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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.) and Acting Circuit Court Judge

Case No. 2021-CP-40-03484

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.; and Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co., Defendants.

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

v.

Zurich American Insurance Company (Individually and as Successor to Northern Insurance Company of New York, Maryland All 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; Certain Underwriters

at Lloyd's of London and Various London Market Companies; South Carolina Property and Casualty Insurance Guaranty Association; R.L. Jarrett (Underwriting) Agency, Inc.; U.S. Risk, LLC; Rexel USA, Inc.; and Compass Risk Services, LLC, Third-Party Defendants,

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

and

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

and

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

RESPONDENT'S RETURN TO APPELLANTS' EMERGENCY MOTION TO CLARIFY AND ENFORCE RULE 205

Appellants'[1] Emergency Motion to Clarify and Enforce Rule 205 and their related request to stay briefing pending resolution of the emergency motion are just the latest in a long line of dilatory and vexatious filings seeking to undermine and delay the Receiver's ability to meet his court-appointed obligations, including during the pendency of this appeal. Appellants' current Emergency Motion merely repeats a series of arguments that they lost before this Court just last month, when this Court ruled that the pendency of Appellants' appeal does not stay "the March 31, 2023 order", "the receivership action" pending below, or "the Receiver's ability to carry out

[1] Zurich American Insurance Company ("Zurich") has filed an improper motion to be added as an appellant into this appeal, and to join in Appellants' Emergency Motion to Clarify. Rule 202, SCACR, defines an appellant as "[t]he party appealing." While Zurich is a party to the circuit court action, it has not appealed an order of the circuit court, and the time for it to do so has passed.

his duties." *See Childers v. Davis Mech. Contractors, Inc.*, S.C. Ct. App. Order dated Sept. 8, 2023 (the "September 8 Order"). Appellants have provided no basis for this Court to change its mind, and their efforts to relitigate issues they have already lost are inappropriate and a clear waste of court and party resources.

A. This Court Has Already Ordered That the Circuit Court Receivership Action May Proceed and the Receiver May Continue His Duties During This Appeal.

This Court fully heard and already ruled against Appellants' arguments that Rule 205 jurisdictionally bars further proceedings in the receivership action while this appeal is pending. This Court's September 8, 2023 Order expressly held that receivership actions are not stayed during an appeal, pursuant to Rule 62(a), SCRCP, and S.C. Code Ann. § 14-3-450:

> After consideration of Respondent's [i.e., the Receiver's] "motion to clarify the court's order on appealability," as well as the returns and reply, we clarify that Appellants' appeal of the circuit court's March 31, 2023 order denying their motion to dismiss third-party claims and dissolve the Payne & Keller receivership shall proceed. ***We further clarify that the March 31, 2023 order is not stayed during pendency of this appeal.*** *See* Rule 62(a), SCRCP ("Unless ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action . . . shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal."); S.C. Code Ann. § 14-3-450 (2017) ("In case of an appeal under item (4) of Section 14-3-330 the proceedings in other respects in the court below shall not be stayed during the pendency of such appeal unless otherwise ordered by the court below."). ***Accordingly, the receivership action and the receiver's ability to carry out his duties are not stayed.***

September 8 Order (emphasis added).

In the current Emergency Motion, Appellants contend that "the circuit court is and was divested of jurisdiction to rule on Ms. Childers's motion under Rule 205, and the question of a stay was irrelevant to that analysis." Mot. at 14. Specifically, Appellants argue that, while the September 8 Order held that the receivership action in the circuit court was not stayed and could proceed during the appeal, this Court nevertheless intended to leave the circuit court without

jurisdiction regarding the receivership action, pursuant to Rule 205, SCACR, because the validity of the receivership was subject to the pending appeal. Plainly, this was not the result intended by this Court—nor does it reflect South Carolina law regarding receivership actions.

This Court's September 8 Order was prompted by Appellants repeatedly instructing the circuit court that it could not proceed on receivership matters while the new wave of appeals challenging the appointment of receivers were pending before the appellate court. At the August 21, 2023 hearing, the circuit court requested that the parties seek clarification regarding the circuit court's ability to proceed with orders and the receivership action during the appeal

In response to the circuit court's request for clarification, the Receiver filed a Motion to Clarify in this Court seeking confirmation that Appellants' appeal of the circuit court's March 31, 2023 order did not stay the underlying receivership action, and that the Receiver could continue his court-appointed duties while the appeal is pending, pursuant to Rule 62(a), SCRCP, and S.C. Code Ann. § 14-3-450. *See* Receiver's Expedited Motion to Clarify the Court's Order on Appealability, Aug. 23, 2023, at 4.

Appellants filed Returns to the Receiver's Motion to Clarify—making the very same arguments that they are now raising again in their current motion—that is, *that the receivership action below could not proceed during the appeal on jurisdictional grounds pursuant to Rule 205*. Specifically, Appellants argued to this Court:

> While the Receiver ostensibly asks for 'clarification,' what he actually seeks is permission from this Court to ignore Rule 205 and continue his efforts to litigate before the Circuit Court matters that are in this Court's exclusive jurisdiction. . . . The language of Rule 205 is clear—as are the Supreme Court's recent decisions reiterating Rule 205's application in *Stokes-Craven* [*Holding Corp. v. Robinson*, 416 S.C. 517, 532, 787 S.E.2d 485, 493 (2016)] and *Lancaster* [*v. Georgia-Pacific Corp.*, 403 S.C. 136, 137 742 S.E.2d 867, 868 (2013)]. The issues the Receiver seeks to pursue in the Circuit Court are the very issues pending before this Court on

> appeal. Therefore, this Court has "exclusive jurisdiction" over these issues.

See Appellants' Return to Respondent's Expedited Motion to Clarify the Court's Order on Appealability, Sept. 5, 2023, at 10-13.

In a separately filed Return, Appellant Travelers similarly argued to this Court that nothing could be done in the underlying circuit court action during the appeal, because any action by the Receiver or the circuit court would run afoul of Rule 205:

> The Receiver's motion [to clarify] frames the question as one of a stay. But this is incorrect. As a matter of hornbook South Carolina law, once an issue is before the appellate courts, the circuit court loses jurisdiction over those issues. *See* Rule 205, SCACR (providing that upon service of a notice of appeal, "the appellate court shall have *exclusive jurisdiction* over the appeal") (emphasis added); . . . Jean H. Toal, et al., *Appellate Practice in South Carolina* 121 (3d ed. 2016) (explaining that "[t]he appellate court obtains exclusive jurisdiction over the appeal upon service of the notice of appeal").
>
> ***Because the very existence of the receivership is presently on appeal before this Court, there is nothing the Receiver can do at the trial level, as anything the Receiver does would, by definition, involve "matters affected by the appeal." As such, the Receiver cannot continue to prosecute his third-party case or take other actions purportedly on Payne & Keller's behalf while the validity of his appointment is on appeal.***

See Travelers's Response in Opposition to the Receiver's Motion to Clarify, Sept. 5, 2023, at 4-5 (emphasis added) (citations omitted).[2]

[2] Travelers further argued that Rule 62(a) and Section 14-3-450—on which this Court ultimately relied—were irrelevant, because Rule 205, standing alone, settled the question:

> This is not at odds with Civil Rule 62(a) or South Carolina Code § 14-3-450, on which the Receiver exclusively relies. Rule 62(a), SCRCP, creates an automatic stay against executing on any judgment for a ten-day period after it has been entered, but then it exempts "injunctions, receivership, and accountings" from this automatic-stay period. ***That has nothing to do with whether the trial court still has jurisdiction to direct a receiver when the very***

After considering these arguments—***including specifically Appellants' arguments regarding Rule 205, SCACR***—this Court held that the Receiver's position based on Rule 62(a) and Section 14-3-450 was correct, confirming that "the receivership action and the receiver's ability to carry out his duties are not stayed." *See* September 8 Order, at 3.

In their Emergency Motion, Appellants do not challenge the application of Rule 62(a) and Section 14-3-450 to receivership actions as set forth in this Court's September 8 Order.[3] Instead, Appellants repeat the same Rule 205 arguments just rejected by this Court. Appellants implausibly construe the September 8 Order as, on the one hand, *expressly ruling* that the receivership action could proceed in the circuit court under Rule 62(a) and Section 14-3-450, while on the other hand, *silently agreeing* with Appellants' extensively briefed arguments that Rule 205 precludes circuit court jurisdiction during the appeal or, as described in a status conference on October 24, 2023, simply not taking that issue up yet, despite the fact that it was fully briefed by Appellants.

The response to this Court's Order clarifying the trial court's ability to proceed is mindboggling. In its September 8 Order, this Court made clear that the receivership action and

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> ***existence of the receivership has been challenged on appeal and is squarely presented to this Court.*** *See* Rule 205, SCACR (vesting the appellate court with "*exclusive jurisdiction*" over matters on appeal) (emphasis added).
>
> [Section 14-3-450] is similarly inapplicable. It provides: "In case of an appeal under item (4) of Section 14-3-330 the proceedings *in other respects* in the court below shall not be stayed during the pendency of such appeal unless otherwise ordered by the court below." *Id.* (emphasis added). On its face, this statute recognizes the jurisdictional limitations placed on the trial court when a matter is on appeal, but it authorizes "the other" parts of case—that is, the unappealed parts—to proceed unless the trial court decides to stay the entirety of the proceedings.

Id. at 5 (emphasis added).

[3] Indeed, Appellants' Emergency Motion does not even cite Rule 62(a) or Section 14-3-450, and it contains no discussion of these authorities on receivership proceedings.

the efforts of the Receiver could continue. If the Court intended to leave the circuit court with no jurisdiction to proceed in the receivership action, it would have said so. Instead, this Court's September 8 Order expressly—and properly—held that the receivership action could proceed and the Receiver could continue to carry out his duties.

Accordingly, far from improperly acting in this receivership action, the circuit court's October 5, 2023 order was entered consistent with South Carolina receivership law, as confirmed by this Court's September 8 Order. Appellants' attempts to ignore this Court's ruling and relitigate the same meritless jurisdictional arguments again and again are improper and should be soundly rejected—at a minimum.

B. This Non-Meritorious Emergency Filing Is the Latest in a Long History of Similar Meritless Appeals and Motions in This and Other Receivership Matters.

Faced with receivership matters, the insurers implicated in these cases have a long history of attempting to thwart the legitimate claims brought by the Receiver. Almost every time the legacy insurers involved in these receivership matters have attempted appellate review of trial court orders, their efforts have failed:

No.	Date	Case	Court	Ruling
1	10/16/2019	*Zurich American Insurance Company v. CBS Corp.*, Appellate Case No. 2019-001651	Supreme Court	Denying petition for writ of certiorari filed by USF&G, Sentry, and Zurich related to interlocutory discovery order
2	10/16/2019	*Zurich American Insurance Company v. CBS Corp.*, Appellate Case No. 2019-001654	Supreme Court	Denying petition for writ of certiorari filed by USF&G, Sentry, and Zurich related to interlocutory discovery order

3	11/1/2019	*Hartford Accident & Indemnity Company v. Covil Corporation*, Appellate Case No. 2019-001764	Court of Appeals	Appellant Hartford withdrew appeal
4	11/18/2019	*Hartford Accident and Indemnity Company v. Covil Corporation*, Appellate Case No. 2019-001758	Supreme Court	Granting request to withdraw petition for a writ of certiorari
5	2/13/2020	*Zurich American Insurance Company v. CBS Corporation,* Appellate Case No. 2020-000206	Court of Appeals	Dismissing appeal of Zurich and USF&G because timely post-trial motion still pending before circuit court
6	5/22/2020	*Tracy Jolly Pavlish v. Covil, Hutto v. Covil, Hagan v. Covil, Rampey v. Covil, Reilly v. Covil, Jonas v. Covil, and Murphy v. Covil*, Appellate Case No. 2020-00749	Supreme Court	Denying Zurich's petition for a writ of mandamus to reconsider motion to recuse Justice Toal as not appropriate
7	6/17/2020	*United States Fidelity & Guaranty Company v. Protopapas,* Appellate Case No. 2020-000791	Supreme Court	Dismissing petition for a writ of supersedeas because no appeal pending
8	7/30/2020	*United States Fidelity & Guaranty Company v. Protopapas (In re Roxanne Falls)*, Appellate Case No. 2020-000845	Court of Appeals	Granting motion to dismiss because USFG was not a party to the action
9	10/22/2020	*Protopapas v. Wall, Templeton*, Appellate Case No. 2020-001322	Court of Appeals	Appellant's request for dismissal granted
10	12/15/2020	*Protopapas v. Wall Templeton*, Appellate Case No. 2020-001322	Court of Appeals	Appellant's (Zurich) request to withdraw its appeal granted
11	1/4/2021	*Finch v. United States Fidelity and Guaranty Co.*,	Supreme Court	Appellant withdrew its Petition for Writ of Prohibition

		Appellate Case No. 2020-001670		
12	1/6/2021	*Finch v. United States Fidelity & Guaranty Company*, Appellate Case No. 2020-001663	Court of Appeals	Dismissing appeal because underlying order not appealable
13	3/9/2021	*Finch v. United States Fidelity and Guaranty Co.*, Appellate Case No. 2020-001670	Supreme Court	Supreme Court denied Covil's Motion for Sanctions but cautioned any "action taken for the purpose of delaying the disposition of this case will, under appropriate circumstances, merit the imposition of sanctions"
14	4/5/2021	*Finch v. United States Fidelity & Guaranty Company*, Appellate Case No. 2020-001663	Court of Appeals	Petition to rehear dismissal of appeal denied
15	7/6/2021	*Finch v. United States Fidelity & Guaranty Co.*, Appellate Case No. 2021-000462	Supreme Court	Denying petition for a writ of certiorari
16	1/5/2022	*Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company*, Appellate Case No. 2020-001239	Court of Appeals	Affirming partial summary judgment for Covil
17	5/21/2021	*Protopapas v. Wall Templeton*, Appellate Case No. 2020-001437	Court of Appeals	Appellant consents to the Receiver's motion to dismiss the *Hutto* claim in this appeal (remaining issues fully briefed)
18	8/9/2022	*Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company*, Appellate Case No. 2022-000761	Court of Appeals	Granting Covil's motion to dismiss, finding that the discovery orders on appeal are not immediately appealable.

19	8/23/2022	*Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company*, Appellate Case No. 2022-000785	Supreme Court	Denying petition for a writ of certiorari.
20	11/15/2022	*Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company*, Appellate Case No. 2022-000761	Court of Appeals	Order denying petition for rehearing of August 9, 2022 dismissal of appeal
21	1/12/2023	*Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company*, Appellate Case No. 2022-001764	Supreme Court	Denying petition for writ of certiorari
22	2/8/2023	*Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company*, Appellate Case No. 2022-001722	Court of Appeals	Order dismissing appeal
23	6/6/2023	*Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company*, Appellate Case No. 2022-001722	Court of Appeals	Order denying petition for rehearing from 2/8/2023 dismissal of appeal
24	4/13/2023	*Southern Insulation Inc. v. OneBeacon, et al.*, Appellate Case No. 2023-000252	Court of Appeals	Order dismissing appeal as not immediately appealable
25	7/6/2023	*Southern Insulation Inc. v. OneBeacon, et al.*, Appellate Case No. 2023-000252	Court of Appeals	Order denying petition for rehearing from 4/13/2023 dismissal of appeal

This practice of filing serial meritless appeals for the purposes of delay triggers the protections of Rule 269 of the South Carolina Appellate Court Rules.[4]

The filing at issue is yet another improper attempt by Appellants to circumvent the Appellate Court Rules. Pursuant to Rule 221(c), SCACR, "[t]he appellate court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal." The Court already considered the arguments Appellants raise here in their briefing on the Receiver's motion to clarify, which led to this Court's ruling that the order on appeal, the receivership action, and the Receiver's ability to carry out his duties was not stayed. *See* Travelers' Response in Opposition to the Receiver's Motion to Clarify at 4-6;[5] Joint Insurers' Return to Respondents' Expedited Motion to Clarify at 10-13. Now, Appellants improperly re-raise the same arguments before the court in hopes of obtaining a different result. Procedurally, Appellants could not file a petition for rehearing, so they now attempt to fabricate an emergency to engineer another bite at the apple and have the Court reconsider its prior order.

C. Appellants Misunderstand the Role of the Receiver as an Officer of the Court.

After Payne & Keller was placed into default in the circuit court when it failed to file an answer to Ms. Childers' claim against it, plaintiffs moved to appoint a receiver over the company.

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[4] The Supreme Court has warned that the filing of frivolous appeals to delay trial proceedings would not be tolerated: "We, in turn, expect the parties and their attorneys in this and any other case to fully cooperate with the trial court in order to ensure the case is tried or otherwise disposed of in a timely manner. Any action taken for the purpose of delaying the disposition of this case will, under appropriate circumstances, merit the imposition of sanctions under Rule 269, SCACR. *See* March 9, 2021 Order, Appellate Case No. 2020-001670.

[5] Travelers disparagingly referred to the Receiver's August 23, 2023 Motion to Clarify in quotation marks throughout its Response, questioning the propriety of such a motion before this Court: "In the face of this Court's instructions, the Receiver has filed a motion that he captions 'motion to clarify.'" Now, Travelers files its own Motion to Clarify. *Id.* at 3.

The trial court appointed Peter Protopapas as the Receiver of Payne & Keller "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." Order of Appointment, Aug. 27, 2021 at 1.

> 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. . . . It follows that he has no personal interest in the property in his official character, except that which arises out of his responsibility in the faithful and correct discharge of his duties.

Peurifoy v. Gamble, 145 S.C. 1, 142 S.E. 788, 790 (1928). The Receiver for Payne & Keller is, therefore, an officer of the Court, deriving his authority from the circuit court and the Order of Appointment.

Appellants misunderstand the role of the Receiver who is charged with addressing the past liabilities of Payne & Keller—whether that is good or bad for Payne & Keller's legacy insurers. He has no personal interest in Payne & Keller's asbestos liabilities or the available insurance to defend and pay those liabilities, but instead dutifully evaluates all information available to him to faithfully discharge his obligations to marshal the company's assets. The Receiver evaluates information gathered through investigation of historical sources as well as information brought to him by others, including the legacy insurers.

When Payne & Keller's legacy insurers presented the Receiver with their argument that Payne & Keller was dissolved and therefore could not be sued, it was the Receiver's responsibility to research the insurers' position—not to take it at face-value. The Receiver represents the

company seeking to recover its insurance proceeds from its historical insurers. He does not represent the interests of the insurers themselves.

D. In carrying out his duties, the Receiver Must Acknowledge Historic Corporate Malfeasance Where His Investigation Reveals It.

The Receiver, acting as a court officer, must acknowledge historic corporate malfeasance where his investigation reveals it. Here, confronted with the insurers' argument that Payne & Keller was dissolved and could not be sued, the Receiver ultimately learned that the company was not properly dissolved under Texas law. Instead, the evidence established that Payne & Keller was dissolved with an intent to avoid, or at the very least ignore, a flood of asbestos-related personal injury claims. *See* Findings of Fact and Conclusions of Law on Plaintiffs' Motion to Revoke the Termination of Payne & Keller Company, Case No. 2021-CP-40-03484 (Richland Cnty. Ct. Comm. Pl. Oct. 5, 2023) at 5-6.

The Receiver's role does not include perpetrating a corporate scheme from the 1980s apparently designed to shield corporate assets from responding to the claims of injured plaintiffs. In the Covil receivership, when Travelers sought to require the Receiver to adopt a defense crafted only for its benefit and inconsistent with the historical record, the trial court emphasized that the Receiver need not advance frivolous arguments for the benefit of the legacy insurers:

> The Objecting Insurers repeatedly insinuate that the Receiver's key role in these proceedings is to protect the Objecting Insurers from the contractual obligations that they voluntarily assumed when they sold insurance policies to Covil. This Court views the Receiver's role differently. As the Court's appointed receiver, Mr. Protopapas is charged with marshaling Covil's assets and prudently using those assets to address Covil's asbestos liabilities in a responsible fashion. This Court's appointed Receiver is certainly under no obligation to advance frivolous arguments or to assert specious defenses to Covil's asbestos cases.

Falls v. CBS Corp, C.A. No. 2015-CP-46-02155 (York Cnty. Ct. Comm. Pl. May 6, 2020), at 14.[6]

E. Appellants Improperly Impugn the Integrity of South Carolina Courts and Other Counsel with Their Filings.

In response to their frustration over the Receiver's failure to act directly in their interests, Payne & Keller's legacy insurers launch attacks against the moral character of the receiver and the ethics of the trial court. In this appeal, frustrated by the Receiver's failure to assert a factually inaccurate defense that would inure to their benefit, Payne & Keller's insurers criticize the Receiver *for doing exactly what South Carolina law contemplates*, which is to marshal assets for the protection of creditors.[7] The insurers stoop even lower, though, by insinuating that the Receiver is somehow ethically compromised by moving "for payment in the form of contingency fees. Thus, the Receiver has significant interest in continuing to justify his existence as a receiver."

The same counsel representing Travelers in the current motion before this Court also directly challenged the propriety of the receiverships in a filing this week. This latest filing takes the attack to Justice Toal too, for appointing this Receiver in a number of cases and agreeing to the fees paid to the Receiver:

> Since Justice Toal's appointment of the Receiver, Covil has collectively settled cases for over $20 million."). In other words, from the inception of "receiverships" in the Asbestos Docket, the

[6] It is beyond dispute that the Receiver is not obligated to present baseless arguments to limit liability. Consider the Receivers for Alexander Murdaugh appointed in *Beach v. Alexander Murdaugh*, C.A. No. 2019-CP-25-00111 (pending in Hampton County). The Receivers for Mr. Murdaugh are not obligated to assert that Mr. Murdaugh is an honorable person who did not steal money from others when the evidence shows otherwise.

[7] The insurers go so far as to refer to the Receiver's decision to acknowledge corporate malfeasance in this case, rejecting the dissolution defense, as having "abandoned his charge," asking rhetorically, "Why would the Receiver take this approach?" Appellants AIG Property Casualty Company, Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; and The Continental Insurance Company Return to Respondent's Expedited Motion to Clarify the Court's Order on Appealability at 16.

> plaintiffs move to have this same receiver appointed dozens of times; he then extracts money from third parties in the name of the companies he has been charged to protect; and he then uses those proceeds to pay enormous sums to himself, his counsel, and the plaintiffs' counsel who get him appointed in the first place.

Exh. A, Reply in Support of Mohed Altrad and Altrad Investment Authority SAS's Motion to Dissolve the Cape PLC Receivership, in *John A. Tibbs and Margaret Tibbs v. 3M Co., et al.*, C.A. No. 2023-CP-40-01759 (Richland Cnty. Ct. Comm. Pl. Oct. 23, 2023) at 8, fn. 16.

The Receiver understands that it is the view of Payne & Keller's legacy insurers that the Receiver has "extracted" money from legacy insurers in other receiverships. Those same insurers also take the position that the Receiver does not "protect them." In reality, the legacy insurers hold the liability for Payne & Keller's historical insurance policies. Payne & Keller paid premiums to these legacy insurers in return for the promised protection from certain liabilities.

Let us be clear about what has gotten under the legacy insurers' skin: the insurers have rested comfortably for decades believing that the contracts they entered into with Payne & Keller would never be honored. Not because of anything clever done by those insurers, but because the contracts were simply undiscovered by the people who would have directly benefitted from them—plaintiffs in the South Carolina asbestos litigation. The circuit court appointed a receiver to research the existence of any such insurance policies and now that those policies have been discovered—and the insurers have been called to pay for legitimate claims under the terms of those policies—they complain that money is being "extract[ed]" from them, by way of settlements negotiated for the insurers through their counsel, is a gross mischaracterization of the underlying asbestos litigation and the Receiver's actions. Actually, the insurers are being called upon merely to honor contracts for which they were paid premiums. The insurers response to this affront is to attack the trial court and its appointed receiver.

The legacy insurers' serial filings in this and other receivership cases are designed to ensure that the South Carolina courts involved in adjudicating these matters cannot move forward efficiently.[8] At the same time that the Payne & Keller legacy insurers have gone to great lengths to avoid South Carolina courts, they raced to Texas to circumvent the trial court's ruling on dissolution. Payne & Keller was sued in a Texas asbestos-related case styled *Daniel D. Williams, individually and as personal representative of the estate of Jimmie Lee Williams, Deceased, Sheila L. Wright, and Jimmietta Williams v. The Dow Chemical Company, et al*.; In the District Court of Harris County, Texas; 11th Judicial District; Cause No. 2023-36960-ASB (Before the Texas Asbestos MDL Pretrial Judge) ("Texas Action"). Rather than appoint Payne & Keller's South Carolina asbestos defense counsel, Bowman & Brooke, the insurers insisted on retaining the Texas law firm of Baker & Patterson, L.L.P. ("Baker & Patterson").

On July 26, 2023, almost two full years after the Receiver's appointment, months after the instant appeal, and while Travelers actively took the position that the instant appeal stayed the South Carolina trial court action because it addressed the dissolution of Payne & Keller, the Baker & Patterson firm filed an answer on behalf of Payne & Keller in the Texas Action.

[8] *See* October 16, 2019 Order, Appellate Case No. 2019-001651 (dismissing Zurich American Insurance Company, United States Fidelity and Guaranty Company, and Sentry Insurance a Mutual Company's notices of appeal because the appealed order was an interlocutory discovery order); October 16, 2019 Order, Appellate Case No. 2019-001654 (denying petition for writ of certiorari to review an interlocutory discovery order); February 13, 2020 Order, Appellate Case No. 2020-000206 (dismissing Zurich American Insurance Company and United States Fidelity and Guaranty Company's notices of appeal as improper due to timely pending post-trial motions); May 22, 2020 Order, Appellate Case No. 2020-000749 (denying petition for writ of mandamus and finding it "not appropriate" because recusal decision was not ministerial); June 17, 2020 Order, Appellate Case No. 2020-000791 (dismissing United States Fidelity and Guaranty Company's petition for a writ of supersedeas as improper due to no pending appeal); July 30, 2020 Order, Appellate Case No. 2020-000845 (dismissing United States Fidelity and Guaranty Company's appeal due to its status as a non-party to the action).

Inexplicably, the Baker & Patterson firm filed this answer without any previous communication with the Receiver—its client. In its answer, the Baker & Patterson firm asserted two affirmative defenses: (1) "The Court does not have jurisdiction because Defendant is a terminated corporation. *See* Tex. Bus. Org. Code § 11.359 (formerly Tex. Bus. Corp. Act art. 7.12)"; and (2) Plaintiff cannot sustain a claim against Defendant because it is a terminated corporation. *See* Tex. Bus. Org. Code § 11.359 (formerly Tex. Bus. Corp. Act art. 7.12)." Exh. B, Payne & Keller Answer and Affirmative Defenses in Cause No. 2023-36960-ASB (July 26, 2023).

Ignoring their position in South Carolina that these matters are stayed, Payne & Keller's insurers went to Texas and instructed a new law firm to raise these issues without the Receiver's knowledge or consent in a court filing that the insurers knew the Receiver did not, and would not, authorize. The answer also did not disclose the existence of this receivership to the Texas Court.

Respectfully, the legacy insurers are defendants in a declaratory judgment/ breach of contract case. They can assert their positions as to why the contracts are not enforceable without improperly impugning the integrity of the judiciary.

CONCLUSION

For the reasons explained above, Appellants' Emergency Motion to Clarify and Enforce Rule 205 should be denied, and the Court should consider any other appropriate relief in light of Appellants' litigation conduct and Rule 269, SCACR.

(Signature page follows)

Respectfully submitted,

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EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
JOHN A. TIBBS and MARGARET B. TIBBS, Plaintiffs, v. 3M COMPANY, *et al.*, Defendants.	)	Civil Action No. 2023-CP-40-01759 In Re: Asbestos Personal Injury Litigation Coordinated Docket
**********	)	
CAPE PLC, individually and as successor in interest to CAPE ASBESTOS COMPANY LIMITED, by and through its duly appointed Receiver Peter D. Protopapas, Third-Party Plaintiff, v. ANGLO AMERICAN PLCS, *et al.*, Third-Party Defendants.	)	**REPLY IN SUPPORT OF MOHED ALTRAD AND ALTRAD INVESTMENT AUTHORITY SAS'S MOTION TO DISSOLVE THE CAPE PLC "RECEIVERSHIP" AND MOTION FOR PROTECTIVE ORDER AND TO DISSOLVE RECEIVERSHIP**

The Court must dissolve this receivership because the Receiver admits that the one and only entity named in the order appointing the receiver—Cape PLC—was not served with any papers in the *Park* action. The f/k/a's and n/k/a's used by the Receiver to whitewash these uncorrectable mistakes appear nowhere in the motion seeking appointment of this Receiver or the order granting that motion—a motion and order that have not been served on Cape PLC to this day. The Receiver further admits that Cape PLC and Cape Intermediate Holdings Limited are different companies incorporated in different foreign jurisdictions that were separately named defendants in the *Park* action. Indeed, the Receiver confirms that Cape PLC is "organized under

the laws of the Bailiwick of Jersey in 2011," is an active foreign company that is not insolvent or dissolved, and is a "holding company of the Cape Group." Yet the *Park* Amended Complaint and the Motion to Appoint Receiver were admittedly **not** served on Cape PLC through its registered agent in Jersey in accordance with the Hague Convention. These facts alone defeat the receivership as a matter of law, as notice of both the *Park* lawsuit and the motion to appoint the receiver are mandatory conditions precedent to the effectiveness of the receivership.

The only response from the Receiver is to pretend that Cape PLC and CIHL are the *same defendant*—despite the fact that the *Park* plaintiffs named them as *separate defendants* in *separate amendments* to the complaint—and to speculate that Cape PLC would not have appeared even if it was properly served. Why bother to serve Cape PLC before appointing a South Carolina Receiver to take over an active, foreign company – especially if your thesis centers on the belief that it would not appear and defend? The Court should reject these preposterous arguments, which eviscerate basic notions of due process and justice and violate a laundry list of federal constitutional protections.

Even assuming proper service on Cape PLC (a patently false assumption), the Receiver makes more admissions showing his appointment under § 15-65-10(4) and (5) was unlawful—Cape PLC (and Cape Intermediate Holdings Limited for that matter) are **not** dissolved, they are **not** insolvent, and they do **not** have property in South Carolina. The Receiver argues that appointment under subsection (4) is proper because Cape PLC has "forfeited its corporate rights," but this is a term of art that refers to a forfeiture action resulting in a final forfeiture judgment by a South Carolina court pursuant to established South Carolina law. *See, e.g.*, S.C. Code § 39-3-20 (authorizing the Attorney General to "begin an action against such *domestic* corporation to forfeit its charter" for certain antitrust violations (Emphasis added)). Here, the Receiver claims a make-

believe "forfeiture" over a foreign company, based on the false and unadjudicated allegations in the motion to appoint the Receiver, and citation to Black's Law Dictionary. A plaintiff cannot simply cite his own unproven allegations of wrongdoing to trigger the "forfeiture" clause of subsection (4)—that would make a pre-judgment receivership available in every case rather than extraordinary ones. And as for the Receiver's conclusory argument that appointment under subsection (5) is "in accordance with the existing practice," there is not one South Carolina case appointing a receiver in circumstances remotely similar to those presented here.[1] This receivership order purporting to seize the foreign assets of a foreign company without notice is unprecedented, and must be dissolved.

This is an extremely serious case, but the Receiver's opposition responds with variations of the following three arguments: (1) "it is so because I say it is so," (2) "my mistakes don't matter because my opponents should've known what I meant," and (3) "my mistakes don't matter because I assume my opponents who never received notice would have failed to act." Given the multitude of defects that taint the receivership in the first instance, what else could he say? The Receiver concedes every point that should be dispositive of the motion to dissolve the receivership, all the

[1] The one case cited by the Receiver involved the appointment of a receiver over the assets of a *South Carolina citizen*, Mr. Hunter, who owed substantial undisputed debts to multiple persons and engaged in a series of fraudulent transfers to defraud his creditors. *Virginia-Carolina Chem. Co. v. Hunter*, 84 S.C. 214, 66 S.E. 177, 179 (1909). Cape PLC is not remotely similar to Mr. Hunter. Furthermore, the *Hunter* case supports dissolution of this receivership because it holds that the Court must vacate the appointment of a receiver who is not "entirely impartial" and is acting merely as "the agent of the plaintiff." *Id.* at 224. Mr. Protopapas' positions in his opposition show that he has entirely abdicated his responsibility to protect Cape PLC's interests and is "so closely connected with one of the parties in interest" that he cannot continue to serve. *Id.* No Court could view Mr. Protopapas as a "disinterested person"—as shown by the fact that he is actively defending the interests of the plaintiff's counsel that had him appointed. *Id.* Indeed, the Receiver's "defense" of Cape PLC has consisted of waiving all defenses, admitting liability without any adjudication that "Cape" fibers caused injury to any South Carolina resident—including Park and Tibbs—and then pursuing his "reckoning" against the third-party defendants based on liabilities he seeks to manufacture. The only logical reason for such conduct is that it being done at the behest of plaintiff's counsel.

way down to the fact that Cape PLC—the entity over which he was purportedly appointed a receiver—was never served in the *Park* case from which the appointment order came.

And on points not conceded, the Receiver makes arguments that are either false on the facts or wrong on the law. The Receiver's arguments have no basis in American jurisprudence, and his opposition brief reads as if this Court has universal jurisdiction to right any perceived wrong everywhere on the globe that will result in a windfall for the Receiver, regardless of whether or not the Receiver or the Court has any actual authority to do anything at all.

As the Receiver's own authority makes clear, a receivership is reserved for "exceptional" circumstances that allow for assets to be marshalled to the satisfaction of creditors who were prevented, usually in the case of insolvency or dissolution, from adequately preserving their rights. Here, there are no creditors because there is no judgment. Also fatal for the Receiver is the fact that the entity over which he is appointed, Cape PLC, is a going concern, incorporated in 2011, that has no assets in South Carolina. The Receiver, with a straight face, now asks this Court to simply ignore these admitted errors and omissions in procedure and substance and allow this legal fiction to continue without interference. The Court should decline this invitation.

Accordingly, if the Court does not first grant the pending motion to dismiss for lack of personal jurisdiction, it should grant this motion and dissolve the receivership appointment.

POINTS CONCEDED BY THE RECEIVER

In his opposition memorandum, the Receiver concedes the following:

1. **Cape PLC** is not the same entity as Cape Intermediate Holdings Limited.[2]

[2] *See* Opp. at 3 (conceding that the *Park* plaintiff attempted to add Cape Intermediate Holdings Limited "as a defendant, apart from **Cape PLC**," in the *Park* case).

2. **Cape PLC**—the Jersey entity that is the subject of the receivership order—was never served with any pleading or the motion to appoint the receiver in *Park*.[3]

3. Neither the motion to appoint the receiver nor the order appointing the receiver made any reference whatsoever to Cape Intermediate Holdings Limited, and never used the n/k/a acronym that the Receiver misleadingly uses throughout his opposition.[4]

4. The Second Amended Complaint in *Park*—the actual operative pleading—was never served on either **Cape PLC** or Cape Intermediate Holdings Limited.[5]

5. There is no proof that any complaint was actually included in any mailing made to Cape Intermediate Holdings Limited.[6]

6. The Second Amended Complaint in *Park* was served before the responsive pleading deadline for the First Amended Complaint expired, meaning **Cape PLC** and Cape Intermediate Holdings Limited could not be deemed in default of the superseded First Amended Complaint.[7]

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[3] *See id.* at 10 (conceding that "there has been **no** reference to the Jersey entity" in "the underlying Park and Tibbs Lawsuits, and in this third-party action," and "the conduct of the 130-year-old Cape entity in England (and not the recently formed holding company in the Bailiwick of Jersey) is at issue") (emphasis in original).

[4] *See id.* at 20 n.15 (proposing the Court's "amendment of the Appointment Order to identify Cape Intermediate Holdings Ltd.," thus conceding that Cape Intermediate Holdings Limited is not identified at all in the current order).

[5] *See id.* at 4 (conceding "Plaintiffs did not serve that specific pleading on Cape," which the Receiver misleadingly uses as shorthand for both Cape PLC and Cape Intermediate Holdings Limited, which are two separate companies). For reasons unknown, the Receiver also speculates as to why the *Park* Plaintiffs failed to undertake an essential step to joining either of those entities as defendants to litigation. But the reason does not matter; the fact that no service of an operative pleading happened is dispositive, and the Receiver concedes that foundational point—as he must, as the *Park* Plaintiffs confirmed their errors through photographs and sworn testimony from their process server.

[6] *See id.* at 12 (speculating the "*Park* Plaintiffs ***would have***" had a process server include the complaint with a summons, even though the process server himself testified that he only tried to serve "the First Amended Summons") (emphasis added).

[7] *See id.* at 3-4 (arguing that service of the First Amended Complaint on Cape PLC and Cape Intermediate Holdings Limited was effective on December 16, 2021, but that Plaintiffs filed a Second Amended Complaint "[o]ne week later, on December 23, 2021").

7. Cape Intermediate Holdings Limited was allegedly[8] served by DHL with a motion to appoint a receiver that did not reference Cape Intermediate Holdings Limited at all and purported to seek appointment over a separate Jersey entity—**Cape PLC**.

8. There is no proof that anything was ever served on **Cape PLC** in Jersey. In fact, the Receiver argues that the very entity on whose behalf he purports to act was never involved in the "underlying Park and Tibbs Lawsuits."[9]

9. The *Park* Plaintiffs represented to the Court in June 2022 that the case was "fully resolved," nine months before the Court purported to appoint a receiver over **Cape PLC**.[10]

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[8] Neither the Receiver or the *Park* plaintiffs have produced a proof of service, or even a delivery confirmation, showing that the motion to appoint the receiver was actually served via DHL on Cape Intermediate Holdings Limited. The only "proof" of this fact is an unsubstantiated allegation of DHL delivery in footnote 13 of the motion to appoint the receiver that was unaccompanied by any supporting exhibit. Thus, the Receiver has no actual proof that Cape Intermediate Holdings Limited was served with the motion to appoint the Receiver as required by S.C. Code § 15-65-20. And again, even assuming Cape Intermediate Holdings Limited was served, nothing in the motion to appoint the Receiver referenced that entity.

[9] *Id.* at 10. It is unbelievable that the *Park* Plaintiffs would seek to have a receiver appointed over **Cape PLC**, and the Receiver would purport to bring claims on behalf of (and waive the personal objections of) **Cape PLC**, yet when faced with the complete impropriety of their actions, the jurisdiction Receiver somehow suggests that the *Park* Plaintiff, the "Receiver," and the Court intended to reference a company other than **Cape PLC** in all of their respective filings and orders.

[10] *See id.* (conceding the validity of Ms. Park's counsel's message to the Court). The Receiver purports to rewrite counsel's message to apply only to "defendants who had appeared in the litigation and were scheduled for trial." *Id.* This is stunning for several reasons. First, there is no basis for the Receiver to suggest counsel's phrase "fully resolved" meant anything less than "fully resolved." Second, there is no reason (beyond his own self-interest and the interest of the plaintiffs' lawyers who are responsible for his appointment) for the Receiver to try and rewrite the history of a case in which the Receiver was not involved. Third, even if **Cape PLC** was in default in *Park*—and there is absolutely nothing in the record or in reality to suggest that it was—**Cape PLC** would have still been part of the trial group that was "fully resolved" because a jury has to apportion damages among all defendants, including those in default (or assign liability in full to a third party). *See* Rule 55(b)(2), SCRCP (requiring a jury trial, even in a default setting, on "the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter" when "required by any statute"); S.C. Code Ann. §§ 15-38-15(A), (C), (D) (establishing the statutory process for apportioning damages and liability in cases involving multiple defendants). The Receiver's attempt to rewrite history and the *Park* counsel's unambiguous representation to the Court fails as a matter of fact and law.

10. The *Park* Plaintiffs never served **Cape PLC** with notice of the motion to appoint a receiver over it.[11]

11. Neither **Cape PLC** nor Cape Intermediate Holdings Ltd. ever defaulted, nor was any default judgment entered against either company: not in *Park*, and not in any other case in South Carolina.[12]

12. The order appointing the Receiver made no finding that a South Carolina state court has personal jurisdiction over **Cape PLC**, a Jersey company that has zero connections to this state and is beyond the jurisdictional boundaries of this Court.[13]

13. **Cape PLC** has no assets in South Carolina.[14]

14. Damningly, the Receiver is working against **Cape PLC** and on behalf of the *Park* Plaintiffs.[15]

This final concession is worth highlighting. In South Carolina, a receiver's role is as a trustee of the company over which he has been appointed, along with responsibilities to the court and to the company's creditors. *In re Am. Slicing Mach. Co.*, 125 S.C. 214, 217–18, 118 S.E. 303,

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[11] *See id.* at 5 (conceding the *Park* Plaintiff mailed notice of motion to appoint a receiver over **Cape PLC** to the same incorrect address used when a process server mailed the First Amended Summons); *id.* at 18 (same).

[12] *See id.* at 18 (conceding there is "no entry of a default against **Cape PLC** or a judgment reflecting a liquidated sum due to the *Park* Plaintiffs").

[13] *See id.* at 20 (conceding that "the Court did not make an explicit finding that it has personal jurisdiction over **Cape PLC**"). The Receiver claims that "[n]o such finding was needed" and pretends that "personal jurisdiction is self-evident." *Id.* The law directly rejects such a position; personal jurisdiction must be proven with admissible evidence, and the Court cannot constitutionally act over a person or entity over which it lacks personal jurisdiction. *See, e.g.*, *Abdulla v. S. Bank*, 439 S.C. 391, 403–04, 887 S.E.2d 138, 144–45 (Ct. App. 2023) (affirming dismissal of a defendant for lack of personal jurisdiction when a plaintiff failed to present evidence sufficient to prove that exercising personal jurisdiction over the defendant would comport with the Due Process Clause).

[14] *See id.* at 18–19 (conceding that **Cape PLC** "lacks assets in South Carolina"). The Receiver does add a parenthetical comment, without any evidence or explanation, that **Cape PLC** has "insurance and legal claims" here. *Id.* But this makes no sense—**Cape PLC** has nothing in South Carolina, so there is no conceivable way that it has "insurance" or "legal claims" here. It is on the other side of the Atlantic Ocean and has nothing to do with this state. Further, having been formed in the 21st century, there is no reasonable or rational basis for the Receiver to assert that any insurance **Cape PLC** may have in Jersey covers asbestos lawsuits filed in America about products manufactured by other companies.

[15] *See, e.g., id.* at 22 ("In addition, the Receiver's ability to successfully marshal assets will directly inure to the benefit of the *Park* Plaintiffs, which allege uncompensated harm from Cape's conduct.").

304 (1923). But without a judgment in hand, a plaintiff is not a creditor, and South Carolina law requires a receiver to be "entirely impartial" and forbids him from acting as "one of the agents of the plaintiff." *Va.-Carolina Chem. Co. v. Hunter*, 84 S.C. 214, 224, 66 S.E. 177, 180 (1909).

Here, there are no known creditors of Cape PLC in South Carolina—instead the Receiver is assuming their existence as a legal fiction. The *Park* Plaintiffs never got a judgment against Cape PLC before telling the Court their case was "fully resolved." The *Tibbs* Plaintiffs likewise have no judgment. Yet, the Receiver seems determined to extract cash from the third-party defendants for both himself and those plaintiffs—and to undermine Cape PLC at every turn along the way. Not only does he see his mission as "a day of reckoning", his actions in affirmatively waiving defenses available to **Cape PLC** can only be seen as proof of a lack of impartiality and that he has improperly hijacked the function of a receivership to a degree that defies explanation and is unrecognizable as compared to its intended purpose. Such conduct is forbidden and highlights the impropriety of these entire proceedings—but it is consistent with a pattern of imposter "receiverships" emanating from this Court.[16]

[16] The same plaintiffs' counsel have had the same person appointed as a receiver nearly two-dozen times already in the Asbestos Docket, but Covil Corporation provides another obvious example of the receiver's failure to comply with his obligation to be "entirely impartial." As the Court, the Receiver, and undersigned counsel know, the Mr. Protopapas was appointed Receiver for Covil at the request of the same plaintiffs' counsel, and he extracted at least $44.5 million in "settlements" from Covil's insurance carriers and the insurance carrier of its former counsel. The same receiver and his counsel kept one-third of that for themselves, and then deposited the rest in a "qualified settlement fund." (Order entered Apr. 10, 2020, in *Falls v. CBS Corp.*, Case No. 2015-CP-46-02155.) No one has any visibility into that "fund" other than the receiver, but he has disclosed he has paid plaintiffs exorbitant sums from it. *See, e.g.*, Receiver's Br. at 4 (filed Oct. 4, 2021, in Appellate Case No. 2020-001437 (Ct. App.)) ("From 1976–2016, Covil collectively settled hundreds of lawsuits for under $500,000. Since Justice Toal's appointment of the Receiver, Covil has collectively settled cases for over $20 million."). In other words, from the inception of "receiverships" in the Asbestos Docket, the plaintiffs move to have this same receiver appointed dozens of times; he then extracts money from third parties in the name of the companies he has been charged to protect; and he then uses those proceeds to pay enormous sums to himself, his counsel, and the plaintiffs' counsel who get him appointed in the first place.

These concessions render the receivership a nullity, and everything the Receiver purports to do is *ultra vires*. If **Cape PLC** was never served with process in *Park*, then the South Carolina circuit court could never even claim to have acquired personal jurisdiction over **Cape PLC**. And if the South Carolina circuit court had no personal jurisdiction over **Cape PLC**, then it was powerless to appoint a receiver over **Cape PLC**. And if the circuit court was powerless to appoint a receiver over **Cape PLC**, then the receivership is a nullity and has no authority to do anything at all.

All of these points are conceded in the Receiver's opposition brief, and they make the outcome of this motion inescapable: the receiver's "day of reckoning" is forfeited and the receivership must be dissolved as a matter of law.

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FALSE OR MISLEADING STATEMENTS IN THE RECEIVER'S OPPOSITION

In addition to the dispositive concessions identified above, the Receiver's memorandum contains a host of other statements and arguments that are either directly false or that appear designed to mislead, including:

1. **Constant use of the phrase "Cape PLC n/k/a Cape Intermediate Holdings Ltd."**[17] This phrase is a fiction of the Receiver's opposition memorandum. **Cape PLC** is a standalone Jersey entity that was created in 2011. Even though it was separately named in *Park* (in addition to **Cape PLC**), Cape Intermediate Holdings Ltd. does not show up anywhere in either (1) the motion to appoint a receiver over **Cape PLC** or (2) the order appointing a receiver over **Cape PLC**. The Receiver cannot whitewash the problems that cripple his supposed appointment by trying to bolt two disparate companies together with an "n/k/a" acronym.

2. **Suggesting the Court can simply rewrite the prior receivership order to correct the myriad errors—several of which are even conceded by the Receiver in his opposition memo.**[18] This is an absurd argument. Among other obvious defects, if the

[17] *E.g.*, Opp. at 9.

[18] *E.g.*, *id.* at 14–15, 17 n.13, 19–20 n.15.

Court never had jurisdiction over **Cape PLC** or Cape Intermediate Holdings in the first place, then it cannot possibly swap out the entities' names and somehow retroactively rewrite the defective appointment order. And as if the complete absence of jurisdiction wasn't enough, South Carolina law specifically prohibits such attempts at issuing orders *nunc pro tunc*. *See, e.g.*, *Ex parte Strom*, 343 S.C. 257, 264–65, 539 S.E.2d 699, 702–703 (2000) (citing numerous cases for the proposition that a court is prohibited from attempting to correct a so-called "error" by issuing an order *nunc pro tunc*). Nor does the Receiver's repeated citation of South Carolina Code § 33-14-320© have anything to do with this situation. That statute is part of the statutory scheme allowing judicial dissolutions over South Carolina corporations; by definition, that law has nothing to do with an active Jersey company. *See* S.C. Code Ann. § 33-1-400(4) (defining "corporation" for purposes of Title 33 as "a corporation for profit, which is not a foreign corporation").

3. **Repeatedly stating "Cape still has not responded" to the *Park* second amended complaint.**[19] Of course it hasn't—it was never served with an operative pleading in the first place, and a South Carolina state court has no jurisdiction over it at all. It is unremarkable that **Cape PLC** never responded to a pleading no one ever served on it; why would it?

4. **Pretending the Court can simply disregard the lack of service on Cape PLC, including an incredible argument that requiring a plaintiff to properly serve an international defendant that has no connection to South Carolina "exalt[s] technical form over substance."**[20] Service is essential to a court's ability to claim personal jurisdiction over a defendant, and everything a court tries to do without personal jurisdiction is void. *See Fin. Fed. Credit, Inc. v. Brown*, 384 S.C. 555, 562, 683 S.E.2d 486, 490 (2009) ("A judgment is void if a court acts without personal jurisdiction. A judgment of a court without jurisdiction of the person or of the subject matter is not entitled to recognition or enforcement in another state, or to the full faith and credit provided for in the federal Constitution." (quoting *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006), and 50 C.J.S. *Judgments* § 986 (1997))). This isn't "technical form over substance"; it's a constitutional requirement taught to every first-year law student.

5. **Claiming that Cape PLC has "forfeited its corporate rights" based on a "1978 liquidation of its American subsidiary."**[21] This is nonsense. **Cape PLC**—the entity

[19] *E.g.*, *id.* at 15.

[20] *E.g.*, *id.*

[21] *Id.* at 17.

on whose behalf the Receiver purports to speak—did not come into existence until 2011, and it remains an active company that has "forfeited" nothing.[22]

6. **Claiming that Cape PLC has "defraud[ed] its tort creditors."**[23] **Cape PLC** has no "creditors" in South Carolina. The *Park* Plaintiffs have no judgment against **Cape PLC** (there isn't even a motion for entry of default in that case); they are simply plaintiffs who had an empty claim who then "fully resolved" their case over sixteen months ago without any liability attaching to **Cape PLC**. And there are no other judgment creditors against **Cape PLC** anywhere in South Carolina.

These final two bullet points are critical, as these misleading remarks are how the Receiver attempts to resuscitate the Court's statutory authority to create his receivership in the first place. The appointment order cited South Carolina Code §§ 15-65-10(4) and (5), but neither can apply.

The Receiver rightly concedes that Section (4) is inapplicable because **Cape PLC** is not "dissolved," even though the appointment order wrongly claimed that it was.[24] Nor is **Cape PLC** insolvent; it is an active foreign entity incorporated in 2011 in Jersey. But he suggests that Section (4) may still be applicable because **Cape PLC** "forfeited its corporate rights." That is false, as explained above, and Section (4) provided no lawful basis for appointing a receiver over **Cape PLC**. While certain South Carolina statutes might authorize the forfeiture of corporate rights in certain circumstances, the Receiver identifies no South Carolina judgment that resulted in the forfeiture of Cape PLC's corporate rights. The Receiver's bald assertion that Cape PLC has "forfeited its corporate rights" based on the *unproven allegations* in the Receiver's own third-party complaint has no support in South Carolina law—that would make pre-judgment receivership

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[22] Even more elemental, a subsidiary's liquidation does not amount to a parent entity's own forfeiture of its own corporate rights. *See generally Bank of Augusta v. Earle*, 38 U.S. 519, 541, (1839) ("The rights of a corporation, that is, its corporate rights, are all conferred by its charter, are all of equal authority, and from the same source of power. What are they? To have a corporate name and style. To have a common seal. To have succession. To sue and be sued by its corporate name. To be, by that name, a person in law, capable of contracting. To make by-laws.").

[23] *E.g.*, *id.* at 17–18.

[24] *Id.* at 17 n.13.

appointments available in every case where the plaintiff alleges wrongdoing, contrary to the South Carolina Supreme Court's admonition that such appointments are reserved for "exceptional" circumstances.

Section (5) is similarly inapplicable. The Receiver identifies no discernible standard for applying this section; he simply claims that a receivership can be created out of whole cloth "to correct injustice" when a "creditor" is being prevented from collecting a debt owed.[25] But that's no standard at all, and it has nothing to do with this case, where there isn't a creditor in sight.

While the Receiver argues that subsections (4) and (5) do not require entry of default or a default judgment, the Receiver ignores what those subsections **do** require—insolvency, dissolution, forfeiture of corporate rights, or clear guidance from the South Carolina appellate courts that appointment of a pre-judgment receiver in these circumstances is historically consistent with existing practice. None of those conditions are met here. Furthermore, the duties of a pre-judgment receiver under subsections (4) and (5) are fundamentally different than the duties of a post-judgment receiver; as explained by the South Carolina Supreme Court, a pre-judgment receiver appointed under subsection (5) must be "entirely impartial" precisely because liability has not been established. *Hunter*, 84 S.C. at 224. If the Receiver seeks the benefit of a pre-judgment appointment, he must faithfully discharge the duties of that role. As reflected by the Receiver's purported waiver of Cape PLC's personal jurisdiction defense in its opposition (Opp. at 20), however, the Receiver is clearly acting as "one of the agents of the plaintiff," and is thus unfit to serve under subsections (4) and (5). *See id.*

The Receiver next argues that Park's filing of the Second Amended Complaint did not render service of the First Amended Complaint "defective" because the Second Amended

[25] *Id.* at 17–18.

Complaint did not allege new or additional claims for relief against "Cape." This argument fails because it ignores the timing of the amendment. The Second Amended Complaint in *Park* was served well before the responsive pleading deadline for the First Amended Complaint expired, meaning Cape PLC and Cape Intermediate Holdings Limited could not be deemed in default of the superseded First Amended Complaint that was "no longer the operative pleading in the case." *Schein v. Lamar*, 284 S.C. 252, 255, 325 S.E.2d 573, 574 (Ct. App. 1985). Contrary to the Receiver's argument, the law is clear in South Carolina that the filing of an amended complaint supersedes the original complaint. *See id.*

Further, the Court should reject the Receiver's footnote suggestion that it could amend the receivership order to refer to Cape Intermediate Holdings Limited and correct a "misnomer." As an initial matter, the Receiver's cited authority relates to amendment of a complaint to correct the name of a defendant from a d/b/a to a formal legal name when the undisputed d/b/a defendant *actually appeared and litigated the matter*. In contrast, this case involves a proposed amendment of a receivership order where the named entity—Cape PLC—has not appeared, and where the correct name of the entity implicates the due process and notice rights of multiple categories of stakeholders—the Receiver, the entity in receivership, and the Third-Party Defendants that are defending the matter. The Receiver's contention that the wrong name in the receivership order did not mislead or prejudice anyone is absurd; given the fact that Cape PLC is an active Jersey entity, the Third-Party Defendants did not know until reading the Receiver's opposition which entity the Receiver believed he was acting for. The Receiver admits that Cape PLC was the former name of a UK entity and the current name of a Jersey entity, both of which occupy different positions on the Cape corporate structure. While the Receiver cites S.C. Code 33-14-320(c) in support of its argument that "amendment of appointment order" is permitted, that Code section is limited to a

"judicial proceeding brought to dissolve a corporation," which clearly does not apply here, and that statute only provides that "the power and duties of the receiver or custodian in its appointing order" may be "amended," not that the actual entity under receivership may be amended.

The Receiver's argument that there is a justiciable controversy merely highlights how the Receiver is acting as an agent of plaintiff's counsel, not as an impartial, pre-judgment trustee protecting the interests of Cape PLC (or Cape Intermediate Holdings Limited). The Receiver does not dispute that Park's counsel sent an email to the Court stating that the lawsuit had been "completely resolved" months before the motion to appoint the Receiver. Instead, the Receiver purports to speak for plaintiff's counsel and argue that the "completely resolved" statement applied only to "responding defendants"—a qualification found nowhere in the communication itself.

Nor is the Receiver correct that his appointment in the *Park* action is sufficient to deputize him as the Receiver for Cape PLC for any and all future asbestos lawsuits in which Cape PLC is named as a party—including the separate *Tibbs* action. Appointment of a receiver is an exceptional remedy that must be assessed on a case-by-case basis and is contingent on the unique facts and circumstances of a particular case. This is particularly true here—where both Cape PLC and Cape Intermediate Holdings Limited are going concerns. The Receiver cites no South Carolina authority holding that an appointment under Section 15-65-10 applies forever and for all cases.

The Court must reject this perpetual appointment theory because it conflicts with Section 15-65-10 (which calls for a case-by-case analysis), South Carolina precedent (which always reviews the propriety of receivership orders based on the specific facts of the underlying case in which the appointment is made), and because the theory is unconstitutional, particularly in the pre-judgment context seen here. If accepted, it would strip an active foreign company of its ability to defend itself in all future asbestos cases in South Carolina before any finding of liability in even

one case. This interpretation would clearly contravene the Dormant Commerce Clause, the Foreign Commerce Clause, the Taking Clause, the Due Process Clause, the Excessive Fines Clause, the Equal Protection Clause, and the Supremacy Clause of the U.S. Constitution. A judicially imposed, pre-judgment takeover of a foreign company — without any identifiable property in South Carolina—violates principles of international comity.

Finally, the appointment order, as well as South Carolina law, does not authorize a Receiver to file a derivative third-party complaint on behalf of a foreign company plaintiff with no assets in the state, against foreign company defendants and individuals. The Receiver does not cite one case from South Carolina with a fact pattern remotely similar to the one presented here. While the Receiver parses the text of the appointment order to argue that the order allows the Receiver to assert legal claims on Cape PLC's behalf, the order cannot authorize what South Carolina law forbids, and the order says nothing about authorizing a Receiver to assert the peculiar self-piercing claims at issue here—which facially violate the order's mandate to protect Cape PLC's interests whatever they may be.

At bottom, both purported avenues for the Receiver's appointment fail as a matter of law, and this is not subject to legitimate dispute. The receivership should be nullified without delay.

CONCLUSION

The South Carolina Supreme Court has repeatedly warned trial courts that appointing a receiver "is a drastic remedy, and should be granted only with reluctance and caution." *Richland Cty. v. S.C. DOR*, 422 S.C. 292, 313, 811 S.E.2d 758, 769 (2018). At the *Park* Plaintiffs' request, and based on false information provided by the *Park* Plaintiffs, the Court ignored the Supreme Court's warning when it hastily appointed a receiver over **Cape PLC**.

But the Supreme Court's instructions regarding receiverships do not end there. Because receiverships are so highly disfavored—after all, they involve a state court attempting to seize private property and placing it in the hands of a third-party—the Supreme Court has also commanded that the "refusal of revocation [of a receivership], under changed circumstances, is also drastic." *Vasiliades v. Vasiliades*, 231 S.C. 366, 376, 98 S.E.2d 810, 815 (1957).

There is no basis in the law for a South Carolina state court, at the request of a South Carolina plaintiff, to appoint a South Carolina lawyer to attempt to seize assets of an international company that remains active overseas but that has no connection at all to South Carolina. This is unconscionable behavior, and the Receiver concedes every point that should be dispositive of this issue. The Court should dissolve the receivership without delay, and it would be "drastic" for the Court to wrongfully allow these proceedings continue.[26]

[26] This reply is based on the statutes and case law of the State of South Carolina, the motions, exhibits and pleadings filed in this matter, and such other material as may be properly received by the Court in connection therewith. On September 20, 2023, the Altrad Defendants filed a "Motion for Protective Order and to Dissolve Receivership." On October 18, 2023, the Receiver filed "Third Party Plaintiff's Omnibus Opposition to Motions to Dissolve by Responding Altrad Third-Party Defendants and Charter Third-Party Defendants" and "Third-Party Plaintiff's Omnibus Opposition to Motions for Stay of Discovery and for Protective Order by Third-Party Defendants." This Reply is filed in support of both the Motion to Dissolve the Cape PLC "Receivership" and the Motion for Protective Order and to Dissolve Receivership and in opposition to both Omnibus Opposition responses by the Receiver.

The undersigned third-party defendants do not waive any of their arguments from their initial motion, many of which were unaddressed by the Receiver's opposition memo. They specifically incorporate by reference all of their constitutional, statutory, common law, and fact-based arguments regarding the impropriety of this receivership, as well as any arguments regarding dissolving the receivership put forth by any other third-party defendant. Additionally, by filing this reply, the undersigned third-party defendants do not waive, but instead specifically preserve, their objections based on this Court's lack of personal jurisdiction over them.

Respectfully submitted this 23rd day of October, 2023.

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Attorneys for Third-Party Defendants Mohed Altrad and Altrad Investment Authority S.A.S.

EXHIBIT B

7/26/2023 6:39 PM
Marilyn Burgess - District Clerk Harris County
Envelope No. 77925369
By: cassie combs
Filed: 7/26/2023 6:39 PM

CAUSE NO. 2023-36960-ASB
BEFORE THE ASBESTOS MDL PRETRIAL JUDGE

DANIEL D. WILLIAMS, individually and as personal representative of the estate of JIMMIE LEE WILLIAMS, Deceased, SHEILIA L. WRIGHT, and JIMMIETTA WILLIAMS *Plaintiffs,*	§	IN THE DISTRICT COURT
v.	§	149TH JUDICIAL DISTRICT
THE DOW CHEMICAL COMPANY, et al. *Defendant.*	§	BRAZORIA COUNTY, TEXAS

Transferred from:
CAUSE NO. 123060-cv

DANIEL D. WILLIAMS, individually and as personal representative of the estate of JIMMIE LEE WILLIAMS, Deceased, SHEILIA L. WRIGHT, and JIMMIETTA WILLIAMS *Plaintiffs,*	§	IN THE DISTRICT COURT
v.	§	149TH JUDICIAL DISTRICT
THE DOW CHEMICAL COMPANY, et al. *Defendant.*	§	BRAZORIA COUNTY, TEXAS

DEFENDANT PAYNE & KELLER COMPANY, INC.'s
ORIGINAL ANSWER AND AFFIRMATIVE DEFENSES

DEFENDANT PAYNE & KELLER COMPANY, INC. files this its Original Answer and Affirmative Defenses:

I.
GENERAL DENIAL

Pursuant to Rule 92, Defendant PAYNE & KELLER COMPANY, INC. generally denies all the material allegations of Plaintiffs' Original Petition and demand that Plaintiffs provide strict proof thereof according to the applicable legal standards pertaining to each allegation.

II.
AFFIRMATIVE DEFENSES

The Court does not have jurisdiction because Defendant is a terminated corporation. *See* Tex. Bus. Org. Code § 11.359 (formerly Tex. Bus. Corp. Act art. 7.12).

Plaintiffs cannot sustain a claim against Defendant because it is a terminated corporation. *See* Tex. Bus. Org. Code § 11.359 (formerly Tex. Bus. Corp. Act art. 7.12).

WHEREFORE, Defendant PAYNE & KELLER COMPANY, INC prays for a take-nothing judgment, for all costs, and for all other just relief.

Respectfully Submitted,

BAKER & PATTERSON, L.L.P.

By: ***/s/ Kenneth C. Baker***

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CERTIFICATE OF SERVICE

A copy of the foregoing was served on all known counsel of record in compliance with Tex. R. Civ. P. 21 and 21a on July 26, 2023.

/s/ Kenneth C. Baker
Kenneth C. Baker

RECEIVED
Oct 27 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.) and Acting Circuit Court Judge

Case No. 2021-CP-40-03484

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.; and Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co., Defendants.

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

v.

Zurich American Insurance Company (Individually and as Successor to Northern Insurance Company of New York, Maryland All 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; Certain Underwriters

at Lloyd's of London and Various London Market Companies; South Carolina Property and Casualty Insurance Guaranty Association; R.L. Jarrett (Underwriting) Agency, Inc.; U.S. Risk, LLC; Rexel USA, Inc.; and Compass Risk Services, LLC, Third-Party Defendants,

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

and

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

and

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

PROOF OF SERVICE

I certify that a true copy of Respondent's Return to Appellants' Emergency Motion to Clarify and Enforce Rule 205 in this case has been served on the following, this 27th day of October, 2023, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to Rule 262(a)(1), SCACR, and *RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022)*, S.C. Sup. Ct. Order dated May 6, 2022.

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October 27, 2023

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Subject:	Lenora Childers v. Davis Mechanical Contractors, Inc. - 2023-000727
Date:	Friday, October 27, 2023 4:32:00 PM
Attachments:	Return to Appellants" Emergency Motion w exhibits, 1.pdf

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On behalf of Jon Robinson, please find attached the Respondent's Return to Appellants' Emergency Motion to Clarify and Enforce Rule 205 that we are filing with the court today.

Thank you,

SMITH ROBINSON
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Smith Robinson Holler DuBose and Morgan, LLC
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