

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

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 its 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 f/k/a Stonewall Insurance Company, individually and as successor in interest to Stonewall Surplus Lines Insurance Company; Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company; and Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company are the Appellants.

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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

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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

Electronically signed on 2021-08-27 08:31:22 page 4 of 4

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

Peter D. Protopapas, as the Receiver for Payne
& Keller Company,

Plaintiff,

v.

Zurich American Insurance Company;
Travelers Casualty & Surety Company,
formerly known as Aetna Casualty & Surety
Company; Continental Insurance Company;
National Union Fire Insurance Company of
Pittsburgh, PA; Medmarc Casualty Insurance
Company; Berkshire Hathaway Specialty
Insurance Company, formerly known as
Stonewall 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.; and U.S.
Risk, LLC,

Defendants

Civil Action No. 3:21-CV-04086-JMC

**FIRST AMENDED COMPLAINT FOR
DECLARATORY JUDGMENT AND
BREACH OF CONTRACT**

COMES NOW Peter D. Protopapas, as the Receiver for Payne & Keller Company, (“plaintiff” or “Payne & Keller”), and files this First Amended Complaint¹ complaining of the defendants Zurich American Insurance Company, individually and as successor in interest to Maryland American General Insurance Company and Maryland Casualty Company (“Zurich”); Travelers Casualty & Surety Company, formerly known as Aetna Casualty & Surety Company

¹ Leave to file this First Amended Complaint is not required pursuant to Rule 15(a)(1)(B) of the Federal Rules of Civil Procedure. Payne & Keller files this amendment primarily to correct the parties’ names and does not waive any rights in doing so, including the right to seek remand.

(“Aetna”); Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company (“Continental”); National Union Fire Insurance Company of Pittsburgh, PA (“National Union”); Medmarc Casualty Insurance Company, individually and as successor in interest to Dependable Insurance Company, Inc. (“Dependable”); Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company, individually and as successor in interest to Stonewall Surplus Lines Insurance Company (“Stonewall”); Lexington Insurance Company (“Lexington”); First State Insurance Company (“First State” or “Hartford”); Birmingham Fire Insurance Company (“Birmingham Fire”); Certain Underwriters at Lloyd’s of London and various London Market Companies; South Carolina Property and Casualty Insurance Guaranty Association (the “Guaranty Association”); R.L. Jarrett (Underwriting) Agency, Inc. (“R.L. Jarrett”); and U.S. Risk, LLC (“U.S. Risk”), who through undersigned counsel respectfully shows unto the Court as follows:

PARTIES

1. Payne & Keller Company, appearing by and through its duly appointed Receiver, Peter D. Protopapas, who maintains his principal place of business in Richland County, South Carolina, brings this action. 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. A, Receiver Order, 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 failure to act of Payne & Keller's insurance carriers."); *see also* Ex. B, Order Granting Motion to Clarify.)

2. Plaintiff is informed and believes that defendant Zurich American Insurance Company, sued individually and as successor in interest to Maryland American General Insurance Company and Maryland Casualty Company ("Zurich") is a corporation organized under the laws of the State of New York, with its principal place of business in the state of Illinois.

3. Plaintiff is informed and believes that defendant Travelers Casualty & Surety Company, formerly known as Aetna Casualty & Surety Company ("Aetna"), is a corporation organized under the laws of the State of Connecticut, with its principal place of business located in the state of Connecticut.

4. Plaintiff is informed and believes that defendant Continental Insurance Company, sued individually and as successor in interest to Harbor Insurance Company ("Continental"), is a corporation organized under the laws of the State of Illinois, with its principal place of business located in the Commonwealth of Pennsylvania.

5. Plaintiff is informed and believes that defendant National Union Fire Insurance Company of Pittsburgh, PA ("National Union") is a corporation organized under the laws of the Commonwealth of Pennsylvania, with its principal place of business located in the State of New York.

6. Plaintiff is informed and believes that defendant Medmarc Casualty Insurance Company, individually and as successor in interest to Dependable Insurance Company, Inc. ("Dependable") is a corporation organized under the laws of the State of Vermont, with its principal place of business located in the state of Vermont.

7. Plaintiff is informed and believes that defendant Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company, sued individually and as successor in interest to Stonewall Surplus Lines Insurance Company (“Stonewall”) is a corporation organized under the laws of the State of Nebraska, with its principal place of business located in the State of Nebraska.

8. Plaintiff is informed and believes that defendant Lexington Insurance Company (“Lexington”) is a corporation organized under the laws of the State of Maryland, with its principal place of business in the Commonwealth of Massachusetts.

9. 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.

10. 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.

11. 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.

12. Plaintiff is informed and believes that the Guaranty Association is an association formed under the laws of South Carolina.

13. 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.

14. 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.

15. Plaintiff is informed and believes that one or more additional insurance companies issued policies of insurance to plaintiff that are responsive to the losses described herein (“Additional Defendants”). Such Additional Defendants may include one or more insurance companies managed by organizations located in New Hampshire, Massachusetts, or other jurisdictions and may include one or more insurance companies for which the Guaranty Association has responsibility. When the identities of these Additional Defendants become known to plaintiff, this Complaint will be amended *nunc pro tunc* to state the true identity of such Additional Defendants.

JURISDICTION

16. Plaintiff filed this action in the Court of Common Pleas for Richland County, South Carolina, and maintains that jurisdiction is proper in that court.

17. Plaintiff contends that the United States District Court for the District of South Carolina lacks subject matter jurisdiction and is filing a Motion to Remand to that effect.

18. The Court of Common Pleas for Richland County, South Carolina, 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 Payne & Keller.

19. Payne & Keller is a defendant in multiple asbestos suits pending in South Carolina, including the following: 2021-CP-40-04877; 2021-CP-40-5068; 2021-CP-40-03484; and 21-CP-40-06190.

20. In those suits, it is alleged that Payne & Keller was authorized to do business in South Carolina and that it regularly conducted business in the State of South Carolina.

21. The South Carolina Secretary of State's website shows that plaintiff was authorized to conduct business in South Carolina from at least 1967 to 1986.

22. It is further alleged that based on Payne & Keller's conduct in South Carolina, South Carolina citizens suffered permanent injuries while working in South Carolina, including but not limited to, mesothelioma and other lung damage.

VENUE

23. Plaintiff maintains that venue is proper in the Court of Common Pleas for Richland County, South Carolina, and that it is improper in the United States District Court for the District of South Carolina because the Court lacks subject matter jurisdiction over the case. However, if the Court finds that subject matter jurisdiction exists, venue is proper in this district and division because they encompass the venue where this case was originally filed.

24. Venue is proper in the Court of Common Pleas for Richland County, South Carolina, as it is the Receiver Court with cases pending and anticipated new filings in that 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

25. 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 those referenced above ("Payne & Keller Asbestos Suits").

1. The 1965 to 1973 Policies

26. 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 within thirty (30) days after this action was filed, entered 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.

27. The Guaranty Association and other pertinent defendant insurers have failed to fully acknowledge or accept their insuring obligations under the 1965 to 1973 Policies. An actual and justiciable dispute exists between and among these parties.

2. The Zurich Policies

28. Defendant Zurich, individually and as successor in interest to Maryland American General Insurance 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 five policy periods March 1, 1973 – March 1, 1978, and may have issued such policies during earlier policy periods.

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

3. *The Aetna Policies*

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 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.

4. *The Continental Policies*

32. 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.

33. Continental, by and through Resolute Management and NICO, has failed to fully acknowledge or accept its insuring obligations under the Continental Policies. An actual and justiciable dispute exists between these parties.

5. The National Union Policies

34. 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.

35. National Union, by and through Resolute Management and NICO, has failed to fully acknowledge or accept its insuring obligations under the National Union Policies. An actual and justiciable dispute exists between these parties.

6. *The Dependable Policy*

36. 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.

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

7. *The Stonewall Policies*

38. 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.

39. Stonewall, by and through Resolute Management and NICO, has failed to fully acknowledge or accept its insuring obligations under the Stonewall Policies. An actual and justiciable dispute exists between these parties.

8. *The Lexington Policy*

40. 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.

41. Lexington, by and through Resolute Management and NICO, has failed to fully acknowledge or accept its insuring obligations under the Lexington Policy. An actual and justiciable dispute exists between these parties.

9. *The First State Policies*

42. 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.

43. First State has failed to fully acknowledge or accept its insuring obligations under the Hartford Policies. An actual and justiciable dispute exists between these parties.

10. The Birmingham Fire Policies

44. 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.

45. Birmingham Fire, by and through Resolute Management and NICO, has failed to fully acknowledge or accept its insuring obligations under the Birmingham Fire Policies. An actual and justiciable dispute exists between these parties.

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

46. 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.

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

12. The Reliance Policies and the Guaranty Association

48. Reliance Insurance Company ("Reliance") issued general liability policies to Payne & Keller ("The Reliance Policies"). The Reliance Policies have standard terms and conditions. It is the burden of any insurer, or an entity standing in the place of the insurer, to prove any limitation on or exclusion of coverage. Reliance issued primary general liability coverage to Payne & Keller for at least the three policy periods March 1, 1965—March 1, 1968.

49. On information and belief, Reliance Insurance Company was liquidated on October 3, 2001.

50. The Guaranty Association was statutorily created to protect the policy holders of insolvent insurance companies like Reliance. 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).

13. The Highlands Policies and the Guaranty Association

51. 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).

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

53. 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).

54. On March 16, 2021, plaintiff was appointed Receiver of Payne & Keller, giving him the power and authority fully to 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. Since appointment, the Receiver has expended substantial time and incurred expenses to identify potential assets and responsive policies and to defend Payne & Keller Asbestos Suits in fulfillment of his responsibilities as Receiver. The Receiver will continue to expend substantial time and incur expenses in connection with Payne & Keller Asbestos Suits.

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

55. R.L. Jarrett served as an insurance broker to Payne & Keller.

56. 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

57. Plaintiff incorporates by reference paragraphs 1 through 56 as if repeated verbatim herein.

58. 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.

59. Upon information and belief, Payne & Keller purchased insurance policies from defendants Zurich, Aetna, National Union, Continental, Lexington, First State, Dependable, Birmingham Fire, Lloyd's Underwriters and London Market Insurers, Stonewall, Highlands and Reliance (the "Insurers").

60. These policies are the property of Payne & Keller.

61. The Receiver has requested these policies and related documents, but the Insurers have failed to provide them.

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.

SECOND CAUSE OF ACTION
DECLARATORY JUDGMENT

63. Plaintiff incorporates by reference paragraphs 1 through 62 as if repeated verbatim herein.

64. The Receiver seeks a declaration and order that defendants Zurich, Aetna and the Guaranty Association issued or are responsible for primary general liability coverage to Payne

& Keller, subject to the per occurrence and aggregate limits of those policies, and that defendants have an unlimited supplemental duty to defend or to pay or reimburse defense costs.

65. The Receiver seeks a further declaration and order that defendants National Union, Continental, Lexington, First State, Dependable, Birmingham Fire, Lloyd's Underwriters and London Market Insurers, and Stonewall issued umbrella coverage to Payne & Keller that "drops down" to provide "first dollar" coverage in the event there is no primary coverage, or in the event such coverage is unavailable or not responding, subject to the per occurrence and aggregate limits of those policies.

66. The Receiver seeks a further declaration as to the interpretation and meaning of the insurance policies that defendants Zurich, Aetna, National Union, Continental, Lexington, First State, Dependable, Birmingham Fire, Lloyd's Underwriters and London Market Insurers, Stonewall and the Guaranty Association, on behalf of Reliance and Highlands, issued to Payne & Keller (the "Payne & Keller Insurance Policies"), as follows:

- a. The Payne & Keller Insurance Policies cover all Payne & Keller 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 Payne & Keller asbestos suit "triggers" the Payne & Keller Insurance Policies as long as an asbestos plaintiff alleges injury during the period of the policy;
- c. Payne & Keller may select the policy or policy years to which to assign or allocate in full each Payne & Keller Asbestos Suit-related loss;

- d. In the case of any claimed ambiguity in any Payne & Keller Insurance policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Payne & Keller Insurance Policies;
- e. Defense costs for the Payne & Keller 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;
- f. If any allegation or cause of action in a Payne & Keller Asbestos Suit is potentially covered under the Payne & Keller 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 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 Payne & Keller Asbestos Suits;
- h. Each Payne & Keller Insurance Policy must indemnify covered Payne & Keller Asbestos Suits, in full, up to its “per occurrence” limit, regardless of whether a continuing injury spans multiple policy periods;
- i. 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;
- j. Any aggregate limit on coverage in any of the Payne & Keller Insurance policies is a limitation on coverage, and therefore each insurer has 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

- k. Each insurer 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 Policies, in order for the insurer to disclaim coverage for a Payne & Keller Asbestos Suit against Payne & Keller otherwise alleging injury during any Payne & Keller Insurance policy period.

67. Actual and justiciable controversies therefore exist between Payne & Keller and defendants concerning their obligations under the Payne & Keller Insurance Policies.

THIRD CAUSE OF ACTION
DECLARATORY JUDGMENT

68. Plaintiff incorporates by reference paragraphs 1 through 67 as if repeated verbatim herein.

69. At the time that Reliance was liquidated on October 3, 2001, the Guaranty Association became statutorily required to take on the liabilities of Reliance. At the time the liquidation order was executed for Highlands on October 29, 2021, the Guaranty Association became statutorily required to take on the liabilities of Highlands.

70. Plaintiff seeks the same declarations sought in paragraphs 62 and 66 of this complaint against the Guaranty Association under the Reliance and the Highlands policies, and incorporates by reference paragraphs 62 and 66 as though fully set forth against the Guaranty Association under the Reliance and the Highlands policies.

71. Plaintiff seeks a declaration that the Guaranty Association is responsible for any and all amounts Reliance and Highlands owe to Payne & Keller under the terms of the Reliance and Highlands insurance policies.

FOURTH CAUSE OF ACTION
BREACH OF CONTRACT

72. Plaintiff incorporates by reference paragraphs 1 through 71 as if repeated verbatim herein.

73. Payne & Keller was insured by one or more policies issued by defendants Zurich, Aetna, the other insurers with defense obligations, and the policies for which the Guaranty Association is responsible.

74. Payne & Keller provided timely notice to defendants of the Payne & Keller Asbestos Suits.

75. Defendants Zurich, Aetna, the other insurers with defense obligations, and the Guaranty Association unreasonably and without proper cause, have failed to defend Payne & Keller in the Payne & Keller Asbestos Suits as required by the policies they issued to Payne & Keller, or are responsible for and/or have failed to cooperate or consult with Payne & Keller in connection with their duty to defend fully their insured.

76. The foregoing failure of defendants Zurich, Aetna, the other insurers with defense obligations, and the Guaranty Association to provide a proper defense to Payne & Keller in the Payne & Keller Asbestos Suits has caused, and will continue to cause, harm and damages to Payne & Keller, including, but not limited to, incurring legal fees that should be paid for by

defendants Zurich, Aetna, the other insures with defense obligations, and the Guaranty Association.

FIFTH CAUSE OF ACTION
ACCOUNTING

77. Plaintiff incorporates by reference paragraphs 1 through 76 as if repeated verbatim herein.

78. Upon information and belief, Payne & Keller purchased insurance policies from defendants Zurich, Aetna, National Union, Continental, Lexington, First State, Dependable, Birmingham Fire, Lloyd's Underwriters and London Market Insurers, Stonewall, Reliance and Highlands during the periods 1965 to 1989.

79. Upon information and belief, Payne & Keller have had claims made against the Payne & Keller Policies, including, but not limited to, Payne & Keller Asbestos Suits filed and disposed of prior to the appointment of the Receiver. The defendants possess information related to the past claims, expenses, and payments associated with the historic claims against Payne & Keller, but the Receiver is not in possession of that information. The Receiver is not aware of the number of past claims against the defendants' policies, the handling of those claims, or the allocation methods for those claims.

80. Plaintiff therefore seeks an accounting to evaluate the past claims practices of the defendants to ensure the appropriate characterization of prior claims and expenses.

SIXTH CAUSE OF ACTION
FAILURE TO PROCURE INSURANCE

81. Plaintiff incorporates by reference paragraphs 1 through 80 as if repeated verbatim herein.

82. R.L. Jarrett had a duty to exercise reasonable skill, care, and diligence to procure appropriate insurance for Payne & Keller.

83. Upon information and belief, R.L. Jarrett was negligent and breached its duty to procure appropriate insurance coverage for Payne & Keller during each of the years R.L. Jarrett was obligated to procure insurance.

84. This failure on the part of R.L. Jarrett includes, but is not limited to, the failure to procure products coverage for Payne & Keller.

85. Defendant U.S. Risk is the successor-in-interest to R.L. Jarrett and assumed responsibility for R.L. Jarrett's acts and omissions and, therefore, is responsible for any shortfall or deficiency in coverage for the Payne & Keller Asbestos Suits.

86. In the alternative, R.L. Jarrett is responsible for its own acts and omissions and, therefore, is responsible for any shortfall or deficiency in coverage for the Payne & Keller Asbestos Suits.

87. R.L. Jarrett's failure to procure appropriate insurance for Payne & Keller was not discovered until the Receiver's appointment.

SEVENTH CAUSE OF ACTION
DECLARATORY JUDGMENT

88. Plaintiff incorporates by reference paragraphs 1 through 87 as if repeated verbatim herein.

89. An actual and justiciable controversy exists between the Receiver for Payne & Keller and defendants Zurich, Aetna, National Union, Continental, Lexington, First State, Dependable, Birmingham Fire, Lloyd's Underwriters and London Market Insurers, the Guaranty Association and Stonewall concerning defendants' obligations to Payne & Keller, including

their obligations to pay for, or reimburse as ultimate net loss, the Receiver's defense of Payne & Keller.

90. Judicial declarations are necessary and appropriate at this time, under the circumstances alleged above, so that plaintiff may ascertain his rights against defendants.

91. 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.

92. 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.

93. Plaintiff is dedicating a substantial amount of time and incurring substantial expenses in his role as Receiver for Payne & Keller, including in connection with the defense of asbestos suits against Payne & Keller. The Receiver is continuing to devote such time to the defense of Payne & Keller and will continue to incur expenses in his role as Receiver, which defense obligations are those of defendants.

94. Plaintiff respectfully requests this Court to declare that defendants must fairly 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.

PRAYER FOR RELIEF

WHEREFORE, Payne & Keller, by and through its duly appointed Receiver, demands judgment against defendants as follows:

- A. For plaintiff's compensation in connection with the defense of asbestos suits against Payne & Keller in an amount set by this Court;
- B. For an order requiring that defendants provide to plaintiff complete and authentic copies of any general liability and excess liability insurance policies it issued to Payne & Keller 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;
- C. For an order requiring defendants to defend Payne & Keller in full against all asbestos suits alleging bodily injury during the Defendants' policy periods unless and until a defendant 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. 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 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 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;
- E. For an order declaring that defendant Guaranty Association is responsible for any and all amounts Reliance and Highlands owe to Payne & Keller under the terms of their respective insurance policies;
- F. For an order declaring that defendants Zurich, Aetna, the other insurers with defense obligations, and the Guaranty Association are liable for the damages incurred by Payne & Keller due to their breaches of contract, including, but not limited to, reimbursing Payne & Keller for any legal fees and costs incurred by defending the Payne & Keller Asbestos Suits;

- G. For an accounting of defendants' past claims practices for claims against Payne & Keller and its Historic Affiliates, including but not limited to historical Payne & Keller Asbestos Suits;
- H. For an order declaring that defendant R.L. Jarrett or, in the alternative, defendant U.S. Risk as its successor, breached its obligations by not procuring the appropriate insurance for Payne & Keller and is liable to the Receiver for money damages in an amount to be proven at trial;
- I. For an order declaring that neither Hartford nor Lloyd's Underwriters or any London Market Insurer may join in or bring any motion or petition to remove or transfer venue but, instead, must submit to the jurisdiction of this Court and comply with all requirements necessary to give this Court jurisdiction over this cause and determine all matters herein in accordance with the law and practice of this Court;
- J. For preliminary and permanent injunctive relief against First State, Lloyd's Underwriters and London Market Insurers restraining each and all of them from joining in or bringing any motion or petition to remove or transfer venue; and
- K. 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.

/SIGNATURE ON FOLLOWING PAGE/

Dated: January 18, 2021

RIKARD & PROTOPAPAS, LLC

s/ Brian M. Barnwell

Brian M. Barnwell (Fed Bar 10624)

Rikard & Protopapas, LLC

2110 N. Beltline Blvd.

Columbia, SC 29204

803.978.6111

bb@rplegalgroup.com

Attorney for the Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2021, I caused a true and correct copy of the foregoing Amended Complaint, to be served on all counsel of record by email through the Court's CM/ECF system.

Dated: January 18, 2021

/s/ Brian M. Barnwell

Brian M. Barnwell

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

Electronically signed on 2021-08-27 08:31:22 page 4 of 4

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Plaintiff,

v.

**DAVIS MECHANICAL
CONTRACTORS, INC.**, et al.,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

C.A. No. 2021-CP-40-03484

**ORDER GRANTING THE RECEIVER
FOR
PAYNE & KELLER COMPANY'S
MOTION TO CLARIFY THE
RECEIVER ORDER**

This matter comes before the Court by way of the Receiver for Payne & Keller Company's Motion to Clarify Order Appointing a Receiver for Payne & Keller Company issued by this Court on August 27, 2021. The Receiver's Motion is hereby GRANTED.

Peter D. Protopapas (the "Receiver") was appointed for Payne & Keller Company on August 27, 2021. Since his appointment, the Receiver has discovered that Payne & Keller Company did business under a series of corporate names before its final dissolution. The entities now known to the Receiver to be related to the historic operations of Payne & Keller Company are as follows: 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 the "P&K Entities").

This Order hereby clarifies that the Receiver's Order of Appointment entered on August 27, 2021, which is incorporated herein by reference, including all of the Receiver's duties and protections, extends to all of the P&K Entities and their predecessors, successors, affiliates, parents, assigns, and subsidiaries that may be discovered in the future. This Order also clarifies

that the reference to Payne & Keller Insulation, Inc. on page 3 of the Order of Appointment is a scrivener's error and is amended to state that neither the Receiver nor the P&K Entities may be sued outside this Court without obtaining the Receiver's consent or an order of this court prior to doing so.

IT IS SO ORDERD.

[ELECTRONIC SIGNATURE ON FOLLOWING PAGE]



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

Electronically signed on 2021-09-30 08:46:25 page 3 of 3

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:

v.

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.,

SECOND AMENDED SUMMONS

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 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., 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 THE ABOVE-NAMED THIRD-PARTY DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Third 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 Third 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 Third Amended Third-Party Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in such Third Amended Third-Party Complaint.

Respectfully submitted,

Dated: July 14, 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

Attorney 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.,

**SECOND 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., 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 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 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, 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.

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., Payne & Keller Company, and PBI QSF, LLC (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., 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 LLC, United States Fire Insurance Company, Fireman's Fund Insurance Company (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 Third 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. PBI QSF, LLC, a Delaware limited liability company (the “QSF”), is the intended transferee and assignee of insurance proceeds and subrogation, contribution, “other insurance,” and similar rights (“Contribution Rights”) pursuant to a settlement reached with one of Pipe & Boiler’s insurance carriers since this case was filed. The QSF has its principal place of business in South Carolina. The QSF asserts its Contribution Rights against the remaining Third-Party Defendants. The Third-Party Defendants take the position that these Contribution Rights are assertable on a pro-rata basis in accordance with the South Carolina Supreme Court’s decision in *Crossman Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), and, to the extent the QSF must advance funds or defend itself against the assertion of claims by the Third-Party Defendants, the QSF is an appropriate party to this action.
4. 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.
5. 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.
6. 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.
- 7. The Receiver is informed and believes that Arrowpoint Group, Inc. is a Delaware corporation with its principal place of business in North Carolina.
 - 8. The Receiver is informed and believes that Arrowpoint Capital Corporation is a Delaware corporation with its principal place of business in North Carolina.
 - 9. 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.
 - 10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. Plaintiff is informed and believes that the Guaranty Association is an association formed under the laws of South Carolina.

16. 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.
17. 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.
18. 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.
19. 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.
20. The Receiver is informed and believes that SKRLA LLC ("SKRLA") is a limited liability company organized under the laws of Texas with its principal place of business in the State of Texas.
21. The Receiver is informed and believes that Century Indemnity Company ("Century Indemnity") is a corporation organized under the laws of Pennsylvania with its principal place of business in Pennsylvania.
22. The Receiver is informed and believes that United States Fire Insurance Company ("U.S. Fire") is a corporation organized under the laws of Delaware with its principal place of business in the State of New Jersey.
23. The Receiver is informed and believes that Fireman's Fund Insurance Company ("Fireman's Fund") is a corporation organized under the laws of Illinois with its principal place of business in the State of Illinois.

24. 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

25. 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

26. 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

27. 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

28. 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

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

issued primary general liability coverage to Carolina Industrial for at least the three policy periods from January 1, 1973 – January 1, 1976.

29. 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 Third Amended Third-Party Complaint may be amended to include such additional Zurich Policies.
30. 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

31. 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.

32. 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 Third Amended Third-Party Complaint will be amended to include such additional Allstate Policies.
33. 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

34. 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.

35. 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 Third Amended Third-Party Complaint will be amended to include such additional Continental Carolina Industrial Policies.

36. 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.

D. The U.S. Fire Policies

37. On information and belief, Third-Party Defendant U.S. Fire issued standard excess liability policies to Carolina Industrial at least between 1976 and 1983 (“The U.S. Fire Carolina Industrial Policies”). The U.S. Fire Carolina Industrial Policies contain standard terms and conditions. It is the burden of U.S. Fire to prove any limitation on or exclusion of coverage.

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

39. U.S. Fire has repudiated its insurance contracts as respects to all of the Carolina Industrial Asbestos Suits and as respects to all of the asbestos suits ever to be filed against Carolina Industrial by asserting that the “products hazard” exclusion in its policies bars coverage for any suit alleging liability based on Carolina Industrial’s use of “products” containing asbestos.

Every asbestos suit alleges the plaintiff's injurious exposure to asbestos via one or more "products." At least one "actual and justiciable dispute" therefore exists between U.S. Fire and Carolina Industrial.

THIRD-PARTY PLAINTIFF FLAME REFRACTORIES

A. The Admiral Policies

40. Third-Party Defendant Admiral Insurance Company issued general liability policies to Flame Refractories for at least two policy periods: from April 1, 1985 to April 1, 1986 and from April 1, 1986 to April 1, 1987 ("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.

41. 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 Third Amended Third-Party Complaint will be amended to include such additional Admiral Flame Refractories Policies.

42. 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.

B. The Hartford Policy

43. 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.

44. 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 Third Amended Third-Party Complaint may be amended to include such additional Hartford Flame Refractories Policies.

45. 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.

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

C. The First State Policies

46. 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 State Flame Refractories Policy has standard terms and conditions. It is the burden of Hartford to prove any limitation on or exclusion of coverage.
47. 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 Third Amended Third-Party Complaint may be amended to include such additional First State Flame Refractories Policies.

D. The Century Indemnity Policies

48. Upon information and belief, Third-Party Defendant Century Indemnity issued primary general liability insurance policies to Flame Refractories for at least the policy periods, January 1, 1979 to January 1, 1980 and January 1, 1980 to January 1, 1981 (“The Century Indemnity Flame Refractories Primary Policies”). The Century Indemnity Flame Refractories Primary Policies have standard terms and conditions. The Century Indemnity Flame Refractories Primary 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 Century Indemnity Flame Refractories Primary Policies require Century Indemnity to fully defend any Flame

Refractories Asbestos Suit alleging bodily injury during any Century Indemnity Flame Refractories Primary Policy period. The Century Indemnity Flame Refractories Primary Policies have a separate duty to fully indemnify Flame Refractories from and against any and all Flame Refractories Asbestos Suits with bodily injury taking place during any Century Indemnity Flame Refractories Primary Policy period. It is the burden of Century Indemnity to prove any limitation on or exclusion of coverage.

49. Century Indemnity also issued excess liability policies to Flame Refractories at least for the policy period January 1, 1979 to January 1, 1980. (“The Century Indemnity Flame Refractories Excess Policies”). The 1979–80 policy is immediately excess of the primary policy identified above for the January 1, 1979 to January 1, 1980 period. The Century Indemnity Flame Refractories Excess Policies have standard terms and conditions. It is the burden of Century Indemnity to prove any limitation or exclusion of coverage.
50. The Receiver for Flame Refractories continues to require all pertinent parties to conduct a diligent search for additional policies issued by Century Indemnity or any of its predecessors, successors, subsidiaries or affiliates. Should additional policies be located, this Third Amended Third-Party Complaint may be amended accordingly.
51. Century Indemnity has failed, or will fail, to fully acknowledge or accept its insuring obligations under the Century Indemnity Flame Refractories Policies. An actual and justiciable dispute exists between these parties.

E. The Continental Policies

52. Third-Party Defendant Continental issued excess liability policies to Flame Refractories for at least the January 1, 1983 to January 1, 1984 policy period (“The Continental Flame

Refractories Policies”). The Continental Flame Refractories Policies have standard terms and conditions. It is the burden of Continental to prove any limitation or exclusion of coverage.

53. The Receiver for Flame Refractories 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 additional policies be located, this Third Amended Third-Party Complaint may be amended accordingly.
54. Continental has failed, or will fail, to fully acknowledge or accept its insuring obligations under the Continental Flame Refractories Policies. An actual and justiciable dispute exists between these parties.

F. The Fireman’s Fund Policies

55. Third-Party Defendant Fireman’s Fund issued excess liability policies to Flame Refractories for at least the January 1, 1984 to January 1, 1985 policy period (“The Fireman’s Fund Flame Refractories Policies”). The Fireman’s Flame Refractories Policies have standard terms and conditions. It is the burden of Fireman’s Fund to prove any limitation on or exclusion of coverage.
56. The Receiver for Flame Refractories continues to require all pertinent parties to conduct a diligent search for additional policies issued by Fireman’s Fund or any of its predecessors, successors, subsidiaries or affiliates. Should additional policies be located, this Third Amended Third-Party Complaint may be amended to include such additional Fireman’s Fund Flame Refractories Policies.

THIRD-PARTY PLAINTIFF PIPE & BOILER INSULATION COMPANY

A. The Arrowood Policies

57. 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.
58. 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

59. 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.
60. 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.
61. 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

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.”

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.

62. 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 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).
63. The ownership structure of Arrowood has, and the officers and directors of Arrowood have, changed very little since 2007.
64. 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.

65. 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).

66. 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.*

67. 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).

68. 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.
69. 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.

70. 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.

71. 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).

72. “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.
73. 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”).
74. 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.

75. 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.
76. “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.
77. 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.
78. 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.

79. 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].

80. 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.

81. 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.

82. 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.

83. 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.
84. 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.***
85. 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.
86. 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.

87. 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.

88. 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).

89. 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).

90. 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.

91. 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.
92. 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."
93. 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).
94. 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).

95. 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.
96. Although the statutory references obviously vary by state, the basic rules (as dictated by the NAIC) are the same.
97. If a regulated insurer does not maintain adequate surplus or comply with RBC rules, the regulators are required to assume control over the company.
98. 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.*

99. 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.

100. 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*

101. 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).

102. 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.

103. 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.

104. 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.
105. 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.

106. 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.

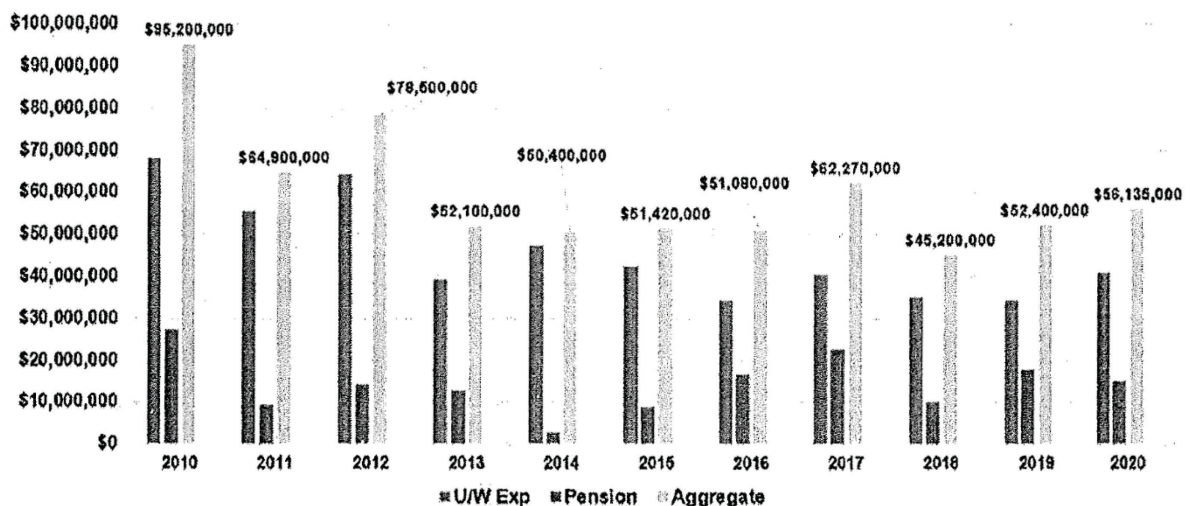
107. Arrowood Indemnity was the 100% owner of another insurer, Arrowood Surplus Lines Insurance Company (“ASL”). As of December 31, 2011, ASL had a Policyholders’ Surplus of \$184 million. The Arrowood Third-Party Defendants implemented a strategy to slowly upstream the \$184 million surplus of ASL. 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.

108. 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.

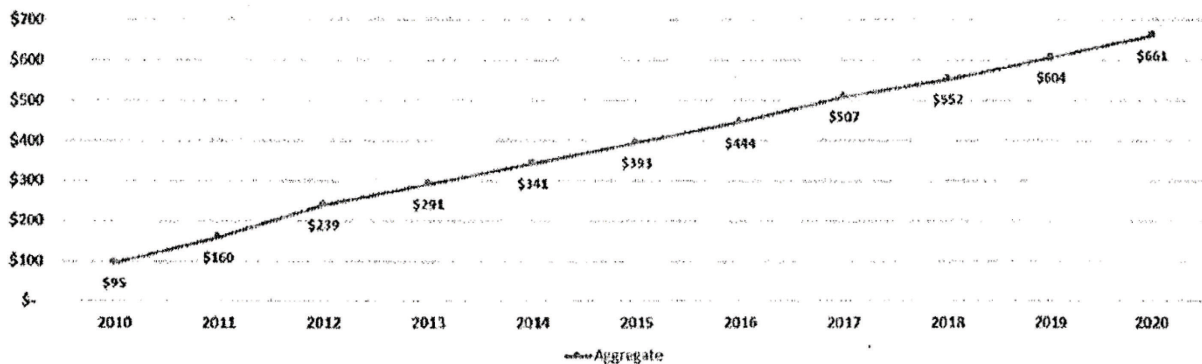
109. The below charts, produced by Arrowood in its publicly filed Annual Statements, quantify some of the material amounts, both annually and in the aggregate, of untoward management

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



110. 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

111. 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.

112. 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

113. 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).

114. 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	4,095	(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	(194)	(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.

115. 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.

116. 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.
117. 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. Keddie.

118. Arrowood appointed Keddie as its Appointed Actuary on March 14, 2004, and Keddie 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).
119. 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.

120. 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.
121. 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.

122. 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

123. 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.

124. 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.

125. 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.

126. 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.

127. 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.

128. 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.

129. 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).

130. 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.

131. 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).

132. 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.

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.

vii. *The misleading Reports on Examination*

133. 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 these financial examinations is to determine the insurer's fiscal condition and compliance with applicable laws and regulations.
134. 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).
135. 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.
136. 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.

137. 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.

138. 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.

139. 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.
140. 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.
141. 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

142. 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").

A. Rexel's and SKRLA's Competing Claims to Payne & Keller's Insurance Program

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

144. The Receiver is informed and believes that Rexel's and SKRLA'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 SKRLA and the competing claims to Payne & Keller's insurance policies, but these inquiries have gone unanswered. Moreover, the existence of these competing claims from Rexel and SKRLA have 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 and between the Receiver and SKRLA 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 and SKRLA'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 and between the Receiver and SKRLA, will be delineated herein.

B. The 1965 to 1973 Policies

145. 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.

146. 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 or between SKRLA and Payne & Keller. An actual and justiciable dispute exists between and among these parties.

C. The Zurich Policies

147. 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.

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

D. The Aetna Policies

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.

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.

E. The Continental Policies

151. 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.

152. 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 or between SKRLA and Payne & Keller. An actual and justiciable dispute exists between these parties.

F. The National Union Policies

153. 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.

154. 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 or between SKRLA and Payne & Keller. An actual and justiciable dispute exists between these parties.

G. The Dependable Policy

155. 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.

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

H. The Stonewall Policies

157. 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.

158. 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 or between SKRLA and Payne & Keller. An actual and justiciable dispute exists between these parties.

I. The Lexington Policy

159. 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.

160. 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 or between SKRLA and Payne & Keller. An actual and justiciable dispute exists between these parties.

J. The First State Policies

161. 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 PolicyPeriod. 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 policyperiods March 1, 1976—March 1, 1977, April 1, 1983—April 1, 1985, and May 15, 1985—April 1, 1986.

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

K. The Birmingham Fire Policies

163. 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.

164. 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 or between SKRLA and Payne & Keller. An actual and justiciable dispute exists between these parties.

L. The Lloyd's Underwriters & London Market Insurers Policy

165. 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.

166. 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 or between SKRLA and Payne & Keller. An actual and justiciable dispute exists between these parties.

M. The Reliance Policies and the Guaranty Association

167. Reliance Insurance Company ("Reliance") issued general liability policies to Payne & Keller ("The Reliance Policies"). The Reliance Policies have standard terms and

conditions. It is the burden of any insurer, or an entity standing in the place of the insurer, to prove any limitation or exclusion of coverage. Reliance issued primary general liability coverage to Payne & Keller for at least the three policy periods March 1, 1965—March 1, 1968.

168. On information and belief, Reliance Insurance Company was liquidated on October 3, 2001.

169. The Guaranty Association was statutorily created to protect the policy holders of insolvent insurance companies like Reliance. 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).

N. The Highlands Policies and the Guaranty Association

170. 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).

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

172. 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).

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

173. 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.

174. 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

175. Third-Party Plaintiffs incorporate the foregoing paragraphs by reference.

176. 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.

177. 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.

178. 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.
179. 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.
180. 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.
181. 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

182. Third-Party Plaintiffs incorporate the foregoing paragraphs as if repeated verbatim herein.
183. 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.
184. 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.

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.

THIRD CAUSE OF ACTION
DECLARATORY JUDGMENT

186. Third-Party Plaintiffs incorporate the foregoing paragraphs by reference.

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

188. The Receiver seeks a further declaration as to the interpretation and meaning of the insurance policies that Third-Party Defendants Zurich, Continental, Allstate, and U.S. Fire 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 with a duty to defend;
- f. If any allegation or cause of action in a Carolina Industrial Asbestos Suit is potentially covered under the Carolina Industrial Insurance Policies with a duty to defend, 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.
189. Actual and justiciable controversies therefore exist between Carolina Industrial and Third-Party Defendants Zurich, Continental, Allstate, and U.S. Fire concerning their obligations under the Carolina Industrial Insurance Policies.

FOURTH CAUSE OF ACTION
DECLARATORY JUDGMENT

190. Third-Party Plaintiffs incorporate the foregoing paragraphs by reference.
191. The Receiver seeks a declaration and order that Third-Party Defendants Admiral, Hartford, First State, Century Indemnity's predecessor, Continental, and Fireman's Fund issued primary and excess general liability coverage to Flame Refractories, subject to the

per occurrence and aggregate limits of those policies, and that Admiral and Century Indemnity have an unlimited supplemental duty to defend, through the provision of appropriate and qualified defense counsel, and to pay or reimburse defense costs.

192. The Receiver seeks a further declaration as to the interpretation and meaning of the insurance policies that Third-Party Defendants Admiral, Hartford, First State, Century Indemnity's predecessor, Continental, and Fireman's Fund issued to Flame Refractories (the "Flame Refractories Insurance Policies"), as follows:

- a. The Flame Refractories Insurance Policies 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 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 Policies, such ambiguity shall be construed in favor of the broadest coverage afforded under the Flame Refractories Insurance Policies;
- 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 with a duty to defend;

- f. If any allegation or cause of action in a Flame Refractories Asbestos Suit is potentially covered under the Flame Refractories Insurance Policies with a duty to defend, 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 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 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;
- 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, if any; and
- k. Each insurer has 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, 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.

193. Actual and justiciable controversies therefore exist between Flame Refractories and Third-Party Defendants Admiral, Hartford, First State, Century Indemnity, Continental, and Fireman's Fund concerning their obligations under the Flame Refractories Insurance Policies for which they are responsible.

FIFTH CAUSE OF ACTION
BREACH OF CONTRACT

194. Third-Party Plaintiff Flame Refractories incorporates the forgoing paragraphs by reference.

195. 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.

196. 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.

197. 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

198. Third-Party Plaintiff Carolina Industrial incorporates the foregoing paragraphs by reference.
199. Carolina Industrial was insured by one or more policies issued by Third-Party Defendants Zurich, Continental, and Allstate.
200. Carolina Industrial has provided or will provide timely notices to Third-Party Defendants Zurich, Continental, and Allstate of the Carolina Industrial Asbestos Suits.
201. 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.
202. 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

203. Third-Party Plaintiff Pipe & Boiler Insulation incorporates the foregoing paragraphs by reference.
204. Prior to its dissolution, Pipe & Boiler was a North Carolina corporation.

205. 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.
206. 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).
207. 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.”
208. 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.

209. 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.
210. 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.
211. 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.

212. 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.

213. 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

214. Third-Party Plaintiff Pipe & Boiler incorporates the foregoing paragraphs by reference.

215. 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.

216. 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.

217. 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

218. Third-Party Plaintiffs incorporate the foregoing paragraphs by reference.
219. Arrowood issued at least five contracts of insurance to Pipe & Boiler during the period January 1, 1981 to January 1, 1986.
220. As corporate officers and directors of Arrowood's parent companies, the Individual Arrowood Third-Party Defendants have maintained absolute control of Arrowood.
221. The Individual Arrowood Third-Party Defendants each were aware of the insurance contracts into which Arrowood had entered with insureds, including Pipe & Boiler.
222. 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.
223. 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.
224. 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.

225. 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.

226. 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

227. Third-Party Plaintiff Pipe & Boiler incorporates the foregoing paragraphs by reference.

228. 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.

229. Arrowpoint Group and Arrowpoint Capital negligently supervised the actions of the Individual Arrowood Third-Party Defendants.

230. 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

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

232. The Receiver is informed and believes that Rexel's and SKRLA'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 SKRLA and the competing claims to Payne & Keller's insurance policies, but these inquiries have gone unanswered. Moreover, the existence of these competing claims from Rexel and SKRLA have 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 and between the Receiver and SKRLA 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 and SKRLA'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 and between the Receiver and SKRLA, will be delineated herein.

233. The Receiver therefore seeks 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 and between SKRLA 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, Allstate, and U.S. Fire to defend Carolina Industrial in full—under policies containing a duty to defend—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, Hartford, First State, Century Indemnity, Continental, and Fireman's Fund to defend Flame Refractories in full—under policies containing a duty to defend—against all asbestos suits alleging bodily injury during the Third-Party Defendants' policy periods unless and until these Third-Party Defendants 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 and between SKRLA and Payne & Keller with respect to the Payne & Keller insurers. Specifically, the Receiver therefore seeks 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 and between SKRLA 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,

RIKARD & PROTOPAPAS, LLC

Dated: July 14, 2022

By: s./ Brian M. Barnwell

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Attorney 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

Plaintiff,

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

2021-CP-40-03484

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

**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,

Case No. 2021-CP-40-03484

Plaintiff,

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.

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

Third Party Plaintiff Payne & Keller Company ("Payne & Keller"), by and through its duly
appointed Receiver Peter D. Protopapas (the "Receiver"), files this Response in Opposition to

Third-Party Defendant Travelers Casualty & Surety Company's August 24, 2022 Motion to Dismiss Third-Party Claims and to Dissolve the Payne & Keller Receivership (the "Motion").¹

I. INTRODUCTION

On August 27, 2021, this Court appointed the Receiver and granted him "the power and authority [to] fully administer all assets of Payne & Keller" including "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." (Exhibit A, 8/27/2021 Order.) On September 30, 2021, the Court amended its receivership order clarifying that the Receiver's authority extended to certain specifically identified entities that were related to Payne & Keller's operations (the "P&K Entities") "and their predecessors, successors, affiliates, parents, assigns, and subsidiaries that may be discovered in the future." (Exhibit B, 9/30/2021 Order.) Although the Third-Party Plaintiff Payne & Keller dissolved in 1986, asbestos personal-injury plaintiffs continue to file asbestos personal-injury lawsuits against it (the "Asbestos Suits") (2d Amend. Compl. ¶¶ 27, 142), including this suit filed by Lenora Childers, Individually and as Personal Representative of the Estate of Lewis C. Childers.

During its existence, Payne & Keller purchased insurance policies, including policies issued by The Aetna Casualty & Surety Company, n/k/a Travelers Casualty & Surety Company

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 Unnamed Underwriters at Lloyd's, London and Certain as yet Unnamed London Market Companies (the "Joining Defendants") filed a Joinder to Travelers' Motion, wherein they "join[ed] in and adopt[ed] 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." (Joining Defs.' Mot. at 3.) The Receiver submits this filing in response to that Joinder as well.

(“Travelers”), that should now provide defense costs and liability coverage for the Asbestos Suits, and the Receiver seeks declaratory relief in that regard. *Id.* at ¶¶ 143–172. *See* Exhibit C, Initial Payne & Keller Insurance Coverage Chart. Payne & Keller also seeks declaratory relief from Travelers establishing that Travelers is one of the Third-Party Defendants that must compensate the Receiver for his time and efforts spent defending the Asbestos Suits. *See id.* at ¶¶ 175–181. Payne & Keller also seeks declaratory relief relating to production of policies and related documents from all of the Third-Party Defendants. *See id.* at ¶¶ 182–85. Finally, Payne & Keller seeks declaratory relief addressing competing claims for historical insurance coverage issued to Payne & Keller from other companies. *See id.* at ¶¶ 231–33.

II. TRAVELERS’ MOTION TO DISMISS AND TO DISSOLVE THE PAYNE & KELLER RECEIVERSHIP SHOULD BE DENIED

Travelers offers two arguments in support of its motion to dismiss and dissolve the Payne & Keller Receivership. Neither is availing.

First, Travelers argues that the Receiver has no greater right to assert coverage claims than Payne & Keller, and, as a Texas corporation that dissolved in 1986, Payne & Keller can no longer file suit. (Mot. at 4, 6–11). This argument fails because both South Carolina and Texas law allow the appointment of a receiver even **after** a company “has been dissolved” (*see* Section A below). These statutes do not impose any limitation on how soon after dissolution appointment must occur, and neither South Carolina nor Texas courts have elected to import into their receivership statutes the survival periods set forth in dissolution statutes. Thus, both South Carolina and Texas law contemplate that a receiver can be appointed to bring suit on behalf of a dissolved corporation even after the company has lost the ability to act on its own behalf.

Even if this were not the case, this Court also has the power, based on Texas law, to ignore and/or set aside the dissolution of Payne & Keller because the Receiver will demonstrate that the

dissolution occurred “as a result of actual or constructive fraud.” TEX. BUS. ORGS. CODE § 11.153(a). Although the Receiver’s investigation is continuing, there is sufficient evidence available even at this initial pleading stage (*see* Section A below) to allow the Receiver to demonstrate that, at a minimum, constructive fraud occurred in connection with the Payne & Keller dissolution sufficient to invoke Section § 11.153.

After operating for decades building and maintaining major petrochemical and heavy industrial facilities, Payne & Keller abruptly dissolved just as a flood of asbestos-related personal injury claims were being filed (including in Texas) and immediately after the company learned it could face significant toxic tort liability as a creditor in a pending bankruptcy proceeding. Despite the existence of significant historic insurance to address these liabilities, there is evidence that Payne & Keller dissolved with an intent to avoid (or, at the very least, ignore) these liabilities in direct violation of the statutory duties it owed creditors to make adequate provision for these liabilities.

Second, Travelers argues that South Carolina law “permits receiverships only with respect to property located in South Carolina.” (Mot. at 4; *see also id.* at 11–14.) This flawed argument ignores well-settled South Carolina law relating to the scope of this Court’s authority to appoint a receiver.

A. Texas and South Carolina Law Authorize the Receiver to Pursue Payne & Keller’s Coverage Claims After the Company Has Dissolved and the Survival Period Has Ended.

Travelers’ motion to dissolve is predicated on the incorrect assumption that this Court’s ability to appoint a Receiver to bring claims on behalf of Payne & Keller is limited by the three-year window after a dissolution for a dissolved entity to sue or be sued. But here it is the Receiver, pursuant to his appointment by this Court—and not Payne & Keller itself—that asserts coverage

claims. This Court’s authority to appoint a receiver has a legal basis that is separate and apart from the provisions of the corporate code that govern dissolutions. Indeed, the South Carolina and Texas receivership statutes expressly authorize this Court to appoint a receiver to pursue claims on behalf of a corporation that “has been dissolved” without limiting the time within which an appointment must occur.

Section 15-65-10 of the South Carolina Code governs the appointment of a receiver and authorizes a circuit court judge to appoint a receiver “[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 Ann. § 15-65-10(4) (emphasis added). Likewise, Section 64.001 of the Texas Code governs the appointment of a receiver and authorizes “[a] court of competent jurisdiction” to appoint a receiver “for a corporation that is insolvent, is in imminent danger of insolvency, *has been dissolved*, or has forfeited its corporate rights.” TEX. CIV. PRAC. & REM. CODE § 64.001(a)(5) (emphasis added). These statutory provisions expressly provide for the appointment of a receiver after a corporation “*has been dissolved*,” and that is how they have been interpreted and applied. *See, e.g., Allen v. Cooley*, 53 S.C. 414, 31 S.E. 634 (1898) (approving the appointment of a receiver post-dissolution); *Cent. Nat’l. Bank v. Dallas Bank & Tr. Co.*, 66 S.W.2d 474, 479 (Tex. Civ. App.—Dallas 1933, no writ) (indicating the appointment of a receiver is appropriate when dissolution has been “accomplished” and holding that the trial court could not appoint a receiver for banks in voluntary liquidation including because “their dissolution as corporations has not yet been accomplished”).

Texas courts also have interpreted section 64.001 as authorizing the appointment of a receiver after a dissolved corporation’s existence terminates. In *A-Medical Advantage Healthcare*

Sys. v. Shwarts, No. 10-18-00050-CV, 2019 WL 7374735, 2019 Tex. App. LEXIS 11278 (Tex. App.—Waco Dec. 31, 2019, pet. denied) (mem. op.), the Waco Court of Appeals reviewed the trial court’s appointment of a receiver for a dissolved professional association more than three years after dissolution. Noting that the appointment would be affirmed “if it can be upheld on any legal theory that finds support in the evidence,” the court determined it was appropriate under Section 64.001(6). *See id.* at *9.² That provision of the Texas receivership statute authorizes a court to appoint a receiver “in any other case in which a receiver may be appointed under the rules of equity.” TEX. CIV. PRAC. & REM. CODE § 64.001(a)(6). The court of appeals upheld the trial court’s determination that—in light of evidence of financial mismanagement of the dissolved entity’s assets presented during an evidentiary hearing—appointment of a receiver was justified and necessary to oversee management of those assets and distributions.³ *See Shwarts*, 2019 WL 7374735, at *11–12.

By recognizing that the broad statutory authorization granted to a receiver is distinct from the statutory limitations placed on the independent actions of dissolved corporations, these courts (as well as courts in other jurisdictions⁴) recognize the special role and broad responsibilities of a

² The court did not consider the application of section 64.001(5).

³ Appellants also challenged the trial court’s jurisdiction on the grounds that (i) venue was lacking, and (ii) Respondents did not have standing to assert claims after the end of the three-year survival period. The appeal was interlocutory, and the court of appeals held that it lacked jurisdiction to decide these issues. *See Shwarts*, 2019 WL 7374735, at *8.

⁴ Other courts have reached the same result and expressly held that a receiver can be appointed after the expiration of the dissolution statute’s three-year survival period. In *In re Krafft-Murphy Co.*, 82 A.3d 696 (Del. 2013), for example, the Delaware Supreme Court acknowledged that “[a]fter the expiration of § 278’s three year winding-up period, the dissolved Corporation ceased to exist as a ‘body corporate,’ and lost the power to conduct its own affairs.” *Id.* at 710. That did not mean, however, that a receiver could not be appointed to complete the winding up process on behalf of the dissolved corporation. The dissolved corporation, the court held, “may become re-empowered to defend its interests in the litigation . . . through the appointment of a receiver under

court-appointed Receiver. As the South Carolina Supreme Court explained almost a century ago in *Peurifoy v. Gamble*, 145 S.C. 1, 142 S.E. 788, 790 (1928), the Receiver is an “officer of the court.” As such, the Receiver fills a complex role that implicates corporate interests as well as the interests of creditors, shareholders, and property owners:

A receiver is an officer of the court through whom the court takes possession of the assets of the insolvent [entity], for the purpose of preventing their waste or destruction and of reducing them to such form as may be necessary for their ratable distribution among those who may be entitled thereto. A receivership is simply a remedial agency created for the purpose of preserving and disbursing the assets of the insolvent estate. The property in the hands of the receiver is in *custodia legis*; the possession of the property by him is the possession of the court which appointed him. . . . He is the medium through which the court acts in the execution of its orders and decrees.

Id. The Supreme Court of Texas shares this view of a Receiver’s role:

[T]he receiver does not act as the agent of the creditors or of any of the other parties. He is officer of the court, the medium through which the court acts. He is a disinterested party, the representative and protector of the interests of all persons, including creditors, shareholders and others, in the property in receivership.

Sec. Tr. Co. of Austin v. Lipscomb Cnty., 180 S.W.2d 151, 158 (Tex. 1944). A Receiver is appointed to act to protect interests beyond those of the dissolved corporation itself. Subjecting the Receiver to a three-year survival period would undermine the Receiver’s ability to fill this role and would be contrary to state receivership statutes, which do not incorporate this limitation.

[the receivership statute].” *Id.* The receiver could assert the corporation’s rights to recover under liability insurance policies when the dissolved corporation itself had lost its ability to act. In *Glazer v. Motor Parts Rebuilders, Inc.*, 865 S.W.2d 371 (Mo. Ct. App. W.D. 1993), the result was the same. Interpreting Kansas statutes governing corporate dissolutions and the appointment of receivers, the court held that the three-year statutory limitation placed on a dissolved corporation’s ability to prosecute and defend suits does not apply to a receiver acting on behalf of a dissolved corporation. The survival period, the court explained, was included in the dissolution statute but not in the receivership statute. *Id.* at 373–374 (comparing Kansas Stat. Ann. § 17-6807 with Kansas Stat. Ann. § 17-6808).

For all these reasons, the Receiver's pursuit of coverage claims on behalf of Payne & Keller is consistent with both South Carolina and Texas law. Accordingly, dissolution of the receivership on the ground that the Receiver lacks standing to assert coverage claims is neither required nor appropriate.

B. Payne & Keller can assert claims that relate back to when its corporate existence was terminated because the dissolution was based on actual or constructive fraud.

Alternatively,⁵ this Court also has the ability to ignore and/or set aside the Payne & Keller dissolution because the dissolution was the result of actual or constructive fraud.

In alleging that the Receiver lacks standing to pursue coverage claims on behalf of Payne & Keller, Travelers' focus is on the Texas three-year survival statute, which limits a dissolved corporation's ability to sue or defend against claims in its own corporate name. (Mot. at 7–9.) According to Travelers, the Receiver can assert only the rights of the dissolved company, and the rights of Payne & Keller were extinguished when the survival period ended in 1989.

However, in making that argument, Travelers ignores Section 11.153 of the Texas Business Organizations Code ("TBOC"), which authorizes a court to revoke a corporation's termination of its own corporate existence if that termination was "as a result of actual or constructive fraud." § 11.153(a) ("Notwithstanding any provision of this code to the contrary, a court may order the revocation of termination of an entity's existence that was terminated as a result of actual or constructive fraud."). Revocation of the corporate termination enables the corporate entity to pursue claims as if it were never dissolved. "[T]he revocation relates back to the effective date of the termination and takes effect as of that date . . . [and] the entity's status as an entity continues

⁵ Even if this Court does not find it necessary to reach this "actual or constructive fraud" issue at this time, the Receiver reserves the right to assert this argument at a later time to potentially identify other sources of funds for Payne & Keller creditors.

in effect as if the termination of the entity's existence had never occurred.” *Id.* at § 11.153(b)(1)–(2).

In interpreting another provision of the TBOC imposing liability for “actual fraud,” the Texas Supreme Court addressed the distinction between “actual fraud” and “constructive fraud”:

Actual fraud usually involves dishonesty of purpose or intent to deceive, whereas constructive fraud is the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests.

Castleberry v. Branscum KM, 721 S.W.2d 270, 273 (Tex. 1986), *superseded on other grounds by statute, as recognized in SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008) (citations omitted). For example, dissolving a company after an attorney threatens to file a suit for damages suggests an intent to avoid liability and is evidence of actual fraud. *See Latham v. Burgher*, 320 S.W.3d 602, 610 (Tex. App.—Dallas 2010, no pet.) (“A rational juror could also have decided Latham’s conduct in dissolving the corporation in the face of Burgher’s claim represented dishonesty of purpose or an intent to deceive, i.e., actual fraud.”).

Even at this early juncture in this case, there is ample evidence supporting a claim that, at the very least, constructive fraud occurred in connection with Payne & Keller’s dissolution. Events surrounding Payne & Keller’s dissolution suggest that the company 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.

The historical record developed to date suggests that Payne & Keller’s work included significant construction projects in industries and time periods where the use of asbestos-containing products was prevalent, including manufacturing facilities and petrochemical facilities.

For example, in 1981, Payne & Keller worked on an insulation replacement project for Archer Daniels Midland (“Archer Daniels”). Archer Daniels initially awarded this project to another firm. After its workers went on strike, Archer Daniels cancelled that initial contract and assigned the remainder of the work to Payne & Keller. (Exhibit D, Construction: Labor Report, Vol. 28, No. 1391.) Payne & Keller also worked on valve replacements at a Citgo Petroleum Corporation facility in Westlake/Lake Charles, Louisiana, *see Seeney v. Citgo Petroleum Corp.*, 848 F.2d 664, 666 (5th Cir. 1988), which has since been the subject of asbestos litigation. *See Bourque v. Anco Insulations, Inc.*, 25 So. 3d 1008 (La. App. 3 Cir. 2009).

By 1983, some of Payne & Keller’s excess-level insurance policies expressly excluded coverage for asbestos-related claims, and, in the years before its dissolution, Payne & Keller agreed, in its service contracts, to indemnify companies from financial responsibility for any property damage or personal injury claims arising from the work completed by Payne & Keller employees. *See, e.g., In re Charter Co.*, 63 B.R. 568, 570 (Bankr. M.D. Fla. 1986).

During the 1980s, Payne & Keller defended itself against a variety of toxic tort claims arising from occupational exposures. In 1983, the Louisiana Court of Appeals affirmed that Payne & Keller and its insurer Aetna Surety & Casualty Company (now a Travelers company, the movant here) were liable for a workers’ compensation claim brought by a former Payne & Keller painter and sandblaster who was permanently disabled by silicosis. *See Thornell v. Payne & Keller, Inc.*, 442 So.2d 536 (La. App. 1st Cir. 1983), *cert. denied*, 445 So. 2d 1231 (La. 1984). In 1986, Payne & Keller was also a defendant in a Texas asbestos case filed by Baron & Budd. (Exhibit E, *Hanagriff v. Brown & Root Inc.*, cover sheet). The claims against Payne & Keller filed in that case were dismissed on May 21, 1986, (Exhibit F, Order), but by then, asbestos-related personal injury claims were filling court dockets. In the Eastern District of Texas alone, more than 3,000 asbestos-

related personal injury claims had been filed by 1981. *See Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353, 1354 (E.D. Tex. 1981), *reversed in part*, 681 F.2d 334 (5th Cir. 1982).

In the weeks before it began its hasty dissolution process, Payne & Keller was alleged to be liable for significant personal injury claims arising from toxic occupational exposures at a Houston refinery. In a bankruptcy proceeding filed by the Charter International Oil Company (“Charter”), Payne & Keller sought payment for services provided to Charter, which were secured by mechanic’s and materialmen’s liens against the refinery. *See In re Charter Co.*, 63 B.R. 568 (Bankr. M.D. Fla. 1986). Charter objected to the claim on the grounds that Payne & Keller had agreed to indemnify Charter for personal injury claims arising from the refinery work and that this indemnification obligation encompassed more than a thousand claims arising from occupational dioxin exposure. The bankruptcy court denied Charter’s objection, holding that the claims of the dioxin class had not been reduced to judgment and, as “unmatured” claims, could not be “offset” against Payne & Keller’s matured claim, unless Payne & Keller was insolvent. *Id.* at 571. No such allegation had been made. To the contrary, Payne & Keller asserted that it maintained insurance that would cover any indemnification obligation it owed to Charter. *Id.* at 570. The court ordered Charter to pay Payne & Keller’s bankruptcy claim.

Immediately after this decision was issued (on July 31, 1986), Payne & Keller began taking steps to dispose of its assets and dissolve. On September 29, 1986, Payne & Keller’s parent company executed a Specific Guaranty with Payne & Keller and the entity that purchased its assets, guaranteeing certain aspects of Payne & Keller’s performance under a purchase and sale agreement. (Exhibit G, Specific Guaranty). The sale was initially intended to close the next day, on September 30, 1986, but was delayed. In the interim, on October 1, 1986, Charter filed a proof

of claim on behalf of the dioxin plaintiffs in the bankruptcy proceeding. Only six days later, Payne & Keller sold its assets and began completing the rest of its dissolution-related paperwork:

- On October 7, 1986, Payne & Keller executed its purchase and sale agreement, selling substantially all of its assets.
- Payne & Keller retained liabilities including those arising from its operations. Payne & Keller agreed to indemnify and hold its Buyer harmless for a range of claims, including “[c]laims for injury to or death of any person or damage to property relating to the business, operations or assets of Sellers or Shareholder or any of them or any subcontractor or supplier, regardless of tier, or any of them whether related to the Assigned Contracts or the Purchased Assets or otherwise based on facts, omissions or events that occurred prior to Closing.” (Exhibit H, Purchase & Sale Agreement, ¶ 9(c).) Payne & Keller’s parent agreed to maintain \$6 million in insurance coverage for these claims for two years after closing and capped its overall liability to the Buyer to \$5 million in the aggregate. (Exhibit G, Specific Guaranty, ¶¶ 8, 9.)
- On October 7, 1986, Payne & Keller changed its name to Frentex Enterprises Company (“Frentex”). Frentex filed its amended articles of incorporation on October 20, 1986. (Exhibit I, Amended Articles of Incorporation.)
- On October 27, 1986, Frentex adopted its articles of dissolution. (Exhibit J, Articles of Dissolution.)
- On December 3, 1986, Frentex filed its articles of dissolution and certificate of dissolution representing that “[a]ll debts, obligations and liabilities of the corporation have been paid, discharged, or adequate provision has been made thereof.” (*Id.* at ¶ 5.) With thousands of potential dioxin claims pending, the limited parental guaranty was the only provision made for the payment of significant known current and decades of future liabilities.
- On January 16, 1987, the dioxin class claims in the Charter bankruptcy proceeding matured. The bankruptcy court entered an order approving settlement of the dioxin class claims against Charter. The court authorized an award of \$5.275 million to the 1,105 personal injury dioxin claimants, \$1 million to the State of Missouri, and \$5 million to the United States Environmental Protection Agency for their dioxin-related contamination claims. *See In re Charter Co.*, 81 B.R. 90, 91 (M.D. Fla. 1987).

Payne & Keller dissolved before the Charter dioxin claims matured and, contrary to the representations it made to the Secretary of State, failed to make adequate provision for the payment of either those claims or the variety of other occupational injury claims that it had faced—and reasonably expected that it would face for many decades in the future. Because the company

therefore dissolved as a result of (at the very least) constructive fraud, the termination of its corporate existence should be revoked, and pursuant to section 11.153 of TBOC, Payne & Keller should be permitted to maintain the insurance coverage claims pending in this litigation to allow it to address the decades of tort claims that it sought to avoid by way of its improper dissolution.

C. The Receiver's assertion of coverage claims is proper and consistent with the South Carolina receivership statute.

Travelers also argues that the receivership should be dissolved because the Court has exceeded its authority under South Carolina's receivership statute, section § 15-65-10(4). According to Travelers, the statute provides that a receiver can only be appointed for a foreign corporation "to the extent of their 'property within this state.'" (Mot. at 12.) However, the law does not limit a receiver's authority in this manner.

The South Carolina receivership statute provides in relevant part that "[a] receiver may be appointed by a judge of the circuit court . . . 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." S.C. Code Ann. §15-65-10(4). The statute authorizes the receiver to dispose of the "property" of a foreign corporation within the state, but that is neither the extent of a receiver's authority or the most relevant aspect of a receiver's authority in a receivership like this one, which involves a corporation that "has been dissolved" and has disposed of its tangible assets. As this Court's order appointing the Receiver recognizes, the Receiver has the authority to assert the dissolved corporation's rights of action. Here, the Receiver has the authority to "administer all assets of Payne & Keller" and has a further obligation to "administer any insurance assets" including "any claims related to the actions or failure to act of Payne & Keller's insurance carriers." (Exhibit B.)

This Court's view of the scope of the Receiver's authority is not unique. The United States Supreme Court recognized in *Porter v. Sabin*, 149 U.S. 473 (1893), that "[t]he whole property of the corporation [is] within the jurisdiction of the court which appointed the receiver, ***including all its rights of action***, except so far as already lawfully disposed of under orders of that court, [and] remains in its custody, to be administered and distributed by it." *Id.* at 480 (emphasis added). Recognizing that assets subject to the Receiver's oversight include rights of action is particularly significant where, as here, those rights of action represent the full extent of the remaining corporate assets.

That the South Carolina receivership statute references "property within this state" is not a limitation on the Receiver's authority in this case, which does not involve any tangible property. Instead, the statutory reference is consistent with principles of comity, which deter a state court from reaching beyond a state's borders and asserting jurisdiction over such property located in another jurisdiction. These same principles of comity support a state court's authority to vest a statutory receiver with the authority to assert a dissolved corporation's rights of action. *See, e.g., Hirson v. United Stores Corp.*, 263 A.D. 646, 34 N.Y.S.2d 122 (App. Div. 1st Dept. 1942), *aff'd*, 43 N.E.2d 712 (N.Y. App. Ct. 1942) (holding that title to choses in action held by a receiver appointed in a dissolution proceeding pursuant to Delaware law would be afforded "full faith and credit"). That is the authority asserted by the Receiver here.

The case law cited by Travelers does not support a contrary view of the scope of the Receiver's authority under the South Carolina receivership statute. *Boynton v. Consolidated Indemnity & Insurance Co.*, 180 S.C. 279, 185 S.E. 731 (1936), (*see* Mot. at 12), addressed a plaintiff's efforts to enforce a money judgment entered against a dissolved foreign corporation against a bond posted with the superintendent of insurance by a different foreign corporation. The

Court held that the bond was not the property of the liable company and was not available to satisfy the judgment; the plaintiff had delayed in enforcing its judgment against the liable company's own bond, and during the delay the liable defendant became insolvent. The case does not address the issue that is relevant here: the Receiver's authority to assert Payne & Keller's rights of action.

The cases that Travelers cites for the proposition that an executory contract is located in the state of the obligor (here, Travelers), are no more persuasive, as they address the attachment and garnishment of assets and the basis of a court's personal jurisdiction. (*See* Mot. at 13.) None of those issues are relevant here. As is shown below, the propriety of the Court's personal jurisdiction over Travelers is not in doubt. And the Receiver does not seek to attach or garnish any res held by Travelers.

The Receiver's assertion of rights of action on behalf of Payne & Keller is appropriate and consistent with the Court's authority to appoint a receiver under the South Carolina receivership statute.

III. TRAVELERS' REMAINING ARGUMENTS FAIL AS A MATTER OF LAW

Travelers' other arguments for dismissal fare no better. Travelers' personal jurisdiction argument is belied by the evidence available to the Receiver at this early stage in the case showing that Travelers wrote coverage for Payne & Keller in South Carolina. Travelers' other arguments already have been addressed by this Court and should once again be rejected here.

A. Travelers is subject to specific personal jurisdiction in this Court.

Travelers seeks dismissal of Payne & Keller's third-party claims under Rule 12(b)(2), SCRCp, on the theory that this Court lacks specific personal jurisdiction over Travelers.⁶ (Mot. at

⁶ The Second Amended Complaint does not assert that Travelers is "at home" in South Carolina or otherwise subject to general jurisdiction.

19–24.) This Court has repeatedly held—consistent with the South Carolina long-arm statute, S.C. Code Ann. § 36-2-803⁷—that insurers who enter insurance contracts covering risks within the state of South Carolina are subject to specific personal jurisdiction in South Carolina. *See, e.g.*, Exhibits K and L, Orders Denying Zurich’s Motion to Dismiss, *Pavlish v. Covil Corp.*, No. 2019-CP-42-03968 (S.C. Com. Pl. June 26, 2020), and USF&G’s Motion to Dismiss, *Protopapas v. Wall Templeton*, No. 2019-CP-40-02285 (S.C. Com. Pl. Sept. 15, 2020) (holding it is undisputed that the relevant insurers contracted with Covil to insure a risk located within South Carolina at the time of contracting), respectively.

Even at this early stage of discovery, the Receiver has compiled evidence that makes this showing. For example:

- Certain of the insurance policies that Travelers issued to Payne & Keller are described by Travelers itself as “National Accounts” that cover the entire United States of America, including South Carolina. *See* Exhibit M, Excerpt of Aetna (Travelers) Comprehensive Liability Policy for the period March 1, 1979 to March 1, 1980 at 2 (declarations page stamped “NATIONAL ACCOUNT” and “NATIONAL ACCOUNT OFFICE”); *id.* at 6 (“policy territory” defined as “the United States of America, its territories or possessions, or Canada”). *See also* Exhibit N, Excerpt of Aetna (Travelers) Comprehensive Liability Policy for the period April 1, 1983 to April 1, 1986 (same).
- Additionally, as to Payne & Keller’s work in South Carolina, the Receiver has uncovered evidence that Payne & Keller was “awarded new jobs in South Carolina” and sought to “add South Carolina . . . to P&K’s WC and CL policies” in 1973. *See* Exhibit O, Sept. 29, 1973 (asking “what can we do about covering South Carolina”).
- Payne & Keller applied for and obtained a Certificate of Authority to transact business in South Carolina. *See* Exhibit P, July 17, 1967 (Application for Amended Certificate of Authority).

⁷ The South Carolina long-arm statute expressly extends jurisdiction to any entity that “contract[ed] to insure [a] person, property, or risk located within” South Carolina. S.C. Code Ann. § 36-2-803 (2016).

The Receiver expects that discovery will show additional links between the policies issued by Travelers and risks in South Carolina, but the evidence available to the Receiver at this time already supports a finding that specific personal jurisdiction exists.

Likely recognizing this, Travelers retreats to a “fairness” argument, i.e., that it could not have expected to be haled into court in South Carolina. (Mot. at 20–22.) In the context of a motion to dismiss, however, that is not dispositive. In *Leggett v. Smith*, 386 S.C. 63, 686 S.E.2d 699 (Ct. App. 2009), the court affirmed a lower court ruling that South Carolina had personal jurisdiction over an insurer, recognizing that “[o]ther jurisdictions have . . . held a territory-of coverage provision that includes the forum state, coupled with the insured event occurring in the forum state, is sufficient to establish minimum contacts.” *Id.* at 69 (holding that an insurer was subject to specific jurisdiction); *see also Parker v. Fireman’s Ins. Co. of Newark, N.J.*, 297 S.C. 166, 375 S.E.2d 325 (Ct. App. 1988) (holding that personal jurisdiction is proper where an insurer knew an insured would drive his vehicle in South Carolina).

Travelers asserts that “[t]he Court must . . . find the exercise of jurisdiction is reasonable or fair.” (Mot. At 19 (quoting *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 432, 665 S.E.2d 660, 665 (Ct. App. 2008)).) Based on the facts, the allegations asserted in the Second Amended Complaint, and the record before this Court, the exercise of jurisdiction over Travelers is both reasonable and fair. Travelers should “reasonably anticipate being haled into [this] court” because it intentionally wrote insurance coverage designed to cover risks within South Carolina. *Coggeshall v. Reprod. Endocrine Assoc.*, 376 S.C. 12, 22, 655 S.E.2d 476, 478 (2007) (Toal, C.J., concurring). Travelers issued policies that cover Payne & Keller risks in South Carolina, and Travelers was aware that Payne & Keller was awarded contracts to perform work in South Carolina. Travelers clearly “directed its activities to . . . resident[s] of this State,” and the Third-

Party Plaintiffs' causes of action "arise[] out of or relate[] to those activities." (Mot. at 20 (quoting *S. Plastics Co. v. S. Com. Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 131 (1992)).)

In sum, considering the pleadings in the light most favorable to the Receiver and accepting all facts as true, Travelers' 12(b)(2) motion should be denied because the Receiver alleges facts sufficient to establish his claim that this Court has specific personal jurisdiction over Travelers.

B. Travelers' Arguments Under Rules 12(b)(8) and 14(a) Should Be Rejected (Again).

1. This Court Has Already Rejected These Same Arguments When Raised By Other Third-Party Defendants in Receivership Cases.

Travelers' arguments under Rules 12(b)(8) and 14(a), SCRCPP, have already been rejected by this Court when raised by other Third-Party Defendants.

Before Travelers appeared in this case, several Third-Party Defendants filed Motions to Dismiss or Strike the Amended Third-Party Complaint or, in the Alternative, to Sever and/or Stay the Amended Third-Party Complaint.⁸ These Third-Party Defendants sought similar relief under Rules 12(b)(6), 12(b)(8), 12(e), 14(a), 12(e), and 20, SCRCPP. At a June 20, 2022 hearing, this Court denied the Third-Party Defendants' Rule 12(b)(1), 12(b)(2), and 14(a) motions. *See* Exhibit Q, June 20, 2022 Hr'g Tr. at 70:17–19. Regarding the Arrowpoint Group's 12(b)(6) motion, the Arrowpoint Group declined to argue the motion, noting that the Court could rule on the papers. *See id.* at 10:18–21.

⁸ Third-Party Defendants Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company ("Berkshire"); Birmingham Fire Insurance Company ("Birmingham"); Certain Underwriters at Lloyd's of London and various London Market Companies ("Lloyd's"); Continental Insurance Company (individually and as successor in interest to Harbor Insurance Company) ("Continental" and "Continental for Harbor"); Lexington Insurance Company ("Lexington"); Medmarc Casualty Insurance Company, individually and as successor in interest to Dependable Insurance Company, Inc. ("Medmarc"); and National Union Fire Insurance Company ("National Union") filed motions to dismiss.

Since that hearing, the Court has fully denied the eight motions on the papers:

Chief Justice Toal has ruled that Continental's Motion to Dismiss/Strike and/or Sever and/or Stay or for a more Definitive Statement, Continental, Individually and as Successor in Interest to Harbor Ins. Co's, Motion to Dismiss/Strike and/or Sever and/or Stay, Birmingham Fire Insurance Company's Motion to Dismiss and/or Strike or in the Alternative to Sever and/or Stay, Lexington Insurance Company's Motion to Dismiss and/or Strike or in the Alternative to Sever and/or Stay, Certain Underwriters at Lloyds Motion to Dismiss and/or Strike or in the Alternative to Sever and/or Stay, National Union Fire Insurance Company's Motion to Dismiss and/or Strike or in the Alternative to Sever and/or Stay, Berkshire Hathaway's Motion to Dismiss and/or Strike or in the Alternative to Sever and/or Stay, and MedMarc Casualty Company, Individually and as Successor to Dependable Insurance Company's Motion to Dismiss and/or Strike or [in] the Alternative to Sever and/or Stay are **denied**.

Exhibit R, July 14, 2022 e-mail from Judicial Law Clerk M. Weeks.⁹

Six weeks after this ruling, Travelers filed the instant motions on August 24, 2022, raising essentially the same arguments made by the other Third-Party Defendants that this Court already has rejected. There is no need for this Court to revisit the rulings it already has made. For the same reasons that justified denying the prior motions, Travelers' arguments under Rules 12(b)(8) and 14(a) should be denied.

⁹ Payne & Keller would also like to update this Court on the status of the case styled *Protopapas, Receiver for Payne & Keller Company v. Zurich American Insurance Company, et al.*, C/A 3:21-4086-DCC (D.S.C.). Magistrate Judge Paige Gossett held argument on Payne & Keller's motion to remand on October 4, 2022. In her October 20, 2022 Report and Recommendation, the judge found that this case must be remanded because "at least one properly joined and served Defendant is apparently bound by a 'service of suit' or forum selection clause." ECF No. 167 at 14.

On November 3, 2022, Plaintiff filed its partial objections to the Magistrate's Report and Recommendation. ECF No. 169. Plaintiff argued, in part, that *this Court* retains exclusive jurisdiction over all of Payne & Keller's assets, including Plaintiff's claims. *Id.* Plaintiff further argued that, contrary to the Magistrate Judge's recommendation, the Barton doctrine, and in particular the Supreme Court's articulation of that doctrine in *Porter v. Sabin*, 149 U.S. 473 (1893), is binding in this case and precludes the exercise of federal court jurisdiction, independently requiring remand. Travelers also filed partial objections, which were joined by Zurich American Insurance Company, Medmarc, and US Risk, LLC. *See* ECF Nos. 168, 170, 171.

2. Travelers' Rule 12(b)(8) Motion should be denied.¹⁰

Travelers argues that the claims against it in this case should be dismissed under Rule 12(b)(8) due to the pendency of a federal case captioned *Protopapas as Receiver for Payne & Keller Co. v. American International Group*, No. 3:21-cv-04086-DCC; *see* Rule 12(b)(8), SCRCP. However, Rule 12(b)(8) does not apply when two actions are pending in separate jurisdictions, or when the two cases do not have precisely or substantially the same claims between the same parties. As this Court has ruled previously, regarding the same *Protopapas* matter above, Travelers' Rule 12(b)(8) Motion should be denied.

Overlapping jurisdiction, sometimes in virtually identical cases, has long been the accepted practice: "Despite what may appear to result in a duplication of judicial resources, 'the rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *McLaughlin v. United Va. Bank*, 955 F.2d 930, 934 (4th Cir. 1992) (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)). Rule 12(b)(8) provides for dismissal if "another action is pending between the same parties for the same claim." Rule 12(b)(8), SCRCP. The Rule must be interpreted "narrowly such that the claim must be *precisely or substantially the same* in both proceedings in order for the drastic remedy of dismissal to be appropriate." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 106, 674 S.E.2d 524, 532 (Ct. App. 2009) (emphasis added). Indeed, "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). Also, a Rule 12(b)(8) motion cannot prevail if, as here, one case is in state court and another in federal

¹⁰ Although the Court need not revisit its previous rulings, for the sake of completeness, Payne & Keller has included substantive responses to Travelers' motions under Rules 12(b)(8) and 14(a).

court. *Logan v. Atlanta & C. Air Line R. Co.*, 82 S.C. 518, 520–21, 64 S.E. 515, 516 (1909); *see also Hauge v. Curran*, No. 2011-UP-264, 2011 WL 11734637, at *1 (S.C. Ct. App. June 7, 2011).

This Court has already denied multiple insurers’ substantially similar 12(b)(8) motions in its July Order. *See* Exhibit R, July 14, 2022 email from M. Weeks (denying 12(b)(8) motion that argued the *Protopapas* action at issue here was the same as the current state court action). There is no reason to reach a different conclusion here. As previously held, the federal case is not “identical” to this case because (1) the two cases do not involve the same parties, and (2) only the *Childers* case involves claims against Rexel, SKRLA, and Compass Risk. Also, of course, the *Childers* case is in state court, while the *Protopapas* case is currently in federal court.

The South Carolina Supreme Court has held that there is no bar to a state court action, even though an action is already pending in federal court for the same cause of action, when the suits are in different jurisdictions. *Logan*, 82 S.C. at 520–21, 64 S.E. at 516. The *Logan* Court found that actions pending “in jurisdictions which are foreign to each other . . . will not abate an action pending in the other between the same parties for the same cause.” *Id.* at 516. Relevant here, “the state courts are foreign to the federal courts sitting within the same state.” *Id.* For this reason, Travelers’ Rule 12(b)(8) motion should be denied because the *Protopapas* case is treated as if it is pending in a foreign jurisdiction.

Travelers’ 12(b)(8) motion should also be denied because South Carolina courts have held 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*, 191 S.C. at 317–18, 4 S.E.2d at 262. Here, the parties are not in the same jurisdiction, and the claims are not “precisely or substantially the same in both proceedings.” *Capital City*, 382 S.C. at 106, 674 S.E.2d at 532.

Further, dismissal under Rule 12(b)(8) is only appropriate when the action involves “the same facts and circumstances” as the other actions. *Corbett v. City of Myrtle Beach*, 336 S.C. 601, 610, 521 S.E.2d 276, 281 (Ct. App. 1999). While the two cases tangentially relate to one another, the two cases are different because the case pending in federal court is a traditional insurance coverage action between a policyholder and its insurers. The state court action, however, also involves a dispute between alleged policyholders whereby the Receiver seeks a declaratory judgment delineating Rexel’s rights, if any, under Payne & Keller’s historical insurance policies. Travelers’ Rule 12(b)(8) motion should thus be denied because the facts and circumstances in the two cases differ.¹¹

3. Travelers’ Rule 14(a) motion should be denied.

Rule 14(a), SCRCP, provides:

At any time after commencement of the action, a defending party, 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.

As Travelers acknowledges, a third-party complaint is appropriate under Rule 14 so long as the third-party plaintiff has “a substantive claim against the third-party defendant founded upon derivative liability” and the outcome of the principal claim “impact[s] the third-party defendant’s liability.” *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (1994). Whether to grant a motion to strike a third-party claim is within “the sound discretion of the trial court.” *Beach v. Hudson*, 298 S.C. 424, 426, 380 S.E.2d 869, 871 (Ct. App. 1989). A court may properly consider “the effect the additional parties and claims will have on the

¹¹ Travelers relies on *State ex rel. Wilson v. Condon*, 410 S.C. 331, 764 S.E.2d 247 (2014), but there the Supreme Court did not dismiss the state case. *Id.* at 333, 764 S.E.2d at 247. Instead, it “accept[ed] this case in [its] original jurisdiction for the limited purpose of maintaining the status quo.” *Id.*

adjudication of the main action—in particular, whether continued joinder will serve to complicate the litigation unduly or will prejudice the other parties in any substantial way.” *Id.* (citation omitted).

Travelers argues the Second Amended Complaint’s Counts I, II, and XI against Travelers must be dismissed because they are not derivatively based on Plaintiff Childers’s tort claims. (Mot. at 24–25.) This argument fails for several reasons.

First, the Receiver properly filed claims against Travelers because Travelers may be liable to Payne & Keller for all or part of Plaintiff Childers’s asbestos claim. “Impleader of the insurer . . . is the proper procedural device for an insured to state its claim against the insurer for the amounts which the insured is or may be liable to the plaintiff.” *Impex Agric. Commodities Div. Impex Overseas Corp. v. Parness Trucking Corp.*, 576 F. Supp. 587, 588 n.1 (D.N.J. 1983) (citing FED. R. CIV. P. 14(a)).¹² Indeed:

It is common practice for an insured party, who is a defendant in a case brought by an injured party, to implead her insurer . . . because it makes sense to determine within the same proceeding, not only liability and damages, but also the legal rights and obligations of involved parties with respect to the payment of those damages. Trying this latter issue separately in a different case or court system imposes an unnecessary burden on parties and on the courts.

O’Bannon v. Friedman’s, Inc., 437 F. Supp. 2d 490, 493 (D. Md. 2006).

Second, the Receiver has substantive claims against Travelers founded upon derivative liability; that is, Childers’s primary claim against Payne & Keller (and other claims like it) impacts Travelers’ obligations to the Receiver, who acts for Payne & Keller. *See First Gen. Servs. of Charleston*, 314 S.C. at 442, 445 S.E.2d at 447. It is therefore squarely within the Court’s

¹² Rule 14 of the Federal Rules of Civil Procedure is similar to Rule 14 of the South Carolina Rules of Civil Procedure. *See* Rule 14 note (providing Rule 14(a) is “substantially the same as the Federal Rule”).

discretion to allow the third-party complaint to move forward. *See Mahaffey v. First Coast Intermodal Serv., Inc.*, No. CV 00-68-M2, 2001 WL 37126679, at *3 (M.D. La. May 29, 2001) (finding that the insured's third-party "claims against [the insurer] are derivative of the claims asserted in the main [underlying tort] action and therefore [the insurer was] appropriately a third-party defendant"); *Hitachi Cap. Am. Corp. v. Nussbaum Sales Corp.*, No. CIV.A.09-731(SDW), 2010 WL 1379804, at *7 (D.N.J. Mar. 30, 2010) (permitting a defendant to implead primary insurers, emphasizing that "Rule 14 is intended to reduce multiplicity of litigation and therefore is entitled to liberal construction"); *Fid. State Bank of Garden City v. McNeilus Truck & Mfg., Inc.*, No. 96-1253-JTM, 1997 WL 446422, at *5 (D. Kan. July 8, 1997) (permitting impleading liability insurer in a wrongful death case); *Baker v. Moors*, 51 F.R.D. 507, 510 (W.D. Ky. 1971).

For these reasons, Travelers' Rule 14(a) motion should be denied.

IV. CONCLUSION

Based on the foregoing, the Receiver respectfully requests that this Court deny Travelers' motion to dismiss/dissolve in its entirety.

Dated: January 13, 2023

Respectfully submitted,

/s/ Marghretta H. Shisko
 Marghretta H. Shisko (S.C. Bar No. 100106)
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 291 S. Pine Street
 P.O. Box 2465 (29304)
 Spartanburg, SC 29302
 (864) 594-5988
mshisko@johnbwhitelaw.com

Attorney for the Receiver of Payne & Keller

EXHIBIT J

00056830197

FILED
In the Office of the
Secretary of State of Texas

DEC 03 1986

ARTICLES OF DISSOLUTION

Clerk IN
Corporations Section

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.

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

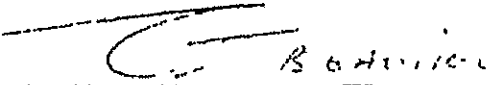
FURTHER RESOLVED, that the dissolution and liquidation of the Company be consummated as soon as practicable; and be it

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.

DATED: 10-27, 1986

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

By: 

Title: President

850:33



BOB BULLOCK
Comptroller

COMPTROLLER OF PUBLIC ACCOUNTS
STATE OF TEXAS
AUSTIN, 78774

NOVEMBER 25, 1986

MELINDA WINN, SULLIVAN KING AND SABOM
5005 WOODWAY
HOUSTON, TX 77056

THE STATE OF TEXAS

COUNTY OF TRAVIS

I, Bob Bullock, Comptroller of Public Accounts of the State of Texas
DO HEREBY CERTIFY that according to the records of this office
FRENTEX ENTERPRISES COMPANY OF TEXAS
is, as of this date, in good standing with this office, for the
purpose of dissolution, merger or withdrawal having filed the
required franchise tax reports and having paid the franchise tax
computed to be due thereunder through April 30, 1987.

GIVEN UNDER MY HAND AND SEAL OF OFFICE
in the City of Austin, this 25th day
of November, 1986, A.D.

BOB BULLOCK
COMPTROLLER OF PUBLIC ACCOUNTS

05-329-3(3-84)

Charter/COA No. 172882-0

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.

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.

2021-CP-40-03484

In Re:

Asbestos Personal Injury Litigation
Coordinated Docket

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

Third-Party Defendant Travelers Casualty and Surety Company, formerly known as The Aetna Casualty and Surety Company ("Travelers"), submits this reply in support of its motion to dismiss the claims asserted against Travelers in the Second Amended Third-Party Complaint ("Third-Party Complaint") of Third-Party Plaintiff Payne & Keller Company, through its receiver, Peter D. Protopapas (the "Receiver" or "Payne & Keller"), and to dissolve the Payne & Keller Receivership.

I. INTRODUCTION

The Receiver's opposition to Travelers' motion to dismiss and dissolve the Payne & Keller Receivership finds no support in the law.¹ As Travelers explained in its motion, because Payne & Keller is a Texas corporation that dissolved in 1986, Payne & Keller cannot sue or be sued with respect to any claim more than three years after the date of its dissolution. The Receiver argues that even though he is asserting claims in this case on behalf of Payne & Keller, because he is a Receiver, he is somehow bestowed with greater rights to sue (and be sued) than those of Payne & Keller. The Receiver is wrong. As a matter of settled receivership law, the Receiver stands in the shoes of Payne & Keller and does not acquire rights greater than those of Payne & Keller. Because Payne & Keller indisputably dissolved in 1986, its ability to sue, and the Receiver's ability to sue on its behalf, lapsed in 1989.

Moreover, even if the Receiver could bring suit (he cannot), South Carolina law does not authorize nationwide receiverships over foreign corporations like Payne & Keller that do not

¹ Travelers filed its motion on August 24, 2022. The Receiver did not respond until January 13, 2023.

involve property in South Carolina. Insurance policies issued to Payne & Keller in Texas are not property located in South Carolina, and the Receiver does not identify any other in-state property that is the subject of this dispute. The Receiver thus lacks standing to administer or liquidate Payne & Keller's insurance policies, and the Payne & Keller Receivership should be dissolved.

In an effort to get around these issues—which are dispositive as to all claims against Travelers and require dissolution of the Payne & Keller Receivership—the Receiver speculates for the first time that this Court—a South Carolina state court—can somehow revoke the corporate dissolution in Texas of Payne & Keller and reinstate Payne & Keller as a Texas corporation so as to revive its ability to sue (and be sued) because the dissolution may have occurred as a result of fraud.² This is a new claim that appears nowhere in the Receiver's Third-Party Complaint or anywhere else; it is being made for the first time in response to Travelers' motion to apply the Texas statute of repose exactly as it is written. It should thus be disregarded.

But even if the Court were to consider it, it fails for several reasons: (1) the Receiver cites no authority, and Travelers is aware of none, to support his assertion that a South Carolina state court has the extraordinary power to revoke the 37-year-old termination of a Texas corporation; (2) the provision of the Texas Business Organizations Code on which the Receiver relies for his "termination by fraud" speculation was not added to the Texas Business Code until 2021, decades after Payne & Keller's supposedly fraudulent dissolution, and statutory provisions/laws cannot be applied retroactively to disrupt vested substantive rights; (3) even if this Court had the power to revoke the termination of Payne & Keller based upon a finding of actual or constructive fraud—it doesn't—the Court cannot do so here because the Receiver did not plead any such

² The Receiver attached the Certificate of Dissolution for Payne & Keller—issued by and under the seal of the Texas Comptroller of Public Accounts on November 25, 1986—as Exhibit J to its opposition memorandum.

fraud; and (4) the Receiver does not have standing to bring any claims on Payne & Keller's behalf, including an unpled claim to revoke the termination of Payne & Keller for fraud.³

The Receiver's third-party claims against Travelers fail for at least three additional reasons, and his opposition brief does nothing to save his claims.

First, as explained in Travelers' motion, this Court cannot exercise specific personal jurisdiction over Travelers because the Receiver's claims against Travelers do not arise out of or relate to any contacts between Travelers and South Carolina. The Receiver does not come close to satisfying his burden to establish personal jurisdiction over Travelers. He does not plead any jurisdictional facts specific to Travelers, and his opposition fails to present any competent evidence to show that Travelers reasonably anticipated being haled into Court in South Carolina for claims relating to Payne & Keller.

Second, Payne & Keller's third-party contract claims against Travelers should be dismissed under SCRCP 14(a), because they are not "derivative" of Payne & Keller's alleged tort liability Plaintiff Lenora Childers. Rather, the third-party contract claims seek relief directly against Travelers, independent of Childers' claims.

Third, the third-party claims must be dismissed under SCRCP 12(b)(8), because the relief the Receiver seeks is substantially identical to the relief he seeks against Travelers in the first-filed case he brought against Travelers and others that is now pending in the U.S. District Court for the District of South Carolina. The Receiver's allegations and claims against Travelers in the

³ The Texas statute of repose for terminated businesses provides Payne & Keller with an absolute defense to any tort claims against it (like Plaintiff Lenora Childers' claims in this case), which it has asserted here. (Payne & Keller Ans. to Am. Compl. ¶ 157 (Dec. 30, 2021).) The Receiver is effectively asking this Court to do away with that defense and expose Payne & Keller to liability for suits and claims that, as a matter of law, do not exist and were extinguished over 30 years ago. That violates the Court's order appointing the Receiver, which requires him "to protect the interests of Payne & Keller whatever they may be." (Order at 1 (Aug. 27, 2021).)

instant case are substantially identical to those asserted there, and the parties are nearly identical too. The Receiver cannot credibly contend otherwise.

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

II. ARGUMENT

A. **Because Payne & Keller Can No Longer Sue or Be Sued, As a Matter of Texas Corporate Law, the Receiver's Claims on Behalf of Payne & Keller in This Case Necessarily Fail and the Receivership Should Be Dissolved**

The Receiver argues that even though the statutory deadline for Payne & Keller to file suit expired in 1989, his claims "on behalf of Payne & Keller" in this case should be allowed to go forward because, as a Receiver, he has greater rights than those of Payne & Keller. *See* Opp. at 4-7. He goes so far as to say that "it is the Receiver . . . and not Payne & Keller itself . . . that asserts coverage claims" in this case. *See id.* at 4-5. That is nonsensical. The Receiver himself has no right to insurance coverage from Travelers. His claims are asserted "on behalf of Payne & Keller," something he admits repeatedly throughout his opposition brief. *See, e.g.,* Opp. at 8, 15. Simply put, the Receiver's rights and ability to file suit are wholly dependent on, and derivative of, Payne & Keller's rights. *See* Mot. at 8-11. Because Payne & Keller's ability to bring file suit lapsed in 1989—three years after its dissolution under the Texas dissolution statute, Tex. Bus. Orgs. Code Ann. §§ 11.356, 11.359—the deadline for the Receiver to bring claims on behalf of Payne & Keller likewise expired in 1989. *See id.*

Indeed, the South Carolina Supreme Court has made clear that "[a] primary concept of the law of receivers is that a receiver stands in the shoes of the debtor," *Nat'l Cash Register Co. v. Burns*, 217 S.C. 310, 313, 60 S.E.2d 615, 617 (1950), and "the appointment by the court can vest in the receiver no greater interest than the insolvent possessed," *In re Am. Slicing Mach.*

Co., 125 S.C. 214, 218, 118 S.E. 303, 304 (1923). The United States Supreme Court has also noted that a “receiver stands in the shoes of the company, and has no higher rights than the corporation” *White v. Ewing*, 159 U.S. 36, 39 (1895).

Other courts are in accord. *See, e.g., Goodman v. Fed. Commc’ns Comm’n*, 182 F.3d 987, 992-93 (D.C. Cir. 1999) (“a receiver has authority to bring a suit only if the entity in receivership could itself properly have brought the same action.” (citations omitted)); *Certain Underwriters at Lloyds of London v. Stanford*, No. 3:09-CV-2206-N, 2013 WL 12360529, at *3 (N.D. Tex. May 13, 2013) (“It has long been held that an equitable receiver ‘stands in the shoes’ of the person or entity in receivership.”) (citations omitted); *Matter of Still*, 963 F.2d 75, 77 (5th Cir. 1992) (“The FDIC, like any receiver, stands in the shoes of the failed bank, marshals the assets, and administers a fund.” (citation omitted)); *Rich v. Cantilo & Bennett, L.L.P.*, 492 S.W.3d 755, 761 (Tex. Ct. App. 2016) (“‘When a receiver sues for the entity’s claims, the receiver generally stands in the shoes of that entity, possessing no greater rights than the entity had and subject to any agreements the entity entered.’” (quotation and other citations omitted)).

The Receiver points to this Court’s appointment order and the South Carolina receivership statute under which he was appointed, S.C. Code Ann. § 15-65-10(4), in an effort to support his expansive view of his authority. *See Opp.* at 5. He says that because the South Carolina receivership statute authorizes a court “to appoint a receiver to pursue claims on behalf of a corporation that ‘has been dissolved’ without limiting the time within which an appointment must occur,” *Opp.* at 5 (citing S.C. Code Ann. § 15-65-10(4)), that somehow means he can pursue claims on behalf of Payne & Keller at any time.⁴ The Receiver is wrong. Nothing in the

⁴ The Receiver also cites the Texas receivership statute. *See Opp.* at 5 (“Section 64.001 of the Texas Code governs the appointment of a receiver and authorizes ‘[a] court of competent jurisdiction’ to appoint a receiver ‘for a corporation that is insolvent, is in imminent danger of

statute supports his interpretation of it, and again, the appointment of a receiver cannot create a right to sue that does not exist. *See* Mot. at 8-11. Under Texas law, a dissolved corporation cannot sue or be sued more than three years after its dissolution. Tex. Bus. Orgs. Code Ann. §§ 11.356, 11.359. That means the Receiver, standing in Payne & Keller’s shoes, cannot sue Travelers here, nor can it be sued by Ms. Childers or anyone else; the Texas statute of repose blocks any and all claims against Payne & Keller.

The cases the Receiver cites are inapposite. He cites *A-Medical Advantage Healthcare Sys. v. Shwarts*, No. 10-18-00050-CV, 2019 WL 7374735 (Tex. App.—Waco Dec. 31, 2019, pet. denied) (mem. op.), for the proposition that “Texas courts [] have interpreted section 64.001 as authorizing the appointment of a receiver after a dissolved corporation’s existence terminates.” *See* Opp. at 5-6. But this misrepresents that case. In *A-Medical*, the Texas Court of Appeals specifically explained that it was not addressing the very proposition for which the Receiver cites it because it lacked jurisdiction to do so. 2019 WL 7374735, at *2–4. To suggest that case stands for anything relevant to this situation is simply untrue.⁵

insolvency, has been dissolved, or has forfeited its corporate rights.” (citing TEX. CIV. PRAC. & REM. CODE § 64.001(a)(5)). That statute is irrelevant. The Receiver here was appointed under the South Carolina receivership statute, which he admits.

⁵ In a footnote, the Receiver also cites *In re Krafft-Murphy Co.*, 82 A.3d 696 (Del. 2013). *See* Opp. at 6 n. 4. But *Krafft-Murphy* supports dissolving the receivership here. In that case, the Delaware Supreme Court held that unexpired insurance policies could constitute property that could be administered by a receiver “so long as those rights are capable of vesting.” *Id.* at 698. Here, as a matter of Texas law, there is no “capability” for claims to be brought against Payne & Keller because of the expiration of the post-termination statute of repose, meaning that Payne & Keller no longer has any “rights” that “are capable of vesting” under any prior insurance policy. The other case the Receiver cites, *Glazer v. Motor Parts Rebuilders, Inc.*, 865 S.W.2d 371 (Mo. Ct. App. W.D. 1993), is similarly inapposite. There, a defendant asked a Missouri court to hold that a Kansas court had improperly appointed a receiver over a dissolved Kansas company pursuant to Kansas law. The Missouri court, of course, deferred to the Kansas court’s appointment under Kansas law. 865 S.W.2d at 372–74. And, in any event, the Missouri court would not have had authority to reverse a Kansas court’s appointment of a receiver over a dissolved Kansas company under, at least, the Full Faith and Credit Clause.

Simply put, the Receiver's claims against Travelers are time-barred and the Receivership should be dissolved.

B. South Carolina Law Does Not Allow Nationwide Receiverships Over Foreign Corporations Like Payne & Keller That Do Not Involve Property in South Carolina

Even if the Receiver could sue on behalf of Payne & Keller (he cannot), Payne & Keller's insurance policies – the subject of this dispute – are not property of Payne & Keller located within South Carolina. *See* Mot. at 11-14. As a result, the Receiver lacks standing to administer or liquidate Payne & Keller's insurance policies and the Receivership should not have been created in the first place. *See id.* The Receiver's opposition does nothing to rebut this argument.

As Travelers explained in its motion, the statute under which the Receiver was appointed—S.C. Code § 15-65-10(4)—specifies that a South Carolina court may only appoint a receiver for a foreign corporation with respect to “property within this State,” *i.e.*, South Carolina. Specifically, it says that a receiver may be appointed “[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). In other words, while a receiver can generally be appointed for an in-state corporation that “has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights,” a receiver may only be appointed for a foreign corporation as it relates to “the property within this State of [the] foreign corporation[.]” *Id.* Nothing in the statute supports the Receiver's interpretation that South Carolina courts have the authority to appoint a receiver for any defunct foreign corporation, regardless of the circumstances, and to

vest in the receiver the same powers as if it were an in-state corporation—including the power to marshal all its property, wherever located throughout the country.

The South Carolina Supreme Court has confirmed that the statute means what it says: If a foreign corporation has property in 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 Receiver summarily says that *Boynton* “does not address the issue that is relevant here: the Receiver’s authority to assert Payne & Keller’s rights of action.” Opp. at 15. The Receiver is wrong. While the case obviously did not involve Peter Protopapas or Payne & Keller, it is relevant and controlling. Like the foreign corporation at issue in *Boynton*, Payne & Keller has no property in South Carolina, and thus this Court was not empowered to appoint the Receiver in the first place, and the Receiver is without authority to act with respect to Payne & Keller’s out-of-state property—namely, its insurance policies.

Indeed, the Receiver does not and cannot dispute that insurance policies issued to Payne & Keller in Texas are not “property [of Payne & Keller] within [South Carolina][.]” *See* Mot. at 13. Nor does he dispute that 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 id.* As a result, the insurance contracts at issue in this case plainly are not “property [of Payne & Keller] within [South Carolina].” The Receiver thus does not have standing to assert Payne & Keller’s rights or to otherwise act on Payne & Keller’s behalf with respect to those contracts.

The Receiver ignores virtually all of the authority cited in Travelers’ motion and instead falls back on his argument that this Court’s appointment order – which appointed him Receiver under S.C. Code § 15-65-10(4) – somehow bestowed in him greater power than the law allows. *See Opp.* at 13. He says that he “has the authority to assert the dissolved corporation’s rights of action,” “to ‘administer all assets of Payne & Keller,’” and “to ‘administer any insurance assets’ including ‘any claims related to the actions or failure to act of Payne & Keller’s insurance carriers.’” *Id.* That may arguably be true if Payne & Keller were a defunct in-state corporation. But it is not. It is a foreign corporation and, as such, the scope of his authority had to be curtailed to in-state property, which is non-existent here.

“The South Carolina Supreme Court has written repeatedly that South Carolina statutes have no extraterritorial effect . . . because the general rule is that no state or nation can, by its laws, directly affect, bind, or operate upon property or persons beyond its territorial jurisdiction[.]” *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N.A., Inc.*, 492 F.3d 484, 489 (4th Cir. 2007) (citations and internal quotation marks omitted); *see also, e.g., Ex parte First Pennsylvania Banking & Trust Co.*, 247 S.C. 506, 508-509 (S.C. 1966) (“it is quite clear that the South Carolina statute could not affect the rights or liabilities of the parties flowing from the North Carolina collision”). The authority to appoint a receiver for a dissolved foreign corporation like Payne & Keller is subject to constitutional limitations, including the Full Faith and Credit Clause and the Commerce Clause. *See Carolina Trucks & Equip.*, 492 F.3d at 489-90 (“The principle that state laws may not generally operate extraterritorially is one of constitutional magnitude. One state may not ‘project its legislation’ into another”); *see also* Mot. at 9-11.

Here, because Payne & Keller is not amenable to suit under Texas law and does not have any property in South Carolina, this Court lacked the authority to appoint a receiver for Payne &

Keller in the first place, the Receiver lacks standing to pursue his claims in this case (or any case) on behalf of Payne & Keller, and the Receivership should be dissolved.⁶

C. The Court Should Disregard the Receiver's New, Speculative Argument that This Court Should Somehow Revoke Payne & Keller's Corporate Dissolution Because It Allegedly Involved Fraud

The Receiver devotes much of his opposition brief to arguing, for the first time, that “this Court has the ability to ignore and/or set aside the Payne & Keller dissolution because the dissolution was the result of actual or constructive fraud.” Opp. at 8. The Receiver relies on Section 11.153 of the Texas Business Organizations Code, which authorizes a court to revoke a corporation’s termination if it was was “as a result of actual or constructive fraud.” Opp. at 8. He suggests that “there is ample evidence supporting a claim that, at the very least, constructive fraud occurred in connection with Payne & Keller’s dissolution.” Opp. at 9. According to the Receiver, 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.* The Receiver thus speculates that because Payne & Keller “dissolved as a result of (at the very least) constructive fraud, the termination of its corporate existence should be revoked, and pursuant to section 11.153 of TBOC, Payne & Keller should be permitted to maintain the insurance coverage claims pending in this litigation to allow it to address the decades of tort claims that it sought to avoid by way of its improper dissolution.” Opp. at 12-13.

⁶ The Receiver cites two cases to support his erroneous view of his authority: *Porter v. Sabin*, 149 U.S. 473 (1893) and *Hirson v. United Stores Corp.*, 263 A.D. 646, 34 N.Y.S.2d 122 (App. Div. 1st Dept. 1942), *aff'd*, 43 N.E.2d 712 (N.Y. App. Ct. 1942). See Opp. at 14. These cases are irrelevant. They say nothing about the South Carolina receivership statute, let alone the specific issue of whether the statute authorizes a South Carolina court to appoint a receiver for a foreign corporation where there is no in-state property at issue.

This new “claim”—which is really nothing more than speculation in an opposition memorandum—is entirely unpled. It is mentioned nowhere in the Receiver’s Third-Party Complaint, but Payne & Keller itself admits it “is a dissolved entity and therefore lacks the capacity to be sued.” (Payne & Keller Ans. to Am. Compl. ¶ 157 (Dec. 30, 2021).) The Court thus can and should disregard the Receiver’s argument, which is not based on any actual, admissible evidence of “fraud,” but is based only on the Receiver’s speculation.

But even if the Court were to consider this issue, it does nothing to save the Receiver’s claims in this case for several reasons.

First, the Receiver cites no authority to support his assertion that this Court, a South Carolina state court, has the power to revoke the termination of a Texas corporation as a matter of Texas corporate law. He does not even try to explain how that would happen, legally or practically, or the impact it might have on myriad other claims and suits (or on his ability to continue to serve as a Receiver). Nor could he. For the reasons explained above, the Full Faith and Credit Clause, the Commerce Clause, and black-letter South Carolina law bar this Court from issuing an extraterritorial order that purports to change Payne & Keller’s out-of-state dissolution status under Texas law or to instruct the Texas Secretary of State to do the same.

Second, Texas the statutory provisions on which the Receiver relies cannot be applied retroactively. Section 11.359(a) of the Code, “Extinguishment of Existing Claim,” provides that “an existing claim by or against a terminated filing entity,” *i.e.*, a dissolved Texas corporation like Payne & Keller, “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.” The Code was amended in 2021 to add a provision that states in part: “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[.]" Tex. Bus. Orgs. Code. § 11.359(c)(1).

But this statutory amendment, on which the Receiver exclusively bases his argument, cannot be retroactively applied to reach backwards and revive potential claims that were extinguished nearly 40 years earlier. This is hornbook Texas law. *See generally Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 145–50 & n.122 (Tex. 2010) (explaining that the Texas Constitution prohibits retroactively applying new statutes when doing so would disrupt settled expectations, terminate existing claims, or revive barred claims, and noting that the Texas Supreme Court has "invalidated statutes as prohibitively retroactive" in several instances "involving extensions of statutes of limitations"); *Baker Hughes, Inc. v. Keco R.&D., Inc.*, 12 S.W.3d 1, 4 (Tex. 1999) ("To permit barred claims to be revived years later would undermine society's interest in repose, which is one of the principal justifications for statutes of limitations. Thus, we have written that a statute extending the limitations period of a claim already barred by limitations violates the Texas Constitution's prohibition against retroactive laws, which is article I, section 16.").

Third, even if this Court had the power to revoke the termination of Payne & Keller and reinstate its corporate existence based upon a finding of actual or constructive fraud, the Court cannot do so here because, again, the Receiver did not plead actual or constructive fraud, or even file a motion seeking such relief. The Receiver cannot seek the unprecedented and extraordinary remedy of reinstating a foreign corporation's corporate existence (that was terminated nearly 40 years ago in Texas) by way of argument in opposition to a motion to dismiss.

Fourth, for the reasons already discussed, the Receiver does not have standing to bring any claims on Payne & Keller's behalf, including an unpled claim to revoke the termination of Payne & Keller for fraud.

* * * * *

At bottom, Travelers has moved to dissolve the receivership because it has no assets to marshal in light of the fact that Payne & Keller is immune from suit as a matter of Texas law because the statute of repose for claims against terminated businesses lapsed in 1989. *See* Tex. Bus. Orgs. Code Ann. § 11.359(a) (three-year repose period following termination); *In re All Cases Against Sager Corp.*, 967 N.E.2d 1203 (Ohio 2012) (vacating lower court orders creating a receivership over a dissolved Illinois company because Illinois law barred suit against that company); *see generally* U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."). And it further moved to dissolve the receivership because Payne & Keller has no South Carolina assets. S.C. Code Ann. § 15-65-10(4).

In response, the Receiver has argued that he somehow has rights beyond those held by Payne & Keller. *This is wrong as a matter of law.* *See 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.").

The Receiver has argued that South Carolina law permits this Court to grant a receiver authority to act outside of South Carolina and seize assets held beyond this state's borders. *This is wrong as a matter of law.* *See* S.C. Code Ann. § 15-65-10(4) (authorizing appointment of a receiver only over "property within this State of foreign corporations"); *Doctors Hosp. of Augusta, LLC v. CompTrust AGC Workers' Comp. Trust Fund*, 371 S.C. 5, 9, 636 S.E.2d 862,

864 (2006) (reiterating “the principle that state statutes generally have no extra-territorial effect remains a foundation of the respect for individual sovereignty the states must share with one another”); *see generally* U.S. Const. art. I, § 8 (reserving to Congress the authority “to regulate Commerce . . . among the several States”).

And the Receiver has argued that under a brand new Texas law, Payne & Keller may be subject to suit if its dissolution was “fraudulent.” *This, too, is wrong as a matter of law.* *See Baker Hughes*, 12 S.W.3d at 4 (“To permit barred claims to be revived years later would undermine society’s interest in repose, which is one of the principal justifications for statutes of limitations. Thus, we have written that a statute extending the limitations period of a claim already barred by limitations violates the Texas Constitution’s prohibition against retroactive laws, which is article I, section 16.”).

There is simply no basis for this receivership to continue. South Carolina, Texas, and federal constitutional law all prohibit it. The Court should dissolve the receivership (and dismiss Payne & Keller from this case) accordingly.

D. The Court Also Lacks Personal Jurisdiction Over Travelers

The Receiver’s Third-Party Complaint does not include any jurisdictional allegations specific to Travelers. Not one. He simply 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.” Sec. Am. Third-Party Compl. ¶ 25. This pleading deficiency 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”).⁷

In his opposition brief, the Receiver relies on prior decisions issued by this Court in other cases, but “[p]ersonal jurisdiction over a nonresident defendant is a question to be resolved upon the facts of each particular case.” *See Power Prods. & Servs. Co., Inc. v. Kozma*, 665 S.E.2d 660, 664 (S.C. Ct. App. 2008) (citation omitted). As “[t]he party seeking to invoke personal jurisdiction over a non-resident defendant” like Travelers, the Receiver “bears the burden of establishing jurisdiction.” *See id.* (citation omitted). To do so the Receiver has to show claim-specific contacts between Travelers and South Carolina. *See Mot.* at 20-21. The Receiver has not and cannot satisfy his burden here.

The Receiver points to three pieces of “evidence” in his opposition brief: (1) “[c]ertain of the insurance policies that Travelers issued to Payne & Keller are described by Travelers itself as ‘National Accounts’ that cover the entire United States of America, including South Carolina”; (2) “Payne & Keller was ‘awarded new jobs in South Carolina’ and sought to ‘add South Carolina . . . to P&K’s WC and CL policies’ in 1973”; and (3) “Payne & Keller applied for and obtained a Certificate of Authority to transact business in South Carolina.” *Opp.* at 16. Only one of these pieces of “evidence” even arguably relates to Travelers’ alleged conduct in South Carolina – the reference to “National Accounts” in certain insurance policies. The two others relate to Payne & Keller’s conduct, not Travelers’ conduct, and are thus irrelevant for purposes of establishing personal jurisdiction over Travelers. *See Mot.* at 21-22 (collecting cases). The Receiver’s assertion that Payne & Keller did something aimed at South Carolina in 1973 is

⁷ The Receiver’s argument is limited to specific personal jurisdiction. He admits the Court does not have general jurisdiction over Travelers. *See Opp.* at 15 n. 6.

particularly irrelevant, given that, according to his own allegations, Travelers did not provide insurance coverage to Payne & Keller until 1978. *See* Sec. Am. Compl. ¶ 149.

As Travelers explained in its motion, “[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. v. S. Com. Bank*, 423 S.E.2d 128, 131 (S.C. 1992) (citation omitted) (emphasis added). “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[.]” *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 655 S.E.2d 476, 478 (S.C. 2007) (citation omitted) (emphasis added). The relevant contacts “must center on the contacts generated by the defendant and not on the unilateral actions of some other entity[.]” *Cockrell*, 611 S.E.2d at 508 (citation omitted); *see also Moosally v. W.W. Norton & Co., Inc.*, 594 S.E.2d 878, 885 (S.C. Ct. App. 2004) (“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)).

“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.’” *Maseng v. Lenox Corp.*, 483 F. Supp. 3d 360, 365 (D.S.C. 2020) (quotation omitted); *Cockrell*, 611 S.E.2d at 509 (similar). The reference to “National Accounts” in certain policies Travelers issued to Payne & Keller is woefully insufficient to show that Travelers anticipated being haled into court in South Carolina with respect to Payne & Keller insurance policies. *See* Mot. at 21-22 (collecting cases). What’s more, the Travelers policies that the Receiver presented as exhibits to the Court with his

opposition memorandum reference Payne & Keller doing business in several places—Texas, Louisiana, Ohio, New Jersey, and even North Carolina—but ***not*** in South Carolina. (Exs. M & N to the Receiver’s Opposition Memorandum.) 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 or that Travelers could have ever expected to wind up litigating in South Carolina when it issued policies to Payne & Keller, the exercise of personal jurisdiction over Travelers would violate due process.

Moreover, as Travelers explained in its motion, it would also be unreasonable and unfair for the Court to exercise personal jurisdiction over Travelers here. *See* Mot. at 22-24. Each of the considerations South Carolina courts consider in assessing the fairness prong of the due process analysis weighs in favor of declining to exercise jurisdiction over Travelers. *See* Mot. at 22-24. The Receiver does not meaningfully respond to this argument in his opposition.

E. The Third-Party Claims Are Improper Under SCRCP 14 Because They Are Not Based On Derivative Liability of Plaintiff Childers’ Tort Claims

The Receiver argues that his third-party claims against Travelers are proper under Rule 14 of the SCRCP “because Travelers may be liable to Payne & Keller for all or part of Plaintiff Childers’s asbestos claim.” *Opp.* at 23. To support his position that impleader of an insurer under SCRCP 14 is the proper procedural device for an insured to state a claim against an insurer for amounts the insured may owe to the plaintiff, he cites two out-of-state cases that have no bearing on this dispute. He ignores all of the cases cited in Travelers’ motion – including South Carolina authority – which make clear that liability issues in tort cases and insurance coverage issues should be litigated separately. *See* Mot. at 27-28 (collecting cases). That line of cases should be dispositive here.

The Receiver argues that he “has substantive claims against Travelers founded upon derivative liability; that is, Childers’s primary claim against Payne & Keller (and other claims like it) impacts Travelers’ obligations to the Receiver, who acts for Payne & Keller.” Opp. at 23. This argument misses the point. Payne & Keller’s contract claims against Travelers are not derivative of or dependent on Childers’ tort claims against Payne & Keller. Travelers, an insurer, is not derivatively liable if Payne & Keller is found responsible for Childers’ alleged asbestos exposure. Travelers does not have any obligation whatsoever to Childers. The Receiver’s third-party claims seek relief directly from and against Travelers, purportedly on Payne & Keller’s behalf; they simply do not seek to establish derivative liability as it relates to Childers. *See* Mot. at 26-27. The claims are thus not actionable under SCRCP 14. *See id.*

The Receiver also completely ignores the fact that the Payne & Keller insurance policies themselves show that the parties to those contracts—Payne & Keller and Travelers—agreed that Payne & Keller cannot implead Travelers in a direct asbestos tort case like this one before Payne & Keller’s liability has been determined. *See* Mot. at 28. In one such contract, for example, Payne & Keller and Travelers expressly agreed that “[n]o action shall lie against [Travelers] . . . until the amount of [Payne & Keller’s] obligation to pay [has] been finally determined either by judgment against [Payne & Keller] after actual trial or by written agreement,” and “[n]o person or organization shall have any right under this policy to join the company as a party to any action against [Payne & Keller] to determine [Payne & Keller’s] liability, nor shall [Travelers] be impleaded by [Payne & Keller] or his legal representative . . .” *Id.* (citing Ex. H to Travelers’ Motion at TRAV_SUB_002207).

Simply put, Travelers cannot be impleaded and the Receiver’s third-party claims should be dismissed under SCRCP 14.

F. Payne & Keller’s Third-Party Claims Should Also 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

As explained in Travelers’ motion, 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); *see also* Mot. at 29. The Receiver argues that “Rule 12(b)(8) does not apply when two actions are pending in separate jurisdictions, or when the two cases do not have precisely or substantially the same claims between the same parties.” Opp. at 20. He also argues that “a Rule 12(b)(8) motion cannot prevail if, as here, one case is in state court and another in federal court.” *Id.* at 20-21. Once again the Receiver is mistaken, and once again he ignores almost all of the authority cited in Travelers’ motion demonstrating why he is wrong.

In *State ex rel. Wilson v. Condon*, 410 S.C. 331 (S.C. 2014) (Toal, C.J.), the South Carolina Supreme Court explained that even where the parties in the two cases at issue “are not identical,” and one case is pending in state court and one in federal court, “the principle underlying Rule 12(b)(8) of the South Carolina Rules of Civil Procedure that duplicative litigation should be avoided applies” *Id.* at 333. The Supreme Court in that case “agree[d] with the [petitioner] that [an] issue [would be] more appropriately resolved in the pending litigation in the Federal District Court,” and found that “[a]voiding concurrent litigation in both the courts of this state and the Federal District Court will foster wise judicial administration and conserve judicial resources.” *Id.* The same is true here.

The Receiver suggests that the pending federal case is not sufficiently “identical” to the instant case for Rule 12(b)(8) to apply. *See* Opp. at 21-22. Incredibly, he goes so far as to say

that the two cases only “tangentially relate to one another[.]” Opp. at 22. Travelers included in its motion a chart that demonstrates that the allegations and claims in both cases are substantially identical as to Travelers. *See* Mot. at 29-33. Travelers respectfully refers the Court to that chart, which should speak for itself. That this case includes a few additional third-party defendants makes no difference. *See Condon*, 410 S.C. at 333. The Receiver’s third-party claims against Travelers should be dismissed under SCRCP 12(b)(8) because they are substantially identical to his claims against Travelers in the pending federal case.

Further, as Travelers explained in its motion, dismissal is especially appropriate here because the federal case was filed first. *See* Mot. at 33-34. Indeed, when considering whether to dismiss or stay a parallel action, courts often give deference to a first-filed suit over a second-filed action. *See id.* The Receiver ignores this point altogether in his opposition. 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 case.

III. CONCLUSION

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

Respectfully submitted,

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January 25, 2023

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

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), SCRCP, 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

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PROOF OF SERVICE

I, the undersigned of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellant, 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): Travelers's Response Regarding Appealability and Accompanying Appendix

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May 15, 2023