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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

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.

APPENDIX VOLUME IV
IN SUPPORT OF EMERGENCY MOTION TO CLARIFY AND ENFORCE RULE 205

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HEARING

LENORA CHILDERS

v.

2021-CP-40-03484

DAVIS MECHANICAL CONTRACTORS,
INC., ET AL.

*** UNOFFICIAL DAILY COPY TRANSCRIPT ***

BEFORE THE HONORABLE
CHIEF JUSTICE (RET.) JEAN TOAL

DATE TAKEN: Wednesday, October 25, 2023

TIME START: 10:49 a.m.

TIME END: 11:49 a.m.

LOCATION: Richland County Judicial Center
1701 Main Street
Columbia, South Carolina

REPORTED BY: Cindy A. Hayden, RMR-CRR
EveryWord, Inc.

APPEARANCES :

ATTORNEYS FOR THE RECEIVER ON BEHALF OF
PAYNE & KELLER :

SMITH ROBINSON
BY: JONATHAN ROBINSON, ESQUIRE
2530 Devine Street
Columbia, South Carolina 29205
803.254.5445
jon@smithrobinsonlaw.com

ATTORNEYS FOR THIRD-PARTY 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 TO HARBOR
INSURANCE COMPANY :

MURPHY & GRANTLAND, P.A.
BY: WESLEY B. SAWYER, ESQUIRE
4406-B Forest Drive
Columbia, South Carolina 29206
803.454.1233
wsawyer@murphygrantland.com

ATTORNEYS FOR TRAVELERS :

WOMBLE BOND DICKINSON
BY: M. TODD CARROLL, ESQUIRE
1221 Main Street, Suite 1600
Columbia, South Carolina 29201
803.454.7730
todd.carroll@wbd-us.com

~ And ~

(Appearances continued on next page.)

APPEARANCES CONTINUED:

STEPTOE & JOHNSON LLP
BY: HARRY LEE, ESQUIRE
1330 Connecticut Avenue, NW
Washington, DC 20036
202.429.8112
hlee@steptoe.com

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P R O C E E D I N G S

* * *

THE COURT: We're going to do a status on Childers. All right. So let's do that before we take a break and then go to Tibbs. All right?

This is the Payne & Keller situation. And basically, what I understand that I have in Payne & Keller is two filings, one by Mr. Wes Sawyer and one by Mr. Todd Carroll, in which -- the case of which they say: You were too restrictive about signing your order. We want you to reopen this matter. And we also think since we've appealed certain things, that you don't have any status to do anything.

So that's kind of where we stand now. And I received Mr. Sawyer's filing first. So the order of things is this: I will first turn to Mr. Sawyer and ask him to present, and then I will turn to Mr. Carroll. And, Mr. Robinson, I will then turn to you to answer both of them rather than to take them up separately. Is that okay?

1 MR. ROBINSON: Certainly, Your Honor.

2 THE COURT: Very good.

3 Mr. Sawyer.

4 MR. SAWYER: Your Honor, it's a
5 pleasure to see you again. Wesley Sawyer.
6 I represent a number of third-party
7 defendants: AIG Property Casualty Company,
8 Lexington Insurance Company, National Union
9 Fire Insurance Company of Pittsburgh,
10 Berkshire Hathaway Specialty Insurance
11 Company, and The Continental Insurance
12 Company.

13 For purposes of this motion, I have
14 given the court reporter my card with all
15 of those appearances.

16 And, Your Honor, my understanding is
17 today is an informational session is the
18 way it was presented to us yesterday when
19 we were asked to come. So I'm not quite
20 sure what -- what the agenda is today.

21 THE COURT: Here's what I want to
22 know, Mr. Sawyer, is how you want me to
23 proceed, because maybe it's even better to
24 have Mr. Carroll speak first rather than
25 you.

1 Your contention is that a fuller
2 hearing should have preceded doing anything
3 further about Payne & Keller.

4 MR. SAWYER: Yes. Our first and
5 foremost contention is Rule 205, which we
6 stated Mr. Lee argued that with you in
7 July. I think he's the best person to
8 argue that because he had a long colloquy
9 with you on that in July.

10 THE COURT: Right.

11 MR. SAWYER: After 205, this Court
12 stated in July that if the case came back
13 from the Court of Appeals, it would
14 reconvene a hearing. The Court's order
15 that's on appeal also stated there would be
16 an opportunity for discovery on these
17 actual constructive fraud issues. None of
18 that has taken place.

19 THE COURT: Right.

20 MR. SAWYER: So our position is, even
21 if 205 didn't apply and this matter was
22 properly with the Court, it's premature
23 because we haven't had the chance for
24 discovery and because we were told to, you
25 know, reconvene a hearing.

1 And then we have all of our other
2 items we've raised in the motion, which my
3 understanding is we're not arguing motions
4 today.

5 THE COURT: Sure.

6 MR. SAWYER: So I don't want to get
7 into the nuances and details because I
8 don't think it's the time to do that,
9 Your Honor. But those are our -- our
10 concerns, Your Honor.

11 THE COURT: Right. All right. And --
12 all right. I'll hear from everybody before
13 I give you any insight as to what I did and
14 why I did it. But let's hear from
15 everybody about why 205 essentially says
16 set aside anything you've done and wait
17 upon further advices from the Court of
18 Appeals.

19 MR. SAWYER: Certainly. And --

20 THE COURT: That's basically the
21 position you-all have taken?

22 MR. SAWYER: It is. And we've cited
23 the Stokes Graves case as the key case and
24 all the cases that I also cite to apply.
25 But, again, I think it's best for me to

1 defer to Mr. Lee since he took the lead on
2 that argument in July. You had a one-hour
3 conversation with him about it. So I don't
4 want to steal his thunder, Your Honor.

5 THE COURT: Okay. Very good. And of
6 course, for the record, and for the benefit
7 of the court reporter, please say who you
8 are and who you represent.

9 MR. LEE: Yes, Your Honor.

10 Good morning. Harry Lee for the
11 Travelers -- Travelers third-party
12 defendants in the Childers matter.

13 THE COURT: And, there again, the
14 court reporter is for your benefit.
15 This -- this discussion, which could take
16 place in several of these cases, but is
17 taking place right now in Childers against
18 Davis Mechanical, 2021-CP-40-03484, and in
19 a case which has been appealed and bears
20 Appellate Case Number 2023-000727 before
21 the Court of Appeals. Mr. Lee.

22 MR. LEE: Thank you, Your Honor.

23 And I take to heart the informational
24 nature of this, not an argument nature of
25 this.

1 THE COURT: Yes.

2 MR. LEE: So -- so --

3 THE COURT: I'm just trying to get
4 some focus on what I need to do, if
5 anything, further right now to protect
6 everybody's position in this matter.

7 MR. LEE: Right. And Mr. Sawyer is
8 correct. There is the jurisdictional
9 issue. There were also some procedural
10 issues that were all discussed with
11 the Court over the summer. They've been
12 cited -- the transcripts and so forth
13 have been cited in the motion for
14 reconsideration, which is before the Court.

15 And that's what's before Your Honor
16 at the moment, is the motion for
17 reconsideration. There is a motion to
18 enforce Rule 205, which is with the Court
19 of Appeals. And those are the two things
20 informationally that need to be dealt with.

21 Now, Your Honor may want to delve into
22 if the Court -- if this Court wants to
23 consider the motion for reconsideration and
24 whether it wants to practically decide what
25 to do. That's what I hear Your Honor

1 saying.

2 And the concern we would have is the
3 motion to reconsider -- the order behind
4 the motion to reconsider issue needs to be
5 vacated for purposes of dealing with the
6 issues that Mr. Sawyer raised, which would
7 be a hearing -- an actual hearing on
8 that -- on that proposed order and/or
9 discovery before we got to that hearing on
10 that proposed order.

11 But you would have to vacate the order
12 of termination in order for us to get
13 there. And that's what the motion for
14 reconsideration certainly asked to have
15 happen.

16 The Court of Appeals may act on the
17 jurisdictional point, and when they -- when
18 and if they do, we'll find out, I guess,
19 and we'll maybe be informed by that. But
20 in the meantime, as far as answering
21 the Court's question as to what to do, we
22 believe that the order should be vacated
23 and there should be another hearing set and
24 discovery committed to lead up to that
25 hearing so we can have a proper argument on

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the order.

THE COURT: And just to be clear which order we're talking about --

MR. LEE: I apologize, Your Honor.

THE COURT: Just to be clear which order we're talking about, there was an order that was initially filed by me that was then appealed.

MR. LEE: Well, we should back up, Your Honor. You're right. There was an order on -- on the motion to dissolve the receivership.

THE COURT: Right.

MR. LEE: That order had -- went final and has been appealed. Then there were --

THE COURT: And that motion to dissolve -- the order on the motion to dissolve was signed by me when?

MR. LEE: March of this year, Your Honor.

THE COURT: Yeah.

MR. LEE: And it's been on appeal. It is -- it is about to be briefed. The concern with the briefing is there's now a new order actually acting on the revocation

1 and letting the receiver do that, which we
2 believe runs afoul of the matters on appeal
3 in the first order.

4 And now we don't know -- we have
5 concerns about what's actually going to be
6 appealed, what the record is. We now have
7 a certificate -- a new certificate from the
8 Texas Secretary of State that was based
9 upon an order that wasn't even ten days old
10 and wasn't even effective. I don't want to
11 argue any of that.

12 I guess the question really is: Will
13 the Court reconsider vacate the order on
14 termination so that there can be a hearing
15 as the Court said it would do and there
16 would be discovery as the Court said there
17 would be an opportunity to do.

18 In the meantime, we may find out from
19 the Court of Appeals whether any of this
20 should be happening because of the lack of
21 juris -- the potential lack of
22 jurisdiction.

23 THE COURT: Got it.

24 MR. LEE: That's -- that's how I view
25 this.

1 THE COURT: Okay. Mr. Robinson.

2 MR. ROBINSON: Your Honor, Jonathan
3 Robinson from Smith Robinson here in
4 Columbia on behalf of the receiver for
5 Payne & Keller.

6 Your Honor, when I saw this on the
7 agenda as informational session, I went
8 back through the record. And with
9 the Court's permission, I would like to
10 address both the information and
11 misinformation that perhaps had been
12 presented.

13 The filings this week by the carriers
14 and what appears to be their newly elected
15 leader, Travelers, and its counsel, are the
16 latest examples of the serial filings that
17 we have seen over the last couple of years
18 and the ones that we have become accustomed
19 to.

20 Your Honor, not only are -- do the
21 filings misrepresent the facts and the law
22 by omissions or otherwise, they have
23 vaulted the level of rhetoric and the
24 efforts to obstruct and disrespect
25 this Court and the appellate courts to a

1 level I have not seen before. And this --
2 there's been a lot that's happened over the
3 last couple of years.

4 First, Your Honor, I want to address
5 an order from the Court of Appeals, which I
6 believe you have a copy of, September the
7 8th. I have a copy of it, if I may hand it
8 up.

9 THE COURT: Certainly. I'm very
10 familiar with it, as you might imagine.

11 MR. ROBINSON: As this Court might --
12 may recall, after a series of hearings --
13 and I say "series" because -- after a
14 series of hearings -- somebody heard
15 "Siri."

16 After a series of hearings -- and I
17 say "series of hearings" because you've
18 taken this matter up, the issue of the
19 potential fraud involved in the dissolution
20 as far back as -- the motion was filed
21 initially to dissolve in January. You
22 denied the motion in -- in March of this
23 year. You had a hearing in Charleston in
24 July of this year. You had another hearing
25 in Columbia on August the 21st of this

1 year. And here we are again, Your Honor.

2 So at the conclusion at the last
3 hearing we had on this issue of --
4 regarding the fraudulent dissolution,
5 either by way of the carrier's motion to
6 dissolve or by way of the plaintiff's
7 motion to reconstitute based on the
8 constructive fraud, you asked us at the
9 last hearing for clarification on your
10 abilities to rule on matters and on whether
11 any automatic stays would impact your
12 ability to rule and on these proceedings
13 and on the receivership itself.

14 In response to that, Your Honor, on
15 behalf of the receiver, we filed a motion
16 to clarify with the Court of Appeals. You
17 know, I heard just now that we need more
18 discovery; we need an opportunity for a
19 hearing. And I have heard that every time
20 that this has been taken up before you.

21 So we filed a motion to clarify. And
22 the carriers filed a response to that
23 motion. The carriers -- Mr. Carroll filed
24 a response along with his co-counsel on
25 behalf of Travelers. Mr. Sawyer filed a

1 response on behalf of the clients that he
2 indicated he represents today.

3 So we briefed it. We asked for the
4 clarification. We provided a copy of the
5 pleadings. We referenced your order
6 back -- all the way back from -- I guess it
7 was in March of this year, the order that
8 is actually on appeal. That order was in
9 the record at the Court of Appeals,
10 clearly, because it is the subject of the
11 appeal.

12 And we expressed in our motion to
13 clarify the struggles that have been
14 brought up by opposing counsel and the
15 carriers regarding whether the receivership
16 can proceed and what restrictions, if any,
17 are on this Court and the receiver. Again,
18 this was briefed.

19 And the Court issued an order. And
20 quite frankly, I'm just dumbfounded by some
21 of the things I'm hearing today because
22 the Court issued an order on September 8th,
23 2023.

24 And in this order, they restate
25 something that they have already stated,

1 that the appeal was going to proceed.

2 But then they say something that
3 apparently has been overlooked: We further
4 clarify that the March 31st, 2023, order --
5 that's your order, Your Honor, the order
6 denying their motion to dismiss -- is not
7 stayed during the pendency of this appeal.

8 So, again, you issued an order on
9 March 31st. You had some concerns about,
10 you know, the effect of appeal on that
11 order. We talked ad nauseam on multiple
12 hearings about the effect of the statute,
13 Title 14, about Rule 205, about Rule 241,
14 about Rule 26 -- 62. All of those were
15 briefed, argued, not only to this Court,
16 but, again, now to the Court of Appeals in
17 the motion to clarify.

18 And the Court, as a result of that
19 extensive briefing and consideration, again
20 says: We further clarify that the
21 March 31st, 2023, order is not stayed
22 during the pendency of the appeal.

23 But the Court doesn't stop there,
24 Your Honor. The Court of Appeals says:
25 Accordingly -- in the last sentence -- the

1 receivership action and the receiver's
2 ability to carry out his duties are not
3 stayed.

4 Your Honor, the filings this week with
5 the Court of Appeals and what is captioned
6 the "Emergency Motion," the carriers talk
7 about the receiver's -- and this is what
8 they put in their emergency motion: The
9 receivers did not seek a ruling on 205
10 jurisdiction.

11 Your Honor, their briefs -- and I
12 don't know that the Court has seen it, but
13 the Court of Appeals certainly has. Their
14 briefs regarding the motion to clarify
15 solely talk about, almost, Rule 205.

16 In fact, their newest motion is based
17 almost -- their newest motion now is based
18 almost exclusively on the very issue they
19 raised to the Court before the Court issued
20 the order on September 8th, the appellate
21 court.

22 And, Your Honor, I appreciate the
23 opportunity to put this in the record. But
24 I think it is important based on you
25 receiving the information necessary in

1 making your determination on how we
2 proceed.

3 In their briefing to the Court of
4 Appeals before the Court of Appeals
5 determined that your order was not
6 stayed -- so this would have been prior to
7 September 8th -- the carriers in their
8 briefing: While the receiver ostensibly
9 asked for clarification, what he actually
10 seeks is permission from the Court to
11 ignore Rule 205 and continue his efforts to
12 litigate before the Circuit Court matters
13 that are in this Court's exclusive
14 jurisdiction.

15 Their briefing goes on, Your Honor:
16 The issues the receiver seeks to pursue in
17 the Circuit Court are the very issues
18 pending before this Court on appeal.
19 Therefore, this Court has exclusive
20 jurisdiction over those issues.

21 In a separately filed return,
22 Travelers states: Because the very
23 existence of the receivership is presently
24 on appeal before this Court, there is
25 nothing the receiver can do at the trial

1 level, as anything the receiver does would
2 by definition involve matters affected by
3 the appeal.

4 As such, the receiver cannot continue
5 to prosecute his third-party case or take
6 other actions purportedly on Payne &
7 Keller's behalf while the validity of his
8 appointment is on appeal.

9 Now, again, Your Honor, in -- the
10 receivers in their motion -- I mean, the
11 carriers in their motion, their position is
12 that the Court did not -- I'm sorry -- that
13 the receiver did not seek a ruling on the
14 205 jurisdiction.

15 Well, Your Honor, the receiver argued
16 the law that we believe applied. The
17 carriers argued the law that they
18 believe -- that they believe applied. And
19 the Court of Appeals made a determination,
20 having heard both arguments.

21 The fact that -- you know, Your Honor,
22 I think I saw in an email from one of the
23 carrier's attorneys to you that they said
24 they were surprised by your ruling on the
25 fraud. Your Honor, I think perhaps -- I

1 don't think there was a surprise.
2 Disappointment perhaps, but not a surprise.

3 You know, Your Honor, I'm not one
4 to -- nor am I -- can say what might
5 surprise people, but I do know that it was
6 not a lack of notice in this case.

7 This Court in the order, the
8 March 31st order, said that there was a
9 prima facie case of constructive fraud and
10 therefore refused to dismiss the case or
11 dissolve the receivership.

12 And despite the hints to the contrary,
13 this Court did not make a finding of
14 constructive fraud at that time.

15 In fact, the Court specifically said,
16 quote: This Court does not, however, find
17 that fraud has been conclusively proven,
18 nor does the Court order the revocation of
19 Payne & Keller's termination at this time.
20 Such a determination will be made after the
21 parties have had the opportunity to explore
22 this issue through the discovery process.

23 That order is in place and is not
24 stayed, and the Court of Appeals has
25 granted you the authority in writing in an

1 order saying that the order is not stayed.
2 And if it is not stayed, then it is in
3 effect.

4 And with that order from the Court of
5 Appeals, this Court and the receiver is
6 continuing the business of the
7 receivership, and it is moving forward on a
8 parallel track with the Court of Appeals,
9 just as the Court of Appeals has ordered it
10 should do.

11 THE COURT: Here's their biggest gripe
12 as I understand it, or at least one of
13 the -- I mean, there is so much flowery
14 jargon -- language in there, I have to kind
15 of just cut through it all and get to what
16 they're really fussing about.

17 And what they're really fussing about
18 is best exhibited by the filing by
19 Mr. Sawyer. And it is that I made a -- a
20 finding that a prima facie case had been
21 established for constructive fraud. They
22 then wanted to have the ability to try that
23 issue of whether there was, in fact,
24 constructive fraud before I made a decision
25 to revoke their termination and reinstate

1 its corporate existence. And on October
2 the 5th, that's what I did.

3 Their -- the most legitimate question
4 they've got, in my view, is the fuss about
5 whether or not they've got their chance in
6 court on -- on that issue.

7 MR. ROBINSON: Your Honor, it is no
8 different than the -- than the --

9 THE COURT: I'm not asking you whether
10 I could do that. I think I clearly could
11 do that.

12 MR. ROBINSON: And I'll address it
13 directly, Your Honor.

14 THE COURT: Right. But what I'm
15 asking is whether or not I should have done
16 that.

17 I mean, frankly, when I got
18 Judge Verdin's order, it indicated to me
19 pretty clearly that I can go right ahead
20 with this matter. It says: The receiver's
21 ability to carry out his duties aren't
22 stayed, and my order of March the 31st is
23 not stayed.

24 So I think I could do whatever I felt
25 the justice of the case indicated I should

1 do. The question is whether they've had a
2 fair opportunity to argue the merits of the
3 contention that the revocation should be
4 terminated because the revocation was
5 obtained through constructive fraud.

6 MR. ROBINSON: Your Honor, the answer
7 can be found in the same logic that they
8 are presently arguing in front of the Court
9 of Appeals, that they didn't have the
10 opportunity or the Court of Appeals didn't
11 rule on the 205 issue.

12 As this Court may recall --

13 THE COURT: Well, I agree with that
14 because you can't endlessly continue to
15 plow the same ground in aid of trying to
16 delay a decision on having the receiver do
17 what the receiver needs to do by explaining
18 many times other related cases, and that
19 is, to deal with the question of the
20 assets, in this case of Payne & Keller, and
21 to pursue collection of those assets.

22 MR. ROBINSON: Your Honor, the problem
23 with this issue coming up so many times
24 before you and the discussions that have
25 been -- that have been had at the multiple

1 hearings -- because what we are seeing
2 today is the carriers conflate the
3 different -- and cherry-pick the different
4 discussions and arguments from the various
5 hearings --

6 THE COURT: Oh, I -- I couldn't agree
7 with that more. Zurich does that.

8 MR. ROBINSON: Right.

9 THE COURT: Zurich --

10 MR. ROBINSON: So --

11 THE COURT: -- by the way, has made a
12 similar filing on this emergency motion.
13 Their counsel from Robinson Gray has got a
14 conflict and couldn't be here today. But
15 he will not be disadvantaged by that at
16 all.

17 Now, of course, Travelers is really
18 the main, well, spirit carrier for the
19 contention that we should revisit this
20 whole thing of what Payne & Keller's status
21 ought to be.

22 MR. ROBINSON: So let's not forget,
23 Your Honor, that after your order was
24 signed in March, the -- and it was
25 appealed, you had a -- in that order, the

1 March order, you specifically made the
2 ruling about, you know, we're going -- I'm
3 going to allow more discovery.

4 THE COURT: Exactly.

5 MR. ROBINSON: And so we filed a
6 report with you, Your Honor, after the
7 plaintiff filed their motion for
8 constructive fraud. So this would have
9 taken us back probably to July when we were
10 in Charleston.

11 THE COURT: That's right. And we had
12 a hearing in July.

13 MR. ROBINSON: And that report is --
14 addresses the very question you're asking
15 today. In that report, Your Honor, we
16 reported to this Court that since your
17 hearing, we had -- and, again, none of the
18 discovery was in the record at your
19 hearing.

20 But we reported to this Court that the
21 receiver had conducted discovery on the
22 issue of fraud. We had sent out additional
23 discovery, and that no carrier in any
24 response or any party in the response to
25 the discovery had produced any evidence or

1 any documents that contradict the
2 allegations the plaintiff was making
3 regarding constructive fraud.

4 Now, that's important because
5 they're -- they're here today saying, oh,
6 we need more discovery. Since that time,
7 Your Honor, they have not conducted any
8 discovery on this issue.

9 THE COURT: And then what happened in
10 August? I have another hearing.

11 MR. ROBINSON: You had another hearing
12 on August the 21st. And as you are -- and
13 you told Ms. McVey at that hearing in
14 July -- yes, in July -- you may recall
15 telling Ms. McVey that: I am -- I have the
16 information I need, it appears. The
17 discovery has not produced anything in the
18 contrary. The carriers have failed to
19 provide any affidavits or otherwise to
20 contradict the allegations made in this --
21 in Ms. McVey's motion.

22 So now we're at a stage where nobody
23 is claiming they need more discovery at
24 that point because the discovery has
25 been -- we've reported to this Court.

1 We've conducted discovery. Nobody has --
2 nobody has got anything. There's nothing
3 to contradict the allegations. That's
4 where we are.

5 And you said -- and in that hearing,
6 you said: Well, it seems I've got
7 everything I need, but I am concerned about
8 the appeal and the impact that it has.

9 THE COURT: And then in September --

10 MR. ROBINSON: In September --

11 THE COURT: Just -- just a week or
12 two --

13 MR. ROBINSON: Well, on August the
14 21st --

15 THE COURT: The 21st is when we had
16 our hearing.

17 MR. ROBINSON: Correct.

18 THE COURT: And then it wasn't but a
19 week or two later we got this --

20 MR. ROBINSON: Right.

21 THE COURT: -- order from the Court of
22 Appeals saying my order is not stayed and
23 duties aren't stayed.

24 MR. ROBINSON: That's right. But I
25 want -- I want to remind you, in August you

1 said -- and I believe -- we don't have the
2 transcript -- that: I believe I've got
3 everything I need, but my concern is the
4 appeal.

5 They argued why you should not issue
6 an order for constructive fraud. They
7 argued it ad nauseam. They've argued it in
8 their motion to dismiss. They've argued it
9 in opposition to Ms. McVey's motion for
10 constructive fraud and to reconstitute.

11 And at each stage, at the conclusion
12 of their argument, they end with: And by
13 the way, Judge, you don't have any
14 authority to make that decision now.
15 That's how it's ended.

16 So now we're here because they said
17 you didn't have authority. And the Court
18 of Appeals says they are wrong and you are
19 correct. And they say, no, Judge, you
20 still can't issue that order because we
21 need to be heard on it.

22 Your Honor, it -- again, it's the same
23 thing that we're seeing at the Court of
24 Appeals right now: You haven't heard us
25 yet.

1 Well, maybe they have been heard, and
2 the Court is not buying it. That is a
3 possibility, Judge. And I don't think it's
4 one that they take lightly and certainly
5 not one they like. But we have to have
6 respect for the law and the Court.

7 The attacks that have been launched
8 this week by these carriers against the
9 receiver, this Court, and the appellate
10 process are shameful. And, Your Honor,
11 this has to come to an end.

12 I counted 25 appeals since 2019 that
13 have been filed by these carriers. Now, I
14 want to caveat the appeal. These are
15 appeals that have been dismissed,
16 withdrawn, in fact -- or withdrawn.

17 These aren't just appeals that are
18 pending. These are the 25 that the Court
19 has gotten rid of or either they've
20 withdrawn them. They've been everything
21 from petitions for cert, petitions for
22 rehearing, petitions for en banc.

23 Judge Beatty -- Justice Beatty
24 earlier -- early in this case -- in fact,
25 in -- and I'm -- I think it's important

1 that this get into the record.

2 It says that -- Judge Beatty early in
3 this case says -- in response to motion for
4 sanctions because of the serial appeals
5 that were happening, Justice Beatty says:
6 We are cautioning any action taken for the
7 purpose of delaying disposition of this
8 case will, under appropriate circumstances,
9 merit the imposition of sanctions.

10 That was on March 9th, 2021. And,
11 Your Honor, since then -- that was, by the
12 way, Appeal 13. We are now at 25 that has
13 been dismissed, not counting the current
14 appeals. Just the appeals that have been
15 dismissed, improvidently presented, is
16 improperly presented. There have been more
17 interlocutory appeals in this case probably
18 than any -- than any other case in the
19 history.

20 So, Judge, you know, I'm sorry, but
21 the idea -- and certainly, there is a
22 motion to reconsider, which is the proper
23 venue for the matter to be reconsidered.

24 But as far as information, we believe
25 that the Court -- there's a lot of

1 information out there. And -- and the
2 pleadings speak for themselves, as do the
3 transcripts, the filings. And particularly
4 Judge Verdin's order speaks for itself.

5 I will -- and, Your Honor, because
6 this is now in the public record, I want to
7 address some things that were put in the
8 public record this week regarding the
9 attacks on this Court, the receiver and
10 the -- the disparaging treatment of the
11 appellate courts.

12 Your Honor, there's been a note -- and
13 I think it's in one of the footnotes --
14 that the receiver and receiver court has
15 extracted \$40 million, \$50 million -- tens
16 of millions of dollars -- has extracted
17 from the carriers through settlements and
18 otherwise.

19 And I think that's a very good place
20 for us to recognize the carriers' continued
21 position; and that is, they are not going
22 to voluntarily fulfill the obligations that
23 they made to these companies when they
24 issued these policies and accepted their
25 premium.

1 If I get in a car wreck -- I'm going
2 to knock on wood. If I get in a car wreck
3 and I make an insurance claim and they pay
4 my claim, I could apply their same logic.
5 I have extracted the money from my company.

6 They view this as extracting money.
7 They don't mention the fact that they had a
8 \$32 million verdict against their insured.
9 I guess that was a \$32 million extraction.

10 You know, Judge, I just think -- and
11 we are going to file very quickly, perhaps
12 today or tomorrow, a response to this
13 latest appellate shenanigans that have been
14 brought. And we will, of course, provide
15 the Court a copy of it.

16 I anticipate that it will be -- it
17 will include the -- a lot of the
18 information and address a lot of the
19 misinformation that has occurred. And we
20 hope to address all of those things,
21 because these serial filings and appeals
22 really have to come to an end and -- so
23 that the receiver can get on with his
24 business that this Court has assigned it to
25 do and that the appellate courts have

1 repeatedly said that you have the authority
2 to move forward with.

3 I'll be happy to answer any questions,
4 Your Honor.

5 THE COURT: All right. Mr. Sawyer, in
6 response.

7 MR. SAWYER: Your Honor, I think the
8 most important place to start is the
9 timeline that was given about the reference
10 to discovery, because that is important in
11 terms of our due process issues, which you
12 yourself have said is a concerning issue
13 based upon the motion that I filed,
14 Your Honor.

15 The claim is discovery is taking
16 place. So I want to give you the timeline
17 of this purported discovery, because it's
18 incredibly important as to our due process
19 rights.

20 The discovery that the receiver filed
21 with the Court was served before the
22 receiver ever filed anything suggesting a
23 claim of constructive or actual fraud. It
24 was October of last year.

25 The first time that they put in any

1 pleading or filing with the Court a
2 suggestion of this actual or constructive
3 fraud theory was -- was January of 2023.

4 The Court heard the hearing on the
5 motion to dissolve, and then that ruling
6 was -- was appealed in March. And our view
7 was, under Rule 205, that meant that it is
8 now sitting with the Court of Appeals. We
9 aren't touching it.

10 And then we had the hearing in July,
11 which, again, that issue was raised. And
12 at that time, the Court stated it stands
13 because the matter was before the Court of
14 Appeals.

15 Until September, there was never an
16 indication -- and we still believe, by the
17 way -- and I think Mr. Lee is going to
18 address the September order and the
19 difference between Rule 205 and Rule 241,
20 and a stay under 241, exclusive
21 jurisdiction under 205. So I'll leave that
22 to him.

23 But on discovery, there's never been a
24 chance for discovery. And, in fact, in the
25 July hearing, when you said that you were

1 going to stay -- and I specifically stood
2 up. You read that in the brief. I know
3 you're aware of the conversation we had.

4 And I said, I have points I want to
5 put on the record. But I don't want to
6 waste your time, Your Honor, if you're
7 waiting on the Court of Appeals.

8 And you agreed and said, We're staying
9 this. If the Court of Appeals sends it
10 down, we're going to reconvene.

11 And one of those points was absolutely
12 going to be: We need discovery. Your
13 order that's on appeal in March said there
14 would be discovery on this. And we haven't
15 had a chance.

16 And written interrogatories from a
17 party before they were revealed that
18 they've got a broad theory is not full and
19 complete discovery. As we all know, it's
20 not an -- one party's lack of personal
21 knowledge doesn't mean they can't go serve
22 subpoenas; they can't go depose witnesses
23 who may have pertinent knowledge about the
24 decisions that were made at the time the
25 company dissolved.

1 There's all sorts of discovery that we
2 would be entitled to under standard Rules
3 of Civil Procedure once a party discloses
4 their intent of what they're pleading,
5 which is also why Rule 9 in particular
6 requires particularized pleadings of fraud.

7 And no pleadings in this case in terms
8 of the actual pleadings ever alleged fraud
9 to put us on notice to conduct this
10 discovery prior to, effectively, the March
11 appeal. So --

12 THE COURT: We -- however this issue
13 arose, the issue of constructive fraud has
14 been out there since --

15 MR. SAWYER: Since January.

16 THE COURT: -- January.

17 MR. SAWYER: And -- and if the
18 Court -- and the Court --

19 THE COURT: And very actively
20 litigated four -- four different times now.

21 MR. SAWYER: Well, it was -- it was
22 raised in -- the first time it was ever
23 raised was in January. The Court had a
24 hearing. The Court issued its order
25 March 1st, and that order went on appeal.

1 So there hasn't been time --

2 THE COURT: What does Judge Verdin's
3 order mean, in your judgment, when she
4 says: We further clarify that the order
5 you just referred to is not stayed during
6 the pendency of this appeal?

7 She says that.

8 And then she says: The receivership
9 action and the receiver's ability to carry
10 out his duties are not stayed. What does
11 that mean?

12 MR. SAWYER: Your Honor, I think what
13 it means is, it is a full reflective of
14 what was asked of her in the motion to
15 clarify. The motion to clarify from the
16 receiver to Judge Verdin only asked about
17 Rule 241 and the -- the --

18 THE COURT: I don't care whether it
19 asked about 241 or what it asked about,
20 Mr. Sawyer.

21 MR. SAWYER: Well --

22 THE COURT: The -- what does -- I'm
23 asking you what Judge Verdin -- she doesn't
24 refer to any particular rule one way or
25 another, other than the civil procedure

1 rule that says that interlocutory orders
2 are not stayed by an appeal, which this is
3 one. And that's all she says about that.

4 And then she further said -- refers to
5 the provisions in the receivership statute
6 that state proceedings in all respects are
7 not stayed.

8 What -- what does she mean by that?

9 MR. SAWYER: She means that there's
10 not a stay. 241 talks about a stay.

11 THE COURT: Well, if there's not a
12 stay, then what prevents me from issuing
13 the order I issued in October?

14 MR. SAWYER: Rule 205, which says that
15 matters affected by the appeal are within
16 the exclusive jurisdiction of the appellate
17 court. That's the distinction --

18 THE COURT: The matters affected by
19 the appeal are the matters contained in the
20 order of March 31st, 2023, at most.

21 MR. SAWYER: And -- and those --

22 THE COURT: And she's already said
23 that that order is not stayed during the
24 pendency of this appeal.

25 MR. SAWYER: Again, a stay is not the

1 same as -- as a matter affected by the
2 appeal being within the exclusive
3 jurisdiction of the Court.

4 THE COURT: Well, I -- I --

5 MR. SAWYER: That's 205.

6 THE COURT: I hear the words that
7 you're saying, but they really don't square
8 up with what I'm reading in terms of her
9 order.

10 And it is for the reasons she stated
11 in the order that I -- after considering
12 this thing for some time after it was
13 filed, which was their motion that led to
14 my October 5th order, you know.

15 As you-all very well know, I go about
16 my book of business on a weekly basis and
17 see what's outstanding and what I need to
18 rule upon. And I really regarded it as
19 rather routine and done what I did after
20 having four different hearings on this
21 thing.

22 I don't see how in the world you would
23 be precluded, no matter what the Court of
24 Appeals says, from litigating this issue
25 further in connection with what your

1 responsibilities are and what your
2 situation is and what the carrier's
3 situation -- and that's really what you're
4 talking about. You're not concerned,
5 really, one way or another about Payne &
6 Keller. You're concerned --

7 MR. SAWYER: Well, I am, because --

8 THE COURT: You're concerned about the
9 coverage and whether you have coverage.

10 MR. SAWYER: Well, and -- but, also,
11 even if there is coverage, the carrier only
12 agrees to pay the amounts that the insurer
13 is legally obligated to pay.

14 THE COURT: Well, now --

15 MR. SAWYER: So if Payne & Keller is
16 mutually sued, that has a significant
17 impact on coverage.

18 THE COURT: Well, all those matters
19 will continue to be discussed, I feel quite
20 sure. And that's why I don't understand
21 the big hoopla that has descended upon me
22 with your filings and Zurich's filings and
23 Travelers' filings on this matter right
24 now.

25 I -- I don't really see what has begun

1 here that disadvantages you as the carrier
2 in talking about whatever it is you want to
3 talk about in terms of coverage.

4 And quite frankly, it's a kind of
5 double-edged sword. If constructive fraud
6 is found and the termination of Payne &
7 Keller is revoked as it has been by the
8 state of Texas, then you've got some
9 arguments you're going to be making about
10 what that does to the contract you have to
11 provide coverage. Because what
12 transpired -- and I don't see -- and that's
13 really what you're going to be arguing
14 about. I don't see that as being something
15 you're disadvantaged about one way or
16 another.

17 But to take the position, as y'all
18 have taken very fiercely, that some wild
19 impropriety has taken place by my
20 management of this docket in view of these
21 outstanding orders and moving this docket
22 along by dealing with it is disappointing.

23 MR. SAWYER: Well -- and, Your Honor,
24 I -- I really did not believe that we'd be
25 in a situation with the order happening

1 without having had another hearing without
2 having discovery.

3 We -- we had the colloquy in July, and
4 I was told that we would have another
5 hearing. It was said that you would
6 reconvene it. Your order in March --

7 THE COURT: Right. And, of course,
8 that was a --

9 MR. SAWYER: -- said that it would be
10 discussed.

11 THE COURT: -- much of that was
12 focused on the fact that there was still
13 this lingering question as to what
14 the Court of Appeals would say about the
15 authority of the Court to continue in this
16 matter.

17 MR. SAWYER: Well, and --

18 THE COURT: But then come September
19 and the Court of Appeals says, quite
20 clearly, in my view: Circuit Court Judge,
21 continue to do what you're doing.

22 MR. SAWYER: And -- and if that's what
23 it said and we -- I don't think it's worth
24 bickering about that.

25 THE COURT: It isn't.

1 MR. SAWYER: We disagree.

2 THE COURT: Because you don't -- you
3 disagree very much with that, and that's
4 your privilege.

5 I'm just trying to explain to you what
6 went through my mind as a Circuit Court
7 judge when I get an order from my
8 superiors, this appellate court, saying
9 move forward with what you're doing.

10 MR. SAWYER: And it --

11 THE COURT: That's all I thought I was
12 doing. I didn't think I was wreaking havoc
13 on your ability, and your considerable
14 ability, all three of you, to represent --
15 and your colleague at Robinson Gray -- to
16 do what you need to do to represent your
17 insurer. And I think all those things are
18 still up there on the table and going to be
19 litigated fiercely.

20 MR. SAWYER: And, Your Honor, what
21 we -- what we would have done had we been
22 able to file our opposition to the proposed
23 order and if it --

24 THE COURT: Well, I mean, you weren't
25 prevented from doing that. That thing

1 has --

2 MR. SAWYER: Well --

3 THE COURT: -- been out there for a
4 long time.

5 MR. SAWYER: It was less -- less than
6 ten days. Travelers had asked for ten days
7 to respond. They didn't get a response and
8 then the -- the --

9 But, again, the main point is, in
10 July, when you said you were going to
11 reconvene, it said: If the Court of
12 Appeals sends this down, I'm going to
13 reconvene.

14 So if the view is that the September
15 order from the Court of Appeals sent it
16 back down, then our expectation from what
17 was stated in July said it would be
18 reconvened before we were going to have any
19 ruling in the case. And I -- and I frankly
20 did rely upon that, Your Honor.

21 THE COURT: Okay. Well, I understand
22 what you're saying, and I believe you. But
23 you don't -- I believe all three of you.
24 That's what you thought that meant. I
25 thought differently.

1 And I will try to figure out some way
2 to be sure that your ability to litigate
3 these matters is fully protected, even now.

4 But what I would appreciate is y'all
5 understanding and respecting what I'm
6 trying to do to keep this matter on track
7 instead of ascribing all kinds of motives
8 to the Court that are really not fair to
9 the judge.

10 I -- I have heard y'all to the
11 fare-thee-well. About everything you've
12 ever wanted I've heard. I've read every
13 shred of materials -- this is -- just
14 represents a drop in the ocean. And all of
15 them come with flash drives that have
16 exhibits that will take up ten bankers box
17 to each thing I hear, and I go through
18 every one of them.

19 So that's all I'm trying to explain to
20 you, is that this isn't some mistake on my
21 part. It was my considered judgment. That
22 is what the Court of Appeals expected me to
23 do, is to move on with this thing, because
24 these arguments, fussing with y'all, have
25 been made in extreme to me, as Mr. Robinson

1 has recited.

2 All I thought I was doing is what they
3 had asked me to do, is to move on with this
4 case. But I understand your feeling that
5 there are still matters you want to
6 litigate, and I'm going to figure out a way
7 to protect those things.

8 But I would sure appreciate being able
9 to do it without having these over-the-top
10 filings take place that take up a lot of my
11 time and, in addition, place in the record
12 a tone that I don't think is worthy of any
13 of us.

14 MR. SAWYER: Thank you, Your Honor.

15 And one thing I would also note, that
16 in terms of a lot of the conversation that
17 was just stated was couching all carriers
18 into every receivership matter together.

19 THE COURT: I don't look at it that
20 way, and you will --

21 MR. SAWYER: Well, I appreciate that,
22 Your Honor. I know. That -- that was the
23 tone and the express statements that were
24 made about verdicts and appeals.

25 THE COURT: And you've got a little

1 over the top between -- now, those 25
2 appeals aren't about y'all, by any means.
3 I know that.

4 MR. SAWYER: Okay. Thank you,
5 Your Honor.

6 THE COURT: I accept that.

7 MR. SAWYER: Thank you, Your Honor.

8 THE COURT: And understand that
9 completely.

10 Mr. Lee, you were burning to say
11 something?

12 MR. LEE: Probably more than I will.
13 But I -- but I'll say -- keep it to a
14 minimum.

15 Your Honor, I do want to make sure
16 Your Honor understands that we don't take
17 lightly and are not being accusatory, but
18 we take very, very seriously for a very
19 good practical reason exactly what's
20 happened in this case.

21 We had a discussion with Your Honor
22 that there was no jurisdiction to decide
23 matters affected by that first appeal, the
24 one that's on appeal now, and that you
25 would not deal with the order on revocation

1 because there were a multiplicity. There
2 were some issues that were on appeal that
3 Your Honor would have to rely upon as being
4 X versus Y in order to sign the order of
5 revocation.

6 Having signed the order of revocation,
7 you now have a situation where this Court
8 has, in fact, redecided the issues on
9 appeal one way, the way it believes is
10 correct.

11 THE COURT: Well --

12 MR. LEE: Just hear me out for one
13 second.

14 THE COURT: All right.

15 MR. LEE: Issued an order, which was
16 then taken to Texas, and now there is a
17 certificate of termination.

18 THE COURT: Right.

19 MR. LEE: That's chaos for the appeal.

20 THE COURT: I don't see it that way
21 one bit.

22 MR. LEE: You're going to see a
23 briefing from this side with the Court of
24 Appeals telling them about that order --

25 THE COURT: Well --

1 MR. LEE: -- about that certificate.

2 THE COURT: I probably --

3 MR. LEE: And that's the -- that's the
4 practical -- the very practical reason for
5 the jurisdictional problem.

6 THE COURT: But here's the other
7 practical thing: You-all, despite words on
8 the page that read to me just as clearly as
9 words reading from Judge Verdin for
10 the Court on this matter, say they don't
11 have any meaning because of an
12 interpretation you made of Rule 205.

13 MR. LEE: I think they have great
14 meaning but not -- they're not about
15 jurisdiction.

16 THE COURT: Well, I read them
17 completely differently because that's
18 exactly what she was asked to decide, which
19 is the Court's order on appealability
20 and -- so we're just going to have to agree
21 to disagree about that.

22 I took my directions direct from my
23 superiors at the Court of Appeals, and I
24 think I can read this order well enough to
25 get what they're saying.

1 They don't have all of this in front
2 of them. The world is not going to come to
3 an end if y'all brief all of this with your
4 continuing very, very vast differences as
5 to what they're being asked to decide.
6 That will all be briefed up there.

7 And if it turns out that you prevail,
8 then we'll have plenty of time here to
9 correct whatever has to be done that you
10 think interferes with your ability to make
11 the kind of objection you want to make on
12 behalf of your carrier clients.

13 MR. LEE: I appreciate that,
14 Your Honor.

15 THE COURT: All right. So I -- I
16 don't see that anything has been
17 irretrievably broken, even if the Court of
18 Appeals -- even if Texas has entered a
19 revocation of the termination. That's --
20 so what? That's been done. That's going
21 to sit there. How that affects this matter
22 going forward will certainly be something
23 that we'll litigate here.

24 That hasn't been litigated yet. I
25 have no idea how it's going to affect it.

1 And I have no idea what the Court of
2 Appeals is going to ultimately say about
3 the arguments you-all make up there about
4 that matter --

5 MR. LEE: Thank you, Your Honor.

6 THE COURT: -- in aid of your
7 position, that this Court has exercised its
8 authority entirely.

9 MR. LEE: Thank you, Your Honor. We
10 would just ask that the motion to
11 reconsider be decided so we can get that
12 done with and move on. We will obviously
13 talk to the Court of Appeals.

14 THE COURT: All right. Thank you so
15 much.

16 MR. LEE: Thank you.

17 THE COURT: Anything further?

18 Mr. Robinson are you burning to say
19 one more thing?

20 MR. ROBINSON: I am.

21 THE COURT: Well, let's make it quick.

22 MR. ROBINSON: Yes, Your Honor.

23 I think the Court has correctly
24 pointed out that the Court of Appeals had
25 all of this in front of them. No matter

1 who asked for it, the information was in
2 front of them. And that's the way appeals
3 happen. One side presents their side, and
4 the other side presents their side, and
5 the Court issues an order.

6 And at the end of the day, as we have
7 seen in -- over and over, when the carriers
8 don't like the order, then they want --
9 they don't accept it. And it's just -- and
10 they give every reason why it should not be
11 enforced. I don't know that we've ever
12 seen them actually just abide by it.

13 And so, you know, Judge, to argue that
14 the -- this jurisdictional issue was not
15 before the Court of Appeals is just beyond
16 my ability to imagine because I read the
17 briefs and the Court of Appeals --

18 THE COURT: And you might not be
19 amazed at all to think that I have read the
20 briefs as well.

21 MR. ROBINSON: I'm certainly not,
22 Your Honor. You -- as everyone knows in
23 this courtroom, you read every brief that
24 is filed and every piece of evidence no
25 matter how many hundreds of thousands of

1 pages that come from these carriers.

2 THE COURT: Well, be that as it may --

3 MR. ROBINSON: They're filed in
4 triplicate, duplicate, four times and five
5 times over.

6 THE COURT: Yes.

7 MR. ROBINSON: It's the same thing,
8 and you get reams of paper.

9 And I will just point out -- because I
10 think, you know, Judge, the -- this is the
11 only thing I'm going to say, and then I'm
12 going to sit down: The carriers -- before
13 the ink was even dry on Judge Verdin's
14 order, the carriers filed just last week --
15 or this week in the ABC case in a motion
16 for protective order, the carriers are
17 asserting that because the appeal involves
18 the receivership, that matter is also
19 stayed.

20 They are not going to accept the issue
21 of the order of the Court of Appeals. And
22 they are going to continue filing things
23 that are -- that are -- that completely
24 contradict what the Court of Appeals has
25 said.

1 And they're going to continue putting
2 these things in front of you and perhaps in
3 front of other judges, because there are
4 other judges hearing receiverships now.
5 And we -- and we're seeing some of those
6 things. We've had federal courts and state
7 courts hearing receiverships.

8 They're going to continue pressing.
9 Despite the fact the Court of Appeals says
10 it is not stayed, they're going to file it
11 in every single case. They've done it.
12 They've started this week, that it's stayed
13 because of 205; it's stayed because there's
14 an appeal.

15 The Court of Appeals says, no, it's
16 not. The carrier says, yes, it is. And
17 you're placed in the position of deciding
18 who to follow.

19 THE COURT: Well, here's what I'm
20 going to do: What I've got in front of me
21 is a motion for reconsideration of my
22 October 5th order and a complimentary copy,
23 I guess you could say, of the motion -- the
24 emergency motion to the Court of Appeals.

25 I am going to do something I rarely do

1 in these cases, which is I am going to hold
2 in abeyance any ruling on the motion for
3 reconsideration.

4 Normally, I rule on these things
5 promptly. But I am going to hold in
6 abeyance any ruling on the motion that I
7 reconsider my October order. So it will
8 simply stay there with a pending motion for
9 reconsideration.

10 And I, frankly, do that for two
11 reasons. Number one, it gives me the
12 ability to see what else might need to be
13 done after we see what the Court of Appeals
14 does on the merits of this matter.

15 But the other thing, quite frankly, it
16 does, is to keep this thing in stasis and I
17 have yet one more appeal go up on this,
18 unless the parties plan to appeal my
19 announcement that I am going to stay any
20 further consideration of this matter for
21 the present time. So I don't know what
22 they'll do about that.

23 But I am going to defer ruling on the
24 matter until we get further briefing and
25 further activity from the Court of Appeals

1 on this matter.

2 But I do not feel that I ought to act
3 on the reconsideration that I felt was
4 appropriate under the September 8th, 2023,
5 ruling of the Court of Appeals, because
6 that's just going to further send the
7 litigation machine into another level on
8 what's really the same issue.

9 The Court of Appeals has got a full
10 ability to look at everything that's just
11 been argued here about the effect of these
12 various orders, maybe not necessarily the
13 order of October, but certainly the basic
14 order of March 31st.

15 And they're going to have much
16 argument in front of them about the
17 substance of the October order as well as
18 the effect of the receivership status and
19 all the rest of it.

20 So I think further guidance will
21 obviously be given by the Court of Appeals,
22 whether they end up dismissing it, whether
23 they end up hearing full arguments or
24 whatever they do. And I am going to wait
25 until further occurrence is developed on

1 that front before I go further.

2 So that's what I'm going to do. I'm
3 going to defer to them on the motion for
4 reconsideration that's still pending, still
5 alive, and we'll see what happens.

6 MR. ROBINSON: Thank you, Your Honor.

7 THE COURT: Anything further?

8 MR. LEE: Thank you, Your Honor.

9 THE COURT: Very good.

10 All right. Now, we're at ten minutes
11 of 12:00 now, and all we've got left is
12 this rather lengthy matter of Cape.

13 Y'all tell me what you want to do.
14 Cape people, speak. Do you want to take a
15 break for lunch, or do you want to keep on
16 going?

17 MR. PROTOPAPAS: Let's take a break
18 for -- Your Honor, it's Peter Protopapas,
19 receiver. I suggest we take a break for
20 lunch and reconvene with -- with our
21 motions.

22 THE COURT: Okay. Now, Cape -- who
23 are my main Cape defendants in this --
24 representatives of Cape? I know we've got
25 a slew of wonderful lawyers who have filed

1 things, but who is going to be the main
2 person speaking?

3 MR. CARROLL: We are --

4 MS. O'NEILL: We are for --

5 THE COURT: Okay. Todd --

6 MS. O'NEILL: -- two -- for two
7 defendants, two --

8 THE COURT: -- you and Elizabeth got
9 two. Mr. Pugh I know has got a huge
10 number.

11 MR. PUGH: I have three.

12 THE COURT: Three. Oh, good.

13 MR. ELLIOTT: I have the huge number.

14 THE COURT: And you've got the huge
15 number. So I'm looking at the folks that
16 are going to be talking, right? Okay.

17 MR. RAWL: And, Your Honor, also, I'm
18 Vic Rawl.

19 THE COURT: Well -- yeah, and Vic
20 Rawl. Okay.

21 All right. So what I'm asking is
22 this: How about we come back at -- will
23 1:15 or 1:30 give you enough time to kind
24 of break and see where you are? Are you
25 good with that?

1 MR. PUGH: If that works for you.

2 THE COURT: Yeah. Let's come back at
3 1:30.

4 MS. O'NEILL: Can I ask you a
5 question?

6 THE COURT: Yes, you can.

7 MS. O'NEILL: I saw two different
8 agendas, and in one agenda --

9 THE COURT: The final agenda -- excuse
10 me.

11 MS. O'NEILL: I just want to know
12 which is first. Is it personal
13 jurisdictions or the --

14 THE COURT: What I've got -- the one
15 I'm looking at is motion to dissolve,
16 motion to dismiss, motion for protective
17 order, motion for entry of default.

18 MS. O'NEILL: That's the order in
19 which you want to hear them?

20 THE COURT: Yeah, that's what we were
21 thinking.

22 MS. O'NEILL: Okay.

23 THE COURT: I mean, if you've got some
24 other idea that you think would be
25 better --

1 MS. O'NEILL: A different -- one of
2 the other agendas had a different order. I
3 just wanted to know --

4 THE COURT: It did, and we revised it
5 later on --

6 MS. O'NEILL: Understood.

7 THE COURT: -- after we got
8 everybody's stuff in. I mean, does that
9 suit?

10 MR. CARROLL: Yes, Your Honor.

11 MR. PUSH: Yes, ma'am.

12 MS. O'NEILL: Yes. Yes, ma'am. I
13 just wanted to know which order.

14 THE COURT: Okay. That's the order.

15 MS. O'NEILL: Thank you.

16 THE COURT: All right. The court will
17 be in recess.

18 * * *

19 (Whereupon, there was a luncheon
20 recess in the proceedings from 11:49 a.m.
21 to 1:30 p.m.)
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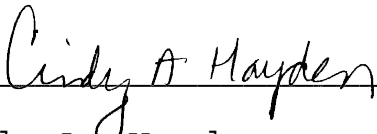
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CERTIFICATE OF REPORTER

I, Cindy A. Hayden, Registered Merit Reporter and Notary Public for the State of South Carolina at Large, do hereby certify:

That the foregoing proceedings were taken before me on the date and at the time and location stated on Page 1 of this transcript; that the foregoing proceedings as typed is a true, accurate and complete record of the proceedings to the best of my ability.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof. Witness my hand, this 26th of October, 2023.



Cindy A. Hayden,
Registered Merit Reporter
Notary Public
State of South Carolina at Large
My Commission expires:
July 27, 2030

CHILDERS, LENORA (INDIVIDUALLY AND AS
PERSONAL REPRESENTATIVE OF THE

PLAINTIFF - CIVIL

HORWITZ,
NOAH
MORRIE

1330 LAUREL STREET, COLUMBIA, SC 29201

PAYNE & KELLER COMPANY

DEFENDANT - CIVIL

2110 N BELTLINE BLVD, COLUMBIA, SC 29204

PROTOPAPAS, PETER

RECEIVER

HORWITZ,
NOAH
MORRIE

2110 N BELTLINE BLVD, COLUMBUS, SC 29202

INACTIVE PARTIES

No inactive parties found.

JUDGMENT/EVENTS

Date	Description	Order Signed	Post Jdgm	Pgs	Volume /Page	Filing Attorney	Person Filing
10/12/2023	ENFORCEMENT OF FOREIGN JUDGMENT FILED	10/12/2023		13			
10/12/2023	NO COSTS ALLOCATED			0			
10/12/2023	ORIGINAL PETITION			0		HORWITZ, NOAH MORRIE	CHILDERS, LENORA (INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE

DOCUMENTS

Number	Document	Post Jdgm	Date	Pgs
110758521	Notice of Domestication of a Foreign Order		10/12/2023	4
-> 110758522	Domestication -- Exhibit A -- Foreign Order		10/12/2023	9
110774200	Affidavit of Noah M Horwitz Regarding Mailing of Notice of Domestication of Foreign Order		10/12/2023	3
-> 110774201	Exhibit A -- Notice of Mailing		10/12/2023	2
110777311	ENFORCEMENT OF FOREIGN JUDGMENT FILED		10/12/2023	13
	NO COSTS ALLOCATED		10/12/2023	

2023-70875 / Court: 127

CAUSE NO. _____

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

v.

**PAYNE & KELLER COMPANY, by and
its duly-appointed Receiver, PETER D.
PROTOPAPAS,**

IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

____ JUDICIAL DISTRICT

FILED
In the Office of the
Secretary of State of Texas

OCT 12 2023

Corporations Section

NOTICE OF DOMESTICATION OF A FOREIGN ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the Receiver of Payne & Keller Company, by and through the undersigned counsel, and files this Notice of Domestication of a Foreign Order, pursuant to Texas Civil Practice and Remedies Code § 35.001, *et seq.*, implicating Lenora Childers and the Court-Appointed Receiver for Payne & Keller Company.

On October 5, 2023, the Richland County Court of Common Pleas in South Carolina, Civil Action No. 2021-CP-40-03484, issued the attached Findings of Fact and Conclusions of Law on Childers' Motion to Revoke The Termination of Payne & Keller Company. This Order reinstates Payne & Keller as a Texas corporation under Texas Business Organizations Code § 11.153. An authenticated copy of this order is attached hereto.

In connection with this Notice, the undersigned has served on the parties identified below a copy of this Notice and respective accompanying affidavits in accordance with Texas Civil Practice and Remedies Code § 35.005, at their last known addresses, by certified mail, return receipt requested, and by regular mail:

**Lenora Childers
c/o Theile McVey, Esq.
KASSEL/MCVEY**

1330 Laurel Street
Columbia, South Carolina 29201

-and-

Payne & Keller Company
c/o Peter D. Protopapas, Esq.
RIKARD & PROTOPAPAS, LLC
2110 N. Beltline Boulevard
Columbia, South Carolina 29204

WHEREFORE, PREMISES CONSIDERED, the Receiver prays that copies of the Order be filed in accordance with the law and that said Order be domesticated, having the same force and effect as if rendered in the State of Texas.

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

By: /s/ Brady Edwards
Brady Edwards
State Bar No. 00793021
Noah M. Horwitz
State Bar No. 24116537
1000 Louisiana Street, Suite 4000
Houston, Texas 77002
Telephone:
Facsimile:

ATTORNEYS FOR THE RECEIVER

**AFFIDAVIT OF NOAH M. HORWITZ IN SUPPORT OF DOMESTICATION
OF FOREIGN ORDER REGARDING PAYNE & KELLER COMPANY**

STATE OF TEXAS

§
§
§

COUNTY OF HARRIS

KNOW ALL MEN BY THESE PRESENTS:

BEFORE ME, the undersigned Notary Public, personally appeared Noah M. Horwitz, who after being duly sworn, deposed and stated the following matters under penalty of perjury:

"My name is Noah M. Horwitz. I am authorized and competent to make this Affidavit. I am over the age of twenty-one (21), am of sound mind, and have never been convicted of a felony or crime of moral turpitude. I swear that the statements contained in this Affidavit are true and correct. The matters attested to herein are within my personal knowledge.

"I am a lawyer at the law of firm of Morgan, Lewis & Bockius LLP. I am duly licensed to practice law in the State of Texas. I am an attorney for the Receiver for Payne & Keller Company.

"I am executing this Affidavit in conjunction with the filing for domestication of the Order issued by the Richland County Court of Common Pleas in South Carolina, Civil Action No. 2021-CP-40-03484, on October 5, 2023, in the case styled *Childers v. Payne & Keller Company, et al.* The Order is the attached Findings of Fact and Conclusions of Law on Childers' Motion to Revoke The Termination of Payne & Keller Company.

"Lenora Childers may be served, by and through her attorney of record, by serving Theile McVey at 1330 Laurel Street, Columbia, South Carolina 29202.

"The duly appointed Receiver, Peter D. Protopapas, may be served at 2110 N. Beltline Boulevard, Columbia, South Carolina 29202.

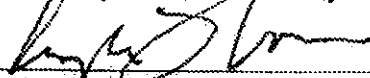
"The Order filed herewith is an authenticated copy obtained from the Richland County Clerk of Court."

FURTHER AFFIANT SAYETH NAUGHT.

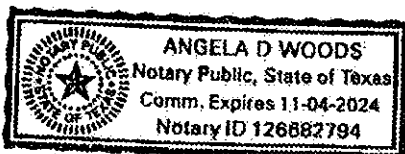
X. 

Noah M. Horwitz, Affiant

SUBSCRIBED AND SWORN TO before me by Noah M. Horwitz on this 12th day of October, 2023, to certify which witness my hand and official seal.

X. 

Notary Public in and for the State of Texas -- Commission Expires 11/01/2024



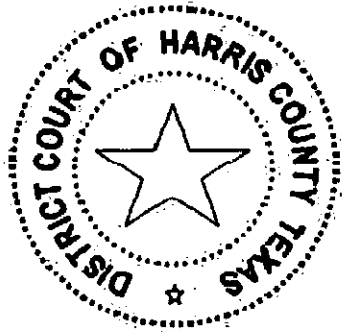
Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Noah Horwitz on behalf of Noah Horwitz
Bar No. 24116537
noah.horwitz@morganlewis.com
Envelope ID: 80515901
Filing Code Description: Petition
Filing Description: Notice of Domestication of Foreign Order
Status as of 10/12/2023 11:34 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Brady Edwards	793021	brady.edwards@morganlewis.com	10/12/2023 10:18:57 AM	SENT
Noah Horwitz	24116537	noah.horwitz@morganlewis.com	10/12/2023 10:18:57 AM	SENT
Theile McVey		tmcvey@kassellaw.com	10/12/2023 10:18:57 AM	SENT
Peter D.Protopapas		pdp@rlegalgroup.com	10/12/2023 10:18:57 AM	SENT
Lindsay Valek		lindsay@rlegalgroup.com	10/12/2023 10:18:57 AM	SENT



I, Marilyn Burgess, District Clerk of Harris County, Texas, certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office this October 12, 2023

Certified Document Number: 110758521 Total Pages: 4

Marilyn Burgess, DISTRICT CLERK
HARRIS COUNTY, TEXAS

In accordance with Texas Government Code 51.301 and 406.013 electronically transmitted authenticated documents are valid. If there is a question regarding the validity of this document and or seal please e-mail support@hcdistrictclerk.com

2023-70875 / Court: 127

ELECTRONICALLY FILED - 2023 Oct 05 4:10 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4003484

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAINTIFFS' MOTION TO REVOKE THE TERMINATION OF PAYNE & KELLER COMPANY

Before the Court is Plaintiffs' Motion to Revoke the Termination of Payne & Keller Company ("Payne & Keller") pursuant to Section 11.153 of the Texas Business Organizations Code ("TBOC"). As the parties know, Payne & Keller has appealed this Court's refusal to terminate the appointment of a receiver and dismiss the underlying receivership. As set forth below this matter is not stayed on appeal. Moreover, the Court does find that, based on the evidence below, Payne & Keller committed, at a minimum, constructive fraud when dissolving and thus revocation of the termination of Payne & Keller pursuant to Section 11.153 of the Texas Business Organizations Code is appropriate.

STATUS OF RECEIVERSHIP ON APPEAL

At the outset, and following the hearing on this matter, this Court asked for further clarification of the status of this matter during the pendency of the appeal. Specifically, this Court requested clarification on whether it retained jurisdiction to issue orders in this matter and whether the matter or portions thereof were stayed. As a result, the receiver sought clarification

from the Court of Appeals. On September 8, 2023, the Court of Appeals issued an order clarifying that under the law and statutes of South Carolina, that while the appeal of this Court's orders proceeds, the Receivership action is not stayed. See Order, *Childers v. Davis Mechanical*, 2023-000727 (S.C. App., Sept. 8, 2023). That matter having been resolved, a decision on the question of whether a finding of constructive fraud as to Payne & Keller's Texas dissolution is appropriate.

BACKGROUND

On August 27, 2021, this Court entered an order appointing Peter D. Protopapas ("Receiver") over this dissolved Texas Corporation. The Receiver has conducted substantial research regarding Payne & Keller, including the reasons for Payne & Keller's purported dissolution and the underlying reasons for that dissolution. Much of that history is set forth in the Receivers' Response to Third Party Defendant Travelers Casualty & Surety Company's Motion to Dismiss Third Party Claims and Dissolve the Payne & Keller Receivership filed January 13, 2023 and subsequently repeated in the instant motion. Large portions of those undisputed facts and the applicable law are reiterated here in whole or in part.

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.

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. 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. The claims against Payne & Keller filed in that case were dismissed on May 21, 1986, 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. 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.
- 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.
- On October 27, 1986, Frentex adopted its 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.

LAW AND ANALYSIS

Section 11.153 of the TBOC¹ 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 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,

¹ Of note, Section 1.053 of the TBOC states the "code applies to the conduct of affairs with foreign countries and the other states of the United States only to the extent permitted under the United States Constitution."

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.”).

The story of Payne & Keller’s dissolution appears clear, 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.

Finally, no party opposing Plaintiffs’ motion has come forth with any evidence to suggest that the facts as set forth in Plaintiffs’ motion are not accurate. Indeed, the receiver sent discovery to numerous insurance carriers seeking to learn what they knew, or did not know, about Payne & Keller’s history. See Receiver’s Notice of Filing of Insurer Discovery Responses, June 30, 2023. In each of those discovery responses, the various insurance carriers disclaimed any knowledge of the facts surrounding Payne & Keller’s dissolution. Thus, to the extent that this Court thought

that further discovery on the issue of constructive fraud needed to take place, it already has. And the facts remain the same, and uncontroverted.

CONCLUSION

In light of the evidence presented and the clear implication of that historical evidence, it is clear to this Court that, at the time it dissolved, Payne & Keller, as a result of the circumstances facing it, was constructively aware that it was leaving behind thousands of workers whose injuries from asbestos and other toxic diseases would manifest themselves over the next decades. It is precisely this type of knowledge, constructive or otherwise, and the resulting fraud, that Texas law provides for the revocation of a company's dissolution. Therefore, for all of the reasons set forth above and after review of all the evidence, Plaintiffs' motion for revocation of the dissolution of Payne & Keller is GRANTED and this Court orders that Payne & Keller Company be reinstated as provided by Section 11.153 of the TBOC.

IT IS SO ORDERED.

[JUDGE'S E-SIGNATURE PAGE FOLLOWS]

CERTIFIED TRUE COPY
OF ORIGINAL FILED
Jeanette W. M. ...
C.C.C. P&G. S. ...
RICHLAND COUNTY
SOUTH CAROLINA
Oct. 11, 2023



Richland Common Pleas

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

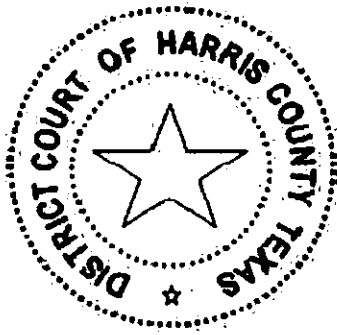
So Ordered

Jean H. Toal

Electronically signed on 2023-10-04 16:08:19 page 9 of 9

CERTIFIED TRUE COPY
OF ORIGINAL FILED
Jeanette W. M. Toal
C.C.P. & G. S. Toal
RICHLAND COUNTY
SOUTH CAROLINA

Oct. 11, 2023



I, Marilyn Burgess, District Clerk of Harris County, Texas certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office this October 12, 2023

Certified Document Number: 110758522 Total Pages: 9

Marilyn Burgess, DISTRICT CLERK
HARRIS COUNTY, TEXAS

In accordance with Texas Government Code 51.301 and 406.013 electronically transmitted authenticated documents are valid. If there is a question regarding the validity of this document and or seal please e-mail support@hcdistrictclerk.com

1330 Laurel Street
Columbia, South Carolina 29201

-and-

Payne & Keller Company
c/o Peter D. Protopapas, Esq.
RIKARD & PROTOPAPAS, LLC
2110 N. Beltline Boulevard
Columbia, South Carolina 29204

WHEREFORE, PREMISES CONSIDERED, the Receiver prays that copies of the Order be filed in accordance with the law and that said Order be domesticated, having the same force and effect as if rendered in the State of Texas.

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

By: /s/ Brady Edwards
Brady Edwards
State Bar No. 00793021
Noah M. Horwitz
State Bar No. 24116537
1000 Louisiana Street, Suite 4000
Houston, Texas 77002
Telephone: (713) 890-5000
Facsimile: (713) 890-5001
brady.edwards@morganlewis.com
noah.horwitz@morganlewis.com

ATTORNEYS FOR THE RECEIVER

**AFFIDAVIT OF NOAH M. HORWITZ IN SUPPORT OF DOMESTICATION
OF FOREIGN ORDER REGARDING PAYNE & KELLER COMPANY**

STATE OF TEXAS

§

COUNTY OF HARRIS

§

§

KNOW ALL MEN BY THESE PRESENTS:

BEFORE ME, the undersigned Notary Public, personally appeared Noah M. Horwitz, who after being duly sworn, deposed and stated the following matters under penalty of perjury:

“My name is Noah M. Horwitz. I am authorized and competent to make this Affidavit. I am over the age of twenty-one (21), am of sound mind, and have never been convicted of a felony or crime of moral turpitude. I swear that the statements contained in this Affidavit are true and correct. The matters attested to herein are within my personal knowledge.

“I am a lawyer at the law of firm of Morgan, Lewis & Bockius LLP. I am duly licensed to practice law in the State of Texas. I am an attorney for the Receiver for Payne & Keller Company.

“I am executing this Affidavit in conjunction with the filing for domestication of the Order issued by the Richland County Court of Common Pleas in South Carolina, Civil Action No. 2021-CP-40-03484, on October 5, 2023, in the case styled *Childers v. Payne & Keller Company, et al.* The Order is the attached Findings of Fact and Conclusions of Law on Childers’ Motion to Revoke The Termination of Payne & Keller Company.

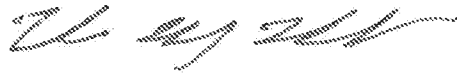
“Lenora Childers may be served, by and through her attorney of record, by serving Theile McVey at 1330 Laurel Street, Columbia, South Carolina 29202.

“The duly appointed Receiver, Peter D. Protopapas, may be served at 2110 N. Beltline Boulevard, Columbia, South Carolina 29202.

“The Order filed herewith is an authenticated copy obtained from the Richland County Clerk of Court.”

FURTHER AFFIANT SAYETH NAUGHT.

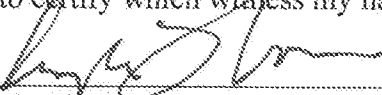
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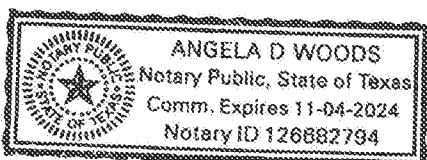
Noah M. Horwitz, Affiant

SUBSCRIBED AND SWORN TO before me by Noah M. Horwitz on this 12th day of October, 2023, to certify which witness my hand and official seal.

X



Notary Public in and for the State of Texas – Commission Expires 11/04/2024



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Noah Horwitz on behalf of Noah Horwitz
Bar No. 24116537
noah.horwitz@morganlewis.com
Envelope ID: 80515901
Filing Code Description: Petition
Filing Description: Notice of Domestication of Foreign Order
Status as of 10/12/2023 11:34 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Brady Edwards	793021	brady.edwards@morganlewis.com	10/12/2023 10:18:57 AM	SENT
Noah Horwitz	24116537	noah.horwitz@morganlewis.com	10/12/2023 10:18:57 AM	SENT
Theile McVey		tmcvey@kassellaw.com	10/12/2023 10:18:57 AM	SENT
Peter D.Protopapas		pdp@rplegalgroup.com	10/12/2023 10:18:57 AM	SENT
Lindsay Valek		lindsay@rplegalgroup.com	10/12/2023 10:18:57 AM	SENT

2023-70875 / Court: 127

ELECTRONICALLY FILED - 2023 Oct 05 4:10 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4003484

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAINTIFFS' MOTION TO REVOKE THE TERMINATION OF PAYNE & KELLER COMPANY

Before the Court is Plaintiffs' Motion to Revoke the Termination of Payne & Keller Company ("Payne & Keller") pursuant to Section 11.153 of the Texas Business Organizations Code ("TBOC"). As the parties know, Payne & Keller has appealed this Court's refusal to terminate the appointment of a receiver and dismiss the underlying receivership. As set forth below this matter is not stayed on appeal. Moreover, the Court does find that, based on the evidence below, Payne & Keller committed, at a minimum, constructive fraud when dissolving and thus revocation of the termination of Payne & Keller pursuant to Section 11.153 of the Texas Business Organizations Code is appropriate.

STATUS OF RECEIVERSHIP ON APPEAL

At the outset, and following the hearing on this matter, this Court asked for further clarification of the status of this matter during the pendency of the appeal. Specifically, this Court requested clarification on whether it retained jurisdiction to issue orders in this matter and whether the matter or portions thereof were stayed. As a result, the receiver sought clarification

from the Court of Appeals. On September 8, 2023, the Court of Appeals issued an order clarifying that under the law and statutes of South Carolina, that while the appeal of this Court's orders proceeds, the Receivership action is not stayed. *See Order, Childers v. Davis Mechanical*, 2023-000727 (S.C. App., Sept. 8, 2023). That matter having been resolved, a decision on the question of whether a finding of constructive fraud as to Payne & Keller's Texas dissolution is appropriate.

BACKGROUND

On August 27, 2021, this Court entered an order appointing Peter D. Protopapas ("Receiver") over this dissolved Texas Corporation. The Receiver has conducted substantial research regarding Payne & Keller, including the reasons for Payne & Keller's purported dissolution and the underlying reasons for that dissolution. Much of that history is set forth in the Receivers' Response to Third Party Defendant Travelers Casualty & Surety Company's Motion to Dismiss Third Party Claims and Dissolve the Payne & Keller Receivership filed January 13, 2023 and subsequently repeated in the instant motion. Large portions of those undisputed facts and the applicable law are reiterated here in whole or in part.

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.

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. 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. The claims against Payne & Keller filed in that case were dismissed on May 21, 1986, 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. 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.
- 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.
- On October 27, 1986, Frentex adopted its 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.

LAW AND ANALYSIS

Section 11.153 of the TBOC¹ 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 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,

¹ Of note, Section 1.053 of the TBOC states the "code applies to the conduct of affairs with foreign countries and the other states of the United States only to the extent permitted under the United States Constitution."

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.”).

The story of Payne & Keller’s dissolution appears clear, 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.

Finally, no party opposing Plaintiffs’ motion has come forth with any evidence to suggest that the facts as set forth in Plaintiffs’ motion are not accurate. Indeed, the receiver sent discovery to numerous insurance carriers seeking to learn what they knew, or did not know, about Payne & Keller’s history. *See Receiver’s Notice of Filing of Insurer Discovery Responses*, June 30, 2023. In each of those discovery responses, the various insurance carriers disclaimed any knowledge of the facts surrounding Payne & Keller’s dissolution. Thus, to the extent that this Court thought

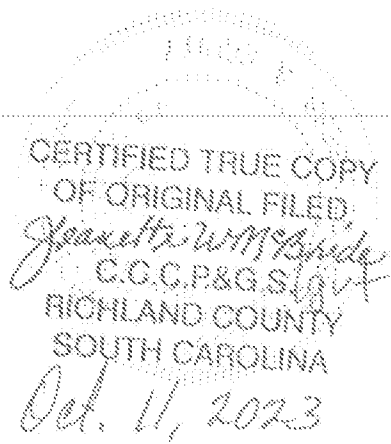
that further discovery on the issue of constructive fraud needed to take place, it already has. And the facts remain the same, and uncontroverted.

CONCLUSION

In light of the evidence presented and the clear implication of that historical evidence, it is clear to this Court that, at the time it dissolved, Payne & Keller, as a result of the circumstances facing it, was constructively aware that it was leaving behind thousands of workers whose injuries from asbestos and other toxic diseases would manifest themselves over the next decades. It is precisely this type of knowledge, constructive or otherwise, and the resulting fraud, that Texas law provides for the revocation of a company's dissolution. Therefore, for all of the reasons set forth above and after review of all the evidence, Plaintiffs' motion for revocation of the dissolution of Payne & Keller is GRANTED and this Court orders that Payne & Keller Company be reinstated as provided by Section 11.153 of the TBOC.

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

Electronically signed on 2023-10-04 15:09:19 page 9 of 9

CERTIFIED TRUE COPY
OF ORIGINAL FILED
Jessette W. M. [Signature]
C.C.C.P.&G.S. [Signature]
RICHLAND COUNTY
SOUTH CAROLINA
Oct. 11, 2023

CERTIFIED MAIL®



7022 2410 0000 9096 7823



Morgan Lewis

1000 Louisiana, Suite 4000
Houston, TX 77002
United States

TO: Payne & Keller Company
C/O Perter D. Protopapas
Rikard & Protopapas, LLC
2110 N. Beltline Blvd.
Columbia, SC 29201

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Rikard & Protopapas, LLC
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Columbia, SC 29201

Postmark
Here

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions



Morgan Lewis

1000 Louisiana, Suite 4000
Houston, TX 77002
United States

TO: Lenora Childress
C/O Theile McVey, Esq.
Kassel McVey
1330 Laurel St
Columbia, SC 29201

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Lenora Childress
C/O Theile McVey, Esq.
Kassel McVey
1330 Laurel St
Columbia, SC 29201

See Reverse for Instructions

CAUSE NO. 2023-70875

LENORA CHILDERS, individually and §
as Personal Representative of the Estate §
of LEWIS C. CHILDERS, §
§
v. §
§
PAYNE & KELLER COMPANY, by and §
its duly-appointed Receiver, PETER D. §
PROTOPAPAS, §
§
STATE OF TEXAS §
§
COUNTY OF HARRIS §

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
127th JUDICIAL DISTRICT

AFFIDAVIT OF NOAH M. HORWITZ REGARDING MAILING
OF NOTICE OF DOMESTICATION OF FOREIGN ORDER

KNOW ALL MEN BY THESE PRESENTS:

BEFORE ME, the undersigned Notary Public, personally appeared Noah M. Horwitz, who after being duly sworn, deposed and stated the following matters under penalty of perjury:

“My name is Noah M. Horwitz. I am authorized and competent to make this Affidavit. I am over the age of twenty-one (21), am of sound mind, and have never been convicted of a felony or crime of moral turpitude. I swear that the statements contained in this Affidavit are true and correct. The matters attested to herein are within my personal knowledge.

“I am a lawyer at the law of firm of Morgan, Lewis & Bockius LLP. I am duly licensed to practice law in the State of Texas. I am an attorney for the Receiver for Payne & Keller Company.

“On October 12, 2023, I sent by certified mail, return receipt requested, and by regular mail, a true copy of the Notice of Domestication of a Foreign Order filed with the District Clerk, along with a copy of the order Findings of Fact and Conclusions of Law on Childers’s Motion to Revoke The Termination of Payne & Keller Company issued by the Richland County Court of Common Pleas in South Carolina, Civil Action No. 2021-CP-40-03484, on October 5, 2023, in the case styled *Childers v. Payne & Keller Company, et al.*, obtained from the Richland County Clerk of Court, and my Affidavit in support of domestication of foreign judgment to each of the following as follows:

Lenora Childers
c/o Theile McVey, Esq.
KASSEL MCVEY
1330 Laurel Street

Columbia, South Carolina 29202
CMRRR: 7022 2410 0000 9096 7830

Payne & Keller Company
c/o Peter D. Protopapas, Esq.
Rikard & Protopapas, LLC
2110 N. Beltline Boulevard
Columbia, South Carolina 29202
CMRRR: 7022 2410 0000 9096 7823

“A true and correct copy of the certified mailing sent to Lenora Childers, CMRRR: 7022 2410 0000 9096 7830, is attached hereto as Exhibit A.

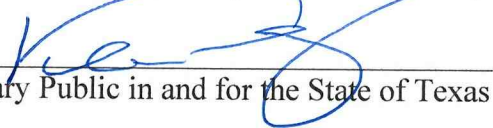
“A true and correct copy of the certified mailing sent to Payne & Keller Company, CMRRR: 7022 2410 0000 9096 7823, is also attached hereto as Exhibit A.”

FURTHER AFFIANT SAYETH NAUGHT.

X 

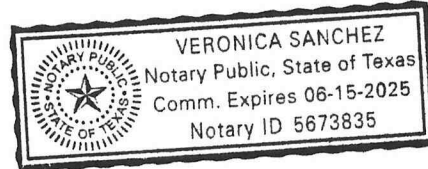
Noah M. Horwitz, Affiant

SUBSCRIBED AND SWORN TO before me by Noah M. Horwitz on this 12th day of October, 2023 to certify which witness my hand and official seal.

X 

Notary Public in and for the State of Texas

My Commission expires: 6/15/2025



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Noah Horwitz on behalf of Noah Horwitz

Bar No. 24116537

noah.horwitz@morganlewis.com

Envelope ID: 80548589

Filing Code Description: Notice

Filing Description: Notice of Mailing Domestication of Foreign Order

Status as of 10/13/2023 6:52 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Theile McVey		tmcvey@kassellaw.com	10/12/2023 4:52:26 PM	SENT
Peter D.Protopapas		pdp@rlegalgroup.com	10/12/2023 4:52:26 PM	SENT
Lindsay Valek		lindsay@rlegalgroup.com	10/12/2023 4:52:26 PM	SENT
Brady Edwards	793021	brady.edwards@morganlewis.com	10/12/2023 4:52:26 PM	SENT
Noah Horwitz	24116537	noah.horwitz@morganlewis.com	10/12/2023 4:52:26 PM	SENT

CAUSE NO. 2023-70875

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

§
§
§
§

IN THE DISTRICT COURT OF

v.

§
§
§
§
§
§

127th JUDICIAL DISTRICT

**Payne & Keller Company, by and through
Its duly-appointed Receiver, Peter D.
Protopapas,**

§
§

HARRIS COUNTY, TEXAS

**PLEA IN INTERVENTION, MOTION TO VACATE,
AND PETITION FOR DECLARATORY JUDGMENT**

In accordance with Tex. R. Civ. P. 60 and Tex. Civ. Prac. & Rem. Code § 35.003(c), Intervenor Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Security Company (“Travelers” or “Intervenor”) files this plea in intervention, motion to vacate domestication, and petition for declaratory judgment, and shows the Court as follows:

**I.
STATUS OF INTERVENOR**

Travelers is a Connecticut insurance company with its principal place of business located in Hartford, Connecticut. Prior to 1986, Travelers issued liability insurance policies to Payne & Keller Company (“Payne & Keller”), a former Texas corporation. Payne & Keller dissolved in Texas in 1986 and, as a matter of Texas corporate law, has been immune from suit since 1989. TEX. BUS. ORG. CODE §§ 11.356, 11.359.

In 2021, a South Carolina state court improperly appointed a South Carolina lawyer, Peter Protopapas, as Payne & Keller’s receiver (the “Receiver”) even though Payne & Keller has been immune from suit since 1989 and has no assets located in the state of South Carolina.

Incredibly, upon his appointment, the South Carolina Receiver, with the South Carolina circuit court’s assistance, has actively sought to *maximize* Payne & Keller’s exposure to claims and liabilities, including most recently by filing with this Honorable Court a “Notice of Domestication of a Foreign Order”—an unlawful order issued by the same South Carolina state court that improperly appointed the South Carolina Receiver. Reaching far beyond its bounds, the Order, dated October 5, 2023, purports to revoke Payne & Keller’s *Texas* termination to reinstate its existence *in Texas*. Completely unaware of the unauthorized nature of the South Carolina Receiver’s actions, the Texas Secretary of State has issued a certificate revoking Payne & Keller’s termination as of October 12, 2023. This certificate of reinstatement must be revoked.

II.
INTERVENOR’S INTEREST IN THIS ACTION

As previewed above, Travelers issued several liability insurance policies to Payne & Keller Company beginning in 1979. Payne & Keller is a former Texas entity that lawfully dissolved in Texas nearly 40 years ago, in 1986. *See* Texas Comptroller of Public Accounts Dissolution Papers for Frentex Enterprises Company of Texas, f/k/a Payne & Keller Company dated Nov. 25, 1986. Payne & Keller’s ability to sue or be sued under any circumstances terminated under the applicable Texas statute of repose as of 1989.

TEX. BUS. ORG. CODE §§ 11.356, 11.359; *see also* Tex. Bus. Corp. Act Art. 7.12 (1984) (predecessor statute).

The South Carolina Receiver for Payne & Keller, improperly appointed by a South Carolina state court with no jurisdiction or power to act in Texas and/or over assets located in Texas, has demanded that Payne & Keller's liability insurers, including Travelers, provide it with a defense to multiple lawsuits naming Payne & Keller as a defendant in several asbestos personal injury lawsuits. The Receiver has not only refused to assert the Texas statute of repose as a defense to these lawsuits, he has taken steps to destroy this and other defenses related to or arising from Payne & Keller's status as a long-dissolved Texas entity that can no longer be sued. Given its potential exposure as a liability insurer for Payne & Keller's liabilities, Travelers has a significant and concrete interest in ensuring that Payne & Keller's corporate termination is not improperly revoked and/or that the operation of the statute of repose is not disturbed. Towards this end, this Court's domestication of the South Carolina court's unlawful October 5, 2023 order purporting to revoke Payne & Keller's termination must be vacated.

If the order is not vacated, such that Payne & Keller's corporate termination is revoked and it is reinstated as an active company in Texas, that would effectively eliminate one of Travelers' main affirmative defenses in the underlying South Carolina litigation based on Texas's statute of repose (*i.e.*, because Payne & Keller dissolved in 1986, its ability to sue, and the Receiver's ability to sue on its behalf, lapsed in 1989). It would also eliminate a critical defense of Payne & Keller and expose it to claims and liabilities that have been extinguished as a matter of Texas law since 1989, to the detriment of

both Payne & Keller and Travelers. In addition, it would materially alter, and impermissibly interfere with, issues that are currently within the exclusive jurisdiction of the South Carolina Court of Appeals, at least as far as the South Carolina state courts are concerned. Travelers thus has a direct and substantial interest in the outcome of this proceeding, and its intervention is necessary to protect its rights.

III.

FACTS CONCERNING IMPROPER APPOINTMENT OF RECEIVER AND IMPROPER EFFORT TO REVOKE PAYNE & KELLER'S DISSOLUTION

1. Lenora Childers Sues Payne & Keller in South Carolina Circuit Court

Payne & Keller is a former Texas corporation that dissolved in Texas in 1986. As a result, Payne & Keller has been immune from any suit of any kind as a matter of Texas law since 1989 under Texas's statute of repose for claims against terminated businesses. Despite this, Lenora Childers, on July 14, 2021, commenced an asbestos personal injury case against Payne & Keller and various other defunct companies in South Carolina circuit court in *Childers v. Davis Mechanical Contractors, Inc.*, Case No. 2021-CP-40-03484 (Childers action).

2. Ms. Childers Requests and the Circuit Court Appoints a Receiver Over Payne & Keller

On August 23, 2021, Ms. Childers filed a motion asking the South Carolina circuit court to appoint Peter Protopapas as Payne & Keller's Receiver, even though Payne & Keller was terminated as a corporation more than 30 years ago, has no property in South Carolina and has never done any business in South Carolina. Four days later, on August 27, 2021, the circuit court granted Ms. Childers' motion without a hearing and without notice to Travelers, and appointed Mr. Protopapas as the Receiver for Payne & Keller with respect to Payne & Keller's assets located in South Carolina (of which there

are none). The Receiver, ostensibly acting on behalf of Payne & Keller, subsequently filed an improper third-party insurance coverage complaint in the Childers action against Travelers and other alleged historical insurers of Payne & Keller in South Carolina circuit court.

3. Travelers Moves to Dissolve the Receivership

On August 24, 2022, Travelers filed a motion to dissolve the Payne & Keller Receivership in its entirety. Other alleged insurers of Payne & Keller joined in Travelers' motion to dissolve the Receivership. Travelers demonstrated, among other things, that Payne & Keller can no longer sue or be sued under Texas law, so the Receiver's claims against Travelers, purportedly on Payne & Keller's behalf, necessarily fail and the Receivership must be dissolved. Travelers also explained that because Payne & Keller is a defunct foreign corporation without any property in South Carolina—indeed which has never done any business in South Carolina—the South Carolina circuit court did not have the power to appoint a Receiver over Payne & Keller. Travelers made clear that the Receivership was improper from the start and must be dissolved.

The Receiver opposed Travelers' motion. Remarkably, the Receiver sought to avoid the Texas statutory repose period that has barred any claims by or against Payne & Keller for more than 30 years (*i.e.*, since 1989, three years after its termination), by openly speculating that Payne & Keller may have engaged in some sort of "fraud" at the time of its 1986 dissolution. He argued that the South Carolina circuit court should somehow revoke Payne & Keller's termination and reinstate its corporate existence in Texas under Section 11.153 of the Texas Business Organizations Code—enacted only two years ago—which authorizes a court to revoke a corporation's termination if it was

“a result of actual or constructive fraud.” The Texas General Assembly did not enact any form of a fraud exception to dissolution until 2005. Business Entities And Associations, 2005 Tex. Sess. Law Serv. Ch. 64 (H.B. 1319) (VERNON’S). Thus, the fraud provision did not come into existence until 2005—almost 20 years after Payne & Keller dissolved.

In essence, the Receiver argued that Payne & Keller, the company he was obligated to protect, should be revived so as to expose it to potential claims and liabilities that have been extinguished as a matter of law for decades.

4. The South Carolina Court Denies Travelers’ Motion to Dissolve

In a March 30, 2023 order, the circuit court denied Traveler’s motion to dissolve the Payne & Keller Receivership. The order not only rejected the obvious dissolution grounds Travelers raised, it also modified the scope and purview of the Receivership by authorizing the Receiver to pursue his new and unpleaded “fraud” theory, with the thinly-veiled goal of improperly revoking Payne & Keller’s termination in Texas. The South Carolina circuit court’s order also rejected Travelers’ argument that the retroactive application of Section 11.153(a) of the Texas Business Organizations Code, which was not added to the Code until 2021, would directly violate the Texas Constitution.

5. Travelers Appeals the Order Denying the Motion to Dissolve

On April 28, 2023, Travelers timely appealed the circuit court’s order denying Travelers’ motion to dissolve the Payne & Keller Receivership (the South Carolina rules permit immediate interlocutory appeals of certain orders issued in connection with receiverships). The appeal remains pending with the South Carolina Court of Appeals. The appeal asks the South Carolina Court of Appeals to decide, among other things:

- Whether the circuit court erred by (i) appointing a Receiver over Payne & Keller, a dissolved Texas corporation that does not

have any property in South Carolina, and (ii) by denying Travelers' motion to dissolve the Receivership.

- Whether the circuit court erred in finding that alleged liability insurance policies issued by non-South Carolina-based insurers to Payne & Keller in Texas are somehow “property within [South Carolina]” justifying the appointment of the Receiver under S.C. Code Ann. § 15-65-10(4).
- Whether the circuit court erred in finding Texas’s statute of repose for claims against dissolved Texas corporations like Payne & Keller does not apply to preclude claims by or against Payne & Keller more than three years after the date of its dissolution—1989 for Payne & Keller—thereby rendering the Receivership a nullity and requiring its dissolution.
- Whether the circuit court erred in finding that the Receiver had made a prima facie showing that Payne & Keller was terminated as a result of fraud or constructive fraud under Section 11.153(a) of the Texas Business Organizations Code, such that Texas’s three-year statute of repose somehow does not apply to Payne & Keller.
- Whether the court erred in finding that the retroactive application of Section 11.153(a) of the Texas Business Organizations Code would not violate the Texas Constitution.
- Whether the circuit court erred in rejecting Travelers’ argument that a South Carolina circuit court does not have the power to revoke the termination of a foreign corporation like Payne & Keller and reinstate its corporate existence in another state, Texas, as if the dissolution never happened.

The South Carolina Court of Appeals has twice rejected the Receiver’s requests to the dismiss the appeal, and has stated expressly that the appeal will be heard. Moreover, under Rule 205 of the South Carolina Appellate Court Rules (“SCACR”), the Court of Appeals has had “exclusive jurisdiction” over all of these issues since April 28, 2023, when Travelers filed its notice of appeal. *See* Rule 205, SCACR (“Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal”); *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 534, 787 S.E.2d 485, 494 (2016)

(“Rule 205 divests the lower court or administrative tribunal of jurisdiction over ‘*matters affected by the appeal*’”) (emphasis provided by the Supreme Court) (quotation and other citation omitted); *Lancaster v. Ga.-Pac. Corp.*, 403 S.C. 136, 137, 742 S.E.2d 867, 868 (2013) (“Pursuant to Rule 205, SCACR, upon the service of a notice of appeal, the appellate Court has exclusive jurisdiction over the appeal, with the exception of matters not affected by the appeal. The appellate court retains jurisdiction until the remittitur is sent to the lower court.”); *Tillman v. Oakes*, 398 S.C. 245, 255 & n. 3, 728 S.E.2d 45, 51 & n.3 (Ct. App. 2012) (reiterating that “[u]nder Rule 205, the lower court is deprived of the power to proceed with matters that are affected by the appeal,” and explaining that this rule “deprives the lower court of the power to address a particular issue, or ‘matter,’ during the pendency of the appeal”).

6. Ms. Childers Files a Motion Asking the South Carolina Circuit Court to Revoke Payne & Keller’s Corporate Termination in Texas for the Same Reasons Raised in the Receiver’s Opposition to Travelers’ Now-Appealed Motion to Dissolve

On June 14, 2023, Ms. Childers filed a motion asking the circuit court to revoke the corporate termination of Payne & Keller pursuant to Section 11.153 of the Texas Business Organizations Code. Travelers filed an opposition to Ms. Childers’s motion to revoke on July 7, 2023. The circuit court held a hearing on July 10, 2023, at which time it deferred ruling on the motion due to its express admission that it lacked jurisdiction to rule, *i.e.*, because the motion to revoke depends on the resolution of matters that are pending before the South Carolina Court of Appeals, the circuit court admitted that it could not rule. During a subsequent hearing on August 21, 2023, the circuit court again declined to rule on the motion because of its lack of jurisdiction to do so.

7. Ms. Childers Emails the South Carolina Circuit Court a Proposed Order Granting Her Motion to Revoke

On September 26, 2023, Ms. Childers’s counsel emailed the South Carolina circuit court judge a proposed order granting her motion to revoke, entitling the order “Findings of Fact and Conclusions of Law on Plaintiffs’ [sic] Motion to Revoke the Termination of Payne & Keller Company.” Travelers’ counsel sent a response email on September 28, 2023, noting again the circuit court’s lack of jurisdiction to issue the proposed order due to Rule 205, SCACR, and requesting 10 days to respond if the circuit court intended to consider the proposed order. The circuit court judge never responded to counsel’s email and, instead, on October 5, 2023, before the expiry of 10 days, entered the proposed order in a form nearly identical to the one submitted by Ms. Childers’s counsel. The circuit court apparently relied on a ruling from the South Carolina Court of Appeals noting, entirely unremarkably, that Travelers’ appeal did not “stay” the Receivership. That stay ruling did not, however, matter to or alter the effect of Rule 205, i.e., the circuit court had no power (jurisdiction) to issue the proposed order for the very obvious reason that the order involved multiple matters already on appeal. Of course, the absence of a stay did not and does not mean the presence of circuit court jurisdiction.

8. The South Carolina Circuit Court Issues its October 5, 2023 Order Purporting to Revoke Payne & Keller’s Termination in Texas

The circuit court’s October 5, 2023 order purports to affirmatively revoke Payne & Keller’s termination and reinstate its corporate existence in Texas. The order is not only unconstitutional on its face, the circuit court did not have jurisdiction to issue it because the South Carolina circuit court has no power to reach into Texas’s corporate

affairs and issue an order that changes the dissolution status of a Texas corporation. The South Carolina circuit court was also divested of jurisdiction to issue the order under Rule 205, South Carolina Appellate Court Rules, given that the order involves matters within the exclusive jurisdiction of the South Carolina Court of Appeals.

On October 24, 2023, the circuit court requested an “informational conference” that took place on October 25, 2023. During this conference, the Receiver advocated for the court to deny Travelers’ motion for reconsideration of its October 5, 2023, order and to permit the Receiver to act on the improper and unfounded *ex parte* revocation it obtained of Payne & Keller’s dissolution. But the circuit court refused to rule.

9. Without Notice to Travelers, The Receiver Initiated This Case Seeking to Domesticate the South Carolina Circuit Court’s Order in Texas

On October 23, 2023, the South Carolina Receiver filed with the circuit court a “Notice of Filing,” attaching a “Certificate of Revocation of Dissolution” of Payne & Keller (f/k/a Frentex), dated October 12, 2023. The South Carolina Receiver apparently sought and obtained this Certificate of Revocation by (i) “noticing” a copy of the South Carolina circuit court’s October 5, 2023 order in the Childers action, and (ii) asking the Texas Secretary of State to formally revoke Payne & Keller’s termination. *The South Carolina Receiver did not provide any notice to Travelers or the South Carolina Court of Appeals, even though issues regarding Payne & Keller’s dissolution status and the applicability of Texas’s statute of repose are on appeal and hence are solely within the South Carolina Court of Appeals’ exclusive jurisdiction. Further, on information and belief, the*

Receiver did not comply with Tex. Bus. Org. Code § 11.202, which sets forth requirements for reinstatement of a terminated entity, or § 22.365, requiring certain tax filing requirements before a corporation may be reinstated.

On October 23, 2023, Travelers and other insurers filed with the South Carolina Court of Appeals an emergency motion to enforce Rule 205, SCACR, asking the South Carolina Court of Appeals to issue an order advising the South Carolina circuit court that it lacked jurisdiction to issue its October 5, 2023 order, and enjoining the circuit court and the Receiver from any further efforts to proceed with matters affected by this appeal, including in Texas. That motion remains pending.

V.
PRAYER FOR RELIEF

Travelers requests that the parties take notice of the filing of this plea in intervention and that this Court vacate the domestication of the South Carolina circuit court's October 5, 2023, order. The order is neither valid nor enforceable, because, among other things, the South Carolina circuit court did not have jurisdiction to issue the order in the first place. It is thus not entitled to full faith and credit in Texas. The order is void and its domestication in Texas should be vacated. Travelers further requests that this Court grant the following additional relief:

- A declaration that a South Carolina circuit court does not have the power to issue an order purporting to revoke the termination of Texas corporations, including Payne & Keller;
- A declaration that the alleged liability insurance policy assets issued by Travelers, a non-South Carolina-based insurer; to Payne & Keller, a now-terminated Texas corporation, are property located within the state of Texas, not South Carolina, such that the South Carolina circuit court lacked the authority to appoint a South Carolina receiver over Payne & Keller, and such

that the improperly-appointed South Carolina receiver lacks any authority to seek to revoke Payne & Keller's termination;

- A declaration that Texas's statute of repose precludes the filing of any claims by or against Payne & Keller more than three years after the date of its dissolution, i.e., 1989, regardless of the outcome of any effort to reinstate its corporate existence;
- A declaration that there is inadequate proof that Payne & Keller was terminated as a result of fraud or constructive fraud under Section 11.153(a) of the Texas Business Organizations Code; and
- An order, under authority of § 11.403(a)(5) of the Tex. Bus. Org. Code, and in accordance with § 64.021 of the Tex. Civ. Prac. & Rem. Code (requiring receiver for property located in Texas be a Texas Citizen and qualified voter and not be a party, attorney, or other person interested in the action), appointing a proper receiver for Payne & Keller to administer its Texas assets, if any, and to take any other steps necessary to protect Payne & Keller and reject the unauthorized acts of the South Carolina Receiver.

Respectfully submitted,

/s/ Robert B. Gilbreath _____

Robert B. Gilbreath

State Bar No. 07904620

rgilbreath@hpylaw.com

Hawkins, Parnell & Young, LLP

6301 Gaston Avenue, Suite 1444

Dallas, Texas 75214

(214) 780-5114

ATTORNEYS FOR INTERVENOR

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument has been served on the parties and their counsel of record via electronic service on this 27th day of October 2023.

/s/ Robert B. Gilbreath
Robert B. Gilbreath

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Robert Gilbreath on behalf of Robert B. Gilbreath

Bar No. 7904620

rgilbreath@hpylaw.com

Envelope ID: 81068532

Filing Code Description: Motion for New Trial

Filing Description: Motion to Vacate Domestication of Judgment, along with plea in intervention

Status as of 10/30/2023 8:29 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Brady Edwards		brady.edwards@morganlewis.com	10/27/2023 4:34:06 PM	SENT
Brady Edwards	793021	brady.edwards@morganlewis.com	10/27/2023 4:34:06 PM	SENT
Noah Horwitz	24116537	noah.horwitz@morganlewis.com	10/27/2023 4:34:06 PM	SENT
Theile McVey		tmcvey@kassellaw.com	10/27/2023 4:34:06 PM	SENT
Peter D.Protopapas		pdp@rplegalgroup.com	10/27/2023 4:34:06 PM	SENT
Lindsay Valek		lindsay@rplegalgroup.com	10/27/2023 4:34:06 PM	SENT
Noah MHorwitz		noah.horwitz@morganlewis.com	10/27/2023 4:34:06 PM	SENT

Associated Case Party: Travelers Casualty and Surety Company

Name	BarNumber	Email	TimestampSubmitted	Status
Robert BGilbreath		rgilbreath@hpylaw.com	10/27/2023 4:34:06 PM	SENT

RECEIVED

Nov 03 2023

SC Court of Appeals

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): Appendix Volume IV in Support of Emergency Motion to Clarify and Enforce Rule 205

Parties Served:

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

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

By: /s/ M. Todd Carroll

November 3, 2023