Project, and 2) the cause of the broken pipeline was Mears' faulty workmanship, which is excluded from coverage." ECF No. 21 at 2. KIU incorporated the factual background from its response, which includes this statement, into its own cross-motion for summary judgment. ECF No. 25 at 1 n.1.

In addition, the hearing on the summary judgment motions, counsel for KIU argued that Westport "did issue a denial letter in part based on [Westport's] finding that this insurance was excess" and that Westport "concluded that Mears was the party that had the obligation to provide the insurance, and [Westport] denied the claim on that basis." ECF No. 42, Tr. 30:9–14. Counsel then said that Westport "also denied the claim

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on the basis that [Mears's work] was faulty workmanship, . . . [s]o there were multiples grounds on which that claim was denied." Id., Tr. 30:15–19. Moreover, Mears argued in its motion for summary judgment that Westport determined that the Westport Policy was excess to any policy maintained by Mears, and KIU never disputed that argument in its response. In other words, the consistent arguments before the court during summary judgment briefing led the court to believe that Westport denied covered both because it determined the Westport Policy to be excess and because Mears engaged in faulty workmanship.

b. The Court's Order

In considering whether summary judgment was warranted for Mears's breach of contract claim, the court began by listing the elements of a breach of contract cause of action and noting that KIU's argument related to the third element—whether Mears's damage was caused by KIU's breach. The court then stated that Mears was damaged because Westport refused primary coverage for the $7 million loss. The court explained that, based on what both parties told the court, Westport denied coverage because Westport determined that KIU was not obligated to provide builder's risk insurance under the Contract and because Mears engaged in faulty workmanship, which is excluded from coverage. In other words, Mears was damaged by the fact that the Westport Policy did not comply with the Contract requirements.

The court then stated that "[b]ased on the parties' arguments about contract interpretation, the court finds that KIU did breach the Contract by failing to procure primary builder's risk insurance." ECF No. 49 at 19–20. KIU seems to interpret this portion of the court's order to mean that the court found that KIU breached the Contract

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solely based on Westport's determination that KIU was not obligated to provide builder's risk insurance. See ECF No. 84 at 4 ("In response to KIU's Motion for Reconsideration, the Court affirmed its ruling and declared that KIU had breached the Contract requirement by not providing primary builder's risk insurance. The Court's ruling was based on [Westport's adjustor]'s first letter suggesting that other insurance, i.e., the Swiss Re Policy, 'would be the primary coverage.'"); ECF No. 97 at 1 ("While this Court has ruled that KIU breached the contract by not purchasing a 'primary' builder's risk insurance policy, that ruling was founded on an adjustor's letter, on behalf of Westport, stating that the policy was not primary."). The court notes that even if this were the only reason why the court found that KIU breached the Contract, the court's reliance on the argument that Westport denied coverage in part because its policy was not primary was argued to the court by both Mears and KIU, giving the court no reason to doubt this argument.

However, this is only part of the reason why the court found that KIU breached the Contract. As the court explained, the court based its determination that KIU breached the Contract "on the parties' arguments about contract interpretation," which led the court to interpret the Contract to require KIU to obtain primary builder's risk insurance. As discussed above, Mears argued that KIU breached the Contract by failing to ensure that the Westport Policy conformed with the Contract requirements, which was based on Westport's adjustor's letter. Mears contended that because the Westport Policy did not comply with the contractual requirements, KIU did not provide the builder's risk insurance that was required by the Contract. Notably, KIU did not respond to that argument or otherwise argue that KIU did not breach the Contract. KIU did not argue

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that, if the court found the Contract to require KIU to procure primary builder's risk insurance, the Westport Policy fulfilled that contractual requirement. Instead, KIU only argued that Mears was not damaged. Therefore, the court found that KIU breached the Contract based on Mears's argument and KIU's lack of response to it.

The court went on to explain that "Mears's breach of contract claim is only premised on KIU's failure to procure insurance, not on Westport's decision to deny coverage." ECF No. 49 at 20. The court stated that Mears was damaged by Westport's denial of coverage and stated that "there is still an issue of material fact as to whether Westport properly denied coverage due to Mears's faulty workmanship." Id. The court then explained that "[t]here is a possibility that even if KIU procured primary builder's risk insurance, the insurance would not have covered the $7 million damage because it was caused by Mears's faulty workmanship." Id. The court concluded by holding that "there is a genuine issue of material fact as to whether Mears engaged in faulty workmanship that would not have been covered by insurance and caused the $7 million of damage." Id. at 21.

c. KIU's Motion to Reconsider

KIU filed a motion to reconsider the court's order based on four grounds, and two are tangentially related to the breach of contract claim. KIU argued that the court's order resulted in manifest injustice because KIU would have to personally bear the $7 million of damage, and because the court's order found that Mears was required to obtain secondary builder's risk insurance, Mears should be required to submit a claim to its insurer. ECF No. 50-1 at 9–10. The court was unconvinced by this argument, finding that the case is a dispute over who must pay the $7 million, meaning that it is possible

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that KIU will be responsible for the $7 million, which is not manifest injustice. The court also rejected KIU's request for the court to order Mears to submit a claim to its insurer because the request amounted to injunctive relief, and KIU provided no legal basis for the court to grant such relief.

KIU also argued that the court's order misstated Westport's reasons for denying coverage. KIU explained that the court stated that Westport denied KIU's claim in part because the Contract required Mears, not KIU, to obtain builder's risk insurance and that Westport determined that the Westport Policy was excess to any of Mears's policies. KIU then explained that the court cited a September 30, 2016 letter issued by Westport's claim adjustor to support its statement, and that the letter was not the final coverage determination. Instead, KIU explained, Westport's adjustor's May 18, 2018 letter denied coverage solely based on a finding of faulty workmanship and errors or omissions. In response, Mears argued that the May 18, 2018 letter incorporated the adjustor's previous letters, including the September 30, 2016 letter, meaning that the court's statement was correct.

The court declined to amend its order for several reasons. First, the court explained that it was KIU who stated in its response to Mears's motion that Westport denied the claim in part because Mears was responsible for obtaining builder's risk insurance, and that KIU could not now fault the court for relying on KIU's statement. The court notes now that KIU's counsel also argued this point at the hearing on the motions. In other words, KIU argued for the first time that Westport denied coverage only for faulty workmanship in its motion to reconsider, and it is axiomatic that a party

may not raise an issue for the first time in a motion to reconsider.[2] The court also agreed with Mears that the May 18, 2018 letter incorporated the September 30, 2016 letter.

Now, the parties disagree on the remaining issue in the Mears action. KIU believes the issue to be one of insurance coverage, focusing on the court's statement that there is a genuine issue of material fact as to whether Westport properly denied coverage. Mears contends that the remaining issue is whether Mears was damaged by KIU's failure to procure builder's risk insurance, which could include the question of whether Mears engaged in faulty workmanship that would have been excluded from coverage had KIU obtained a primary builder's risk insurance policy. Mears contends that this issue does not involve any of the insurance companies or existing policies at play here.

The section of the court's order on Mears's breach of contract claim, read in its entirety and in context, establishes that the remaining issue for trial in the Mears action is whether Mears was damaged by KIU's failure to procure builder's risk insurance, not whether Westport's coverage determination was correct. The court explained that Mears's breach of contract claim is premised on KIU's failure to procure the contractually required insurance, not on Westport's decision to deny coverage, and there

[2] There has been continued debate over whether Westport denied coverage solely based on faulty workmanship or also based on a finding that the Westport Policy is excess to Mears's policy. The court acknowledges that Westport, the party who denied coverage and is in the best position to explain its reasoning for denial, has now stated its position on this issue and asks the court to clarify the record to reflect that Westport denied coverage solely based on faulty workmanship. However, the court declines to amend the record in the Mears action, a case in which Westport is not a party, because the court's finding on this issue was based on the information that presented by the parties that only became disputed in a motion to reconsider. As for the record in the KIU action, consideration of this issue is not necessary to resolve the motion to consolidate, so the court declines to do so now. Westport may raise its argument again when the issue becomes relevant to the matter before the court.

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is a possibility that even if KIU had procured builder's risk insurance, the insurance would not have covered the pipeline damage if it was caused by Mears's faulty workmanship. The court concluded its discussion by stating "[t]herefore, there is a genuine issue of material fact as to whether Mears engaged in faulty workmanship that would not have been covered by insurance and caused the $7 million of damage." ECF No. 49 at 21.

The court acknowledges KIU's reliance on the sentence in the court's order that states "[h]ere, there is still an issue of material fact as to whether Westport properly denied coverage due to Mears's faulty workmanship." Id. at 20. To be sure, the argument before the court was that Westport's denial of coverage, based in part on the finding that the Westport Policy was excess, meant that Westport Policy did not comply with the Contract and as a result, KIU breached the Contract. In other words, the purported reason behind Westport's coverage denial was linked the KIU's breach. However, as the court continued to explain in its order, and as Mears's complaint reveals, "Mears's breach of contract claim is only premised on KIU's failure to procure insurance, not on Westport's decision to deny coverage." Id. at 20. Indeed, a review of Mears's complaint indicates that it is not contesting Westport's coverage determination. As such, whether Westport properly denied coverage is irrelevant.

The court also notes that KIU now argues that the Westport Policy fulfilled KIU's contractual insurance obligation, meaning KIU did not breach the Contract. This argument is too late because the court has already held that KIU breached the Contract by failing to procure builder's risk insurance. Again, in its motion for summary judgment, Mears argued that KIU breached the Contract by failing to provide primary builder's risk

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insurance and failing to name Mears as a loss payee. As discussed above, KIU did not respond to this argument nor did KIU argue that the Westport Policy fulfilled its contractual obligations. Instead, KIU only argued that even if KIU breached the Contract, Mears was not damaged by the breach. Therefore, the court found "that KIU did breach the Contract by failing to procure primary builder's risk insurance." ECF No. 49 at 19–20. KIU cannot take a second bite of the apple and now argue that it did not breach the Contract based on the Westport Policy.

With this clarification in mind, the court now turns to the motions before it and finds that a stay is not warranted in the Mears action and that consolidation of the Mears action and the KIU action is not appropriate.

B. Motion to Stay

KIU argues that a stay is warranted in the Mears action while the KIU action is resolved for several reasons. "When considering a motion to stay, the district court should consider three factors: '(1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; and (3) potential prejudice to the non-moving party.'" Impulse Monitoring, Inc., 2014 WL 4748598, at *1 (quoting Johnson, 2012 WL 4538642, at *2). While KIU does not reference these three factors, KIU's arguments fit within them. Specifically, KIU's argument that a stay would streamline the issues in the Mears action suggests that a stay is in the interest of judicial economy. KIU argues that it would face hardship and prejudice if the Mears action was not stayed due to a risk of inconsistent verdicts in the Mears action and the KIU action, and KIU argues that there little potential prejudice to Mears if the Mears action were stayed. The court addresses each in turn.

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a. Judicial Economy

KIU first argues that a stay in the Mears action is warranted because the KIU action can streamline the issues involved in the Mears action. KIU points to the following alleged effects on the Mears action if KIU is granted the relief it seeks in the KIU action:

- **Declaration that Westport has to provide coverage for damage:** the Mears action will be moot because if Westport has to provide coverage, it will pay for the damage, and if Westport properly denied coverage because Mears engaged in faulty workmanship, Mears will have not suffered damage from KIU's failure to procure primary builder's risk insurance.
- **Declaration that KIU is an Additional Insured under Swiss Re Policy:** the damages in the Mears action could be greatly reduced or become zero because if KIU is an Additional Insured, then the Insurers will have to make a coverage determination and could provide coverage. If the Swiss Re Policy does not provide coverage based on faulty workmanship, then the Mears action would be moot.
- **Declaration that the Insurers must provide coverage up to available limits:** the Mears action will be moot because the damage will be paid for, and if the Westport Policy is primary and properly denied coverage, then coverage could still be available under the Swiss Re Policy.
- **Declaration that the Westport Policy must provide coverage up to the amount of available coverage and that the Swiss Re Policy must provide coverage for any amount not covered by the Westport Policy:** the pipeline

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loss or damage would be covered, and Mears's damages would be reduced or eliminated.

In response, Mears makes several arguments. First, Mears argues that the question of whether KIU may be indemnified by one of the insurance companies does not moot the question of the liability that KIU owes to Mears for breach of contract. Mears then discusses the specific insurance companies. First, Mears explains that the Westport Policy is a property policy, not a builder's risk policy,[3] so KIU cannot be absolved of liability for not obtaining primary builder's risk insurance by the Westport Policy. Second, Mears argues that the Insurers do not consider KIU to be an Additional Insured, so the Swiss Re Policy does not moot KIU's liability for failing to obtain builder's risk insurance. Moreover, Mears argues that even if KIU is determined to be an Additional Insured, KIU will simply be allowed to seek indemnification from Insurers.

Based on the court's explanation of the remaining issue in the Mears action, the court finds that staying the Mears action while the KIU action is litigated would not streamline the issues or moot any issues in the Mears action. KIU's arguments are based on the false premise that available insurance coverage from Westport and the Insurers is at issue in the Mears action. As the court explained above, the remaining issue in the Mears action is whether Mears was damaged by KIU's failure to procure a primary builder's risk insurance policy in accordance with the Contract. The court has already determined that KIU breached the Contract by failing to procure the required insurance. Therefore, even if coverage were available under the Westport Policy or the Swiss Re

[3] Westport agrees with this argument, and KIU contends that the Westport Policy does include builder's risk coverage. As discussed below, the court declines to address the substance of this argument as it is not necessary to resolve the instant motions.

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Policy, that does not change the fact that the court already ruled that KIU breached the Contract. As Mears explains, any coverage that may be obtained from Westport or the Insurers would simply serve to indemnify KIU and would not moot the remaining issue in the Mears action.

KIU also argues that staying the Mears action will ultimately reduce the complexity of the Mears action. KIU contends that by allowing the KIU action to be decided first, the jurors in the Mears action would not be required to speculate about whether insurance companies acted properly in denying coverage. Mears disagrees. Mears contends that the remaining issues in this case are "(1) whether Mears engaged in faulty workmanship; (2) if Mears engaged in faulty workmanship, would the losses have been covered by insurance (i.e., would a faulty workmanship exclusion and ensuing loss exception provision apply); and (3) the damages KIU should pay to Mears because it did not obtain the required builder's risk all-risk policy." ECF No. 92 at 14. Mears argues that these questions relate to the builder's risk policy KIU should have obtained and not the Westport Policy or the Swiss Re Policy. Therefore, the jury would not have to speculate about what Westport or Insurers would have done. In other words, the jury would be considering a policy that does not exist but should have existed, not the Westport Policy or the Swiss Re Policy. Mears also argues that the jury would not be speculating but instead would be making a decision based on the evidence and law before it.

The court agrees that the jury in the Mears action will not have to speculate about what Westport and the Insurers did or should have done because those policies are not at issue in the Mears action. Instead, a jury will have to determine whether Mears was

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damaged by KIU's failure to procure primary builder's risk insurance in accordance with the Contract. While KIU may find it impractical to ask a jury to determine whether Mears engaged in faulty workmanship and would thus be excluded from coverage under a policy that does not exist, the court notes that it was KIU who put faulty workmanship at issue in the first place.

The court also acknowledges that the parties make several substantive arguments that are related to the propriety of a stay, such as whether the collateral source rule would apply here, whether the parties in the KIU action would be bound by a finding on faulty workmanship in the Mears action, and whether the Westport Policy is in fact a builder's risk insurance policy. While the court understands why the parties raise these issues, the court declines to make any rulings on the issues because it is unnecessary for the resolution of the motion to stay. The parties can raise these arguments again at the appropriate time.

In sum, the court is unconvinced that it would be in the interest of judicial economy to stay the Mears action pending resolution of the KIU action.

b. Prejudice to KIU

Next, KIU contends that it may be prejudiced by inconsistent jury verdicts if the Mears action is not stayed. KIU explains that a jury in the Mears action could find KIU liable for damages for failure to procure the contractually required builder's risk insurance, but that in the KIU action, KIU argues that it did procure the required coverage through the Westport Policy. As such, the KIU action could establish that KIU procured the required insurance, when a jury in the Mears action could find that KIU failed to do so. KIU contends that any determination of whether KIU satisfied its

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contractual obligations should be based on an adjudicated decision in the KIU action about Westport's coverage obligations. Moreover, KIU argues that the KIU action will determine what coverage is available to cover the damage, and that any determination of coverage would contradict an award of damages in the Mears action.

KIU's argument is unconvincing. As explained above, the issue in the Mears action is whether Mears was damaged by KIU's failure to procure builder's risk insurance. The court has already determined that KIU breached the Contract by failing to do so, and KIU cannot now argue that it did not breach the Contract based on the Westport Policy. KIU had the opportunity to make that argument in response to Mears's summary judgment motion and failed to do so. Therefore, a jury verdict in the Mears action would determine what, if any, amount of damages Mears is entitled to for KIU's breach. A verdict in the KIU action would determine if any insurance coverage does in fact cover the pipeline loss or damage, but whether that coverage would have satisfied KIU's obligation under the Contract is immaterial because the court has already ruled that KIU breached the Contract. That ship has sailed.

c. Prejudice to Mears

Finally, KIU argues that Mears faces little prejudice if the Mears action is stayed because Mears is not currently suffering any harm. KIU also contends that Mears will not suffer significant prejudice in a delay in being paid because Mears's claim for $7 million is not what Mears has actually spent but instead is based on calculations, and that Mears has not quantified the actual cost of the re-work. Finally, KIU points to the fact that Mears could have, and should have, presented the claim to its own insurance carrier, the Insurers, but has still failed to do so.

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Again, Mears disagrees. Mears first notes that KIU is seeking an indefinite stay that would likely extend for years until the KIU action is resolved. Mears then explains that it has been prejudiced because it completed the work it was required to do under the Contract, meaning that KIU has benefitted from Mears's completed work, but still hasn't been paid. Mears also points to other prejudice in delaying this case, such as lost opportunities and the disclosure of this litigation to Mears's future contract partners that may negatively affect Mears's reputation. In reply, KIU clarifies that it did pay Mears for its successful work and that KIU is seeking to avoid paying Mears for the repair work for damage that KIU did not cause. KIU also argues that Mears has provided no evidence of lost opportunities or explained how involvement in litigation creates a negative perception in the marketplace.

The court finds that Mears would be prejudiced by a stay in the Mears action. The case has been pending for over two years and is now ready for trial, meaning that Mears would suffer prejudice by a stay during the final stages of litigation. See Commonwealth of Virginia ex rel. Integra Rec LLC v. Countrywide Sec. Corp., 2015 WL 222312, at *5 (E.D. Va. Jan. 14, 2015) (finding limited prejudice in granting a stay when "[n]o answers have been filed, no discovery has begun, and no trial date has been set"). Moreover, staying the Mears action pending resolution of the KIU action would result in an indefinite stay that would likely last several years. Courts have found that a delay of a few months is significant and contribute to prejudice suffered by the non-moving party. See, e.g., Sehler v. Prospect Mortg., LLC, 2013 WL 5184216, at *3 (E.D. Va. Sept. 16, 2013) (finding a delay of four to six months to be prejudicial). Here, it will clearly take longer than a few months to resolve the KIU action.

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Furthermore, regardless of whether the $7 million cost of Mears's repair work is the actual cost of Mears's rework, Mears still had to pay whatever the cost of the rework was. In addition, the court is not convinced by KIU's argument that Mears has failed to provide any evidence regarding its harm. Mears does not have the burden of proving prejudice here; rather, KIU has the burden of showing that Mears will not be prejudiced. Given the prospect of an indeterminant stay of a case that is ready for trial along with the fact that Mears has paid the cost of work, the court finds that Mears would suffer prejudice by a stay.

After weighing the competing interests here, the court determines that a stay is not warranted. There is little, if any, benefit to resolving the KIU action prior to the resolution of the Mears action, and Mears would be prejudiced by a delay in the adjudication of the Mears action, which is ready for trial. In sum, KIU has not demonstrated that clear and convincing circumstances exist that outweigh potential harm to Mears. As such, the court denies the motion to stay.

C. Motion to Consolidate

Next, KIU asks the court to consolidate the Mears action and the KIU action. KIU filed the same motion to consolidate in both the Mears action and the KIU action. For ease of discussion, the court will reference the docket numbers in the KIU action.[4]

In determining whether the cases should be consolidated, the court first considers whether the cases have common questions of law and fact. KIU provides several reasons as to why it believes that the cases have common questions of law and fact. First, KIU

[4] In their arguments against consolidation, Westport and the Insurers also maintain that the claims against them should be dismissed pursuant to their motions to dismiss.

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contends that the question of whether the Westport Policy is primary will almost certainly be resolved by the KIU action. In making this argument, KIU claims that "[w]hile this Court has ruled in the Mears [action] that [KIU] breached the [Contract] by not purchasing a 'primary' builder's risk insurance policy, that ruling was founded on an adjustor's letter, on behalf of Westport, stating that the police was not primary." ECF No. 42 at 4–5. As discussed above, the court's ruling was based on Mears's argument that KIU breached the Contract by failing to procure primary builder's risk insurance, which did incorporate the adjustor's letter, <u>and</u> KIU's lack of response to that argument. Therefore, it is too late for KIU to now assert that the Westport Policy complies with the Contract's requirement about primary builder's risk insurance. As such, the question of whether the Westport Policy fulfills KIU's contractual obligations is not relevant in the Mears action.

Next, KIU explains that it is KIU's position in the Mears action that the Westport Policy complies with the Contract's insurance requirements, and that the KIU action will confirm this. Again, the problem with this argument is that the court has already found that KIU breached the Contract by failing to provide primary builder's risk insurance. Therefore, whether KIU breached the Contract has already been determined by the court, and KIU cannot relitigate the issue now.

KIU also argues that the KIU action will determine whether the faulty workmanship exclusion is a bar to coverage, and then that determination will be applied in the Mears action to resolve the question of whether Mears engaged in faulty workmanship. However, as discussed above, Westport's denial of coverage is not at

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issue in the Mears action. Therefore, any findings about Westport's denial of coverage based on faulty workmanship will not be admissible nor impact the Mears action.

Finally, KIU contends that the KIU action will resolve the issue of whether the Westport Policy includes ensuing loss coverage. Again, this is not relevant to the question of whether Mears was damaged by KIU's failure to procure builder's risk insurance, because up until now, KIU had never argued that the Westport Policy satisfied KIU's contractual obligation. Therefore, whether the Westport Policy had ensuing loss coverage is irrelevant.

In response, Mears argues that the issues in the cases are different, namely that the Mears action will focus on whether Mears was damaged by KIU's failure to procure primary builder's risk insurance and the KIU action will focus on whether insurance should cover any of the pipeline loss or damage. Mears stresses that Westport's denial of coverage is not at issue in the Mears action.

Similarly, Westport argues that the Mears action does not involve the interpretation of the Westport Policy or Westport's denial of coverage, meaning that cases involve different questions of fact and law. Westport cites to a similar case that, while not within the Fourth Circuit, contains analogous facts and in which the court denied consolidation based on a lack of commonality of questions facts and law. In Star Constr. & Restoration, LLC v. Gratiot Ctr. LLC, a heavy snowfall caused the roof of a shopping center to partially collapse. 2017 WL 1021060, at *1 (E.D. Mich. Mar. 16, 2017). The owner, Gratiot Center, contracted with Star Construction and Restoration ("Star") to repair the roof. Star subsequently sued Gratiot Center because Gratiot Center did not pay Star for its work. Then, Gratiot Center filed another suit against a group of

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insurance companies who denied coverage for the repairs. The court found that there were not common questions of fact and law between the two suits that warranted consolidation. The court explained that Star's legal theories for recovery, which were based on unjust enrichment, promissory estoppel, and fraud/misrepresentation, did not rely upon a finding that insurance covered the repairs. Id. at *2–*3. Indeed, the court found that if Star prevailed in its suit, Gratiot would have to pay Star regardless of whether Gratiot succeeded in recovering from the insurance companies. The only potential connection that the court found between the two actions was Gratiot Center's defense. Gratiot Center claimed that Star was only to perform work covered by insurance, and absent a finding that insurance covered Star's work, Star performed work outside of the scope of the contract and therefore wasn't entitled to relief. However, the court found this connection to be too tenuous to justify consolidation. Id. at *2.

The facts of Star Constr. & Restoration, LLC and the instant cases are similar. In the Mears action, KIU's liability is based on whether Mears was damaged by KIU's failure to procure primary builder's risk insurance, and that determination will be made by a jury regardless of what coverage the Westport Policy or Swiss Re Policy might provide. As such, KIU's liability in the Mears action, like Gratiot Center's liability to Star, is not based on insurance coverage, meaning that there are not common questions of fact and law that warrant consolidation.

Moreover, the Insurers argue that there are no common question of fact and law as applied to them because the Mears action solely focuses on KIU's failure to procure insurance, and the Insurers provided insurance to Mears. KIU claims that it has made allegations about the Swiss Re Policy in defending against Mears's motion for summary

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judgment, making the Swiss Re Policy at issue in the Mears action. KIU cites to statements in KIU's response to Mears's motion for summary judgment that say "KIU, in turn, demanded that Mears submit the claim to its own builder's risk insurance carrier, as Mears had provided evidence of having builder's risk coverage at the start of the Project, as required under the contract," ECF No. 21 at 2, and that "[o]n April 21, 2016, Scott Kehrer, on behalf of Mears, provided evidence of Mears' insurance coverage to Thomas & Hutton and KIU. That insurance summary included, as the first item, the same builder's risk insurance that Mears claims KIU was obligated to provide[,]" id. at 10. KIU also cites to Exhibit 2 to KIU's response, in which counsel for KIU memorialized his demands that Mears submit a claim to the Insurers. However, these instances are all recitations of past events and not legal arguments by KIU that Mears must submit a claim to the Insurers. KIU did ask the court to require Mears to submit a claim to the Insurers in KIU's motion to reconsider, but it did so briefly and without providing any legal basis for the court to do so, so the court denied KIU's request. Therefore, the court is unconvinced that the Mears action and any claims against the Insurers involve common questions of fact and law.

The court acknowledges that may be a common issue between the two cases—whether Mears engaged in faulty workmanship. In the Mears action, that issue could be considered in determining whether Mears was damaged by KIU's failure to procure primary builder's risk insurance. In the KIU action, whether Mears engaged in faulty workmanship will influence the determination of whether Westport properly denied coverage based on faulty workmanship and potentially whether coverage is available under the Swiss Re Policy, if KIU is found to be an Additional Insured. However, this

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commonality alone is not sufficient to warrant consolidate because the other Arnold factors weigh against consolidation.

With regard to the first Arnold factor, the court finds that there is significant risk of prejudice and possible confusion if the cases were to be consolidated. As explained at length, the Westport Policy and Swiss Re Policy are not at issue in the Mears action. If the cases were consolidated, the jurors would likely be confused by the discussion of the Westport Policy and the Swiss Re Policy and mistakenly think that those policies were relevant to the Mears action. As to the length of time to conclude multiple suits compared to one, the difference in procedural posture in these cases weighs against consolidation. Because the court denies KIU's motion to stay the Mears action, the Mears action is ready for trial. In contrast, the KIU action has yet to begin discovery. Therefore, consolidating the cases will significantly prolong the Mears action when the case's resolution is currently within sight. Moreover, consolidating the Mears action and KIU action will not reduce the burden on the parties, witnesses, and available judicial resources posed by multiple suits. The Mears action will focus on what, if any, damage Mears suffered from KIU's breach of the Contract and will not involve parties or witnesses related to Westport and the Insurers. And because the issues in the cases are different, judicial resources will not be conserved by consolidating the cases.

The court notes that there is a disagreement among the parties about whether there is a risk of inconsistent adjudication if the cases are not consolidated. Mears argues that the law requires that any factual finding on Mears's faulty workmanship in the Mears action would apply to the coverage disputes in the KIU action. Westport and KIU disagree. However, the court declines to decide this issue now because it does not affect

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the court's analysis. The potential inconsistency would occur if a jury in the Mears action determined that Mears did not engage in faulty workmanship, while a jury or the court found in the KIU action that there is no coverage available under the Westport Policy or Swiss Re Policy because Mears did engage in faulty workmanship. However, that inconsistency is a product of KIU's failure to argue in the Mears action that the Westport Policy fulfilled its contractual requirements. If KIU had argued that, if the court were to find that KIU was required to provide primary builder's risk insurance, the Westport Policy satisfied that requirement, then whether Mears engaged in faulty workmanship based on a builder's risk insurance policy that KIU did not actually obtain would not be a potential issue. Therefore, to the extent that there is a possibility of inconsistent adjudication, it is by KIU's creation, and because all other factors weigh strongly against consolidation, the court denies KIU's motions to consolidate.

III. CONCLUSION

For the reasons set forth above, the court **DENIES** the motion to stay and **DENIES** the motions to consolidate.

AND IT IS SO ORDERED.

DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

October 22, 2019
Charleston, South Carolina

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BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2021-324-WS

IN RE: Application of Kiawah Island Utility, Incorporated for an Adjustment of Rates and Charges	))))	**SOUTH CAROLINA OFFICE OF REGULATORY STAFF'S SIXTH AND CONTINUING REQUEST FOR PRODUCTION OF BOOKS, RECORDS, AND OTHER INFORMATION**

TO: SCOTT ELLIOTT, ESQUIRE AND CHARLIE L. TERRENI, ESQUIRE ATTORNEYS FOR KIWAH ISLAND UTILITY, INC.:

The South Carolina Office of Regulatory Staff ("ORS") hereby requests, pursuant to S.C. Code Ann. §§ 58-4-50(A), 58-4-55, and 58-5-230, and other applicable law that Kiawah Island Utility, Inc. ("KIU" or the "Company") provide responses in writing and electronically where required and under oath and serve the undersigned by January 13, 2022, to ORS at 1401 Main Street, Suite 900, Columbia, South Carolina 29201.

DEFINITIONS

As used in these Requests, "identify" means, when asked to identify a person, to provide the full name, business title, address, and telephone number. As used in these Requests, "address" means mailing address and business address. When asked to identify or provide a document, "identify" and "provide" mean to provide a full and detailed description of the document and the name and address of the person who has custody of the document. In lieu of providing a full and detailed description of a document, you may attach to your responses a copy of the document and identify the person who has custody of it. When the word "document" is used herein, it means any written, printed, typed, graphic, photographic, or electronic matter of any kind or nature and

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includes, but is not limited to, statements, contracts, agreements, reports, opinions, graphs, books, records, letters, correspondence, notes, notebooks, minutes, diaries, memoranda, transcripts, photographs, pictures, photomicrographs, prints, negatives, motion pictures, sketches, drawings, publications, and tape recordings.

"Party" is defined as every entity that has intervened in, petitioned to intervene in, filed an Application in, or is otherwise a party of record to these dockets, and each Party's officers, agents, employees (past and present), representatives, successors, or any other person or persons acting for or purportedly acting on the Party's behalf.

The words "you" and "your" refer to KIU, as well as their officers, agents, employees (past and present), representatives, successors, or any other person or persons acting for or purportedly acting on KIU's behalf.

Wherever in this Request a masculine pronoun or possessive adjective appears, it refers to both males and females in accordance with traditional English usage.

INSTRUCTIONS

1. Pursuant to S.C. Code Ann. § 58-4-55(A), all responses shall be submitted under oath.

2. This Request shall be deemed to be continuing so as to require the KIU to supplement or amend its responses as any additional information becomes available.

3. In addition to the signature and verification at the close of the responses, the witness(es), employee(s), contractor(s), or agent(s) responsible for the information contained in each response shall be indicated at the bottom of each response.

4. If the KIU believes that a response to any of the Requests was previously submitted to ORS, please cite the document and page number in the response.

5. If information requested herein is found in other places or other exhibits, reference shall *not* be made to those other places or other exhibits; instead, the information

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shall be reproduced, and an additional copy shall be produced in response to the Request in the appropriate numerical sequence.

6. If the response to any Request is that the information requested is not currently available, state when the information requested will be available and provided to ORS. This statement is not a waiver of the deadline for all other responses.

7. If you are unable to respond to any of the Requests, or part or parts thereof, please specify the reason for your inability to respond and state what other knowledge or information you have concerning the unanswered portion.

8. If you refuse to disclose any document requested herein, in whole or in part, based on any claim of privilege or immunity, identify the specific privilege or protection claimed and state the basis for the claim, identifying the pertinent circumstances with sufficient specificity to ORS to assess the basis of any such claim. If you have a good-faith objection to any of these Requests, or any part thereof, the specific nature of the objection and whether it applies to the entire Request or to a certain portion thereof shall be clearly stated. If there is an objection to any part of a Request, then the part or parts objected to should be indicated and documents responsive to the remaining unobjectionable parts should be provided.

9. All responses to the Requests below shall be labeled using the same numbers as used herein.

10. Each Request shall be reproduced and included in front of each set of responses.

11. All information requested below, unless otherwise specified, shall be provided in electronic form only unless otherwise requested.

12. All information available in Excel spreadsheets shall be provided in Excel. All Excel spreadsheets shall be working copies with all formulas, links, and calculations intact.

13. Responses containing .pdf documents must be searchable. Each electronic file must be clearly marked with the Response number.

14. Where a hardcopy response is requested, KIU shall provide one paper copy/binder of all responses to ORS. The paper copy shall be bound in 3-ring binders with numbered tabs between each request. The request should be reproduced at the beginning of each tab for the responses included. All exhibits shall be reduced or expanded to 8 ½" x 11" formats, where practical. This entire list of requests shall be reproduced and included in front of each set of responses.

15. For every page produced to ORS that contains confidential information, the page is to be marked "CONFIDENTIAL" in the header. Any specific information which KIU designates as confidential information must also be marked by notation, highlighting, or other conspicuous means.

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16. Any inquiries or communications relating to the Requests concerning clarification of the information requested below should be directed to Alexander W. Knowles, Esquire (803.737.0889), Donna L. Rhaney, Esquire (803.737.0609), Daniel Hunnell (803.737.0780), Daniel Sullivan (803.737.0476), and Liz McGlone (803.737.0580) of ORS.

17. Unless stated otherwise, the requested items are for the test year, period of January 1, 2020 through December 31, 2020 ("Test Year"), unless stated otherwise.

REQUESTS

Mears Group, Incorporation

6-1 Provide a copy of the request for proposal ("RFP"), request for qualification ("RFQ") or similar solicitation documents that KIU provided to potential contractors prior to contracting with Mears Group, Inc. to install approximately 7,000 feet of a water line under the Kiawah River from Johns Island to Kiawah Island ("Project").

6-2 When did KIU become aware that Mears had not secured builders risk insurance related to the Project? Please describe the related circumstances in detail.

6-3 What steps did KIU take to ensure that builders risk insurance had been secured prior to the commencement of the Project?

6-4 Please fully describe whether and why KIU believes its efforts were reasonable and prudent to ensure builders risk insurance had been secured prior to commencement of the Project.

6-5 Did KIU obtain any estimates of the costs of securing builders risk insurance related to the Project? Please explain in detail why or why not.

6-6 Please provide the estimated cost of securing builders risk insurance related to the Project, including any related workpapers or other documents that support the estimate.

6-7 Please fully describe KIU's efforts to ensure that the Mears Contract was clear regarding the obligations, or lack thereof, of the parties to the Mears Contract to procure builders risk insurance related to the Project.

6-8 Please fully describe KIU's efforts in monitoring and supervising Mears' activities related to the Project.

6-9 Please fully describe whether and why KIU believes its monitoring and supervision of Mears' activities related to the Project was reasonable and prudent.

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6-10 Follow up to KIU's response to IR 4-16 in file "CONF ORS AIR 4-16 Att b – insurance premiums." Please explain why the premiums paid to SwissRe International SE and Lloyd's Sindicate 1882 CHB for years 2016 to 2020 are listed as "unknown."

6-11 Follow up to KIU's response to IR 4-14 in file "CONF ORS AIR 4-14 Att a – Mears legal costs." Please explain whether there are any legal expenses associated with the Mears Litigation which have not yet been incurred or which KIU expects to incur in the future.

6-12 Follow up to KIU's response to IR 4-13 in file "CONF ORS AIR 4-13 Att a – Mears narrative." Please provide a copy of the settlement agreement resolving the Mears Litigation referenced in KIU's response to IR 4-13.

6-13 Please provide any expert reports prepared by, for or on behalf of KIU relating to Mears' performance in connection with the Project. Please also provide any other expert reports in KIU's possession relating to Mears' performance in connection with the Project.

6-14 Does KIU assert that it complied with all insurance requirements under the Mears Contract?

6-15 Please fully explain why KIU asserts that the approximately $2.4M that KIU paid to Mears., as a result of the settlement agreement regarding the Mears litigation should be included for recovery in this rate case.

6-16 Please describe the nature and scope of the insurance coverage which, according to Mears in Docket No. 2:17-CV-02418-DCN (D.SC), that KIU should have secured under the Mears Contract. Please explain whether and how such insurance would have covered the damages claimed by Mears related to the Project.

Economic

6-17 In MS Excel format with formulas intact, please provide:

a. A list of current debt issuances held by the Company, including date of issuance, maturity date, original principal amount, amount outstanding, interest rate, and an itemization of all associated costs, fees, and charges for each debt issuance; and

b. A calculation for the Company's Weighted Average Cost of Debt for the Test Year.

6-18 Provide the amount and type of short-term debt held by the Company, if any.

6-19 Does the Company plan to seek any additional debt (of any maturity term) in the next five years? If so, proved the expected/estimated:

a. Number of debt issuance;

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b. Date(s) of issuances(s) (for this response, the anticipated year or month and year is sufficient);

c. Original principal amount(s); and

d. Interest rate(s).

6-20 Is there a make-whole provision for any Long-Term Debt agreement underlying any of the Company's Long-Term Debt? If so, please furnish a copy of each agreement with such a provision.

6-21 Referencing the "Interest" Adjustment #24 in Schedule B of Exhibit B of the Application:

a. Provide in MS Excel format with all formulas intact the calculations and source data used to determine the interest expense/interest sync calculation.

b. Provide any relevant supporting documentation responsive to IR 6-21(a).

6-22 Does the Company ever utilize a hypothetical capital structure? If so:

a. For what purpose(s) is the hypothetical capital structure used?

b. What is the current or most recent hypothetical capital structure utilized by the Company?

c. If any alternate hypothetical capital structures to the one indicated in subpart (b) of this question have been used by the Company in the last five years, please identify the debt and equity ratios of the same.

6-23 Provide the actual annual capital structure, including common equity, long-term debt, and short-term debt, for each of the last five full calendar years for both the Company and its parent company.

6-24 Provide the consolidated annual capital structures for SouthWest Water Company for each calendar year from 2018 to 2020. For this response:

a. Show all components of the capital structure for each period, including Equity, Preferred Stock, Long-Term Debt, Short-Term Debt, and Debentures, with their consolidated cost rates at the parent holding company level.

b. Show how the equity cost rate was calculated from the weighted rates of all subsidiaries for the most recent period.

c. Provide the issuance costs and fees, the yield-to-maturity rate as an annual percentage rate, and the date of issuance of the most recent Long-Term Debt

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instrument, such as a bond. Please discuss credit ratings of each issuance, including rating at time of issuances and all changes of rating and outlook.

d. Provide the monthly balances of short-term debt and effective monthly costs rates for each period.

6-25 In MS Excel format with formulas intact, provide calculations for the Company's debt and equity ratios for its capital structure for the Test Year, including a breakdown of total debt and equity components.

6-26 Identify how much of the Company's capital is internally funded (i.e., from SouthWest Water Company, a SouthWest Water Company subsidiary, or other affiliated entity of KIU). For this response, provide the amount of internally funded debt and equity separately.

6-27 What portion of net earnings is retained? Please provide the calculation starting with total earnings.

6-28 What dividend payments or equivalent profit distributions has the Company made to its owner(s) in the last 12 quarters? Provide how much, to what owner(s), and on what date(s) such payments or distributions were made.

6-29 Please provide the operating margins granted by commission order in the five most recent rate cases involving SouthWest Water Company subsidiaries. Include as part of this response:

a. Name of the utility;

b. Jurisdiction;

c. Docket number;

d. Operating margin sought by utility, and

e. Operating margin awarded by the commission.

6-30 Please provide the Company's annual forecasted growth rates for the following factors over the next 10 years (or longest period available):

a. Total customer demand;

b. Total customers;

c. Total revenue;

d. Net income; and

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e. Rate base.

6-31 Please provide the Company's historical annual figures for the following factors over the past 10 years and the source of such information:

a. Total customer demand;

b. Total customers;

c. Total revenue;

d. Operating income;

e. Net income; and

f. Rate base.

Audit Follow up

6-32 Please reconcile the following Company responses:

a. Company response to 4-17 when asked to identify and provide documentation of any funds received by the Company from insurance providers: "The Company did not, and will not, receive any funds as part of the settlement of the litigation."
b. Company response to 4-2, attachment B, analytical review, balance sheet, company identified they accrued in 2019 and received in 2020, $1,600,000 insurance recovery related to secondary pipeline.

6-33 For the KIU water asset - Secondary Pipeline – St. John to Kiawah Island in the amount of $9,742,848.83 that is included in the 2020 KIU Assets excel workbook provided in response to Supplemental to IR 1 on 12/17/21:

a. Provide a list that shows invoice number and invoice amount for all invoices associated with Mears included in the amount of $9,742,848.83 for the secondary pipeline.
b. Provide copies of all invoices associated with Mears included in the amount of $9,742,848.83 for the secondary pipeline.

/s/ Donna L. Rhaney
Donna L. Rhaney, Esquire
Alexander W. Knowles, Esquire,
South Carolina Office of Regulatory Staff
1401 Main St., Ste. 900

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SC PSC

Columbia, SC 29201
Phone: (803) 737-0609
(803) 737-0889
Email: drhaney@ors.sc.gov
aknowles@ors.sc.gov

January 6, 2022
Columbia, South Carolina.

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DOCKET: 2021-324-WS
Monday, April 11, 2022 1:42:42 AM
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Kiawah Island Utility, Inc.
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Response to ORS Sixth Information Request

6-1 Provide a copy of the request for proposal ("RFP"), request for qualification ("RFQ") or similar solicitation documents that KIU provided to potential contractors prior to contracting with Mears Group, Inc. to install approximately 7,000 feet of a water line under the Kiawah River from Johns Island to Kiawah Island ("Project").

KIU Response:

Please see Attachment a.

Prepared By:

Becky Dennis

6-2 When did KIU become aware that Mears had not secured builders risk insurance related to the Project? Please describe the related circumstances in detail.

KIU Response:

The premise of this question is incorrect; Mears did have builders risk insurance throughout the duration of the Project, as reflected in the below excerpt from the Certificate of Insurance (COI), dated April 21, 2016, that Mears provided KIU as required under its contract. Please see attachment a, a copy of the Mears COI.

Builders Risk / Contractors Equipment / Real & Personal Property Policy No. B0180ME1504780
Insurer: 50% Swiss Re International SE / 50% Lloyds Syndicate Chubb 1882 through R.K. Harrison
Policy Term: May 1, 2016 to May 1, 2017

SECTION I - BUILDERS RISK:

Limits/Sub Limits:

$	75,000,000	Any One Occurrence for any Insured Project
$	10,000,000	Any One Occurrence as respects Covered Property in Temporary Offsite locations
$	25,000,000	Any One Occurrence as respects Horizontal Directional Drilling Works
$	10,000,000	Any One Occurrence as respects Covered Property in Transit
$	10,000,000	Any One Occurrence as respects Debris Removal or 25% of loss amount, whichever is less
$	25,000,000	Any One Occurrence as respects Expediting Expense
$	2,500,000	Any One Occurrence as respects Extra Expense

Aggregate Limits of Liability (Subject to Policy Aggregate Limits of Liability):

$	50,000,000	Any One Occurrence/Annual Aggregate Flood - Flood Level 1 and U.S. Territories & Possessions, and the Commonwealth of Puerto Rico and any foreign project location(s).
$	25,000,000	Any One Occurrence/Annual Aggregate Earthquake - California
$	50,000,000	Any One Occurrence/Annual Aggregate Earthquake - within all other Earthquake Zone1
$	50,000,000	Any One Occurrence/Annual Aggregate Named Windstorm within Wind Zone 1

Valuation:
The actual cost to repair or replace the lost or damaged property, valued as of the time and place of loss, with material of like kind and quality.

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Kiawah Island Utility, Inc.
Docket 2021-324-WS
Response to ORS Sixth Information Request

Prepared By:

Dan Medina

6-3 What steps did KIU take to ensure that builders risk insurance had been secured prior to the commencement of the Project?

KIU Response:

Under the KIU-Mears contract, before starting any work at the project site, Mears was required to provide KIU with certificates of insurance or other evidence of insurance for which Mears was required to purchase and maintain under the contract. In accordance with the contract, Mears provided a certificate of insurance that reflected the following builders risk coverage:

Builders Risk / Contractors Equipment / Real & Personal Property Policy No. B0180ME1504780
Insurer: 50% Swiss Re International SE / 50% Lloyds Syndicate Chubb 1882 through R.K. Harrison
Policy Term: May 1, 2016 to May 1, 2017

SECTION I - BUILDERS RISK:

Limits/Sub Limits:

$	75,000,000	Any One Occurrence for any Insured Project
$	10,000,000	Any One Occurrence as respects Covered Property in Temporary Offsite locations
$	25,000,000	Any One Occurrence as respects Horizontal Directional Drilling Works
$	10,000,000	Any One Occurrence as respects Covered Property in Transit
$	10,000,000	Any One Occurrence as respects Debris Removal or 25% of loss amount, whichever is less
$	25,000,000	Any One Occurrence as respects Expediting Expense
$	2,500,000	Any One Occurrence as respects Extra Expense

Aggregate Limits of Liability (Subject to Policy Aggregate Limits of Liability):

$	50,000,000	Any One Occurrence/Annual Aggregate Flood - Flood Level 1 and U.S. Territories & Possessions, and the Commonwealth of Puerto Rico and any foreign project location(s).
$	25,000,000	Any One Occurrence/Annual Aggregate Earthquake - California
$	50,000,000	Any One Occurrence/Annual Aggregate Earthquake - within all other Earthquake Zone1
$	50,000,000	Any One Occurrence/Annual Aggregate Named Windstorm within Wind Zone 1

Valuation:
The actual cost to repair or replace the lost or damaged property, valued as of the time and place of loss, with material of like kind and quality.

Please see the copy of the Mears COI, provided as attachment a to KIU's response to AIR 6-2.

Prepared By:

Dan Medina

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Kiawah Island Utility, Inc.
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Response to ORS Sixth Information Request

6-4 Please fully describe whether and why KIU believes its efforts were reasonable and prudent to ensure builders risk insurance had been secured prior to commencement of the Project.

KIU Response:

KIU's efforts were reasonable and prudent to ensure builders risk insurance had been secured prior to commencement of the Project. Under the KIU-Mears contract, before starting any work at the project site, Mears was required to provide KIU with certificates of insurance or other evidence of insurance Mears was required to purchase and maintain under the contract. In accordance with the contract, Mears provided a certificate of insurance that reflected the following builders risk coverage:

Builders Risk / Contractors Equipment / Real & Personal Property Policy No. B0180ME1504780
Insurer: 50% Swiss Re International SE / 50% Lloyds Syndicate Chubb 1882 through R.K. Harrison
Policy Term: May 1, 2016 to May 1, 2017

SECTION I - BUILDERS RISK:

Limits/Sub Limits:

$	75,000,000	Any One Occurrence for any Insured Project
$	10,000,000	Any One Occurrence as respects Covered Property in Temporary Offsite locations
$	25,000,000	Any One Occurrence as respects Horizontal Directional Drilling Works
$	10,000,000	Any One Occurrence as respects Covered Property in Transit
$	10,000,000	Any One Occurrence as respects Debris Removal or 25% of loss amount, whichever is less
$	25,000,000	Any One Occurrence as respects Expediting Expense
$	2,500,000	Any One Occurrence as respects Extra Expense

Aggregate Limits of Liability (Subject to Policy Aggregate Limits of Liability):

$	50,000,000	Any One Occurrence/Annual Aggregate Flood - Flood Level 1 and U.S. Territories & Possessions, and the Commonwealth of Puerto Rico and any foreign project location(s).
$	25,000,000	Any One Occurrence/Annual Aggregate Earthquake - California
$	50,000,000	Any One Occurrence/Annual Aggregate Earthquake - within all other Earthquake Zone1
$	50,000,000	Any One Occurrence/Annual Aggregate Named Windstorm within Wind Zone 1

Valuation:
The actual cost to repair or replace the lost or damaged property, valued as of the time and place of loss, with material of like kind and quality.

Please see the copy of the Mears COI, provided as attachment a to KIU's response to AIR 6-2.

Moreover, the COI provided by Mears was consistent with Mears' representations during the negotiations of the KIU-Mears contract. Specifically, during the negotiations, Mears' representative stated: "We [Mears] are providing Builder's Risk insurance. Doesn't that address your concern?". Below is a snip of the comment as it appeared in the draft of the document being negotiated:

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Commented [BJ4]: There appears to be some misunderstanding. I don't think KIU expects us to pay for loss or damage which is due to the negligence of KIU, its engineer, or other contractors, do you? If our insurer pays any such claim, it would increase our premiums in the coming years to offset the claim paid, so that it would eventually come out of our pocket. We are providing builder's risk insurance. Doesn't that address your concern?

Prepared By:

Dan Medina

6-5 Did KIU obtain any estimates of the costs of securing builders risk insurance related to the Project? Please explain in detail why or why not.

KIU Response:

No. The KIU-Mears contract required Mears, not KIU, to procure and maintain builder's risk insurance for the Project, which Mears did, as reflected in the COI Mears provided to KIU:

Builders Risk / Contractors Equipment / Real & Personal Property Policy No. B0180ME1504780
Insurer: 50% Swiss Re International SE / 50% Lloyds Syndicate Chubb 1882 through R.K. Harrison
Policy Term: May 1, 2016 to May 1, 2017

SECTION I - BUILDERS RISK:

Limits/Sub Limits:

$	75,000,000	Any One Occurrence for any Insured Project
$	10,000,000	Any One Occurrence as respects Covered Property in Temporary Offsite locations
$	25,000,000	Any One Occurrence as respects Horizontal Directional Drilling Works
$	10,000,000	Any One Occurrence as respects Covered Property in Transit
$	10,000,000	Any One Occurrence as respects Debris Removal or 25% of loss amount, whichever is less
$	25,000,000	Any One Occurrence as respects Expediting Expense
$	2,500,000	Any One Occurrence as respects Extra Expense

Aggregate Limits of Liability (Subject to Policy Aggregate Limits of Liability):

$	50,000,000	Any One Occurrence/Annual Aggregate Flood - Flood Level 1 and U.S. Territories & Possessions, and the Commonwealth of Puerto Rico and any foreign project location(s).
$	25,000,000	Any One Occurrence/Annual Aggregate Earthquake - California
$	50,000,000	Any One Occurrence/Annual Aggregate Earthquake - within all other Earthquake Zone1
$	50,000,000	Any One Occurrence/Annual Aggregate Named Windstorm within Wind Zone 1

Valuation:
The actual cost to repair or replace the lost or damaged property, valued as of the time and place of loss, with material of like kind and quality.

Please see the copy of the Mears COI, provided as attachment a of KIU's response to AIR 6-2.

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DOCKET: 2021-324-WS
Filing Date: 4/30/2022 1:42:42 AM
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Prepared By:

Dan Medina

6-6 Please provide the estimated cost of securing builders risk insurance related to the Project, including any related workpapers or other documents that support the estimate.

KIU Response:

KIU has no information or documents regarding the estimated cost of securing builders risk insurance related to the Project. It was Mears' responsibility to procure the coverage, which it did, as evidenced by its COI that was provided to KIU in accordance with the KIU-Mears contract:

Builders Risk / Contractors Equipment / Real & Personal Property Policy No. B0180ME1504780
Insurer: 50% Swiss Re International SE / 50% Lloyds Syndicate Chubb 1882 through R.K. Harrison
Policy Term: May 1, 2016 to May 1, 2017

SECTION I - BUILDERS RISK:

Limits/Sub Limits:

$	75,000,000	Any One Occurrence for any Insured Project
$	10,000,000	Any One Occurrence as respects Covered Property in Temporary Offsite locations
$	25,000,000	Any One Occurrence as respects Horizontal Directional Drilling Works
$	10,000,000	Any One Occurrence as respects Covered Property in Transit
$	10,000,000	Any One Occurrence as respects Debris Removal or 25% of loss amount, whichever is less
$	25,000,000	Any One Occurrence as respects Expediting Expense
$	2,500,000	Any One Occurrence as respects Extra Expense

Aggregate Limits of Liability (Subject to Policy Aggregate Limits of Liability):

$	50,000,000	Any One Occurrence/Annual Aggregate Flood - Flood Level 1 and U.S. Territories & Possessions, and the Commonwealth of Puerto Rico and any foreign project location(s).
$	25,000,000	Any One Occurrence/Annual Aggregate Earthquake - California
$	50,000,000	Any One Occurrence/Annual Aggregate Earthquake - within all other Earthquake Zone1
$	50,000,000	Any One Occurrence/Annual Aggregate Named Windstorm within Wind Zone 1

Valuation:
The actual cost to repair or replace the lost or damaged property, valued as of the time and place of loss, with material of like kind and quality.

Please see the copy of the Mears COI, provided as attachment a to KIU's response to AIR 6-2.

Moreover, KIU does not have any information regarding Mears' cost for its builders risk policy as Mears did not provide such information to KIU.

Prepared By:

Dan Medina

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Kiawah Island Utility, Inc.
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Response to ORS Sixth Information Request

6-7 Please fully describe KIU's efforts to ensure that the Mears Contract was clear regarding the obligations, or lack thereof, of the parties to the Mears Contract to procure builders risk insurance related to the Project.

KIU Response:

KIU relied on in-house counsel as well as outside counsel to review and negotiate the terms of the KIU-Mears contract, including the insurance provisions.

Moreover, KIU relied on Mears' express representations during negotiations confirming their understanding that they, not KIU, was providing the builders risk insurance: "We [Mears] are providing Builder's Risk insurance. Doesn't that address your concern?". Below is a snip of the comment as it appeared in the draft of the document being negotiated:

> **Commented [BJ4]:** There appears to be some misunderstanding. I don't think KIU expects us to pay for loss or damage which is due to the negligence of KIU, its engineer, or other contractors, do you? If our insurer pays any such claim, it would increase our premiums in the coming years to offset the claim paid, so that it would eventually come out of our pocket. We are providing builder's risk insurance. Doesn't that address your concern?

Prepared By:

Dan Medina

6-8 Please fully describe KIU's efforts in monitoring and supervising Mears' activities related to the Project.

KIU Response:

The premise of this question is incorrect; neither KIU nor its engineers had the authority or obligation to monitor or supervise Mears' performance of the complex and specialized horizontal directional drilling (HDD) work on the Project for which KIU sought out contractors with significant HDD experience and expertise. In particular, the KIU-Mears contract expressly provided that KIU "will not supervise, direct, or have control or authority over" Mears' performance of the work on the Project:

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Docket: 2021-324-WS
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Submission Status: Accepted
Filing Date: 04/30/2022
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> **8.09** *Limitations on Owner's Responsibilities*
>
> A. The Owner shall not supervise, direct, or have control or authority over, nor be responsible for, Contractor's means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto, or for any failure of Contractor to comply with Laws and Regulations applicable to the performance of the Work. Owner will not be responsible for Contractor's failure to perform the Work in accordance with the Contract Documents.

The contract likewise expressly provided that KIU's engineers "will not supervise, direct, or have control or authority over" Mears' performance of the work on the Project:

> B. Engineer's visits and observations are subject to all the limitations on Engineer's authority and responsibility set forth in Paragraph 9.09. Particularly, but without limitation, during or as a result of Engineer's visits or observations of Contractor's Work, Engineer will not supervise, direct, control, or have authority over or be responsible for Contractor's means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto, or for any failure of Contractor to comply with Laws and Regulations applicable to the performance of the Work.

Prepared By:

Brian Bahr

6-9 Please fully describe whether and why KIU believes its monitoring and supervision of Mears' activities related to the Project was reasonable and prudent.

KIU Response:

Please see KIU's response to ORS AIR 6-8.

Prepared By:

Brian Bahr

6-10 Follow up to KIU's response to IR 4-16 in file "CONF ORS AIR 4-16 Att b – insurance premiums." Please explain why the premiums paid to SwissRe International SE and Lloyd's Sindicate 1882 CHB for years 2016 to 2020 are listed as "unknown."

KIU Response:

The referenced policies were Mears' policies, not KIU's policies. KIU does not have any information regarding the premiums Mears paid to those insurers.

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Prepared By:

Dan Medina

6-11 Follow up to KIU's response to IR 4-14 in file "CONF ORS AIR 4-14 Att a – Mears legal costs." Please explain whether there are any legal expenses associated with the Mears Litigation which have not yet been incurred or which KIU expects to incur in the future.

KIU Response:

There are no legal expenses associated with the Mears Litigation that have not yet been incurred. KIU does not expect to incur any such expenses in the future.

Prepared By:

Dan Medina

6-12 Follow up to KIU's response to IR 4-13 in file "CONF ORS AIR 4-13 Att a – Mears narrative." Please provide a copy of the settlement agreement resolving the Mears Litigation referenced in KIU's response to IR 4-13.

KIU Response:

Please see confidential Attachment a.

Prepared By:

Dan Medina

6-13 Please provide any expert reports prepared by, for or on behalf of KIU relating to Mears' performance in connection with the Project. Please also provide any other expert reports in KIU's possession relating to Mears' performance in connection with the Project.

KIU Response:

Please see Attachment a.

Prepared By:

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Dan Medina

6-14 Does KIU assert that it complied with all insurance requirements under the Mears Contract?

KIU Response:

Yes.

Prepared By:

Dan Medina

6-15 Please fully explain why KIU asserts that the approximately $2.4M that KIU paid to Mears., as a result of the settlement agreement regarding the Mears litigation should be included for recovery in this rate case.

KIU Response:

Please see Attachment b and confidential Attachment a.

Prepared By:

Brian Bahr

6-16 Please describe the nature and scope of the insurance coverage which, according to Mears in Docket No. 2:17-CV-02418-DCN (D.SC), that KIU should have secured under the Mears Contract. Please explain whether and how such insurance would have covered the damages claimed by Mears related to the Project.

KIU Response:

Please see Mears' allegations in its complaint in Docket No. 2:17-CV-02418-DCN (D.SC) with respect to its contentions as to what insurance coverage it contended that KIU should have secured.

It is unclear whether a builders risk policy of the type claimed by Mears would have covered the damages Mears claimed related to the Project. This is due, in part, to the fact that there is no uniform, standard form of a builders risk policy. Rather, because builders risk policies are customized, individually negotiated policies, the specific language and

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provisions of the individually negotiated builders risk policy, and the insurer's interpretation of such provisions, would dictate whether Mears' claimed damages would have been covered by such policy. Accordingly, it would be speculative to opine as to whether a builders risk policy of the type claimed by Mears would have covered the damages Mears claimed related to the Project.

Prepared By:

Dan Medina

6-17 In MS Excel format with formulas intact, please provide:

a. A list of current debt issuances held by the Company, including date of issuance, maturity date, original principal amount, amount outstanding, interest rate, and an itemization of all associated costs, fees, and charges for each debt issuance; and

b. A calculation for the Company's Weighted Average Cost of Debt for the Test Year.

KIU Response:

a. There is an intercompany loan agreement in the amount of $19,669,858.41 by and among KIU and SouthWest Water Company effective June 1, 2018. The loan matures May 17, 2048 and carries and interest rate of 4.57%. There were no debt issuance costs.

b. The weighted average cost of debt for the test year is 4.57%.

Prepared By:

Kent Cauley

6-18 Provide the amount and type of short-term debt held by the Company, if any.

KIU Response:

The Company does not have short-term debt with maturities less than 12 months.

Prepared By:

Kent Cauley

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6-19 Does the Company plan to seek any additional debt (of any maturity term) in the next five years? If so, proved the expected/estimated:

a. Number of debt issuance;

b. Date(s) of issuances(s) (for this response, the anticipated year or month and year is sufficient);

c. Original principal amount(s); and

d. Interest rate(s).

KIU Response:

The Company monitors the need for debt in the ordinary course of business. The long-term financing plan for KIU is currently being evaluated and has not yet been finalized.

Prepared By:

Kent Cauley

6-20 Is there a make-whole provision for any Long-Term Debt agreement underlying any of the Company's Long-Term Debt? If so, please furnish a copy of each agreement with such a provision.

KIU Response:

No.

Prepared By:

Kent Cauley

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6-21 Referencing the "Interest" Adjustment #24 in Schedule B of Exhibit B of the Application:

a. Provide in MS Excel format with all formulas intact the calculations and source data used to determine the interest expense/interest sync calculation.

b. Provide any relevant supporting documentation responsive to IR 6-21(a).

KIU Response:

a. Please see supplemental response to ORS AIR 1 for working interest synchronization calculation provided 12.17.21.
b. Please see Attachment a and schedules to the Application.

Prepared By:

Lauren Hutson

6-22 Does the Company ever utilize a hypothetical capital structure? If so:

a. For what purpose(s) is the hypothetical capital structure used?

b. What is the current or most recent hypothetical capital structure utilized by the Company?

c. If any alternate hypothetical capital structures to the one indicated in subpart (b) of this question have been used by the Company in the last five years, please identify the debt and equity ratios of the same.

KIU Response:

a-b. KIU utilized a 50:50 imputed capital structure during its last rate case in 2018. This capital structure approximated the actual capital structure of KIU at the end of 2018. The sole purpose of this capital structure was to calculate interest expense in the case.

c. None.

Prepared By:

Kent Cauley

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6-23 Provide the actual annual capital structure, including common equity, long-term debt, and short-term debt, for each of the last five full calendar years for both the Company and its parent company.

KIU Response:

The capital structure of KIU's parent, South Carolina Utility Systems, Inc., is 100% equity. Please refer to PSC annual report filings for KIU for the information requested for the periods from 2016-2019 and Exhibit B, Schedule A of the application for 2020.

Prepared By:

Kent Cauley

6-24 Provide the consolidated annual capital structures for SouthWest Water Company for each calendar year from 2018 to 2020. For this response:

a. Show all components of the capital structure for each period, including Equity, Preferred Stock, Long-Term Debt, Short-Term Debt, and Debentures, with their consolidated cost rates at the parent holding company level.

b. Show how the equity cost rate was calculated from the weighted rates of all subsidiaries for the most recent period.

c. Provide the issuance costs and fees, the yield-to-maturity rate as an annual percentage rate, and the date of issuance of the most recent Long-Term Debt instrument, such as a bond. Please discuss credit ratings of each issuance, including rating at time of issuances and all changes of rating and outlook.

d. Provide the monthly balances of short-term debt and effective monthly costs rates for each period.

KIU Response:

a. Please refer to the SouthWest Water Company consolidated financial statements provided in response to ORS AIR 2-41 for requested information for the years 2019 and 2020. Please see confidential attachment a for 2018.

b. Please refer to the SouthWest Water Company consolidated financial statements provided in response to ORS AIR 2-41 for requested information.

c. Please refer to Note 7 of the SouthWest Water Company consolidated financial statements provided in response to ORS AIR 2-41 for issuance costs and fees,

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the yield-to-maturity rate, and the date of issuance of the most recent long-term debt instrument. Please see confidential Attachment b for discussion of credit ratings.

d. Southwest Water Company does not have short-term debt with maturities less than 12 months.

Prepared By:

Kent Cauley

6-25 In MS Excel format with formulas intact, provide calculations for the Company's debt and equity ratios for its capital structure for the Test Year, including a breakdown of total debt and equity components.

KIU Response:

Please see supplemental response to ORS AIR 1 for working interest synchronization calculation and test year debt and equity ratios provided 12.17.21. Debt and equity component detail can be found on page 2 of Schedule A of the Application, lines 1-11.

Prepared By:

Lauren Hutson

6-26 Identify how much of the Company's capital is internally funded (i.e., from SouthWest Water Company, a SouthWest Water Company subsidiary, or other affiliated entity of KIU). For this response, provide the amount of internally funded debt and equity separately.

KIU Response:

See response to ORS AIR 6-17a. related to internally funded debt. KIU is 100% owned by South Carolina Utility Systems, Inc. and generates equity from the operations of the business.

Prepared By:

Kent Cauley

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6-27 What portion of net earnings is retained? Please provide the calculation starting with total earnings.

KIU Response:

All net earnings have been retained.

Prepared By:

Kent Cauley

6-28 What dividend payments or equivalent profit distributions has the Company made to its owner(s) in the last 12 quarters? Provide how much, to what owner(s), and on what date(s) such payments or distributions were made.

KIU Response:

The Company has not declared any dividends in the last 12 quarters.

Prepared By:

Kent Cauley

6-29 Please provide the operating margins granted by commission order in the five most recent rate cases involving SouthWest Water Company subsidiaries. Include as part of this response:

a. Name of the utility;

b. Jurisdiction;

c. Docket number;

d. Operating margin sought by utility, and

e. Operating margin awarded by the commission.

KIU Response:

Please see table below:

a	b	c	d	e

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CUC, Inc.	South Carolina	2019-64-WS	15.18%	12.51%
Kiawah Island Utility	South Carolina	2018-257-WS	14.50%	14.25%
Kiawah Island Utility	South Carolina	2016-222-WS	16.60%	14.00%
Harbor Island Utilities, Inc.	South Carolina	2016-29-WS	17.57%	13.75%
CUC, Inc.	South Carolina	2013-451-WS	15.00%	12.51%

Prepared By:

Brian Bahr

6-30 Please provide the Company's annual forecasted growth rates for the following factors over the next 10 years (or longest period available):

a. Total customer demand;

b. Total customers;

c. Total revenue;

d. Net income; and

e. Rate base.

KIU Response:

a. Please see below for the Company's forecasted customer demand growth rates for 2021 – 2025.

2021	2022	2023	2024	2025
5.9%	1.6%	0.7%	1.2%	1.0%

b. Please see below for the Company's forecasted customer growth rates for 2021 – 2025.

2021	2022	2023	2024	2025
1.3%	1.5%	1.3%	4.4%	1.2%

c. Please see below for the Company's forecasted revenue growth rates for 2021 – 2025.

2021	2022	2023	2024	2025
3.5%	3.3%	7.3%	1.5%	2.8%

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d. Net income forecasts are not readily available; please see below for the forecasted annual growth rates in EBITDA for 2021 – 2025.

2021	2022	2023	2024	2025
8.1%	8.4%	14.8%	0.5%	1.3%

e. For item e, the Company does not forecast rate base growth rates.

Prepared by: Lizzie Wright

6-31 Please provide the Company's historical annual figures for the following factors over the past 10 years and the source of such information:

a. Total customer demand;

b. Total customers;

c. Total revenue;

d. Operating income;

e. Net income; and

f. Rate base.

KIU Response:

Response: Please see below for the requested information for f-j. The sources for items f-j were the respective year's water and wastewater annual reports filed with the Public Service Commission for Kiawah Island Utilities, Inc. For f, the amount reported for water is the gallons of water sold and for wastewater is the annualized average daily flow. For item k, the Company does not annually calculate rate base. Please see response to ORS AIR 2-29 for rate base as of 12/31/20.

	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Customer Demand (Kgal)	990,104	1,064,371	1,002,801	904,465	1,014,119	1,107,131	1,080,983	1,114,665	1,173,095	1,121,744
Customers	7,087	7,147	7,224	7,315	7,433	7,533	7,642	7,793	7,929	8,004
Revenue	5,867,913	6,528,180	6,470,183	6,538,222	6,822,242	7,212,829	7,973,304	8,572,712	9,669,830	9,477,169
Operating Income	580,644	944,658	1,184,619	925,321	965,151	952,935	1,462,468	455,224	1,409,450	972,919
Net Income	(32,731)	599,462	885,946	751,802	806,625	739,264	1,145,629	(158,532)	514,388	29,165

Prepared by: Lizzie Wright

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6-32 Please reconcile the following Company responses:

a. Company response to 4-17 when asked to identify and provide documentation of any funds received by the Company from insurance providers: "The Company did not, and will not, receive any funds as part of the settlement of the litigation."
b. Company response to 4-2, attachment B, analytical review, balance sheet, company identified they accrued in 2019 and received in 2020, $1,600,000 insurance recovery related to secondary pipeline.

KIU Response:

The response to 4-17 is correct and the response to 4-2, attachment B should be amended as follows. The Company did not, and will not, receive any funds as part of the settlement of the litigation. However, as required by accounting standards (FASB ASC 720-20-45-1), a reporting entity is typically required to accrue and present the gross amount of a loss even if it purchased insurance to cover the loss. An insurance company may agree to pay the harmed party directly, on the insured's behalf, but this does not typically extinguish or provide a legal release from the insured's obligation prior to payment to the harmed party, as is required for accounting liability extinguishment. As such, in 2019, the Company recorded a $1.6M insurance recovery (along with a gross $4.0M liability) related to the secondary pipeline. In 2020, when the Company and insurers each paid their portion of the settlement directly to Mears, the Company unrecognized both the asset and liability

Prepared By:

Mujeeb Hafeez

6-33 For the KIU water asset - Secondary Pipeline – St. John to Kiawah Island in the amount of $9,742,848.83 that is included in the 2020 KIU Assets excel workbook provided in response to Supplemental to IR 1 on 12/17/21:

a. Provide a list that shows invoice number and invoice amount for all invoices associated with Mears included in the amount of $9,742,848.83 for the secondary pipeline.
b. Provide copies of all invoices associated with Mears included in the amount of $9,742,848.83 for the secondary pipeline.

KIU Response:

a-b. Please see Attachment a.

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Prepared By:

Becky Dennis

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KIU maintains its position in the Mears Litigation as set forth in its Cross-Motion for Summary Judgment dated September 10, 2018 (please see attachment b):

> The Contract requires Mears, not KIU, to provide builder's risk insurance. First, as a matter of law, the Special Conditions take precedence over the Standard General Conditions, and SC-7 controls. Second, even if the Contract is deemed to be ambiguous because of the Contract's potentially conflicting provisions, the only extrinsic evidence is that Mears intended to and did provide that insurance; Mears resolved any ambiguity through its own words and actions. Third, by operation of the Contract and Mears' inaction, Mears waived any potential right to demand that KIU provide the builder's risk insurance for the Project. Each of these grounds provides an independent basis to grant KIU summary judgment as to Mears' causes of action for breach of contract and declaratory judgment.

Nevertheless, after almost 2-1/2 years of litigating against Mears and insurers at significant cost, KIU opted to settle the lawsuits against Mears and the insurers in accordance with the terms of the settlement agreement, which included KIU's $2.4 million payment and the insurers' $1.6 million payment to Mears in settlement of Mears' $7+ million claims, as partial reimbursement of Mears' costs in completing the Project.

KIU decided to settle all disputes relating to the Project for a variety of reasons, including: (1) the significant cost of continuing to litigate the cases, which would have included trials in both the Mears litigation and the Insurance litigation, as well as likely appeals; (2) the significant additional time it would take for the litigation to conclude to final judgments, including appeals; (3) the uncertainty inherent in any litigation, including the possibility that, after additional years of litigation, KIU could ultimately be held liable for all of Mears' $7+ million in claimed damages, with no insurance coverage afforded under any of the policies at issue. Given these considerations, KIU's decision to settle the disputes by agreeing to contribute $2.4 million to partially reimburse Mears' costs incurred to complete the Project was reasonable and prudent. Accordingly, KIU is entitled to recover the $2.4 million in additional costs for the Project.