

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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May 15 2023

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Joan H. Toal
Acting Circuit Court Judge

Appellate Case No. 2023-000727
Circuit Court Case No. 2021-CP-40-03484

Lenora Childers, Individually and as Personal Representative of the
Estate of Lewis C. Childers, ...

Plaintiff,

v.

Davis Mechanical Contractors, Inc.; Flame Refractories, Inc.;
General Boiler Casing Company, Inc.; HEFCO, Inc.; J.R. Dean
Company, Inc.; Payne & Keller Company; SFB, Incorporated;
Stafford Insulation Company; Standard Insulation Company of
N.C., Inc.; Systra Engineering, Inc.; United Construction Co. of
Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-
Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial
Insulating Co., ...

Defendants,

Flame Refractories, Inc., United Construction Co. of Rome, Inc.,
Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe &
Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co.,
Payne & Keller Company, and PBI QSF, LLC, By and Through
Their Duly Appointed Receiver Peter D. Protopapas, ...

Third-Party
Plaintiffs,

v.

Zurich American Insurance Company (Individually and as
Successor to Northern Insurance Company of New York, Maryland
American General Insurance Company, and Maryland Casualty
Company); Allstate Insurance Company; John Tighe; Sean
Anthony Beatty; Dennis William Cahill; Catherine Ann Carlino;
Andre Lefebvre; David Dean Shumway; Gil Chandler, Michael
Davenport; Linda Young Pettigrew; Gwyn Wallace Fuller; Daniel
Robert Keddie; Julie Ann Fortune; Michael John Crall; James
Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.;
Arrowpoint Capital Corp.; Admiral Insurance Company;
Continental Insurance Company (Individually and as Successor in
interest to Harbor Insurance Company); Hartford Accident and

Indemnity Company, Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company, National Union Fire Insurance Company of Pittsburgh, PA, Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc., Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company, Lexington Insurance Company, First State Insurance Company, Birmingham Fire Insurance Company, Certain Underwriters at Lloyd's of London and various London Market Companies, South Carolina Property and Casualty Insurance Guaranty Association, R.L. Jarrett (Underwriting) Agency, Inc., U.S. Risk, L.L.C., Rexel USA, Inc., Compass Risk Services, LLC, SKRLA, LLC, Century Indemnity Company, in its own capacity and as successor to CCI Insurance Company, as successor to Insurance Company of North America, United States Fire Insurance Company, and Fireman's Fund Insurance Company,

Third-Party Defendants,

of which

Payne & Keller Company, By and Through Their Duly Appointed Receiver, Peter D. Protopapas, is the Respondent,

and

AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; and Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company;

and

Travelers Casualty and Surety Company, f/k/a the Aetna Casualty and Surety Company, are the Appellants.

RESPONSE TO COURT'S APPEALABILITY INQUIRY

Appellants AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of

Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; and The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company (hereinafter, “Appellants”), submit this Memorandum in response to the Court’s May 5, 2023 Request for memoranda addressing the issue of appealability.

SUMMARY

The Court has express statutory authority to hear this appeal because the Order continues and modifies a receivership. South Carolina Code § 14-3-330(4) states the Supreme Court “shall have appellate jurisdiction” and “shall review upon appeal” an “interlocutory order . . . granting, continuing, modifying, or refusing the appointment of a receiver.” The Circuit Court granted a motion to appoint a receiver over Payne & Keller Company (“Payne & Keller”). After the Receiver filed a Third-Party Complaint against them, Appellants and Travelers moved to dissolve the receivership. The Circuit Court denied that motion, thus continuing the receivership. The Order also modified the receiver’s role. Because the Order on appeal continued – and modified – the receivership, this appeal falls squarely within Section 14-3-330(4), and the Order is properly before this Court on appeal.

BACKGROUND

A. Payne & Keller was a Texas corporation that dissolved in 1986.

Payne & Keller was a Texas corporation located in Texas that dissolved in 1986, pursuant to Texas law. (Ex. A, Certificate of Dissolution, Dec. 3, 1986). While in business, Payne & Keller allegedly supplied and or installed insulation at various locations in the southeastern United States, some of which allegedly contained asbestos. (Ex. B, Pltfs’ Mot. to Appoint a Receiver, p. 1). Under Texas corporations law, Payne & Keller could only be sued for three years after its dissolution. Tex. Bus. Org. Code § 11.359(a). Thus, Payne & Keller has not been subject to suit since 1989.

B. Plaintiff files suit against defunct companies and seeks appointment of the Receiver over each and every defendant.

On July 14, 2021 – over thirty years after Payne & Keller dissolved – Plaintiff Lenora Childers, Individually and as Personal Representative of the Estate of Lewis Childers, filed a Summons and Complaint in the above-captioned matter in the Richland County Court of Common Pleas, within the South Carolina asbestos docket. Unlike a typical asbestos personal injury suit – which names dozens of defendants – this Summons and Complaint named only ten defendants, one of which was Payne & Keller Company. Over the following months, Plaintiff dismissed one defendant and proceeded to move for appointment of a receiver over each of the remaining nine defendants. The Circuit Court granted every motion. Thus, until recently,¹ all defendants in the case have been defunct companies under a receivership.

Plaintiff moved for the appointment of a receiver for Payne & Keller on August 23, 2021. Notice of the motion was only served on the South Carolina Secretary of State. Four days later, the Circuit Court entered an Order granting the motion and appointing Peter Protopapas to serve as the receiver. (Ex. C, Order Granting Motion to Appoint Receiver for Payne & Keller). The order directed the Receiver to “take any and all steps necessary to protect the interests of Payne & Keller . . .” (Ex. C, Order Granting Motion to Appoint Receiver for Payne & Keller).

C. The Receiver files Third-Party Complaints against insurance companies and related entities.

On February 23, 2022, the Receiver filed an Amended Third-Party Summons and Complaint, naming over twenty-five third-party defendants, consisting of insurance companies,

¹ After Appellants and Travelers filed their respective Notices of Appeal – and almost two years after filing the initial Complaint – Plaintiffs filed a Motion for Leave to Amend, which will add over sixty new defendants.

agencies, and insurance company officers or directors. (Ex. D, Amended Third-Party Complaint). Appellants were among the third-party defendants named in the Amended Third-Party Complaint.

Appellants moved to dismiss the Amended Third-Party Complaint pursuant to Rules 12(b)(8), 12(b)(6) and Rule 14, and alternatively sought a stay and a more definite statement. The Circuit Court indicated in an email from the Court's law clerk that it was denying those motions, but it did not issue a written order. A consent Order noting that all arguments on those issues were preserved followed. This appeal does not involve the denial of those motions.

D. Traveler moves to dismiss and to dissolve the receivership, and Appellants join the portion of that motion seeking to dissolve the receivership.

On August 24, 2022, Travelers Casualty & Surety Company ("Travelers") filed a Motion to Dismiss Third-Party Claims and Dissolve the Payne & Keller Receivership. (Ex. E, Travelers' Motion). Appellants joined in the motion on September 19, 2022, joining to the portions of Travelers' motion that sought to dissolve the Receivership. (Ex. F, Appellants' Motion and Joinder, p. 3). The bases for the motion are straightforward. The receivership is legally invalid.

Under Texas law, a corporation has three years after its dissolution to sue or be sued. Tex. Bus. Org. Code § 11.359(a).² The statute acts as one of repose. The Full Faith and Credit Clause requires this Court to enforce the Texas law here – meaning Payne & Keller can neither sue nor be sued.

The Receiver stands in the shoes of Payne & Keller and has no greater rights than Payne & Keller. *See, e.g., National Cash Register Co. v. Burns*, 217 S.C. 310, 313, 60 S.E.2d 615, 617 (1950) ("A primary concept of law of receivers is that a receiver stands in the shoes of the debtor with respect to the property of the latter . . ."). Thus, the Receiver – standing in Payne & Keller's

² The law was the same at the time of Payne & Keller's dissolution. Tex. Code. Title 32, Art. 1396-7.12 (1984).

shoes –cannot not bring suit, and any suit asserted against Payne & Keller is subject to dismissal. Thus, the receivership is a nullity and should be dissolved.

South Carolina law also does not allow a South Carolina court to create a nationwide receivership over a foreign corporation that does not have any property in the State and that has not had any judgment entered against it. S.C. Code § 15-65-10(4). Payne & Keller did not have any property in this State, and no judgment has entered against the company. Thus, the receivership is legally invalid.

The Receiver filed a memorandum in opposition to Appellants’ and Travelers’ motions. Lacking any argument that the Receivership is valid when suit by and against Payne & Keller is barred by Texas law, the Receiver attempted to open up liability against Payne & Keller by arguing that somehow Payne & Keller’s dissolution – which took place over thirty-five years ago – was a fraudulent attempt to avoid liabilities such as this suit that was filed decades later. Plaintiff proffered no evidence to support this contention.

Travelers filed a Reply on January 25, 2023. Again, Appellants filed a joinder to Travelers’ Reply. (Ex. G, Appellants’ Joinder to Travelers’ Reply). As they did in the initial joinder, Appellants only joined in and adopted by reference the portions of Travelers’ Reply that addressed dissolution of the Receivership. (Ex. G, Appellants’ Joinder to Travelers’ Reply, p. 3).

On January 27, 2023, the Court heard arguments on the motions. On March 31, 2023, the Court entered its Order Denying Appellants’ and Travelers’ motions. (Ex. H, Order Denying Dissolution). This appeal followed.

ARGUMENT

Recognizing the unique harms that can result when an entity is placed into a receivership, the General Assembly long ago determined that the Supreme Court “shall have” jurisdiction and

“shall review upon appeal” any interlocutory order that grants, continues, modifies, or refuses the appointment of a receiver. The Circuit Court’s Order denied Appellants’ Motion to Dissolve the Receivership, thus continuing the unlawful receivership. Moreover, the Order Denying Dissolution fundamentally changed the Receiver’s role. Prior to the Order, the Receiver was ordered to “take any and all steps necessary to protect the interests of Payne & Keller.” Now, the Receiver is being allowed to try to show that Payne & Keller fraudulently procured its dissolution and that the company should lose the protections of a statute of repose. Therefore, the Order Denying Dissolution both continues and modifies the receivership, and the Order is immediately appealable.

I. Appellate courts have express statutory authority – and are required to – review interlocutory orders continuing or modifying receiverships.

South Carolina Code § 14-3-330(4) states:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in cases, and shall review upon appeal:

- (4) An interlocutory order or decree in a court of common pleas . . . granting, continuing, modifying, or refusing the appointment of a receiver.

Thus, the statute both authorizes appellate review -- “shall have appellate jurisdiction” – and mandates review – “shall review upon appeal” of the Order Denying Dissolution. *Id.*

South Carolina’s appellate courts have often found this statute grants appellate jurisdiction over interlocutory orders involving disputes over receiverships. *See Vasiliades v. Vasiliades*, 231 S.C. 366, 98 S.E.2d 810 (1957) (reviewing interlocutory order dissolving receivership even when other parts of the order on appeal were not yet reviewable); *Wrenn v. Wrenn*, 228 S.C. 588, 91 S.E.2d 267 (1956) (reviewing interlocutory order denying motion to appoint receiver); *Lyles v. Williams*, 96 S.C. 290, 80 S.E. 470 (1913) (reviewing interlocutory order denying appointment of

a receiver and dissolving an injunction). The Order Denying Dissolution falls squarely within the statute's grant of appellate review.

II. The General Assembly recognized the importance of immediate access to appellate review of orders continuing or modifying receiverships.

The procedural history of this case highlights one of the exact risks created when a receiver takes over a company – especially a dissolved corporation. Payne & Keller has long been dissolved. It has no risk of facing legal liability because Texas law provides that any suits against a dissolved corporation must be brought within three years of dissolution. Tex. Code. Title 32, Art. 1396-7.12 (1984) This statute of repose gives finality to the corporation. No shareholder or stakeholder in the dissolved Payne & Keller corporation would have any legitimate interest in invalidating that protection and opening the company up to legal liabilities more than thirty years after its dissolution. However, that is exactly what the Receiver is now trying to do.

To make the problem worse, no one with a legitimate interest in opposing the receivership received notice of the Motion for Appointment. As South Carolina has long recognized, the “appointment of a receiver is a drastic remedy, and should be granted only with reluctance and caution.” *Midlands Utility, Inc. v. SCDHEC*, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (1989). However, the Receiver here was appointed with no meaningful review. Plaintiff's Motion to Appoint a Receiver states that the only entity that received notice of the motion was the South Carolina Secretary of State. (Ex. B, Motion for Appointment, p. 2). The Order appointing the Receiver was entered a mere four days after the motion was filed. (Ex. C, Order Appointing Receiver).

Of course, the receivership impacts more than just Payne & Keller. Parties facing claims brought by the Receiver have an interest in the validity of the receivership. Because those parties will not receive notice at the time the receiver is initially appointed, their challenges to the

receivership will inevitably come in the form of a motion to dissolve or modify the receivership. Recognizing this reality, the General Assembly chose to include orders continuing or modifying receiverships within the ambit of reviewable interlocutory orders, and for good reason. By including orders continuing or modifying receiverships within the ambit of appealable, interlocutory orders, the General Assembly ensured that parties facing claims asserted by receivers – such as Appellants here – have an immediate ability to challenge the ongoing existence of the receivership and to access the State’s appellate courts on those issues without awaiting a final adjudication of the entire case.

III. The Order Denying Dissolution continues and modifies the Receivership.

Section 14-3-330 grants appellate jurisdiction for appeal of an order that continues or modifies a receivership. The Order Denying Dissolution does both.

Appellants and Travelers moved to dissolve the receivership for a number of reasons. Payne & Keller cannot bring suit because it has been dissolved for more than three years. Therefore, the receivership is invalid and the receiver – who stands in the shoes of Payne & Keller – lacks standing to sue. Moreover, the receivership in South Carolina over a Texas corporation that existed in Texas and was incorporated and ultimately dissolved under Texas law is improper. Payne & Keller did not own any property located in South Carolina, and there is no basis for the South Carolina court to take control over a Texas corporation.

Faced with the Motion to Dissolve, the Circuit Court had two options: (1) dissolve the Receivership; or (2) continue the Receivership. The Circuit Court chose the latter. It denied the Motion to Dissolve, thus continuing the Receivership. Therefore, this Court has appellate jurisdiction.

The Order also modifies the receivership. Specifically, the order creating the receivership directed the Receiver to “take any and all steps necessary to protect the interests of Payne & Keller whatever they may be.” (Ex. C, Order Appointing Receiver, p. 1). Any rational defendant facing lawsuits for personal injuries thirty-plus years after its dissolution would take steps necessary to raise and preserve its statute of repose defenses.

Rather than relying on the statute of repose – which plainly protects Payne & Keller’s interests – the Receiver opposed Appellants’ and Travelers’ motions by arguing that Payne & Keller somehow fraudulently dissolved with knowledge of potential, future asbestos liabilities. This argument directly contradicts the Receiver’s prior directive to protect Payne & Keller’s interests. The Order Denying Dissolution allows the Receivership to proceed in this entirely new and contrary direction. Now, the Receiver is expected to conduct discovery and to pursue a claim to undo the company’s dissolution. (Ex. H, Order Denying Dissolution, p. 5). Thus, in addition to continuing the legally invalid receivership, the Court’s Order also drastically modifies the Receivership.³

An interlocutory order is appealable if it has the effect of either continuing or modifying the Receivership. The Order Denying Dissolution here does both. Therefore, the matter is properly before this Court on appeal.

IV. The appeal is timely.

Appellants received written notice of entry of the Order Denying Dissolution March 31, 2023. Appellants filed the Notice of Appeal on April 28, 2023. Thus, the appeal was timely filed.

³ To be clear, Appellants deny that the dissolution can be undone. The Receiver relies upon a statute that was enacted years after Payne & Keller dissolved and years after Payne & Keller gained the protection of the statute of repose. The Texas Constitution prohibits retroactive application of the statute. However, this error of law will be dealt with in the merits brief.

CONCLUSION

For the above-stated reasons, this Court has jurisdiction to review the Order Denying Dissolution. Pursuant to the appealability statute, the Court “shall review upon appeal” orders continuing or modifying a receivership. The Order Denying Dissolution does just that. Therefore, the Order Denying Dissolution is subject to immediate appellate review.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

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May 15, 2023

PROOF OF SERVICE

I, the undersigned of the law offices of Murphy & Grantland PA, attorneys for Appellants, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specific below by emailing them at the addresses below:

Pleading(s): Appellant's Response to Court's Appealability Inquiry

Parties Served:

Peter D. Protopapas (pdp@rplegalgroup.com)
Brian M. Barnwell (bb@rplegalgroup.com)
John B. White, Jr. (jwhite@johnbwhitelaw.com)
Marghretta H. Shisko (mshisko@johnbwhitelaw.com)
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Scott Shutte (scott.schutte@morganlewis.com)
Brady Edwards (brady.edwards@morganlewis.com)

Counsel for Respondent Payne & Keller Corp., through its Receiver Peter D. Protopapas

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Jamie D. Rutkoski (jrutkoski@kassellaw.com)
Jonathan Marshall Holder (jholder@dobslegal.com)

Counsel for Plaintiff

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May 15, 2023



The State of Texas

SECRETARY OF STATE

The undersigned, as Secretary of State of the State of Texas, HEREBY CERTIFIES that the attached is a true and correct copy of the following described instruments on file in this Office:

FRENTEX ENTERPRISES COMPANY OF TEXAS

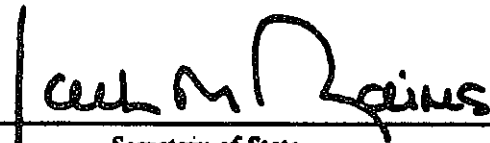
Articles of Dissolution

December 3, 1986



IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, this

7th day of July, A. D. 19 87


Secretary of State

EXHIBIT

A

tabbies

00056000197

FILED
In the Office of the
Secretary of State of Texas

REC 03 1986

Clerk IN
Corporations Section

ARTICLES OF DISSOLUTION

Pursuant to the provisions of Article 6.06 of the Texas Business Corporation Act, the undersigned corporation adopts the following Articles of Dissolution for the purpose of dissolving:

1. The name of the Corporation is FRENTEX ENTERPRISES COMPANY OF TEXAS.

2. The names and respective addresses of its officers are:

NAME	OFFICE	ADDRESS
Bernard Gautier	President	P. O. Box 262546 Houston, Texas 77207-2546
John J. King	Secretary	5005 Woodway Houston, Texas 77056

3. The names and respective addresses of its directors are:

NAME	ADDRESS
Bernard Gautier	P. O. Box 262546, Houston, Texas 77207-2546
Lucien Dehan	P. O. Box 262546, Houston, Texas 77207-2546
John J. King	5005 Woodway, Houston, Texas 77056

4. A written consent to dissolve, A COPY OF WHICH IS ATTACHED, has been signed by all shareholders of the corporation, or in their behalf by their duly authorized attorney.

5. All debts, obligations and liabilities of the corporation have been paid, discharged, or adequate provision has been made therefor.

6. All remaining property and assets of the corporation have been distributed among its shareholders in accordance with their respective rights and interests.

7. Adequate provision has been made for the satisfaction of any judgment, order, or decree which may be entered against it in any pending suit.

00006000190

DATED this the 27 day of October, 1986.

By: [Signature]
Bernard Gautier
Its President

By: [Signature]
John J. King
Its Secretary

STATE OF TEXAS

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COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this the 27 day of October, 1986, personally appeared Bernard Gautier, who being by me first duly sworn, declared that he is the President of the above corporation, that he signed the foregoing document as such officer of said corporation, and that the statements contained therein are true and correct.

[Signature]
Notary Public in and for
the State of Texas

My commission expires: _____

Printed Name of Notary

STATE OF TEXAS

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COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this the 27 day of October, 1986, personally appeared John J. King, who being by me first duly sworn, declared that he is the Secretary of the above corporation, that he signed the foregoing document as such officer of said corporation, and that the statements contained therein are true and correct.

Melinda Winn
Notary Public in and for
the State of Texas

Printed Name of Notary

My commission expires: _____

MELINDA WINN

My Commission Expires: 4/24/90

850:33dr

00056800199

CONSENT ACTION OF THE SOLE SHAREHOLDER OF
FRENTEX ENTERPRISES COMPANY OF TEXAS

The undersigned, constituting the sole shareholder of Frentex Enterprises Company of Texas, formerly known as "Payne & Keller Company", a Texas corporation (the "Company"), acting pursuant to Article 9.10A of the Texas Business Corporation Act, as amended, hereby consents to the adoption of and does hereby adopt the resolutions hereinafter set forth with the same force and effect as if said resolutions were duly adopted by a unanimous vote of the shareholder of the Company at a meeting thereof duly and regularly called for those purposes, to-wit:

RESOLVED, that the resolutions of the Board of Directors recommending that the Company be dissolved and liquidated, be and the same are hereby adopted and approved in all respects; and be it

FURTHER RESOLVED, that the dissolution and liquidation of the Company be consummated as soon as practicable; and be it

FURTHER RESOLVED, that when and as assets of the Company are reduced to cash, provision having been made for the debts and liabilities of the Company, distribution may be made to the shareholders of the Company from time to time, as partial distributions on account of the complete liquidation of the Company, in such amounts as the Board of Directors may from time to time determine; and be it

FURTHER RESOLVED that the proper officers of the Company be and they hereby are authorized and directed to take all such action as they may deem necessary or appropriate to consummate the liquidation and dissolution of the Company, including the execution and delivery of all documents necessary to effectuate the liquidation and dissolution of the Company.

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DATED: 10-27, 1986

FRENTEX ENTERPRISES CORPORATION
(formerly known as
"Payne & Keller Corporation"),
SOLE SHAREHOLDER

By: [Signature]

Title: President

850:33

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
LENORA CHILDERS , Individually and as	)	C/A NO. 2021-CP-40-03484
Personal Representatives of the Estate of	)	
LEWIS C. CHILDERS ,	)	<i>In Re:</i>
	)	Asbestos Personal Injury Litigation
Plaintiff,	)	Coordinated Docket
	)	
v.	)	
	)	
DAVIS MECHANICAL	)	
CONTRACTORS, INC. , et al.	)	
	)	
Defendants.	)	

**PLAINTIFF'S MOTION TO APPOINT A RECEIVER OVER PAYNE & KELLER
COMPANY PURSUANT TO S.C. CODE §15-65-10(4)**

Plaintiff, pursuant to S.C. Code §15-65-10(4), moves this Court to appoint a receiver over Payne & Keller Company. This entity is a defendant in the above-captioned action and the Plaintiff would respectfully show the Court as follows:

BACKGROUND

Payne & Keller Company ("Payne & Keller"), was a supplier and installers of asbestos insulation in the southeastern United States during the 1960s, 1970s, 1980s and 1990s. Payne & Keller is a dissolved Texas corporation.¹ With its dissolution, Payne & Keller leaves its creditors, namely the thousands of men and women it exposed to asbestos, without any meaningful entity to proceed against and, apparently, disposed of its assets without regards to those creditors. Now, apparently, all that remains of Payne & Keller is its insurance coverage.

Plaintiff requests that this Court appoint Peter Protopapas as the Receiver over Payne & Keller to determine what assets, including insurance coverage, is available Payne & Keller and

¹ See South Carolina Secretary of State business entities search information attached as Exhibit A.



that the receiver be granted such further and other powers as may be appropriate, including, but not limited to, the acceptance of service of claims, retaining counsel, making claims against insurance policies which may exist and otherwise wholly administrate all of the assets and attendant business of Payne & Keller .

LAW AND ARGUMENT

South Carolina Code §15-65-10(4) state states that a receiver may be appointed by a judge of the circuit court, either in or out of court:

. . . . (4) When a corporation has been dissolved, is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights, and in like cases, of the property within this state of foreign corporations . . .

It is undisputed that Payne & Keller, because of its dissolution/suspension, has forfeited their rights to do business in South Carolina.

Section 15-65-20 requires that notice of this application be provided to the party to the action whose property is sought to be put in the hands of a receiver. Plaintiff, concurrently herewith, has served copies of this motion on the South Carolina Secretary of State.²

CONCLUSION

For the foregoing reasons, the appointment of a receiver for Payne & Keller for all purposes, including, but not limited to taking possession of and disposing of any remaining assets of Payne & Keller is appropriate. Plaintiff requests that this Court issue an order appointing a receiver as soon as practicably possible and for such other and further relief to which they may be entitled. Plaintiff respectfully suggests that Peter Protopapas be appointed the receiver over Payne & Keller.

² Plaintiff served the South Carolina Secretary of State. *See* Affidavit of Charles W. Branham, III, Confirmation of Service Attached as Exhibit A.

Respectfully submitted,

s/Theile B. McVey

Theile B. McVey (SC Bar No. 16682)

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Jonathan M. Holder (SC Bar No. 77935)

Charles W. Branham, III (To be admitted *Pro Hac Vice*)

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ATTORNEYS FOR PLAINTIFF

August 23, 2021

Columbia, South Carolina.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
LENORA CHILDERS , Individually and as	)	C/A NO. 2021-CP-40-03484
Personal Representatives of the Estate of	)	
LEWIS C. CHILDERS ,	)	<i>In Re:</i>
	)	Asbestos Personal Injury Litigation
Plaintiff,	)	Coordinated Docket
	)	
v.	)	
	)	<u>ORDER</u>
DAVIS MECHANICAL	)	
CONTRACTORS, INC., et al.	)	
	)	
Defendants.	)	

CAME ON _____, 2021, to be heard the Plaintiff's Motion to Appoint a Receiver Over Payne & Keller Company, pursuant to S.C. Code §15-65-10(4). This Court finds that the application is meritorious under the applicable statute because Payne & Keller Company ("Payne & Keller") dissolved and Payne & Keller, a Texas Corporation, has forfeited its charter and has further failed to answer this case and therefore, Plaintiff requests for an expedited ruling on this motion is appropriate and also granted.

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



In addition to the powers of the Receiver set forth herein, the Receiver shall have the following rights, authority and powers with respect to the Respondent's property, to: 1) collect all accounts receivable of Respondent and all rents due to the Respondent from any tenant; 2) to change locks to all premises at which any property is situated; 3) open any mail addressed to the defendant and addressed to any business owned by the Respondent; redirect the delivery of any mail addressed to the Respondent or any business of the Respondent, so that the mail may come directly to the receiver; 4) endorse and cash all checks and negotiable instruments payable to Respondent, except paychecks for current wages; 5) hire a real estate broker to sell any real property and mineral interest belonging to the Respondents; 6) hire any person or company to move and store the property of Respondent; 7) to insure any property belonging to the Respondents (but not the obligation); 8) obtain from any financial institution, bank, credit union, savings and loan or title company, credit bureau or any other third party, any financial records belonging to or pertaining to the Defendants; 9) obtain from any landlord, building owner or building manager where the Respondent or the Respondent's business is a tenant, copies of the Respondent's lease, lease application, credit application, payment history and copies of Respondent's checks for rent or other payments; 10) hire any person or company necessary to accomplish any right or power under this Order; and 11) take all action necessary to gain access to all storage facilities, safety-deposit boxes, real property, and leased premises wherein any property of Respondent may be situated, and to review and obtain copies of all documents related to same.

Based on the Court's experience in other receivership matters, and in an effort to streamline these proceedings, the Court expects the Receiver to investigate the existence of all insurance coverages potentially available to the company in receivership. The Receiver will provide potential insurers with lists of work sites, contractors, and insurance brokers and agents to facilitate

the insurers' searches for coverage (specifically including coverage provided to any related or subsidiary companies of the company in receivership or any company for whom the company in receivership did work as an "additional insured" under coverage written to another entity). The Court expects all insurers to comply with subpoenas issued by this Court and its Receiver in effectuating these thorough searches.

The Court further orders that, as the Receiver Court, that the Receiver or Payne & Keller Insulation, Inc. may not be sued outside this Court without obtaining the Receiver's consent or an order of this Court prior to doing so.

AND IT SO ORDERED this _____ day of _____ 2021.

Jean Hoefer Toal, Chief Justice of the Supreme Court of
South Carolina (Retired), acting as Circuit Court Judge



Richland Common Pleas

Case Caption: Lenora Childers , plaintiff, et al vs Davis Mechanical Contractors ,
defendant, et al
Case Number: 2021CP4003484
Type: Order/Appointment of Receiver

So Ordered

Jean H. Toal

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

LENORA CHILDERS, Individually and as
Personal Representative of the Estate of LEWIS
C. CHILDERS,

2021-CP-40-03484

Plaintiff,

In Re:
Asbestos Personal Injury Litigation Coordinated
Docket

v.

AMENDED SUMMONS

Davis Mechanical Contractors, Inc., Flame
Refractories, Inc., General Boiler Casing
Company, Inc., HEFCO, Inc., J.R. Deans
Company, Inc., Payne & Keller Company, SFB,
Incorporated, Stafford Insulation Company,
Standard Insulation Company of N.C., Inc.,
Systra Engineering, Inc., United Construction
Co. of Rome, Inc., Wind Up, Ltd., Individually
and as Successor-in-Interest to Pipe & Boiler
Insulation, Inc. f/k/a Carolina Industrial
Insulating Co.,

Defendants.

Flame Refractories, Inc., United Construction
Co. of Rome, Inc., Wind Up, Ltd., Individually
and as Successor-in-Interest to Pipe & Boiler
Insulation, Inc. f/k/a Carolina Industrial
Insulating Co., and Payne & Keller Company By
and Through Their Duly Appointed Receiver
Peter D. Protopapas,

Third-Party Plaintiffs,

v.

Zurich American Insurance Company
(Individually and as Successor to Northern
Insurance Company of New York, Maryland
American General Insurance Company, and
Maryland Casualty Company); Allstate
Insurance Company; John Tighe; Sean Antony



Beatty; Dennis William Cahill; Catherine Ann Carlino; Andre Lefebvre; David Dean Shumway; Gil Chandler, Michael Davenport; Linda Young Pettigrew; Gwyn Wallace Fuller; Daniel Robert Keddie; Julie Ann Fortune; Michael John Crall; James Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.; Arrowpoint Capital Corp.; Admiral Insurance Company; Continental Insurance Company (Individually and as Successor in interest to Harbor Insurance Company); Hartford Accident and Indemnity Company, Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company, National Union Fire Insurance Company of Pittsburgh, PA, Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc., Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company, Lexington Insurance Company, First State Insurance Company, Birmingham Fire Insurance Company, Certain Underwriters at Lloyd's of London and various London Market Companies, South Carolina Property and Casualty Insurance Guaranty Association, R.L. Jarrett (Underwriting) Agency, Inc., U.S. Risk, L.L.C., Rexel USA, Inc., and Compass Risk Services, LLC

Third-Party Defendants.

TO THE ABOVE-NAMED THIRD-PARTY DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Amended Third Party Complaint in this action, a copy of which is hereby served on you, and to serve a copy of your Answer to the said Amended Third-Party Complaint upon the subscribers at 2110 N. Beltline Blvd., Columbia, South Carolina 29204, within thirty (30) days after service hereof, exclusive of

the day of such service, and if you fail to answer the Amended Third-Party Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in such Amended Third-Party Complaint.

Respectfully submitted,

Dated: February 23, 2022

RIKARD & PROTOPAPAS, LLC

By: s./ Brian M. Barnwell

Brian M. Barnwell (SC Bar 78249)
Rikard & Protopapas, LLC
2110 N. Beltline Blvd.,
Columbia, South Carolina 29204
803.978.6111
bb@rplegalgroup.com

Attorneys for Third-Party Plaintiffs

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

LENORA CHILDERS, Individually and as
Personal Representative of the Estate of LEWIS
C. CHILDERS,

2021-CP-40-03484

Plaintiff,

v.

In Re:

Asbestos Personal Injury Litigation Coordinated
Docket

Davis Mechanical Contractors, Inc., Flame
Refractories, Inc., General Boiler Casing
Company, Inc., HEFCO, Inc., J.R. Deans
Company, Inc., Payne & Keller Company, SFB,
Incorporated, Stafford Insulation Company,
Standard Insulation Company of N.C., Inc.,
Systra Engineering, Inc., United Construction
Co. of Rome, Inc., Wind Up, Ltd., Individually
and as Successor-in-Interest to Pipe & Boiler
Insulation, Inc. f/k/a Carolina Industrial
Insulating Co.,

AMENDED THIRD-PARTY COMPLAINT

Defendants.

Flame Refractories, Inc., United Construction
Co. of Rome, Inc., Wind Up, Ltd., Individually
and as Successor-in-Interest to Pipe & Boiler
Insulation, Inc. f/k/a Carolina Industrial
Insulating Co., and Payne & Keller Company By
and Through Their Duly Appointed Receiver
Peter D. Protopapas,

Third-Party Plaintiffs,

v.

Zurich American Insurance Company
(Individually and as Successor to Northern

Insurance Company of New York, Maryland American General Insurance Company, and Maryland Casualty Company); Allstate Insurance Company; John Tighe; Sean Antony Beatty; Dennis William Cahill; Catherine Ann Carlino; Andre Lefebvre; David Dean Shumway; Gil Chandler, Michael Davenport; Linda Young Pettigrew; Gwyn Wallace Fuller; Daniel Robert Keddie; Julie Ann Fortune; Michael John Crall; James Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.; Arrowpoint Capital Corp.; Admiral Insurance Company; Continental Insurance Company (Individually and as Successor in interest to Harbor Insurance Company); Hartford Accident and Indemnity Company, Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company, National Union Fire Insurance Company of Pittsburgh, PA, Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc., Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company, Lexington Insurance Company, First State Insurance Company, Birmingham Fire Insurance Company, Certain Underwriters at Lloyd's of London and various London Market Companies, South Carolina Property and Casualty Insurance Guaranty Association, R.L. Jarrett (Underwriting) Agency, Inc., U.S. Risk, L.L.C., Rexel USA, Inc., and Compass Risk Services, LLC

Third-Party Defendants.

COMES NOW Flame Refractories, Inc.; United Construction Co. of Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co., and Payne & Keller Company (collectively, "Third-Party Plaintiffs") by

and through their duly appointed receiver Peter D. Protopapas (the "Receiver"), complaining of the third-party defendants Zurich American Insurance Company (Individually and as Successor to Northern Insurance Company of New York, Maryland American General Insurance Company, and Maryland Casualty Company); Allstate Insurance Company; John Tighe; Sean Antony Beatty; Dennis William Cahill; Catherine Ann Carlino; Andre Lefebvre; David Dean Shumway; Gil Chandler, Michael Davenport; Linda Young Pettigrew; Gwyn Wallace Fuller; Daniel Robert Keddie; Julie Ann Fortune; Michael John Crall; James Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.; Arrowpoint Capital Corp.; Admiral Insurance Company; Continental Insurance Company (Individually and as Successor in interest to Harbor Insurance Company); Hartford Accident and Indemnity Company, Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company, National Union Fire Insurance Company of Pittsburgh, PA, Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc., Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company, Lexington Insurance Company, First State Insurance Company, Birmingham Fire Insurance Company, Certain Underwriters at Lloyd's of London and various London Market Companies, South Carolina Property and Casualty Insurance Guaranty Association, R.L. Jarrett (Underwriting) Agency, Inc., U.S. Risk, L.L.C., Rexel USA, Inc., and Compass Risk Services, LLC (collectively, "Third-Party Defendants"), who through undersigned counsel respectfully show unto the Court as follows:

PARTIES

1. The Third-Party Plaintiffs appearing by and through their duly appointed Receiver, who maintains his principal place of business in Richland County, South Carolina, bring this amended third-party complaint. This Court appointed the Receiver to undertake actions to administer all assets of the Third-Party Plaintiffs, including, without limitation, their insurance policies. *See* Ex. A, Flame Refractories Receivership Order; Ex. B, United Construction Receivership Order; Ex. C, Pipe & Boiler Receivership Order, Ex. D, Payne & Keller Receivership Order, and Ex. E, Payne & Keller Order Granting Payne & Keller Motion to Clarify.
2. The Receiver was appointed over Payne & Keller and entities related to the historic operations of Payne & Keller Company, including Payne & Keller, Inc.; Payne & Keller of Louisiana, Inc.; Bayou Maintenance, Inc.; Bayou Maintenance and Constructors, Inc.; Payne & Keller Gulf Coast, Inc.; Frentex Enterprises Company; and Frentex Enterprises Company of Texas (collectively “Payne & Keller”). This Court appointed the Receiver to administer all assets of Payne & Keller, including without limitation its insurance policies. (*See* Ex. D at 1–2 (“This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Payne & Keller as well as any claims related to the actions, or failures to act, of Payne & Keller’s insurance carriers.”); *see also* Ex. E.
3. The Receiver is informed and believes that Third-Party Defendant Zurich American Insurance Company (Individually and as Successor to Northern Insurance Company of New York, Maryland American General Insurance Company, and Maryland Casualty Company) is a

corporation organized under the laws of New York, with its principal place of business located in Illinois.

4. The Receiver is informed and believes that Third-Party Defendant Allstate Insurance Company is a corporation organized under the laws of Illinois, with its principal place of business located in Illinois.
5. The Receiver is informed and believes the following with regard to the individual Third-Party Defendants named in the complaint, all of whom hold roles at Arrowood, or held roles at Arrowood at relevant times (collectively, the "Individual Arrowood Third-Party Defendants"):
 - a. John Tighe ("Tighe") is, and at all relevant times has been, the President and Chief Executive Officer, and Chairman of the Board of Arrowood. Tighe owns 20% of Arrowpoint Capital.
 - b. Sean Anthony Beatty ("Beatty") is, and at all relevant times has been, a Senior Vice President and the Chief Financial Officer, as well as a director of Arrowood. Beatty owns 12.8% of Arrowpoint Capital.
 - c. Dennis William Cahill ("Cahill") is, and at all relevant times has been, a Senior Vice President and Planning Governance Executive, as well as director of Arrowood. Cahill owns 12.8% of Arrowpoint Capital.
 - d. Catherine Ann Carlino ("Carlino") is, and at all relevant times has been, a Senior Vice President, a Planning & Governance Executive, and a director of Arrowood.
 - e. Andre Lefebvre ("Lefebvre") is, and at all relevant times has been, a Senior Vice President and Financial Risk Officer, as well as a director of Arrowood.

- f. David Dean Shumway (“Shumway”) is, and at all relevant times has been, a Senior Vice President and Chief Investment Officer, as well as a director of Arrowood.
 - g. Gil Chandler (“Chandler”) is, and at all relevant times has been, a Vice President and Assistant Corporate Secretary, as well as a director of Arrowood.
 - h. Michael Davenport (“Davenport”) is, and at relevant times has been, a Vice President and Controller, as well as a director of Arrowood.
 - i. Linda Young Pettigrew (“Pettigrew”) is, and at all relevant times has been, the Corporate Secretary of Arrowood.
 - j. Gwyn Wallace Fuller (“Fuller”) is, and at all relevant times has been, the Treasurer of Arrowood.
 - k. Daniel Robert Keddie (“Keddie”) is a director, and all relevant times has been a Vice President and Chief Actuary (as well as the Appointed Actuary) of Arrowood.
 - l. Julie Ann Fortune (“Fortune”) at relevant times was a Senior Vice President and Chief Claims Officer, as well as a director of Arrowood.
 - m. John Crall (“Crall”) at relevant times was a director of Arrowood.
 - n. James Francis Meehan (“Meehan”) was at relevant times a Senior Vice President and the General Counsel, as well as a director of Arrowood.
 - o. Larry Gene Simmons (“Simmons”) was at relevant times a director of Arrowood.
6. The Receiver is informed and believes that Arrowpoint Group, Inc. is a Delaware corporation with its principal place of business in North Carolina.
7. The Receiver is informed and believes that Arrowpoint Capital Corporation is a Delaware corporation with its principal place of business in North Carolina.

8. The Receiver is informed and believes that Admiral Insurance Company is a corporation organized under the laws of the state of Delaware with its principal place of business in New Jersey.
9. The Receiver is informed and believes that Continental Insurance Company (Individually and as Successor in interest to Harbor Insurance Company), is a corporation organized under the laws of the state of Illinois with its principal place of business in Pennsylvania.
10. The Receiver is informed and believes that Hartford Accident and Indemnity Company is organized under the laws of the state of Connecticut with its principal place of business in Connecticut.
11. Plaintiff is informed and believes that defendant First State Insurance Company (“First State” or “Hartford”) is a corporation organized under the laws of the State of Connecticut, with its principal place of business located in the Commonwealth of Massachusetts. Further, First State agreed that “in any suit instituted against it upon this contract this Company will abide by the final decision of such Court or any Appellate Court in the event of an appeal.” Moreover, by including the “service of suit clause” in its contract of insurance with Payne & Keller, Hartford has consented to the jurisdiction of this Court. In pertinent part, the Hartford Policies contain the following service of suit clause:

It is agreed that in the event of the failure of this Company to pay any amount claimed to be due hereunder, this Company, at the request of the Insured, will submit to the jurisdiction of any Court of Competent Jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

By virtue of the foregoing service of suit clause, First State agreed to comply with all requirements necessary to give this Court jurisdiction, and further agreed that all matters pertinent

to the instant dispute shall be determined by this Court. The portion of the “service of suit” clause which states that “all matters arising hereunder shall be determined in accordance with the law and practice of such Court” is a valid “choice of forum” clause. First State has consented to the jurisdiction of this Court and, accordingly, this action may not be removed or transferred to any other court.

12. Plaintiff is informed and believes that defendant Birmingham Fire Insurance Company (“Birmingham Fire”) is a corporation organized under the laws of New York with its principal place of business in New York.

13. Plaintiff is informed and believes that defendants Certain Underwriters at Lloyd’s, London (“Lloyd’s Underwriters”), and any and all London Market Insurers that participated in any of the policies at issue in this action (“London Market Insurers”), are an association of underwriters and individual insurance companies existing under the laws of the United Kingdom or another foreign sovereign with their principal place of business in London, England, that sold or subscribed to insurance policies covering plaintiff (generally referred to herein as “Lloyd’s Underwriters and London Market Insurers”). At all times relevant hereto, Lloyd’s Underwriters and London Market Insurers were authorized, through their respective agents, to underwrite insurance policies covering risks in the State of South Carolina and elsewhere. Lloyd’s Underwriters and London Market Insurers agreed further that “in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.” Moreover, Lloyd’s Underwriters and London Market Insurers, and those defendant insurers which issued follow form policies or otherwise incorporate the “service of suit” language in the Lloyd’s Underwriters and London Market

Insurer policies by the terms of the policies issued and subscribed by them, have consented to the jurisdiction of this Court. In pertinent part, the Lloyd's Underwriters and London Market Insurer policies, and those defendant insurers that issued follow form coverage policies to the same, contain the following service of suit clause:

It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Assured, will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

By virtue of the foregoing service of suit clause, Lloyd's Underwriters and London Market Insurers, and the following form defendant insurers agreed to the jurisdiction of the court of Payne & Keller's choosing, agreed to comply with all requirements necessary to give such court jurisdiction, and further agreed that all matters pertinent to the instant dispute shall be determined by such court. The portion of the "service of suit" clause which states that "all matters arising hereunder shall be determined in accordance with the law and practice of such Court" is a valid "choice of forum" clause. The financial responsibility for Lloyd's Underwriters and certain of the London Market Insurers currently rests with National Indemnity Company ("NICO"), a subsidiary of Berkshire Hathaway, Inc., the largest insuring organization in the United States as measured by total admitted assets (in excess of \$135 billion) and by policyholder surplus (in excess of \$65 billion). Resolute Management, Inc., another Berkshire Hathaway subsidiary, makes claims decisions for Lloyd's Underwriters and certain of the London Market Insurers. The term "Lloyd's Underwriters" when used in this complaint includes its agent and reinsurers including without limitation NICO, Resolute Management, and Equitas Limited, a successor to Lloyd's Underwriters. On information and belief, NICO is also financially

responsible for the obligations of defendants National Union, Lexington, Birmingham Fire, Continental and Stonewall, all of whose claims decisions are also made by Resolute Management.

14. Plaintiff is informed and believes that the Guaranty Association is an association formed under the laws of South Carolina.
15. Plaintiff is informed and believes that R.L. Jarrett Underwriting Agency, Inc. is a corporation organized under the laws of the State of Texas, with its principal place of business located in the State of Texas.
16. Plaintiff is informed and believes that U.S. Risk LLC is a limited liability company organized under the laws of the State of Delaware, with its principal place of business located in the State of Texas.
17. The Receiver is informed and believes that Rexel USA, Inc. is a corporation organized under the laws of Delaware with its principal place of business in the State of Texas.
18. The Receiver is informed and believes that Compass Risk Services, LLC is a limited liability company organized under the laws of Texas with its principal place of business in the State of Texas.
19. The Receiver believes that one or more additional insurance companies issued or may have issued policies of insurance to one or more of the Third-Party Plaintiffs that are responsive to the losses described herein ("Additional Third-Party Defendants"). Such Additional Third-Party Defendants may include one or more insurance companies managed by organizations located in New Hampshire, Massachusetts, or other jurisdictions. When the identities of these Additional Third-Party Defendants become known to Third-Party Plaintiffs, this Complaint may be amended *nunc pro tunc* to state the true identity of such Additional Third-Party Defendants.

JURISDICTION

20. This Court has jurisdiction over the matters alleged herein pursuant to S.C. Code Ann. §§ 36-2-802 and 36-2-803, Article V of the Constitution of the State of South Carolina, and the Court's plenary powers. This Court appointed Peter D. Protopapas as Receiver of Third-Party Plaintiffs.

VENUE

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

FACTUAL BACKGROUND

22. Third-Party Plaintiffs' historic operations, and the historic operations of their predecessors, included the installation, repair, replacement, removal, or disturbance of thermal insulation and other building materials. Those operations allegedly exposed persons to asbestos who thereby suffered bodily injury or personal injury (the "Asbestos Allegations"). The alleged bodily injury or personal injury resulting from the Asbestos Allegations has resulted in suits against Third-Party Plaintiffs ("Asbestos Suits"), including the instant suit filed by Lenora Childers, Individually and as Personal Representative of the Estate of Lewis C. Childers.

THIRD-PARTY PLAINTIFF CAROLINA INDUSTRIAL INSULATION

A. The Zurich Policies

23. Third-Party Defendant Zurich American Insurance Company (as Successor to Northern Insurance Company of New York) issued primary general liability policies (“The Zurich Policies”) to Carolina Industrial Insulation Co. (“Carolina Industrial”).¹ The Zurich Policies have standard terms and conditions. The Zurich Policies have a duty to defend or to reimburse defense costs on behalf of Carolina Industrial against any and all Carolina Industrial Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false, or fraudulent. The duty to defend is joint, several, indivisible, and supplemental. The Zurich Policies require Zurich fully to defend any Carolina Industrial Asbestos Suit alleging bodily injury during any Zurich Policy period. The Zurich Policies have a separate duty fully to indemnify Carolina Industrial from and against any and all Carolina Industrial Asbestos Suits with bodily injury taking place during any Zurich Policy period. It is the burden of Zurich to prove any limitation on or exclusion of coverage. Specifically, Zurich issued primary general liability coverage to Carolina Industrial for at least the three policy periods from January 1, 1973 – January 1, 1976.

24. The Receiver for Carolina Industrial continues to require all pertinent parties to conduct a diligent search for additional policies issued by Zurich or any of its predecessors, successors, subsidiaries, or affiliates. Should additional policies be located, this Amended Third-Party Complaint may be amended to include such additional Zurich Policies.

¹ Pipe & Boiler merged with Carolina Industrial on September 15, 1983. The merged entity continued operating under the name “Pipe & Boiler Insulation, Inc.”

25. Zurich has failed fully to acknowledge or accept its insuring obligations under the Zurich Policies. An actual and justiciable dispute exists between these parties.

B. The Allstate Policies

26. Third-Party Defendant Allstate issued primary general liability policies to Carolina Industrial (“The Allstate Policies”). The Allstate Policies have standard terms and conditions. The Allstate Policies have a duty to defend or to reimburse defense costs on behalf of Carolina Industrial against any and all Carolina Industrial Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false or fraudulent. The duty to defend is joint, several, indivisible and supplemental. The Allstate Policies require Allstate fully to defend any Carolina Industrial Asbestos Suit alleging bodily injury during any Allstate Policy period. The Allstate Policies have a separate duty fully to indemnify Carolina Industrial from and against any and all Carolina Industrial Asbestos Suits with bodily injury taking place during any Allstate Carolina Industrial Policy Period. It is the burden of Allstate to prove any limitation on or exclusion of coverage. Specifically, Allstate issued primary general liability coverage to Carolina Industrial for at least the three policy periods January 1, 1970 – January 1, 1973.

27. The Receiver for Carolina Industrial continues to require all pertinent parties to conduct a diligent search for additional policies issued by Allstate or any of its predecessors, successors, subsidiaries or affiliates. Should additional policies be located, this Amended Third-Party Complaint will be amended to include such additional Allstate Policies.

28. Allstate has failed fully to acknowledge or accept its insuring obligations under the Allstate Policies. An actual and justiciable dispute exists between these parties.

C. The Continental Policies

29. On information and belief, Third-Party Defendant Continental issued general liability policies to Carolina Industrial ("The Continental Carolina Industrial Policies"). The Continental Carolina Industrial Policies have standard terms and conditions. The Continental Carolina Industrial Policies have a duty to defend or to reimburse defense costs on behalf of Carolina Industrial against any and all Carolina Industrial Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false, or fraudulent. The duty to defend is joint, several, indivisible, and supplemental. The Continental Carolina Industrial Policies require Continental fully to defend any Carolina Industrial Asbestos Suit alleging bodily injury during any Continental Carolina Industrial Policy period. The Continental Carolina Industrial Policies have a separate duty fully to indemnify Carolina Industrial from and against any and all Carolina Industrial Asbestos Suits with bodily injury taking place during any Continental Carolina Industrial Policy period. It is the burden of Continental to prove any limitation on or exclusion of coverage. Specifically, upon information and belief, Continental issued primary general liability coverage to Carolina Industrial for multiple policy periods between January 1, 1978 and January 1, 1983.
30. The Receiver for Carolina Industrial continues to require all pertinent parties to conduct a diligent search for additional policies issued by Continental or any of its predecessors, successors, subsidiaries or affiliates. Should such additional policies be located, this Amended Third-Party Complaint will be amended to include such additional Continental Carolina Industrial Policies.

31. Continental has failed, or will fail, fully to acknowledge or accept its insuring obligations under the Continental Carolina Industrial Policies. An actual and justiciable dispute exists between these parties.

THIRD-PARTY PLAINTIFF FLAME REFRACTORIES

D. The Admiral Policies

32. Third-Party Defendant Admiral Insurance Company issued general liability policies to Flame Refractories (“The Admiral Flame Refractories Policies”). The Admiral Flame Refractories Policies have standard terms and conditions. The Admiral Flame Refractories Policies have a duty to defend or to reimburse defense costs on behalf of Flame Refractories against any and all Flame Refractories Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false, or fraudulent. The duty to defend is joint, several, indivisible, and supplemental. The Admiral Flame Refractories Policies require Admiral fully to defend any Flame Refractories Asbestos Suit alleging bodily injury during any Admiral Flame Refractories Policy period. The Admiral Flame Refractories Policies have a separate duty fully to indemnify Flame Refractories from and against any and all Flame Refractories Asbestos Suits with bodily injury taking place during any Admiral Flame Refractories Policy period. It is the burden of Admiral to prove any limitation on or exclusion of coverage. Specifically, upon information and belief, Admiral issued primary general liability coverage to Flame Refractories for multiple policy periods between 1970 and April 1, 1987.
33. The Receiver for Flame Refractories continues to require all pertinent parties to conduct a diligent search for additional policies issued by Admiral or any of its predecessors, successors,

subsidiaries or affiliates. Should such additional policies be located, this Amended Third-Party Complaint will be amended to include such additional Admiral Flame Refractories Policies.

34. Admiral has failed to fully acknowledge or accept its insuring obligations under the Admiral Flame Refractories Policies. An actual and justiciable dispute exists between these parties.

E. The Hartford Policy

35. Third-Party Defendant Hartford Accident and Indemnity Company issued an excess liability policy to Flame Refractories² for at least one policy period from April 1, 1985 to April 1, 1986 (“The Hartford Flame Refractories Policy”). The Hartford Flame Refractories Policy has standard terms and conditions. It is the burden of Hartford to prove any limitation on or exclusion of coverage.

36. The Receiver for Flame Refractories continues to require all pertinent parties to conduct a diligent search for additional policies issued by Hartford or any of its predecessors, successors, subsidiaries or affiliates. Should additional policies be located, this Amended Third-Party Complaint may be amended to include such additional Hartford Flame Refractories Policies.

37. Hartford has failed, or will fail, fully to acknowledge or accept its insuring obligations under the Hartford Policy. An actual and justiciable dispute exists between these parties.

F. The First State Policies

38. Third-Party Defendant First State Insurance Company issued an excess liability policy to Flame Refractories for at least two policy periods: from April 1, 1978 to April 1, 1979 and from April 1, 1979 to June 1, 1979 (“The First State Flame Refractories Policy”). The First

² Flame Refractories and United Construction Co. of Rome, Inc. merged in 1986, leaving Flame Refractories as the surviving entity.

State Flame Refractories Policy has standard terms and conditions. It is the burden of Hartford to prove any limitation on or exclusion of coverage.

39. The Receiver for Flame Refractories continues to require all pertinent parties to conduct a diligent search for additional policies issued by First State or any of its predecessors, successors, subsidiaries or affiliates. Should additional policies be located, this Amended Third-Party Complaint may be amended to include such additional First State Flame Refractories Policies.

THIRD-PARTY PLAINTIFF PIPE & BOILER INSULATION COMPANY

F. The Arrowood Policies

40. Arrowood Indemnity Company, formerly known as Security Insurance Company of Hartford, issued general liability policies to Pipe & Boiler (“The Arrowood Policies”). Specifically, Arrowood issued primary general liability coverage to Pipe & Boiler for at least the five policy periods January 1, 1981 – January 1, 1986, and issued umbrella coverage to Pipe & Boiler for at least the three policy periods January 1, 1983 – January 1, 1986.
41. Arrowood has failed fully to acknowledge or accept its insuring obligations under the Arrowood Policies. An actual and justiciable dispute exists between the Receiver and Arrowood.

i. The ownership and control of Arrowood³

42. Arrowood, formerly Royal Indemnity Company, was previously a member of the Royal & Sun Alliance USA, Inc. (“RSAUSA”) insurance group, whose ultimate parent was RSA Insurance Group plc. Arrowood is licensed to sell insurance in all 50 states.
43. In September 2003, RSAUSA announced a strategic change that resulted in the sale of the majority of its businesses under various renewal rights transactions. In 2004, RSAUSA also implemented a Plan of Reorganization and Consolidation that reduced the number of its insurance companies in the United States.
44. On March 3, 2007, Arrowpoint Capital, which was formed in 2006 and owned by Arrowood’s management and independent directors, purchased 100% of the interests of Arrowpoint General Partnership, the U.S. holding entity which owned all of the RSAUSA businesses. The approval of the transaction by the Delaware Department of Insurance (“DOI”) resulted in the Delaware Insurance Commissioner’s Order (“Order”) which subjected Arrowood to certain requirements. Those requirements included that Arrowood’s then parent, RSAUSA, provide Arrowood with a stop loss reinsurance agreement. According to a 2014 financial examination report for Arrowood issued by the Delaware DOI, by then, the RSAUSA stop loss reinsurance agreement had already become fully incurred, and there are no remaining limits of liability under the stop loss reinsurance agreement available for unpaid claims.
45. In addition, in accordance with the Order, Arrowood cannot pay dividends or sell or distribute assets in the ordinary course of business without the Delaware DOI’s approval (which the

³ The following allegations pertain specifically to the acts and omissions of the Individual Arrowood Third-Party Defendants, Arrowpoint Group, Inc., and Arrowpoint Capital Corp., herein collectively referred to as “the Arrowood Defendants.”

Individual Arrowood Third-Party Defendants have wrongfully circumvented or violated the order by paying themselves exorbitant salaries and benefits far outside the norm for insurance companies actively engaged in business, much less companies in runoff whose only business is adjusting claims).

46. The ownership structure of Arrowood has, and the officers and directors of Arrowood have, changed very little since 2007.
47. The Individual Arrowood Third-Party Defendants, in their capacities for Arrowood and as officers and directors of Arrowood's parent companies (Arrowpoint Group and Arrowpoint Capital), have maintained absolute control of Arrowood over the relevant years. Maintenance of such total control has been central to the Arrowood Third-Party Defendants' ability to engage in the wrongful conduct set forth in this complaint.
48. A critical component of the application of RSAUSA to spin off what is now Arrowood was the commitment of RSAUSA to infuse an additional \$287.5 million into the insurance companies for the specific stated purposes of payment of policyholder claims. As the then Delaware Insurance Commissioner concluded:

[I]n the event of continued adverse development beyond that projected by the Applicants (but consistent with the stressed financial conditions considered by the Department in its financial analysis, the British parent's \$287.5 million capital infusion may be barely sufficient to cover all outstanding claims.

In the Matter of The Proposed Acquisition of Royal Indemnity Company, Insurance Department of the State of Delaware, Docket No. 313, Decision and Final Order at 6 (Feb. 20, 2007).

49. Little did the (non-Delaware) insurance regulators know that the plan was or morphed into one to use a substantial part of that \$287.5 million not to pay policyholder claims but, instead, to wrongfully pay exorbitant salaries to Arrowood management and “management fees” to Arrowpoint.

ii. Insurance companies are regulated to protect policyholders, and their officers, directors, and ultimate control persons owe the insurance companies’ policyholders a duty of care.

50. Insurance companies are regulated to protect consumers. As the National Association of Insurance Commissioners (“NAIC”) has written:

The fundamental reason for government regulation of insurance is to protect American consumers. Insurance is more heavily regulated than other types of business because of the complexity of the insurance contracts, the lack of sufficient information for insurance consumers to adequately shop for prices and adequacy of coverage and because insurance contracts are generally contracts of adhesion. Conceptually insurance regulation is very simple. The public wants two things from insurance regulators. **They want solvent insurers who are financially able to make good on the promises they have made** and they want insurers to treat policyholders and claimants fairly. All regulatory functions will fall under either solvency regulation or market regulation to meet these two objectives. State insurance regulatory systems are accessible and accountable to the public and sensitive to local social and economic conditions. State regulation has proven that it effectively protects consumers and ensures that promises made by insurers are kept. Insurance regulation is structured around several key functions, including insurer licensing, producer licensing, product regulation, market conduct, financial regulation and consumer services.

NAIC and the Center for Insurance Policy and Research, State Insurance Regulation, *available at* https://www.naic.org/documents/topics_white_paper_hist_ins_reg.pdf, at 2 (last accessed Jan. 20, 2022) (emphasis added).

51. Indeed, the insurance statutes and regulations are designed to require the interests of policyholders to be of paramount concern for the officers, directors, and other persons who

exercise ultimate control over regulated and licensed insurance companies. For example, every state has detailed restrictions on transactions within an insurance holding company system (regulated by state insurance Holding Company Acts) to make sure that an insurance company does not improperly transfer funds to the detriment of policyholders. Another example is debt. If an insurance company wants to borrow money, unlike a non-regulated company, any such debt is subordinated to the interests of policyholders and evidenced by what is referred to as a "surplus note," such that repayment is subject to regulatory approval.

52. Insurers must be operated by individuals who are honest and trustworthy. Indeed, every year, the signatories to the Arrowood statutory financials must personally attest to the veracity of such information, stating:

The officers of this reporting entity being duly sworn, each depose and say that they are the described officers of said reporting entity, and that on the reporting period stated above, all of the herein described assets were the absolute property of the said reporting entity, free and clear from any liens or claims thereon, except as herein stated, and this statement, together with related exhibits, schedules, and explanations therein contained, annexed or referred to, is a full and true statement of all the assets and liabilities and of the condition and affairs of the said reporting entity as of the reporting period stated above, and of its income and deductions therefrom for the period ended, and have been completed in accordance with the NAIC Annual Statement Instructions and Accounting Practices and Procedures manual except to the extent that (1) state law may differ; or (2) that state rules or regulations require differences in reporting not related to accounting practices and procedures, according to the best of their information, knowledge, and belief, respectively. Furthermore, the scope of this attestation by the described officers also includes the related corresponding electronic filing with the NAIC, when required, that is an exact copy (except for formatting differences due to electronic filing) of the enclosed statement. The electronic filing may be requested by various regulators in lieu of or in addition to the enclosed statement.

See, e.g., Annual Statement as of December 31, 2020 of the Condition and Affairs of the Arrowood Indemnity Company at 1.

53. Insurance company accounting is slightly different than GAAP accounting. An insurer has assets and liabilities with the net difference called the “surplus” or “policyholders’ surplus.” Policyholders’ surplus (together with the company’s stated capital) is roughly equivalent to the net worth of the insurer. As liabilities for losses and expenses increase or assets decrease, the policyholders’ surplus is diminished.

54. Insurance companies must set loss reserves with integrity:

Reserves are liabilities. They reflect an insurer’s financial obligations with respect to the insurance policies it has issued. An insurer’s two major liabilities are loss reserves and unearned premium reserves. Loss reserves are an insurance company’s best estimate of what it will pay in the future for claims. Unearned premium reserves represent the premiums paid for coverage that has not yet been used because the policy has not expired. If the policy was cancelled by the policyholder, for example, the insurer would have to return the dollar amount of unused coverage.

Loss reserves are generally the largest liability on an insurer’s balance sheet. When a claim is filed, a reserve is established for payment of that claim. Property claims are usually clear-cut and are paid soon after a claim is filed. But with product liability and other so-called long tail coverages, the total harm caused may not be apparent for some time and the ultimate cost of claims may not be known for years, especially in complex cases that are litigated. In such cases, claims adjusters and actuaries continuously reevaluate costs as new information on the claim becomes available and adjust reserves accordingly based on their experience and judgment.

Companies pay considerable attention to their loss reserves. **Serious under-reserving may cause an insurer to over-estimate its policyholder surplus. . . . making its financial health appear better than it is.**

Insurance Information Institute, Financial Reporting, available at: <https://www.iii.org/publications/commercial-insurance/how-it-functions/financial-reporting> (last accessed Jan. 20, 2022) (emphasis added).

55. “Loss reserves” are estimates of unpaid losses that have been booked by an insurer to be paid in the future. There are, in the most general sense, two different types of loss reserves

established by property and casualty insurers. One is a case reserve for reported losses. A case reserve should be a good faith estimate of the amount for which a particular claim will ultimately be settled or adjudicated.

56. The other type of loss reserves that an insurer is required to establish is called “IBNR” or “incurred but not reported” loss reserves. IBNR is calculated by the insurer’s appointed actuary using various actuarial tools to estimate (a) losses that have occurred but have not been reported and (b) adverse development of case reserves on known losses (these are also at times referred to as “Bulk Reserves”).

57. In addition to loss reserves, insurance companies must establish reserves for expenses. There are two main types of expenses for a typical operating insurer. One is called “Allocated Loss Adjustment Expense” or “ALAE.” ALAE is generally attributed to the processing of specific insurance claims. Examples of ALAE are independent adjusters and outside defense counsel with respect to a particular claim.

58. In contrast, “Unallocated Loss Adjustment Expenses,” or “UALAE,” are internal costs and expenses incurred by an insurance company that cannot be associated with specific claims but are related to the claims adjustment process, such as administrative and internal expenses related to the settlement of claims. Examples of UALAE are employees acting in the capacity of claims managers handling claims, establishing loss reserves, providing authority to settle claims, and making coverage determinations.

59. “Incurred losses” are a combination of amounts that are paid for losses, together with loss reserves on reported claims. If an insurance company is adequately reserved, as unpaid losses become paid losses, the incurred amount should not materially change, as the amount simply

is recharacterized from a “reserved” amount to a “paid” amount. The same is true for loss adjustment expenses.

60. All of those reserves—incurred loss reserves, ALAE, ULAE, and IBNR/Bulk Reserves—in the aggregate are commonly referred to as the “carried reserves” of the insurer.
61. Every property and casualty insurer domiciled in Delaware, such as Arrowood, is required on a yearly and quarterly basis under 18 Del. Code § 526A to file with regulators an Annual Statement and Quarterly Statement, setting forth detailed information regarding, *inter alia*, its case reserves, IBNR and Bulk reserves, loss adjustment expenses, and “other underwriting expenses.” Every insurer must file those Statements with the regulators in every state in which it is licensed.
62. In addition, every insurer must annually file a Management Discussion and Analysis (“MD&A”). The purpose of the MD&A is to add qualitative information to the quantitative Annual Statement. As the Securities and Exchange Commission has explained,

The Commission has long recognized the need for a narrative explanation of the financial statements, because a numerical presentation and brief accompanying footnotes alone may be insufficient for an investor to judge the quality of earnings and the likelihood that past performance is indicative of future performance. MD&A is intended to give the investor an opportunity to look at the company through the eyes of management by providing both a short and long-term analysis of the business of the company.

Securities and Exchange Commission, Securities Act Release No. 6711 (April 24, 1987) [52 FR 13715].

63. Moreover, every property and casualty insurance company doing business in Delaware, unless exempt (which Arrowood is not), is required to submit to the Delaware DOI the opinion of an appointed actuary, entitled “Statement of Actuarial Opinion,” with supporting documentation

on a yearly basis with respect to the loss and expense reserves established and reported by the company. *See* 18 Del. Code. § 1132.

64. The critical role of the Appointed Actuary cannot be overstated, particularly for an insurer such as Arrowood which as of the spin-off had significant asbestos liabilities. The Appointed Actuary must be a member of a professional actuarial association that requires adherence to the same Code of Professional Conduct promulgated by the actuarial credentialing societies, requires adherence to the U.S. Qualification Standards, and participates in the Actuarial Board for Counseling and Discipline when its members are practicing in the U.S.
65. The Appointed Actuary must report to the Board of Directors each year on the items within the scope of the Actuarial Opinion. The Actuarial Opinion and the Actuarial Report must be made available to the Board of Directors. The Appointed Actuary must explicitly identify whether his/her actuarial opinion provides a reasonable determination of the insurer's reserves. In so doing, the Appointed Actuary must provide relevant comment paragraphs to address Company-Specific Risk Factors and the risk of material adverse deviation.
66. When the insurer's carried reserve amount is less than the minimum amount that the Appointed Actuary believes is reasonable, the Appointed Actuary should issue a Statement of Actuarial Opinion that the carried reserve amount does not make a reasonable provision for the liabilities associated with the specified reserves. In addition, the Appointed Actuary should disclose the minimum amount of reserves that the Appointed Actuary believes is reasonable.
67. As a matter of insurance law and/or regulation promulgated by the NAIC, other key elements of the work of the Appointed Actuary include:

- a. A description of the Appointed Actuary's relationship to the Company, with clear presentation of the Appointed Actuary's role in advising the Board of Directors and/or management regarding the carried reserves. The Actuarial Report should identify how and when the Appointed Actuary presents the analysis to the Board of Directors and, where applicable, to the officer(s) of the Company responsible for determining the carried reserves.
- b. An exhibit that ties to the Annual Statement and compares the Appointed Actuary's conclusions to the carried amounts consistent with the segmentation of exposure or liability groupings used in the analysis. The Appointed Actuary's conclusions include the Appointed Actuary's point estimate(s), range(s) of reasonable estimates, or both.
- c. An exhibit or appendix showing the change in the Appointed Actuary's estimates from the prior Actuarial Report, including extended discussion of factors underlying any material changes. The exhibit or appendix should illustrate the changes on a net basis but should also include the changes on a gross basis, if relevant. If the Appointed Actuary is newly appointed and does not review the work of the prior Appointed Actuary, then the Appointed Actuary should disclose this.
- d. Extended comments on trends that indicate the presence or absence of risks and uncertainties that could result in material adverse deviation.
- e. Extended comments on factors that led to unusual IRIS ratios for One-Year Reserve Development to Policyholders' Surplus, Two-Year Reserve Development to

Policyholders' Surplus, or Estimated Current Reserve Deficiency to Policyholders' Surplus, and how these factors were addressed in prior and current analyses.

iii. *NAIC IRIS Ratios are designed to uniformly measure solvency and liquidity to highlight troubled companies for state insurance regulators.*

68. The NAIC Insurance Regulatory Information System (IRIS) is a collection of analytical solvency tools and databases designed to provide state insurance departments with an integrated approach to screening and analyzing the financial condition of insurers operating within their respective states. IRIS is intended to assist state insurance departments in targeting resources to those insurers in greatest need of regulatory attention.
69. The IRIS Ratios are a set of ratios designed to measure solvency and liquidity. They are calculated from insurers' annual statements that are filed with the NAIC, and insurers that fail four or more tests can be placed under the supervision of their domicile regulator.
70. IRIS Ratios are particularly important where an insurer, like Arrowood, is licensed nationally, since most regulators have limited resources and cannot spend significant time and attention on foreign insurers licensed but not domiciled in their state. The NAIC IRIS Ratios provide the non-domiciliary regulators with important guidance as to the financial wherewithal of the foreign insurer. If an insurer is outside of more than four (4) of the NAIC Ratios, the insurer will come to the attention of the non-domiciliary regulators as a troubled company.
71. Delaware insurance regulations also require that an "Enterprise Risk Report" be filed by the "ultimate controlling person" of an insurer, which here is Arrowood Capital:

The ultimate controlling person of an insurer required to file an enterprise risk report pursuant to Section 5004(l) of the Act shall furnish the required information on Form F, hereby made a part of these regulations.

19 Del. Reg. 642 (2016).

72. Enterprise Risk is a defined term in insurance regulation. Under Delaware regulations,

“Enterprise risk” – The term ‘enterprise risk’ shall mean any activity, circumstance, event or series of events, involving 1 or more affiliates of an insurer that, if not remedied promptly, is likely to have a material adverse effect upon the financial condition or liquidity of the insurer or its insurance holding company system as a whole, including, but not limited to, anything that would cause the insurer’s risk-based capital to fall into company action level as set forth in § 5803 of this title or would cause the insurer to be in hazardous financial condition as set forth in Section 3 of Department of Insurance Regulation 304 – Standards and Commissioner’s Authority for Companies Deemed to be in Hazardous Financial Condition [18 DE Admin. Code § 304-3.0].

18 Del. Code § 5001(4).

73. The foregoing statutory requirements were enacted to impose duties upon the officers, directors, and ultimate controlling persons of insurance companies doing business or domiciled in Delaware to protect the solvency of licensed insurers for the benefit of their policyholders.

74. In addition to the Delaware insurance laws, the Arrowood Third-Party Defendants at all times were well aware of Arrowood’s obligation to comply with the insurance laws and regulations in each state in which it was licensed to sell insurance (all 50 states in the case of Arrowood) and, according to Schedule T of Arrowood’s Annual Statement, Arrowood has, in varying amounts, significant insurance liabilities in every state other than North Dakota and Wyoming.

75. Insurers have a statutory obligation to be solvent. Under applicable Delaware law, Title 18, Chapter 59 § 5901(a), “The capital of a stock insurer . . . shall be deemed to be impaired, and the insurer shall be deemed to be insolvent, when such insurer is not possessed of assets at least equal to all liabilities and required reserves together with its total issued and outstanding capital stock, it a stock insurer, . . . required by this title to be maintained for the kind or kinds of insurance it is then authorized to transact.”

76. Under 18 Del. Code § 5802, Arrowood, like every Delaware domestic insurer, is required to prepare and submit by March 1 of each year to the Delaware Insurance Commissioner a report of its RBC levels as of the end of the calendar year just ended, “in a form as is required by the RBC instructions.” “RBC instructions” is a phrase defined as “the RBC report including risk-based capital instructions adopted by the NAIC [National Association of Insurance Commissioners]; as such, RBC instructions may be amended by the NAIC from time to time in accordance with the procedures adopted by the NAIC.” 18 Del. Code § 5802(9).

77. The NAIC has explained Risk Based Capital requirements as follows:

Risk-Based Capital (RBC) is a method of measuring the minimum amount of capital appropriate for a reporting entity to support its overall business operations in consideration of its size and risk profile. RBC limits the amount of risk a company can take. It requires a company with a higher amount of risk to hold a higher amount of capital. Capital provides a cushion to a company against insolvency. RBC is intended to be a minimum regulatory capital standard and not necessarily the full amount of capital that an insurer would want to hold to meet its safety and competitive objectives. In addition, RBC is not designed to be used as a stand-alone tool in determining financial solvency of an insurance company; rather it is one of the tools that give regulators legal authority to take control of an insurance company.

Federal Bar Association, “Insurance Tax Seminar Session 7A – Capital Planning: One Concept to Rule Them All,” available at <https://www.fedbar.org/wp-content/uploads/2019/12/Session-7A-PPT-REV-pdf-1.pdf> (last visited Jan. 20, 2022).

78. Thus, a Delaware regulated insurer has two different financial thresholds that it must maintain:

- a. It must, under § 5901, maintain “assets at least equal to all liabilities and required reserves,” and
- b. Pursuant to § 5801, maintain adequate Risk-Based Capital.

79. Although the statutory references obviously vary by state, the basic rules (as dictated by the NAIC) are the same.

80. If a regulated insurer does not maintain adequate surplus or comply with RBC rules, the regulators are required to assume control over the company.

81. Moreover, federal statutes impose harsh penalties when insurers knowingly and with the intent to deceive file with state regulators false financial statements. Indeed, officers and directors who willfully misappropriate funds from insurers can be personally liable under those same statutes. *See, e.g.*, 18 U.S.C. § 1033.

iv. *Pipe & Boiler purchased insurance policies issued by Arrowood.*

82. Security Insurance Company of Hartford issued primary general liability coverage to Pipe & Boiler for at least the two policy periods January 1, 1981 – January 1, 1983, which policies have been administered by Arrowood in runoff since 2007.

83. The officers, directors, Appointed Actuary, and other ultimate controlling persons had a duty to (a) operate Arrowood in a manner consistent with the insurance statutes and regulations of Delaware to protect the interests of Arrowood's policyholders and (b) make accurate and timely regulatory filings and disclosures.

v. *The Arrowood Third-Party Defendants' Conversion of Assets of Arrowood*

84. On March 4, 2007, John Tighe, then CEO of both Arrowpoint and Arrowood, announced,

Our focus has always been on our obligation to all of our policyholders – the successful completion of this transaction is a huge win for them . . . The transaction builds on the strong success we've achieved to date through our restructuring efforts and provides us with a solid foundation for taking the business forward. Most importantly, it represents an excellent outcome for our policyholders, who are the primary beneficiaries of the acquisition and the additional \$287.5 million it provides.

See “Arrowpoint Capital Finalizes Acquisition of Royal & SunAlliance USA Businesses, Arrowpoint Capital Press Release, March 4, 2007, available at <https://www.arrowpointcap.com/Arrowpoint/GetPrintPage.aspx?pageId=500> (last accessed Jan. 20, 2022).

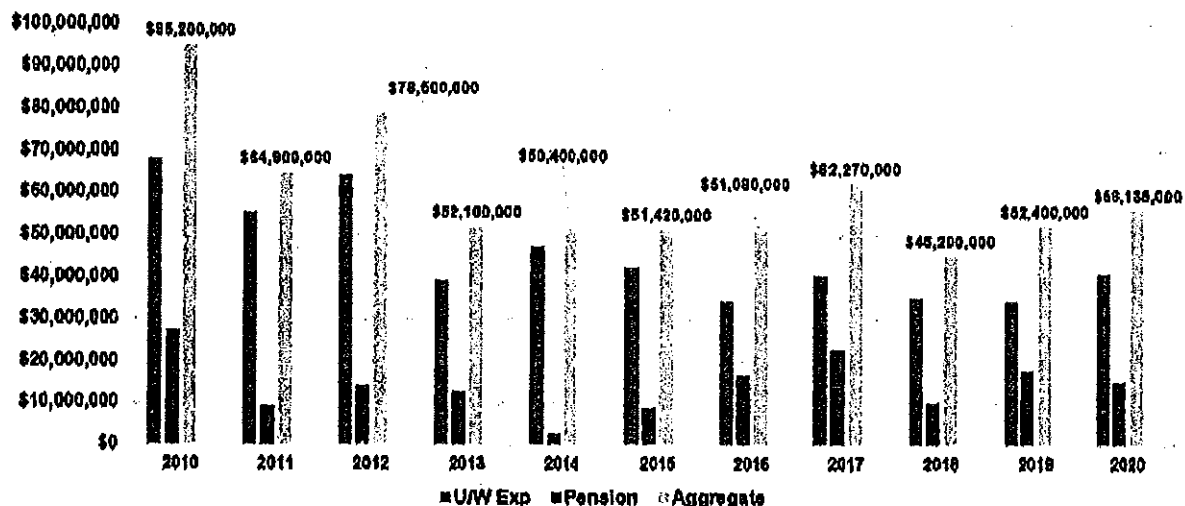
85. In approximately 2007, Arrowood, with approximately \$3 billion in surplus, stopped writing new business and thus, other than investment income on its assets, ceased to have income from operations, and commenced to be engaged solely in the “runoff” of its claims. Arrowood wrote little-to-no new business in and after 2007.
86. Arrowood’s sole functions after it was put in runoff were (a) to operate the insurer in a legally compliant manner, and (b) to process and administer claims under insurance policies that had been issued when it was writing insurance, including the primary general liability policies it issued to Pipe & Boiler for at least the two policy periods January 1, 1981 – January 1, 1983.
87. But the Individual Arrowood Third-Party Defendants, in their management capacities for Arrowood and its parent companies (Arrowpoint Group and Arrowpoint Capital) consistently have failed to properly establish and maintain loss and expense reserves for known and unreported claims, which resulted in Arrowood’s statutory financial reports having an appearance of solvency that misrepresented the true nature of Arrowood’s deepening financial woes. The ongoing and consistent yearly under-reserving of losses and expenses allowed the Arrowood Third-Party Defendants to maintain the air of solvency and liquidity while millions of dollars in Arrowood funds were improperly and wrongfully transferred from Arrowood through exorbitant salaries, benefits, management fees to its parent companies, and expenses, all performed for the personal benefit of various present and former employees of Arrowood

- (including the Individual Arrowood Third-Party Defendants herein) as well as its parent companies (Arrowpoint Group and Arrowpoint Capital). The net result has been to cause Arrowood's policyholders' surplus to drop to the point that Arrowood's RBC Level under 18 Del. Code § 5801 is now at a precarious Company Action Level RBC as defined in that statute.
88. The true extent of the diversion of funds that should have been preserved for Arrowood's policyholders is to be determined through discovery; however, it is known from the annual MD&A filed with regulators regarding various pension plans for present and former employees that Arrowood maintains "a non-qualified deferred compensation plan for a select group of management and highly compensated employees." Arrowood Indemnity Co., Management's Discussion and Analysis of Financial Condition and Results of Operations for the Year Ended December 31, 2020, at 8. This plan may include Third-Party Defendants Tighe and Cahill, and probably a number of others of the Individual Arrowood Third-Party Defendants.
89. Arrowood management also employed other means to deplete or divert the assets of Arrowood to the detriment of its policyholders, but to the benefit of the Arrowood Third-Party Defendants.
90. Arrowood Indemnity was the 100% owner of another insurer, Arrowood Surplus Lines Insurance Company ("ASL"). As of December 31, 2011, ASL had a Policyholders' Surplus of \$184 million. The Arrowood Third-Party Defendants implemented a strategy to slowly upstream the \$184 million surplus of ASL. By 2015, \$120 million had been so (?) "upstreamed." However, Arrowood's 2015 MD&A filed with the regulators states that a dividend from ASL resulted in "additional unaffiliated equity, commodity and limited partnership holdings." (emphasis added). Any diversion to unaffiliated entities would

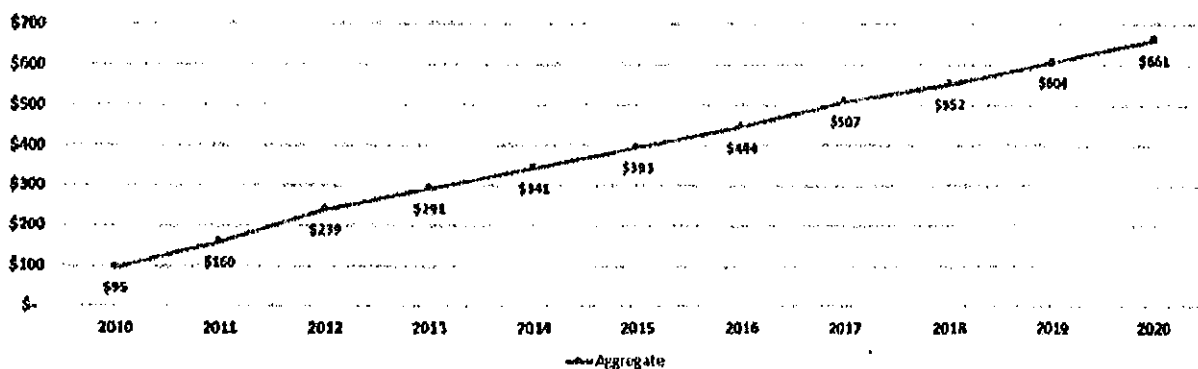
constitute an improper diversion of a material portion of the assets of Arrowood to the detriment of policyholders and to the benefit of the Arrowood Third-Party Defendants.

91. Arrowood was a party to a Tax Allocation agreement. That Tax Allocation agreement typically would have allowed the Arrowpoint Group to offset taxable gains against losses of Arrowood. There is no clear public record of Arrowood receiving its properly allocable portion of any such tax savings each year, but PwC's 2019 audit reflected that Arrowood took an unexplained \$7.7 million tax write-off of money due from its parent company, one of the Arrowood Third-Party Defendants herein.
92. The below charts, produced by Arrowood in its publicly filed Annual Statements, quantify some of the material amounts, both annually and in the aggregate, of untoward management fees, grossly excessive salaries, and other emoluments that the Arrowood Third-Party Defendants have distributed or diverted from the policyholders' surplus for the benefit of management (including, but not limited to, the Individual Arrowood Third-Party Defendants), Arrowpoint, and present and former Arrowood employees.

Other Underwriting Expense and Pension Costs and in the Aggregate



Other Underwriting Expense and Pension Costs and in the Aggregate



93. In 2007, Arrowood had total admitted assets of \$2,998,163,220. Those admitted assets steadily decreased between 2007 and 2020, to \$848,361,366 in 2020, despite the company having strong net investment gains. Indeed, between 2011 and 2020, Arrowood's net investment gain was as follows for each year:

Net Investment Gain	
2011	\$74,639,663
2012	\$64,643,502
2013	\$54,871,494
2014	\$63,288,306
2015	\$57,762,477
2016	\$48,650,645
2017	\$43,746,769
2018	\$50,921,661
2019	\$40,607,859
2020	\$34,958,745

94. With regard to policyholders, Arrowood's policyholders' surplus also has decreased significantly year after year. In 2007, Arrowood's policyholder surplus was \$445,627,238. The number steadily declined to \$94 million by 2020.

95. Arrowood also has consistently failed to set proper reserves for claims. Year after year, Arrowood has booked reserve deficiencies.

vi. The Arrowood Defendants manipulated reserves as set forth in Schedule P to the Arrowood Annual Statement

96. All insurance company annual statements contain a "Schedule P." The data within schedule P are organized by "Accident Year." "Accident Year" is typically defined as follows:

Accident Year Data – a method of arranging loss and exposure data of an insurer or group of insurers or within a book of business, so that all losses associated with accidents occurring within a given calendar year and all premium earned during that same calendar year are compared. Thus, regardless of individual policy periods and regardless of when a loss is reported or is paid, accident year data 2015 will include all premiums earned during 2015 and will include all losses occurring in 2015.

IRMI, Accident Year Data, available at <https://www.irmi.com/term/insurance-definitions/accident-year-data> (last accessed Jan. 20, 2022).

97. Schedule P provides details, both on an aggregate basis (Parts 1, 2, 3, and 4) and by Line of Business, of critical reserve information. Schedule P, Part 2 Summary provides the details of all Incurred Losses (including bulk reserves and IBNR), which guides the calculation of two of the twelve IRIS Ratios – the One-year and Two-year Adverse Development Ratios. The Schedule P, Part 2 Summary for 2020 is as shown here:

Annual Statement for the year 2020 of the **Arrowood Indemnity Company**

SCHEDULE P - PART 2 - SUMMARY

Years in Which Losses Were Incurred	Incurred Net Losses and Defense and Cost Containment Expenses Reported at Year End (\$000 omitted)										DEVELOPMENT	
	1	2	3	4	5	6	7	8	9	10	11	12
	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	One Year	Two Year
1. Prior.....	933,833	937,288	947,193	1,005,279	1,004,000	1,026,778	1,054,822	1,073,195	1,119,956	1,144,330	24,374	71,135
2. 2011.....	56,108	3,034	3,538	3,796	3,868	4,087	3,321	4,373	4,328	4,085	(233)	(277)
3. 2012.....	XXX	49,613	6,084	6,208	6,116	6,098	6,063	6,020	5,834	5,547	(287)	(473)
4. 2013.....	XXX	XXX	31,276	5,291	5,256	5,282	5,240	5,241	5,195	5,001	(184)	(240)
5. 2014.....	XXX	XXX	XXX	13,538	3,014	3,044	3,096	3,089	3,079	3,131	51	42
6. 2015.....	XXX	XXX	XXX	XXX	8,084	2,554	2,520	2,487	2,437	2,416	(21)	(71)
7. 2016.....	XXX	XXX	XXX	XXX	XXX	4,850	1,705	1,767	1,772	1,785	13	18
8. 2017.....	XXX	XXX	XXX	XXX	XXX	XXX	4,351	874	895	885	(10)	10
9. 2018.....	XXX	XXX	XXX	XXX	XXX	XXX	XXX	2,386	645	640	(5)	(1,746)
10. 2019.....	XXX	XXX	XXX	XXX	XXX	XXX	XXX	XXX	1,252	633	(619)	XXX
11. 2020.....	XXX	XXX	XXX	XXX	XXX	XXX	XXX	XXX	XXX	8,338	XXX	XXX
12. Totals.....											23,071	68,399

Arrowood Indemnity Company 2020 Annual Statement, at 63.

98. The One-Year Ratio (column 11) measures the development of unpaid losses and loss adjustment expenses based on loss adjustment expenses reported one year prior. The Two-Year Ratio (column 12) measures the development of loss and loss adjustment expenses reported two years ago. Negative results indicate that the reserves were deficient and have since adversely developed. Adverse developments evidence inadequate reserving.

99. This chart demonstrates that for each year going back to 2011, the oldest publicly available information, the Arrowood Third-Party Defendants failed to establish adequate Reserves, year after year, for multiple years. Because an insurer's management and its Appointed Actuary are

responsible for establishing a reasonable reserve estimate (and its auditor, PwC, is responsible for an independent verification of those reserves), this state of affairs for Arrowood should, at a minimum, be considered reckless conduct on the part of the Arrowood Defendants.

100. But the Arrowood Third-Party Defendants did not just fail to establish adequate reserves for “Prior Years.” To disguise the patent inadequacy of “Prior Year” reserves, so as not to have the appearance of deficient reserves on a cumulative basis, starting no later than 2007, the Arrowood Third-Party Defendants established a materially and clearly artificially large reserve in the first year of any given Accident Year, and then the next year, immediately reduce the Accident Year reserve by 90% or more. The net result of this machination was to make Arrowood’s overall reserves appear redundant when, in fact, they were significantly deficient. Added to this ruse as of year-end 2020 was the use of an artificial negative IBNR/Bulk reserve for Accident Year 2020 in the amount of \$17 million. When combined with the grossly inadequate Prior Year Reserves, the Arrowood Third-Party Defendants were able to mask two highly significant IRIS Ratios (the One-Year and Two-Year Adverse Development Ratios), which, in turn, avoided heightened scrutiny from ancillary regulators (*i.e.* all states other than Delaware), including South Carolina. The Arrowood Third-Party Defendants accomplished their goal, but could not have done so without a complicit actuary who filed properly to measure IBNR. That critical actuary was Daniel R. Keddle.

101. Arrowood appointed Keddle as its Appointed Actuary on March 14, 2004, and Keddle continued to serve in that role until his retirement on July 9, 2021. Arrowood Annual Statement General Interrogatories Part 1 – Common Interrogatories #11 (setting forth appointment).

102. Actuaries are subject to a uniform Code of Conduct, adopted by all five U.S.-based actuarial organizations. *See* American Academy of Actuaries 2009 Yearbook and Leadership Manual at 69. The Code of Conduct contains 14 Precepts, two of which are crucial to the instant analysis:

PRECEPT 1. An Actuary shall act honestly, with integrity and competence, and in a manner to fulfill the profession's responsibility to the public and to uphold the reputation of the actuarial profession

...

ANNOTATION 1-4. An Actuary shall not engage in any professional conduct involving dishonesty, fraud, deceit, or misrepresentation or commit any act that reflects adversely on the actuarial profession.

...

PRECEPT 8. An Actuary who performs Actuarial Services shall take reasonable steps to ensure that such services are not used to mislead other parties.

Id. at 70, 71.

103. Keddie ignored those Code of Conduct Precepts, and instead complied with the requirements of his fellow Third-Party Arrowood Defendants to the significant detriment of the Arrowood policyholders, including Pipe & Boiler, by issuing reports every year wrongfully attesting to the reasonableness of the Arrowood reserves.

104. Even though Keddie was credentialed as an Associate of the Casualty Actuarial Society at all material times and, as such, was bound by the Code of Conduct, his primary and critical role over the past 15 years was to facilitate the plan the Arrowood Third-Party Defendants hatched to consistently under-reserve all losses and expenses so that Arrowood assets would be used not for Arrowood's policyholders as legally required, but instead for the Arrowood Third-Party Defendants' benefit—to pay salaries and management fees to Arrowpoint.

105. Perhaps most troubling, over the last ten years, the expenses Arrowood characterizes as non-claim expenses have been astronomical. Between 2011 and 2020, the Arrowood Third-Party Defendants caused Arrowood to pay the following salaries (primarily to the Individual Arrowood Third-Party Defendants) and management fees (wrongfully paid to Arrowpoint, Arrowood's parent company), as set forth in Arrowood's statutory annual statements:

<u>Year</u>	<u>Salaries</u>	<u>Management Fees</u>
2011	\$22,711,734	\$2,007,592
2012	\$27,165,164	\$4,821,266
2013	\$28,563,024	\$4,539,749
2014	\$21,681,769	\$4,255,422
2015	\$26,790,534	\$4,763,587
2016	\$30,785,393	\$5,009,820
2017	\$26,919,005	\$5,064,432
2018	\$21,360,756	\$5,266,542
2019	\$20,266,145	\$4,909,334
2020	\$22,083,049	\$4,820,219
Total	\$248,326,594	\$45,457,963

106. That is, the Arrowood Third-Party Defendants caused Arrowood to pay nearly \$250 million in salaries—more than would be expected by an active insurance company the size of Arrowood, and far more than typically would be paid by a comparable property and casualty insurer in runoff during the relevant ten-year period – and over \$45 million in “management fees” to its owner (which were improper asset transfers). These monies, which Arrowood should have held and invested to meet its liabilities to its policyholders, as well as to injured asbestos plaintiffs, were taken from the company under false pretenses based on claim reserves that were underreported.

107. Furthermore, had the Arrowood Third-Party Defendants not wrongfully diverted millions of dollars from Arrowood, and instead kept that money with Arrowood to establish adequate

reserves for claims and invested the funds, Arrowood would have had substantially more money to adjust and pay claims, considering the investment gains that Arrowood realized with the funds that the Arrowood Third-Party Defendants did not wrongfully divert.

108. In its 2020 Management's Discussion and Analysis, signed by a number of the Individual Arrowood Third-Party Defendants, Arrowood admitted as follows:

The Company is required to maintain certain levels of capital and surplus. The minimum level is based on the individual lines of business for which the Company is licensed. As of December 31, 2020, the Company's RBC ratio, which is the ratio of the Company's adjusted capital to Authorized Control Level, is at the Company Action Level. As required, an RBC plan will be filed with the Delaware Department of Insurance. Discussions are ongoing with the Delaware Department of Insurance regarding the Company's business plan. The operations continue to have risks and uncertainties that could have a material adverse impact on the Company's capital position and ability to maintain capital in excess of regulatory RBC requirements including (i) credit risk of and/or potential disputes with reinsurers; (ii) adverse loss development on certain long-tail lines including workers compensation, asbestos and environmental and professional and general liability.

Arrowood Indemnity Company MD&A for the Year Ended December 31, 2020, at 6-7.

109. While the Delaware DOI, or another insurance department of another state, may require Arrowood to take action to correct its deficient financial circumstances, Pipe & Boiler is not confident that the Delaware DOI will do so in a timely fashion, nor that any other insurance regulator will act in time to remedy the situation.
110. For instance, the Individual Arrowood Third-Party Defendants' failure to post adequate reserves for Arrowood's claims has been a consistent and recurring problem. Indeed, between 2009 and 2014, Arrowood sustained a net underwriting loss of \$464 million. Between 2014 and 2018, Arrowood sustained a net underwriting loss of \$374 million.

111. Indeed, in addition to conceding that Arrowood's RBC Level is at Company Action Level under 18 Del. Code § 5801, Arrowood's 2020 Annual Statement shows that Arrowood has failed 6 of the 13 Insurance Regulatory Information System ("IRIS") tests. As the NAIC notes in its Insurance Regulatory Information Systems ("IRIS") Manual:

The NAIC Insurance Regulatory Information System (IRIS) is a collection of analytical solvency tools and databases designed to provide state insurance departments with an integrated approach to screening and analyzing the financial condition of insurers operating within their respective states. IRIS, developed by the state insurance regulators participating in NAIC committees, is intended to assist state insurance departments in targeting resources to those insurers in greatest need of regulatory attention.

...

IRIS helps by providing solvency tools and databases that highlight those insurers that merit the highest priority in the allocation of the state insurance regulators' resources, thus directing those resources to the best possible use.

NAIC Insurance Regulatory Information System (IRIS) Ratios Manual (2017 ed.) at 9.

112. Pipe & Boiler has tendered the asbestos bodily injury claims that have been filed against it to Arrowood for defense and indemnity coverage under the primary commercial general liability policies that it purchased between 1981 and 1983. Pipe & Boiler is not the only insured of Arrowood that has tendered such claims to Arrowood since 2019; Arrowood insured a number of other similarly situated companies which are seeking defense and indemnity for similar asbestos bodily injury claims. Yet, as evident in Schedule T of Arrowood's Annual Statements for 2019 and 2020, Arrowood has *reduced* its claim reserves ("Unpaid Losses") in 2019 (as compared to 2018), and again *reduced* its reserves in 2020 (as compared to 2019).

113. That is, Arrowood has not posted any realistic reserves for the hundreds (if not thousands) of claims that its insureds, including Pipe & Boiler, have tendered for defense and indemnity

coverage, and if and when such reserves are properly posted, Arrowood's financial situation will be shown to be that much worse.

114. The Delaware Insurance Code defines "Enterprise Risk" as follows:

"(4) 'Enterprise risk.' – The term 'enterprise risk' shall mean any activity, circumstance, event or series of events, involving 1 or more affiliates of an insurer that, if not remedied promptly, is likely to have a material adverse effect upon the financial condition or liquidity of the insurer or its insurance holding company system as a whole, including, but not limited to, anything that would cause the insurer's risk-based capital to fall into company action level as set forth in § 5803 of this title or would cause the insurer to be in hazardous financial condition as set forth in Section 3 of Department of Insurance Regulation 304 – Standards and Commissioner's Authority for Companies Deemed to be in Hazardous Financial Condition [CDR 18-300-304-3.0].⁴"

18 Del. Code § 5001(4).

115. While the Arrowood Third-Party Defendants, as the ultimate controlling persons of Arrowood, were required to file an annual Enterprise Risk Report with the Delaware Department of Insurance based on the facts set forth above, the Arrowood Third-Party Defendants failed to do so, or did not file such a report that accurately and completely sets forth the Enterprise Risk Arrowood faced, to the detriment of Pipe & Boiler and Arrowood's other policyholders.

vii. *The misleading Reports on Examination*

116. Every state conducts financial examinations of the insurers that it regulates. This is consistent with the obligation of the domiciliary state to protect policyholders. The purpose of

⁴ 18 DE Admin. Code § 304-3.0 sets forth the standards, either singly or a combination of two or more, that the Delaware Department of Insurance Commissioner may consider to determine whether the continued operation of an insurer transacting an insurance business in Delaware might be deemed to be hazardous to its policyholders, creditors, or the general public.

these financial examinations is to determine the insurer's fiscal condition and compliance with applicable laws and regulations.

117. In Delaware, the Bureau of Company Examination, Rehabilitation and Guaranty ("BERG") performs that examination function. BERG "is responsible for ensuring the financial health and stability of insurance companies in Delaware. It does so by analyzing and assessing the financial condition of insurance companies domesticated and doing business in Delaware in order to protect consumers and, if necessary, by managing, rehabilitating or liquidating financially impaired insurers." Delaware Department of Insurance Company Regulation (BERG), <https://insurance.delaware.gov/divisions/berg/> (last visited Jan. 20, 2022).

118. BERG clearly failed in the discharge of its responsibilities concerning Arrowood as it allowed the Arrowood Third-Party Defendants' reckless scheme to be implemented and maintained. Delaware will at times engage independent actuaries to provide assistance on financial examinations. Here, BERG retained and apparently relied upon INS Consultants, Inc. ("INS"), an independent consulting actuarial firm, to review and analyze the adequacy of the carried reserves of Arrowood as part of the state's financial examinations.

119. In reviewing the Arrowood reserves, the credentialed actuarial principals of INS were required to comply with the Actuarial Code of Conduct. They knew at all times that their work would be relied upon by the regulators of all states, not just Delaware. Indeed, the conclusion of the INS Report, dated October 18, 2019, states:

The assistance of the consulting actuarial firm, INS Consultants, Inc., the consulting information systems specialist firm, INS Services, Inc., the Company's outside audit firm, PwC, and the Company's management and staff was appreciated and is acknowledged.

Delaware Department of Insurance, Examination Report of the Arrowood Surplus Lines Insurance Company as of December 31, 2018, dated October 18, 2019. The same wording can be found in the 2015 Report on Examination for Arrowood as of December 13, 2014.

120. INS Consultants, Inc. and its credentialed principals knew, had reason to know, or should have known in 2015 and 2019 that the carried reserves of Arrowood were consistently, year after year, materially inadequate. And yet, both of those Reports on Examination are silent as to such reserve inadequacy. INS Consultants, Inc. at all times knew that if a company with assets and liabilities of the magnitude of Arrowood was required to significantly increase its carried reserves, that would adversely and materially impact its solvency, its RBC ratios, and its IRIS Ratios, and that, as a result, the regulators of other states would quickly focus their attention on Arrowood. BERG and others at the Delaware Department of Insurance knew that in such an event, other regulators would force Delaware to take action to stop the wrongful conduct of the Arrowood Third-Party Defendants.

viii. The Arrowood Third-Party Defendants cannot rely on safe harbors.

121. The Arrowood Third-Party Defendants believe that they have been artful in taking certain actions to protect their wrongful conduct from question. But they have been living with a false sense of security. They have no safe harbors for their wrongful conduct.

122. The first “safe harbor” that the Arrowood Third-Party Defendants will claim was Keddie’s conduct as the Appointed Actuary. Despite his legal and ethical obligations, despite the Schedule P machinations, and notwithstanding Arrowood’s patent and consistent under-reserving for the past 15 years, Keddie wrongfully attested to the “reasonableness” of Arrowood’s reserves upon which the Arrowood Third-Party Defendants would rely in the

annual Arrowood MD&A. One of the Arrowood Third-Party Defendants' most significant wrongful acts was their failure to properly reserve for Unallocated Loss Adjustment Expense. The Unallocated Loss Adjustment Expenses have been one of the most significant drivers of the losses Arrowood has sustained over the past 10 years.

123. Next, the Arrowood Third-Party Defendants may attempt to rely on the Delaware Department of Insurance's acquiescence as a "safe harbor." The Arrowood Third-Party Defendants surely will have made various regulatory filings seeking permission from the Delaware Department of Insurance to commit some of the conduct set forth herein. But regardless of whether the Arrowood Third-Party Defendants believed that they secured absolution by such filings, that does not vitiate in any manner their liability for their abandonment of their primary obligation to Arrowood's policyholders.

124. Pipe & Boiler alleges that all of its primary coverage provides an unlimited supplemental duty to defend, and provides "per occurrence" coverage for operations claims, with no limit to the number of occurrences. Pipe & Boiler also alleges that its umbrella coverage, when and if to the extent located and identified, provides for an unlimited supplemental duty to defend when there is no responsive primary coverage and that such umbrella coverage also responds on a per occurrence basis with no limit to the number of occurrences.

THIRD-PARTY PLAINTIFF PAYNE & KELLER

125. Payne & Keller's historic operations included the installation, repair, replacement, removal, or disturbance of thermal insulation and other building materials. Those operations allegedly exposed persons to asbestos who thereby suffered bodily injury (the "Asbestos Allegations"). The alleged bodily injury resulting from the Asbestos

Allegations has resulted in suits against Payne & Keller, including the instant suit and those referenced above (“Payne & Keller Asbestos Suits”).

Rexel’s Competing Claims to Payne & Keller’s Insurance Program

126. Since his appointment, the Receiver has become aware that Third-Party Defendant Rexel periodically makes claims against Payne & Keller’s historical insurance program by tendering Rexel-related lawsuits to the Payne & Keller insurers. Rexel tenders these Rexel-related lawsuits to the Payne & Keller insurers by way of its agent and claims administrator, Third-Party Defendant Compass Risk Services, LLC. without any communication or coordination with the Receiver.

127. The Receiver is informed and believes that Rexel’s uncoordinated and competing claims to Payne & Keller’s insurance program will interfere with his efficient and orderly administration of his duties as the receiver for Payne & Keller. In carrying out his duties, Payne & Keller’s receiver has made inquiries about the role of Rexel and its competing claims to Payne & Keller’s insurance policies, but these inquiries have gone unanswered. Moreover, the existence of these competing claims from Rexel has thwarted, or will thwart, the Receiver’s efforts to reach agreements with certain of Payne & Keller’s insurers regarding their rights and obligations under these insurance policies. As such, a justiciable controversy exists between the Receiver for Payne & Keller and Rexel regarding the rights and responsibilities of each relative to the Payne & Keller insurance program. Similarly, a controversy exists between the Receiver for Payne & Keller and Rexel’s agent Compass Risk Services regarding the rights of Compass to submit claims to the Payne & Keller insurers without any communication or disclosing any information in response to requests for

information made by the Receiver for Payne & Keller. The Receiver seeks declaratory relief regarding these issues to guide his performance of his duties. The Receiver has joined the known Payne & Keller insurers to this action because their rights and responsibilities, as between the Receiver and Rexel, will be delineated herein.

1. The 1965 to 1973 Policies

128. During various policy periods from March 1, 1965 to March 1, 1973, Payne & Keller was insured by one or more primary insurers for which the Guaranty Association is responsible, including Reliance Insurance Company and Highlands Underwriting Insurance Company, the latter of which was subject to a liquidation order issued by the 23rd Judicial District, Travis County, dated October 29, 2021, and, upon information and belief, one or more existing defendants including defendant Maryland American General Insurance Company, all of which issued primary general liability policies to Payne & Keller (“The 1965 to 1973 Policies”). The 1965 to 1973 Policies have standard terms and conditions. The 1965 to 1973 Policies have a duty to defend Payne & Keller against any and all Payne & Keller Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false, or fraudulent. The duty to defend is joint, several, indivisible, and supplemental. These policies require the insurers fully to defend any Payne & Keller Asbestos Suit alleging bodily injury. These policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any portion of the 1965 to 1973 Policy periods.

129. The Guaranty Association and other pertinent defendant insurers have failed to fully acknowledge, delineate or accept their insuring obligations under the 1965 to 1973

Policies as between Rexel and Payne & Keller. An actual and justiciable dispute exists between and among these parties.

2. The Zurich Policies

130. Defendant Zurich, individually and as successor in interest to Maryland American General Insurance Company and Maryland Casualty Company, issued general liability policies to Payne & Keller (“The Zurich Policies”). The Zurich Policies have standard terms and conditions. The Zurich Policies have a duty to defend Payne & Keller against any and all Payne & Keller Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false, or fraudulent. The duty to defend is joint, several, indivisible, and supplemental. The Zurich Policies require Zurich fully to defend any Payne & Keller Asbestos Suit alleging bodily injury during any Zurich Policy period. The Zurich Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Zurich Policy period. It is the burden of Zurich to prove any limitation on or exclusion of coverage. Specifically, Zurich issued primary general liability coverage to Payne & Keller for at least the three policy periods from March 1, 1968 – March 1, 1971 and at least five policy periods March 1, 1973 – March 1, 1978, and may have issued such policies during earlier policy periods.

131. Zurich has failed to fully acknowledge, delineate or accept its insuring obligations under the Zurich Policies between Rexel and Payne & Keller. An actual and justiciable dispute exists between these parties.

3. The Aetna Policies

132. Defendant Aetna issued general liability policies to Payne & Keller (“The Aetna Policies”). The Aetna Policies have standard terms and conditions. The Aetna Policies have a duty to defend Payne & Keller against any and all Payne & Keller Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false or fraudulent. The duty to defend is joint, several, indivisible and supplemental. The Aetna Policies require Aetna fully to defend any Payne & Keller Asbestos Suit alleging bodily injury during any Aetna Policy period. The Aetna Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Aetna Policy Period. It is the burden of Aetna to prove any limitation on or exclusion of coverage. Specifically, Aetna issued primary general liability coverage to Payne & Keller for at least the seven policy periods March 1, 1978 – April 1, 1985.

133. Aetna has failed to fully acknowledge, delineate or accept its insuring obligations under the Aetna Policies between Rexel and Payne & Keller. An actual and justiciable dispute exists between these parties.

4. The Continental Policies

134. Defendant Continental issued umbrella liability policies to Payne & Keller (“The Continental Policies”). The Continental Policies have standard terms and conditions. The Continental Umbrella Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Continental Policy Period. It is the burden of Continental to prove any limitation on or exclusion of coverage. Specifically, Continental issued umbrella liability coverage to Payne & Keller for at least the two policy periods March 1, 1979 – March 1, 1980 and April 1,

1985—April 1, 1986.

135. Continental, by and through Resolute Management and NICO, has failed to fully acknowledge, delineate or accept its insuring obligations under the Continental Policies as between Rexel and Payne & Keller. An actual and justiciable dispute exists between these parties.

5. The National Union Policies

136. Defendant National Union issued general liability policies to Payne & Keller (“The National Union Policies”). The National Union Policies have standard terms and conditions. The National Union Policies have a duty to defend Payne & Keller against any and all Payne & Keller Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false or fraudulent. The duty to defend is joint, several, indivisible and supplemental. The National Union Policies require National Union fully to defend any Payne & Keller Asbestos Suit alleging bodily injury during any National Union Policy period. The National Union Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any National Union Policy Period. It is the burden of National Union to prove any limitation on or exclusion of coverage. Specifically, National Union issued primary general liability coverage to Payne & Keller for at least the three policy periods April 1, 1985—April 1, 1989, and issued umbrella liability coverage to Payne & Keller for at least the three policy periods April 1, 1985—October 6, 1988.

137. National Union, by and through Resolute Management and NICO, has failed to fully acknowledge, delineate or accept its insuring obligations under the National Union

Policies as between Rexel and Payne & Keller. An actual and justiciable dispute exists between these parties.

6. The Dependable Policy

138. Defendant Dependable issued at least one umbrella liability policy to Payne & Keller (“The Dependable Policy”). The Dependable Policy has standard terms and conditions. The Dependable Policy has a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Dependable Policy Period. It is the burden of Dependable to prove any limitation on or exclusion of coverage. Specifically, Dependable issued umbrella liability coverage to Payne & Keller for at least the policy period March 1, 1976—March 1, 1977.

139. Dependable has failed to fully acknowledge, delineate or accept its insuring obligations under the Dependable Policy as between Rexel and Payne & Keller. An actual and justiciable dispute exists between these parties.

7. The Stonewall Policies

140. Defendant Stonewall issued umbrella liability policies to Payne & Keller (“The Stonewall Policies”). The Stonewall Policies have standard terms and conditions. The Stonewall Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Stonewall Policy Period. It is the burden of Stonewall to prove any limitation on or exclusion of coverage. Specifically, Stonewall issued umbrella liability coverage to Payne & Keller for at least the three policy periods March 1, 1976—March 1, 1977 and April 1, 1986—October 6, 1988.

141. Stonewall, by and through Resolute Management and NICO, has failed to fully acknowledge, delineate or accept its insuring obligations under the Stonewall Policies as between Rexel and Payne & Keller. An actual and justiciable dispute exists between these parties.

8. The Lexington Policy

142. Defendant Lexington issued at least one umbrella liability policy to Payne & Keller (“The Lexington Policy”). The Lexington Policy has standard terms and conditions. The Lexington Policy has a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Lexington Policy Period. It is the burden of Lexington to prove any limitation on or exclusion of coverage. Specifically, Lexington issued umbrella liability coverage to Payne & Keller for at least the policy period April 1, 1985—April 1, 1986.

143. Lexington, by and through Resolute Management and NICO, has failed to fully acknowledge, delineate or accept its insuring obligations under the Lexington Policy as between Rexel and Payne & Keller. An actual and justiciable dispute exists between these parties.

9. The First State Policies

144. Defendant First State issued at least four umbrella liability policies to Payne & Keller (“The Hartford Policies”). The Hartford Policies have standard terms and conditions. The Hartford Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Hartford Policy Period. It is the burden of First State to prove any limitation on or exclusion

of coverage. Specifically, First State issued umbrella liability coverage to Payne & Keller for at least the policy periods March 1, 1976—March 1, 1977, April 1, 1983—April 1, 1985, and May 15, 1985—April 1, 1986.

145. First State has failed to fully acknowledge, delineate or accept its insuring obligations under the Hartford Policies as between Rexel and Payne & Keller. An actual and justiciable dispute exists between these parties.

10. The Birmingham Fire Policies

146. Defendant Birmingham Fire issued at least two umbrella liability policies to Payne & Keller (“The Birmingham Fire Policies”). The Birmingham Fire Policies have standard terms and conditions. The Birmingham Fire Policies have a separate duty fully to indemnify Payne & Keller from any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Birmingham Fire Policy Period. It is the burden of Birmingham Fire to prove any limitation or exclusion of coverage. Specifically, Birmingham Fire issued umbrella liability coverage to Payne & Keller for at least the two policy periods April 1, 1983—April 1, 1985.

147. Birmingham Fire, by and through Resolute Management and NICO, has failed to fully acknowledge, delineate or accept its insuring obligations under the Birmingham Fire Policies as between Rexel and Payne & Keller. An actual and justiciable dispute exists between these parties.

11. The Lloyd’s Underwriters & London Market Insurers Policy

148. Defendants Lloyd's Underwriters and London Market Insurers issued at least one umbrella policy to Payne & Keller ("The Lloyd's Policy"). The Lloyd's Policy has standard terms and conditions. The Lloyd's Policy has a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Lloyd's Policy Period. The Lloyd's Policy also contains the "service of suit" clause as set forth above. It is the burden of Lloyd's to prove any limitation on or exclusion of coverage. Specifically, Lloyd's issued umbrella liability coverage to Payne & Keller for at least the policy period April 1, 1984—April 1, 1985.

149. Defendant Lloyd's Underwriters, by and through Resolute Management and NICO, have failed to fully acknowledge, delineate or accept their insuring obligations under the Lloyd's Policy as between Rexel and Payne & Keller. An actual and justiciable dispute exists between these parties.

12. The Reliance Policies

150. On information and belief, Highlands Underwriters Insurance Company issued general liability policies to Payne & Keller including policy numbers GA 2038 (March 1, 1971 to March 1, 1972) and GA 2278 (March 1, 1972 to March 1, 1973).

13. The Highlands Policies and the Guaranty Association

151. On information and belief, Highlands is currently in liquidation proceedings in Texas, by order dated October 29, 2021, staying all proceedings against Highlands.

152. The Guaranty Association was statutorily created to protect the policy holders of insolvent insurance companies like Highlands. The Guaranty Association "is considered the

insurer to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent.”

S.C. Code Ann. § 38-31-60(b).

14. R.L. Jarrett and U.S. Risk Broker Services

153. R.L. Jarrett served as an insurance broker and underwriter to Payne & Keller, facilitating and issuing certain quota share policies in conjunction with other Third-Party Defendants herein, including at least First State and Lloyd’s.

154. Upon information and belief, in or before 1990, U.S. Risk acquired one or more entities related to R.L. Jarrett, which makes U.S. Risk the successor-in-interest to R.L. Jarrett.

FIRST CAUSE OF ACTION
DECLARATORY JUDGMENT

155. Third-Party Plaintiffs incorporate by reference paragraphs 1 through 28 as though fully set forth herein.

156. Peter Protopapas is the duly appointed Receiver of Third-Party Plaintiffs, giving him the power and authority fully to administer all assets of Third-Party Plaintiffs, accept service on behalf of Third-Party Plaintiffs, engage counsel on behalf of Third-Party Plaintiffs, and take any and all steps necessary to protect the interests of Third-Party Plaintiffs, whatever they may be. Since appointment, the Receiver has expended substantial time and incurred expenses to identify potential assets and responsive policies and to defend Third-Party Plaintiffs’ Asbestos Suits in fulfillment of his responsibilities as Receiver. The Receiver will continue to expend substantial time and incur expenses in connection with Third-Party Plaintiffs’ Asbestos Suits.

157. An actual and justiciable controversy exists between the Receiver and the Third-Party Defendant Insurers, including their obligations to pay for the Receiver's activities in connection with the defense of Third-Party Plaintiffs' Asbestos Suits.
158. Judicial declarations are necessary and appropriate at this time, under the circumstances alleged above, so that the Receiver may ascertain these rights against Third-Party Defendants.
159. Pursuant to S.C. Code Ann. § 15-65-100, the Receiver shall be allowed such commissions as may be fixed by the Court appointing the Receiver.
160. Pursuant to the Supreme Court of South Carolina's ruling in *Ex Parte Simons*, 289 S.C. 1, 344 S.E.2d 151 (1986), a Receiver's fee is based on the value of the Receiver's services and at the appointing Court's discretion.
161. The Receiver respectfully requests this Court to declare that Third-Party Defendants must fairly compensate the Receiver for the substantial time, effort, and expenses expended in connection with the defense of asbestos suits potentially covered under the Third-Party Defendants' policies and to further declare that this obligation is unlimited and shall continue as long as there are Asbestos Suits pending against Third-Party Plaintiffs.

SECOND CAUSE OF ACTION
DECLARATORY JUDGMENT

162. Third-Party Plaintiffs incorporate by reference paragraphs 1 through 28 as though fully set forth herein.
163. Pursuant to *Jeffcoat v. Morris*, 300 S.C. 526, 389 S.E.2d 159 (Ct. App. 1989), a Receiver holds the property coming into his or her hands by the same right and title as the person for whose property he or she is receiver.

164. Upon information and belief, Third-Party Plaintiffs purchased insurance policies from Third-Party Defendant Insurers. These policies are the property of the Third-Party Plaintiffs.

165. Third-Party Plaintiffs seek a judicial declaration that all policies, evidence of policies and documents relating to their placement, purchase and underwriting, including, but not limited to, such documents in the possession of Third-Party Defendants are the property of the Receiver and shall be delivered immediately to the Receiver to be maintained in his sole possession for his unrestricted use in carrying out his duties.

THIRD CAUSE OF ACTION
DECLARATORY JUDGMENT

166. Third-Party Plaintiffs incorporate by reference paragraphs 1 through 28 as though fully set forth herein.

167. The Receiver seeks a declaration and order that Third-Party Defendants Zurich, Continental, and Allstate issued primary general liability coverage to Carolina Industrial, subject to the per occurrence and aggregate limits of those policies, and that those Third-Party Defendants have an unlimited supplemental duty to defend and to pay or reimburse defense costs.

168. The Receiver seeks a further declaration as to the interpretation and meaning of the insurance policies that Third-Party Defendants Zurich, Continental, and Allstate issued to Carolina Industrial (the “Carolina Industrial Insurance Policies”), as follows:

- a. The Carolina Industrial Insurance Policies cover all Carolina Industrial Asbestos Suits that allege bodily injury, personal injury, injurious exposure, progression

of injury and/or disease, manifestation of illness, or death during any of the policy periods;

- b. Each Carolina Industrial asbestos suit “triggers” the Carolina Industrial Insurance Policies as long as an asbestos plaintiff alleges injury during the period of the policy;
- c. Carolina Industrial may select the policy or policy years to which to assign or allocate in full each Carolina Industrial Asbestos Suit-related loss;
- d. In the case of any claimed ambiguity in any Carolina Industrial Insurance policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Carolina Industrial Insurance Policies;
- e. Defense costs for the Carolina Industrial asbestos suits are supplemental, and the payment of defense costs does not erode or impair any limit of liability of any of the Carolina Industrial Insurance Policies;
- f. If any allegation or cause of action in a Carolina Industrial Asbestos Suit is potentially covered under the Carolina Industrial Insurance Policies, then the insurer must fully defend or reimburse in full the costs of defending against all of the allegations and all of the causes of action in the complaint;
- g. Each Carolina Industrial Insurance Policy is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of Carolina Industrial Asbestos Suits;

- h. Each Carolina Industrial Insurance Policy must indemnify covered Carolina Industrial Asbestos Suits, in full, up to its “per occurrence” limit, regardless of whether a continuing injury spans multiple policy periods;
- i. The Carolina Industrial Asbestos Suits that allege exposure to asbestos during Carolina Industrial’s work are subject only to the “per occurrence” limits of the Carolina Industrial Insurance Policies;
- j. Any aggregate limit on coverage in any of the Carolina Industrial Insurance policies is a limitation on coverage, and therefore each insurer has the burden to prove, based on the evidence, that a Carolina Industrial Asbestos Suit is subject to the aggregate limit in the Carolina Industrial Insurance Policies, if any; and
- k. Each insurer has the burden to prove, based on the evidence, that any particular Carolina Industrial Asbestos Suit is either a “products” claim or a “completed operations” claim, as those terms are defined in the Carolina Industrial Insurance Policies, in order for the insurer to disclaim coverage for a Carolina Industrial Asbestos Suit against Carolina Industrial otherwise alleging injury during any Carolina Industrial Insurance policy period.

169. Actual and justiciable controversies therefore exist between Carolina Industrial and Third-Party Defendants Zurich, Continental, and Allstate concerning their obligations under the Carolina Industrial Insurance Policies.

FOURTH CAUSE OF ACTION
DECLARATORY JUDGMENT

170. Third-Party Plaintiffs incorporate by reference paragraphs 1 through 28 as though fully set forth herein.
171. The Receiver seeks a declaration and order that Third-Party Defendants Admiral and First State issued primary and excess general liability coverage to Flame Refractories, subject to the per occurrence and aggregate limits of those policies, and that Third-Party Defendant Admiral has an unlimited supplemental duty to defend, through the provision of appropriate and qualified defense counsel, and to pay or reimburse defense costs.
172. The Receiver seeks a further declaration as to the interpretation and meaning of the insurance policies that Third-Party Defendant Admiral and First State issued to Flame Refractories, as follows:
- a. The Flame Refractories Insurance Policies issued by Admiral and First State cover all Flame Refractories Asbestos Suits that allege bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of the policy periods;
 - b. Each Flame Refractories asbestos suit “triggers” the Flame Refractories Insurance Policies issued by Admiral and First State as long as an asbestos plaintiff alleges injury during the period of the policies;
 - c. Flame Refractories may select the policy or policy years to which to assign or allocate in full each Flame Refractories Asbestos Suit-related loss;
 - d. In the case of any claimed ambiguity in any Flame Refractories Insurance policy issued by Admiral and First State, such ambiguity shall be construed in favor of

the broadest coverage afforded under the Flame Refractories Insurance Policies issued by Admiral and First State;

- e. Defense costs for the Flame Refractories asbestos suits are supplemental, and the payment of defense costs does not erode or impair any limit of liability of any of the Flame Refractories Insurance Policies issued by Admiral and First State;
- f. If any allegation or cause of action in a Flame Refractories Asbestos Suit is potentially covered under the Flame Refractories Insurance Policies issued by Admiral and First State, then the insurer must fully defend or reimburse in full the costs of defending against all of the allegations and all of the causes of action in the complaint;
- g. Each Flame Refractories Insurance Policy issued by Admiral and First State is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of Flame Refractories Asbestos Suits;
- h. Each Flame Refractories Insurance Policy issued by Admiral and First State must indemnify covered Flame Refractories Asbestos Suits, in full, up to its “per occurrence” limit, regardless of whether a continuing injury spans multiple policy periods;
- i. The Flame Refractories Asbestos Suits that allege exposure to asbestos during Flame Refractories’ work are subject only to the “per occurrence” limits of the Flame Refractories Insurance Policies issued by Admiral and First State;

- j. Any aggregate limit on coverage in any of the Flame Refractories Insurance policies is a limitation on coverage, and therefore each insurer has the burden to prove, based on the evidence, that a Flame Refractories Asbestos Suit is subject to the aggregate limit in the Flame Refractories Insurance Policies issued by Admiral and First State, if any; and
 - k. Third-Party Defendant Admiral and First State have the burden to prove, based on the evidence, that any particular Flame Refractories Asbestos Suit is either a “products” claim or a “completed operations” claim, as those terms are defined in the Flame Refractories Insurance Policies issued by Admiral and First State, in order for the insurer to disclaim coverage for a Flame Refractories Asbestos Suit against Flame Refractories otherwise alleging injury during any Flame Refractories Insurance policy period.
173. Actual and justiciable controversies therefore exist between Flame Refractories and Third-Party Defendants Admiral and First State concerning their obligations under the Flame Refractories Insurance Policies issued by Admiral and First State.

FIFTH CAUSE OF ACTION
BREACH OF CONTRACT

174. Third-Party Plaintiff Flame Refractories incorporates by reference paragraphs 1 through 28 and 129 through 132 as though fully set forth herein.
175. Flame Refractories was insured by one or more policies issued by Third-Party Defendant Admiral. The Receiver for Flame Refractories provided timely notices to Third-Party Defendant Admiral of the Flame Refractories Asbestos Suits.

176. Third-Party Defendant Admiral unreasonably and without proper cause, has either failed to defend entirely or has failed to provide an appropriate defense for Flame Refractories in the Flame Refractories Asbestos Suits as required by the policies it issued to Flame Refractories.

177. The failure of Third-Party Defendant Admiral to provide a proper defense to Flame Refractories in the Flame Refractories Asbestos Suits has caused, and will continue to cause, harm and damages to Flame Refractories, including, but not limited to, incurring legal fees (or unnecessary legal fees) that should be paid for by Third-Party Defendant Admiral.

SIXTH CAUSE OF ACTION
BREACH OF CONTRACT

178. Third-Party Plaintiff Carolina Industrial incorporates by reference paragraphs 1 through 28 and 129 through 132 as though fully set forth herein.

179. Carolina Industrial was insured by one or more policies issued by Third-Party Defendants Zurich, Continental, and Allstate.

180. Carolina Industrial has provided or will provide timely notices to Third-Party Defendants Zurich, Continental, and Allstate of the Carolina Industrial Asbestos Suits.

181. Third-Party Defendants Zurich, Continental, and Allstate unreasonably and without proper cause, have failed or will fail to defend Carolina Industrial in the Carolina Industrial Asbestos Suits as required by the policies they issued to Pipe & Boiler.

182. The failure of Third-Party Defendants Zurich, Continental, and Allstate to provide a defense to Carolina Industrial in the Carolina Industrial Asbestos Suits has caused, and/or will continue to cause, harm and damages to Carolina Industrial, including, but not limited to,

incurring legal fees that should be paid for by Defendants Zurich, Continental, and/or Allstate.

SEVENTH CAUSE OF ACTION
UNFAIR OR DECEPTIVE TRADE PRACTICES AFFECTING COMMERCE

183. Third-Party Plaintiff Pipe & Boiler Insulation incorporates by reference paragraphs 29 through 113 as though fully set forth herein.
184. Prior to its dissolution, Pipe & Boiler was a North Carolina corporation.
185. Under N.C. Gen. Stat. § 75-1.1(a), unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
186. Under N.C. Gen. Stat. § 75-1.1(b), “commerce” includes all business activities, however denominated. The business of insurance falls within the ambit of “in commerce,” and people who buy insurance are consumers whose welfare Chapter 75 of the North Carolina Statutes was intended to protect. *See Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 469 (1986).
187. N.C. Gen. Stat. § 75-16 provides as follows: “if any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.”

188. N.C. Gen. Stat. § 58-63-15 defines unfair methods of competition and unfair or deceptive practices in the business of insurance. Subsection (5) thereof provides as follows:

False Financial Statements. - Filing with any supervisory or other public official, or making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false statement of financial condition of an insurer with intent to deceive.

Making any false entry in any book, report or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to whom such insurer is required by law to report, or who has authority by law to examine into its condition or into any of its affairs, or, with like intent, willfully omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer.

189. The Arrowood Defendants, and each of them, have violated N.C. Gen. Stat. § 58-63-15, and, therefore, N.C. Gen. Stat. Chapter 75, by making false statements in each of Arrowood's Annual Statements and other financial reports and documents to the extent, *inter alia*, that those documents stated or implied that moneys paid by Arrowood in the form of salaries to the Individual Arrowood Defendants, and management fees paid to Arrowpoint Group and/or Arrowpoint Capital, were legitimate payments by Arrowood, and failing to correctly state in those documents that such payments were, in reality, bogus payments made to loot Arrowood and siphon off its funds to line the pockets of the Arrowood Defendants, and otherwise unjustly enrich the Arrowood Defendants, at the expense and harm of policyholders, including Pipe & Boiler.

190. In addition, the Arrowood Defendants, and each of them, have violated N.C. Gen. Stat. § 75-1.1 by unfairly and deceptively looting Arrowood through exorbitant salaries, management fees, and other unreasonable expenses payable to the Arrowood Defendants,

causing Arrowood to become impaired and in violation of the applicable risk-based capital requirements and in a position where it cannot pay all current and future policyholder claims.

191. Pipe & Boiler has suffered actual injury as a result of the Arrowood Defendants' unfair and deceptive practices as alleged herein because Arrowood is now, as a direct and proximate result of the Arrowood Defendants' wrongful conduct, in a financial position where it will be unable to comply entirely with its defense and indemnity obligation to Pipe & Boiler. In short, as a direct and proximate result of the Arrowood Defendants' wrongful looting and filing of false financial statements, and other conduct as alleged herein, Arrowood will be placed in liquidation years after it should have been placed in receivership, which would have allowed for a solvent run-off, and years after the Arrowood Defendants improperly paid benefits to themselves, resulting in an insolvent winding up of the company. Pipe & Boiler will, at best, receive pennies on the dollar with respect to the insurance coverage that Pipe & Boiler is entitled to under its primary commercial general liability policies issued between 1981 and 1983. But for the Arrowood Defendants' conduct, the company would have been able to pay its claim obligations. As a direct and proximate result of the Arrowood Defendants' unfair and deceptive trade practices as alleged herein, Pipe & Boiler will not receive millions of dollars of insurance coverage for which it paid and to which it is entitled.

192. Pipe & Boiler has been injured and damaged as a result of the Arrowood Defendants' unfair and deceptive practices as alleged herein, in violation of N.C. Gen. Stat. § 75-1.1, and is therefore entitled to recover damages in an amount that will be proven at trial, is in excess

of any applicable jurisdictional limits, and is subject to treble damages under N.C. Gen. Stat. § 75-16.

193. Pipe & Boiler further seeks a declaration that the actions of the Arrowood Defendants with regard to Arrowood were in fact unfair and deceptive.

EIGHTH CAUSE OF ACTION
CONSTRUCTIVE TRUST

194. Third-Party Plaintiff Pipe & Boiler incorporates by reference paragraphs 29 through 113 and 142 through 152 as though fully set forth herein.

195. A constructive trust is a duty or relationship imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty, or some other circumstance, making it inequitable for him to retain it against the claim of the beneficiary or the constructive trust. A constructive trust is a fiction of equity, brought into operation to prevent unjust enrichment through the breach of some duty or other wrongdoing. There is a common, indispensable element in the many types of situations out of which a constructive trust is deemed to arise. This common element is some fraud, breach of duty, or other wrongdoing by the holder of the property.

196. The Arrowood Third-Party Defendants have taken possession of the property of Arrowood – to wit, funds – of which they should not have taken through their wrongful and deceptive acts as alleged herein.

197. The funds that the Arrowood Third-Party Defendants have wrongfully diverted from Arrowood should have remained with Arrowood so that the company would have had additional resources available to meet its contractual obligations to policyholders, including

Pipe & Boiler, and injured claimant third parties. The funds would have remained in Arrowood had the Arrowood Third-Party Defendants not filed false or misleading financial statements and prevented state insurance regulators from knowing the extent of problems and taking action to place the company into receivership. The proper and appropriate remedy under the circumstances here is for the Court to exercise its equitable power and authority to require the Arrowood Third-Party Defendants to return those funds that they have wrongfully diverted from Arrowood's policyholders in an amount to be proven at trial.

NINTH CAUSE OF ACTION
TORTIOUS INTERFERENCE WITH CONTRACT

198. Third-Party Plaintiffs incorporate by reference paragraphs 29 through 113 as though fully set forth herein.
199. Arrowood issued at least five contracts of insurance to Pipe & Boiler during the period January 1, 1981 to January 1, 1986.
200. As corporate officers and directors of Arrowood's parent companies, the Individual Arrowood Third-Party Defendants have maintained absolute control of Arrowood.
201. The Individual Arrowood Third-Party Defendants each were aware of the insurance contracts into which Arrowood had entered with insureds, including Pipe & Boiler.
202. Despite their knowledge of these contracts of insurance, the Individual Arrowood Third-Party Defendants, acting in their various roles as officers, directors, employees, and owners of Arrowood, intentionally made decisions and took actions that breached the insurance contracts between Arrowood and Pipe & Boiler.
203. For instance, the Individual Arrowood Third-Party Defendants, in their management capacities for Arrowood and its parent companies, consistently have failed to properly

establish and maintain loss and expense reserves for known and unreported claims, which resulted in Arrowood's statutory financials having an appearance of solvency that misrepresented the true nature of Arrowood's deepening financial woes.

204. The Individual Arrowood Third-Party Defendants' actions of looting Arrowood through exorbitant salaries, management fees, and other unreasonable expenses payable to the Individual Arrowood Third-Party Defendants, caused Arrowood to become impaired and in violation of the applicable risk-based capital requirements and in a position where it cannot pay all current and future policyholder claims.

205. There was no justification for the Individual Arrowood Third-Party Defendants' decisions not to properly report loss and expense reserves, and to divert funds that should have been preserved for Arrowood's policyholders, other than to feather the nests of the Individual Arrowood Third-Party Defendants, and to otherwise put the interests of the employees of Arrowood ahead of the interests of Arrowood's policyholders, including Pipe & Boiler.

206. As a direct and proximate result of the Individual Arrowood Third-Party Defendants' tortious interference with the contract between Arrowood and Pipe & Boiler as alleged herein, Pipe & Boiler will not receive millions of dollars of insurance coverage for which it paid and to which it is entitled.

TENTH CAUSE OF ACTION
NEGLIGENT SUPERVISION

207. Third-Party Plaintiff Pipe & Boiler incorporates by reference paragraphs 29 through 113 as though fully set forth herein.
208. Arrowpoint Group and Arrowpoint Capital employed or were otherwise responsible for the actions of each of the Individual Arrowood Third Party Defendants during their employment with Arrowood.
209. Arrowpoint Group and Arrowpoint Capital negligently supervised the actions of the Individual Arrowood Third-Party Defendants.
210. Arrowpoint Group and Arrowpoint Capital's negligent supervision caused harm to Pipe & Boiler by allowing the Individual Arrowood Third-Party Defendants to loot and siphon funds from Arrowood so that Arrowood no longer had sufficient resources available to meet its contractual obligations to policyholders, including Pipe & Boiler, and injured claimant third parties. As a direct and proximate result of Arrowpoint Group and Arrowpoint Capital's negligent supervision as alleged herein, Pipe & Boiler will not receive millions of dollars of insurance coverage for which it paid and to which it is entitled.

ELEVENTH CAUSE OF ACTION
DECLARATORY JUDGMENT

211. As outlined above, since his appointment, the Receiver has become aware that Third-Party Defendant Rexel periodically makes claims against Payne & Keller's historical insurance program by tendering Rexel-related lawsuits to the Payne & Keller insurers. Rexel tenders these Rexel-related lawsuits to the Payne & Keller insurers by way of its agent and claims administrator, Third-Party Defendant Compass Risk Services, LLC. without any communication or coordination with the Receiver.

212. The Receiver is informed and believes that Rexel's uncoordinated and competing claims to Payne & Keller's insurance program will interfere with his efficient and orderly administration of his duties as the receiver for Payne & Keller. In carrying out his duties, Payne & Keller's receiver has made inquiries about the role of Rexel and its competing claims to Payne & Keller's insurance policies, but these inquiries have gone unanswered. Moreover, the existence of these competing claims from Rexel has thwarted, or will thwart, the Receiver's efforts to reach agreements with certain of Payne & Keller's insurers regarding their rights and obligations under these insurance policies. As such, a justiciable controversy exists between the Receiver for Payne & Keller and Rexel regarding the rights and responsibilities of each relative to the Payne & Keller insurance program. Similarly, a controversy exists between the Receiver for Payne & Keller and Rexel's agent Compass Risk Services regarding the rights of Compass to submit claims to the Payne & Keller insurers without any communication or disclosing any information in response to requests for information made by the Receiver for Payne & Keller. The Receiver seeks declaratory relief regarding these issues to guide his performance of his duties. The Receiver has joined the known Payne & Keller insurers to this action because their rights and responsibilities, as between the Receiver and Rexel, will be delineated herein.

213. The Receiver therefore seeks declarations, after thorough discovery regarding Rexel's competing claims to the Payne & Keller insurance program, regarding the nature, extent, and priority (if any) of Rexel's claims to the Payne & Keller insurance coverage so as to provide the Receiver with guidance and certainty as to how to go about carrying out his duties as the Receiver for Payne & Keller and to provide the Payne & Keller insurers with

certainty and guidance as to the delineation of their rights and responsibilities as between Rexel and Payne & Keller in this regard.

PRAYER FOR RELIEF

WHEREFORE, Third-Party Plaintiffs, by and through their duly appointed Receiver, demand judgment against Third-Party Defendants as follows:

- A. For the Receiver's compensation in connection with the defense of asbestos suits against Third-Party Plaintiffs in an amount set by this Court;
- B. For an order requiring that Third-Party Defendants provide to the Receiver complete and authentic copies of any general liability and excess liability insurance policies they issued to Pipe & Boiler together with all other documents and things relating to these policies, including (but not limited to) certificates of insurance, underwriting manuals and documents, and claims files for the Receiver's unrestricted use in carrying out his duties;
- C. For an order requiring Third-Party Insurer Defendants Zurich, Continental, and Allstate to defend Pipe & Boiler in full against all asbestos suits alleging bodily injury during the Third-Party Defendants' policy periods unless and until either Third-Party Defendants can show unequivocally, based on the evidence adduced in the litigation, that an exclusion in their respective policies otherwise bars coverage for a suit;
- D. For an order requiring Third-Party Insurer Defendants Admiral and First to defend Flame Refractories in full against all asbestos suits alleging bodily injury during Third-Party Defendants Admiral's and First State's policy periods unless and until Third-Party Defendant Admiral or First State can show unequivocally, based on the evidence

adduced in the litigation, that an exclusion in its policies otherwise bars coverage for a suit;

E. As described in detail above, the Receiver seeks a further declaration as to the interpretation and meaning of the Third-Party Plaintiffs' insurance policies:

- i. The Third-Party Plaintiffs' Insurance Policies cover all Third-Party Plaintiffs' Asbestos Suits that allege any bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of its policy periods;
- ii. Each Third-Party Plaintiffs' asbestos suit "triggers" at least one Third-Party Plaintiffs' Insurance policy as long as an asbestos plaintiff alleges injury during the period of the policy;
- iii. Third-Party Plaintiffs may select the policy or policy years to which to assign or allocate in full each asbestos loss;
- iv. In the case of a claimed ambiguity in any Third Party Plaintiffs' Insurance policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Third-Party Defendants' policies, and Third-Party Defendants bear the burden of proof as to any such ambiguity;
- v. Defense costs for the Third-Party Plaintiffs' asbestos suits are supplemental, and the payment of defense costs does not erode or impair any limit of liability of any of the Third-Party Plaintiffs' Insurance policies;
- vi. If any allegation in a Third-Party Plaintiffs' Asbestos Suit is potentially covered under the Third-Party Plaintiffs' Insurance Policies, then the responsive insurer

must defend or reimburse in full the costs of defending against all of the allegations and all of the causes of action in the complaint;

- vii. Each Third-Party Plaintiffs' Insurance Policy is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of the Third-Party Plaintiffs' Asbestos Suits;
- viii. Each Third-Party Plaintiffs' Insurance Policy must indemnify covered Third-Party Plaintiffs' Asbestos Suits, in full, up to its "per occurrence" limits, regardless of whether a continuing injury spans multiple policy periods;
- ix. The Third-Party Plaintiffs' Asbestos Suits that allege exposure to asbestos during Third-Party Plaintiffs' work are subject only to the "per occurrence" limits of the Third-Party Plaintiffs' Insurance policies;
- x. Any aggregate limit on coverage in any of the Third-Party Plaintiffs' Insurance Policies is a limitation on coverage, and the insurers therefore have the burden to prove, based on the evidence, that a Third-Party Plaintiffs' Asbestos Suit is subject to the aggregate limit in the Third-Party Plaintiffs' Insurance Policies, if any; and
- xi. Each insurer has the burden to prove, based on the evidence, that any particular Third-Party Plaintiffs' Asbestos Suit is either a "products" claim or a "completed operations" claim, as those terms are defined in the Third-Party Plaintiffs' Insurance Policies, in order for the insurer to disclaim coverage for an Asbestos Suit against a Third-Party Plaintiff otherwise alleging injury during the Third-Party Plaintiffs' insurance policy period.

- F. For an order declaring that Third-Party Defendants Zurich, Continental, and Allstate are liable for the damages incurred by Carolina Industrial due to their breaches of contract, including, but not limited to, reimbursing Carolina Industrial for any legal fees and costs incurred by defending the Carolina Industrial Asbestos Suits.
- G. For an order declaring that Third-Party Defendant Admiral is liable for the damages incurred by Flame Refractories due to its breaches of contract, including, but not limited to, reimbursing Flame Refractories for any legal fees (or inappropriate legal fees) and costs incurred by defending the Flame Refractories Asbestos Suits.
- H. As to the Arrowood Defendants, compensatory and punitive damages in an amount to be proven at trial; and for a declaration that the actions of each of the Arrowood Defendants, together and individually, constituted unfair and deceptive practices.
- I. A constructive trust to recover the amounts that the Arrowood Defendants wrongfully diverted from Arrowood's policyholders, and a preliminary and permanent injunction prohibiting the Arrowood Defendants from further such diversions;
- J. Compensatory and punitive damages against The Individual Arrowood Defendants in an amount to be proven at trial;
- K. For an order outlining the orderly priority of claims as between Rexel and Payne & Keller with respect to the Payne & Keller insurers. Specifically, the Receiver therefore seeks declarations, after thorough discovery regarding Rexel's competing claims to the Payne & Keller insurance program, regarding the nature, extent, and priority (if any) of Rexel's claims to the Payne & Keller insurance coverage so as to provide the Receiver with guidance and certainty as to how to go about carrying out his duties as the Receiver for

Payne & Keller and to provide the Payne & Keller insurers with certainty and guidance as to the delineation of their rights and responsibilities as between Rexel and Payne & Keller in this regard.

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

Respectfully submitted,

Dated: February 23, 2022

RIKARD & PROTOPAPAS, LLC

By: s./ Brian M. Barnwell

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Attorneys for Third-Party Plaintiffs

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

LENORA CHILDERS, Individually and as
Personal Representative of the Estate of
LEWIS C. CHILDERS

2021-CP-40-03484

Plaintiff,

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

v.

Davis Mechanical Contractors, Inc., et al.,

Defendants.

Flame Refractories, Inc., United Construction
Co. of Rome, Inc., Wind Up, Ltd., Individually
and as Successor-in-Interest to Pipe & Boiler
Insulation, Inc. f/k/a Carolina Industrial
Insulating Co., Payne & Keller Company, and
PBI QSF, LLC, By and Through Their Duly
Appointed Receiver Peter D. Protopapas,

Third-Party Plaintiffs

v.

Zurich American Insurance Company
(Individually and as Successor to Northern
Insurance Company of New York, Maryland
American General Insurance Company, and
Maryland Casualty Company), et al.

Third-Party Defendants



**THIRD-PARTY DEFENDANT TRAVELERS CASUALTY AND SURETY COMPANY'S
NOTICE OF MOTION AND MOTION TO DISMISS THIRD-PARTY CLAIMS AND
DISSOLVE THE PAYNE & KELLER RECEIVERSHIP**

Third-Party Defendant Travelers Casualty and Surety Company (improperly named as Travelers Casualty & Surety Company), formerly known as The Aetna Casualty and Surety Company (improperly named as Aetna Casualty & Surety Company) ("Travelers"), by and through undersigned counsel, hereby moves (1) pursuant to Rules 12 and 14 of the South Carolina Rules of Civil Procedure ("SCRCP"), to dismiss the claims asserted against Travelers in the Second Amended Third-Party Complaint¹ of Defendant/Third-Party Plaintiff Payne & Keller Company, through its receiver, Peter D. Protopapas² ("Payne & Keller" or the "Receiver")³ and (2) pursuant to S.C. Code § 15-65-10(4), to dissolve the Payne & Keller Receivership.

PRELIMINARY STATEMENT AND BACKGROUND

On November 23, 2021, Peter D. Protopapas, as Receiver for Payne & Keller, filed an insurance coverage action against Travelers and Payne & Keller's other historical, out-of-state

¹ Paragraph 1 of the Receiver's Second Amended Third-Party Complaint incorrectly states that the pleading is the "Third Amended Third-Party Complaint." In fact, it is the Second Amended Third-Party Complaint (although it is the third iteration of the Receiver's third-party complaint).

² The Receiver filed his Second Amended Third-Party Complaint in his capacity as the Receiver for Flame Refractories, Inc.; United Construction Co. of Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co.; Payne & Keller Company; and PBI QSF, LLC. All allegations and claims against Travelers, however, appear to have been asserted by the Receiver solely in his capacity as the Receiver for Payne & Keller, not any of the other entities.

³ Travelers understands that the Court has denied other third-party defendant insurers' motions to dismiss the Receiver's third-party claims via a July 14, 2022 email. That decision does not affect this Motion as Travelers is asserting several new grounds that require dismissal and were not raised in the other insurers' motions. To the extent any arguments asserted here were raised and denied in those prior motions, Travelers asserts them here to preserve its arguments and avoid potential waiver of any issue discussed herein.

insurers in the Court of Common Pleas of Richland County, South Carolina. *See Protopapas as Receiver for Payne & Keller Co. v. Am. Int'l Grp. et al.*, No. 2021CP4005768, Summons and Complaint for Declaratory Judgment and Breach of Contract, filed Nov. 23, 2021 (S.C. Ct. Common Pleas, Fifth Judicial Circuit). On December 20, 2021, Travelers removed the case to the United States District Court for the District of South Carolina, Columbia Division, because there is complete diversity of citizenship among the properly joined and served parties and the amount in controversy exceeds \$75,000. *See Protopapas as Receiver for Payne & Keller Co. v. Am. Int'l Grp. et al.*, No. 3:21-cv-04086-JMC, Dkt. No. 1 (Notice of Removal filed Dec. 20, 2021) (D.S.C.) (the "Federal Coverage Action"). On January 18, 2022, the Receiver filed an amended complaint in the Federal Coverage Action; Travelers then answered. *See id.* at Dkt. Nos. 23, 42. The Receiver also filed a motion to remand, along with a motion to stay the Federal Coverage Action pending resolution of the remand motion, both of which Travelers opposed. *See id.* at Dkt. Nos. 24, 47, 80, 119. Those motions have not been decided, and the Federal Coverage Action remains pending in federal court.

On July 14, 2022, the Receiver filed a Second Amended Third-Party Complaint against Travelers⁴ and the other insurance companies, even though the instant action is an *asbestos tort case* that has nothing to do with insurance coverage issues. The tort case was brought by plaintiff Lenora Childers, individually and as Personal Representative of the Estate Lewis C. Childers ("Childers"), pursuant to S.C. Gen. Stat. 15-51-10 *et seq.*, for the alleged wrongful death of Lewis C. Childers purportedly caused by exposure to asbestos and asbestos-containing products. *See generally* Pl.'s 1st Am. Compl. The defendants named in the Childers' complaint

⁴ The Second Amended Third-Party Complaint was served on Travelers on August 9, 2022 via the South Carolina Department of Insurance.

allegedly “manufactured, sold, and/or distributed asbestos-containing products or raw asbestos materials” and/or “controlled the work sites” where Childers was allegedly exposed to asbestos. *See id.* ¶ 3. Travelers is not named as a defendant, nor is any other insurance company, which is not surprising given that none of the insurance companies has ever manufactured, sold, or distributed asbestos-containing products. Nonetheless, the Receiver’s Second Amended Third-Party Complaint includes allegations and claims against Travelers and other insurers in an improper attempt to litigate here insurance coverage issues that are pending in the Federal Coverage Action.

The Receiver’s third-party claims against Travelers must be dismissed for several reasons.

First, the Receiver’s claims against Travelers must be dismissed because the Receiver lacks standing to assert claims against Travelers. Payne & Keller, according to the Receiver’s own filings, is a *Texas* corporation that dissolved in 1986. Under Texas corporate law, a dissolved corporation is not liable for post-dissolution claims and cannot sue or be sued with respect to any claim more than three years beyond dissolution. As a matter of settled receivership law, the Receiver stands in Payne & Keller’s shoes and does not acquire rights greater than those of Payne & Keller. Thus, the Receiver’s suit against Travelers is a nullity by operation of Texas corporate law. Moreover, even if the Receiver could bring suit, South Carolina law does not authorize nationwide receiverships over foreign corporations; it permits receiverships only with respect to property located within South Carolina. Insurance policies issued by Travelers to Payne & Keller in Texas are not property located in South Carolina.

What’s more, those lack of standing arguments also warrant dissolution of the Payne & Keller Receivership. First, because the law of Payne & Keller’s domicile (Texas) precludes any

suits by or against Payne & Keller brought after 1989, appointment of the Receiver here for the purpose of investigating and administering Payne & Keller's insurance assets was improper and must be undone. Second, the Receiver's third-party claims brought on behalf of Payne & Keller relate solely to alleged insurance assets of Payne & Keller under policies issued by foreign insurers; any insurance assets are property of the state where the debtor or obligor (*i.e.*, the insurers) are domiciled; and the Receiver admits that neither the debtor nor any of its insurers are domiciled in South Carolina. Thus, there is no South Carolina property over which the Receiver has any power—making a South Carolina Receiver powerless and a South Carolina receivership pointless and in need of dissolution.

Second, the Court lacks personal jurisdiction over Travelers. The Court has no general personal jurisdiction over Travelers because the company is not incorporated in South Carolina, it does not have its principal place of business in South Carolina, and it is not otherwise “essentially at home” in South Carolina. The Court also cannot exercise specific personal jurisdiction over Travelers because Payne & Keller's third-party claims against Travelers do not arise out of or relate to any contacts between Travelers and South Carolina.

Third, under SCRCP 14(a), a third-party claim may be asserted only against “a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.” A defendant acting as a third-party plaintiff must have a substantive claim against the third-party defendant founded upon derivative liability, *i.e.*, the outcome of the principal claim must impact the third-party defendant's liability. Here, Payne & Keller's third-party contract claims against Travelers are not “derivative” of Payne & Keller's alleged tort liability to Childers specifically. Rather, the third-party contract claims seek relief directly against Travelers, independent of Childers' claims, as demonstrated by the fact that Payne & Keller is pursuing

substantially identical relief in the first-filed Federal Coverage Action, a case to which Childers is not a party.

Finally, the third-party claims must be dismissed under SCRCP 12(b)(8), because the relief the Receiver seeks is the subject of the first-filed Federal Coverage Action, and the allegations and claims against Travelers in the instant case are substantially identical to those asserted there.

Accordingly, Travelers respectfully requests that the Court dismiss the third-party claims against it with prejudice and dissolve the Payne & Keller receivership.

ARGUMENT

I. The Receiver Lacks Standing to Bring Claims Concerning Payne & Keller's Insurance Coverage Against Travelers, and Those Same Grounds Warrant Dissolution of the Payne & Keller Receivership.

"Standing to sue is a fundamental requirement in instituting an action." *Joseph v. S.C. Dep't of Lab., Licensing & Regul.*, 417 S.C. 436, 467, 790 S.E.2d 763, 779 (2016). In order for a party to have standing to bring an action, the party "must have a real, material, or substantial interest in the subject matter of the action." *Id.*; *see also Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). "No justiciable controversy is presented unless the plaintiff has standing to maintain the action." *Brock v. Bennett*, 313 S.C. 513, 519, 443 S.E.2d 409, 413 (Ct. App. 1994). Thus, "[o]nce it is determined a plaintiff has no standing to prosecute, the court must dismiss the action." *Id.*

It is black-letter law that a plaintiff may not seek recovery on a claim that belongs to another, or that he otherwise lacks a right to bring. *See, e.g., Furman Univ. v. Livingston*, 244 S.C. 200, 204 (1964) ("It is fundamental that one without interest in the subject matter of a law suit has no legal standing to prosecute it."); *Duke Power Co. v. S.C. Pub. Serv. Comm'n*, 284

S.C. 81, 96 (1985) (“In order to have standing to present a case before the courts of this State, a party must have a personal stake in the subject matter of the lawsuit.”).

Here, the Receiver does not allege any personal right or interest in the matters asserted in his Second Amended Third-Party Complaint. Instead, his right to sue is wholly dependent on, and derivative of, his authority as Receiver for Payne & Keller, a Texas corporation that dissolved in 1986. *See Nat’l Cash Register Co. v. Burns*, 217 S.C. 310, 313, 60 S.E.2d 615, 617 (1950) (“A primary concept of the law of receivers is that a receiver stands in the shoes of the debtor . . .”); *In re Am. Slicing Mach. Co.*, 125 S.C. 214, 218, 118 S.E. 303, 304 (1923) (“[I]t is clear that the appointment by the Court can vest in the Receiver no greater interest than the insolvent possessed.”).

Moreover, because Payne & Keller is not a South Carolina corporation, the Court’s authority to appoint a receiver over Payne & Keller is limited to Payne & Keller’s in-state property. Under South Carolina law, a “receiver may be appointed by a judge of the circuit court, either in or out of court . . . [w]hen a corporation has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights, and, in like cases, of the *property within this State* of foreign corporations.” S.C. Code § 15-65-10(4) (emphasis added).

These two bedrock principles of South Carolina receivership law doom the claims the Receiver seeks to assert on behalf of Payne & Keller for two distinct reasons. First, under Texas corporate law, a dissolved corporation cannot sue or be sued more than three years after its dissolution. That means the Receiver, standing in Payne & Keller’s shoes, cannot sue Travelers here. Second, even if the Receiver could sue on behalf of Payne & Keller contrary to Texas law, Payne & Keller’s insurance policies are not property of Payne & Keller located within South

Carolina, and therefore the Receiver lacks standing to administer or liquidate Payne & Keller's insurance policies.

A. Payne & Keller Cannot Sue or Be Sued Under Texas Law, So Payne & Keller's Claims Against Travelers Fail as a Matter of Law and Dissolution of the Payne & Keller Receivership Is Warranted.

Payne & Keller is a Texas corporation that dissolved in 1986. *See* Ex. A to Plaintiffs' Motion to Appoint a Receiver over Payne & Keller Co. Pursuant to S.C, Code § 15-65-10(4). Texas law provides that dissolved corporations are liable only for "existing claims." Tex. Bus. Orgs. Code Ann. § 11.351. Moreover, such claims can only be brought for three years after dissolution. *Id.* § 11.359; *see, e.g., Durham Clinic, P.A. v. Barrett*, 107 S.W.3d 761, 762 (Tex. App. 2003) (claim against dissolved corporation was barred because it was brought more than three years post-dissolution; under the statute, "a corporation shall not be liable for any claim other than an existing claim"); *Boudreaux v. U.S. Framing*, No. 6:17-cv-0517, 2017 WL 6758448 (W.D. La. Nov. 21, 2017), *aff'd sub nom. Boudreaux v. C J R Framing Inc.*, 744 F. App'x 208 (5th Cir. 2018) ("[U]nder Texas law, a dissolved corporation is not liable for a post-dissolution claim."). Thus, Payne & Keller has an absolute defense to any personal injury tort claims that may now be brought against it.

In addition, a dissolved corporation may bring suit only within three years of the date of its dissolution. Under Texas corporate law, a "terminated filing entity continues in existence *until the third anniversary of the effective date of the entity's termination only* for purposes of: (1) prosecuting or defending in the terminated filing entity's name an action or proceeding brought by or against the terminated entity." Tex. Bus. Orgs. Code Ann. § 11.356(a) (emphasis added); *see also id.* § 11.359(a) ("[A]n existing claim *by or against* a terminated filing entity is extinguished unless an action or proceeding is brought on the claim not later than the third anniversary of the date of termination of the entity.") (emphasis added).

Again, Payne & Keller dissolved in 1986. Its ability to sue lapsed in 1989. *See Emmett Props. v. Halliburton Energy Servs.*, 167 S.W.3d 365, 369-70 (Tex. App. 2005) (“[Plaintiff] was a ‘dissolved corporation’ with a dissolution date of February 12, 1999. As such, [Plaintiff] was required to bring suit on its claims within three years of this date, which was February 12, 2002. [Plaintiff], however, did not file suit until June 13, 2002, more than three years after the dissolution date. Therefore, [Plaintiff’s] claims were extinguished under article 7.12, section C, and the trial court properly granted the appellees’ motion for summary judgment.”)⁵; *Brooks v. Binger*, 2019 WL 3023226, at *2 (Tex. App. July 11, 2019) (“The trial court’s purported adjudication of claims by B2 Towing in a lawsuit commenced more than 26 years after B2 Towing’s dissolution amounted to a nullity. . . .”); *see also Carter v. Harvey*, 525 S.W.3d 420, 426 (Tex. App. 2017) (same). Appointment of a receiver cannot create a right to sue that does not exist under the Texas statutes that govern Payne & Keller’s corporate existence. *See Nat’l Cash Register Co., supra*; *In re Am. Slicing Mach. Co., supra*. Therefore, the Receiver lacks the authority to bring claims on behalf of Payne & Keller and his claims against Travelers must be dismissed for lack of standing.

As shown above, Texas law is clear that Payne & Keller may not sue or be sued at this point. *In re All Cases Against Sager Corp.*, 967 N.E.2d 1203, 1209 (Ohio 2012) (“We concur. The question of whether a dissolved foreign corporation has the capacity to sue or be sued is a matter determined by the law of the state of incorporation.”). And because Payne & Keller is no longer amenable to suit, foreign courts lack authority under the Full Faith and Credit Clause of

⁵ *Emmett* cites article 7.12 of the Texas Business Corporations Act (“TBCA”), the predecessor statute to the current Texas Business Organizations Code (“TBOC”). The TBOC replaced the TBCA on January 1, 2010 but made no substantive changes to TBCA article 7.12. *See Boudreaux v. U.S. Framing*, No. CV 6:17-0517, 2017 WL 6758448, at *3 (W.D. La. Nov. 21, 2017).

the United States Constitution to appoint a receiver over Payne & Keller for claims not pending before 1989. *Id.* at 1211 (“The authority to appoint a receiver for a dissolved foreign corporation is subject to constitutional limitations, notably the Full Faith and Credit Clause, obliging us to recognize Illinois corporation law as barring claims filed against Sager that were not pending on June 17, 2003. Thus, the court is without authority to appoint a receiver to ‘accept the process of claims, process defenses and marshal assets’ on behalf of the Sager Corporation, as the trial court ruled.”).

In *Sager*, the Ohio Supreme Court reversed an Ohio court’s appointment of a receiver for a defunct foreign corporation in an identical situation as here. *In re Sager*, 967 N.E.2d at 1211. *Sager* involved a plaintiff that sought appointment of a receiver to access Sager’s insurance assets to compensate the claimant for asbestos-related injuries. *See id.* at 1205. Sager was an Illinois corporation that dissolved in 1998. *Id.* Illinois law set a five-year post-dissolution window for claims to be brought by or against dissolved corporations, meaning Sager was amenable to suit until 2003. *Id.* But the claimants did not bring suit against Sager until 2007. *Id.* Sager sought summary judgment, in part arguing that the appointment of a receiver violated the Due Process, Commerce, and Full Faith and Credit Clauses of the United States Constitution. *Id.* The trial court and intermediate appellate court both disagreed and affirmed the receiver’s appointment. *Id.* Reversing the intermediate appellate court, the Ohio Supreme Court held that the Ohio trial court was “without authority to appoint a receiver” over foreign-domiciled Sager because “[t]he authority to appoint a receiver for a dissolved foreign corporation is subject to constitutional limitations, notably the Full Faith and Credit Clause” and the court was “oblig[ed] ... to recognize Illinois corporation law as barring claims filed against Sager that were not pending on June 17, 2003.” *Id.* at 1211. The Ohio Supreme Court also noted that “the existence

of an insurance policy is irrelevant” where “[n]o cause of action which accrues after dissolution may be brought against a dissolved corporation.” *Id.*

The principles underlying *Sager* forcefully demonstrate that this Court lacks the authority to appoint a receiver for Payne & Keller, because the company has not been amenable to suit under the laws of its state of incorporation (Texas) since 1989. Because Texas law bars Payne & Keller from suing or being sued, the Full Faith and Credit Clause of the United States Constitution requires this Court to honor Texas corporate law and prevents it from appointing a receiver over Payne & Keller in contravention of Texas law. Thus, the receivership must be dissolved.

Dismissal is also warranted by the fact, as observed in *Sager*, that insurance policies are worthless where a dissolved foreign corporation is immune from suit. *In re Sager*, 967 N.E.2d at 1211. Here, as Plaintiffs admit, “all that remains of Payne & Keller is its insurance coverage.” Pl.’s Mot. to Appoint a Receiver over Payne & Keller Co. Pursuant to S.C. Code § 15-65-10(4) at 1 (Aug. 23, 2021).

B. Because the Travelers Insurance Policies Are Not Property of Payne & Keller in South Carolina (Nor Are Any of the Other Insurers’ Policies), the Receiver Lacks Standing to Sue Travelers and the Receivership Must Be Dissolved.

Even if the Receiver could bring claims on behalf of Payne & Keller contrary to Texas law, his authority is circumscribed by South Carolina law, which strictly confines the powers of South Carolina receivers of foreign corporations to the corporation’s in-state property.

It is undisputed that Payne & Keller is not a South Carolina corporation. *See* 2d Am. Third-Party Compl. ¶ 1 (citing Ex. D, Order (identifying Payne & Keller as a dissolved “Texas

corporation”).⁶ The statute under which the Receiver was appointed—S.C. Code § 15-65-10(4)—does not authorize general receiverships over corporations not incorporated in South Carolina. It only permits South Carolina courts to appoint receivers for such foreign corporations to the extent of their “property within this state.” The South Carolina Supreme Court has confirmed that this statute means what it says: if a foreign corporation has property within South Carolina, a South Carolina court may appoint a receiver over that in-state property; if a foreign corporation has no in-state property, no receiver may be appointed. *See Boynton v. Consol. Indem. & Ins. Co.*, 185 S.E. 731, 737 (S.C. 1936) (reversing appointment of receiver where there was a “total failure of any proof” that the foreign company “has property in this state”).

The circumscribed nature of state receiverships over foreign corporations is a basic principle of state receivership law. *See, e.g.*, 17A FLETCHER CYC. CORP. § 8554, *Jurisdiction and power to appoint receivers—General receivers* (“But where the corporation has no property in the state, there would be nothing for the receiver to take under control, and the appointment would be an idle act that the courts cannot be called upon to perform.”) (collecting cases); *id.* § 8555, *Receivers to take charge of local assets* (“While denying the power to appoint a general receiver, the authorities agree that equity has jurisdiction to prevent the dissipation and

⁶ Nor are any of the entities “related to the historic operations of Payne & Keller Company” to which the Payne & Keller Receivership was extended pursuant to the September 30, 2021 Order Granting the Receiver for Payne & Keller Company’s Motion to Clarify the Receiver Order. *See* 2d Am. Third-Party Compl. ¶ Ex. E (Order Granting The Receiver For Payne & Keller Company’s Motion To Clarify The Receiver Order). That order identifies several companies, all of which were incorporated in either Texas or Louisiana, not South Carolina. *See* Payne & Keller, Inc. (Ex. A, Texas corporation); Payne & Keller of Louisiana, Inc. (Ex. B, Louisiana corporation); Bayou Maintenance, Inc. (Ex. C, Louisiana corporation); Bayou Maintenance and Constructors, Inc. (Ex. D, Louisiana corporation); Payne & Keller Gulf Coast, Inc. (Ex. E, Louisiana corporation); Frentex Enterprises Company (Ex. F, Texas corporation); and Frentex Enterprises Company of Texas (Ex. G, Texas corporation).

misapplication of assets of the foreign corporation within the state, and if necessary, to appoint a receiver of the assets . . .”) (collecting cases); *see also* 75 C.J.S. RECEIVERS § 475 (“In accordance with the general rule as to extraterritorial rights, neither the court nor the receiver appointed by it has authority over property beyond the boundaries of its territorial jurisdiction.”). As a matter of clear South Carolina law, the Receiver may have authority with respect to Payne & Keller’s property located within the state of South Carolina, but he has no authority with respect to Payne & Keller’s out-of-state property.

Insurance policies issued to Payne & Keller (in Texas) by Travelers (in Connecticut) are not “property [of Payne & Keller] within [South Carolina]” as required under the South Carolina receivership statute. The situs of intangible property such as a contractual obligation under an insurance policy is the domicile of the debtor/obligor (here, Travelers), whose domicile is its state of incorporation or principal place of business (here, Connecticut). *See, e.g., H.J. Baker & Bro. v. Doe*, 70 S.E. 431, 433 (S.C. 1911) (“The general rule of law is well settled that for the purposes of founding administration, all simple contract debts are assets at the domicile of the debtor.”); *Af-Cap Inc. v. Republic of Congo*, 383 F.3d 361, 371–72 (5th Cir. 2004) (“[C]ourts consistently hold that the situs of a debt obligation is the situs of the debtor [T]his rule’s general operation has been recognized by the Supreme Court.”); *Long v. Baldt*, 464 F. Supp. 269, 273 (D.S.C. 1979) (“the situs of the debt lies with the debtor”). Travelers is incorporated and has its principal place of business in Connecticut; it has few, if any, contacts with South Carolina, and all of the subject insurance policies were issued and delivered to Payne & Keller outside of South Carolina. *See infra* at § II; *see also* Ex. I (Declaration of Ann B. Mulcahy (“Mulcahy Decl.”)) at ¶¶ 3-6. Similarly, all other third-party defendant insurers are incorporated and maintain their principal places of business outside of South Carolina. *See* 2d Am. Third-Party

Compl. at ¶¶ 4-5, 7-14, 21-24. As a result, the subject contracts are plainly not “property [of Payne & Keller] within [South Carolina].” Accordingly, the Receiver has no standing to assert Payne & Keller’s rights or otherwise act on Payne & Keller’s behalf with respect to contracts of insurance between Travelers and Payne & Keller. The claims the Receiver asserts against Travelers in this action must be dismissed for this reason as well.

The Payne & Keller Receivership also must be dissolved for similar reasons. The Receiver’s Third-Party Claims, as they relate to Payne & Keller, relate solely to insurance assets. *See* 2d Am. Third-Party Compl. ¶¶ 142-174, Causes of Action 1, 2, 11, and “all that remains of Payne & Keller is its insurance coverage” (Pl.’s Mot. to Appoint a Receiver over Payne & Keller Co. Pursuant to S.C. Code § 15-65-10(4) at 1 (Aug. 23, 2021)). As discussed above, those assets are property of the state in which the issuing insurer is domiciled. *See, e.g., H.J. Baker*, 70 S.E. at 433; *Af-Cap*, 383 F.3d at 371–72; *Long*, 464 F. Supp. at 273. And the Receiver admits that none of Payne & Keller’s insurers are domiciled in South Carolina. *See* 2d Am. Third-Party Compl. at ¶¶ 4-5, 7-14, 21-24. Given that Payne & Keller has no property located in South Carolina for a receiver to administer, the Payne & Keller receivership has no point and must be dissolved.

II. The Court Lacks Personal Jurisdiction Over Travelers

Pursuant to SCRCP 12(b)(2), a court must grant a motion to dismiss where the plaintiff fails to allege plausible facts supporting the exercise of personal jurisdiction over the non-resident defendant. *See Power Prods. & Servs. Co., Inc. v. Kozma*, 665 S.E.2d 660, 664 (S.C. Ct. App. 2008). “The party seeking to invoke personal jurisdiction over a non-resident defendant . . . bears the burden of establishing jurisdiction.” *Id.* (citation omitted). “When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the court is

not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction.” *Id.* (citation omitted). “Personal jurisdiction over a nonresident defendant is a question to be resolved upon the facts of each particular case.” *Id.* (citation omitted). Because South Carolina’s long-arm statute has been interpreted to apply coextensively with the limits of due process, the sole question eventually “becomes whether the exercise of personal jurisdiction in this case would violate the strictures of due process.” *Id.* (citation omitted); *see also, e.g., S. Plastics Co. v. S. Com. Bank*, 423 S.E.2d 128, 130 (S.C. 1992) (“the question becomes whether the exercise of personal jurisdiction over the [nonresident defendant] comports with due process.”).

“Due process requires that there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Hidria, USA, Inc. v. Delo*, 783 S.E.2d 839, 843 (S.C. Ct. App. 2016) (quotation omitted). There are two prongs to the due process analysis: “(1) the ‘power’ prong, under which minimum contacts grant a court the ‘power’ to adjudicate the action; and (2) the ‘fairness’ prong, which requires the exercise of jurisdiction to be ‘reasonable’ or ‘fair.’” *Id.* (citation omitted). The plaintiff bears the burden of satisfying both; if either prong fails, the exercise of personal jurisdiction over the nonresident defendant fails to comport with the requirements of due process. *See id.* (citations omitted). Here, there is no basis for the Court to exercise either general or specific jurisdiction over Travelers.

A. The Court Does Not Have General Jurisdiction Over Travelers

“General jurisdiction is the State’s right to exercise personal jurisdiction over a defendant even though the suit does not arise out of or relate to the defendant’s contacts with the forum[.]” *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 655 S.E.2d 476, 478 (S.C. 2007) (citing

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 n. 15, 105 S. Ct. 2174, 85 L.Ed.2d 528 (1985)). A nonresident corporation must have substantial contacts with the forum state to support a court's exercise of general jurisdiction when the nonresident's contacts do not directly relate to the plaintiff's cause of action. *See Cockrell v. Hillerich & Bradsby Co.*, 611 S.E.2d 505, 508 (S.C. 2005) (citations omitted).

Subject to the constraints imposed by federal due process, general jurisdiction is determined under S.C. Code Ann. § 36-2-802, which states: "A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, doing business, or maintaining his or its principal place of business in, this State as to any cause of action." For general jurisdiction to attach, the foreign corporation's activities or affiliations within the forum state must be "so continuous and systematic as to render [it] essentially at home in the forum State." *Daimler AG v. Bauman*, 571 U.S. 117, 119 (2014) (citation and internal quotation marks omitted); *see also Companion Prop. & Cas. Ins. Co. v. U.S. Bank Nat'l Ass'n.*, 3:15-cv-01300-JMC, 2016 WL 6781057, at *5 (D.S.C. Nov. 16, 2016) ("general jurisdiction requires affiliations so continuous and systematic as to render [the foreign corporation] essentially at home in the forum State, *i.e.*, comparable to a domestic enterprise in that State" (citation and internal quotation marks omitted)). "[O]nly a limited set of affiliations with a forum" can satisfy the "essentially at home" requirement. *Daimler*, 571 U.S. at 137. Thus, in order to haul a nonresident corporation into court to answer for claims that have nothing to do with the corporation's activities in or contacts with the forum state, the corporation must have substantial contacts with the forum state. *See Gibson v. Confie Ins. Grp. Holdings, Inc.*, 2:16-CV-02872-DCN, 2017 WL 2936219, at *5 (D.S.C. July 10, 2017) ("The threshold level of contacts with the

forum state required for the exercise of general jurisdiction is significantly higher than for specific jurisdiction and must be fairly extensive.” (citation omitted)).

A corporation typically will only be found “at home” in its state of incorporation and the state in which it has its principal place of business. *See Sutton v. Motor Wheel Corp., LLC*, No. 3:17-01161-MGL, 2018 WL 2197535, at *3 (D.S.C. May 14, 2018) (citation omitted); *see also Daimler*, 571 U.S. at 137 (“the place of incorporation and principal place of business are ‘paradig[m] ... bases for general jurisdiction.’” (citations omitted)). Only “in an exceptional case” may “a corporation’s operations in a forum other than its formal place of incorporation or principal place of business [] be so substantial and of such a nature as to render the corporation at home in that State.” *Daimler*, 571 U.S. at 139 n. 19. This exception is very limited, and plaintiffs face a heavy burden in proving it applies. *See Daimler*, 571 U.S. at 138 (rejecting as “unacceptably grasping” the proposition that a party can be subject to general jurisdiction in every state in which it “engages in a substantial, continuous, and systematic course of business”).⁷

⁷ *See also, e.g., Companion Prop. & Cas. Ins. Co.*, 2016 WL 6781057, at *7 (noting a party asserting general jurisdiction under *Daimler*’s “exceptional case” exception “faces a heavy burden,” and rejecting argument that foreign corporation was at home in South Carolina (citations omitted)); *Maseng v. Lenox Corp.*, 483 F. Supp. 3d 360, 368-69 (D.S.C. 2020) (“Lenox’s contacts with South Carolina are limited to one retail store in Myrtle Beach, South Carolina and the marketing, distribution, and sale of its own products in various retail stores in South Carolina. The Myrtle Beach retail store is one of the 20 retail stores that Lenox operates in 12 states. . . . Thus, while this contact is certainly systematic and continuous, it is not substantial enough to render Lenox ‘at home’ in South Carolina.”); *Sunny Days Entm’t, LLC v. Traxxas, L.P.*, 376 F. Supp. 3d 654, 660-61 (D.S.C. 2019) (nonresident company that sold toys to South Carolina customers through brick and mortar stores and online not subject to general jurisdiction in South Carolina); *Fidrych v. Marriott Int’l, Inc.*, No. 2:17-2195-BHH, 2018 WL 9811052, at *6 (D.S.C. Aug. 3, 2018) (nonresident corporation with 90 hotels and certificate of authority to transact business in South Carolina not subject to general jurisdiction in South Carolina).

Here, there is no basis for the assertion of general jurisdiction over Travelers. Travelers is incorporated in and has its principal place of business in Connecticut. *See* Ex. I at ¶ 3. Thus, the only way this Court can have general personal jurisdiction over Travelers is if Payne & Keller can meet its heavy burden of showing that Travelers' contacts with South Carolina are so continuous and systematic as to render it essentially at home in South Carolina. Payne & Keller cannot possibly meet its burden here.

Payne & Keller does not so much as allege that Travelers is subject to general jurisdiction in South Carolina, let alone explain how or why it could be. That is reason alone to reject any argument that Travelers is somehow at home in South Carolina. But even if the Court were to look past this pleading deficiency, Travelers' limited activities in South Carolina are plainly insufficient to render it at home in South Carolina. As set forth in the accompanying declaration of Ann B. Mulcahy:

- Travelers is a corporation with its principal place of business and state of incorporation outside of South Carolina (*see* Ex. I at ¶¶ 3, 6);
- Travelers' business operations are managed principally from its Connecticut offices (*see id.* at ¶ 4);
- None of Travelers' senior officers or directors are located in South Carolina (*see id.* at ¶ 5);
- Travelers does not have employees in South Carolina (*see id.* at ¶ 6);
- Travelers does not own or rent office space in South Carolina (*see id.* at ¶ 6);
- Travelers does not have any loan applications with South Carolina banks or financial institutions (*see id.* at ¶ 6); and
- Travelers does not hold meetings of directors in South Carolina (*see id.* at ¶ 6).

Simply put, Travelers is not "at home" in South Carolina, and Payne & Keller does not assert otherwise. Travelers' limited contacts with South Carolina relate solely to its insuring

relationship with certain South Carolina businesses and residents. Notably, Payne & Keller, a defunct Texas corporation, is not one such business. Accordingly, because Travelers is not incorporated in South Carolina, does not have its principal place of business in South Carolina, and otherwise lacks the type of contacts needed to render it essentially at home in South Carolina, general jurisdiction does not exist.

B. The Court Lacks Specific Jurisdiction Over Travelers

Specific jurisdiction exists where the plaintiff's claims arise out of or relate to the defendant's substantial contacts with the forum state. *See Coggeshall*, 655 S.E.2d at 478 (“Specific jurisdiction is the State’s right to exercise personal jurisdiction because the cause of action arises specifically from a defendant’s contacts with the forum” (citation omitted)); *Maseng*, 483 F. Supp. 3d at 365 (“A defendant has minimum contacts with a jurisdiction sufficient to subject it to specific jurisdiction in the forum state if ‘the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.’” (quotation omitted)). Because South Carolina’s long-arm statute has been interpreted to be coextensive with the limits of due process, the dispositive question for purposes of specific jurisdiction is whether the exercise of jurisdiction would comport with due process. *See Coggeshall*, 655 S.E.2d at 478; *S. Plastics Co.*, 423 S.E.2d at 131.

As noted above, to comport with due process in the specific jurisdiction context, Payne & Keller must allege plausible facts sufficient to satisfy both the “power” prong and the “fairness” prong. *See Hidria, USA, Inc.*, 783 S.E.2d at 843. “The court must (1) find that the defendant has the requisite minimum contacts with the forum, without which, the court does not have the ‘power’ to adjudicate the action and (2) find the exercise of jurisdiction is reasonable or fair.” *Power Prods. & Servs. Co.*, 665 S.E. 2d at 665 (citation omitted). “If either prong fails, the

exercise of personal jurisdiction over the defendant fails to comport with the requirements of due process.”” *Id.* (quotation omitted). Payne & Keller has not come close to alleging specific jurisdiction facts sufficient to satisfy its burden as to either the “power” prong or the “fairness” prong.

1. The Power Prong Is Not Met

“A minimum contacts analysis requires a court to find that the defendant directed its activities to a resident of this State and that the cause of action arises out of or relates to those activities.” *S. Plastics Co.*, 423 S.E.2d at 131 (citation omitted). Here, Travelers did not purposefully avail itself of the privileges of conducting activities in South Carolina in connection with the instant claims, given that there are no factual allegations or evidence that Travelers conducted activities in South Carolina that serve as the basis for Payne & Keller’s third-party claims against Travelers.

In its Second Amended Third-Party Complaint, Payne & Keller rotely alleges that “[t]his Court has jurisdiction over the matters alleged herein pursuant to S.C. Code Ann. §§ 36-2-802 and 36-2-803, Article V of the Constitution of the State of South Carolina, and the Court’s plenary powers,” and that “[t]his Court appointed Peter D. Protopapas as Receiver of Third-Party Plaintiffs.” 2d Am. Third-Party Compl. ¶ 25. There are no jurisdictional allegations specific to Travelers. This is reason alone to find that specific personal jurisdiction is lacking. *See Sullivan v. Hawker Beechcraft Corp.*, 723 S.E.2d 835, 839 (S.C. Ct. App. 2012) (the mere “repeating of the [long-arm] statute is insufficient to support a finding of personal jurisdiction”).

Beyond this pleading deficiency, Payne & Keller cannot demonstrate the minimum, claim-specific contacts between Travelers and South Carolina necessary to meet the constitutional requirements of due process. Payne & Keller’s third-party claims against

Travelers do not arise from or relate to Travelers' contacts with South Carolina. Payne & Keller seeks insurance coverage rulings that have nothing to do with Travelers' limited contacts with South Carolina. The Receiver has not alleged, and cannot allege, that Travelers directed its Payne & Keller-related activities at residents of South Carolina, or that Payne & Keller's third-party claims against Travelers in this case arise out of Travelers' in-state activities. Indeed, Payne & Keller is not and has never been a South Carolina company, and all of the subject insurance policies were issued and delivered to Payne & Keller outside of South Carolina. Travelers is not alleged to have ever manufactured, distributed, or sold any Payne & Keller-related asbestos or asbestos-containing products in South Carolina or elsewhere, and the insurance policies Travelers issued to Payne & Keller are not alleged to have caused Childers' asbestos injuries.

Moreover, even assuming Travelers could have foreseen that Payne & Keller would be subject to asbestos tort lawsuits in South Carolina, foreseeability alone is insufficient to establish personal jurisdiction. *See Cockrell*, 611 S.E.2d at 509 ("The foreseeability that is critical to due process analysis" is that "the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." (citation omitted)). Payne & Keller cannot avoid the absence of jurisdiction over Travelers by attempting to impute the South Carolina contacts of individual asbestos claimants (or others) to Travelers. The relevant contacts for jurisdictional purposes "must center on the contacts generated by the defendant and not on the unilateral actions of some other entity[.]" *Id.* at 508 (citation omitted); *see also Moosally v. W.W. Norton & Co., Inc.*, 594 S.E.2d 878, 885 (S.C. Ct. App. 2004) ("Because the due process requirements must be met as to each defendant, we must assess individually each defendant's contacts with South Carolina." (citations omitted)); *Walden v. Fiore*, 571 U.S. 277, 284 (2014)

(“the relationship must arise out of contacts that the ‘defendant *himself*’ creates with the forum State” (citation omitted) (emphasis in original)); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984). Indeed, the United States Supreme Court has made clear that the “unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984) (citations omitted).⁸ Thus, the contacts asbestos claimants or others may have had with South Carolina are irrelevant to the question whether Travelers has sufficient minimum contacts with South Carolina to give rise to specific personal jurisdiction over Travelers.

In short, because Payne & Keller fails to allege facts sufficient to show that Travelers conducted activities in South Carolina that serve as the basis for Payne & Keller’s third-party claims against Travelers in this case, the exercise of personal jurisdiction over Travelers would violate due process under the power prong of the due process analysis.

2. The Fairness Prong is Not Met

It would also be unreasonable and unfair for the Court to exercise personal jurisdiction over Travelers in this case. Under the fairness prong of the due process analysis, a court should consider: “(1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident’s acts; (3) the inconvenience resulting to

⁸ See also, e.g., *Wallace v. Yamaha Motors Corp.*, No. 9:19- cv-0730-DCN, 2019 WL 6170419, at *3 (D.S.C. Nov. 20, 2019) (finding personal jurisdiction could not be exercised over a nonresident motorcycle manufacturer for product liability claims stemming from a vehicular accident because “conduct of plaintiffs or third parties that creates a connection between the defendant and the forum state will be disregarded”); *Sutton v. Motor Wheel Corp.*, 2018 WL 2197535, at *5 (finding personal jurisdiction did not exist over the defendant, a tire manufacturer, based on the contacts of a distributor of defendant’s tires that was authorized to transact business in South Carolina).

the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State's interest in exercising jurisdiction." *Power Prods. & Servs. Co., Inc.*, 655 S.E.2d at 665 (citation omitted). Each of these considerations weighs in favor of declining to exercise jurisdiction over Travelers in this case.

With respect to the first two factors, Travelers' activities in South Carolina are not only limited, they are unrelated to the facts and circumstances of Payne & Keller's third-party claims against Travelers. As explained, Travelers is incorporated in Connecticut, its principal place of business is in Connecticut, none of its senior officers or directors are located in South Carolina, it does not have employees in South Carolina, and it does not own or rent office space in South Carolina. *See* Ex. I at ¶¶ 3-6. In addition, Payne & Keller was never a South Carolina company, and Travelers is not alleged to have done anything in South Carolina that forms the basis for Payne & Keller's third-party claims against Travelers in this case. Indeed, Payne & Keller's claims against Travelers are based on insurance policies that Travelers issued to Payne & Keller outside of South Carolina.

With respect to the third factor, no party would be inconvenienced if this Court were to find that it does not have jurisdiction over Travelers. The parties are litigating substantially identical claims in the first-filed Federal Coverage Action, which is pending in federal court in Columbia, South Carolina. Thus, the Receiver will have no reason to complain if his substantially identical claims are dismissed in this case. If anything, the parties to this asbestos tort case—particularly Childers—would be inconvenienced if the Receiver is allowed to implead Travelers and other insurers. Permitting the Receiver to pursue his duplicative third-party claims would expand unnecessarily the scope of the case and delay its ultimate resolution, thereby prejudicing Childers and the other parties, and wasting party and judicial resources.

Finally, South Carolina's interest in exercising jurisdiction here is minor. "[W]hile South Carolina has an interest in providing redress for its citizens, that interest is diminished when no business was transacted in this State and any contract formed was not to be performed in this State." *Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc.*, 402 S.E.2d 177, 181 (S.C. 1991). Payne & Keller has never been a South Carolina company, and all of the policy contracts were issued to Payne & Keller outside of South Carolina. Further, given the existence of the first-filed Federal Coverage Action now pending in South Carolina federal court, a court located in South Carolina will still hear and resolve substantially identical claims if this Court were to decline to exercise jurisdiction over Travelers in this case, as it should.

Under the facts of this case, even if Payne & Keller could establish the minimum contacts necessary to meet the constitutional requirements of due process under the power prong (it cannot), the Court cannot exercise jurisdiction over Travelers under the fairness prong because it would be neither reasonable nor fair.

III. The Third-Party Claims Are Improper Under SCRCP 14 Because They Cannot Establish, and Are Not Based On, Derivative Liability of Childers' Tort Claims

Rule 14 of the SCRCP provides that a defendant "as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to him for all or part of the plaintiff's claim against him.*" S.C. R. Civ. P. 14(a) (emphasis added). This means that "the third-party plaintiff must have a substantive claim against the third-party defendant founded upon derivative liability," and "[t]he outcome of the principal claim must impact the third-party defendant's liability[.]" *First Gen. Servs. of Charleston, Inc. v. Miller*, 445 S.E.2d 446, 447 (S.C. 1994) (citation omitted). "Consequently, a non-party is subject to impleader [under SCRCP 14] only if there is a basis to assert he is liable to the named defendant(s) for all or part of the plaintiff's claim." *Smith v. Tiffany*, 799 S.E.2d 479, 486 (S.C.

2017); *see also Gathings v. Robertson Brokerage Co., Inc.*, 367 S.E.2d 423, 426 (S.C. Ct. App. 1988) (“Rule 14 may be used only when the substantive law permits the defendant to shift some or all of his liability [on the principal claim] to the impleaded party.” (quotation omitted)).

“The third party claim must be derivative of the plaintiff’s claim because [d]erivative liability is central to the operation of Rule 14.” *CNH Indus. Cap. Am. LLC v. Able Cont., Inc.*, No. 9:16-cv-2520-RMG, 2017 WL 512453, at *1 (D.S.C. Feb. 7, 2017) (citation and internal quotation marks omitted).⁹ “It is not sufficient that the third-party claim is a related claim; the claim must be derivatively based on the original plaintiff’s claim.” *Id.* (quotation omitted). “Rule 14(a) does not allow the defendant to assert a separate and independent claim even though the claim arises out of the same general set of facts as the main claim.” *Id.* (quotation and other citation omitted). “In other words, impleader ‘must involve an attempt to pass on to the third party all or part of the liability asserted against the defendant.... An impleader claim may not be used to assert any and all rights to recovery arising from the same transaction or occurrence as the underlying action.’” *Id.* (quotation omitted). Thus, “[a] third-party claim may be asserted . . . only when the third party’s liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to the defending party.” *Id.* (citation omitted) (emphasis in original). “[A] third-party claim is ‘viable only where a proposed third party plaintiff says, in effect, ‘If I am liable to [the original] plaintiff, then my liability is only technical or secondary or partial, and the third party defendant is derivatively liable and must reimburse me for all or part ... of anything I must pay [the original] plaintiff.’” *For Life Prods.*,

⁹ Rule 14 of the Federal Rules of Civil Procedure is substantially the same as Rule 14 of the SCRCF. “In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules.” *Maybank v. BB&T Corp.*, 787 S.E.2d 498, 510 (S.C. 2016) (citation omitted).

LLC v. Universal Cos., Inc., No. 1:20CV00016, 2021 WL 1169532, at *4 (W.D. Va. Mar. 29, 2021) (quotation omitted).

Here, Payne & Keller's third-party *contract* claims against Travelers are not derivative of or dependent on Childers' *tort* claims against Payne & Keller. Payne & Keller does not and cannot allege that Travelers, an insurer, is derivatively liable if Payne & Keller is found responsible for Childers' alleged asbestos exposure. Nor does Payne & Keller allege that Travelers has any obligation to Childers.

Indeed, rather than seeking to establish derivative liability, the third-party claims seek relief directly from and against Travelers. Specifically, as to Travelers, the Receiver for Payne & Keller seeks the following relief:

- In Count I, a declaration that "Third-Party Defendants must fairly compensate the Receiver for the substantial time, effort, and expenses expended in connection with the defense of asbestos suits potentially covered under the Third-Party Defendants' policies and to further declare that this obligation is unlimited and shall continue as long as there are Asbestos Suits pending against Third-Party Plaintiffs." 2d Am. Third-Party Compl. ¶ 181.
- In Count II, a declaration that "all policies, evidence of policies and documents relating to their placement, purchase and underwriting, including, but not limited to, such documents in the possession of Third-Party Defendants are the property of the Receiver and shall be delivered immediately to the Receiver to be maintained in his sole possession for his unrestricted use in carrying out his duties." *Id.* at ¶ 185.
- In Count XI, "declarations, after thorough discovery regarding Rexel's and SKRLA's competing claims to the Payne & Keller insurance program, regarding the nature, extent, and priority (if any) of Rexel's and SKRLA's claims to the Payne & Keller insurance coverage so as to provide the Receiver with guidance and certainty as to how to go about carrying out his duties as the Receiver for Payne & Keller and to provide the Payne & Keller insurers with certainty and guidance as to the delineation of their rights and responsibilities as between Rexel and Payne & Keller in this regard." *Id.* at ¶ 233.
- In the Prayer for Relief, a "declaration as to the interpretation and meaning of the Third-Party Plaintiffs' insurance policies," ostensibly including any insurance policies Travelers issued to Payne & Keller. *Id.*, Prayer for Relief ¶ E.

These are direct claims against Travelers; they are not based on derivative liability and, as a result, they are not actionable under SCRCP 14. *See Miller*, 445 S.E.2d at 447 (explaining that, because third-party claims are dependent on derivative liability, “no right exists to implead a third-party defendant who is *directly* liable to the [third-party] plaintiff.” (citation omitted) (emphasis in original)). Payne & Keller’s third-party claims against Travelers seek broad insurance coverage contract rulings, including a declaration that Travelers “must fairly compensate the Receiver” for time spent defending “asbestos suits” generally (2d Am. Third-Party Compl. ¶ 181), a declaration that “all policies, evidence of policies and documents relating to their placement, purchase and underwriting . . . are the property of the Receiver and shall be delivered immediately to the Receiver (*id.* ¶ 185), and a declaration regarding “Rexel’s competing claims to the Payne & Keller insurance program” (*id.* ¶ 233). These claims are not specific to Childers and are not based on derivative liability.

Again, the instant case is a tort lawsuit related to alleged asbestos exposure. It has nothing to do with insurance policy obligations. Travelers’ insuring relationship with Payne & Keller is not alleged to have caused Childers’ injuries—nor could it. Childers is a stranger to the insurance contracts Travelers issued to Payne & Keller, and Childers has yet to establish that Payne & Keller has any liability to Childers.

“It is hardly necessary to cite cases or authorities to the effect that in a tort action, suit must first be brought against the insured or party claimed to be liable, and that an insurance carrier cannot be joined in such a suit, or suit brought individually against such a company; and in fact, it is universally forbidden that any evidence or reference be made to the fact that the defendant is protected by insurance.” *Ford v. Glens Falls Indem. Co. of Glens Falls, N.Y.*, 80 F. Supp. 347, 348 (E.D.S.C. 1948). Indeed, recognizing the distinct set of facts and issues relevant

to tort claims as opposed to contract claims, courts in South Carolina have long held that liability issues and insurance coverage issues should be litigated separately. *See Am. Fidelity Fire Ins. Co. v. Hood*, 37 F.R.D. 17, 24 (E.D.S.C. 1965) (dismissing tort cross-claims asserted in declaratory judgment action on insurance coverage because such claims did not arise from same transaction or occurrence as declaratory judgment claims); *Ex Parte Builders Mutual Ins. Co.*, 847 S.E.2d 87, 110-111 (S.C. 2020) (affirming trial court's decision to deny insurers' motions to intervene in underlying tort action, and recognizing that a separate declaratory judgment action is the proper forum to resolve insurance coverage issues).

The Payne & Keller insurance contracts themselves likewise reflect the parties' agreement that Payne & Keller cannot implead Travelers in a direct asbestos tort case before Payne & Keller's liability has been determined. For example, in a liability insurance policy Travelers issued to Payne & Keller for the policy period April 1, 1983 to April 1, 1986, the parties agreed that:

No action shall lie against the company [*i.e.*, Travelers] unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, *nor until the amount of the insured's [i.e., Payne & Keller's] obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company. . . .*

No person or organization shall have any right under this policy to join the company as a party to any action against the insured to determine the insured's liability, nor shall the company be impleaded by the insured or his legal representative. . . .

Ex. H, at TRAV_SUB_002207 (policy number 61 AL 473361 SRA) (emphasis added).

In short, Payne & Keller's third-party claims against Travelers improperly ask this Court for contract-related judicial declarations unrelated to Childers' asbestos tort action and not

premised on derivative liability. Travelers, therefore, cannot be impleaded, and the third-party claims against Travelers must be dismissed.

IV. Payne & Keller’s Third-Party Claims Should Be Dismissed Under SCRCP 12(b)(8) Because They Are Duplicative of Payne & Keller’s Claims Against Travelers in the First-Filed Federal Coverage Action

Under SCRCP 12(b)(8), “[a] defendant may seek dismissal of an action . . . when another action is pending between the same parties for the same claim.” *Babb v. Shaw*, No. 2011-UP-440, 2011 WL 11735697, at *1 (S.C. Ct. App. Oct. 11, 2011) (citation and internal question marks omitted). “[T]he principle underlying Rule 12(b)(8) . . . [is] that duplicative litigation should be avoided[.]” *State ex rel. Wilson v. Condon*, 410 S.C. 331, 333 (S.C. 2014) (Toal, C.J.). “Avoiding concurrent litigation in both the courts of this state and the Federal District Court will foster wise judicial administration and conserve judicial resources.” *Id.* (citation omitted); *see also, e.g., Corbett v. City of Myrtle Beach*, 521 S.E.2d 276, 281 (S.C. Ct. App. 1999) (holding dismissal pursuant to SCRCP 12(b)(8) was appropriate where the “claim involves the same parties and is based upon the same facts and circumstances”).

As the following table demonstrates, the allegations and claims in both cases are substantially identical as to Travelers.

Allegations and Relief Sought as to Travelers in the Federal Coverage Action	Allegations and Relief Sought as to Travelers in the Instant Case
¶ 30 Defendant Aetna issued general liability policies to Payne & Keller (“The Aetna Policies”). The Aetna Policies have standard terms and conditions. The Aetna Policies have a duty to defend Payne & Keller against any and all Payne & Keller Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false or fraudulent. The duty to	¶ 149 Defendant Aetna issued general liability policies to Payne & Keller (“The Aetna Policies”). The Aetna Policies have standard terms and conditions. The Aetna Policies have a duty to defend Payne & Keller against any and all Payne & Keller Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false or fraudulent. The duty to

defend is joint, several, indivisible and supplemental. The Aetna Policies require Aetna fully to defend any Payne & Keller Asbestos Suit alleging bodily injury during any Aetna Policy period. The Aetna Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Aetna Policy Period. It is the burden of Aetna to prove any limitation on or exclusion of coverage. Specifically, Aetna issued primary general liability coverage to Payne & Keller for at least the seven policy periods March 1, 1978 – April 1, 1985.	defend is joint, several, indivisible and supplemental. The Aetna Policies require Aetna fully to defend any Payne & Keller Asbestos Suit alleging bodily injury during any Aetna Policy period. The Aetna Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Aetna Policy Period. It is the burden of Aetna to prove any limitation on or exclusion of coverage. Specifically, Aetna issued primary general liability coverage to Payne & Keller for at least the seven policy periods March 1, 1978 – April 1, 1985.
¶ 31 Aetna has failed to fully acknowledge or accept its insuring obligations under the Aetna Policies. An actual and justiciable dispute exists between these parties.	¶ 150 Aetna has failed to fully acknowledge, delineate or accept its insuring obligations under the Aetna Policies between Rexel and Payne & Keller or between SKRLA and Payne & Keller. An actual and justiciable dispute exists between these parties.
Count I – Declaratory Judgment ¶ 62 Plaintiff seeks a judicial declaration that all policies, evidence of policies and documents relating to their placement, purchase and underwriting, and claims handling, including but not limited to such documents in the possession of defendants, are the property of the Receiver and shall be delivered immediately to the Receiver to be maintained in his sole possession.	Count II – Declaratory Judgment ¶ 185 Third-Party Plaintiffs seek a judicial declaration that all policies, evidence of policies and documents relating to their placement, purchase and underwriting, including, but not limited to, such documents in the possession of Third-Party Defendants are the property of the Receiver and shall be delivered immediately to the Receiver to be maintained in his sole possession for his unrestricted use in carrying out his duties.
Count VII – Declaratory Judgment ¶ 94 Plaintiff respectfully requests this Court to declare that defendants must fairly	Count I – Declaratory Judgment ¶ 181 The Receiver respectfully requests this Court to declare that Third-Party Defendants must

compensate plaintiff for the substantial time, effort, and expenses plaintiff expended in connection with the defense of asbestos suits potentially covered under the defendants' policies and to further declare that this obligation is unlimited and shall continue as long as there is any Payne & Keller Asbestos Suit pending.	fairly compensate the Receiver for the substantial time, effort, and expenses expended in connection with the defense of asbestos suits potentially covered under the Third-Party Defendants' policies and to further declare that this obligation is unlimited and shall continue as long as there are Asbestos Suits pending against Third Party Plaintiffs.
Prayer for Relief ¶ D The Receiver seeks a further declaration as to the interpretation and meaning of the Payne & Keller insurance policies: i. The Payne & Keller Insurance Policies cover all Payne & Keller Asbestos Suits that allege any bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of its policy periods; ii. Each Payne & Keller asbestos suit "triggers" at least one Payne & Keller Insurance policy as long as an asbestos plaintiff alleges injury during the period of the policy; iii. Payne & Keller may select the policy or policy years to which to assign or allocate in full each Payne & Keller asbestos loss; iv. In the case of a claimed ambiguity in any Payne & Keller Insurance policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the defendants' policies, and defendants bear the burden of proof as to any such ambiguity; v. Defense costs for the Payne & Keller asbestos suits are supplemental, and the payment of defense costs does not erode or	Prayer for Relief ¶ E As described in detail above, the Receiver seeks a further declaration as to the interpretation and meaning of the Third-Party Plaintiffs' insurance policies: i. The Third-Party Plaintiffs' Insurance Policies cover all Third-Party Plaintiffs' Asbestos Suits that allege any bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of its policy periods; ii. Each Third-Party Plaintiffs' asbestos suit "triggers" at least one Third-Party Plaintiffs' Insurance policy as long as an asbestos plaintiff alleges injury during the period of the policy; iii. Third-Party Plaintiffs may select the policy or policy years to which to assign or allocate in full each asbestos loss; iv. In the case of a claimed ambiguity in any Third Party Plaintiffs' Insurance policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Third Party Defendants' policies, and Third-Party Defendants bear the burden of proof as to any such ambiguity; v. Defense costs for the Third-Party Plaintiffs' asbestos suits are supplemental, and the payment of defense costs does not erode or

impair any limit of liability of any of the Payne & Keller Insurance policies; vi. If any allegation in a Payne & Keller Asbestos Suit is potentially covered under the Payne & Keller Insurance Policies, then the insurer must defend or reimburse in full the costs of defending against all of the allegations and all of the causes of action in the complaint; vii. Each Payne & Keller Insurance Policy is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of the Payne & Keller Asbestos Suits; viii. Each Payne & Keller Insurance Policy must indemnify covered Payne & Keller Asbestos Suits, in full, up to its “per occurrence” limits, regardless of whether a continuing injury spans multiple policy periods; ix. The Payne & Keller Asbestos Suits that allege exposure to asbestos during Payne & Keller’s work are subject only to the “per occurrence” limits of the Payne & Keller Insurance policies; x. Any aggregate limit on coverage in any of the Payne & Keller Insurance Policies is a limitation on coverage, and the insurers therefore have the burden to prove, based on the evidence, that a Payne & Keller Asbestos Suit is subject to the aggregate limit in the Payne & Keller Insurance Policies, if any; and xi. Each insurer and the Guaranty Association has the burden to prove, based on the evidence, that any particular Payne & Keller Asbestos Suit is either a “products” claim or a “completed operations” claim, as those terms are defined in the Payne & Keller Insurance	impair any limit of liability of any of the Third-Party Plaintiffs’ Insurance policies; vi. If any allegation in a Third-Party Plaintiffs’ Asbestos Suit is potentially covered under the Third-Party Plaintiffs’ Insurance Policies, then the responsive insurer must defend or reimburse in full the costs of defending against all of the allegations and all of the causes of action in the complaint; vii. Each Third-Party Plaintiffs’ Insurance Policy is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of the Third-Party Plaintiffs’ Asbestos Suits; viii. Each Third-Party Plaintiffs’ Insurance Policy must indemnify covered Third- Party Plaintiffs’ Asbestos Suits, in full, up to its “per occurrence” limits, regardless of whether a continuing injury spans multiple policy periods; ix. The Third-Party Plaintiffs’ Asbestos Suits that allege exposure to asbestos during Third-Party Plaintiffs’ work are subject only to the “per occurrence” limits of the Third-Party Plaintiffs’ Insurance policies; x. Any aggregate limit on coverage in any of the Third-Party Plaintiffs’ Insurance Policies is a limitation on coverage, and the insurers therefore have the burden to prove, based on the evidence, that a Third-Party Plaintiffs’ Asbestos Suit is subject to the aggregate limit in the Third-Party Plaintiffs’ Insurance Policies, if any; and xi. Each insurer has the burden to prove, based on the evidence, that any particular Third-Party Plaintiffs’ Asbestos Suit is either a “products” claim or a “completed operations” claim, as those terms are defined in the Third-Party Plaintiffs’ Insurance
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Policies, in order for the insurer to disclaim coverage for a Payne & Keller Asbestos Suit against Payne & Keller otherwise alleging injury during the Payne & Keller insurance policy period[.]	Policies, in order for the insurer to disclaim coverage for an Asbestos Suit against a Third Party Plaintiff otherwise alleging injury during the Third-Party Plaintiffs' insurance policy period.
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Payne & Keller's third-party claims against Travelers here must be dismissed under SCRCP 12(b)(8), because they are substantially identical to Payne & Keller's claims against Travelers in the Federal Coverage Action. *See Condon*, 410 S.C. at 333 ("although the parties in this matter and the federal case are not identical, the principle underlying Rule 12(b)(8) of the South Carolina Rules of Civil Procedure that duplicative litigation should be avoided applies to this case.").

Dismissal is particularly appropriate here because the claims in the Federal Coverage Action were filed first. When considering whether to dismiss or stay a parallel action, courts often give deference to a first-filed suit over a second-filed competing action. *See, e.g., VRCompliance LLC v. HomeAway, Inc.*, 715 F.3d 570, 574 (4th Cir. 2013) ("where two parallel suits are pending in state and federal court, 'the first suit should have priority, absent the showing of balance of convenience in favor of the second action.'" (quotation omitted)); *United Prop. & Cas. Ins. v. D'Ambrosio*, No. 9:19-CV-547-BHH, 2020 WL 6434786, at *2-3 (D.S.C. Nov. 2, 2020) (agreeing "with the sound analysis of the State Court" ruling that, "pursuant to the first-to-file principal, the federal action shall have priority over the state action" where the "the parties to the [first-filed] federal action and state action are identical, and the claims are precisely or substantially the same"). The Receiver for Payne & Keller initiated insurance coverage litigation against its insurers many months ago; he only filed his Third-Party Complaint here when the insurance coverage litigation was removed to federal court and became the Federal Coverage Action. Thus, the Third Amended Complaint should be seen for what it is—pure jurisdictional

gamesmanship. This is an additional reason that counsels in favor of dismissing the Receiver's third-party claims here in favor of the first-filed Federal Coverage Action.

CONCLUSION

Accordingly, for the foregoing reasons and others appearing in the record, Travelers respectfully requests that the Court dismiss the third-party claims asserted against Travelers with prejudice and dissolve the Payne & Keller Receivership.

Respectfully submitted,

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August 24, 2022

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

LENORA CHILDERS, Individually and as
Personal Representative of the Estate of LEWIS
C. CHILDERS,

Plaintiff,

v.

Case No. 2021-CP-40-03484

Davis Mechanical Contractors, Inc., Flame
Refractories, Inc., General Boiler Casing
Company, Inc., HEFCO, Inc., J.R. Deans
Company, Inc., Payne & Keller Company, SFB,
Incorporated, Stafford Insulation Company,
Standard Insulation Company of N.C., Inc.,
Systra Engineering, Inc., United Construction
Co. of Rome, Inc., Wind Up, Ltd., Individually
and as Successor-in-Interest to Pipe & Boiler
Insulation, Inc. f/k/a Carolina Industrial
Insulating Co.,

Defendants.

Flame Refractories, Inc., United Construction
Co. of Rome, Inc., Wind Up, Ltd., Individually
and as Successor-in-Interest to Pipe & Boiler
Insulation, Inc. f/k/a Carolina Industrial
Insulating Co., and Payne & Keller Company
By and Through Their Duly Appointed
Receiver Peter D. Protopapas,

Third-Party Plaintiffs,

v.

Zurich American Insurance Company
(Individually and as Successor to Northern
Insurance Company of New York, Maryland
American General Insurance Company, and
Maryland Casualty Company); Allstate
Insurance Company; John Tighe; Sean Antony
Beatty; Dennis William Cahill; Catherine Ann
Carlino; Andre Lefebvre; David Dean

**NOTICE OF MOTION AND JOINDER
TO THIRD-PARTY DEFENDANT
TRAVELERS CASUALTY AND
SURETY COMPANY'S MOTION TO
DISMISS THIRD-PARTY CLAIMS
AND DISSOLVE THE PAYNE &
KELLER RECEIVERSHIP**



Shumway; Gil Chandler, Michael Davenport; Linda Young Pettigrew; Gwen Wallace Fuller; Daniel Robert Keddie; Julie Ann Fortune; Michael John Crall; James Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.; Arrowpoint Capital Corp.; Admiral Insurance Company; Continental Insurance Company (Individually and as Successor in interest to Harbor Insurance Company); Hartford Accident and Indemnity Company, Travelers Casualty & Surety Company f/k/a/ Aetna Casualty & Surety Company, National Union Fire Insurance Company of Pittsburgh, PA, Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc., Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in Interest to Stonewall Surplus Lines Insurance Company, Lexington Insurance Company, First State Insurance Company, Birmingham Fire Insurance Company, Certain Underwriters at Lloyd's of London and various London Market Companies, South Carolina Property and Casualty Insurance Guaranty Association, R.L. Jarrett (Underwriting) Agency, Inc., U.S. Risk, LLC, Rexel USA, Inc., Compass Risk Services, LLC, SKRLA, LLC, Century Indemnity Company, in its own capacity and as successor to CCI Insurance Company, as successor to Insurance Company of North America, United States Fire Insurance Company, and Fireman's Fund Insurance Company,

Third-Party Defendants.

TO: BRIAN BARNWELL, ESQUIRE, ATTORNEY FOR THE THIRD-PARTY PLAINTIFF PAYNE & KELLER COMPANY, BY AND THROUGH PETER D. PROTOPAPAS, AND TO THE THIRD-PARTY PLAINTIFF ABOVE-NAMED:

Defendants AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall

Insurance Company; The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company; and Certain as yet Unnamed Underwriters at Lloyd's, London and Certain as yet Unnamed London Market Companies (hereinafter collectively referred to as "Joining Defendants"), hereby move for dismissal pursuant to Rule 12(b)(1) and move to dissolve the Payne & Keller Receivership.

On August 24, 2022, Third-Party Defendant Travelers Casualty and Surety Company (hereinafter "Travelers") filed a Motion to Dismiss Third-Party Claims and Dissolve the Payne & Keller Receivership (hereinafter "Travelers' Motion"). In the interest of judicial economy and to avoid unnecessary duplication of briefing, the Joining Defendants join in and adopt by reference the factual recitations and legal authorities in support of certain arguments raised in Travelers' Motion.¹ Specifically, the Joining Defendants hereby join in and adopt by reference the issues and arguments raised in Argument Section I of Travelers' Motion (included on pages 6-14) as well as the factual recitations supporting those arguments.

MURPHY & GRANTLAND, P.A.

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¹ The Joining Defendants previously raised certain arguments in Motions to Dismiss and/or Strike or in the Alternative to Sever and/or Stay. In an Order entered on August 9, 2022, the Court denied those motions and held that the arguments raised in those motions were preserved as to the Second Amended Third-Party Complaint. This Motion and Joinder does not raise those issues which have already been addressed and preserved.

Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company; and Certain as yet Unnamed Underwriters at Lloyd's, London and Certain as yet Unnamed London Market Companies.

September 19, 2022
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

LENORA CHILDERS, Individually and as
Personal Representative of the Estate of LEWIS
C. CHILDERS,

Plaintiff,

v.

Case No. 2021-CP-40-03484

Davis Mechanical Contractors, Inc., Flame
Refractories, Inc., General Boiler Casing
Company, Inc., HEFCO, Inc., J.R. Deans
Company, Inc., Payne & Keller Company, SFB,
Incorporated, Stafford Insulation Company,
Standard Insulation Company of N.C., Inc.,
Systra Engineering, Inc., United Construction
Co. of Rome, Inc., Wind Up, Ltd., Individually
and as Successor-in-Interest to Pipe & Boiler
Insulation, Inc. f/k/a Carolina Industrial
Insulating Co.,

Defendants.

Flame Refractories, Inc., United Construction
Co. of Rome, Inc., Wind Up, Ltd., Individually
and as Successor-in-Interest to Pipe & Boiler
Insulation, Inc. f/k/a Carolina Industrial
Insulating Co., and Payne & Keller Company
By and Through Their Duly Appointed
Receiver Peter D. Protopapas,

Third-Party Plaintiffs,

v.

Zurich American Insurance Company
(Individually and as Successor to Northern
Insurance Company of New York, Maryland
American General Insurance Company, and
Maryland Casualty Company); Allstate
Insurance Company; John Tighe; Sean Antony
Beatty; Dennis William Cahill; Catherine Ann
Carlino; Andre Lefebvre; David Dean

**REPLY AND JOINDER TO THIRD-
PARTY DEFENDANT TRAVELERS
CASUALTY AND SURETY
COMPANY'S REPLY IN SUPPORT OF
MOTION TO DISMISS THIRD-PARTY
CLAIMS AND DISSOLVE THE PAYNE
& KELLER RECEIVERSHIP**



Shumway; Gil Chandler, Michael Davenport; Linda Young Pettigrew; Gwen Wallace Fuller; Daniel Robert Keddle; Julie Ann Fortune; Michael John Crall; James Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.; Arrowpoint Capital Corp.; Admiral Insurance Company; Continental Insurance Company (Individually and as Successor in interest to Harbor Insurance Company); Hartford Accident and Indemnity Company, Travelers Casualty & Surety Company f/k/a/ Aetna Casualty & Surety Company, National Union Fire Insurance Company of Pittsburgh, PA, Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc., Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in Interest to Stonewall Surplus Lines Insurance Company, Lexington Insurance Company, First State Insurance Company, Birmingham Fire Insurance Company, Certain Underwriters at Lloyd's of London and various London Market Companies, South Carolina Property and Casualty Insurance Guaranty Association, R.L. Jarrett (Underwriting) Agency, Inc., U.S. Risk, LLC, Rexel USA, Inc., Compass Risk Services, LLC, SKRLA, LLC, Century Indemnity Company, in its own capacity and as successor to CCI Insurance Company, as successor to Insurance Company of North America, United States Fire Insurance Company, and Fireman's Fund Insurance Company,

Third-Party Defendants.

TO: BRIAN BARNWELL, ESQUIRE, ATTORNEY FOR THE THIRD-PARTY PLAINTIFF PAYNE & KELLER COMPANY, BY AND THROUGH PETER D. PROTOPAPAS, AND TO THE THIRD-PARTY PLAINTIFF ABOVE-NAMED:

Defendants AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall

Insurance Company; The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company; and Certain as yet Unnamed Underwriters at Lloyd's, London and Certain as yet Unnamed London Market Companies (hereinafter collectively referred to as "Joining Defendants"), respectfully submit this Reply in further support of the Motion to Dismiss and Motion to Dissolve the Payne & Keller Receivership.

On January 25, 2013, Third-Party Defendant Travelers Casualty and Surety Company (hereinafter "Travelers") filed a Reply in Support of its Motion to Dismiss Third-Party Claims and Dissolve the Payne & Keller Receivership (hereinafter "Travelers' Reply"). In the interest of judicial economy and to avoid unnecessary duplication of briefing, the Joining Defendants join in and adopt by reference the factual recitations and legal authorities in support of certain arguments raised in Travelers' Reply.¹ Specifically, the Joining Defendants hereby join in and adopt by reference the issues and arguments raised in Argument Section II.A. through II.C. of Travelers' Reply (included on pages 5-15) as well as the factual recitations and summaries supporting those arguments.

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¹ The Joining Defendants previously raised certain arguments in Motions to Dismiss and/or Strike or in the Alternative to Sever and/or Stay. In an Order entered on August 9, 2022, the Court denied those motions and held that the arguments raised in those motions were preserved as to the Second Amended Third-Party Complaint. This Motion and Joinder does not raise those issues which have already been addressed and preserved.

Fire Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company; and Certain as yet Unnamed Underwriters at Lloyd's, London and Certain as yet Unnamed London Market Companies.

January 26, 2023
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

LENORA CHILDERS, Individually and as
Personal Representative of the Estate of
LEWIS C. CHILDERS,

Plaintiff,

Case No. 2021-CP-40-03484

v.

Davis Mechanical Contractors, Inc., et al.,

Defendants.

Flame Refractories, Inc.; United Construction
Co. of Rome, Inc.; Wind Up, Ltd.,
Individually and as Successor-in-Interest to
Pipe & Boiler Insulation, Inc. f/k/a Carolina
Industrial Insulating Co.; and Payne & Keller
Company, By and Through Their Duly
Appointed Receiver, Peter D. Protopapas,

Third-Party Plaintiffs,

v.

Zurich American Insurance Company, et al.,

Third-Party Defendants.

**ORDER DENYING THIRD-PARTY
DEFENDANT TRAVELERS CASUALTY
AND SURETY COMPANY'S MOTION
TO DISMISS THIRD-PARTY CLAIMS
AND DISSOLVE THE PAYNE &
KELLER RECEIVERSHIP**

This matter comes before the Court on Third-Party Defendant Travelers Casualty and Surety Company's ("Travelers") August 24, 2022 Motion to Dismiss Third-Party Claims and Dissolve the Payne & Keller Receivership.¹ Payne & Keller Company, by and through its duly

¹ On September 19, 2022, Defendants AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company; and Certain as yet

EXHIBIT

H

appointed receiver, Peter D. Protopapas (“the Receiver”), filed a Response in Opposition to the Motion on January 13, 2023, and Travelers filed a Reply in Support of the Motion on January 25, 2023.² The Court heard oral arguments on the Motion during a January 27, 2023 hearing. After careful consideration of the parties’ filings and arguments, and for the reasons stated below, Travelers’ Motion is **DENIED**.

BACKGROUND

On August 27, 2021, this Court entered an Order appointing Peter D. Protopapas as the Receiver for Defendant Payne & Keller Company on Plaintiff’s Motion to Appoint a Receiver. The Court’s Order vested the Receiver “with the power and authority [to] fully administer all assets of Payne & Keller” and, among other things, specifically instructed “the Receiver to investigate the existence of all insurance coverages potentially available to [Payne & Keller].” Thereafter, the Receiver discovered that Payne & Keller Company had conducted business under various corporate names before its dissolution. The Court accordingly granted the Receiver’s Motion to Clarify Order Appointing a Receiver for Payne & Keller Company on September 30, 2021, and entered an Order providing that “all of the Receiver’s duties and protections [in the August 7, 2021 Appointment Order] . . . extend[] to all of the P&K Entities and their predecessors, successors, affiliates, parents, assigns, and subsidiaries that may be discovered in the future.”

Pursuant to that authority, the Receiver initiated an insurance coverage action for Payne & Keller by way of a third-party action against multiple carriers in this case on February 23, 2022. Travelers appeared and filed a motion to dismiss the Receiver’s third-party claims and dissolve the Payne & Keller Receivership on August 24, 2022. After the Receiver served discovery requests

Unnamed Underwriters at Lloyd’s, London and Certain as yet Unnamed London Market Companies (the “Joining Defendants”) filed a Joinder to Travelers’ Motion.

² On January 26, 2023, the Joining Defendants filed a Joinder to Travelers’ Reply.

on Travelers, on November 16, 2022, Travelers moved for a protective order and again moved the Court for an order dissolving the Payne & Keller Receivership and dismissing Travelers from this case.

ANALYSIS

A. Standing

Travelers argues that the Receiver's third-party claims should be dismissed because the Receiver lacks standing to bring them. Specifically, Travelers first contends that under section 15-65-10 of the South Carolina Code, the Receiver only has authority over Payne & Keller property located within the State of South Carolina, and (according to Travelers) Payne & Keller's insurance policies are not property within this State. *See generally* § 15-65-10 ("A receiver may be appointed by a judge of the circuit court, either in or out of court . . . (4) When a corporation has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights, and, in like cases, of the property within this State of foreign corporations . . ."). Even assuming Travelers' interpretation of section 15-65-10 is correct, the Court finds the Receiver has alleged and presented sufficient evidence to demonstrate that Travelers issued insurance policies insuring Payne & Keller risks nationwide, including within South Carolina. Accordingly, the Receiver was properly appointed under section 15-65-10 and has standing to assert the third-party claims raised in this action. *See* S.C. Code Ann. § 38-61-10 ("All contracts of insurance on property, lives, or interests in this State are considered to be made in the State . . . and are subject to the laws of this State."); *Sangamo Weston v. Nat'l Sur. Corp.*, 307 S.C. 143, 149, 414 S.E.2d 127, 130 (1992) ("[I]t is immaterial where the contract was entered into. Further there is no requirement that the policyholders or insurers be citizens of South Carolina. What is solely relevant is where the property, lives, or interests insured are located.").

Travelers cites *Howard v. Allen*, 254 S.C. 455, 176 S.E.2d 127 (1970) for the proposition that insurance policies are not “property.” This case does not support Travelers argument. In *Howard v. Allen*, a personal injury plaintiff sought to attach, as a debt, the defense and indemnity obligations of an insurance policy covering the defendant tortfeasor. *Howard* does not speak to whether the Travelers insurance policies protective of Payne & Keller are property within South Carolina for the purposes of the receivership statute.

Travelers also argues that the Receiver lacks standing to bring the third-party claims on behalf of Payne & Keller because, as a Texas corporation that dissolved in 1986, Payne & Keller is no longer able to sue or be sued under Texas law. Travelers relies on Section 11.359(a) of the Texas Business Organizations Code, which provides that a “claim by or against a terminated filing entity is extinguished unless an action or proceeding is brought on the claim not later than the third anniversary of the date of termination of the entity.” However, that statute further provides, “Notwithstanding Subsections (a) and (b), the extinguishment of an existing claim with respect to a terminated filing entity as provided by this section is nullified if . . . the filing entity’s termination is revoked with retroactive effect under Section 11.153” § 11.359(c). And section 11.153 of the Texas Business Organizations Code allows a court to “order the revocation of termination of an entity’s existence that was terminated as a result of actual or constructive fraud.” § 11.153(a); *see also* § 11.153(b) (“If the termination of an entity’s existence is revoked under Subsection (a): (1) the revocation relates back to the effective date of the termination and takes effect as of that date; and (2) the entity’s status as an entity continues in effect as if the termination of the entity’s existence had never occurred.”).

Here, the Receiver has presented sufficient evidence at the pleading stage to support a claim that Payne and Keller’s 1986 dissolution was the result of, at least, constructive fraud. *See Resp.*

in Opp'n, 8–13. Specifically, the Receiver asserts that Payne & Keller “terminated its corporate existence to avoid liability for both current and future toxic tort, silica, and asbestos personal liability claims, and Payne & Keller was keenly aware of those claims when the decision to dissolve Payne & Keller was made.” *Id.* at 9. In support of this contention, the Receiver submitted evidence that, prior to its dissolution: Payne & Keller was exposed to significant potential liability resulting from its construction work at a time when the use of asbestos-containing products was prevalent, its insurers began to exclude coverage for asbestos-related claims, and it contracted to indemnify companies with which it did business for personal injury claims arising out of its work. *Id.* at 9–10. Further evidence indicates that Payne & Keller began the dissolution process in response to demands for indemnification by an oil company in bankruptcy concerning over a thousand personal injury claims arising out of exposure to dioxin, and Payne and Keller dissolved without taking the steps necessary to ensure those claims, and others it reasonably expected to face absent dissolution, would be paid. *Id.* at 11–12.

Travelers has not disputed the Receiver’s evidence or submitted any countervailing evidence regarding the circumstances surrounding its dissolution. Accordingly, this Court finds the Receiver has made a prima facie showing that Payne & Keller “was terminated as a result of actual or constructive fraud,” § 11.153(a), and dismissal on the basis of the termination is unwarranted. *See Latham v. Burgher*, 320 S.W.3d 602, 610 (Tex. App. 2010) (ruling a company’s dissolution, conducted shortly after receiving notice of an intended lawsuit against it and without setting aside funds to address the liability of the lawsuit, could support a finding of fraud). This Court does not, however, find that fraud has been conclusively proven, nor does the Court order the revocation of Payne & Keller’s termination at this time. Such a determination will be made after the parties have had the opportunity to explore this issue through the discovery process.

Relying on *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126 (Tex. 2010), Travelers argues that applying section 11.153 to Payne & Keller’s dissolution would violate Article I, Section 16 of the Texas Constitution. However, as the *Robinson* court explained, “No bright-line test for unconstitutional retroactivity is possible.” *Id.* at 145. Instead, the court outlined a three-factor analysis that must be conducted. *Id.* Moreover, Travelers’ retroactivity argument as to section 11.153 undercuts its reliance on section 11.359, which was also enacted well after Payne & Keller’s dissolution.³ The Court declines Travelers’ invitation to retroactively apply section 11.359 in Travelers’ favor to dismiss the Receiver’s third-party claims while simultaneously holding the retroactive application of section 11.153 would violate the Texas Constitution, especially given that the Texas legislature added subsection (b) to section 11.153 in response to the Fifth Circuit’s determination that revoking an entity’s dissolution would not revive claims extinguished by section 11.359. *See Boudreaux v. C J R Framing*, 744 F. App’x 208, 211 (5th Cir. 2018).

B. Personal Jurisdiction

Travelers argues that the Receiver’s claims should also be dismissed under Rule 12(b)(2), SCRCF, because this Court lacks personal jurisdiction over Travelers in this case. The Court disagrees and finds the Receiver has made a prima facie showing that personal jurisdiction over Travelers exists. *See Brown v. Inv. Mgmt. & Research*, 323 S.C. 395, 399, 475 S.E.2d 754, 756 (1996) (stating when a defendant seeks dismissal for lack of personal jurisdiction under Rule 12(b)(2), “the plaintiff has the burden of showing jurisdiction is properly asserted; however, the law is well-settled that at the pre-trial stage only a prima facie showing is required”). In addition

³ The Court further notes that a predecessor to the Texas Business Organizations Code—the Texas Business Corporation Act—contained a fraudulent termination provision similar to section 11.153.

to relevant allegations in the Second Amended Complaint, the Receiver has also presented evidence that Travelers contracted with Payne & Keller to insure risks in all states, including South Carolina, and that Payne & Keller was registered to do business in South Carolina and had performed work in South Carolina when Travelers issued its policies. *See* Resp. in Opp'n, at 15–17 & Ex. M–O. Travelers' conduct in issuing such policies to Payne & Keller supports a finding of personal jurisdiction and precludes dismissal on this basis. *See* S.C. Code Ann. § 36-2-803(A) (“A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person’s . . . contracting to insure any person, property, or risk located within this State at the time of contracting”); *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (“It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State.”); *Ross v. Am. Income Life Ins. Co.*, 232 S.C. 433, 438-39, 102 S.E.2d 743, 745 (1958) (holding a single insurance policy mailed to an individual in this state was a sufficient contact to warrant the exercise of jurisdiction without violating Due Process).

C. Rule 14

Rule 14(a), SCRCP, allows a defendant to bring third-party claims against “a person not a party to the action who is or may be liable to him for all or part of the plaintiff’s claim against him.” Here, the Receiver has asserted claims against Travelers, which he alleges issued insurance policies to Payne & Keller that may provide coverage for, and therefore trigger indemnity obligations in relation to, the claims brought by the plaintiff in this action. Accordingly, the third-party claims are appropriate under Rule 14 and Travelers’ arguments for dismissal on this basis are rejected.

D. Rule 12(b)(8)

Finally, Travelers argues that the Receiver's third-party claims should be dismissed under Rule 12(b)(8), SCRCF, because they are duplicative of claims brought against it in *Protopapas as Receiver for Payne & Keller Co. v. Am. Int'l Grp. et al.*, No. 3:21-cv-04086-JMC (D.S.C.). However, as the courts of this state have long observed, "The general rule is that an action may be pleaded in abatement of a second suit only when between the same parties and *in the same jurisdiction* and with the same object." *Poston v. Home Ins. Co. of N.Y.*, 191 S.C. 314, 317–18, 4 S.E.2d 261, 262 (1939) (emphasis added). Because no separate action is pending between the Receiver and Travelers for the same claims in South Carolina state court, Rule 12(b)(8) does not provide a basis for dismissing the Receiver's third-party claims here. *See Hill v. Hill*, 51 S.C. 134, 137, 28 S.E. 309, 310 (1897) ("[I]t is a well established doctrine that the pendency of another suit in a foreign jurisdiction cannot be pleaded in the domestic forum."); *see, e.g., Hauge v. Curran*, No. 2011-UP-264, 2011 S.C. App. Unpub. LEXIS 300, at *4 (Ct. App. June 7, 2011) (reversing the trial court's dismissal under Rule 12(b)(8) because the two similar actions were in different jurisdictions).

CONCLUSION

Based on the foregoing, as well as the arguments presented by the Receiver in his filings and at the January 27 hearing, **IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT** Travelers' Motion to Dismiss Third-Party Claims and Dissolve the Payne & Keller Receivership is hereby **DENIED**.⁴ Travelers' November 16, 2022 Motion for Protective Order and to Dissolve Receivership, which relies solely on the standing arguments rejected above, is also **DENIED**.

⁴ The Joining Defendants' motion is also denied.

IT IS SO ORDERED.

[JUDGE'S E-SIGNATURE PAGE FOLLOWS]



Richland Common Pleas

Case Caption: Lenora Childers , plaintiff, et al vs Davis Mechanical Contractors ,
defendant, et al
Case Number: 2021CP4003484
Type: Order/Other

So Ordered

Jean H. Toal