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**Mar 20 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Jean Hoefer Toal, Chief Justice (Ret.) and Acting Circuit Court Judge  
Case No. 2020-CP-40-04385

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Appellate Case No. 2023-000252

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Southern Insulation, Inc., through its Receiver, Peter D. Protopapas, ..... Respondent,

vs.

OneBeacon Insurance Group, Ltd. (f/k/a White Mountains Insurance Group, Ltd., f/k/a CGU Insurance Company, f/k/a Commercial Union Corporation, f/k/a General Accident Insurance Company of America); OneBeacon Insurance Group LLC (n/k/a Intact Insurance Group USA LLC); R.V. Chandler & Associates, Inc.; Chandler Rental Properties, Inc.; Thomas S. Chandler; Jean B. Ownbey, as Trustee of the Thomas S. Chandler, Sr. Living Trust u/d 4/06/06; Gene N. Norville; the South Carolina Property and Casualty Insurance Guaranty Association; Trebuchet US Holdings, Inc.; Trebuchet Investments Limited; Trebuchet Group Holdings Limited (f/k/a Armour Group Holdings Limited); Brad S. Huntington, individually; and John C. Williams, individually, Defendants,

Of which OneBeacon Insurance Group, Ltd. (f/k/a White Mountains Insurance Group, Ltd., f/k/a CGU Insurance Company, f/k/a Commercial Union Corporation, f/k/a General Accident Insurance Company of America); OneBeacon Insurance Group LLC (n/k/a Intact Insurance Group USA LLC); Trebuchet US Holdings, Inc.; Trebuchet Investments Limited; Trebuchet Group Holdings Limited (f/k/a Armour Group Holdings Limited); Brad S. Huntington, individually; and John C. Williams, individually, are the .....Appellants.

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**APPELLANTS' JOINT MOTION FOR LEAVE TO FILE A JOINT SUR-REPLY TO  
RESPONDENT'S MOTION TO DISMISS APPEAL**

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Appellants Intact Insurance Group USA Holdings Inc. (sued as OneBeacon Insurance Group, Ltd. (f/k/a White Mountains Insurance Group, Ltd., f/k/a CGU Insurance Company, f/k/a Commercial Union Corporation, f/k/a General Accident Insurance Company of America); Intact Insurance Group USA LLC (sued as OneBeacon Insurance Group LLC) (together "Intact");

Trebuchet Investments Limited; Trebuchet Group Holdings Limited (f/k/a Armour Group Holdings Limited); Trebuchet US Holdings, Inc.; Brad S. Huntington; and John C. Williams (together, “Trebuchet,” and collectively with Intact, the “Appellants”), through their respective undersigned counsel, jointly move this Court for leave to file a Joint Sur-Reply in further Opposition to the Motion to Dismiss Appeal filed by Respondent Southern Insulation Inc., through its Receiver, Peter D. Protopapas (“Respondent”).

A Joint Sur-Reply is appropriate in this case to briefly address evidence and issues that Respondent did not raise in its Motion to Dismiss Appeal and raised for the first time in Respondent’s Reply to the Motion to Dismiss Appeal. *See generally* Jean Hoefer Toal, et al., *Appellate Practice in South Carolina* at Ch. 13, Section III, ¶ BB (3rd ed. 2016) (“Because motions are used in the appellate courts to seek specific relief, there is no limit to the type of motion that could be filed in the appellate courts.”); *Genesis Health Care, Inc. v. Soura*, 165 F. Supp. 3d 443, 456–57 (D.S.C. 2015) (allowing a sur-reply when addressing cross-motions for summary judgment); *Key v. Shelby Cty.*, 551 F. App’x 262, 265 (6th Cir. 2014) (stating that, “[a]lthough the Federal Rules of Civil Procedure do not expressly permit the filing of surreplies, such filings may be allowed in the appropriate circumstances, especially ‘[w]hen new submissions and/or arguments are included in a reply brief, and a nonmovant’s ability to respond to the new evidence has been vitiated.’”) (quoting *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 481 (6th Cir. 2003)).

Specifically, Respondent’s Reply cites portions of the argument transcript from the trial court, which was not cited nor included in the moving papers or opposition, and raises for the first time purely merits arguments on whether the trial court’s refusal to enforce the Pennsylvania court’s injunction was proper and *not* whether this Court has jurisdiction.

The proposed Joint Sur-Reply is attached as **Exhibit A**.

Respondent does not consent to this motion.

Respectfully submitted,

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March 20, 2023

# **EXHIBIT A**

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Of which OneBeacon Insurance Group, Ltd. (f/k/a White Mountains Insurance Group, Ltd., f/k/a CGU Insurance Company, f/k/a Commercial Union Corporation, f/k/a General Accident Insurance Company of America); OneBeacon Insurance Group LLC (n/k/a Intact Insurance Group USA LLC), Trebuchet US Holdings, Inc; Trebuchet Investments Limited; Trebuchet Group Holdings Limited (f/k/a Armour Group Holdings Limited); Brad S. Huntington, individually; and John C. Williams, individually, are the..... Appellants.

---

**APPELLANTS' JOINT SUR-REPLY IN FURTHER OPPOSITION TO RESPONDENT'S  
MOTION TO DISMISS APPEAL**

---

Appellants Intact Insurance Group USA Holdings Inc. (sued as OneBeacon Insurance Group, Ltd. (f/k/a White Mountains Insurance Group, Ltd., f/k/a CGU Insurance Company, f/k/a Commercial Union Corporation, f/k/a General Accident Insurance Company of America), Intact Insurance Group USA LLC (sued as OneBeacon Insurance Group LLC) (together “Intact”), Trebuchet Investments Limited, Trebuchet Group Holdings Limited (f/k/a Armour Group Holdings Limited), Trebuchet US Holdings, Inc., Brad S. Huntington, and John C. Williams (together, “Trebuchet,” and collectively with Intact, the “Appellants”), through their respective undersigned counsel, submit this Joint Sur-Reply in further Opposition to the Motion to Dismiss Appeal filed by Respondent Southern Insulation Inc., through its Receiver, Peter D. Protopapas (“Respondent”). This Sur-Reply addresses evidence and issues that were not raised in Respondent’s Motion to Dismiss Appeal (“Respondent’s Motion to Dismiss”) and were raised for the first time in Respondent’s Reply to Motion to Dismiss Appeal (“Respondent’s Reply” or “Reply”).

### **SUR-REPLY ARGUMENT**

**A. The Sole Issue Presented by Respondent’s Motion to Dismiss is Jurisdictional.**

On February 7, 2023, the trial court entered an order denying Appellants’ motions to dismiss (the “Order”). On February 21, 2023, Appellants filed notices of appeal of the Order. On February 23, 2023, Respondent filed its Motion to Dismiss Appellants’ consolidated appeal, contending that the Order is “neither [a] final nor an interlocutory order from which appeal may be taken under section 14-3-330.” *See* Respondent’s Motion to Dismiss at 3. Respondent argued that none of the statute’s four alternative grounds for appellate jurisdiction apply. *Id.* at 4-6. Accordingly, the only issue Respondent raises at this juncture is whether the Order falls into any

of four categories of judgments, orders, or decrees, as to which, when an appeal is taken, this Court “shall have appellate jurisdiction.” *See* S.C. Code Ann. § 14-3-330.

**B. S.C. Code Ann. § 14-3-330(4) Vests This Court with Jurisdiction Over the Appeal of a Trial Court’s Refusing an Injunction, and This Provision Applies to this Appeal.**

Appellants’ opposition to Respondent’s Motion to Dismiss primarily focuses on S.C. Code Ann. § 14-3-330(4) which provides for immediate appeal of “[a]n interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction . . . .” The Order satisfies all jurisdictional requirements of subsection 4. First, Respondent and Appellants agree that the Order entered by the trial court is interlocutory. Second, it is an order “refusing an injunction.” *Id.* Appellants’ oppositions to Respondent’s Motion to Dismiss and the exhibits Appellants attached thereto demonstrate this second point.

Respondent’s Reply, Exhibit 2 is the Transcript of Record for the January 27, 2023 hearing on Appellants’ motions to dismiss before the trial court. The transcript was not included with Respondent’s moving papers and was not available to Appellants when they filed their respective Returns. The transcript underscores that Appellants argued before the trial court for the enforcement of the injunction entered by the Commonwealth Court of Pennsylvania, and that the trial court refused to enforce it. For example, at that hearing, counsel for Intact argued:

Southern’s claims against Intact are barred for several reasons. First, the liquidation order for Bedivere from the Commonwealth [C]ourt in Pennsylvania contains an injunction against proceedings such as these against the insurer or its assets. And South Carolina Code Section 38-27-430 says that courts in [South Carolina] shall give full faith and credit to those injunctions from reciprocal states such as Pennsylvania.

Respondent’s Reply, Ex. 2 at 4. Later, counsel for Trebuchet argued:

MR. GROSSMAN: The conclusion, Your Honor, is that Southern is impermissibly asserting claims that belong to the Bedivere liquidator.

THE COURT: Okay. I've got you.

MR. GROSSMAN: There's an injunction that says they can't do that.

THE COURT: Okay. I've got you.

*Id.* at 18. Additional colloquy between the trial court and counsel for Trebuchet further elucidated the pivotal issue of whether the injunction barred Respondent's assertion of its claims and required dismissal of Appellants.

MR. GROSSMAN: ... The stay that's been entered by the court in Pennsylvania that [Southern's counsel] says Southern has fully compl[ied] with says that all parties claiming preferred interests in any assets of Bedivere are hereby enjoined from taking any steps whatsoever –

THE COURT: Let me just stop you right there. He's not claiming the assets of Bedivere.

MR. GROSSMAN: He is. Paragraph –

THE COURT: You all are OneBeacon, and whatever the other one is, y'all are not Bedivere; y'all are independent actors out there. You're not Bedivere.

MR. GROSSMAN: But the claims against these bad actors for the allegations that have been made are the assets of Bedivere. And his complaint, Southern's complaint, at Paragraph 151 says affirmatively that they're seeking to attach the assets of Bedivere. That's exactly what they're trying to do here.

*Id.* at 29-31. Accordingly, Appellants argued for the enforcement of the Commonwealth Court of Pennsylvania's injunction, and the trial court refused this injunction. This Court thus has appellate jurisdiction under S.C. Code Ann. § 14-3-330(4).

This is precisely the teaching of the South Carolina Supreme Court in the *Williams v. Northwestern Sec. Life Ins. Co.* decision, 307 S.C. 462. 415 S.E.2d 809 (1992). Like Appellants here, the appellant in *Williams*, while a defendant at the trial court, filed a motion to dismiss and, in that context, argued for the trial court's enforcement of an injunction entered by a court in another state. And like the trial court here, the trial court in *Williams* refused to enforce the

injunction and denied the defendant's motion to dismiss. The defendant in *Williams* appealed and, like Respondent here, the plaintiff in *Williams* argued on appeal that the trial court's denial of the motion to dismiss was "not immediately appealable as it is an interlocutory order." *Id.* at 463, 415 S.E.2d at 809-10. In response to this argument, the defendant, then appellant, argued:

[U]nder section 14-3-330(4) the denial of its motion [to dismiss] is immediately appealable. Under this subsection, this Court has appellate jurisdiction over orders 'granting, continuing, modifying, or *refusing* an injunction.' [emphasis in the original, citation omitted]. [The appellant] argues that when the trial judge denied its motion to dismiss, the injunction in effect was refused thereby bringing the order within the parameters of subsection (4).

*Id.* at 464, 415 S.E.2d at 810. On this point, the Court held: "Under these facts, we agree." The Court then went on to address the merits of the appeal. *Id.*

**C. Respondent's Reply Brief Raises Merits Arguments Beyond the Scope of its Jurisdictional Motion to Dismiss.**

Recognizing this Court's statutory jurisdiction to hear an appeal of a trial court's order refusing an injunction, Respondent now argues, erroneously, "[t]he trial court did not refuse to enforce an injunction." *See* Respondent's Reply at Point 1(a). But this is exactly what the trial court did in denying Appellants' motions to dismiss, as the South Carolina Supreme Court clearly recognized in *Williams*. And to support its inapposite conclusion, rather than show this Court how it lacks jurisdiction (it cannot), Respondent's Reply raises for the first time purely merits arguments that only relate to whether the trial court's refusal to enforce the Commonwealth Court of Pennsylvania's injunction was proper and *not* to the jurisdictional question of whether the trial court refused an injunction. As discussed above and in Appellants' responses to the Motion to Dismiss, there is no question that this Court has jurisdiction over Appellants' appeal from the Order that denied a request for an injunction. The analysis should end here, and Respondent's Motion to Dismiss should be denied.

As will be more fully addressed in briefing on the merits of the appeal, the non-jurisdictional issues Respondent raised in the Reply fail to overcome the statutory requirement for the courts of this State to enforce the Liquidation Order. For example, Respondent argues that the Appellants here are not the insurer in liquidation. *Id.* at Points 1(a), 2, and 4. Respondent further argues (erroneously) that the Liquidation Order only enjoins claims against Bedivere. *Id.* But, as Appellants argued before the trial court, Respondent is enjoined regardless of whether Bedivere is a party to this lawsuit, because the claims Respondent asserts against the Appellants are *Bedivere's* assets. This, too, is clear in the transcript:

THE COURT: Well, what you're saying is that this crowd, these two, are just hiding behind the liquidator –

MR. RICHARDSON: Right.

THE COURT: -- when it's *Bedivere, the liquidator's entrusted company, is the one that got hurt so bad* by all their shenanigans.

MR. RICHARDSON: Right. ...

Reply Ex. 2 at 22 (emphasis added). Respondent seeks to usurp Bedivere's alleged injury for its own benefit and as a preference ahead of all of Bedivere's other policyholders, and Respondent expressly seeks an equitable attachment of *Bedivere's* assets for itself (all of which violate the Liquidation Order's injunction set forth at ¶ 14, *see* Reply at Ex. 1). The Liquidation Order also vests the Commonwealth Court of Pennsylvania with *in rem* jurisdiction over Bedivere's assets and exclusive jurisdiction to determine whether any asset is an asset of Bedivere's or not. Moreover, the determination of whether Respondent's claims against Appellants belong to

Bedivere must be decided by the court with exclusive *in rem* jurisdiction to make such a determination, *i.e.* the Commonwealth Court of Pennsylvania.<sup>1</sup>

Respondent's Reply also incorrectly argues that Bedivere's Liquidator could not pursue claims against Appellants because of the application of the *in pari delicto* doctrine and because its alter ego claims can only be brought by third parties. Reply at Points 3(a) and (b). But the *in pari delicto* doctrine and alter ego theories would not bar the claims against parties acting adverse to the interests of the entity at issue, which is the type of (hotly disputed) claims Respondent seeks to assert in this proceeding. *See, e.g., Myatt v. RHBT Financial Corp.*, 370 S.C. 391, 395, 635 S.E.2d 545, 547 (Ct. App. 2006). As held and explained in *Myatt*, the *in pari delicto* doctrine bars claims of a plaintiff who has participated in the wrongdoing at issue. But, when an agent engages in wrongdoing in which he is interested adversely to his principal, the principal will not be charged with knowledge of the agent, and the doctrine would not apply to bar the claim. *Id.* Further, Respondent asserts claims that would be common to all policyholders or other creditors of Southern, and Southern even expressly seeks to attach assets that belong to Bedivere. (*See* Respondent's Second Amended Complaint<sup>2</sup> at ¶¶ 136 and 151). Contrary to Southern's argument, receivers and liquidators for insolvent insurance companies routinely bring claims (which are assets of the receivership estate) against those whose bad acts caused the insolvency, including officers, directors, or other owners. *See, e.g., Clark v. Milam*, 452 S.E.2d 714, 720 (W. Va. 1994)

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<sup>1</sup> Respondent's Reply focuses almost exclusively on paragraph 13 of the Liquidation Order, *see* Reply at p. 6, ignoring paragraph 4, which vests in the Commonwealth Court *in rem* jurisdiction over assets of Bedivere and exclusive jurisdiction over determinations of whether assets belong to Bedivere and validity and amounts of claims against Bedivere, and paragraph 14, which enjoins actions to exercise purported property rights in assets of Bedivere.

<sup>2</sup> A copy of the Second Amended Complaint is attached as Exhibit A to Trebuchet's Return to the Motion to Dismiss Appeal and as Exhibit 1 to Intact's Return.

(“When the Commissioner is appointed Receiver for an insolvent insurance company, he is charged with marshalling the assets of the company for the benefit of its policyholders and creditors. Those assets include claims against those who may have looted the insurance company ... of monies that should have been available to pay the claims of totally innocent policyholders.”). Respondent’s arguments on the merits simply do not escape the impact of the injunction provisions of the Liquidation Order.

More fundamentally, none of Respondent’s arguments on the merits of whether Appellants’ request to enforce the injunction provisions of the Liquidation Order was properly denied go to the threshold issue of whether this Court has jurisdiction over this appeal *ab initio*. That issue is straightforward. Pursuant to S.C. Code Ann. § 14-3-330(4) and the South Carolina Supreme Court’s clear interpretation thereof in *Williams*, an appeal from a trial court’s refusal to enforce an injunction – even when in the form of an order denying a motion to dismiss – vests this Court with immediate jurisdiction to hear the merits of an appeal. Merits arguments on whether the trial court’s refusing an injunction was proper or error are premature at this juncture.

### **CONCLUSION**

The jurisdictional challenge raised by Respondent’s Motion to Dismiss this appeal is without support. The trial court’s Order denying the Appellants’ motion to dismiss constituted a refusal of an injunction. Accordingly, this Court has appellate jurisdiction over this appeal, and it should proceed with merits briefing pursuant to the Court’s Rules.

*[Signature Pages Follow]*

Respectfully submitted,

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**PROOF OF SERVICE**

The undersigned hereby certifies that, on this date, a copy of **Appellants' Joint Motion for Leave to File a Joint Sur-Reply to Respondent's Motion to Dismiss Appeal** has been served upon counsel listed below via email, as follows:

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AND INTACT INSURANCE GROUP USA LLC**

March 20, 2023

**Demetri “Jim” K. Koutrakos - MEMBER**

803-404-6900

[JimKoutrakos@callisontighe.com](mailto:JimKoutrakos@callisontighe.com)

March 20, 2023

**RECEIVED**

**Mar 20 2023**

**SC Court of Appeals**

**VIA EMAIL: [ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org)**

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
S. C. Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

RE: Southern Insulation, Inc., through its Receiver, Peter D. Protopapas  
vs. OneBeacon Insurance Group, Ltd., *et al.*  
Appellate Case No. 2023-000252

Dear Ms. Kitchings:

Enclosed herewith please find Appellants’ Joint Motion for Leave to File a Joint Sur-Reply to Respondent’s Motion to Dismiss Appeal, together with the Proof of Service, in the above-referenced matter.

Kindly file the same and return a clocked-in copy to the undersigned via email.

This firm’s check in the amount of \$50 in payment of the required filing fee will be hand delivered to your office.

Please do not hesitate to contact me with any questions.

With kind regards, I am

Sincerely yours,

CALLISON TIGHE & ROBINSON, LLC

*s/ Demetri “Jim” K. Koutrakos*

Demetri “Jim” K. Koutrakos

DKK:ksr

Enclosures

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The Honorable Jenny Abbott Kitchings

March 20, 2023

Page 2

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cc (w/enc.) (via email):

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