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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2021-CP-40-03484

Appellate Case No. 2023-000727

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

v.

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

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

v.

Zurich American Insurance Company (Individually and as Successor to Northern Insurance Company of New York, Maryland All American General Insurance Company, and Maryland Casualty Company); Allstate Insurance Company; John Tighe; Sean Antony Beatty; Dennis William Cahill; Catherine Ann Carlino; Andre Lefebvre; David Dean Shumway; Gil Chandler; Michael Davenport; Linda Young Pettigrew; Gwyn Wallace Fuller; Daniel Robert Keddie; Julie Ann Fortune; Michael John Crall; James Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.; Arrowpoint Capital Corp.; Admiral Insurance Company; Continental Insurance Company, Individually and as Successor in interest to Harbor Insurance Company; Hartford Accident and Indemnity Company; Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company; National Union Fire Insurance Company of Pittsburgh, PA; Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc.; Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; Lexington Insurance Company; First State Insurance Company; Certain Underwriters

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

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

and

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

and

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

RESPONDENT'S MOTION FOR SANCTIONS PURSUANT TO RULE 269

Pursuant to Rule 269 of the South Carolina Appellate Court Rules, Respondent Payne & Keller Company, By and Through its Duly Appointed Receiver, Peter D. Protopapas ("the Receiver") respectfully moves for this Court to enter a sanctions order against Appellants[1] for their frivolous filings in this appeal designed only to delay the disposition of this case and actions in contempt of this Court's September 8, 2023 Order.

[1] Appellants are AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; and Continental Insurance Company, Individually and as Successor in interest to Harbor Insurance Company (collectively, "AIG Insurers"); and Travelers Casualty and Surety Company, f/k/a the Aetna Casualty and Surety Company ("Travelers").

Appellants and their attorneys have refused to abide by the September 8, 2023 Order of this Court, attempted to subvert the South Carolina trial and appellate courts through misleading filings and representations constituting a breach of their obligations of candor to the courts, and have interposed filings for the purpose of delay in violation of Rule 269 and our Supreme Court's warning against this type of behavior dating back to 2021.

BACKGROUND

Payne & Keller, a Texas corporation, dissolved in 1986. While active, its operations included the installation, repair, replacement, removal, and/or disturbance of thermal insulation and other building materials, which allegedly exposed individuals to asbestos. As a result of these alleged exposures, Payne & Keller is a defendant in asbestos-related bodily injury lawsuits in South Carolina state court. After it failed to answer complaints filed against it, and because it is a dissolved corporation, the circuit court appointed Peter D. Protopapas as Payne & Keller's receiver on August 27, 2021, with the authority and obligation to (among other things) marshal Payne & Keller's assets, including all insurance policies and benefits that may provide coverage and defense for the asbestos suits.

In order to fulfill this obligation, the Receiver filed a third-party complaint in the underlying bodily injury lawsuit, *Childers v. Davis Mechanical Contractors, Inc. et al.*, C.A. No. 2021-CP-40-03484, bringing declaratory judgment claims against Payne & Keller's known insurers and several related entities concerning the terms of Payne & Keller's insurance coverage and the relationships and obligations of the other third-party defendants. On August 24, 2022, Travelers moved to dismiss Payne & Keller's claims against it and dissolve the Payne & Keller receivership, and on September 19, 2022, the AIG Insurers filed a joinder to Travelers' motion.

On November 16, 2022, Travelers filed an additional motion, seeking protection from discovery requests propounded by the Receiver and again asking the circuit court to dissolve the Payne & Keller receivership and dismiss Travelers from the action. The circuit court held a hearing on Appellants' motions on January 27, 2023, during which it orally denied them. Following the oral rulings, Travelers requested a written order, which the court entered on March 31, 2023 ("the Order").

In the Order, the circuit court ruled (1) the Receiver has standing to bring his claims against Appellants because Payne & Keller has property within South Carolina and its 1986 dissolution does not preclude the current receivership under Texas law, (2) Appellants are subject to the personal jurisdiction of South Carolina courts, (3) the Receiver's third-party claims were properly brought under Rule 14(a), SCRCP, and (4) Rule 12(b)(8), SCRCP, does not prohibit the Receiver from asserting his third-party claims in the underlying action. Because Travelers' motion for protection from discovery relied on the standing arguments raised in its motion to dismiss, the Order also denied that motion.

On April 28, 2023, Travelers and the AIG Insurers separately appealed the Order, and this Court subsequently consolidated the appeals. After briefing on appealability of the case, this Court issued an order August 9, 2023, indicating that the current matter could proceed on appeal.

At hearings before the circuit court on July 10, 2023, and August 21, 2023, Appellants contended that this appeal imposes a stay on the underlying receivership action and the Receiver's ability to carry out his court-assigned duties. As a result, the Receiver sought this Court's clarification.

This Court issued an order on September 8 expressly holding that receivership actions are not stayed during an appeal, pursuant to Rule 62(a), SCRCP, and S.C. Code Ann. § 14-3-450, and

nothing prevented the Receiver carrying out his receivership duties during the pendency of this appeal. Specifically, this Court stated:

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

September 8 Order (emphasis added).

Instead of complying with the Order of this Court, Appellants filed what they termed as an "emergency motion to clarify and enforce Rule 205" in a veiled attempt to seek reconsideration of the September 8 Order despite the rules preventing a motion for rehearing. Appellants also filed a motion to stay the briefing deadlines in this appeal pending the resolution of their emergency motion. In the emergency motion, Appellants argued that Rule 205 jurisdictionally bars further proceedings in the receivership action while this appeal is pending. However, these exact arguments were presented to the Court previously in the extensive briefing that led to this Court's September 8 Order—that is, *that the receivership action below could not proceed during the appeal on jurisdictional grounds pursuant to Rule 205*. For example, Appellants argued to this Court previously:

> While the Receiver ostensibly asks for 'clarification,' what he actually seeks is permission from this Court to ignore Rule 205 and continue his efforts to litigate before the Circuit Court matters that are in this Court's exclusive jurisdiction. . . . The language of Rule

> 205 is clear—as are the Supreme Court's recent decisions reiterating Rule 205's application in *Stokes-Craven* [*Holding Corp. v. Robinson*, 416 S.C. 517, 532, 787 S.E.2d 485, 493 (2016)] and *Lancaster* [*v. Georgia-Pacific Corp.*, 403 S.C. 136, 137 742 S.E.2d 867, 868 (2013)]. The issues the Receiver seeks to pursue in the Circuit Court are the very issues pending before this Court on appeal. Therefore, this Court has "exclusive jurisdiction" over these issues.

See Appellants' Return to Respondent's Expedited Motion to Clarify the Court's Order on Appealability, Sept. 5, 2023, at 10-13. After considering these arguments—*including specifically Appellants' arguments regarding Rule 205, SCACR*—this Court held that the Receiver's position based on Rule 62(a) and Section 14-3-450 was correct, confirming that "the receivership action and the receiver's ability to carry out his duties are not stayed." *See* September 8 Order, at 3.

After briefing by the parties, the Court denied Appellants' emergency motion on November 21, 2023, stating:

> After careful consideration of Appellants' motion to "clarify and enforce Rule 205," SCACR, the motion is denied. Appellants' motion was prompted by an order issued by the circuit court on October 5, 2023, which Appellants contend the circuit court lacked jurisdiction to issue. Appellants request that this court "enforce" its exclusive jurisdiction over the matters on appeal, confirm that the circuit court acted outside of its jurisdiction in issuing the October 5 order, and "enjoin[]" the circuit court from proceeding further with regard to matters affected by this appeal. The order that was properly appealed to this court is the circuit court's March 31, 2023 order denying Appellants' motion to dissolve the receivership and motion to dismiss. This court will take no action on any order which is not properly before it. *See Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985) ("Service of the notice of intent to appeal is a jurisdictional requirement . . . ."). Moreover, further "motions to clarify" filed by any party may not be considered by this court. *See* Rule 221(c), SCACR ("The appellate court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding the party's appeal.").

DISCUSSION

In filing their emergency motion, Appellants ignored this Court's September 8 ruling and attempted to relitigate the same meritless jurisdictional arguments. As noted by this Court in the

November order, Rule 221(c) does not provide a party the opportunity to seek reconsideration of a decision by this Court unless that decision has the effect of dismissing or finally deciding the appeal. Appellants' emergency motion was improper and interposed merely for delay. Appellants' initial briefs in this matter were originally due on September 25, 2023. Appellants requested two extensions to file their initial briefs. The last extension was filed on October 20, 2023, seeking a second 30-day extension and requesting initial briefs be due on November 27, 2023.[2] However, three days later, when Appellants filed their emergency motion, they also filed a motion to stay briefing deadlines due to their fabricated emergency. Their motion to stay was based entirely on the pending emergency motion and requested a stay of briefing deadlines until a resolution of the emergency motion. The Court issued the Order denying the emergency motion on November 21, 2023. However, despite their emergency motion being resolved for over two weeks, Appellants have yet to file initial briefs in this matter. Appellants dilatory tactics have succeeded in delaying briefing for ten weeks and counting.

The South Carolina Appellate Court Rules allow this Court to impose sanctions when a filing is "frivolous or taken solely for the purposes of delay." Rule 269, SCACR. Specifically, Rule 269 provides:

> Where an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.

Appellants have provided no basis for this Court to change its mind, and their efforts to relitigate issues they already lost are inappropriate and a clear waste of court and party resources.

[2] The Court did not act on this motion, but the deadline for the requested extension has now passed.

While the insurers have employed an unprecedented, coordinated effort to delay the orderly administration of the South Carolina asbestos court and South Carolina jurisprudence generally,[3] the intent behind the emergency motion and motion to stay was to slow down the judicial process in South Carolina. This is illustrated by the initiation and coordination of legal action in Texas against the Receiver. While Payne & Keller's legacy insurers were feverishly trying to avoid South Carolina courts, they began coordinating efforts in Texas to circumvent the trial court's ruling on dissolution. Payne & Keller was sued in a Texas asbestos-related case styled *Daniel D. Williams, individually and as personal representative of the estate of Jimmie Lee Williams, Deceased, Sheila L. Wright, and Jimmietta Williams v. The Dow Chemical Company, et al.*; In the District Court of Harris County, Texas; 11th Judicial District; Cause No. 2023-36960-ASB (Before the Texas Asbestos MDL Pretrial Judge) ("Texas Action"). Rather than appoint Payne & Keller's South Carolina asbestos defense counsel, Bowman & Brooke, the insurers insisted on retaining the Texas law firm of Baker & Patterson, L.L.P. ("Baker & Patterson"). Unbeknownst to the court-appointed Receiver for Payne & Keller, Baker & Patterson filed pleadings and motions asserting positions contrary those taken by the Receiver in South Carolina and Payne & Keller's insurer-appointed South Carolina counsel Bowman and Brooke. This Texas pleading sought rulings on dissolution issues already decided in South Carolina and now part of this appeal.

On July 26, 2023, almost two full years after the Receiver's appointment, months after the instant appeal, and while Travelers actively took the position that the instant appeal stayed the South Carolina trial court action because it addressed the dissolution of Payne & Keller, the Baker

[3] Some parties in receivership appeals have even resorted to impugning the integrity of the South Carolina judicial system by intimating that the South Carolina courts are a "judicial hellhole." *See* November 7, 2023 Motion to Confirm Automatic Stay or, Alternatively, Verified Petition for Supersedeas at p. 5 n.10, Appellate Case No. 2023-001096; October 6, 2023 Appellant's Initial Brief, at p. 3 n.4, Appellate Case No. 2023-001096.

& Patterson firm filed an answer on behalf of Payne & Keller in the Texas Action. Exhibit A, Payne & Keller Answer and Affirmative Defenses in Cause No. 2023-36960-ASB (July 26, 2023). Inexplicably, the Baker & Patterson firm filed this answer without any previous communication with the Receiver—its client. In its answer, the Baker & Patterson firm asserted two affirmative defenses: (1) "The Court does not have jurisdiction because Defendant is a terminated corporation. *See* Tex. Bus. Org. Code § 11.359 (formerly Tex. Bus. Corp. Act art. 7.12)"; and (2) Plaintiff cannot sustain a claim against Defendant because it is a terminated corporation. *See* Tex. Bus. Org. Code § 11.359 (formerly Tex. Bus. Corp. Act art. 7.12)." *Id.* Ignoring their position in South Carolina that these matters are stayed, Payne & Keller's insurers went to Texas and instructed a new law firm to raise these issues without the Receiver's knowledge or consent in a court filing that the insurers knew the Receiver did not, and would not, authorize. The answer also did not disclose the existence of this receivership to the Texas Court. [4]

In addition to seeking competing orders in Texas through defense of underlying tort claims against Payne & Keller while Travelers was simultaneously contending this Court had exclusive jurisdiction to make rulings involving the Payne & Keller receivership and sought emergency relief to that effect, it put the same issues on appeal before a court in Texas once again in a new filing. Exhibit B, October 27, 2023 Travelers' Plea in Intervention, Motion to Vacate, and Petition for Declaratory Judgment. In the newest Texas filing, Travelers seeks a declaration from a Texas court that the Receiver was improperly appointed by the South Carolina circuit court. Specifically, Travelers requests:

> 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

[4] Baker & Patterson and its attorney who appeared on behalf of Payne & Keller in Texas are now defendants in a separate action brought by the Receiver relating to their unauthorized filing of pleadings. *See Protopapas v. Kenneth C. Baker, et al.*, Civil Action. No. 2023-CP-40-05203.

> corporation, are properly 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[.]

Id. at 11–12. It also seeks 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 corporation existence." *Id.* at 12. Travelers also requests:

> 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.

Id.

The declarations and relief Travelers requests from the Texas court are identical to the issues on appeal in South Carolina. While Travelers has not yet filed its initial brief identifying the issues on appeal, it outlines the issues for which it seeks South Carolina appellate relief in the Texas filing. Among other things, Travelers notes it seeks a ruling from this Court on: "Whether the circuit court erred by . . . appointing the Receiver over Payne & Keller, a dissolved Texas corporation that does not have any property in South Carolina," "Whether the circuit court erred in finding the alleged policies issued by non-South Carolina-based insurers to Payne & Keller in Texas are somehow 'properly within [South Carolina]'," and "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." *Id.* at 6–7. However, it also seeks a ruling on these issues now in Texas. In fact, a hearing is currently scheduled in Texas for December 13, 2023. Even more troubling, Travelers' South Carolina attorney is also representing Travelers in Texas. In South Carolina, Travelers contends the South Carolina Court of Appeals has exclusive jurisdiction of the issues involving the appointment and existence of the Receiver for Payne & Keller. However, in Texas, Travelers seeks rulings on many of the same issues they have argued are under the exclusive of the South Carolina Court of Appeals. These tactics are not novel to Travelers' method of operation in forum shopping and obstruction of proceedings.

One of the AIG Insurers—National Union Fire Insurance Company of Pittsburgh, PA—also filed a Plea in Intervention, Motion to Vacate Domesticated Judgment, and Petition for Declaratory Judgment in the Texas action. Exhibit C, November 13, 2023 Plea in Intervention, Motion to Vacate Domesticated Judgment, and Petition for Declaratory Judgment.

In addition to the spurious affront to the South Carolina judiciary, the initiation of legal action in Texas against the Receiver seeking to invalidate the Receivership is also a violation of the long-established *Barton* doctrine, which bars a party from litigation a claim of or against a court-appointed receiver without first obtaining leave of the appointing court. *See Porter v. Sabin*, 149 U.S. 473, 479–80 (1893). In a recent order remanding an action brought by the Payne & Keller Receivership to state court after Travelers and other insurers attempted to remove it, Judge Coggins explained:

> Albeit old law, *Porter* is clear that it is in the appointing court's discretion "to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere" and that the appointing court "may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit." *Porter*, 149 U.S. at 479. *Porter* further states "[t]he reasons are yet stronger for not allowing a suit against a receiver appointed by a state court to be maintained, or the administration by that court of the estate in the receiver's hands to be interfered with, by a court of the

> United States, deriving its authority from another government, though exercising jurisdiction over the same territory." *Id.* at 480.
>
> Here, the receivership court has appointed a receiver who is attempting to preserve and collect assets of the defunct corporation as part of his fiduciary duty. This Court finds that *Barton*, and its subsequent application in *Porter*, act as a limitation on federal jurisdiction when a state court has previously exercised its authority by appointing a receiver to handle the administration of property; to allow this matter to continue in federal court would directly interfere with the exclusive jurisdiction of the receivership court over this dispute.

Exhibit D.

One need look no further than the tortured appellate history and forum shopping pursuits of the insurers following the appointment of the first Receiver (for Covil Corporation) appointed by the Chief Judge for Administrative Purposes over all asbestosis and asbestos litigation state-wide to see the coordinated effort to derail, delay, and obstruct the orderly administration of insurance assets located in South Carolina of defunct corporations who have exposure to asbestos Plaintiffs. It is clear that there is a concerted effort by insurers and other parties in receivership actions to file appeals and appellate motions to delay judicial proceedings in South Carolina and subvert our courts.[5] Here, Appellants refused to abide by this Court's September 8, 2023 Order

[5] As discussed in the Receiver's October 27, 2023 Return to Appellants' Emergency Motion to Clarify and Enforce Rule 205, Travelers and other insurers have continued to rely on Rule 205, SCACR, in the circuit court to argue that receivership actions are halted and all discovery is stayed during the pendency of appeals from receivership actions in contradiction of this Court's September 8, 2023 Order. *See* Exhibits C-I of Return. Further, there are now two other pending appeals from parties seeking judicial review of receiverships that have attempted to raise Rule 205 issues like Appellants here. *See* Appellate Case Nos. 2023-001461 and 2023-001096. In appeals involving the Atlas and Asbestos Corporation Limited receiverships, the appellants filed similar motions asking this Court to "confirm" the automatic stay or grant a supersedeas. *See* November 22, 2023 Motion to Confirm Automatic Stay and/or Purported Receiver's Lack of Jurisdiction or, Alternatively, Verified Petition for Supersedeas, Appellate Case No. 2023-001461; November 7, 2023, Motion to Confirm Automatic Stay or, Alternatively, Verified Petition for Supersedeas, Appellate Case No. 2022-001096. In fact, in the appeal involving the Asbestos Company Limited receivership, an insurer filed a Motion to Intervene in the appeal and a Motion to Clarify and Enforce Rule 205. *See* November 13, 2023 Motions, Appellate Case No. 2023-001461. This Court denied the Atlas appellant's motion on December 1, 2023, finding the motion was procedurally

and, instead, filed meritless motions based on fabricated emergencies in an effort to delay proceedings in South Carolina while pursuing the same remedies elsewhere. As the Court noted in its November Order denying the emergency motion, the Court "will not entertain petitions for rehearing on a motion to petition unless the action of the [C]ourt on the motion or petition has the effect of dismissing or finally deciding the party's appeal. *See* Rule 221(c), SCACR.

Appellants, and other parties in receivership actions, have demonstrated that they will continue to employ delay tactics and clog our appellate courts with meritless and misleading filings even when unambiguously ordered otherwise by the appellate courts. The Receiver does not dispute the importance of the appellate process when utilized to seek review of true appealable issues. However, the legacy insurers' serial filings in this and other receivership cases are designed to ensure that the South Carolina courts involved in adjudicating these matters cannot move forward efficiently.

Even in the infancy of the Asbestos Receiverships' effort to identify assets under the then-newly appointed Asbestos Chief Judge, The Honorable Jean H. Toal, (CJ Retired), the insurers employed efforts to subvert the trial court and obstruct the Receiver's ability to fulfil his charge through the onslaught of interlocutory and meritless appeals. This prompted the South Carolina Supreme Court to warn insurers about litigation tactics undertaken only to delay the disposition of a case:

> We, in turn, expect the parties and their attorneys in this and any other case to fully cooperate with the trial court in order to ensure the case is tried or otherwise disposed of in a timely manner. Any action undertaken for the purpose of delaying the disposition of this case will, under appropriate circumstances, merit the imposition of sanctions under Rule 269, SCACR.

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defective. *See* December 1, 2023 Order, Appellate Case No. 2023-001096. The nearly identical motion in the appeal involving the Asbestos Company Limited was withdrawn by counsel on December 7, 2023.

See Exhibit E, March 9, 2021 Order, Appellate Case No. 2020-001670.[6]

However, since this admonition, our appellate courts have seen an increase, not decrease, in the number of filings by insurers and parties objecting to the institution of receiverships, attacking the receivership court, disregarding court orders, seeking review of unappealable interlocutory orders, and seeking appellate review simultaneously in different appellant courts; all in an effort to delay the adjudication of receivership cases and prevent the Receiver from engaging in his court-appointed duties.[7] Almost every time the legacy insurers and other parties involved in these receivership matters have attempted appellate review of trial court orders, their efforts have failed:

No.	**Date**	**Case**	**Court**	**Ruling**
1	10/16/2019	*Zurich American Insurance Company v. CBS Corp.*,	Supreme Court	Denying petition for writ of certiorari filed by USF&G, Sentry, and

[6] The petitioner in that appeal was United States Fidelity & Guaranty Company ("USF&G"), an affiliate of Travelers, who was represented by some of the same counsel as Travelers in this appeal. Further, recently, this Court issued an opinion in an appeal involving the Covil receivership, noting: "The record reveals years of concerning conduct on the part of USF&G and others as they prepared for the onslaught of asbestos litigation to come" and that USF&G exercised "problematic claims handling and litigation practices related to Covil," which included "the systematic destruction of historical insurance coverage." Op. No. 6037, Appellate Case No. 2020-001437. In that appeal, the Court also noted USF&G's unwillingness to directly answer questions posed by the Court when it "filed a surreply largely unresponsive" to the Court's "five specific questions." *Id.* USF&G has filed a petition for rehearing of this opinion. Again, USF&G's counsel in that appeal also represents Travelers here.

[7] For example, in appeals involving the Covil receivership, insurer Pennsylvania National Mutual Insurance Company ("Penn National") sought review of an unappealable discovery order and an unappealable order on the non-jury nature of a declaratory judgment trial multiple times in our appellate courts. *See* Appellate Case Nos. 2022-000761, 2022-000785, 2022-001764, 2022-001722, and 2023-001079. These appeals were dismissed by both this Court and the Supreme Court and remanded to the circuit court, but the appeals of the trial order succeeded in delaying the trial of that case for nearly a year. Further, as discussed above, other parties in receivership appeals have filed motions to "clarify" or "enforce" a stay in receivership appeals similar to Appellants in this appeal despite this Court's September 8 order. *See* Appellate Case Nos. 2023-001461 and 2023-001096. The Court recently denied one such motion on the grounds that it was procedurally improper. *See* December 1, 2023 Order, Appellate Case No. 2023-001096.

		Appellate Case No. 2019-001651		Zurich related to interlocutory discovery order
2	10/16/2019	*Zurich American Insurance Company v. CBS Corp.*, Appellate Case No. 2019-001654	Supreme Court	Denying petition for writ of certiorari filed by USF&G, Sentry, and Zurich related to interlocutory discovery order
3	11/1/2019	*Hartford Accident & Indemnity Company v. Covil Corporation*, Appellate Case No. 2019-001764	Court of Appeals	Appellant Hartford withdrew appeal
4	11/18/2019	*Hartford Accident and Indemnity Company v. Covil Corporation*, Appellate Case No. 2019-001758	Supreme Court	Granting request to withdraw petition for a writ of certiorari
5	2/13/2020	*Zurich American Insurance Company v. CBS Corporation*, Appellate Case No. 2020-000206	Court of Appeals	Dismissing appeal of Zurich and USF&G because timely post-trial motion still pending before circuit court
6	5/22/2020	*Tracy Jolly Pavlish v. Covil, Hutto v. Covil, Hagan v. Covil, Rampey v. Covil, Reilly v. Covil, Jonas v. Covil, and Murphy v. Covil*, Appellate Case No. 2020-00749	Supreme Court	Denying Zurich's petition for a writ of mandamus to reconsider motion to recuse Justice Toal as not appropriate
7	6/17/2020	*United States Fidelity & Guaranty Company v. Protopapas*, Appellate Case No. 2020-000791	Supreme Court	Dismissing petition for a writ of supersedeas because no appeal pending
8	7/30/2020	*United States Fidelity & Guaranty Company v. Protopapas (In re Roxanne Falls)*, Appellate Case No. 2020-000845	Court of Appeals	Granting motion to dismiss because USFG was not a party to the action

9	10/22/2020	*Protopapas v. Wall, Templeton*, Appellate Case No. 2020-001322	Court of Appeals	Appellant's request for dismissal granted
10	12/15/2020	*Protopapas v. Wall Templeton*, Appellate Case No. 2020-001322	Court of Appeals	Appellant's (Zurich) request to withdraw its appeal granted
11	1/4/2021	*Finch v. United States Fidelity and Guaranty Co.*, Appellate Case No. 2020-001670	Supreme Court	Appellant withdrew its Petition for Writ of Prohibition
12	1/6/2021	*Finch v. United States Fidelity & Guaranty Company*, Appellate Case No. 2020-001663	Court of Appeals	Dismissing appeal because underlying order not appealable
13	3/9/2021	*Finch v. United States Fidelity and Guaranty Co.*, Appellate Case No. 2020-001670	Supreme Court	Supreme Court denied Covil's Motion for Sanctions but cautioned any "action taken for the purpose of delaying the disposition of this case will, under appropriate circumstances, merit the imposition of sanctions"
14	4/5/2021	*Finch v. United States Fidelity & Guaranty Company*, Appellate Case No. 2020-001663	Court of Appeals	Petition to rehear dismissal of appeal denied
15	7/6/2021	*Finch v. United States Fidelity & Guaranty Co.*, Appellate Case No. 2021-000462	Supreme Court	Denying petition for a writ of certiorari
16	1/5/2022	*Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company*, Appellate Case No. 2020-001239	Court of Appeals	Affirming partial summary judgment for Covil

17	5/21/2021	*Protopapas v. Wall Templeton*, Appellate Case No. 2020-001437	Court of Appeals	Appellant consents to the Receiver's motion to dismiss the *Hutto* claim in this appeal (remaining issues fully briefed)
18	8/9/2022	*Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company*, Appellate Case No. 2022-000761	Court of Appeals	Granting Covil's motion to dismiss, finding that the discovery orders on appeal are not immediately appealable.
19	8/23/2022	*Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company*, Appellate Case No. 2022-000785	Supreme Court	Denying petition for a writ of certiorari.
20	11/15/2022	*Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company*, Appellate Case No. 2022-000761	Court of Appeals	Order denying petition for rehearing of August 9, 2022 dismissal of appeal
21	1/12/2023	*Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company*, Appellate Case No. 2022-001764	Supreme Court	Denying petition for writ of certiorari
22	2/8/2023	*Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company*, Appellate Case No. 2022-001722	Court of Appeals	Order dismissing appeal
23	6/6/2023	*Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company*, Appellate Case No. 2022-001722	Court of Appeals	Order denying petition for rehearing from 2/8/2023 dismissal of appeal
24	4/13/2023	*Southern Insulation Inc. v. OneBeacon, et al.*, Appellate Case No. 2023-000252	Court of Appeals	Order dismissing appeal as not immediately appealable

25	7/6/2023	*Southern Insulation Inc. v. OneBeacon, et al.*, Appellate Case No. 2023-000252	Court of Appeals	Order denying petition for rehearing from 4/13/2023 dismissal of appeal
26	11/7/2023	*Covil Corp. v. Pennsylvania National Mutual Casualty Insurance Company*, Appellate Case No. 2023-001079	Supreme Court	Order denying petition for writ of certiorari from Court of Appeals order dismissing appeal
27	11/22/2023	*Covil Corp. v. United States Fidelity & Guaranty Company*, Appellate Case No. 2020-001437	Court of Appeals	Opinion affirming circuit court
28	12/1/2023	*Welch v. Atlas Turner, Inc.*, Appellate Case No. 2023-001096	Court of Appeals	Order Denying Appellant's Motion to Confirm Automatic Stay or, Alternatively, Verified Petition for Supersedeas

Appellants have abused the appellate process for the purposes of delay. This abuse of the process not only has delayed the disposition of this case but has also wasted the resources of this Court and of the court-appointed receiver. The Receiver therefore respectfully requests that this Court grant its motion and impose sanctions against Appellants including but not limited to dismissal of this appeal and monetary sanctions. In light of Travelers' and its attorneys' long history of non-meritorious appeals, filings interposed for the purposes of delay, disregard of orders of courts in this state, lack of candor to tribunals, and castigation of a South Carolina tribunal in pleadings in Texas, the Receiver further respectfully requests this Court impose sanctions including requiring leave of court before filing future appeals.

(Signature pages follows)

Respectfully submitted,

s/Jonathan M. Robinson
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Jonathan M. Robinson (S.C. Bar # 68285)
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Attorneys for Respondent

December 8, 2023.

EXHIBIT A

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

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

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

Transferred from:
CAUSE NO. 123060-cv

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

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

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

I.
GENERAL DENIAL

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

II.
AFFIRMATIVE DEFENSES

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

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

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

Respectfully Submitted,

BAKER & PATTERSON, L.L.P.

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

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Counsel for Defendants

CERTIFICATE OF SERVICE

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

/s/ Kenneth C. Baker
Kenneth C. Baker

EXHIBIT B

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 is 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, 203, 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

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rgilbreath@hpylaw.com
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(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
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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

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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

EXHIBIT C

11/13/2023 4:08 PM
Marilyn Burgess - District Clerk Harris County
Envelope No. 81586330
By: Mariyah Fritz
Filed: 11/13/2023 4:08 PM

CAUSE NO. 2023-70875

LENORA CHILDERS, individually and as Personal Representative of the Estate of LEWIS C. CHILDERS, *Plaintiff*, v. PAYNE & KELLER COMPANY, by and through its duly appointed Receiver, PETER D. PROTOPAPAS, *Defendant*. ********** NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, *Intervenor-Plaintiff,* v. LENORA CHILDERS, individually and as Personal Representative of the Estate of LEWIS C. CHILDERS; and TEXAS SECRETARY OF STATE, *Third-Party Defendants.*	§ §	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 127th JUDICIAL DISTRICT

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA'S PLEA IN INTERVENTION, MOTION TO VACATE DOMESTICATED JUDGMENT, AND PETITION FOR DECLARATORY JUDGMENT

In accordance with Texas Rule of Civil Procedure 60 and Texas Civil Practice and Remedies Code § 35.003(c), Intervenor National Union Fire Insurance Company of Pittsburgh, PA ("National Union") pleads in intervention, moves to vacate the domesticated judgment

("Motion"), and petitions against Plaintiff Lenora Childers ("Childers"), individually and as Personal Representative of the Estate of Lewis C. Childers, and third-party Texas Secretary of State for declaratory judgment ("Petition").

I. INTRODUCTION

1. This action arises from an asbestos lawsuit filed in South Carolina by Childers, a South Carolina resident, against Defendant Payne & Keller Company ("Payne & Keller"), a Texas corporation that—before it dissolved in the 1980s—was headquartered in Texas and had no apparent connection to Childers. Payne & Keller's court-appointed South Carolina Receiver, Peter Protopapas ("Receiver"), recently filed in this Court an October 5, 2023 order invalidly issued by a South Carolina trial court (the "South Carolina Order") at Childers' request, purporting to revoke the Texas company's 1986 termination pursuant to scarcely utilized Texas Business Organizations Code ("TBOC") Section 11.153. The same day, the Receiver (in the name of Payne & Keller) filed the South Carolina Order with the Texas Secretary of State's office, which instantly issued a certificate of revocation of the 37-year-old dissolution of the company. None of that should have happened, as the termination—or revocation of termination—of a Texas corporation under Texas law is for the courts of Texas, and not the courts of the other forty-nine states. "The power to create a corporation is an attribute of sovereignty, and it is therefore, as to its corporate existence, amenable to and controllable in this respect by the sovereignty which created it and ***by none other***." *Mitchell v. Hancock*, 196 S.W. 694, 698 (Tex. App.—Fort Worth 1917, no writ) (citation omitted) (emphasis added); *State v. Dyer*, 200 S.W.2d 813, 816 (Tex. 1947) ("One state has no power to dissolve a corporation created by the laws of another state.").

2. While not material to National Union's Motion and Petition, it is helpful to understand how and why *this Court* is being utilized. National Union, among other insurers,

moved to dissolve the receivership over Payne & Keller (which has no assets in South Carolina), and the denial of that motion is currently on appeal to the South Carolina Court of Appeals ("Receivership Dissolution Appeal"). The revocation of Payne & Keller's corporate termination is obviously designed to permit Childers to pursue her asbestos suit in South Carolina. But it would also allow the Receiver to secure his currently challenged position, pursue insurance money from Payne & Keller's former insurers like National Union—for claims that had been time-barred against Payne & Keller under Texas law for 34 years—and collect a contingent fee from any insurance proceeds. To be clear, it was the Receiver, not Childers, who first made the argument that Payne & Keller's dissolution should be revoked—even though the Receiver is supposed to be acting in Payne & Keller's interests. The Receiver is instead acting adversely to Payne & Keller, waiving its defenses, and seeking to reopen it to liability so that the Receiver can collect a fee on insurance proceeds—nothing like the ordinary conduct of a Receiver who seeks to protect a corporation and its assets and deals at arm's length with creditors.

3. This case follows the pattern of other cases in the South Carolina asbestos docket, in which particular plaintiffs' asbestos firms file suit against defunct corporations and seek appointment of the same Receiver (Mr. Protopapas).[1] The Receiver then leverages settlements

[1] The state's asbestos docket is known to be friendly to plaintiffs and thus is an attractive forum for pursuing defendants and their insurers. *See, e.g.*:

- *South Carolina Asbestos Litigation Ranked 'Judicial Hellhole'*, ATRA (Dec. 6, 2022) ("South Carolina's asbestos litigation has developed a reputation for bias against defendants, unwarranted sanctions, low evidentiary requirements, liability-expanding rulings, unfair trials, severe verdicts, and a willingness to overturn or modify jury verdicts to benefit plaintiffs"), https://www.atra.org/2022/12/06/south-carolina-asbestos-litigation-ranked-judicial-hellhole/#:~:text=ATRF's%20report%20says%20South%20Carolina's,jury%20verdicts%20to%20benefit%20plaintiffs;
- George "Beau" L. Inabinet & Chandler D. Rowh, *Appointment of a Receiver? The New Sanction in South Carolina?*, MARON MARVEL (June 2, 2023), https://www.maronmarvel.com/appointment-of-a-receiver-the-new-sanction-in-south-carolina/;
- Otis Rawl, *Why is South Carolina a 'hotspot' for asbestos lawsuits?*, Legal Newsline (June 10, 2021), https://legalnewsline.com/stories/602531737-why-is-south-carolina-a-hotspot-for-asbestos-lawsuits.

with insurers of the defunct corporation to obtain massive contingent fees for himself and his lawyers, as well as fees for administering the resulting settlement funds and making payouts to the asbestos plaintiffs.

4. The Receiver's motives aside, there are several reasons why the South Carolina Order should not be enforced by a Texas court. First, the South Carolina court had no jurisdiction to enter the order—rendering it void—because only a Texas court can order the reversal of a dissolution of a Texas business entity. Second, the South Carolina circuit court also lacked jurisdiction because it was forbidden, under South Carolina's appellate rules, from ruling on Childers' specific request for revocation of Payne & Keller's 1986 dissolution as fraudulent pursuant to TBOC Section 11.153 due to the pending appeal in which this very matter is at issue—the Receivership Dissolution Appeal. Third, the South Carolina Order is not entitled to full faith and credit because it blatantly interferes with Texas's interests in regulating the corporate status of business entities organized under the laws of this state. This is especially true here, because at the time of Payne & Keller's incorporation and dissolution (and for many years thereafter), TBOC Section 11.153 was not yet in effect, and potential claimants only had three years after dissolution—that is, until 1989—to bring suit. The South Carolina Order violates both (i) legislative intent that TBOC Section 11.153 not apply to corporations that pre-existed its enactment, and (ii) Texas's constitutional prohibition on retroactive application of laws that re-open defendants to otherwise foreclosed liability. Finally, under South Carolina's rules of appellate procedure, the deadline to appeal the South Carolina Order has not yet passed (because a motion to vacate or reconsider that order is still pending); at minimum, the Court should order that the South Carolina Order cannot be enforced or acted upon in Texas until all appeals from that order are resolved.

5. Accordingly, National Union intervenes in this action to prevent the improper reinstatement of a long-dissolved Texas company for the purpose of pressuring Payne & Keller's alleged insurers to settle and enriching the Receiver. National Union seeks to vacate the domestication of the South Carolina Order and requests that the Court declare that Payne & Keller remain terminated unless and until a Texas court with jurisdiction fully and finally determines otherwise.

II. RELEVANT FACTS

A. Childers' Suit Against Payne & Keller

6. Payne & Keller, Inc., a company incorporated and headquartered in Texas, was formed in 1961 for the purpose of carrying on a construction business. Ex. 1 (Art. of Incorp.). In 1982, Payne & Keller, Inc. and two other companies merged to form Payne & Keller Company ("Payne & Keller"). Ex. 2 (Art. of Merger). According to allegations of Plaintiff Childers, Payne & Keller and/or its predecessors supplied and/or installed insulation at various locations in the southeastern United States, some of which allegedly contained asbestos. There is no evidence that Lewis Childers was ever exposed to asbestos by Payne & Keller. He was deposed in at least four cases and signed multiple exposure affidavits, none of which ever identified Payne & Keller. *See* Ex. 3 (10/16/23 Mtn. to Vacate/Reconsider) at 8–9, 16–17.

7. The company was voluntarily terminated in 1986 (by which time it had been renamed Frentex Enterprises Company of Texas) after operating at a loss for years, resulting in the sale of most of its assets. *See* Ex. 4 (Art. of Dissolution of Frentex, filed with Texas Secretary of State). It was not a company facing a flood of claims by alleged asbestos victims: at the time, only one asbestos case had been filed against Payne & Keller, and it had been dismissed. *See* Ex.

3 at 21–25.[2] Also at the time of the company's dissolution in 1986, Texas law provided (as it continues to provide today) a three-year statute of repose for claims by or against terminated Texas business entities. TBOC § 11.359.

8. More than three decades after Texas law unambiguously provided that Payne & Keller could no longer sue or be sued, in July of 2021, Lenora Childers—individually and as the personal representative of her late husband, Lewis Childers—filed suit against Payne & Keller and several other defunct companies in South Carolina, alleging personal injury from asbestos exposure. Ex. 5. In the summer of 2023, Childers expanded her suit, styled *Childers v. Davis Mechanical Contractors, Inc. et al.*, Case No. 2021-CP-40-03484 ("Childers Suit"), to name around 80 different defendants (many of which are existing, solvent companies). Ex. 6. The Hon. Judge Jean H. Toal, former Chief Justice of the South Carolina Supreme Court, presides over South Carolina's asbestos docket, including the Childers Suit.

9. A month after filing suit, without notice to anyone but the South Carolina Secretary of State, Childers sought the appointment of a receiver for Payne & Keller (as well as several other defunct defendants) to determine its assets, including insurance coverage. Four days later, on August 27, 2021, the South Carolina circuit court appointed as Payne & Keller's receiver Peter Protopapas ("Receiver"), Ex. 7, an individual who has been appointed as receiver for several other defunct asbestos defendants, *see* Ex. 8 (3/17/23 Compl. for Administration of Receivership, listing other receiverships).

[2] This Court need not reach the merits of whether Payne & Keller's dissolution was (actually or constructively) fraudulent. Accordingly, National Union does not delve into the details about the company's legitimate, non-liability-related reasons for termination in 1986—or how the South Carolina circuit court merely relied on Childers' mainly irrelevant allegations—but these reasons are outlined in Exhibit 3 on pages 5 to 7 and 21 to 25.

B. The Dispute Between the Receiver and Payne & Keller's Alleged Insurers

10. In November 2021, the Receiver filed a third-party action against several insurance companies alleged to have been Payne & Keller's insurers during the relevant time frame ("Insurer Defendants")—including National Union and Intervenor Travelers Casualty and Surety Company ("Travelers")—seeking liability coverage and defense costs for several pending asbestos cases against Payne & Keller in South Carolina, including the Childers Suit. Ex. 9 (Summons & Complaint). The Receiver seeks not only indemnity for any liability Payne & Keller might have to personal injury plaintiffs, but also compensation for his services as Receiver. *Id*. ¶¶ 85–88.

11. In August 2022, Travelers sought to dissolve the receivership and dismiss the Receiver's action against the insurers, arguing, *inter alia*, that under Texas law, Payne & Keller, a corporation that was dissolved in 1986, could not sue nor be sued for any claim more than three years past its dissolution date. Ex. 10 (Mtn. to Dismiss Claims & Dissolve Receivership) ("Motion to Dissolve Receivership"). National Union and the other Insurer Defendants joined in the dissolution request. In response, the Receiver argued, *inter alia*, that the circuit court could set aside the company's 1986 termination on the grounds of constructive or actual fraud, citing TBOC Section 11.153—a provision that, as explained below, was not in effect until decades after Payne & Keller's dissolution. *See* Ex. 11 (Payne & Keller Resp. to Mtn. to Dissolve Receivership) at 8–13. In denying the Motion to Dissolve Receivership, the South Carolina trial court found that "the Receiver has presented sufficient evidence at the pleading stage to support a claim that Payne and Keller's 1986 dissolution was the result of, at least, constructive fraud." Ex. 12 (3/31/23 Order) ("Order Continuing Receivership") at 4.

12. The Order Continuing Receivership relied on the Receiver's speculation that Payne & Keller terminated its existence to avoid a tidal wave of asbestos and dioxin claims. *Id*. at 5. The

Receiver had presented no evidence, however, that the officers and directors responsible for Payne & Keller's dissolution were motivated by any such concerns. And he had only identified one pre-1986 asbestos claim that had been asserted against Payne & Keller, which had been dismissed. *See* Ex. 11 at 10; *see also supra* ¶ 7. The Receiver had also asserted that Payne & Keller faced indemnity claims for dioxin exposure at a refinery, but the decision he relied upon only identified *three* such claims, *see In re Charter Co.,* 63 B.R. 568, 570 (Bankr. M.D. Fla. 1986). When it dissolved, Payne & Keller reported that it had made "[a]dequate provision . . . for the satisfaction of any judgment, order, or decree which may be entered against it in any pending suit." Ex. 4 ¶ 7. Neither the Receiver nor Childers presented any evidence that this statement was knowingly false, and it was indisputably true as to asbestos claims, because there were no pending suits. And Payne & Keller continued to purchase insurance coverage until 1989, which would have been available if additional claimants had brought suit against it during the three-year post-dissolution period.

13. The Insurer Defendants promptly appealed the Order Continuing Receivership ("Receivership Dissolution Appeal"). Ex. 13 (4/28/23 Notice of Appeal). The South Carolina Court of Appeals has explicitly determined that the Receivership Dissolution Appeal shall go forward. *See* Ex. 14 (8/9/23 Order).

C. The South Carolina Order at Issue Here

14. While the Receivership Dissolution Appeal was (and still is) pending, however, Plaintiff Childers filed a motion in South Carolina trial court parroting the constructive fraud argument advanced by the Receiver and seeking an order that would revoke the Texas Secretary of State's 1986 termination of Payne & Keller pursuant to TBOC Section 11.153.[3] That Texas

[3] In the Receivership Dissolution Appeal, the parties dispute whether Judge Toal had jurisdiction to enter the South Carolina Order, in part due to the pendency of the Receivership Dissolution Appeal. The Insurer Defendants filed an emergency motion before the South Carolina Court of Appeals, which has been briefed and awaits a decision.

statute—contained within the chapter of the TBOC applicable to "Domestic Entities"—provides, in pertinent part:

> 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. In an action under this section, any limitation period provided by law is tolled in accordance with the discovery rule. The secretary of state shall take any action necessary to implement an order under this section.

TBOC § 11.153(a).[4] The Insurer Defendants opposed the motion (both on the merits and on jurisdictional grounds). Initially, the South Carolina circuit court questioned whether she could rule on the motion while the Receivership Dissolution Appeal was pending, stating that she would hold another hearing once the issue was ripe for her consideration. *See* Ex. 3 (10/16/23 Mtn. to Vacate/Reconsider) at 9–10. But Judge Toal then reversed course and—without any further hearing or presentation of evidence—granted Childers' motion and issued the South Carolina Order on October 5, 2023. Ex. 15.

15. In the South Carolina Order, Judge Toal found that Payne & Keller had dissolved with an intent to, at a minimum, ignore potential toxic tort liability, including asbestos claims, even though none was pending at the time of the dissolution. *Id*. Accordingly, the trial court ordered that Payne & Keller "be reinstated as provided by Section 11.153 of the TBOC." *Id.* at 8.

16. One week later, on October 12, 2023, the Receiver for Payne & Keller—not Plaintiff Childers—filed the South Carolina Order in this Court, to domesticate the foreign order

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See Ex. 16 (10/23/23 Appellants' Emergency Mtn. to Clarify & Enforce Rule 205); Ex. 17 (10/27/23 Letter from Court of Appeals acknowledging receipt and seeking response by Appellee Receiver).

[4] Part (b) of the statute—added even later, effective September 1, 2021—provides:

> (b) If the termination of an entity's existence is revoked under Subsection (a):
> (1) the revocation relates back to the effective date of the termination and takes effect as of that date; and
> (2) the entity's status as an entity continues in effect as if the termination of the entity's existence had never occurred.

TBOC § 11.153(b).

("Domestication Filing"). The Receiver gave notice of this filing only to Childers; he did not notify the insurers who had opposed the issuance of the South Carolina Order. That same day, the Receiver filed the Domestication Filing with the Texas Secretary of State, under Payne & Keller's name and company number, and instantly obtained a certificate from the Texas Secretary of State revoking the 1986 termination of Payne & Keller, last known as Frentex Enterprises Company of Texas. Ex. 18 (10/23/23 Notice of Filing, attaching 10/12/23 Cert. of Revocation of Dissolution). National Union only learned of this when the Receiver filed this certificate in South Carolina circuit court 11 days later (*see id.*)—seeking to allow Childers to move forward on her otherwise time-barred claims against Payne & Keller, so that the Receiver, in turn, may move forward with his claims against the Insurer Defendants.

17. The Insurer Defendants have moved the South Carolina circuit court to vacate, or in the alternative, reconsider, the South Carolina Order, and that motion remains pending. Ex. 3. In sum, at the same time that the South Carolina court of appeals and circuit court were (and are) still considering the propriety of the South Carolina Order, the Receiver swiftly and quietly—with no notice to National Union—domesticated that order in this Texas Court and leveraged it to have the Texas Secretary of State revive a company that has been legally dead for 37 years—a company that has never been shown to have harmed Childers.

III. PLEA IN INTERVENTION

18. Pursuant to Rule 60 of the Texas Rules of Civil Procedure, any party with a justiciable interest in the suit may intervene. *In re Union Carbide Corp.*, 273 S.W.3d 152, 154–55 (Tex. 2008). "A party has a justiciable interest in a lawsuit, and thus a right to intervene, when his interests will be affected by the litigation." *Guniganti v. Kalvakuntla*, 346 S.W.3d 242, 247

(Tex. App.—Houston [14th Dist.] 2011, no pet.).

19. The right to intervene extends to situations where "a judgment for plaintiff may lead to an action over against the intervenor or otherwise seriously prejudice the intervenor, and the intervenor's intervention is necessary to assure proper defense of the claim." *Zeifman v. Sheryl Diane Michels*, 229 S.W.3d 460, 467 (Tex. App.—Austin 2007, no pet.) (citing 1 ROY W. MCDONALD & ELAINE A. GRAFTON CARLSON, TEX. CIV. PRAC. § 5.80, at 967–68 (2d ed. 2004)). Further, the Texas Supreme Court has recognized that, under the doctrine of virtual representation, when an insured abandons a defense to a judgment against it, to the detriment of the insurer, the insurer may intervene to assert such defense. *In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718, 725 (Tex. 2006).[5]

20. Here, National Union undoubtedly has a justiciable interest in this domestication action—one that is aligned with neither the plaintiff nor the defendant. As set forth above, Childers seeks to re-expose Payne & Keller to potential liability to recover in her asbestos suit and to satisfy that potential liability from the company's only existing assets—its insurance policies such as the policy issued by National Union. In terms of the Receiver's incentives, first, there is basic self-preservation: the Receiver continues to face a challenge to the receivership in the Receivership Dissolution Appeal, and one of the grounds is that Payne & Keller is a terminated business entity. Relatedly, the Receiver's compensation is contingent on Payne & Keller being capable of suing and being sued and, in turn, recovering from the Insurer Defendants. *See* Ex. 9 (11/23/21 Receiver

[5] *See also Kenneth D. Eichner, P.C. v. Dominguez*, 623 S.W.3d 358, 362 n.3 (Tex. 2021) (under the doctrine of virtual representation, in "determining whether a person is a party, or deemed party, who can appeal, 'the most important consideration is whether the appellant is bound by the judgment'" (citation omitted)); *cf. Tex. Mut. Ins. Co. v. Ledbetter*, 251 S.W.3d 31, 36 (Tex. 2008) ("when a subrogee's interest has been adequately represented and then suddenly abandoned by someone else, it can intervene even after judgment or on appeal so long as there is neither unnecessary delay nor prejudice to the existing parties"); *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 713 (Tex. 1996) (invalidating assignment of bad faith claims by defendant insured to personal injury plaintiff on public policy grounds, when insured abandoned its natural position to take advantage of insurer).

3rd Party Compl.) ¶¶ 85–88 (seeking compensation for serving as Receiver from Insurer Defendants). The same is true for the Receiver's counsel, whose fees are historically contingent on what the Receiver recovers from insurers, *e.g.*, via settlement. *See, e.g.*, Ex. 19 (6/6/23 Order Approving Settlement between Receiver, as receiver for other asbestos defendants, with insurers, approving 33 1/3% contingency fee to attorneys) at 6–7. National Union's concerns are borne out by the fact that the Receiver first urged the revocation of Payne & Keller's dissolution and then chose to swiftly and quietly domesticate the South Carolina Order without providing notice to National Union.

21. In sum, this action has been filed because the Receiver is acting contrary to the interests of his charge, Payne & Keller, by seeking to open it up to claims decades after the statute of repose expired. The Receiver is seeking to enrich himself and his counsel by collecting a contingent fee, based on a percentage of any third-party-defendant insurance recovery, and Payne & Keller's dissolution prevents any such recovery. Childers supports this strategy, because she would have no viable claim against Payne & Keller if the Receiver's arguments are rejected. National Union intervenes to protect its interests, by vacating the domestication of the South Carolina Order and seeking a declaration by a Texas court that such order was invalid to resurrect Payne & Keller under this state's law.

IV. MOTION TO VACATE DOMESTICATED SOUTH CAROLINA ORDER

22. The judgment that the Receiver filed in this Court on October 12, 2023 should be vacated, because the South Carolina Order is void and is not entitled to full faith and credit by this Court. First, the issuing court lacked jurisdiction to revoke the dissolution of a Texas business entity (under TBOC Section 11.153 or otherwise), because this authority lies solely with Texas courts. Second, whether the South Carolina circuit court may order reinstatement of Payne & Keller pursuant to Texas law is currently the subject of a pending appeal—which deprived the trial

court of jurisdiction to enter the South Carolina Order, under South Carolina's appellate rules. Third, the Order is not entitled to full faith and credit because it blatantly interferes with Texas's interests in regulating business entities organized under Texas statutes. Relatedly, because TBOC Section 11.153 was not even in effect during Payne & Keller's existence, enforcing the South Carolina Order would violate the Texas Constitution's prohibition on retroactive application of laws and run contrary to Texas legislative intent behind its business regulatory scheme. Finally, the Insurer Defendants' motion to vacate or reconsider the South Carolina Order is pending in the South Carolina trial court, tolling applicable appellate deadlines. At minimum, this Court should order that the South Carolina Order is unenforceable and may not be acted upon in Texas until any appeal from that order concludes in South Carolina or the time for appeal expires.

A. Legal Standard

23. The filing of a valid, final, and subsisting foreign judgment both initiates enforcement proceedings and creates an enforceable, domesticated Texas judgment. *H. Heller & Co., Inc. v. La.-Pac. Corp.*, 209 S.W.3d 844, 849 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). The burden then shifts to the party resisting domestication of the judgment to establish that the foreign judgment is not valid, final, or subsisting. *See id.*; *Dear v. Russo*, 973 S.W.2d 445, 446 (Tex. App.—Dallas 1998, no pet.). Because the filing of a foreign judgment comprises both plaintiff's original petition and the final judgment, *Walnut Equip. Leasing Co., Inc. v. Wu*, 920 S.W.2d 285, 286 (Tex. 1996), a domesticated judgment is subject to the same defenses and proceedings for reopening, vacating, or staying a judgment as a judgment of a Texas court, TEX. CIV. PRAC. & REM. CODE § 35.003(c); *Mindis Metals, Inc. v. Oilfield Motor & Control, Inc.*, 132 S.W.3d 477, 483 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

24. A motion contesting enforcement of a foreign judgment operates like a motion for new trial—i.e., the movant has 30 days from the filing of the judgment to contest it. *Mindis*, 132 S.W.3d at 483; *H. Heller & Co.*, 209 S.W.3d at 849; TEX. R. CIV. P. 329b(a). The filing of the motion extends the trial court's plenary power until 30 days after the motion is overruled. TEX. R. CIV. P. 329b(e). The trial court's decision on the motion will not be disturbed on appeal absent manifest abuse of discretion. *Karstetter v. Voss*, 184 S.W.3d 396, 402 (Tex. App.—Dallas 2006, no pet.).

25. The two main avenues for collaterally attacking the domestication of a judgment in Texas are by establishing: (1) the foreign court did not have jurisdiction over the judgment debtor or the subject matter of the dispute, or (2) another recognized exception to the full faith and credit requirements of the Constitution applies.[6] *See H. Heller & Co.*, 209 S.W.3d at 849. Both avenues apply here.

B. The South Carolina Order Is Void Because the South Carolina Court Lacked Jurisdiction to Issue It.

26. A "judgment without jurisdiction is void, it is not entitled to recognition in any state, and it is subject to collateral attack." *Wu v. Walnut Equip. Leasing Co.*, 909 S.W.2d 273, 281 (Tex. App.—Houston [14th Dist.] 1995) (citation omitted), *rev'd on other grounds sub nom. Walnut Equip. Leasing Co., Inc. v. Wu*, 920 S.W.2d 285 (Tex. 1996). The South Carolina Order is void because the rendering, South Carolina court lacked jurisdiction (i) "over the subject matter" and (ii) "to enter the particular judgment." *Karstetter*, 184 S.W.3d at 402; *Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005).

[6] *See also* Hon. Mike Engelhart & Sarah Kathryn Foster, *Procedure for Enforcing Foreign State, Federal and Foreign Country Judgments in Texas*, at 15 (15th Annual Collections and Creditors' Rights Course, May 4–5, 2017), available at https://www.justex.net/JustexDocuments/10/Mike_Engelhart_CLE_paper_for_5-2017_Domesticating%20Judgments.docx_Final.pdf.

(1) The South Carolina Court Lacked Subject Matter Jurisdiction to Revoke the Termination of a Texas Business Entity.

27. Through the South Carolina Order, a ***South Carolina*** court purports to revoke the termination of a ***Texas*** company—Payne & Keller. If the South Carolina court had jurisdiction to do that, then every other state in this country would have the same jurisdiction to issue orders changing the status of Texas corporations under Texas law. But the South Carolina court lacked that jurisdiction, rendering its order void. The Court should vacate the domestication of the South Carolina Order for this reason alone.

28. Ironically, the U.S. Constitution's Full Faith and Credit clause that underlies the process of domesticating sister states' judgments prohibited the very entry of the South Carolina Order in the first place. *See* U.S. CONST., art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."). "The power to create a corporation is an attribute of sovereignty, and it is therefore, as to its corporate existence, amenable to and controllable in this respect ***by the sovereignty*** which ***created it and by none other***." *Mitchell*, 196 S.W. at 698 (citation omitted) (emphasis added); *Dyer*, 200 S.W.2d at 816 ("One state has no power to dissolve a corporation created by the laws of another state.").

29. Based on principles of comity and the Full Faith and Credit clause, courts across the country have consistently held for over a century that courts of one state do not have subject matter jurisdiction over the dissolution of a corporation organized under the laws of a different state. *See, e.g.*, *Mitchell*, 196 S.W. at 698 ("[W]e know of no authority for the courts of this state to dissolve a foreign corporation on any ground."); *Wilkins v. Thorne*, 60 Md. 253, 257 (1883) ("Indeed, it would be a strange anomaly in our system of jurisprudence if the courts of one State could be vested with the power to dissolve a corporation created by another . . . ."); *Raharney Cap., LLC v. Cap. Stack LLC*, 25 N.Y.S.3d 217, 219 (N.Y. App. Div. 2016) ("We agree with the near-

universal view that the courts of one state do not have the power to dissolve a business entity formed under another state's laws. Because a business entity is a creature of state law, the state under whose law the entity was created should be the place that determines whether its existence should be terminated . . . ."); *In re Coinmint, LLC*, 261 A.3d 867, 913 (Del. Ch. 2021) ("Delaware's approach is consistent with the general rule advanced in other state and federal courts that only the courts of the jurisdiction under whose law the limited liability company is organized have the capacity to order its dissolution. This Court's protectionist approach over its entities formed under this State's laws compels a similar respect for the interests of other sovereigns in overseeing the life and death of their entities." (footnote omitted)); *Young v. JCR Petroleum, Inc*., 423 S.E.2d 889, 892 (W. Va. 1992) (holding that consistent with Full Faith and Credit Clause of U.S. Constitution, West Virginia courts may not dissolve business entities formed under laws of other states); *Valone v. Valone*, No. CL08-5249, 2010 WL 7373698, at *2 (Va. Cir. Jan. 20, 2010) (noting that "[n]umerous courts around the country" have held that "the courts of one state do not have the power to dissolve a corporation created by the laws of another state"); *Mills v. Anderson*, 214 N.W. 221, 223 (Mich. 1927) ("Any attempt of the court of chancery in this state to dissolve this foreign corporation would seem to be so palpably an attempt to usurp the powers of a foreign jurisdiction without color of authority as to be held a nullity even when called to the court's attention in a collateral proceeding."); *Spurlock v. Santa Fe Pac. R.R. Co*., 694 P.2d 299, 312 (Az. Ct. App. 1984) ("[N]o court can declare a forfeiture of a franchise or a dissolution of a corporation except the courts of the jurisdiction which created it." (citation omitted)). For the same reason one state's court lacks jurisdiction to decide whether to terminate the corporate status of an entity organized under the laws of a sister state, it lacks jurisdiction to *reverse* such termination.

30. Indeed, the South Carolina statute governing foreign corporations transacting

business in that state specifically provides that "[t]his title does not authorize this State to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this State." S.C. CODE ANN. § 33-15-105(c); *see also Pertuis v. Front Roe Rests., Inc.,* 817 S.E.2d 273, 278 (S.C. 2018) ("In South Carolina, our Legislature has made clear that this state is 'not authorize[d]' to 'regulate the organization or internal affairs of a foreign corporation' even if the corporation *is* registered to conduct business in South Carolina . . . ." (brackets and emphasis in original) (quoting S.C. CODE ANN. § 33-15-105(c))). And when the Texas legislature added the provision allowing for courts to order the reinstatement of a fraudulently terminated entity (TBOC Section 11.153), it was to the portion of code applicable to winding up or terminating ***domestic*** (i.e., Texas) entities. *See* TBOC §§ 11.001–11.414 (Ch. 11, "Winding up and Termination of Domestic Entity"); *id*. § 1.002(18) (defining "Domestic entity" as "an organization formed under or the internal affairs of which are governed by this code"). South Carolina similarly now allows for its own courts to reinstate fraudulently terminated *South Carolina* business entities. S.C. CODE ANN. § 33-14-104 ("Revocation of Dissolution" of "corporations"); *id*. § 33-1-400(4) (defining "corporation" as domestic). Thus, neither state has manifested an intent for its own courts to issue orders terminating or resurrecting *foreign* business entities—nor would this be proper, according to over a century of caselaw prohibiting this. Because a sister state's court cannot re-establish the tie that was severed in 1986 between this state and Payne & Keller,[7] the Court should vacate the

[7] *See In re Coinmint*, 261 A.3d at 911 (citing Peter B. Ladig & Kyle Evans Gay, *Judicial Dissolution: Are the Courts of the State that Brought You In the Only Courts that Can Take You Out?,* 70 BUS. LAW 1059, 1082 (2015) as "concluding persuasively that dissolution should be left to the state of formation because 'the act of dissolution is essentially different than other statutory claims' because it 'severs the tie between the parties and the state of formation[,]' 'terminates the special powers given to the entity that only the state of formation can give[,]' and 'also ends the life of the entity in not just the forum state, but in any other state'" (brackets in original)).

domestication of the South Carolina Order for this reason alone.

(2) The South Carolina Court Lacked Jurisdiction to Decide Whether to Revoke Payne & Keller's Termination Because It Is a Matter Affected by a Pending Appeal.

31. The South Carolina court also lacked jurisdiction to enter the South Carolina Order because whether that court could have properly issued an order of reinstatement pursuant to TBOC Section 11.153 is on appeal—namely, the Receivership Dissolution Appeal. Under South Carolina law, "the service of a notice of appeal divests the trial court of jurisdiction over *matters affected by the appeal*." *Stokes-Craven Holding Corp. v. Robinson*, 787 S.E.2d 485, 493 (S.C. 2016) (emphasis added); *Lancaster v. Ga.-Pac. Corp.*, 742 S.E.2d 867, 868 (S.C. 2013) ("Pursuant to Rule 205, SCACR [South Carolina Appellate Court Rules], 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*, 728 S.E.2d 45, 51 & n.3 (S.C. Ct. App. 2012) (reiterating that "[u]nder [SCACR] 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").

32. As explained in Section II.B, *supra*, there was and still is a pending appeal in the South Carolina appeals court related to ***this exact issue*** (the Receivership Dissolution Appeal), stripping the South Carolina trial court of jurisdiction to enter the South Carolina Order. Despite the Receiver's efforts to dismiss the Receivership Dissolution Appeal, the South Carolina appellate court has twice determined the appeal should proceed. *See* Ex. 14 (8/9/23 Order) ("this appeal

shall proceed"); Ex. 20 (9/8/23 Order) (reiterating that the appeal "shall proceed").[8] And there can be no doubt that the question of whether Payne & Keller can or should be un-dissolved under TBOC Section 11.153 is part of the Receivership Dissolution Appeal: the South Carolina Order ***specifically refers back*** to the Receiver's response to the Insurer Defendants' Motion to Dissolve Receivership, noting "[l]arge portions of those undisputed facts and the applicable law are reiterated here in whole or in part." Ex. 15 (10/5/23 South Carolina Order) at 2. And the circuit court's Order Continuing Receivership being appealed was premised, in part, on a finding that "the Receiver has presented sufficient evidence at the pleading stage to support a claim that Payne and Keller's 1986 dissolution was the result of, at least, constructive fraud." Ex. 12 (3/31/23 Order) at 4.

33. Because the South Carolina court lacked jurisdiction to revive a terminated Texas company and to revoke *Payne & Keller's* termination, specifically, given the issue is pending appeal, the South Carolina Order is void and not subject to recognition by any sister state. This Court should grant National Union's Motion and vacate the order's domestication accordingly.

C. The South Carolina Order Is Not Entitled to Full Faith and Credit Because It Interferes with Texas's Interests in Regulating Its Business Entities by Reviving a Texas Company That Has Been Voluntarily Terminated for 37 Years.

34. Before a foreign order can be afforded full faith and credit and enforced in a sister state, due process requires that a party harmed by the order (here, Payne & Keller's insurers) be given the opportunity to establish that an exception to full faith and credit applies, *Schwartz v. F.M.I. Props. Corp.*, 714 S.W.2d 97, 99–100 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd

[8] To be clear, the South Carolina appellate court ruled in September 2023 that the *receivership* was not stayed under South Carolina Rule 241 of Appellate Practice, such that the appeal would not stay the "[R]eceiver's ability to carry out his duties." Ex. 20. But the appellate court did *not* authorize the circuit court to issue further rulings on matters that were on appeal (e.g., whether Payne & Keller could be sued beyond the three-year statute of repose based on fraudulent termination of the corporation). *See* S.C. APP. CT. R. 205 (appellate court has exclusive jurisdiction over matters affected by the appeal); *Stokes-Craven Holding Corp.*, 787 S.E.2d at 493 (same).

n.r.e.); *Knighton v. Int'l Bus. Machs. Corp.*, 856 S.W.2d 206, 209 (Tex. App.—Houston [1st Dist.] 1993, writ denied). Improper interference with important interests (statutory and constitutional) of the sister state is a well-established exception that would prevent Texas from giving full faith and credit to the South Carolina Order. *BancorpSouth Bank v. Prevot*, 256 S.W.3d 719, 727 n.12 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (citing *Reading & Bates Constr. Co. v. Baker Energy Res. Corp.*, 976 S.W.2d 702, 713 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (quoting and citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 & reporter's note (1971) & cmt. a (1988) and noting the "exception derives from opinions of the United States Supreme Court")). There are "limits to the extent to which the policy of one state . . . may be subordinated to the policy of another." *Reading*, 976 S.W.2d at 713 (citing *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 273 (1935)).

35. That exception applies here: domesticating the South Carolina Order would interfere with Texas's interests by retroactively applying a 2006 statute to an entity terminated in 1986—an entity that chose to abide by the laws governing Texas corporations in existence when it was formed in the 1960s, not those that would be enacted 50 years later. The Texas Constitution prohibits this. Further, allowing foreign states' courts to direct the Texas Secretary of State to dissolve or reinstate Texas entities interferes with Texas's interests to regulate its companies. The South Carolina Order is therefore not entitled to full faith and credit.

36. As detailed in Section II.A, *supra*, Payne & Keller was formed in 1961 and terminated in 1986. Under then-applicable Texas law, any suits against Payne & Keller had to be made within three years of termination. TEX. BUS. CORP. ACT ("TBCA"), art. 7.12 (1984). This bears repeating: prior to the enactment of TBOC Section 11.153, the TBCA's three-year statute of repose for suits against dissolved corporations "provide[d] the ***exclusive*** relief to those possessing

a claim against a dissolved corporation." *Pellow v. Cade*, 990 S.W.2d 307, 313 (Tex. App.—Texarkana 1999, no pet.) (emphasis added). The Texas Supreme Court had held that Article 7.12 of the TBCA (now Section 11.359 of the TBOC) "expressed a legislative policy to protect shareholders, officers, and directors of a dissolved corporation from prolonged and uncertain liability." *Id*. (citing *Hunter v. Fort Worth Cap. Corp*., 620 S.W.2d 547, 551 (Tex. 1981)). Thus, by 1989, Payne & Keller could neither sue nor be sued and was fully protected by the Texas statute of repose, because this was the legislature's intent at the time. *See id*. (foreign state court's default judgment was not entitled to full faith and credit because it was filed 33 years after the company had dissolved—in contravention of Texas's three-year statute of repose—and was thus a nullity).

37. Section 11.153(a) of the TBOC—the authority on which the South Carolina Order relies to revoke the termination of Payne & Keller—only became effective, along with the entire TBOC, on January 1, 2006, which was 20 years after the ***termination*** of Payne & Keller.[9] And Section 11.153(b), which provides that a revoked dissolution relates back to the date of termination—and which Childers and the Receiver rely upon for their ability to bring their claims—was passed even later, in 2021. As of 1986, when Payne & Keller dissolved, and 1989, when all claims against Payne & Keller became time-barred, there were no such provisions in Texas law.

38. The Texas legislature made clear that these changes to the laws governing Texas entities would not have retroactive effect:

> Except as otherwise expressly provided by this title, all of the provisions of this code govern acts, contracts, or other transactions by an entity subject to this code or its managerial officials, owners, or members ***that occur on or after the mandatory application date. The prior law governs the acts, contracts, or***

[9] While a similar provision allowing for revocation of a corporate dissolution was added to the previous Texas Business Corporation Act earlier, in 2003, that was still 17 years *after* the termination of Payne & Keller—well beyond the statute of repose. *See* TBCA, art. 6.08 (2003).

> ***transactions of the entity or its managerial officials, owners, or members that occur before the mandatory application date.***

TBOC § 402.006 (emphasis added); *see also id*. § 401.001 (defining "mandatory application date" as either 2006 or 2010, and defining "prior law" as "the applicable law in effect before January 1, 2006"); *see also Country Vill. Homes, Inc. v. Patterson*, 236 S.W.3d 413, 428 n.9 (Tex. App.—Houston [1st Dist.] 2007), *review granted, judgment vacated, and remanded by agreement*, No. 07-0811, 2008 WL 11535924 (Tex. Mar. 7, 2008) ("The Business Corporation Act has been super[s]eded as of January 1, 2006 by the Business Organizations Code. [TBOC] § 402.001(a) (Vernon 2006). However, the Business Corporation Act ***continues to govern those events before January 1, 2006***. *Id*. § 402.006 (Vernon 2006)." (emphasis added)). When the TBOC went into effect, existing businesses were given the opportunity to opt into the new regulatory regime. TBOC § 402.003 (2006). Payne & Keller—by then a terminated entity—obviously did not opt into the Code, as it by then did not even exist. *See id.* (adoption and transition provisions applying only to "existing domestic entit[ies]"). Thus, the South Carolina court did precisely what the Texas legislature, in enacting TBOC Section 11.153, intended to avoid: it retroactively applied a new statute to a business entity that was instead governed by the prior statutory regime.

39. Moreover, the Texas Constitution prohibits retroactive application of statutes. TEX. CONST. art. 1, § 16 ("No . . . retroactive law, or any law impairing the obligations of contract, shall be made."). The Supreme Court of Texas has long held that an example of an illegal retroactive law is one that would "revive causes of action already barred." *Compare De Cordova v. City of Galveston*, 4 Tex. 470, 480 (1849), *with Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 140 (Tex. 2010) (citing *De Cordova*). This includes retroactive laws extending statutes of limitations or repose to revive time-barred claims—because a defendant has a "vested right to rely on such statute as a defense." *See Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 2, 4

(Tex. 1999) (citation omitted); *cf. Robinson*, 335 S.W.3d at 146 & n.122 (collecting cases prohibiting retroactive application of laws extending statutes of limitations).[10] Payne & Keller had a "vested right to rely" on the legal impact of its voluntary termination based on the law that existed at the time of the termination. Although it purports to apply Texas law, the South Carolina Order blatantly violates the Texas Constitution and is not entitled to full faith and credit in this Texas Court.

40. More basically, Texas—like all states—has an interest in determining the legal status of business entities organized under its laws. *See Mitchell*, 196 S.W. at 698 (corporate existence of Texas companies is "amenable to and controllable in this respect by the sovereignty which created it and by none other" (citation omitted)). Opening up Texas business entities to adjudications by sister states' courts that such entities shall be dissolved or un-dissolved—especially when, as here, there is no shown connection between the out-of-state plaintiff and the Texas company—would interfere with Texas's interest in inviting businesses to incorporate themselves here on the condition that they abide by the *then-existing* regulatory landscape, and not subject to future changes in that law. *See, e.g.*, C.S.H.B. 19 JUDICIARY & CIV. JURIS. COMM. REP., Bill Analysis, 88th Leg., Reg. Sess. (Tex. 2023), bill codified at TEX. GOV'T CODE §§ 25A.001–20 (establishing Texas business courts "to streamline resolutions of business disputes . . . ideally giving businesses confidence in Texas' legal system and encouraging them to incorporate and headquarter in Texas"); C.S.H.B. 2127 STATE AFFAIRS COMM. REP., Bill Analysis, 88th Leg., Reg.

[10] In coming to this conclusion, the *Robinson* court analyzed three factors courts consider in determining whether a statute violates the constitutional prohibition of retroactive laws: "the nature and strength of the public interest served," "the nature of the prior right impaired by the statute," and "the extent of the impairment." *Robinson*, 335 S.W.3d at 145. The Supreme Court highlighted that it "has invalidated statutes as prohibitively retroactive in only three cases, all involving extensions of statutes of limitations." *Id.* at 146. Statutes of limitations do not "merely affect remedies or procedure." *Id.* Rather, "once a statute of limitations has run or a cause of action has accrued, retroactive legislation that either revives an extinguished claim, or bars an existing one, affects a vested property right." *Id.* at 156 (concurrence).

Sess. (Tex. 2023), bill enacted into law as Texas Regulatory Consistency Act ("job creators need a baseline of regulatory consistency across the state that allows them to focus their resources on growing their businesses and increasing their economic impact to the betterment of their employees, their communities, and the state"); TEX. TAX CODE § 313.003(3) (purpose of tax code provision to "attract to this state large-scale businesses that are exploring opportunities to locate in other states or other countries").

41. The South Carolina Order purports to apply a Texas statute, but it does so in a way that violates the Texas Constitution and legislative intent. Because the South Carolina Order interferes with Texas's interests, it should not be entitled to full faith and credit in this Texas Court.

D. At Minimum, the Court Should Rule That the South Carolina Order May Not Be Enforced or Acted Upon in Texas Until It Becomes Final.

42. "If . . . an appeal from the foreign judgment is pending or will be taken, [] the time for taking an appeal has not expired, or [] a stay of execution has been granted . . . the [Texas] court shall stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated." TEX. CIV. PRAC. & REM. CODE § 35.006(a). The Insurer Defendants have moved to vacate (or, in the alternative, for reconsideration of) the South Carolina Order in the South Carolina trial court, and that motion remains pending. *See* Ex. 3 (10/16/23 Mtn. to Vacate/Reconsider). Under applicable South Carolina rules, the Insurer Defendants' timeline for appealing the South Carolina Order will only begin to run after the reconsideration motion is decided. *See* S.C. APP. CT. R. 203(b)(1) (providing appellate deadline begins to run from date of decision on motion for reconsideration). Thus, the South Carolina Order is not remotely close to final. Accordingly, if this Court declines to vacate the domestication of the South Carolina Order, then it should still—at minimum—rule that the

South Carolina Order cannot be acted upon or enforced in Texas until an appeal concludes or the time for appeal expires in South Carolina.

V. PETITION FOR DECLARATORY JUDGMENT

43. In connection with the above requested relief, Intervenor National Union files this Petition for declaratory judgment against Childers and the Texas Secretary of State, and pleads as follows:

A. Parties

44. Intervenor National Union is informed and believes that Childers is currently a resident of the state of North Carolina. Childers was appointed as the Personal Representative of the Estate of Lewis C. Childers (deceased) by the Probate Court of Cherokee County, South Carolina on or about June 18, 2020. Childers sought and obtained the entry of the October 5, 2023 South Carolina Order. Childers may be served in person or by registered or certified mail, return receipt requested, at her residence (4205 Springview Drive, Dallas, NC 28034), *see* TEX. R. CIV. P. 106, 108, or by counsel in the Childers Suit upon authorization.

45. The Texas Secretary of State is a public entity entrusted with "the power and authority reasonably necessary to enable the secretary to perform the duties imposed on the secretary under" the TBOC. TBOC §§ 12.001(b)–(c); *cf.* TBOC § 11.153(a) (Secretary "shall take any action necessary to implement an order under this section"). Upon receiving the October 12, 2023 Domestication Filing, the Texas Secretary of State (that same day) issued a "Certificate of Revocation of Dissolution of Frentex Enterprises Company of Texas," revoking the 1986 termination of Payne & Keller—last known as Frentex Enterprises Company of Texas. Ex. 18 at 3. The Texas Secretary of State may be served by "certified mail, return receipt requested, by the clerk of the court in which the case is pending or by the party or the representative of the party,"

TEX. CIV. PRAC. & REM. CODE § 17.026(b), at Service of Process, Secretary of State, P.O. Box 12079, Austin, Texas 78711-2079.

46. Intervenor National Union is a corporation organized under the laws of the Commonwealth of Pennsylvania, with its principal place of business located in the State of New York.

B. Jurisdiction and Venue

47. This Court has personal jurisdiction over Childers because she has purposefully availed herself of the privilege of conducting activities in Texas by seeking to revoke the termination of Payne & Keller, a Texas company, under Texas statute to recover from that 37-year terminated company. The exercise of jurisdiction over Childers would not offend traditional notions of fair play and substantial justice nor be inconsistent with the constitutional requirements of due process. This Court has personal jurisdiction over the Texas Secretary of State because the Secretary is a resident of Texas.

48. Harris County is the mandatory venue for this third-party claim. TEX. CIV. PRAC. & REM. CODE § 15.062(a) ("Venue of the main action ***shall*** establish venue of a counterclaim, cross claim, or third-party claim properly joined under the Texas Rules of Civil Procedure or any applicable statute." (emphasis added)); *Perryman v. Spartan Tex. Six Cap. Partners, Ltd.*, 546 S.W.3d 110, 132 (Tex. 2018) ("[S]ection 15.062(a) is a mandatory venue provision.").

49. The Court has subject matter jurisdiction over this suit and the authority to grant the requested declaratory relief under Texas Civil Practice and Remedies Code section 37.003(a). Intervenor National Union seeks a declaration under the Texas Uniform Declaratory Judgments Act, TEX. CIV. PRAC. & REM. CODE § 37.001 *et seq.*, that the October 5, 2023 Order obtained by Childers in the South Carolina circuit court is invalid to effectuate revocation of Payne & Keller's

terminated status and that Payne & Keller shall remain terminated unless and until a Texas court with jurisdiction orders otherwise.

50. Under Rule 47 of the Texas Rules of Civil Procedure, Intervenor National Union certifies that it seeks only non-monetary relief. Thus, the damages sought are within the jurisdictional limits of this Court.

C. Discovery Control Plan

51. Intervenor National Union intends to conduct discovery under Level 2, as set forth in Rule 190.3 of the Texas Rules of Civil Procedure.

D. Factual Background

52. Intervenor National Union references and incorporates Paragraphs 6 through 17 above as if set forth fully herein.

E. Claim for Declaratory Relief

53. Intervenor National Union incorporates in this claim all the allegations in the foregoing paragraphs.

54. There is an actual controversy among the parties regarding the revocation of the termination of Payne & Keller. *Cf. Sneed v. Webre*, 465 S.W.3d 169, 180 (Tex. 2015). In particular, the parties dispute whether the South Carolina court properly entered the October 5, 2023 South Carolina Order; whether such Order has, or may have, the effect of reviving Payne & Keller from its terminated status; and whether the Texas Secretary of State properly certified such reinstatement—especially when the reinstatement had the effect of applying a statute retroactively, in violation of the Texas Constitution and legislative intent. Further, the parties dispute whether the October 5, 2023 South Carolina Order is enforceable in this Texas Court.

55. The controversy will be actually determined by the declaration Intervenor National Union seeks. *Id.* Pursuant to the Uniform Declaratory Judgments Act, Chapter 37 of the Texas Civil Practice and Remedies Code, Intervenor National Union seeks a declaratory judgment that:

a. The October 5, 2023 Order obtained by Plaintiff Lenora Childers in the South Carolina court is invalid to revoke the terminated status of Payne & Keller; and

b. Payne & Keller shall remain a terminated entity, and the records of the Texas Secretary of State shall so reflect, unless and until a Texas court with jurisdiction orders otherwise in a final, non-appealable judgment.

F. Prayer for Relief

56. Intervenor National Union respectfully requests that Childers and the Texas Secretary of State be cited to appear and answer, and that, on final trial, judgment be entered in favor of Intervenor National Union, awarding it the declaratory relief set forth above and all such other further relief, at law or in equity, to which Intervenor National Union may be justly entitled.

VI. CONCLUSION & PRAYER FOR RELIEF

57. Intervenor National Union respectfully requests that the Court:

(1) vacate the October 12, 2023 domestication of the October 5, 2023 South Carolina Order (or, at a minimum, rule that the South Carolina Order is unenforceable and may not be acted upon until an appeal concludes or the time for appeal expires in South Carolina); and

(2) declare that:

(a) the October 5, 2023 South Carolina Order is invalid to revoke the terminated status of Payne & Keller Company, and

(b) Payne & Keller Company shall remain a terminated entity, and the records of the Texas Secretary of State shall so reflect, unless and until a Texas court with jurisdiction orders otherwise in a final, non-appealable judgment.

National Union further prays for any additional relief to which the Court finds it justly entitled.

Dated: November 13, 2023

Respectfully submitted,

/s/ Ayesha Najam

Ayesha Najam
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Facsimile: (713) 750-0903

Counsel for Intervenor and Third-Party Plaintiff National Union Fire Insurance Company

CERTIFICATE OF SERVICE

I certify that, on November 13, 2023, a true and correct copy of the foregoing Plea and Intervention and Motion to Vacate was served on all counsel of record by using the Court's electronic filing system.

/s/ Ayesha Najam
Ayesha Najam

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.

Christina Pena on behalf of Ayesha Najam
Bar No. 24046507
cpena@gibbsbruns.com
Envelope ID: 81586330
Filing Code Description: Motion (No Fee)
Filing Description: National Union Fire Insurance Co of Pittsburgh, PA's Plea in Intervention, Motion to Vacate Domesticated Judgment, and Petition for Declaratory Judgment
Status as of 11/13/2023 5:16 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Brady Edwards		brady.edwards@morganlewis.com	11/13/2023 4:08:44 PM	SENT
Brady Edwards	793021	brady.edwards@morganlewis.com	11/13/2023 4:08:44 PM	SENT
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Associated Case Party: National Union Fire Insurance Company of Pittsburgh, PA

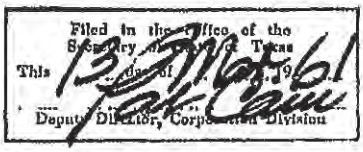
Name	BarNumber	Email	TimestampSubmitted	Status
Caitlyn Cowan		ccowan@gibbsbruns.com	11/13/2023 4:08:44 PM	SENT
Ayesha Najam		anajam@gibbsbruns.com	11/13/2023 4:08:44 PM	SENT

EXHIBIT 1

ARTICLES OF INCORPORATION

OF

PAYNE AND KELLER, INC.



We, the undersigned natural persons of the age of twenty-one years or more, at least two of whom are citizens of the State of Texas, acting as incorporators of a corporation under the Texas Business Corporation Act, do hereby adopt the following Articles of Incorporation for such corporation:

ARTICLE ONE

The name of the corporation is PAYNE AND KELLER, INC.

ARTICLE TWO

The period of its duration is perpetual

ARTICLE THREE

The purpose or purposes for which the corporation is organized are:

To carry on and conduct a general engineering and contracting business, including therein the designing, constructing, enlarging, repairing, removing or otherwise engaging in any work upon buildings, roads, highways, manufacturing plants, equipment, machinery, bridges, piers, docks, mines, shafts, waterworks, railroad, railway structures and all iron, steel, wood, masonry and earth construction and to extend and receive any contracts or assignments of contracts therefor, or related thereto, or connected therewith and to manufacture and furnish the building materials and supplies connected therewith;

To acquire, lease, purchase, invest in, construct, manufacture or otherwise obtain and to hold, own, maintain, operate, use and otherwise enjoy or deal in and to sell, convey, transfer, exchange, pledge, mortgage or otherwise dispose of any

works, plants, pipelines, apparatus, devices, appliances, facilities, goods, wares and merchandise and personal property of every class and description;

To acquire, hold, use, sell, assign, lease, grant licenses in respect of, mortgage or otherwise dispose of letters patent of the United States or of any foreign country, patent rights, licenses and privileges, inventions, improvements in processes, copyrights, trademarks and trade names relating to or useful in connection with any business of this corporation;

In general, to carry out any other business in connection with the foregoing and to have and exercise all the powers conferred by the laws of Texas upon corporations formed under the Texas Business Corporation Act and to do any and all of the things hereinbefore set forth to the same extent as natural persons might or could do.

ARTICLE FOUR

The aggregate number of shares which the corporation shall have authority to issue is ONE THOUSAND (1,000) of common stock of the par value of ONE DOLLAR ($1.00) each.

ARTICLE FIVE

The corporation will not commence business until it has received for the issuance of its shares consideration of the value of One Thousand Dollars ($1,000.00), consisting of money, labor done or property actually received.

ARTICLE SIX

The post office address of its initial registered office is 3410 Dixie Drive, Houston, Texas, and the name of its initial registered agent at such address is Joe T. Payne.

ARTICLE SEVEN

The number of directors constituting the initial board of directors is four (4), and the names and addresses of the persons who are to serve as directors until the first annual meeting of shareholders or until their successors are elected and qualified are:

J. G. McCullough	3126 Askew Houston, Texas
A. A. Weber	7606 Wilmerdean Houston, Texas
Joe T. Payne	1402 Peppertree Houston, Texas
Paul F. Keller	1402 Anne Humble, Texas

ARTICLE EIGHT

The names and addresses of the incorporators are:

J. G. McCullough	3126 Askew Houston, Texas
A. A. Weber	7606 Wilmerdean Houston, Texas
Joe T. Payne	1402 Peppertree Houston, Texas
Paul F. Keller	1402 Anne Humble, Texas

ARTICLE NINE

Except as may otherwise be provided in the by-laws, the board of directors of this corporation is expressly authorized to alter, amend, or repeal the by-laws or to adopt new by-laws of this corporation, without any action on the part of the stockholders, but the by-laws made by

the directors and the powers so conferred may be altered or repealed by the stockholders.

IN WITNESS WHEREOF, we have hereunto set our hands as of the 10 day of March, 1961.

J. G. McCullough

A. A. Weber

Joe T. Payne

Paul F. Keller

THE STATE OF TEXAS §
COUNTY OF HARRIS §

I, Virginia Miller, a Notary Public, do hereby certify that on this 10th day of March, 1961, personally appeared before me J. G. McCULLOUGH, A. A. WEBER, JOE T. PAYNE and PAUL F. KELLER, who each being by me first duly sworn severally declared that they are the persons who signed the foregoing document as incorporators, and that the statements therein contained are true.

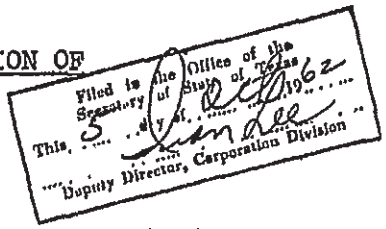
Virginia Miller
Notary Public in and for
Harris County, T e x a s

(S.)

ARTICLES OF AMENDMENT

TO THE ARTICLES OF INCORPORATION OF

PAYNE AND KELLER, INC.



Pursuant to the provisions of Article 4.04 of the Texas Business Corporation Act, the undersigned corporation adopts the following Articles of Amendment to its Articles of Incorporation.

ARTICLE ONE

The name of the corporation is PAYNE AND KELLER, INC.

ARTICLE TWO

The following amendment to the Articles of Incorporation was adopted by the shareholders of the corporation on September 15, 1962. Such amendment to the Articles of Incorporation is for the purpose of increasing the authorized common stock of the corporation from one thousand (1,000) shares of the par value of $1.00 each to one hundred thousand (100,000) shares of the par value of $1.00 each.

The amendment alters or changes Article Four of the original or amended Articles of Incorporation, and Article Four is hereby amended to read as follows:

> "The aggregate number of shares which the corporation shall have authority to issue is One Hundred Thousand (100,000) of common stock of the par value of One Dollar ($1.00) each."

ARTICLE THREE

The number of shares of the corporation

B-1

outstanding at the time of such adoption was one thousand (1,000) and the number of shares entitled to vote thereon was one thousand (1,000).

ARTICLE FOUR

The holders of all the shares outstanding and entitled to vote on said amendment have signed a consent in writing adopting said amendment.

ARTICLE FIVE

This amendment does not effect a change in the amount of stated capital of the corporation.

PAYNE AND KELLER, INC.

By _____
President

_____
Secretary

B-2

-6-

THE STATE OF TEXAS §

COUNTY OF HARRIS §

I, J. T. Sloan, a Notary Public, do hereby certify that on this the 17th day of September, 1962, personally appeared before me Joe T. Payne, who declared that he is President of the corporation executing the foregoing document, and being first duly sworn, acknowledged that he signed the foregoing document in the capacity therein set forth, and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year before written.

J. T. Sloan
Notary Public in and for
Harris County, Texas

B-3

EXHIBIT 2

FILED
In the Office of the
Secretary of State of Texas

DEC 30 1982

Clerk I M
Corporations Section

ARTICLES OF MERGER OF PAYNE AND KELLER, INC., PAYNE & KELLER OF LOUISIANA, INC., AND PAYNE & KELLER GULF COAST, INC.

Pursuant to the provisions of Part Five of the Texas Business Corporation Act and Part XI of the Louisiana Business Corporation Law, the undersigned domestic and foreign corporations adopt the following Articles of Merger for the purpose of merging them into one of such corporations:

ARTICLE I: The names of the merging corporations, the states under the laws of which they are respectively organized, the number of shares of common stock outstanding of each of the corporations and the number of such shares voted for approval of the Plan and Agreement of Merger are:

Name of Corporation	State	Shares Outstanding	Shares Approving
Payne and Keller, Inc.	Texas	10,000	10,000
Payne & Keller of Louisiana, Inc.	Louisiana	1,000	1,000
Payne & Keller Gulf Coast, Inc.	Louisiana	50	50

ARTICLE II: The laws of Louisiana and of Texas permit such merger.

ARTICLE III: The surviving corporation is Payne and Keller, Inc., the name of which is to be changed to Payne & Keller Company pursuant to the following Plan and Agreement of Merger, and it is governed by the laws of the State of Texas.

ARTICLE IV: Each of the merging corporations is a wholly owned subsidiary of Payne & Keller Corporation. The following Plan and Agreement of Merger was approved by unanimous resolution of the Board of Directors of Payne & Keller Corporation in accordance with the Texas Business Corporation Act and the Louisiana Business Corporation Law on December 21, 1982:

AGREEMENT AND PLAN OF MERGER

AGREEMENT AND PLAN OF MERGER dated December 21, 1982, among PAYNE AND KELLER, INC., a Texas corporation ("P&K"), PAYNE & KELLER OF LOUISIANA, INC., a Louisiana corporation ("P&K Louisiana"), and PAYNE & KELLER GULF COAST, INC., a Louisiana corporation ("P&K Gulf Coast").

W I T N E S S E T H:

WHEREAS, P&K is a corporation organized and existing under the laws of the State of Texas, with its principal office located at 1710 Telephone Road, Houston, Texas 77023;

WHEREAS, P&K has a capitalization consisting of 100,000 authorized shares of common stock, with par value of $1.00 each, of which 10,000 shares are issued and outstanding, all of which shares are owned by Payne & Keller Corporation;

WHEREAS, P&K Louisiana is a corporation organized and existing under the laws of the State of Louisiana, with its principal office located at 9969 Professional Boulevard, Baton Rouge, Louisiana 70809;

WHEREAS, P&K Louisiana has an authorized capitalization of 10,000 shares of common stock, with par value of $1.00 each, of which 1,000 shares are issued and outstanding, all of which shares are owned by Payne & Keller Corporation; and

WHEREAS, P&K Gulf Coast is a corporation organized and existing under the laws of the State of Louisiana, with its principal office at 9969 Professional Boulevard, Baton Rouge, Louisiana 70809;

WHEREAS, P&K Gulf Coast has an authorized capitalization of 1,000 shares of common stock, without par value, of which 50 shares are issued and outstanding, all of which shares are owned by Payne & Keller Corporation; and

WHEREAS, the respective Boards of Directors of P&K, P&K Louisiana and P&K Gulf Coast (hereinafter collectively referred to as the "Constituent Corporations") have determined that it is advisable that P&K Louisiana and P&K Gulf Coast be merged into P&K, on the terms and conditions hereinafter set forth, in accordance with the applicable provisions of the laws of the State of Texas and of the State of Louisiana, which laws permit such merger;

NOW, THEREFORE, in consideration of the premises and of the mutual agreements, covenants and provisions hereinafter contained, the parties hereto agree that P&K Louisiana and P&K Gulf Coast shall be merged into P&K and that the terms and conditions of such merger and the manner and basis of converting the shares of P&K Louisiana and P&K Gulf Coast into shares of P&K shall be as follows:

ARTICLE I

At the Effective Time of the Merger (as hereinafter defined), P&K, P&K Louisiana and P&K Gulf Coast shall be merged into a single corporation, in accordance with the applicable provisions of the laws of the State of Texas and of the State of Louisiana, by P&K Louisiana and P&K Gulf Coast merging into P&K, which shall be the surviving corporation. At the Effective Time

of the Merger, the separate existence of P&K Louisiana and of P&K Gulf Coast shall cease, and existence of P&K shall continue unaffected and unimpaired by the merger, with all the rights, privileges, immunities and powers, and subject to all the duties and liabilities, of a corporation organized under the Business Corporation Act of the State of Texas.

ARTICLE II

2.1. The Articles of Incorporation of P&K shall, at the Effective Time of the Merger, be and hereby are amended by deleting Article One in its entirety and by substituting the following in place thereof:

"ARTICLE ONE

The name of the corporation is PAYNE & KELLER COMPANY." The Articles of Incorporation of P&K, as so amended, shall be and constitute the Articles of Incorporation of the surviving corporation from and after the Effective Time of the Merger until the same shall be altered or amended as provided by law.

2.2. The bylaws of P&K shall be and remain the bylaws of P&K until altered, amended or repealed as provided by law.

2.3. At the Effective Time of the Merger, the directors and officers of P&K shall be as follows:

Name	Office
H. M. Martin	Chairman of the Board of Directors
Richard F. Phillips	Director and President
Gilbert Thierry	Director
Harlan M. Stein	Director and Executive Vice President
William C. Mannear	Director and Executive Vice President
Philippe H. Petitfrere	Senior Vice President and Secretary
Walter L. Roberts	Vice President
Donald J. Boutwell	Vice President

Muriel M. Dixon	Assistant Secretary
Keigh C. Leake	Assistant Secretary

Such directors and officers shall continue in office and shall constitute the directors and officers of P&K until their respective successors shall be elected or appointed and qualified.

ARTICLE III

At the Effective Time of the Merger:

3.1. P&K shall possess all the rights, privileges, immunities, powers and franchises of a public as well as of a private nature, and shall be subject to all of the restrictions, disabilities and duties, of each of the Constituent Corporations; and all property, real, personal and mixed, including all patents, applications for patents, trademarks, trademark registrations and applications for registration of trademarks, together with the good will of the business in connection with which said patents and marks are used, and all debts due on whatever account, including subscriptions to shares of capital stock, and other choses in action and all and every other interest of or belonging to or due to each of the Constituent Corporations shall be deemed to be transferred to and vested in P&K without further act or deed, and the title to any real estate, or any interest therein, vested in any of the Constituent Corporations shall not revert or be in any way impaired by reason of the merger.

3.2. P&K shall be responsible and liable for all the liabilities and obligations of each of the Constituent Corporations; and any claim existing or action or proceeding pending by

or against any of the Constituent Corporations may be prosecuted to judgment as if the merger had not taken place, or P&K may be substituted in its place and neither the rights of creditors nor any liens upon the property of any of the Constituent Corporations shall be impaired by the merger. P&K shall execute and deliver any and all documents which may be required for it to assume or otherwise comply with outstanding obligations of P&K Louisiana or P&K Gulf Coast.

3.3. The aggregate amount of the net assets of the Constituent Corporations which is available for payments of dividends immediately prior to the merger, to the extent that the value thereof is not transferred to stated capital by issuance of shares of stock or otherwise, shall continue to be available for the payment of dividends.

ARTICLE IV

The manner and basis of converting the shares of stock of each of the Constituent Corporations into shares of stock of P&K are as follows:

4.1. The shares of common stock of P&K, whether authorized or issued at the Effective Time of the Merger shall not be converted or exchanged as a result of the merger, but at said time, all shares of common stock of P&K theretofore authorized (whether issued or unissued) shall be and be deemed to be shares of common stock of P&K, and all such shares of P&K outstanding at the Effective Time of the Merger, including shares held in the

treasury of P&K, shall remain outstanding, shall be and be deemed fully-paid and non-assessable.

4.2. Each share of common stock of P&K Louisiana and of P&K Gulf Coast issued and outstanding at the Effective Time of the Merger and all rights in respect thereof, shall, at said time, be converted into and exchanged for one share of presently authorized and unissued common stock of P&K.

4.3. As soon as practicable after the Effective Time of the Merger, each holder of shares of common stock of P&K Louisiana or P&K Gulf Coast shall surrender the outstanding certificate or certificates theretofore representing said shares of common stock of P&K Louisiana and of P&K Gulf Coast to P&K, and each such holder shall receive in exchange therefore a certificate or certificates representing the number of shares of common stock of P&K into which the shares of common stock of P&K Gulf Coast and P&K Louisiana theretofore represented by the surrendered certificate or certificates shall have been converted.

4.4. All shares of common stock of P&K into which shares of common stock of P&K Louisiana and P&K Gulf Coast are converted shall be fully-paid and non-assessable.

ARTICLE V

5.1. This Plan shall be submitted to the stockholders of each Constituent Corporation as provided by the applicable laws of the States of Texas and Louisiana. After the approval or adoption thereof by the stockholders of each Constituent Corpora-

tion in accordance with the requirements of the laws of the States of Texas and Louisiana, all required documents shall be executed, filed and recorded and all required acts shall be done in order to accomplish the merger under the provisions of the applicable statutes of the States of Texas and Louisiana.

5.2. This Plan may be terminated at any time prior to the Effective Time of the Merger, either before or after action thereon by the stockholders of the Constituent Corporations, by mutual consent of the Constituent Corporations, expressed by action of their respective Boards of Directors.

5.3. If the merger contemplated hereby shall be consummated, P&K shall pay all expenses of accomplishing the merger. If the merger is not consummated, each of the Constituent Corporations shall pay one-third of all expenses incurred in connection therewith.

ARTICLE VI

The merger shall become effective when the following actions shall have been taken: (1) this Plan has been adopted and approved on behalf of each Constituent Corporation in accordance with the Business Corporation Law of the State of Louisiana and the Business Corporation Act of the State of Texas, (2) this Plan as so adopted and approved, has been certified, executed and acknowledged in accordance with the Business Corporation Law of the State of Louisiana, and has been filed in the office of the Secretary of State of the State of Louisiana, and (3) Articles of Merger (with this Plan attached as a part thereof), setting forth

the information required by, and executed and verified in accordance with, the Texas Business Corporation Act, has been filed in the office of the Secretary of the State of Texas, but in no event sooner than 12:01 a.m. on January 1, 1983 (the time and date when all such action shall have been taken being herein referred to as the "Effective Time of the Merger").

IN WITNESS WHEREOF, the corporate parties hereto, pursuant to authority given by their respective Boards of Directors, have caused this Agreement and Plan of Merger to be entered into and signed by their respective directors, or a majority of them, and in their respective corporate names by their respective Presidents or Vice Presidents, and their corporate seals to be hereunto affixed, and to be attested by their respective Secretaries or Assistant Secretaries, all as of the date and year first above written.

(Signature spaces deleted from Agreement and Plan of Merger)

Dated: December 21, 1982

PAYNE AND KELLER, INC.

By: _____
President

By: _____
Secretary

PAYNE & KELLER OF LOUISIANA, INC.

By: _____
President

_____
Secretary

PAYNE & KELLER GULF COAST, INC.

By: _____
President

_____
Secretary

I, Philip Pettijohn, Secretary of Payne and Keller, Inc., a corporation organized and existing under the laws of the State of Texas (the "Corporation"), do hereby certify, as such Secretary, that the Agreement and Plan of Merger attached to the Articles of Merger to which this certificate is attached, after having been duly signed on behalf of the Corporation and having been signed on behalf of Payne & Keller of Louisiana, Inc. and Payne & Keller Gulf Coast, Inc., both corporations of the State of Louisiana, was duly approved pursuant to Section 5.07 of the Business Corporation Act of the State of Texas on the 21st day of December, 1982, by the written consent of the sole stockholder holding 10,000 shares of the capital stock of the Corporation, the same being all of the shares issued and outstanding, which Agreement and Plan of Merger was thereby adopted as the act of the sole stockholder of Payne and Keller, Inc., and the duly adopted agreement and act of the Corporation.

WITNESS MY HAND this 21st day of December, 1982.

Secretary

SUBSCRIBED AND SWORN TO BEFORE ME, this the 21st day of December, 1982.

NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

I, Philip Stiffler, Secretary of Payne & Keller of Louisiana, Inc., a corporation organized and existing under the laws of the State of Louisiana (the "Corporation"), do hereby certify, as such Secretary, that the Agreement and Plan of Merger attached to the Articles of Merger to which this certificate is attached, after having first been duly signed on behalf of the Corporation and having been signed on behalf of Payne and Keller, Inc., a corporation of the State of Texas, and on behalf of Payne & Keller Gulf Coast, Inc., a corporation of the State of Louisiana, was duly approved pursuant to Art. 12:112 of the Business Corporation Law of the State of Louisiana, on the 21st day of December, 1982, by the written consent of the sole stockholder holding 1,000 shares of the capital stock of the Corporation, the same being all the shares issued and outstanding, which Agreement and Plan of Merger was thereby adopted as the act of the sole shareholder of said Payne & Keller of Louisiana, Inc., and the duly adopted agreement and act of the Corporation.

WITNESS MY HAND this 21st day of December, 1982.

Secretary

SUBSCRIBED AND SWORN TO BEFORE ME, on this the 21st day of December, 1982.

NOTARY PUBLIC IN AND FOR
THE STATE OF Texas

I, Edgar Stiles, Secretary of Payne & Keller Gulf Coast, Inc., a corporation organized and existing under the laws of the State of Louisiana (the "Corporation"), do hereby certify, as such Secretary, that the Agreement and Plan of Merger attached to the Articles of Merger to which this certificate is attached, after having first been duly signed on behalf of the Corporation and having been signed on behalf of Payne and Keller, Inc., a corporation of the State of Texas, and on behalf of Payne & Keller of Louisiana, Inc., a corporation of the State of Louisiana, was duly approved pursuant to Art. 12:112 of the Business Corporation Law of the State of Louisiana, on the 21st day of December, 1982, by the written consent of the sole stockholder holding 1,000 shares of the capital stock of the Corporation, the same being all the shares issued and outstanding, which Agreement and Plan of Merger was thereby adopted as the act of the sole shareholder of said Payne & Keller Gulf Coast, Inc., and the duly adopted agreement and act of the Corporation.

WITNESS MY HAND this 21st day of December, 1982.

Secretary

SUBSCRIBED AND SWORN TO BEFORE ME, on this the 21st day of December, 1982.

NOTARY PUBLIC IN AND FOR
THE STATE OF Texas

State of Louisiana Secretary of State

COMMERCIAL DIVISION
225.925.4704

Fax Numbers
225.932.5317 (Admin. Services)
225.932.5314 (Corporations)
225.932.5318 (UCC)

Name	Type	City	Status
PAYNE & KELLER OF LOUISIANA, INC.	Business Corporation	NEW ORLEANS	Inactive

Previous Names

BAYOU MAINTENANCE AND CONSTRUCTORS, INC. (Changed: 3/22/1972)

Business: PAYNE & KELLER OF LOUISIANA, INC.
Charter Number: 29425610D
Registration Date: 5/27/1971
Domicile Address
1300 HIBERNIA BLDG.
NEW ORLEANS, LA 70112
Mailing Address
1300 HIBERNIA BLDG.
NEW ORLEANS, LA 70112
Principal Office Address

Status

Status: **Inactive**
Inactive Reason: **MERGED**
File Date: 5/27/1971
Last Report Filed: 1/1/1975
Type: Business Corporation

Mergers (1)

Filed Date	Effective Date:	Type	Charter#	Chater Name	Role
12/30/1982	**12/30/1982**	**MERGE**	**25712370F**	**FRENTEX ENTERPRISES COMPANY OF TEXAS**	**SURVIVOR**
			29425610D	PAYNE & KELLER OF LOUISIANA, INC.	NON-SURVIVOR
			31812480D	PAYNE AND KELLER GULF COAST, INC.	NON-SURVIVOR

Amendments on File (3)

Description	Date
Supplemental Initial Report	6/23/1971
Name Change	3/22/1972
Merger	12/30/1982

Print

EXHIBIT 3

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

v.

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

Defendants.

****

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

Third-Party Plaintiffs,

v.

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

Case No. 2021-CP-40-03484

CERTAIN INSURERS' MOTION TO VACATE OR IN THE ALTERNATIVE MOTION TO RECONSIDER THE COURT'S OCTOBER 5, 2023 ORDER

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

Third-Party Defendants.

CERTAIN INSURERS' MOTION TO VACATE OR IN THE ALTERNATIVE MOTION TO RECONSIDER THE COURT'S OCTOBER 5, 2023 ORDER

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; and The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company (hereinafter collectively referred to as "Certain Insurers"), respectfully move pursuant to Rule 59 and 60, SCRCP, for entry of an Order vacating the Court's October 5, 2023 Order or, in the alternative, altering or amending the October 5, 2023 Order.

SUMMARY

The Court's October 5, 2023 Order ("October 5 Order") violates Rule 205, SCACR, is procedurally improper, and is based on numerous incorrect statements of fact and law. Because the Court lacked jurisdiction to enter the Order, the Order should be vacated. If the Court does not vacate, then the Court should alter and amend the Order and enter an order denying Plaintiff's Motion to Revoke the dissolution of Payne & Keller Company ("Payne & Keller") because the retroactive application of the Texas fraud statute violates the Texas Constitution and, even if the statute did apply, the facts do not support a finding of fraud.

First, the question of Payne & Keller's dissolution and whether it can be revoked are currently on appeal before the Court of Appeals. Pursuant to Rule 205, SCACR, these matters are in the exclusive jurisdiction of the Court of Appeals. Respectfully, this Court lacks jurisdiction to rule on Plaintiff's Motion while these issues are pending appeal.

Second, the Court also lacks the authority to revoke the dissolution of a Texas corporation. Under the U.S. Constitution, South Carolina must respect the sovereign acts of other states, including the creation and dissolution of a corporation. *See, e.g., Young v. JCR Petroleum, Inc.*, 423 S.E.2d 889, 892 (W. Va. 1992). Thus, the power to create, dissolve, or reinstate a Texas corporation belongs exclusively to the Texas government. Because the Court had no jurisdiction or power to enter the October 5 Order, the order is void and should be vacated.

Third, the Court ruled on the request for revocation without giving the parties the opportunity for discovery or a further hearing, contradicting its prior statements that it would do so. In the July 10 hearing, the Court said that it was not "closing the book" on Plaintiff's motion to revoke, and that it would "reconvene these proceedings" if the Court of Appeals returned the case to the Circuit Court. (Ex. 1, July 10, 2023 Tr. 78:18-79:1). Similarly, the Court's March 31, 2023 Order stated that the parties would have "the opportunity to explore this issue through the discovery process." (March 1, 2023 Order, p. 5). Nevertheless, the Court issued the October 5 Order without discovery or a reconvened hearing, which deprived Certain Insurers of their due process rights to discovery and to submit additional evidence and argument in opposition to Plaintiff's Motion.

Fourth, Plaintiff has no standing to seek the revocation of Payne & Keller's dissolution. Despite sitting for multiple depositions over multiple decades, Lewis Childers never once identified Payne & Keller as a source of any asbestos exposure. Plaintiff certainly cannot be heard to seek revocation of the dissolution of a company that never harmed Mr. Childers. Further, discovery has not revealed any work Payne & Keller ever performed in South Carolina.

Fifth, the Texas Constitution prohibits retroactive application of statutes. The October 5 Order relies on a provision in the Texas Business Organizations Code that was enacted more than fifteen years after Payne & Keller's dissolution. This provision cannot be applied retroactively to resurrect barred claims. *See* Tex. Const. art. I, § 16 ("No . . . retroactive law . . . shall be made.").

Sixth, the factual assertions in the October 5 Order are erroneous:

1) **Payne & Keller did not "hastily" dissolve**. It dissolved because it sold substantially all of its assets. (Ex. 2, Purchase Agreement). It changed its name prior to dissolving because it gave up the right to use the name Payne & Keller as part of the asset sale. (Ex. 2, Purchase Agreement, p. 21). The process took place over the course of months. Thus, the evidence shows Payne & Keller dissolved because it completed its corporate purpose.

2) **Payne & Keller did not face thousands of asbestos suits**. Plaintiff has only located *one* asbestos suit against Payne & Keller prior to 1986, and that case was dismissed with prejudice before the dissolution. (Ex. 1, July 10, 2023 Tr. 8:15-18) (Plaintiff admitting the "claim was dismissed on May 21, 1986 with prejudice"). Plaintiff paints a picture of Payne & Keller fraudulently dissolving in the face of a tidal wave of asbestos suits. There is absolutely no evidence before the Court to support this assertion.

3) **Payne & Keller did not face thousands of dioxin claims**. Plaintiff gravely misstates the dioxin claims relating to Charter International Oil Company. Charter may have faced "thousands" of alleged dioxin claims, but not Payne & Keller. Rather, Charter claimed that Payne & Keller owed indemnification obligations to Charter for a tiny subset of the dioxin claims – injuries to Payne & Keller employees only. What Plaintiff portrays as "thousands" was in fact no more than a handful. *See In re Charter Co.*, 63 B.R. 568, 570 (M.D. Fla. 1986) (noting that Charter only identified **three** proofs of claims that were allegedly subject to indemnity by Payne & Keller). Also, there is absolutely no evidence that any dioxin claims owed by Payne & Keller went unpaid.

4) **Payne & Keller did not dissolve without assuring that claims asserted within three years of its dissolution could be satisfied**. In fact, the Receiver alleges that Payne & Keller continued to secure insurance for the three years following its dissolution – presumably so that Payne & Keller could satisfy any obligations it owed during its 3-year post-dissolution liabilities under Texas law. (Ex. 3, Second Amended Third-Party Complaint, ¶¶ 153 & 157) (alleging Stonewall issued policies to Payne & Keller up until October 6, 1988 and that National Union issued policies up until April 1, 1989).

For the foregoing reasons, the Court's October 5 Order should be vacated or, if not vacated, substituted with an Order denying Plaintiff's Motion.

FACTS

A. The life and death of Payne & Keller.

Payne & Keller, Inc. was a corporation incorporated and headquartered in Texas, formed by Mr. Payne and Mr. Keller. Payne and Keller, Inc. filed Articles of Incorporation in Texas on March 13, 1961 for the purpose of carrying on a construction business. (Ex. 4, Art. of Inc.).

In 1980, Dumez USA, the United States subsidiary of a French company called Dumez S.A., acquired Payne & Keller, Inc. (Ex. 5, Payne & Keller 30(b)(6) 38:10-13). Two companies, Dumez USA and Jacobs Engineering Group, Inc., were interested in purchasing Payne & Keller, Inc. at this time, but Dumez was the ultimate purchaser as it made a higher offer. (Ex. 9, Morhman

Declaration, ¶25). In 1982, Payne & Keller, Inc. and two other companies merged to form Payne & Keller Company. (Ex. 5, Payne & Keller 30(b)(6) 38:10-18); (Ex. 6, Art. of Merger, pp. 2-3). Payne & Keller Company remained a Texas corporation in accordance with the then-applicable Texas Business Corporations Act. (Ex. 6, Art. of Merger, p. 3). As Payne & Keller's 30(b)(6) deponent explained: "So by 1982, there are other company names. The – what I call the old Payne and Keller, Inc. that Mr. Payne and Mr. Keller owned, um, is gone. It's now Payne & Keller Company." (Ex. 5, Payne & Keller 30(b)(6) 39:3-7). Thus, by 1982, Payne & Keller Company was a subsidiary of a much larger corporate entity.

Dumez USA operated Payne & Keller at a loss for several years. (Ex. 9, Mohrman Declaration, ¶ 25). As a result, Dumez USA did what corporations often do – it decided to sell the assets of its subsidiary Payne & Keller Company and to cease that business. The previous interested buyer of Payne & Keller – Jacobs Engineering Group, Inc. – was the beneficiary of Dumez USA's decision. That decision resulted in a 1986 Purchase Agreement between Dumez USA, Payne & Keller Company, Bayou-Maintenance, Inc.,[1] Payne & Keller Corp.[2] and Jacobs Engineering Group, Inc., a California corporation. (Ex. 2, Purchase Agreement, p. 1). Pursuant to the terms of the Purchase Agreement, Payne & Keller Company sold certain "assigned contracts," machinery and equipment, and additional items. (Ex. 2, Purchase Agreement, pp. 1-2). The end result was that Payne & Keller Company was selling "substantially all of the [its] operating assets . . .." (Ex. 2, Purchase Agreement, p. 4).

As part of the Purchase Agreement, Payne & Keller Company gave up its right to use the "Payne & Keller" name. (Ex. 2, Purchase Agreement, p. 21). As a result, and as anticipated in the

[1] Bayou Maintenance was another subsidiary of Dumez USA.

[2] Payne & Keller Corp. owned all of the shares of Payne & Keller Company. In turn, Dumez USA owned all of the shares of Payne & Keller Corp. (Ex. 2, Purchase Agreement, p. 12).

Purchase Agreement, Payne & Keller Company changed its name to Frentex Enterprises Company on October 20, 1986, which was subsequently changed to Frentex Enterprises Company of Texas ("Frentex"). (Ex. 7, Articles of Amendments to Articles of Incorporation); (Ex. 2, Purchase Agreement, p. 17).

Once it sold substantially all of its assets and gave up its name, Payne & Keller Company – now Frentex – no longer had any reason to continue its corporate existence. Thus, Frentex submitted its Articles of Dissolution to the Texas Secretary of State. (Ex. 8, Art. of Dissolution). The dissolution filing included an accompanying "Consent Action of the Sole Shareholder of Frentex Enterprises Company of Texas" and a letter from the Comptroller of Public Accounts for the State of Texas certifying that Frentex was in good standing and had paid its required franchise taxes.

Under then-applicable Texas law, the Texas Secretary of State would review the articles and, only if he determined the dissolution conformed to Texas law, stamp the articles "Filed." Tex. Bus. Corp. Act, Art. 6.07 (1984). On December 3, 1986, the Texas Secretary of State stamped Payne & Keller's Articles of Dissolution "Filed." (Ex. 8, Articles of Dissolution). Thus, Payne & Keller has been lawfully dissolved for nearly thirty-seven years. The company grew; was acquired by Dumez USA; and when Dumez USA could not operate the company profitably, it ultimately decided to sell the corporate assets and shut down the business. This is a normal trajectory for many businesses, not constructive fraud.

B. Discovery has not revealed any work performed by Payne & Keller in South Carolina nor that it injured Plaintiff.

Over thirty years after its Texas dissolution, this Court appointed Peter Protopapas as a South Carolina receiver for Payne & Keller. Notably, the Court did so in reliance on allegations by Plaintiff Lenora Childers that her husband was exposed to asbestos by Payne & Keller

operations in South Carolina. (Compl. ¶ 24) ("Plaintiff's claims against PAYNE & KELLER COMPANY arise out of this Defendant's business activities in the State of South Carolina.").

At one point in time, Payne & Keller registered to do business in South Carolina, among numerous other states. However, discovery has not revealed any work that Payne & Keller ever actually performed in this State. Counsel for Payne & Keller in this action submitted a lengthy and detailed declaration setting out the various efforts taken to identify any South Carolina jobsites. (Ex. 9, Mohrman Declaration). Despite those extensive efforts, no South Carolina worksites could be identified. This resulted in Payne & Keller's 30(b)(6) deponent confirming in deposition that Payne & Keller was not aware of any work performed in South Carolina. (Ex. 5, Payne & Keller 30(b)(6) Dep. pp. 133-134).

Thus, discovery has not supported the allegations that led to this Court's appointment of a receiver over Payne & Keller. As the evidence currently stands, the Court has appointed a South Carolina receiver over a dissolved Texas corporation even though exhaustive searching has failed to reveal any evidence that the company ever actually performed work in South Carolina.

Plaintiff has no standing to seek revocation of Payne & Keller's dissolution because there is simply no evidence that Lewis Childers was ever exposed to asbestos by Payne & Keller Company. Mr. Childers was deposed in multiple cases, including:

1) *Charlotte Gaye Smith v. CBS Corp., et al.*, 2015-CP-46-2155, Dec. 15, 2015 (424 pages transcript);

2) *Thomas Jessie Gilliam v. Owens-Illinois, Inc.*, C/A No. 85-3283 (D.S.C.), Dec. 2, 1988;

3) *Charles R. Smart v. Owens-Illinois, Inc., et al*, C/A No. 87-1904 (D.S.C.), Oct. 30, 1989;

4) *Lewis Childers v. AC&S, Inc., et al*, 98-CP-23-2527, Feb. 25, 1999;

He also signed multiple exposure affidavits. Neither his testimony nor his affidavits ever identified Payne & Keller.

C. The issues raised in Plaintiff's Motion are currently pending before the South Carolina Court of Appeals – which this Court has previously acknowledged.

Travelers and Certain Insurers previously moved to dissolve the Payne & Keller Receivership. The Receiver filed an opposition to those motions, and the Plaintiff's current Motion to Revoke is a near-verbatim recitation of the Receiver's opposition arguments. On March 31, 2023, this Court denied Travelers' and Certain Insurers' Motions to Dissolve the Payne & Keller Receivership. (March 31, 2023, Order Denying Motion to Dissolve). The Order addressed the propriety of continuing the receivership, the scope of the receivership, and – importantly – whether Payne & Keller's dissolution was subject to challenge under a constructive fraud theory. On April 28, 2023, Travelers and Certain Insurers appealed that Order, thus divesting this Court of jurisdiction over those issues on appeal. *See* Rule 205, SCACR.

At the July 10, 2023, hearing on Plaintiff's Motion, the Court determined that the issues regarding Payne & Keller's dissolution were pending before the Court of Appeals. As a result, this Court withheld any further action on the issue pending a ruling from the appellate courts: "So I am going to hold my ruling in abeyance until we hear from the Court of Appeals." (Ex. 1, July 10, 2023 Tr. 75:8-9). At counsel for Certain Insurers' request, the Court made clear that it was not ending the hearing:

> MR. SAWYER: Just for point of clarification, the impact holding pending a ruling by the court, will there be another hearing. I have points I wanted to put on the record, but I don't want to waste the court's time if we're going to have the Court of Appeals.
>
> THE COURT: Yes, I should say that and make that clear, that this is an adjourned proceeding not a –
>
> MR. SAWYER: We're not closing the book.

> THE COURT: Or a paused proceeding, I guess you could say. ***I am not declaring the hearing at an end. I am pausing it or adjourning it until I receive further information***. Right now, my main concern is the Court of Appeals and my authority. ***But if there are other things from the plaintiff or from the insurance companies with respect to what they're trying to do right now or from the receiver, for that matter, I will certainly take those into account. I will reconvene these proceedings*** at an earlier time if what I'm submitted from the Court of Appeals dictates so, or at least, when the Court of Appeals has decided whether they're going to do it.

(Ex. 1, July 10, 2023 Tr. 78:6-79:1).

At the time of the hearing on Plaintiff's Motion to Revoke Termination, the Court of Appeals was still deciding whether the issues were immediately appealable and whether it would keep the appeal. On August 9, 2023, the Court of Appeals held that it would allow the appeal to proceed. (Ex. 10, Order of the Court of Appeals). Thus, the matter of whether Payne & Keller fraudulently dissolved remains before the Court of Appeals, and merits briefing is underway.

After the appeal was allowed to proceed on August 8, the Court <u>again</u> acknowledged that these issues were pending before the Court of Appeals at a hearing on August 21, 2023, reiterating that the Court would hold in abeyance any rulings pending an outcome from the Court of Appeals. (Ex. 11, Aug. 21, 2023 Tr. p. 64).

There is no colorable argument that the Plaintiff's Motion falls outside the scope of matters "affected by the appeal." Plaintiff's motion is a near-verbatim reiteration of the arguments that the Receiver and this Court ruled upon in the Order now on appeal. Therefore, those issues are within the exclusive jurisdiction of the Court of Appeals.

Moreover, this Cour repeatedly assured the parties – in its written order and from the bench – that there would be an opportunity for discovery and a reconvened hearing before any ruling. Despite those assurances, the Court entered Plaintiff's proposed order without any forewarning, without any reconvened hearing, and without any meaningful opportunity for discovery.

ARGUMENT

I. This Court lacks jurisdiction because the issues raised in the Order are squarely before the South Carolina Court of Appeals.

"Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal . . .." Rule 205, SCACR (emphasis added). "Pursuant to Rule 205, the service of a notice of appeal divests the trial court of jurisdiction over matters affected by the appeal . . .." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 532, 787 S.E.2d 485, 493 (2016).

In the October 5 Order, the Court concluded that it could exercise personal jurisdiction over the Motion to Revoke, relying on the Court of Appeal's September 8, 2023 Order on the Receiver's Motion to Clarify. However, the Receiver's Motion to Clarify in the Court of Appeals only raised Rule 241. The Receiver never asked the Court of Appeals to address Rule 205, and the Court of Appeals' single-judge, one-paragraph order does not address that rule. As the Supreme Court recognized in *Stokes-Craven*, "Rule 205 divests the lower court or administrative tribunal of jurisdiction over '*matters affected by the appeal*," which includes subsequent proceedings – or even a subsequent suit – "based on the outcome of the appealed verdict, judgment, or ruling." *Id.* at 534, 787 S.E.2d at 494 (emphasis in original). Thus, in *Stokes-Craven*, Rule 205 vested the appellate court with exclusive jurisdiction over matters "affected by the appeal" not only in the case on appeal, but also in a subsequent malpractice suit based on the same issues.

Only a few years before *Stokes-Craven*, the Supreme Court clarified the impact of Rule 205. *See Lancaster v. Georgia-Pacific Corp.*, 403 S.C. 136, 742 S.E.2d 867 (2013). In that case, the parties to an appeal reached a settlement that required presentation to and approval by the trial court. As a result, they sought a stay of the appeal. The Supreme Court agreed to stay the case, but it held "the trial court cannot take action as contemplated by the parties unless the case is [first]

remanded to that court." *Id.* at 137, 742 S.E.2d at 868. "Pursuant to Rule 205, SCACR, upon service of the 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." *Id.* Therefore, regardless of any stay under Rule 241, Rule 205 precluded the Circuit Court from taking any action "except with regard to matters not affected by the appeal." *Id.*; *see also Wingate v. Wingate*, 289 S.C. 574, 347 S.E.2d 878 (1985) (addressing Rule 205's predecessor and holding that family court lacked jurisdiction to modify alimony payments because original award of alimony was pending on appeal).

The Court's October 5 Order rules on the very matters that are pending before the appellate court. Plaintiff's Motion is a wholesale restatement of the Receiver's opposition to the Motion to Dissolve, and thus the entirety of the Court's October 5, 2023 Order addresses issues that are on appeal. For example, the Order on appeal held the "Receiver has presented sufficient evidence at the pleading stage to support a claim that Payne and Keller's 1986 dissolution was the result of, at least, constructive fraud." (Ex. 12, Order Denying Dissolution, pp. 4-5). Similarly, the order on appeal rejected that argument that the application of Section 11.153 of the Texas Organizations Business Code to Payne & Keller's 1986 dissolution violated the Texas Constitution's prohibition against retroactive application of statutes. *See* Tex. Const. art. I, § 16. (Ex. 12, Order Denying Dissolution, p. 6). The Court cannot properly find constructive fraud and revoke Payne & Keller's dissolution until those issues are resolved on appeal.

There is also a more fundamental problem with the Court's Order. If the receivership is illegal, then the Receiver has no say in what defenses Payne & Keller raises. As it stands, Payne & Keller did not oppose the Plaintiff's Motion because the Receiver prevented any such opposition. Now – while the propriety of the receivership in the first instance is pending appellate

review – the Court's Order proceeds to revoke a thirty-seven-year-old dissolution without hearing opposition from Payne & Keller because that opposition has been blocked by the Receiver. This creates significant due process concerns.

The language of Rule 205 is clear, as are the Supreme Court's recent decisions reiterating Rule 205's application in *Stokes-Craven* and *Lancaster*. The issues raised in Plaintiff's Motion and ruled upon in the Court's October 5 Order are the very issues pending before the Court of Appeals. In fact, the Court's October 5 Order goes so far as to state:

> The Receiver has conducted substantial research regarding Payne & Keller, including the reasons for Payne & Keller's purposed 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.

(Oct. 5, 2023 Order, p. 2). Thus, the Court's Order expressly acknowledges that it is addressing the very facts and law raised in the prior motion that is currently pending on appeal before the South Carolina Court of Appeals. Therefore, the Court of Appeals has exclusive jurisdiction over these issues, and this Court respectfully lacked jurisdiction to issue the October 5 Order.

II. The Court does not have the power to order reinstatement of a dissolved Texas corporation.

The October 5 Order states: "[T]his Court orders that Payne & Keller Company be reinstated as provided by Section 11.153 of the TBOC." Respectfully, the Court lacked the authority to issue that order. South Carolina's courts have no power to change the dissolution of a Texas corporation, or to direct the Texas Secretary of State to create, dissolve, or reinstate a Texas corporation. That power belongs to Texas.

This is a matter of state sovereignty. A corporation is a creature of the state that created it, and that state controls its legal existence. Article IV, Section 1 of the U.S. Constitution requires the Court to give full faith and credit to the "public Acts, Records, and judicial Proceedings of every other State." The dissolution of Payne & Keller in Texas is one such act, and the Court must give it full faith and credit.

Courts across the country, including in Texas, recognize that they have no authority to change the organizational status of foreign corporations. *See Mitchell v. Hancock*, 196 S.W. 694, 698 (Tex. Ct. App. 1917) ("we know of no authority for the courts of this state to dissolve a foreign corporation on any ground"); *Raharney Cap., LLC v. Cap. Stack LLC*, 138 A.D.3d 83, 86–87, 25 N.Y.S.3d 217, 219 (1st Dep't 2016) ("We agree with the near-universal view that the courts of one state do not have the power to dissolve a business entity formed under another state's laws."); *Hadeed v. Advanced Vascular Res. of Johnstown, LLC*, No. 3:15-cv-22, 2017 WL 4998663, at *20 (W.D. Pa. Oct. 30, 2017) (Full Faith and Credit Clause requires each state to respect the sovereign acts of other states, including as respects the creation and dissolution of corporations).[3] South Carolina should respect Texas's authority over its corporations, as Texas would respect South Carolina's.

Indeed, South Carolina law expressly upholds this principle: it does not permit the Court to "regulate the organization" of a "foreign corporation authorized to transact business in this state." S.C. Code Ann. § 33-15-105(c); *see Pertuis v. Front Roe Rests., Inc.*, 423 S.C. 640, 650, 817 S.E.2d 273, 278 (2018). Rather, a foreign corporation is entitled to regulation of its organizational structure by its own state. Especially so for Payne & Keller, which has virtually *no*

[3] A small minority of courts have found that this issue is not a jurisdictional one, but even those decisions do not suggest that a court can take control of the organization of a foreign corporation simply because it registered to do business in a state.

connection to South Carolina aside from registering to do business here. (Ex. 9, Morhman Declaration); (Ex. 5, Payne & Keller 30(b)(6), pp. 133-134). The Court's order undoing Texas's dissolution and termination of Payne & Keller's corporate existence under Texas law violates the U.S. Constitution and South Carolina law, and it should be vacated for this reason as well.

III. The Court entered Plaintiff's proposed order despite previously ordering that discovery on these issues would take place and despite assuring the parties that the hearing on Plaintiff's Motion was not closed.

"The Due Process Clause requires all parties be given 'an opportunity to be heard in a meaningful way.'" *Halsey v. Simmons*, 432 S.C. 54, 58, 849 S.E.2d 578, 580 (2020) (quoting *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008)). "The law . . . does not permit a court to issue judgment against a party before giving that party an opportunity to present evidence in support of [its] position." *Id.*

The Court told the parties in its March 31, 2023 Order that discovery would take place on the Receiver's claim of fraudulent dissolution. (Ex. 12, March 31, 2023 Order, p. 5) ("Such a determination will be made after the parties have had the opportunity to explore this issue through the discovery process."). The Court then stated on July 10, 2023 that it was not closing the book on the hearing. After being informed that Certain Insurers had points that they wanted to put on the record, the Court assured the parties that "I am not declaring the hearing at an end. I am pausing it or adjourning it until I receive further information." (Ex. 1, July 10, 2023 Tr. 78:7-17). The Court went on to state that it would reconvene the hearing if the case returned from the Court of Appeals and that the parties would be free to provide additional submissions to the Court. (Ex. 1, July 10, 2023 Tr. 78:18-25).

Despite the Court's assurances, the Court signed Plaintiff's proposed Order with no opportunity for discovery, no reconvened hearing, and no warning that the Court was prepared to

rule on the matter.[4] Had the Court provided any warning, Certain Insurers would have filed a Rule 56(e) affidavit regarding discovery that needed to be completed before the Motion would be ready for a ruling. The signing of the Order without the promised discovery, reconvened hearing, or any warning deprived Certain Insurers of fundamental due process rights to participate in discovery on these issues and to be heard.

IV. Plaintiff did not plead fraud, and Plaintiff lacks standing to seek the revocation of Payne & Keller's dissolution.

Plaintiff did not plead fraud. *See* Rule 9(b), SCRCP ("In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity."). There is no request for a finding of fraud or revocation of Payne & Keller's dissolution in Plaintiff's operative or prior complaints. In fact, Plaintiff sought this Court's appointment of a receiver on the express basis that Payne & Keller *was* a dissolved entity. (Ex. 13, Pl.'s Mot. to Appoint a Receiver Over Payne & Keller Company, p. 1) ("Payne & Keller is a dissolved Texas corporation."). Thus, Plaintiff's request for revocation of the dissolution is not properly before the Court because it is not pled and it is contrary to the position Plaintiff previously took when seeking appointment of the Receiver.

Moreover, Plaintiff has no standing to seek revocation of Payne & Keller's dissolution because Plaintiff has not made the initial showing that Payne & Keller ever harmed Plaintiff. Lewis Childers was deposed four times over the span of three decades. Despite four depositions spanning hundreds of pages of testimony, he never once uttered the words "Payne & Keller." Plaintiff has

[4] The October 5 Order also finds that discovery already took place on the issue of dissolution, citing to the Receiver's Notice of Filing of Insurer Discovery. (October 5 Order, p. 7). However, the Receiver served discovery on the insurers in October of 2022. At that time the insurers responded to that discovery, the issue of fraudulent dissolution was not pled. The Receiver did not reveal his assertion of fraudulent dissolution until filing the Response to the Motions to Dissolve, which was not filed until January 13, 2023. Shortly thereafter, the Court entered its order on the Motion to Dissolve, and that order has since been on appeal. Thus, there has not been any meaningful opportunity to conduct discovery.

not presented any evidence of exposure to asbestos caused by Payne & Keller. Thus, Plaintiff lacks any basis to assert any claim against Payne & Keller.

Even ignoring the broader standing issue, Plaintiff more specifically lacks standing to challenge the dissolution of Payne & Keller. Payne & Keller dissolved in 1986 – decades before Lewis Childers developed any asbestos-related disease. Plaintiff alleges Payne & Keller dissolved to avoid dioxin claims that it allegedly knew about in 1986. There is no basis to assert that Payne & Keller knew of Plaintiff's claims, which did not come into existence until decades later. Thus, there is no colorable argument that Payne & Keller fraudulently dissolved to avoid liability owed to Plaintiff, and Plaintiff has no standing to assert fraudulent dissolution against Payne & Keller.

For similar reasons, Plaintiff cannot satisfy the elements of "actual fraud" or "constructive fraud" under Texas law. "Actual fraud" requires proof of a misrepresentation and reliance by the plaintiff. *Strobach v. WesTex Cmty. Credit Union*, 621 S.W.3d 856, 879 (Tex. App. 2021), review denied (Sept. 3, 2021). "Constructive fraud" requires breach of a "legal or equitable duty" existing through a fiduciary or confidential relationship. *Id.* Plaintiff has not produced any evidence of any of these required elements. Her assertions of actual fraud or constructive fraud should be rejected for that reason as well. *See In re Est. of Kuykendall*, 206 S.W.3d 766, 771 (Tex. App. 2006) (plaintiffs' claims of actual or constructive fraud failed because they failed to produce evidence of a misrepresentation or reliance, or "any evidence of a fiduciary or confidential relationship.").

V. Discovery has not revealed <u>any</u> work performed by Payne & Keller in South Carolina.

As discussed in the facts section above, discovery to date has failed to reveal <u>any</u> work ever performed by Payne & Keller in South Carolina. (Ex. 9, Mohrman Declaration); (Ex. 5, Payne & Keller 30(b)(6), pp. 133-134). Thus, even if there were any factual basis to support undoing Payne & Keller's dissolution – there is not – this Court would not be the place for that action.

VI. The Texas Constitution prohibits retroactive application of the fraudulent dissolution statute.

Plaintiffs admit that Payne & Keller dissolved in 1986. (Pl.'s Mot. to Revoke Termination, p. 4) ("On December 3, 1986, Frentex filed its articles of dissolution and certificate of dissolution . . .."). Under the then-applicable Texas law, any suits against Payne & Keller had to be made within three years of dissolution. Tex. Bus. Corp. Act Art. 7.12 (1984). Thus, by December 3, 1989, Payne & Keller could neither sue nor be sued. Payne & Keller was fully protected by the Texas statute of repose.

Plaintiff's Motion and the Court's Order rely on Section 11.153 of the current version of the Texas Business Organizations Code to set aside Payne & Keller's dissolution. Section 11.153 permits a court to "order the revocation of termination of an entity's existence that was terminated as a result of actual or constructive fraud." Tex. Bus. Org. § 11.153 (2021). However, this provision did not exist in the 1986 version of the Texas Business Corporations Act – nor did anything like it. The Texas General Assembly did not enact any form of a fraud exception to dissolution until 2005, after the Texas Business Corporations Act became the Texas Business Organizations Code. 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 twenty years after Payne & Keller dissolved.

While many jurisdictions prohibit ex post facto laws, the Texas Constitution goes a step further and prohibits retroactive application of statutes: "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligations of contract, shall be made." Tex. Const. art. I, § 16 (emphasis added). The Texas Supreme Court has long held that one such example of an illegal retroactive law is one that would "revive causes of action already barred . . .." *De Cordova v. City of Galveston*, 4 Tex. 470, 480 (1849). The Texas Supreme Court long ago recognized that

when a law operates "in favor of a defendant as a defense against a claim made against him," "it must be said that a right exists, has become fixed or vested, and is beyond the reach of retroactive legislation if there be a constitutional prohibition of such laws." *Mellinger v. City of Houston*, 3 S.W. 249, 253 (Tex. 1887). Furthermore, this interpretation is not limited to Texas. Rather, this "so far as we have been enabled to ascertain, has been the ruling in every state in this Union which has a constitution provision in terms forbidding retroactive laws, in which any ruling upon the question has been made." *Id.*

The Texas Supreme Court has repeatedly held that the prohibition against retroactive laws applies to a law that would have the effect – either directly or indirectly – of reviving a claim that is otherwise barred by a statute of limitations or repose. For example, in *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1 (Tex. 2000), the Supreme Court rejected application of an extension of the statute of limitations for misappropriation of trade secrets claims when doing so would revive an already barred claim:

> The principal issue we address here is whether a claim for misappropriation of trade secrets that was barred by limitations was revived by the later [statutory] enactment . . . which extended the limitations period from two years to three years and adopted the discovery rule for determining accrual. We hold that for [the statute] to have such effect would violate the prohibition against retroactive laws in article I, section 16 of the Texas Constitution.

Id. at 2. It is "settled law" in Texas "that, after a cause has become barred by the statute of limitation, the defendant has a vested right to rely on such statute as a defense." *Id.* at 4 (citations omitted). "Thus, we have written that a statute extending the limitations period of a claim already barred by limitations violates the Texas Constitution's prohibition against retroactive laws, which is article I, section 16." *Id.* (citation omitted); *see also Wilson v. Work*, 62 S.W.2d 490, 547 (Tex. 1933) ("[I]t is settled law that, after a cause of action has become barred by the statute of limitation, the defendant has a vested right to rely on such statute as a defense.").

Texas' Supreme Court has repeatedly reached this conclusion, beginning at least as early as the *Mellinger* case in 1887 and continuing as recently as 2010 in *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 140 (quoting with approval that "if an attempt were made by law, either by implication or expressly to revive causes of action already barred; such legislation would be retrospective within the intent of the prohibition, and would therefore be wholly inoperative.") (quoting *De Cordova*, 4 Tex. at 480). In fact, the Texas Supreme Court has invalidated statutes as prohibitively retroactive three times, all in cases involving extensions of statutes of limitations.[5] *Id.* at 146 (citing *Baker*, *Mellinger*, and *Wilson*).

Before the Texas General Assembly enacted the fraud statute in 2005, suits by or against Payne & Keller had already been barred by Texas' repose statute for approximately sixteen years. Payne & Keller had the right to rely on the legal impact of its dissolution based on the law as it existed at the time of the dissolution. Retroactively applying a change in the law that took place sixteen years later seeks to force Payne & Keller to go back in time. This is the very purpose of the prohibition against retroactive application of laws:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . ..
>
> In other words, the rules should not change after the game has been played.

Robinson, 335 S.W.3d at 139 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-266, 114 S.Ct. 1483 (1994)).

[5] The Texas Supreme Court in *Robinson* adopted a new test for whether a statute was prohibitively retroactive. However, the Supreme Court held, "[t]he results in all of our cases applying the constitution provision would be the same under this test." *Id.* at 146. Thus, the three prior cases holding that a statute cannot be used to resurrect a claim barred by the statute of limitations continue to remain binding Texas law.

The Court's application of the fraud statute to Payne & Keller here revives causes of action that had long been barred. In doing so, the Court's Order impermissibly applies a Texas statute retroactively in violation of the Texas Constitution and multiple cases from the Texas Supreme Court.

VII. The factual and legal conclusions in the Order are based on misstatements of the underlying facts and law.

The Court's October 5, 2023 Order cites the "historical record" and "[e]vents surrounding Payne & Keller's dissolution" as the basis for revoking Payne & Keller's dissolution. These purported facts lack any evidentiary support. The reality is that Payne & Keller wound up its business after selling essentially all of its assets in a run-of-the-mill asset sale. There is absolutely no evidence that Payne & Keller's dissolution was motivated by an intent to avoid creditors. Quite the contrary. Dumez USA chose to sell Payne & Keller's assets and the Payne & Keller name. Once that sale closed, Payne & Keller no longer had any reason to maintain its existence – its business was done. Thus, even if the fraud statute could be applied retroactively – it cannot – the evidence does not support the Court's finding of fraudulent dissolution.

A. The truth of the matter is that Payne & Keller wound up as a normal part of business operations after undergoing the sale of substantially all of its assets – like businesses do all the time.

Payne & Keller went through a number of corporate transactions prior to its ultimate winding up in 1986. As set out in detail in the facts above, Payne & Keller was purchased by Dumez USA in 1980. Dumez USA was unable to run Payne & Keller successfully. Thus, in or around 1986, Dumez USA chose to sell Payne & Keller's asset and its name. After that sale, Payne & Keller had no more corporate purpose. As a result, it did exactly what corporations that have ceased their business operations do every day across the county – it dissolved. The undisputed evidence is that the Articles of Dissolution were submitted to the Texas Secretary of State and the

Texas Secretary of State filed the dissolution, confirming that the Secretary of State found that the dissolution complied with the requirements of Texas law. The documentary evidence of the dissolution provides no evidence whatsoever of fraud.

B. Payne & Keller maintained in place insurance at least until April 1, 1989.

Texas corporations law only permitted suits by or against Payne & Keller for three years immediately following its dissolution. *See* Tex. Bus. Corp. Act Art. 7.12 (1984). The Court's October 5, 2023 Order finds the Charter dioxin claims matured on January 16, 1987 and that: "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 . . .." (Oct. 5 Order, p. 5). This is incorrect.

First, Payne & Keller Corporation, the immediate parent of Payne & Keller Company – continued to procure liability coverage following the dissolution of Payne & Keller Company, into 1989. (Ex. 14, Endorsement extending National Union policy period to April 1, 1989). Second, Plaintiff – who bears the burden of proof on any claim of fraud – has not presented evidence of *any* claims that went unpaid.[6]

C. The Plaintiff paints a picture of Payne & Keller dissolving in the face of "thousands" of dioxin suits, but a simple reading of the Bankruptcy Court's Order in *In re Charter* makes clear that Payne & Keller faced only three such claims.

The Plaintiff's Motion and this Court's Order focus heavily on dioxin claims and *In re Charter Co.* Thus, it appears the Court placed special weight on this issue in making its

[6] The Order also appears to imply that Payne & Keller was somehow responsible for the $5.275 million awarded to personal injury dioxin claimants or the roughly $6 million awarded to the state and federal governments. Those amounts were part of a class settlement with *Charter*, not Payne & Keller. No evidence or case law submitted to this Court has suggested in any way that Payne & Keller was responsible for those settlement amounts.

constructive fraud finding. The Court cites *In re Charter Oil* as the critical evidence of Payne & Keller dissolving to avoid an "indemnification obligation [that] encompassed more than a thousand claims arising from occupational dioxin exposure." (Oct. 5 Order, p. 4). However, a simple reading of *In re Charter Oil* shows that **Charter** may have faced "more than a thousand" claims, but Payne & Keller faced no more than a handful of such claims. And Plaintiff has not identified a single such claim that went unpaid.

In *In re Charter Oil*, the Bankruptcy Court addressed Payne & Keller's right to recover on mechanic's and materialmen's liens after Charter sold its Houston refinery. 63 B.R. 568 (M.D. Fla. 1986). Charter claimed it could withhold payment of Payne & Keller's liens because Payne & Keller **may** have owed a duty to indemnify Charter for **a tiny portion** of the dioxin claims asserted against Charter. The bankruptcy court explained the indemnity agreement: "P&K will hold CIOC harmless from any and all claims, judgments, and awards for damages to property or injuries **suffered by P & K employees** arising out of work on the refinery unless such damage or injury was caused by the negligence of" Charter. *Id.* at 570 (emphasis added). Thus, no one in that case claimed Payne & Keller owed a duty to indemnify Charter for "thousands" of dioxin claims. In fact, the bankruptcy court stated: "CIOC relies on twelve separate claims of which **only three** filed proofs of claims in this bankruptcy proceeding." *Id.* (emphasis added). Thus, Payne & Keller faced **three** dioxin claims—not "thousands."

Further, Payne & Keller informed the bankruptcy court that it had insurance to cover those potential obligations. *Id.* Nothing in the *Charter Oil* decision indicates that this statement was untrue. In fact, the bankruptcy court noted: "[t]here is no allegation that P & K is insolvent or unable to pay if an indemnity obligation arises." *Id.* at 571. Thus, Charter– who was in the best position to test Payne & Keller's statement regarding insurance and who had the most interest in

raising that challenge – apparently agreed that Payne & Keller had sufficient insurance to cover the potential indemnity obligations. Plaintiff here has not presented any evidence to the contrary.

Thus, Plaintiff's – and the Court's – reliance on *Charter Oil* is misplaced. *Charter Oil* shows Payne & Keller faced three, and at most twelve, indemnity claims, Payne & Keller had insurance to cover those claims, and there is no evidence that any claims went unpaid.

D. The existence of a single asbestos claim – which was dismissed before Payne & Keller dissolved – is far from sufficient evidence to support a finding that Payne & Keller fraudulently dissolved.

The Court's Order finds that Payne & Keller faced a single asbestos suit in 1986, which was dismissed on May 21, 1986. There is no evidence of any asbestos claims pending against Payne & Keller when it sold its assets, nor when it dissolved.

The existence of a single past suit – that was dismissed – is far from the type of evidence necessary to support a finding of fraud. The Court's Order attempts to bootstrap this single lawsuit by finding "by then, asbestos-related personal injury claims were filling court dockets." (Oct. 5 Order, p. 3). However, there is no evidence that Payne & Keller was aware of asbestos-related claims against *other* companies, much less that any such knowledge was the motivating factor for the sale of the company's assets. If thousands of suits were filling the dockets, the fact that Payne & Keller was not named in those lawsuits is strong evidence that Payne & Keller had no reason to think that it would become a defendant in the decades to come.

The Order states "Payne & Keller worked on valve replacements at a Citgo Petroleum Corporation facility . . . which has since been the subject of asbestos litigation," citing to *Seeney v. Citgo Petroleum Corp.*, 848 F.2d 664, 666 (5th Cir. 1988) and *Bourque v. Anco Insulations, Inc.*, 25 So. 3d 1008 (La. App. 3 Cir. 2009). However, the *Seeney* case does not have anything to do with asbestos. Instead, that case dealt with Payne & Keller employees who were injured in an explosion during work at a refinery. 848 F.2d at 665 ("Seeney and Calvin Demeritt filed separate

suits in negligence and strict liability against [Citgo] . . . for injuries they sustained in an explosion at Citgo's refinery . . ..."). The Fifth Circuit's decision in *Seeney* never references asbestos.

The *Bourque* case does reference asbestos, but the Court of Appeals in that case found that all of that plaintiff's exposure to asbestos occurred on a ship. 25 So.3d at 101 ("The record does not suggest that the plaintiff offered testimony disputing that the relevant work he did for the defendant was over navigable waters."). Moreover, *Bourque* is a 2009 decision. There is no credible argument that Payne & Keller could anticipate 2009 litigation when it dissolved in 1986. Far from fraud, this evinces nothing.[7]

In sum, neither the facts nor the law cited by Plaintiffs and incorporated into the Court's October 2023 Order are correct. As a factual matter, the history of Payne & Keller shows the typical and unsurprising lifecycle of a company. It started. It was acquired by one larger corporation. That corporation sold the company's assets and wound up the company. The final step in winding up was to dissolve the corporation, which started the three-year clock for any claims against the company. During that interim, the company continued to procure liability insurance to cover Payne & Keller liabilities. After three years, the company's dissolution and potential liability became final. Far from fraudulent, this is a common trajectory for a corporation.

CONCLUSION

For the above-stated reasons, the Court's October 5 Order should be vacated. In the alternative, if the Court does not vacate the Order, Certain Insurers submit that the Order should be withdrawn and substituted with an Order denying Plaintiff's Motion.

MURPHY & GRANTLAND, P.A.

By: *s/Wesley B. Sawyer*

[7] Plaintiff also alleges that Payne & Keller worked on an insulation replacement project for Archer Daniels Midland. Again, the mere fact that Payne & Keller did work is of no consequence, and it certainly does not indicate evidence of fraud.

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Counsel 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; and The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company

October 16, 2023
Columbia, South Carolina

EXHIBIT 4

FILED
In the Office of the
Secretary of State of Texas
DEC 03 1986
Clerk I N
Corporations Section

ARTICLES OF DISSOLUTION

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

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

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

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

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

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

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

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

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

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

DATED this the 27 day of October, 1986.

By: _____
Bernard Gautier
Its President

By: _____
John J. King
Its Secretary

STATE OF TEXAS §
§
COUNTY OF HARRIS §

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

_____
Notary Public in and for
the State of Texas

_____
Printed Name of Notary

My commission expires: _____

STATE OF TEXAS §
§
COUNTY OF HARRIS §

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

Melinda Winn
Notary Public in and for
the State of Texas

_____
Printed Name of Notary

My commission expires: MELINDA WINN
My Commission Expires: 4/24/90

_____

850:33dr

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

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

> RESOLVED, that the resolutions of the Board of Directors recommending that the Company be dissolved and liquidated, be and the same are hereby adopted and approved in all respects; and be it
>
> FURTHER RESOLVED, that the dissolution and liquidation of the Company be consummated as soon as practicable; and be it
>
> FURTHER RESOLVED, that when and as assets of the Company are reduced to cash, provision having been made for the debts and liabilities of the Company, distribution may be made to the shareholders of the Company from time to time, as partial distributions on account of the complete liquidation of the Company, in such amounts as the Board of Directors may from time to time determine; and be it
>
> FURTHER RESOLVED that the proper officers of the Company be and they hereby are authorized and directed to take all such action as they may deem necessary or appropriate to consummate the liquidation and dissolution of the Company, including the execution and delivery of all documents necessay to effectuate the liquidation and dissolution of the Company.

DATED: 10-27, 1986

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

By: _____

Title: _____

850:33

BOB BULLOCK
Comptroller

COMPTROLLER OF PUBLIC ACCOUNTS
STATE OF TEXAS
AUSTIN, 78774

NOVEMBER 25, 1986

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

THE STATE OF TEXAS

COUNTY OF TRAVIS

I, Bob Bullock, Comptroller of Public Accounts of the State of Texas, DO HEREBY CERTIFY that according to the records of this office

FRENTEX ENTERPRISES COMPANY OF TEXAS

is, as of this date, in good standing with this office, for the purpose of dissolution, merger or withdrawal having filed the required franchise tax reports and having paid the franchise tax computed to be due thereunder through April 30, 1987.

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

BOB BULLOCK
COMPTROLLER OF PUBLIC ACCOUNTS

05-329-3(3-84)

Charter/COA No. 172882-0

BOB BULLOCK
Comptroller

COMPTROLLER OF PUBLIC ACCOUNTS
STATE OF TEXAS
AUSTIN, 78774

NOVEMBER 25, 1986

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

THE STATE OF TEXAS

COUNTY OF TRAVIS

I, Bob Bullock, Comptroller of Public Accounts of the State of Texas, DO HEREBY CERTIFY that according to the records of this office

FRENTEX ENTERPRISES COMPANY OF TEXAS

is, as of this date, in good standing with this office, for the purpose of dissolution, merger or withdrawal having filed the required franchise tax reports and having paid the franchise tax computed to be due thereunder through April 30, 1987.

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

BOB BULLOCK
COMPTROLLER OF PUBLIC ACCOUNTS

05-329-3(3-84)

Charter/COA No. 172882-0

EXHIBIT 5

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT

LENORA CHILDERS, individually and as Personal Representative of the Estate of LEWIS C. CHILDERS, Plaintiff, v. DAVIS MECHANICAL CONTRACTORS, INC. FLAME REFRACTORIES, INC. GENERAL BOILER CASING COMPANY, INC. HEFCO, INC. J. R. DEANS COMPANY, INC. PAYNE & KELLER COMPANY SFB, INCORPORATED STAFFORD INSULATION COMPANY STANDARD INSULATION COMPANY OF N. C., INC. UNITED CONSTRUCTION CO. OF ROME, INC. Defendants.	)	C/A NO. 2021-CP-40-_____ In Re: Asbestos Personal Injury Litigation Coordinated Docket **SUMMONS**

SUMMONS

TO DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint

upon the Plaintiff's counsel, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service. If you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Respectfully submitted,

s/Theile B. McVey
Theile B. McVey (SC Bar No. 16682)
Jamie D. Rutkoski (SC Bar No. 103270)
KASSEL MCVEY ATTORNEYS AT LAW
1330 Laurel Street
Columbia, South Carolina 29202
T: 803-256-4242
F: 803-256-1952
tmcvey@kassellaw.com
jrutkoski@kassellaw.com
Other email: emoultrie@kassellaw.com

and

Charles W. Branham, III (TX Bar No. 24012323)
To Be Admitted *Pro Hac Vice*
DEAN OMAR BRANHAM SHIRLEY, LLP
302 N. Market Street, Suite 300
Dallas, TX 75202
T: 214-722-5990
F: 214-722-5991
tbranham@dobslegal.com
Other email: tgilliland@dobslegal.com

ATTORNEYS FOR PLAINTIFF

July 14, 2021

Columbia, South Carolina.

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

v.

DAVIS MECHANICAL CONTRACTORS, INC.

FLAME REFRACTORIES, INC.

GENERAL BOILER CASING COMPANY, INC.

HEFCO, INC.

J. R. DEANS COMPANY, INC.

PAYNE & KELLER COMPANY f/k/a PAYNE AND KELLER INC.

SFB, INCORPORATED f/k/a FORD, BACON & DAVIS INCORPORATED

STAFFORD INSULATION COMPANY

STANDARD INSULATION COMPANY OF N. C., INC.

UNITED CONSTRUCTION CO. OF ROME, INC.

Defendants.

C/A NO. 2021-CP-40-_____

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

Deceased Lung Cancer

COMPLAINT

(Jury Trial Demanded)

PLAINTIFF'S ORIGINAL COMPLAINT

Plaintiff, LENORA CHILDERS, individually and as Personal Representative of the Estate of LEWIS C. CHILDERS, sues the named Defendants for compensatory and punitive damages, by and through her attorneys, and come before this court and alleges as follows:

GENERAL ALLEGATIONS

1. This action is brought pursuant to the Wrongful Death Act, S.C. Gen. Stat. 15-51-10 *et seq*., for the wrongful death of the Decedent, Lewis C. Childers, on behalf of all persons entitled to recover damages.

2. This Court has personal jurisdiction over Defendants because Plaintiff's claims arise from Defendants' conduct in:

(a) Transacting business in this State, including the sale, supply, purchase, and/or use of asbestos and/or asbestos-containing products, within this State;

(b) Contracting to supply services or things in the State;

(c) Commission of a tortious act in whole or in part in this State;

(d) Having an interest in, using, or possessing real property in this State; and/or

(e) Entering into a contract to be performed in whole or in part by either party in this State.

3. Each Defendant, or its predecessors in interest, that manufactured, sold, and/or distributed asbestos-containing products or raw asbestos materials for use in South Carolina and other states at times relevant to this action are referred to herein as "Product Defendants." At all times relevant to this action, the Product Defendants and the predecessors of the Product Defendants for whose actions the Product Defendants are legally responsible, were engaged in the manufacture, sale and distribution of asbestos-containing products and raw materials. Defendants that owned and/or controlled the work sites where Decedent Lewis C. Childers experienced

occupational exposure as a result of working with asbestos-containing equipment in his immediate vicinity are referred to herein as the "Premises Defendants."

4. Plaintiff's claims against the Product Defendants, as defined herein, arise out of Defendants' purposeful efforts to serve directly or indirectly the market for their asbestos and/or asbestos-containing products in this State, either through direct sales or through utilizing an established distribution channel with the expectation that their products would be purchased and/or used within South Carolina.

5. Plaintiff's claims against the Premises Defendants, as defined herein, arise out of Defendants' ownership and/or control of real property located in South Carolina and North Carolina, and the purchase and use of asbestos-containing products on their premises located in South Carolina and North Carolina, and/or contracting with the employer of Decedent Lewis C. Childers in South Carolina and North Carolina for Decedent and others to cross state lines to work on Defendant's premises.

6. All of the named Defendants are corporations who purposefully availed themselves of the privilege of doing business in this State, and who's substantial and/or systematic business in South Carolina exposed Decedent Lewis C. Childers to asbestos in this State, subjecting them to the jurisdiction of the South Carolina courts pursuant to the South Carolina Long-Arm Statute and the United States Constitution.

7. Decedent Lewis C. Childers' cumulative exposure to asbestos as a result of acts and omissions of Defendants and their defective products, individually and together, was a substantial factor in causing Decedent Lewis C. Childers' lung cancer and other related injuries and therefore under South Carolina law, is the legal cause of Decedent's injuries and damages.

8. Decedent was not aware at the time of exposure that asbestos or asbestos-containing products presented any risk of injury and/or disease.

9. Decedent Lewis C. Childers worked with, or in close proximity to others who worked with, asbestos-containing materials including but not limited to asbestos-containing products and other asbestos-containing materials manufactured and/or sold by Defendants identified above.

10. Each of the named Defendants is liable for damages stemming from its own tortious conduct or the tortious conduct of an "alternate entity" as hereinafter defined. Defendants are liable for the acts of their "alternate entity" and each of them, in that there has been a corporate name change, Defendant is the successor by merger, by successor in interest, or by other acquisition resulting in a virtual destruction of Plaintiff's remedy against each such "alternate entity"; Defendants, each of them, have acquired the assets, product line, or a portion thereof, of each such "alternate entity"; such "alternate entities" have acquired the assets, product line, or a portion thereof of each such Defendant; Defendants, and each of them, caused the destruction of Plaintiff's remedy against each such "alternate entity"; each such Defendant has the ability to assume the risk-spreading role of each such "alternate entity;" and that each such defendant enjoys the goodwill originally attached to each "alternate entity."

DEFENDANT	ALTERNATE ENTITY
PAYNE & KELLER COMPANY	PAYNE AND KELLER INC.
SFB, INCORPORATED	FORD, BACON & DAVIS INCORPORATED

11. Plaintiff has been informed and believes, and thereon alleges, that at all times herein mentioned, Defendants or their "alternate entities" were or are corporations, partnerships, unincorporated associations, sole proprietorships and/or other business entities organized and existing under and by virtue of the laws of the State of South Carolina, or the laws of some other state or foreign jurisdiction, and that said Defendants were and/or are authorized to do business in

the State of South Carolina, and that said Defendants have regularly conducted business in the State of South Carolina.

12. Plaintiff has been informed and believes, and thereon alleges, that progressive lung disease, lung cancer and other serious diseases are caused by inhalation of asbestos fibers without perceptible trauma and that said disease results from exposure to asbestos and asbestos-containing products over a period of time.

13. As a direct and proximate result of the conduct as alleged within, Decedent Lewis C. Childers suffered permanent injuries, including, but not limited to, lung cancer and other lung damage, as well as the mental and emotional distress attendant thereto, from the effect of exposure to asbestos fibers, all to his damage in the sum of the amount as the trier of fact determines is proper.

14. As a direct and proximate result of the conduct as hereinafter alleged, Decedent Lewis C. Childers incurred liability for physicians, surgeons, nurses, hospital care, medicine, hospices, x-rays and other medical treatment, the true and exact amount thereof being unknown to Plaintiff at this time. Plaintiff requests leave to supplement this Court and all parties accordingly when the true and exact cost of Decedent Lewis C. Childers' medical treatment is ascertained.

15. As a further direct and proximate result of the conduct as hereinafter alleged, Decedent Lewis C. Childers incurred, and will incur, loss of profits and commissions, a diminishment of earning potential, and other pecuniary losses, the full nature and extent of which are not yet known to Plaintiff. Plaintiff prays leave to supplement this Court and all parties accordingly to conform to proof at the time of trial.

16. Plaintiff hereby disclaims each and every claim or cause of action which does or may arise from any United States Marine Corps service or on any federal enclave. This disclaimer is not related solely to actions taken by or at the direction of a federal officer, but is, rather broader.

Plaintiff is not making any claims and are not alleging any causes of action against any entity for any asbestos exposure of any kind which occurred as a result of Decedent Lewis C. Childers' United States Marine Corps service. Moreover, Plaintiff is further disclaiming each and every claim or cause of action arising from any exposure to asbestos as a result of Lewis C. Childers' presence on or at any federal enclave. Plaintiff further disclaims each and every claim or cause of action arising under the United States Constitution and under any Federal Law or Regulation. Finally, Plaintiff disclaims each and every claim or cause of action which may be asserted under federal admiralty or maritime law. Courts across the Country have found that such disclaimers are proper and within the province of the Plaintiff to disclaim. Any removal by any defendant on the basis of the disclaimed claims will result in a motion for sanctions and seeking attorneys' fees.

THE PARTIES

17. Plaintiff Lenora Childers is currently a resident of the State of North Carolina. Decedent Lewis C. Childers was exposed to asbestos during the course of his career at various job sites, including but not limited to, locations in South Carolina and North Carolina.

18. The Plaintiff was appointed as the Personal Representative of the Estate of Lewis C. Childers (deceased) by the Probate Court of Cherokee County, South Carolina on or about June 18, 2020.

19. Defendant, **DAVIS MECHANICAL CONTRACTORS, INC.**, was a South Carolina corporation with its principal place of business in North Carolina. At all times material hereto, DAVIS MECHANICAL CONTRACTORS, INC. manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation and materials at numerous jobsites throughout the southeastern United States. DAVIS MECHANICAL

CONTRACTORS, INC. is sued as a Product Defendant. DAVIS MECHANICAL CONTRACTORS, INC. is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Lewis C. Childers, to lethal doses of asbestos. Plaintiff's claims against DAVIS MECHANICAL CONTRACTORS, INC. arise out of this Defendant's business activities in the State of South Carolina.

20. Defendant, **FLAME REFRACTORIES, INC.**, was a Florida corporation with its principal place of business in North Carolina. At all times material hereto, FLAME REFRACTORIES, INC. manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation and materials at numerous jobsites throughout the southeastern United States. FLAME REFRACTORIES, INC. is sued as a Product Defendant. FLAME REFRACTORIES, INC. is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Lewis C. Childers, to lethal doses of asbestos. Plaintiff's claims against FLAME REFRACTORIES, INC. arise out of this Defendant's business activities in the State of South Carolina.

21. Defendant, **GENERAL BOILER CASING COMPANY, INC.**, was a North Carolina corporation with its principal place of business in North Carolina. At all times material hereto, GENERAL BOILER CASING COMPANY, INC. manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation and materials

at numerous jobsites throughout the southeastern United States. GENERAL BOILER CASING COMPANY, INC. is sued as a Product Defendant. GENERAL BOILER CASING COMPANY, INC. is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Lewis C. Childers, to lethal doses of asbestos. Plaintiff's claims against GENERAL BOILER CASING COMPANY, INC. arise out of this Defendant's business activities in the State of South Carolina.

22. Defendant, **HEFCO, INC.**, was a South Carolina corporation with its principal place of business in South Carolina. At all times material hereto, HEFCO, INC. manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation and materials at numerous jobsites throughout the southeastern United States. HEFCO, INC. is sued as a Product Defendant. HEFCO, INC. is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Lewis C. Childers, to lethal doses of asbestos. Plaintiff's claims against HEFCO, INC. arise out of this Defendant's business activities in the State of South Carolina.

23. Defendant, **J. R. DEANS COMPANY, INC.**, was a South Carolina corporation with its principal place of business in South Carolina. At all times material hereto, J. R. DEANS COMPANY, INC. manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation and materials at numerous jobsites throughout the southeastern United States. J. R. DEANS COMPANY, INC. is sued as a Product Defendant.

J. R. DEANS COMPANY, INC. is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Lewis C. Childers, to lethal doses of asbestos. Plaintiff's claims against J. R. DEANS COMPANY, INC. arise out of this Defendant's business activities in the State of South Carolina.

24. Defendant, **PAYNE & KELLER COMPANY** f/k/a PAYNE AND KELLER INC., was a Texas corporation with its principal place of business in Texas. At all times material hereto, PAYNE & KELLER COMPANY manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation and materials at numerous jobsites throughout the southeastern United States. PAYNE & KELLER COMPANY is sued as a Product Defendant. PAYNE & KELLER COMPANY is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Lewis C. Childers, to lethal doses of asbestos. Plaintiff's claims against PAYNE & KELLER COMPANY arise out of this Defendant's business activities in the State of South Carolina.

25. Defendant, **SFB, INCORPORATED** f/k/a FORD, BACON & DAVIS INCORPORATED, was a New Jersey corporation with its principal place of business in Texas. At all times material hereto, SFB, INCORPORATED manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation and materials at numerous jobsites throughout the southeastern United States. SFB, INCORPORATED is sued as a Product Defendant. SFB, INCORPORATED is also sued for the work it did at the various

industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Lewis C. Childers, to lethal doses of asbestos. Plaintiff's claims against SFB, INCORPORATED arise out of this Defendant's business activities in the State of South Carolina.

26. Defendant, **STAFFORD INSULATION COMPANY**, was a South Carolina corporation with its principal place of business in South Carolina. At all times material hereto, STAFFORD INSULATION COMPANY manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation and materials at numerous jobsites throughout the southeastern United States. STAFFORD INSULATION COMPANY is sued as a Product Defendant. STAFFORD INSULATION COMPANY is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Lewis C. Childers, to lethal doses of asbestos. Plaintiff's claims against STAFFORD INSULATION COMPANY arise out of this Defendant's business activities in the State of South Carolina.

27. Defendant, **STANDARD INSULATION COMPANY OF N.C., INC.**, was a North Carolina corporation with its principal place of business in North Carolina. At all times material hereto, STANDARD INSULATION COMPANY OF N.C., INC. manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation and materials at numerous jobsites throughout the southeastern United States. STANDARD INSULATION COMPANY OF N.C., INC. is sued as a Product Defendant.

STANDARD INSULATION COMPANY OF N.C., INC. is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Lewis C. Childers, to lethal doses of asbestos. Plaintiff's claims against STANDARD INSULATION COMPANY OF N.C., INC. arise out of this Defendant's business activities in the State of South Carolina.

28. Defendant, **UNITED CONSTRUCTION CO. OF ROME, INC.**, was a North Carolina corporation with its principal place of business in North Carolina. At all times material hereto, UNITED CONSTRUCTION CO. OF ROME, INC. manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation and materials at numerous jobsites throughout the southeastern United States. UNITED CONSTRUCTION CO. OF ROME, INC. is sued as a Product Defendant. UNITED CONSTRUCTION CO. OF ROME, INC. is also sued for the work it did at the various industrial sites in the southeastern United States which exposed tens of thousands of people, including the Decedent Lewis C. Childers, to lethal doses of asbestos. Plaintiff's claims against UNITED CONSTRUCTION CO. OF ROME, INC. arise out of this Defendant's business activities in the State of South Carolina.

BACKGROUND FACTS

29. Decedent Lewis C. Childers brings this action for monetary damages as a result of contracting an asbestos-related disease.

30. Decedent Lewis C. Childers was diagnosed with lung cancer on or about April 2, 2020.

31. Decedent Lewis C. Childers' lung cancer was caused by his exposure to asbestos during the course of his employment.

32. During his work history, Decedent was exposed to Defendants' asbestos-containing products through his work as an insulator and maintenance technician from approximately 1960s to 2000s at various commercial and industrial jobsites located primarily in South Carolina and North Carolina. Decedent performed a variety of tasks throughout the facilities where he worked, including but not limited to, the removal and installation of asbestos-containing insulation and materials, construction and/or repair of boilers. Additionally, the maintenance technicians inspected, tested and adjusted various equipment including pumps, turbines, heat exchangers, pumps, fans and similar equipment. They coordinated their work with outer maintenance personnel and worked in confined spaces. All of these activities exposed Decedent to asbestos and asbestos-dust.

33. During his work history, Decedent was further exposed through his work around other trades including carpenters, mechanics, pipefitters, boilermakers, insulators, and electricians. Decedent worked near and closely to a variety of tradesmen working on asbestos-containing pipe insulation, generators, turbines, boilers, valves, steam traps, pumps, furnaces, and other equipment, as well as tradesmen mixing, cutting, and installing asbestos-containing insulation and other products. All of these activities exposed Decedent to asbestos and asbestos-dust.

34. Decedent was exposed to Defendants' asbestos-containing products while employed as an insulator and maintenance technician for Duke Energy Corporation (Duke Power) at various industrial locations, including but not limited to the following:

- Oconee Nuclear plant – Seneca, SC
- Lee Steam plant – Pelzer, SC
- Catawba Nuclear Plant – York, SC
- Dan River Steam plant – Eden, SC
- Belews Creek plant – Walnut Cove, NC
- Riverbend Steam plant – Mount Holly, NC
- Cliffside Steam plant – Cliffside, NC
- Allen Steam plant – Belmont, NC

- Marshall Steam plant – Terrell, NC
- McGuire Nuclear plant – Huntersville, NC

35. Decedent was exposed to Defendants' asbestos-containing products while employed as an insulator for Daniels Construction at various industrial locations, including but not limited to the following:

- Bowater paper mill – Catawba, SC
- Hoechst Celanese a/k/a Fiber Industries – Darlington, SC
- Hoechst Celanese a/k/a Fiber Industries – Greenville, SC
- Hoechst Celanese a/k/a Fiber Industries – Spartanburg – SC
- Hoechst Celanese a/k/a Fiber Industries – Salisbury, NC

36. Decedent was exposed to Defendants' asbestos-containing products while employed as an insulator for Presnell Insulation Co. Inc. at various industrial locations, including but not limited to the following:

- Bowater paper mill – Catawba, SC
- Cannon Mills – Kannapolis, NC
- Cone Mills – Concord, NC
- Cone Mills, Kannapolis, NC
- various cotton mills in SC and NC

37. Decedent was exposed to Defendants' asbestos-containing products while employed as an insulator for Cooks Insulation Co. Inc. at various industrial locations, including but not limited to the following:

- Milliken – Cypress plant – Blacksburg, SC
- Milliken – Gerrish plant – Pendleton, SC
- various cotton mills in SC and NC

38. During the course of Decedent Lewis C. Childers' employment at the location(s) mentioned above, during other occupational work projects, and in other ways, Decedent was exposed to and inhaled, ingested, or otherwise absorbed asbestos fibers emanating from certain products he was working around.

39. Decedent Lewis C. Childers' cumulative exposure to asbestos as a result of acts and omissions of Defendants and their defective products, individually and together, was a substantial factor in causing Decedent Lewis C. Childers' lung cancer and other related injuries and therefore under South Carolina law, is the legal cause of Decedent's injuries and damages.

40. Decedent Lewis C. Childers was not aware at the time of exposure that asbestos or asbestos-containing products presented any risk of injury and/or disease.

41. Decedent has been informed and believes, and thereon alleges, that progressive lung disease, lung cancer and other serious diseases are caused by inhalation of asbestos fibers without perceptible trauma and that said disease results from exposure to asbestos and asbestos-containing products over a period of time.

42. As a direct and proximate result of the conduct as alleged within, Decedent Lewis C. Childers suffered permanent injuries, including, but not limited to, lung cancer and other lung damage, as well as the mental and emotional distress attendant thereto, from the effect of exposure to asbestos fibers, all to his damage in the sum of the amount as the trier of fact determines is proper.

43. As a direct and proximate result of the conduct as hereinafter alleged, Decedent Lewis C. Childers incurred liability for physicians, surgeons, nurses, hospital care, medicine, hospices, x-rays and other medical treatment, the true and exact amount thereof being unknown to Plaintiff at this time. Plaintiff requests leave to supplement this Court and all parties accordingly when the true and exact cost of Decedent Lewis C. Childers' medical treatment is ascertained.

44. As a further direct and proximate result of the conduct as hereinafter alleged, Decedent incurred loss of profits and commissions, a diminishment of earning potential, and other pecuniary losses, the full nature and extent of which are not yet known to Plaintiff. Plaintiff

requests leave to supplement this Court and all parties accordingly to conform to proof at the time of trial.

FOR A FIRST CAUSE OF ACTION
(Product Liability: Negligence)

Plaintiff Complains of Defendants for a Cause of Action for Negligence Alleging as Follows:

45. Plaintiff incorporates herein by reference, as though fully set forth herein, each and every paragraph of the General Allegations above.

46. At all times herein mentioned, each of the named Defendants was an entity and/or the successor, successor in business, successor in product line or a portion thereof, assign, predecessor, predecessor in business, predecessor in product line or a portion thereof, parent, subsidiary, or division of an entity, hereinafter referred to collectively as "alternate entities," engaged in the business of researching, studying, manufacturing, fabricating, designing, modifying, labeling, instructing, assembling, distributing, leasing, buying, offering for sale, supplying, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, re-branding, manufacturing for others, packaging and advertising a certain product, namely asbestos, other products containing asbestos, and products manufactured for foreseeable use with asbestos products.

47. At all times herein mentioned, Defendants, and/or their "alternate entities" singularly and jointly, negligently and carelessly researched, manufactured, fabricated, designed, modified, tested or failed to test, abated or failed to abate, inadequately warned or failed to warn of the health hazards, failed to provide adequate use instructions for eliminating the health risks inherent in the use of the products, labeled, assembled, distributed, leased, bought, offered for sale, supplied, sold, inspected, serviced, installed, contracted for installation, repaired, marketed, warranted, rebranded, manufactured for others, packaged and advertised, a certain product, namely

asbestos, other products containing asbestos, and products manufactured for foreseeable use with asbestos products, in that said products caused personal injuries to Decedent Lewis C. Childers and others similarly situated, (hereinafter collectively called "exposed persons"), while being used for their intended purpose and in a manner that was reasonably foreseeable.

48. The asbestos and asbestos-containing products were defective and unsafe for their intended purpose in that there was an alternative for asbestos that could have been used as the product or as a component instead of asbestos within a normally asbestos-containing/utilizing product. Said alternatives would have prevented Defendants' asbestos and asbestos-containing products from causing Decedent Lewis C. Childers' lung cancer, due to an inability of any asbestos-alternative to penetrate the pleural lining of Decedent Lewis C. Childers' lung, even if inhaled. Said alternatives came at a comparable cost to each of the Defendants and/or their "alternate entities." Said alternatives were of comparable utility to the asbestos or asbestos-containing products of Defendants and/or their "alternate entities." The gravity of the potential harm resulting from the use of Defendants' asbestos or asbestos-containing products, and the likelihood such harm would occur to users of its products, far outweighed any additional cost or marginal loss of functionality in creating and/or utilizing an alternative design, providing adequate warning of such potential harm, and/or providing adequate use instructions for eliminating the health risks inherent in the use of their products, thereby rendering the same defective, unsafe and dangerous for use by Decedent Lewis C. Childers. Defendants and/or their "alternate entities" had a duty to exercise due care in the pursuance of the activities mentioned above and Defendants, each of them, breached said duty of due care.

49. Defendants and/or their "alternate entities" knew or should have known, and intended that the aforementioned asbestos and asbestos-containing products would be transported by truck, rail, ship and other common carriers, that in the shipping process the products would

break, crumble or be otherwise damaged; and/or that such products would be used for insulation, construction, plastering, fireproofing, soundproofing, automotive, aircraft and/or other applications, including, but not limited to grinding sawing, chipping, hammering, scraping, sanding, breaking, removal, "rip-out," and other manipulation, resulting in the release of airborne asbestos fibers, and that through such foreseeable use and/or handling by exposed persons, including Decedent Lewis C. Childers, would use or be in proximity to and exposed to said asbestos fibers.

50. At all times relevant, Defendants and/or their "alternate entities" were aware of their asbestos and asbestos-containing products' defect but failed to adequately warn Decedent Lewis C. Childers, Decedent's family members or others in their vicinity, as well as failed to adequately warn others of the known hazards associated with their products and/or failed to recall or retrofit their products. A reasonable manufacturer, distributor, or seller of Defendants' products would have, under the same or similar circumstances, adequately warned of the hazards associated with their products.

51. Decedent Lewis C. Childers, Decedent's family members and others in their vicinity used, handled or were otherwise exposed to asbestos and asbestos-containing products referred to herein in a manner that was reasonably foreseeable. Decedent's exposure to asbestos and asbestos-containing products occurred at various locations as set forth in this Complaint.

52. Decedent Lewis C. Childers suffers from lung cancer, a cancer related to exposure to asbestos and asbestos-containing products. Decedent Lewis C. Childers was not aware at the time of exposure that asbestos or asbestos-containing products presented any risk of injury or disease.

53. Defendants' conduct and defective products as described in this cause of action were a direct cause of Decedent Lewis C. Childers' injuries, and all damages thereby sustained by

Decedent Lewis C. Childers. Plaintiff therefore seeks all compensatory damages in order to make them whole, according to proof.

54. Furthermore, the conduct of Defendants and/or their "alternate entities" in continuing to market and sell products which they knew were dangerous to Decedent Lewis C. Childers and the public without adequate warnings or proper use instructions was done in a conscious disregard and indifference to the safety and health of Decedent Lewis C. Childers and others similarly situated.

55. In researching, manufacturing, fabricating, designing, modifying, testing or failing to test, warning or failing to warn, failing to recall or retrofit, labeling, instructing, assembling, distributing, leasing, buying, offering for sale, supplying, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, rebranding, manufacturing for others, packaging and advertising asbestos and asbestos-containing products or products manufactured for foreseeable use with asbestos products, Defendants and/or their "alternate entities" did so with conscious disregard for the safety of "exposed persons" who came in contact with asbestos and asbestos-containing products, in that Defendants and/or their "alternate entities" had prior knowledge that there was a substantial risk of injury or death resulting from exposure to asbestos, asbestos-containing products or products manufactured for foreseeable use with asbestos products, including, but not limited to, asbestosis, lung cancer, lung cancer, and other lung damages. This knowledge was obtained, in part, from scientific studies performed by, at the request of, or with the assistance of Defendants and/or their "alternate entities."

56. Defendants and their "alternate entities" were aware that members of the general public and other "exposed persons," who would come in contact with their asbestos and asbestos-containing products, had no knowledge or information indicating that asbestos, asbestos-containing products, or products manufactured for foreseeable use with asbestos products, could

cause injury, and Defendants, and their "alternate entities," each of them, knew that members of the general public and other "exposed persons," who came in contact with asbestos and asbestos-containing products or products manufactured for foreseeable use with asbestos products, would assume, and in fact did assume, that exposure to asbestos and asbestos-containing products was safe, when in fact said exposure was extremely hazardous to health and human life.

57. The above-referenced conduct of Defendants, and their "alternate entities," was motivated by the financial interest of Defendants, their "alternate entities," and each of them, in the continuing, uninterrupted research, design, modification, manufacture, fabrication, labeling, instructing, assembly, distribution, lease, purchase, offer for sale, supply, sale, inspection, installation, contracting for installation, repair, marketing, warranting, rebranding, manufacturing for others, packaging and advertising of asbestos, asbestos-containing products and products manufactured for foreseeable use with asbestos products. Defendants, their "alternate entities," and each of them consciously disregarded the safety of "exposed persons" in pursuit of profit. Defendants were consciously willing and intended to permit asbestos and asbestos-containing products to cause injury to "exposed persons" without warning them of the potential hazards and further induced persons to work with and be exposed thereto, including Decedent Lewis C. Childers.

58. Decedent Lewis C. Childers and other exposed persons did not know of the substantial danger of using Defendants' asbestos, asbestos containing-products, and products manufactured for foreseeable use with asbestos products. The dangers inherent in the use of these products were not readily recognizable by Decedent Lewis C. Childers or other exposed persons. Defendants and/or their "alternate entities" further failed to adequately warn of the risks to which Decedent and others similarly situated were exposed.

59. Defendants and/or their "alternate entities" are liable for the fraudulent, oppressive, and malicious acts of their "alternate entities," and each Defendant's officers, directors and managing agents participated in, authorized, expressly and impliedly ratified, and had full knowledge of, or should have known of, the acts of each of their "alternate entities" as set forth herein.

60. The herein-described conduct of Defendants, and their "alternate entities," was and is willful, malicious, fraudulent, and outrageous and in conscious disregard and indifference to the safety and health of persons foreseeably exposed. Plaintiff, for the sake of example and by way of punishing said Defendants, seeks punitive damages according to proof against all defendants.

FOR A SECOND CAUSE OF ACTION
(Product Liability: Strict Liability - S.C. Code Ann. § 15-73-10, et seq.)

As a Second and Distinct Cause of Action for Strict Liability, Plaintiff Complains of Defendants, and Alleges as Follows:

61. Plaintiff incorporates herein by reference, as though fully set forth herein, each of the preceding paragraphs.

62. Decedent Lewis C. Childers suffered from lung cancer, a cancer related to exposure to asbestos, asbestos-containing products and products manufactured for foreseeable use with asbestos products. Decedent Lewis C. Childers was not aware at the time of exposure that asbestos or asbestos-containing products presented any risk of injury and/or disease.

63. The Defendants' conduct and defective products as described above were a direct cause of Decedent Lewis C. Childers' injuries, and the injuries and damages thereby sustained by Plaintiff.

64. Furthermore, the Defendants' conduct and that of their "alternate entities" in continuing to market and sell products which they knew were dangerous to Decedent Lewis C. Childers and the public without adequate warnings or proper use instructions, was done in a

conscious disregard and indifference to the safety and health of Decedent Lewis C. Childers and others similarly situated.

65. Defendants and/or their "alternate entities" knew or should have known, and intended that the aforementioned asbestos and products containing asbestos would be transported by truck, rail, ship and other common carriers, that in the shipping process the products would break, crumble or be otherwise damaged; and/or that such products would be used for insulation, construction, plastering, fireproofing, soundproofing, automotive, aircraft and/or other applications, including, but not limited to grinding, sawing, chipping, hammering, scraping, sanding, breaking, removal, "rip-out," and other manipulation, resulting in the release of airborne asbestos fibers, and that through such foreseeable use and/or handling, "exposed persons," including Decedent, would use or be in proximity to and exposed to said asbestos fibers.

66. Decedent Lewis C. Childers, Decedent's family members, and others in their vicinity used, handled or were otherwise exposed to asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products, referred to herein in a manner that was reasonably foreseeable. Decedent Lewis C. Childers' exposure to asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products occurred at various locations as set forth in this Complaint.

67. Defendants and/or their "alternate entities" knew and intended that the above-referenced asbestos and asbestos-containing products would be used by the purchaser or user without inspection for defects therein or in any of their component parts and without knowledge of the hazards involved in such use.

68. The asbestos and asbestos-containing products were defective and unsafe for their intended purpose in that there was an alternative for asbestos that could have been used as the product or as a component instead of asbestos within a normally asbestos-containing/utilizing

product. Said alternatives would have prevented Defendants' asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products from causing Decedent Lewis C. Childers' lung cancer, due to an inability of any asbestos-alternative to penetrate the pleural lining of Decedent Lewis C. Childers' lung, even if inhaled. Said alternatives came at a comparable cost to each of the Defendants and/or their "alternate entities." Said alternatives were of comparable utility to the asbestos or asbestos-containing products or products manufactured for foreseeable use with asbestos products of Defendants and/or their "alternate entities." The gravity of the potential harm resulting from the use of Defendants' asbestos or asbestos-containing products, and the likelihood such harm would occur, far outweighed any additional cost or marginal loss of functionality in creating and/or utilizing an alternative design, providing adequate warning of such potential harm, and/or providing adequate use instructions for eliminating the health risks inherent in the use of their products, thereby rendering the same defective, unsafe and dangerous for use.

69. The defect existed in the said products at the time they left the possession of defendants, and/or their "alternate entities," and each of them. Said products were intended to reach the ultimate consumer in the same condition as it left defendants. Said products did, in fact, cause personal injuries, including lung cancer, asbestosis, other lung damage, and cancer to "exposed persons," including Decedent Lewis C. Childers herein, while being used in a reasonably foreseeable manner, thereby rendering the same defective, unsafe and dangerous for use.

70. Decedent Lewis C. Childers and other exposed persons did not know of the substantial danger of using Defendants' asbestos, asbestos-containing products, or products manufactured for foreseeable use with asbestos products. The dangers inherent in the use of these products were not readily recognizable by Decedent or other exposed persons. Said Defendants

and/or their "alternate entities" further failed to adequately warn of the risks to which Decedent Lewis C. Childers and others similarly situated were exposed.

71. Defendants' defective products as described above were a direct cause of Decedent Lewis C. Childers' injuries, and the damages thereby sustained.

72. In researching, manufacturing, fabricating, designing, modifying, testing or failing to test, warning or failing to warn, labeling, instructing, assembling, distributing, leasing, buying, offering for sale, supplying, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, rebranding, manufacturing for others, packaging and advertising asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products, Defendants, and/or their "alternate entities," and each of them, did so with conscious disregard for the safety of Decedent Lewis C. Childers and other exposed persons who came in contact with the asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products, in that Defendants and/or their "alternate entities" had prior knowledge that there was a substantial risk of injury or death resulting from exposure to asbestos or asbestos-containing products or products manufactured for foreseeable use with asbestos products, including, but not limited to, lung cancer, asbestosis, other lung damages and cancers. This knowledge was obtained, in part, from scientific studies performed by, at the request of, or with the assistance of Defendants and/or their "alternate entities."

73. Defendants and/or their "alternate entities" were aware that members of the general public and other exposed persons, who would come in contact with their asbestos and asbestos-containing products, had no knowledge or information indicating that asbestos or asbestos-containing products or products manufactured for foreseeable use with asbestos products could cause injury. Defendants and/or their "alternate entities" further knew that members of the general public and other exposed persons, who came in contact with asbestos, asbestos-containing

products, and products manufactured for foreseeable use with asbestos products would assume, and in fact did assume, that exposure to asbestos and asbestos- containing products was safe, when in fact exposure was extremely hazardous to health and human life.

74. The above-referenced conduct of Defendants and/or their "alternate entities" motivated by the financial interest of Defendants, their "alternate entities," and each of them, in the continuing and uninterrupted research, design, modification, manufacture, fabrication, labeling, instructing, assembly, distribution, lease, purchase, offer for sale, supply, sale, inspection, installation, contracting for installation, repair, marketing, warranting, rebranding, manufacturing for others, packaging and advertising of asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products. Defendants and/or their "alternate entities" consciously disregarded the safety of "exposed persons" in their pursuit of profit and in fact consciously intended to cause injury to Decedent Lewis C. Childers and other exposed persons and induced persons to work with, be exposed to, and thereby injured by asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products.

75. Defendants are liable for the fraudulent, oppressive, and malicious acts of their "alternate entities," and each Defendant's officers, directors and managing agents participated in, authorized, expressly and impliedly ratified, and knew, or should have known of, the acts of each of their "alternate entities" as set forth herein.

76. The conduct of said defendants, their "alternate entities," and each of them as set forth in this Complaint, was and is willful, malicious, fraudulent, outrageous and in conscious disregard and indifference to the safety and health of exposed persons. Plaintiff, for the sake of example and by way of punishing said Defendants, seeks punitive damages according to proof against all Defendants.

77. At all times herein mentioned, each of the named Defendants was an entity and/or the successor, successor in business, successor in product line or a portion thereof, assign, predecessor, predecessor in business, predecessor in product line or a portion thereof, parent, subsidiary, or division of an entity, hereinafter referred to collectively as "alternate entities," engaged in the business of researching, studying, manufacturing, fabricating, designing, modifying, labeling, instructing, assembling, distributing, leasing, buying, offering for sale, supplying, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, re-branding, manufacturing for others, packaging and advertising a certain product, namely asbestos, other products containing asbestos and products manufactured for foreseeable use with asbestos products.

FOR A THIRD CAUSE OF ACTION
(Vicarious Liability of Defendants Based upon Respondeat Superior)

As a Third Distinct Cause of Action Against Defendants, Plaintiff Brings this Third Cause of Action for Vicarious Liability of Product and Premises Defendants Based upon Respondeat Superior and Alleges as Follows:

78. Plaintiff incorporates herein by reference, as though fully set forth herein, each of the preceding paragraphs.

79. Prior to and during all relevant times Defendants and/or their "alternate entities" employed workers (hereinafter "employees") in areas where defendants owned, maintained, controlled, managed and/or conducted business activities where Decedent worked and/or spent time as alleged above.

80. At all times herein mentioned, Defendants' employees frequently encountered asbestos-containing products, materials, and debris during the course and scope of their employment, and during their regular work activities negligently disturbed asbestos-containing materials to which Decedent Lewis C. Childers was exposed.

81. Employees handling and disturbing asbestos-containing products in Decedent Lewis C. Childers' vicinity were the agents and employees of defendants and at all times relevant were subject to the control of Defendants with respect to their acts, labor, and work involving (a) the removal, transport, installation, cleaning, handling, and maintenance of asbestos-containing products, materials, and debris, and (b) the implementation of safety policies and procedures. Defendants controlled both the means and manner of performance of the work of their employees as described herein.

82. Employees handling and disturbing asbestos-containing products in Decedent Lewis C. Childers', Decedent's family members and others' vicinity received monetary compensation from Defendants in exchange for the work performed and these employees performed the work in the transaction and furtherance of Defendants' businesses.

83. Harmful asbestos fibers were released during Defendants' employees' use, handling, breaking, or other manipulation of asbestos-containing products and materials.

84. Once released, the asbestos fibers contaminated the clothes, shoes, skin, hair, and body parts of those exposed, including Decedent Lewis C. Childers, who also inhaled those fibers, and on the surfaces of work areas, where further activity caused the fibers to once again be released into the air and inhaled by Decedent Lewis C. Childers.

85. The asbestos and asbestos-containing materials were unsafe in that handling and disturbing products containing asbestos causes the release of asbestos fibers into the air onto surrounding surfaces, and onto persons in the area. The inhalation of asbestos fibers can cause serious disease and death.

86. Defendants' employees' use, handling and manipulation of asbestos-containing materials, as required by their employment and occurring during the course and scope of their

employment, did in fact, cause personal injuries, including lung cancer and other lung damage, to exposed persons including Decedent Lewis C. Childers.

87. Defendants' employees were negligent in their use, handling and manipulation of said products in that they failed to isolate their work with asbestos and/or to suppress asbestos fibers from being released into the air and surrounding areas. They also failed to take appropriate steps to learn how to prevent exposure to asbestos, failed to warn and/or adequately warn Decedent that he was being exposed to asbestos, failed to adequately warn Decedent Lewis C. Childers of the harm associated with his exposure to asbestos, and provide him with protection to prevent his inhalation of asbestos.

88. Defendants' employees knew or should have known that failure to take such steps would result in exposure to bystanders including Decedent Lewis C. Childers.

89. Defendants' employees owed Decedent Lewis C. Childers a duty to exercise due care and diligence in their activities while he was lawfully on the premises so as not to cause him harm.

90. Defendants' employees breached this duty of care as described above.

91. At all times mentioned, Decedent Lewis C. Childers was unaware of the dangerous condition and unreasonable risk of personal injury created by Defendants' employees' use of and work with asbestos-containing products and materials.

92. As a direct result of the Defendants' employees conduct, Decedent Lewis C. Childers' exposure to asbestos, asbestos-containing materials, and products manufactured for foreseeable use with asbestos products, each individually and together, caused severe and permanent injury to Decedent Lewis C. Childers and the damages and injuries as complained of herein by Plaintiff.

93. The risks herein alleged, and the resultant damages suffered by the Decedent Lewis C. Childers were typical of or broadly incidental to Defendants' business enterprises. As a practical matter, the losses caused by the torts of Defendants' employees as alleged were sure to occur in the conduct of Defendants' business enterprises. Nonetheless, Defendants engaged in, and sought to profit by, their business enterprises without exercising due care as described in this Complaint, which, on the basis of past experience, involved harm to others as shown through the torts of employees.

94. Based on the foregoing, Defendants as the employers of said employees are vicariously liable under the doctrine of respondeat superior for all negligent acts and omissions committed by their employees in the course and scope of their work that caused harm to Decedent Lewis C. Childers.

FOR A FOURTH CAUSE OF ACTION
(Premises Liability: Negligence as to Premises Owner/Contractor)

As a Fourth Distinct Cause of Action for General Negligence, Plaintiff Complains of Premises Defendants, and Alleges as Follows:

95. Plaintiff incorporates by reference, the preceding paragraphs as if fully set forth herein.

96. Prior to and during all relevant times, the Defendants and/or their "alternate entities" employed workers in areas where Defendants owned, maintained, controlled, managed and/or conducted business activities where Decedent Lewis C. Childers worked and/or spent time.

97. At all times herein mentioned, Defendants selected, supplied, and distributed asbestos-containing materials to their employees for use during their regular work activities, and said employees disturbed those asbestos-containing materials.

98. Defendants were negligent in selecting, supplying, distributing and disturbing the asbestos-containing products and in that said products were unsafe. Said products were unsafe

because they released asbestos fibers and dust into air when used which would be inhaled by Decedent Lewis C. Childers and settled onto his clothes, shoes, hands, face, hair, skin, and other body parts thus creating a situation whereby workers and by-standers including Decedent Lewis C. Childers would be exposed to dangerous asbestos dust beyond the present.

99. The asbestos, asbestos-containing materials, and products manufactured for foreseeable use with asbestos products described herein were unsafe in that handling and disturbing products containing asbestos causes the release of asbestos fibers into the air, and the inhalation of asbestos fibers causes serious disease and death. Here, the handling of the above-described asbestos-containing materials by Defendants' employees, as required by their employment and occurring during the course and scope of their employment, did, in fact, cause personal injuries, including lung cancer and other lung damage, to exposed persons, including Decedent.

100. At all times herein mentioned, Defendants knew or should have known that its employees and bystanders thereto, including Decedent Lewis C. Childers, frequently encountered asbestos-containing products and materials during the course and scope of their work activities.

101. At all times herein mentioned, Defendants knew or should have known that the asbestos-containing materials encountered by its employees and bystanders thereto including Decedent Lewis C. Childers, were unsafe in that harmful asbestos fibers were released during the use, handling, breaking, or other manipulation of asbestos-containing products and materials, and that once released, asbestos fibers can be inhaled, and can alight on the clothes, shoes, skin, hair, and body parts of those exposed, where further activity causes the fibers to once again be released into the air where they can be inhaled, all of which causes serious disease and/or death.

102. At all times herein mentioned, Defendants, in the exercise of reasonable diligence, should have known that absent adequate training and supervision, their employees and bystanders

thereto including Decedent Lewis C. Childers were neither qualified nor able to identify asbestos-containing products nor to identify the hazardous nature of their work activities involving asbestos-containing products.

103. At all times herein mentioned, Decedent Lewis C. Childers was unaware of the dangerous condition and unreasonable risk of personal injury created by the presence and use of asbestos-containing products and materials.

104. At all times herein mentioned, Defendants, in the exercise of reasonable diligence, should have known that workers and bystanders thereto, would bring dangerous dust home from the workplace and contaminate their family cars and homes, continuously exposing and potentially causing injury to others off the premises.

105. At all times herein mentioned, Defendants had a duty to use due care in the selection, supply, distribution and disturbance of asbestos-containing products and materials to its employees, to adequately instruct, train, and supervise their employees and to implement adequate safety policies and procedures to protect workers and persons encountering those workers, including Decedent Lewis C. Childers, from suffering injury or death as a result of the asbestos hazards encountered and created by the work of Defendants' employees.

106. Defendants' duties as alleged herein exist and existed independently of Defendants' duties to maintain their premises in reasonably safe condition, free from concealed hazards.

107. Defendants negligently selected, supplied, and distributed the asbestos-containing materials and failed to adequately train or supervise their employees to identify asbestos-containing products and materials; to ensure the safe handling of asbestos-containing products and materials encountered during the course of their work activities; and to guard against inhalation of asbestos fibers and against the inhalation of asbestos fibers by those who would come into close

contact with them after they had used, disturbed, or handled, said asbestos-containing products and materials during the course and scope of their employment by Defendants.

108. Defendants failed to warn its employees and bystanders thereto, including Decedent Lewis C. Childers, of the known hazards associated with asbestos and the asbestos-containing materials they were using and/or disturbing.

109. As a direct and proximate result of the conduct of Defendants in selecting, supplying, distributing and disturbing asbestos-containing materials or products manufactured for foreseeable use with asbestos products and failing to adequately train and supervise their employees and failing to adopt and implement adequate safety policies and procedures as alleged herein, Decedent Lewis C. Childers became exposed to and inhaled asbestos fibers, which was a substantial factor in causing Decedent Lewis C. Childers to develop asbestos-related disease lung cancer, and to suffer all damages attendant thereto.

FOR A FIFTH CAUSE OF ACTION
(Negligence Per Se)

As a Fifth Distinct Cause of Action for Negligence Per Se, Plaintiff Complains of Defendants, and Alleges as Follows:

110. Plaintiff incorporates herein by reference, as though fully set forth herein, each of the preceding paragraphs.

111. The actions of Defendants also constituted negligence per se.

112. Defendants violated federal and state regulations relating to asbestos exposure. Such violations constitute negligence per se or negligence as a matter of law. Further, each such violation resulted in dangerous and unlawful exposures to asbestos for Decedent Lewis C. Childers. Plaintiff is not making any claims under federal law; instead, Plaintiff is simply using the violation of federal standards as proof of liability on her state-law theories. Further, the reference to Federal regulations does not create a federal question. *See* Merrell Dow Pharms., Inc.

v. Thompson, 478 U.S. 804 (1986). Any removal on this basis will be met with an immediate motion for remand and for sanctions.

113. The negligence per se of Defendants was a proximate cause of Decedent's injuries.

FOR A SIXTH CAUSE OF ACTION
(Product Liability: Breach of Implied Warranties - S.C. Code Ann. § 36-2-314)

As a Sixth Distinct Cause of Action for Breach of Implied Warranties, Plaintiff Complains of Defendants and Alleges as Follows:

114. Plaintiff incorporates herein by reference, as though fully set forth herein, each of the preceding paragraphs.

115. Each of the Defendants and/or their "alternate entities" impliedly warranted that their asbestos materials or asbestos-containing products were of good and merchantable quality and fit for their intended use.

116. The implied warranty made by the Defendants and/or their "alternate entities" that the asbestos and asbestos-containing products were of good and merchantable quality and fit for the particular intended use, was breached. As a result of that breach, asbestos was given off into the atmosphere where Decedent Lewis C. Childers carried out his duties and was inhaled by Decedent Lewis C. Childers.

117. As a direct and proximate result of the breach of the implied warranty of good and merchantable quality and fitness for the particular intended use, Decedent Lewis C. Childers was exposed to Defendants' asbestos, asbestos-containing products, and/or products manufactured for foreseeable use with asbestos products and consequently developed lung cancer, causing Decedent to suffer all damages attendant thereto.

FOR A SEVENTH CAUSE OF ACTION
(Fraudulent Misrepresentation)

For a Seventh Distinct Cause of Action for Fraudulent Misrepresentation, Plaintiff Complains of Defendants, and Alleges as Follows:

118. Plaintiff repeats and re-alleges the portions of the above paragraphs where relevant.

119. That during, before and after Decedent Lewis C. Childers' exposure to asbestos products manufactured by Defendants and/or their "alternate entities", the Defendants and/or their "alternate entities" falsely represented facts, including the dangers of asbestos exposure to Decedent Lewis C. Childers in the particulars alleged in the paragraphs above, while Defendants each had actual knowledge of said dangers of asbestos exposure to persons such as Decedent Lewis C. Childers. At the same time of these misrepresentations, Defendants each knew of the falsity of their representations and/or made the representations in reckless disregard of their truth or falsity.

120. The foregoing representations were material conditions precedent to Decedent Lewis C. Childers' continued exposure to asbestos-containing products. Defendants and/or their "alternate entities" each intended that Decedent Lewis C. Childers act upon the representations by continuing his work around, and thereby exposure to, the asbestos products. Decedent Lewis C. Childers was ignorant of the falsity of Defendants' representations and rightfully relied upon the representations.

121. As a direct and proximate result Decedent Lewis C. Childers' reliance upon Defendants' false representations, Decedent has suffered injury and damages as described herein.

FOR AN EIGHTH CAUSE OF ACTION
(Wrongful Death Action, S.C. Code Ann. § 15-51-10, et seq.)

For an Eighth Distinct Cause of Action for Wrongful Death, Plaintiff Complains of Defendants, and Alleges as Follows:

122. Plaintiff incorporates herein by reference, as though fully set forth herein, each of the preceding paragraphs, where relevant.

123. Plaintiff brings this cause of action for Lewis C. Childers' wrongful death pursuant to S.C. Code Ann. § 15-51-10, for the benefit of Lenora Childers, as the widow of Decedent, and on behalf of the heirs of Lewis C. Childers, as defined by S.C. Code § 15-51-20.

124. As a direct and proximate result of the negligence, recklessness, carelessness, and intentional actions of Defendants as described above, Lewis C. Childers died on May 13, 2020, and his wife and heirs have and will endure pecuniary loss, mental shock and suffering, wounded feelings, grief, sorrow, loss of love, loss of society with the Decedent, loss of guidance from the Decedent, loss of his companionship and deprivation of the use and comfort of the Decedent's experience, knowledge and judgment in managing the affairs of himself and his beneficiaries, and they have been otherwise seriously damaged. Moreover, reasonable funeral expenses were incurred, and Plaintiff prays for judgment against Defendants in such amount of actual and punitive damages as the trier of fact may determine.

FOR A NINTH CAUSE OF ACTION
(Loss of Consortium)

For a Ninth Distinct Cause of Action for Loss of Consortium, Plaintiff Lenora Childers Complains of Defendants, and Alleges as Follows:

125. Plaintiff incorporates by reference, the preceding paragraphs, where relevant.

126. Decedent Lewis C. Childers and Plaintiff Lenora Childers were married on or about April 19, 2014, and at all times relevant to this action were husband and wife.

127. Prior to his injuries as alleged, Decedent Lewis C. Childers was able and did perform his spousal duties. As a proximate result thereof, subsequent to the injuries, Decedent

Lewis C. Childers has been unable to perform his spousal duties and the work and service usually performed in the care, maintenance and management of the family home. As a proximate result thereof, Plaintiff Lenora Childers was deprived of the consortium of her spouse, including the performance of duties, all to Decedent's damages, in an amount presently unknown to Plaintiff but which will be proven at time of trial.

128. As a direct and proximate result of the acts of Defendants and/or their "alternate entities" and the severe injuries caused to Decedent Lewis C. Childers as set forth herein, Decedent's spouse and Plaintiff Lenora Childers suffered loss of consortium, including but not by way of limitation, loss of services, marital relations, society, comfort, companionship, love, and affection of her spouse, and has suffered severe mental and emotional distress and general nervousness. Plaintiff prays judgment against Defendants, their "alternate entities" and each of them, as hereinafter set forth.

FOR A TENTH CAUSE OF ACTION
(Survival Action, S.C. Code Ann. § 15-5-90)

For a Tenth Distinct Cause of Action, known statutorily as a Survival Action, Plaintiff Complains of Defendants, and Allege as Follows:

129. Plaintiff incorporates herein by reference, as though fully set forth herein, each of the preceding paragraphs, where relevant.

130. Plaintiff, Lenora Childers, is the wife of Decedent Lewis C. Childers. Plaintiff, Lenora Childers, as Executor of the Estate of Lewis C. Childers, deceased, brings this survival action as allowed under S.C. Code Ann. § 15-5-90.

131. Plaintiff brings this cause of action for Decedent's medical, surgical and hospital bills, as well as for Decedent's conscious pain and suffering prior to his untimely death, as well as for the mental distress of Decedent due to knowledge of his impending death from his incurable disease.

132. As a direct and proximate result of the negligence, recklessness, carelessness, and in some cases intentional actions of Defendants as described, Decedent Lewis C. Childers endured conscious pain, suffering, mental anguish and distress until his untimely death, and Plaintiff prays for judgment against Defendants in such amount of actual and punitive damages as the trier of fact may determine is just.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays judgment, joint and several, against Defendants and/or their "alternate entities" in an amount to be proved at trial, as follows:

1. For Decedent's actual damages according to proof, including pain and suffering, mental distress, as well as medical, surgical and hospital bills;

2. For loss of income or earnings according to proof;

3. For loss of care, comfort and society;

4. For pecuniary loss of the beneficiaries/heirs including but not limited to funeral and burial costs, for mental shock and suffering of the beneficiaries/heirs, for wounded feelings of the beneficiaries/heirs, for grief and sorrow of the beneficiaries/heirs, loss of his companionship and deprivation of the use and comfort of the Decedent's experience, knowledge and judgment in managing the affairs of himself and his beneficiaries;

5. For punitive damages according to proof;

6. For Plaintiff's cost of suit herein;

7. For damages for breach of implied warranty according to proof;

8. For damages for fraudulent misrepresentation according to proof;

9. All economic and non-economic damages allowed pursuant to the Survival and Wrongful Death Act; and

10. For such other and further relief as the Court may deem just and proper, including costs and prejudgment interest as provided by South Carolina law.

A JURY IS RESPECTFULLY DEMANDED TO TRY THESE ISSUES.

Respectfully submitted,

s/Theile B. McVey
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and

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ATTORNEYS FOR PLAINTIFF

July 14, 2021

Columbia, South Carolina.

EXHIBIT 6

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

v.

3M COMPANY

4520 CORP., INC.

AIR & LIQUID SYSTEMS CORPORATION

AMENTUM ENVIRONMENT & ENERGY, INC.

AMERICAN OPTICAL CORPORATION

ANCHOR/DARLING VALVE COMPANY

ARMSTRONG INTERNATIONAL, INC.

ASBESTOS CORPORATION LIMITED

ASCO, L.P.

ATLAS TURNER INC.

BEATY INVESTMENTS, INC.

BW/IP INC.

CAMERON INTERNATIONAL CORPORATION

CANVAS CT, LLC

CAPE PLC

CELANESE CORPORATION

CLEAVER-BROOKS, INC.

C/A NO. 2021-CP-40-03484

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

SECOND AMENDED SUMMONS

CNA HOLDINGS LLC)
)
CONSOLIDATED ELECTRICAL DISTRIBUTORS, INC.)
)
COPES-VULCAN, INC.)
)
COVIL CORPORATION)
)
CRANE INSTRUMENTATION & SAMPLING PFT CORP.)
)
DANIEL INTERNATIONAL CORPORATION)
)
DAVIS MECHANICAL CONTRACTORS, INC.)
)
DEZURIK, INC.)
)
ECODYNE CORPORATION)
)
ELECTROLUX HOME PRODUCTS, INC.)
)
FLAME REFRACTORIES, INC.)
)
FLOWSERVE CORPORATION)
)
FLOWSERVE US INC.)
)
FLUOR CONSTRUCTORS INTERNATIONAL)
)
FLUOR CONSTRUCTORS INTERNATIONAL, INC.)
)
FLUOR DANIEL SERVICES CORPORATION)
)
FLUOR ENTERPRISES, INC.)
)
FMC CORPORATION)
)
FOSTER WHEELER ENERGY CORPORATION)
)
GARDNER DENVER NASH, LLC)
)

GENERAL BOILER CASING COMPANY, INC.)
)
GENERAL ELECTRIC COMPANY)
)
THE GOODYEAR TIRE & RUBBER COMPANY)
)
GOULDS PUMPS, INCORPORATED)
)
GOULDS PUMPS LLC)
)
GREAT BARRIER INSULATION CO.)
)
GRINNELL LLC)
)
HEFCO, INC.)
)
IMO INDUSTRIES, INC.)
)
ITT LLC)
)
J. R. DEANS COMPANY, INC.)
)
JOHNSON CONTROLS, INC.)
)
METROPOLITAN LIFE INSURANCE COMPANY)
)
MINE SAFETY APPLIANCES COMPANY, LLC)
)
THE NASH ENGINEERING COMPANY)
)
NEW-INDY CATAWBA LLC)
)
NEW-INDY CONTAINERBOARD LLC)
)
NIBCO INC.)
)
PARAMOUNT GLOBAL)
)
PAYNE & KELLER COMPANY)
)
PIEDMONT INSULATION, INC.)
)
PRESNELL INSULATION CO., INC.)

REDCO CORPORATION)
)
RESOLUTE FP US INC.)
)
RILEY POWER INC.)
)
SFB, INCORPORATED)
)
SOUTHERN INSULATION, INC.)
)
SPIRAX SARCO, INC.)
)
STAFFORD INSULATION COMPANY)
)
STANDARD INSULATION COMPANY OF N. C., INC.)
)
STARR DAVIS COMPANY, INC.)
)
STARR DAVIS COMPANY OF S.C., INC.)
)
STERLING FLUID SYSTEMS (USA) LLC)
)
SYSTRA ENGINEERING, INC.)
)
UNIROYAL HOLDING, INC.)
)
VALVES AND CONTROLS US, INC.)
)
VELAN VALVE CORP.)
)
VIKING PUMP, INC.)
)
VISTRA INTERMEDIATE COMPANY LLC)
)
WARREN PUMPS LLC)
)
THE WILLIAM POWELL COMPANY)
)
WIND UP, LTD.)
)
ZURN INDUSTRIES, LLC)
)
Defendants.)

SECOND AMENDED SUMMONS

TO DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Second Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the Plaintiff's counsel, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service. If you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Respectfully submitted,

/s/ Theile B. McVey

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Jamie D. Rutkoski (SC Bar No. 103270)
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and

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To Be Admitted *Pro Hac Vice*
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ATTORNEYS FOR PLAINTIFF

May 9, 2023
Columbia, South Carolina.

EXHIBIT 7

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**
Plaintiff,	)	*In Re:* Asbestos Personal Injury Litigation Coordinated Docket
v.	)	**ORDER**
DAVIS MECHANICAL CONTRACTORS, INC., et al.	)	
Defendants.	)	

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

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

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

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

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

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

AND IT SO ORDERED this _____ day of _____ 2021.

_____

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

Richland Common Pleas

Case Caption: Lenora Childers , plaintiff, et al vs Davis Mechanical Contractors , defendant, et al

Case Number: 2021CP4003484

Type: Order/Appointment of Receiver

So Ordered

Jean H. Toal

EXHIBIT 8

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

PETER D. PROTOPAPAS, as Receiver,

Administrative Plaintiff,

v.

Beaty Investments, Inc.
f/k/a Guy M. Beaty, Inc.

Covil Corporation

Davis Mechanical Contractors, Inc.
f/k/a Bryant-Davis Electric Co.

Flame Refractories, Inc.
f/k/a Oakboro Industrial Construction

General Boiler Casing Company, Inc.
f/k/a American Business Services, Inc.

Great Barrier Insulation Co., Inc.

Heat & Frost Insulation Co., Inc.

HEFCO, Inc.

J. & L. Insulation, Inc.

J.R. Deans Company, Inc.

Payne & Keller Company
f/k/a Payne & Keller, Inc.
f/k/a Frentex Enterprises Co.

Piedmont Insulation, Inc.

Presnell Insulation Co., Inc.

Southern Insulation, Inc.

Stafford Insulation Company

In Re: Asbestos Personal Injury Litigation
Coordinated Docket

Case No. 2023-CP-40-

COMPLAINT FOR ADMINISTRATION OF RECEIVERSHIP

Standard Insulation Company of N.C., Inc.

Starr Davis Co., Inc.

Starr Davis Co. of S.C., 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.

Nominal Administrative Defendants.

NOW COMES Peter D. Protopapas seeking a declaration that this action is the proper uniform depository for the filing of Receivership information and status reports. The Receiver would further show:

PARTIES

1. Peter D. Protopapas is a lawyer licensed to practice in Richland County South Carolina with his primary office in Richland County.
2. This Court has appointed Mr. Protopapas as the Receiver for the following entities, which are the nominal administrative defendants named above:
    a. Beaty Investments, Inc. on August 24, 2022, in Case No.: 2022-CP-40-01241 in *Lamm, et al v. 4520 Corp., Inc., et al.*
    b. Covil Corporation on November 2, 2018, in Case No.: 2018-CP-40-04940 in *Taylor, et al v. Air & Liquid Systems Corp., et al.*
    c. Davis Mechanical Contractors, Inc. on December 7, 2021, in Case No.: 2021-CP-40-03484 in *Childers, et al v. Davis Mechanical Contractors, et al.*
    d. Flame Refractories, Inc. on August 27, 2021, in Case No.: 2021-CP-40-03484 in

Childers, et al v. Davis Mechanical Contractors, et al.

e. General Boiler Casing Company, Inc. on August 27, 2021, in Case No.: 2021-CP-40-03484 in *Childers, et al v. Davis Mechanical Contractors, et al.*

f. Great Barrier Insulation Co., Inc. on November 3, 2020, in Case No.: 2020-CP-40-02692 in *Bowlin, et al v. Covil Corp., et al.*

g. Heat & Frost Insulation Co., Inc. on April 6, 2021, in Case No.: 2021-CP-40-06190 in *Love, Jr., et al v. 3M Co., et al.*

h. HEFCO, Inc. on December 7, 2021, in Case No.: 2021-CP-40-03484 in *Childers, et al v. Davis Mechanical Contractors, et al.*

i. J. & L. Insulation, Inc. on March 2, 2021, in Case No.: 2020-CP-40-01952 in *Mccullough, et al v. 4520 Corp., Inc., et al.*

j. J.R. Deans Company, Inc. on December 7, 2021, in Case No. 2021-CP-40-03484 in *Childers, et al v. Davis Mechanical Contractors, et al.*

k. Payne & Keller Company on August 27, 2021, in Case No.: 2021-CP-40-03484 in *Childers, et al v. Davis Mechanical Contractors, et al.*

l. Piedmont Insulation, Inc. on June 28, 2021, in Case No.: 2020-CP-40-04475 in *Carpenter, et al v. Armstrong International, Inc., et al.*

m. Presnell Insulation Co., Inc. on June 30, 2021, in Case No.: 2020-CP-40-01364 in *Murphy, et al v. Abb, Inc., et al.*

n. Southern Insulation, Inc. on May 7, 2019, in Case No.: 2019-CP-42-03968 in *Hopper v. Air & Liquid Systems Corporation et al.*

o. Stafford Insulation Company on August 27, 2021, in Case No.: 2021-CP-40-03484 in *Childers, et al v. Davis Mechanical Contractors, et al.*

p. Standard Insulation Company of North Carolina, Inc. on August 27, 2021, in Case No.: 2021-CP-40-03484 in *Childers, et al v. Davis Mechanical Contractors, et al*.

q. Starr Davis Insulation, Inc. and Starr Davis Company of S.C., Inc. on February 22, 2019, in Case No.: 2019-CP-40-00076 in *Hopper v. Air & Liquid Systems Corporation et al*.

r. United Construction Co. of Rome, Inc. on August 27, 2021, in Case No.: 2021-CP-40-03484 in *Childers, et al v. Davis Mechanical Contractors, et al*.

s. Wind Up, Ltd. on March 16, 2021, in Case No.: 2021-CP-40-03484 in *Childers, et al v. Davis Mechanical Contractors, et al*.

JURISDICTION & VENUE

As the Receivership Court, this Court has jurisdiction over the matters alleged herein pursuant to its exclusive jurisdiction over all asbestos related cases in South Carolina pursuant to the March 3, 2017 Order of the Supreme Court of South Carolina Order Number 2017-03-03-01, and by virtue of its appointment of the Receiver. Receiver was appointed pursuant to S.C. Code Ann. § 15-65-10 with the power and authority to administer all assets in accordance with the rights and obligations of the individual Receiverships. As the Receivership Court, this Court maintains exclusive jurisdiction regarding each of the named Receiverships. Thus, venue in this Court is proper and satisfies S.C. Code Ann. § 15-7-10, *et seq.*

FOR A FIRST CAUSE OF ACTION

(Declaratory Judgment)

Receiver seeks a declaration from this Court that it may file information pertinent to the Receiverships here in this central depository pursuant to the South Carolina Declaratory Judgments Act, S.C. Code Ann. § 15-53-30.

Such a declaration is necessary to allow for the Receiver to consolidate the named Receiverships into a single action for purposes of judicial efficiency and effective adjudication of the Receiverships listed herein.

The declaration sought herein should apply to all future receiverships where Mr. Protopapas is appointed as the Receiver by this Court.

WHEREFORE, having brought this action to create a central depository, the Receiver respectfully requests that the Court grant this relief pursuant to S.C. Code Ann. § 15-53-120 and any and such further relief as the Court finds just and equitable.

Dated: March 17, 2023
Columbia, S.C.

Respectfully submitted,

RIKARD & PROTOPAPAS, LLC

By: */s/ Peter D. Protopapas*

Peter D. Protopapas (SC Bar 68304)
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Columbia, South Carolina 29204
Telephone: (803) 978-6111
pdp@rplegalgroup.com

Receiver for the asbestos Receiverships herein

EXHIBIT 9

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Peter D. Protopapas, as the Receiver for Payne & Keller Company, Plaintiff, v. American International Group; Zurich American Insurance Company; Travelers Casualty & Surety Company, formerly known as Aetna Casualty & Surety Company; Continental Insurance Company; National Union Fire Insurance Company of Pittsburgh; Medmarc Casualty Insurance Company; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; Hartford Accident and Indemnity Company; Certain Underwriters at Lloyd's of London and Various London Market Companies; South Carolina Property and Casualty Insurance Guaranty Association; R.L. Jarrett (Underwriting) Agency, Inc.; and U.S. Risk, LLC, Defendants.	Civil Action No. In Re: Asbestos Personal Injury Litigation Coordinated Docket **SUMMONS**

TO THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the complaint in this action, a copy of which is hereby served on you, and to serve a copy of your Answer to the said complaint upon the subscribers at 2110 N. Beltline Blvd., Columbia, South Carolina 29204, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in such complaint.

Respectfully submitted,

RIKARD & PROTOPAPAS, LLC

s/ Brian M. Barnwell
Brian M. Barnwell (SC Bar 78249)
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Columbia, SC 29204
803.978.6111
bb@rplegalgroup.com

Attorney for the Plaintiff

This 23rd Day of November, 2021

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Peter D. Protopapas, as the Receiver for Payne & Keller Company, Plaintiff, v. American International Group; Zurich American Insurance Company; Travelers Casualty & Surety Company, formerly known as Aetna Casualty & Surety Company; Continental Insurance Company; National Union Fire Insurance Company of Pittsburgh; Medmarc Casualty Insurance Company; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; Lexington Insurance Company; Hartford Accident and Indemnity Company; Certain Underwriters at Lloyd's of London and Various London Market Companies; South Carolina Property and Casualty Insurance Guaranty Association; R.L. Jarrett (Underwriting) Agency, Inc.; and U.S. Risk, LLC, Defendants	Civil Action No. In Re: Asbestos Personal Injury Litigation Coordinated Docket **COMPLAINT FOR DECLARATORY JUDGMENT AND BREACH OF CONTRACT**

COMES NOW Peter D. Protopapas, as the Receiver for Payne & Keller Company, ("plaintiff" or "Payne & Keller"), complaining of the defendants American International Group, individually and as successor in interest to American General Indemnity Company ("American General") and Birmingham Fire Insurance Company ("Birmingham"); Zurich American Insurance Company, individually and as successor in interest to Maryland American General Insurance Company and Maryland Casualty Company ("Zurich"); Travelers Casualty & Surety Company,

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

PARTIES

1. Payne & Keller Company, appearing by and through its duly appointed Receiver, Peter D. Protopapas, who maintains his principal place of business in Richland County, South Carolina, brings this action. The Receiver was appointed over Payne & Keller and entities related to the historic operations of Payne & Keller Company, including Payne & Keller, Inc.; Payne & Keller of Louisiana, Inc.; Bayou Maintenance, Inc.; Bayou Maintenance and Constructors, Inc.; Payne & Keller Gulf Coast, Inc.; Frentex Enterprises Company; and Frentex Enterprises Company of Texas (collectively "Payne & Keller"). This Court appointed the Receiver to administer all assets of Payne & Keller, including without limitation its insurance policies. (*See* Ex. A, Receiver Order, at 1–2 ("This order is inclusive of, but not limited to, the right and obligation to administer

any insurance assets of Payne & Keller as well as any claims related to the actions or failure to act of Payne & Keller's insurance carriers."); *see also* Ex. B, Order Granting Motion to Clarify.)

2. Plaintiff is informed and believes that defendant American International Group, sued individually and as successor in interest to American General Indemnity Company ("American General") and Birmingham Fire Insurance Company ("Birmingham"), referred to collectively, together with defendants National Union and Lexington, as "AIG", is a corporation organized under the laws of Delaware, with its principal place of business located in the State of New York.

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

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

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

6. Plaintiff is informed and believes that defendant National Union Fire Insurance Company of Pittsburgh PA ("National Union") is a corporation organized under the laws of the

Commonwealth of Pennsylvania, with its principal place of business located in the Commonwealth of Pennsylvania.

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

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

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

10. Plaintiff is informed and believes that defendant Hartford Accident and Indemnity Company ("Hartford") is a corporation organized under the laws of the State of Connecticut, with its principal place of business located in the State of Connecticut. Further, Hartford agreed that "in any suit instituted against it upon this contract this Company will abide by the final decision of such Court or any Appellate Court in the event of an appeal." Moreover, by including the "service of suit clause" in its contract of insurance with Payne & Keller, Hartford has consented to the jurisdiction of this Court. In pertinent part, the Hartford policies contain the following service of suit clause:

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

By virtue of the foregoing service of suit clause, Hartford agreed to comply with all requirements necessary to give this Court jurisdiction, and further agreed that all matters pertinent to the instant dispute shall be determined by this Court. The portion of the "service of suit" clause which states that "all matters arising hereunder shall be determined in accordance with the law and practice of such Court" is a valid "choice of forum" clause. Hartford has consented to the jurisdiction of this Court and, accordingly, this action may not be removed or transferred to any other court.

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

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

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

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

and belief, NICO is also financially responsible for the obligations of defendants AIG, Continental and Stonewall whose claims decisions are also made by Resolute Management.

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

13. Plaintiff is informed and believes that R.L. Jarrett Underwriting Agency, Inc. is a corporation organized under the laws of the State of Texas, with its principal place of business located in the State of Texas.

14. Plaintiff is informed and believes that U.S. Risk LLC is a limited liability company organized under the laws of the State of Delaware, with its principal place of business located in the State of Texas.

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

JURISDICTION

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

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

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

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

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

VENUE

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

FACTUAL BACKGROUND

22. Payne & Keller's historic operations included the installation, repair, replacement, removal, or disturbance of thermal insulation and other building materials. Those operations allegedly exposed persons to asbestos who thereby suffered bodily injury (the "Asbestos Allegations"). The alleged bodily injury resulting from the Asbestos Allegations has resulted in suits against Payne & Keller, including those referenced above ("Payne & Keller Asbestos Suits").

1. The American General Policies

23. Defendant American General issued primary general liability policies to Payne & Keller ("The American General Policies"). The American General Policies have standard terms and conditions. The American General Policies have a duty to defend Payne & Keller against any and all Payne & Keller Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false, or fraudulent. The duty to defend is joint, several, indivisible, and supplemental. The American General Policies require American General fully to defend any Payne & Keller Asbestos Suit alleging bodily injury during any American General Policy period. The American General Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any American General Policy period. It is the burden of American General to prove any limitation on or exclusion of coverage. Specifically, American General issued primary general liability coverage to Payne & Keller for at least the three policy periods March 1, 1968 – March 1, 1971. Payne & Keller continues to search for additional policies issued by American General or any of its predecessors, successors, subsidiaries, or affiliates. Should such additional policies be located this Complaint will be amended to include such additional American General Policies.

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

2. The Zurich Policies

25. Defendant Zurich, individually and as successor in interest to Maryland American General Insurance Company, issued general liability policies to Payne & Keller ("The Zurich

Policies"). The Zurich Policies have standard terms and conditions. The Zurich Policies have a duty to defend Payne & Keller against any and all Payne & Keller Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false, or fraudulent. The duty to defend is joint, several, indivisible, and supplemental. The Zurich Policies require Zurich fully to defend any Payne & Keller Asbestos Suit alleging bodily injury during any Zurich Policy period. The Zurich Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Zurich Policy period. It is the burden of Zurich to prove any limitation on or exclusion of coverage. Specifically, Zurich issued primary general liability coverage to Payne & Keller for at least the five policy periods March 1, 1973 – March 1, 1978.

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

3. The Aetna Policies

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

Specifically, Aetna issued primary general liability coverage to Payne & Keller for at least the seven policy periods March 1, 1978 – April 1, 1985.

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

4. The Continental Policies

29. Defendant Continental issued umbrella liability policies to Payne & Keller ("The Continental Policies"). The Continental Policies have standard terms and conditions. The Continental Umbrella Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Continental Policy Period. It is the burden of Continental to prove any limitation on or exclusion of coverage. Specifically, Continental issued umbrella liability coverage to Payne & Keller for at least the two policy periods March 1, 1979 – March 1, 1980 and April 1, 1985—April 1, 1986.

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

5. The National Union Policies

31. Defendant National Union issued general liability policies to Payne & Keller ("The National Union Policies"). The National Union Policies have standard terms and conditions. The National Union Policies have a duty to defend Payne & Keller against any and all Payne & Keller Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false or fraudulent. The duty to defend is joint, several, indivisible and supplemental. The National Union Policies require National Union fully to defend any Payne &

Keller Asbestos Suit alleging bodily injury during any National Union Policy period. The National Union Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any National Union Policy Period. It is the burden of National Union to prove any limitation on or exclusion of coverage. Specifically, National Union issued primary general liability coverage to Payne & Keller for at least the three policy periods April 1, 1985—April 1, 1989, and issued umbrella liability coverage to Payne & Keller for at least the three policy periods April 1, 1985—October 6, 1988.

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

6. The Dependable Policy

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

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

7. The Stonewall Policies

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

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

8. *The Lexington Policy*

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

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

9. ***The Hartford Policy***

39. Defendant Hartford issued at least four umbrella liability policies to Payne & Keller ("The Hartford Policies"). The Hartford Policies have standard terms and conditions. The Hartford Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Hartford Policy Period. It is the burden of Hartford to prove any limitation on or exclusion of coverage. Specifically, Hartford issued umbrella liability coverage to Payne & Keller for at least the policy periods March 1, 1976—March 1, 1977, April 1, 1983—April 1, 1985, and May 15, 1985—April 1, 1986.

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

10. ***The Birmingham Policies***

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

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

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

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

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

12. The Reliance Policies and the Guaranty Association

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

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

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

to the extent of its obligation on the covered claims and, to this extent, has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." S.C. Code Ann. § 38-31-60(b).

48. On March 16, 2021, Plaintiff was appointed Receiver of Payne & Keller, giving him the power and authority fully to administer all assets of Payne & Keller, accept service on behalf of Payne & Keller, engage counsel on behalf of Payne & Keller, and take any and all steps necessary to protect the interests of Payne & Keller, whatever they may be. Since appointment, the Receiver has expended substantial time and incurred expenses to identify potential assets and responsive policies and to defend Payne & Keller Asbestos Suits in fulfillment of his responsibilities as Receiver. The Receiver will continue to expend substantial time and incur expenses in connection with Payne & Keller Asbestos Suits.

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

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

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

FIRST CAUSE OF ACTION
DECLARATORY JUDGMENT

51. Plaintiff incorporates by reference paragraphs 1 through 50 as if repeated verbatim herein.

52. Pursuant to *Jeffcoat v. Morris*, 300 S.C. 526, 389 S.E.2d 159 (Ct. App. 1989), a Receiver holds the property coming into his or her hands by the same right and title as the person for whose property he or she is receiver.

53. Upon information and belief, Payne & Keller purchased insurance policies from defendants American General, Zurich, Aetna, National Union, Continental, Lexington, Hartford, Dependable, Birmingham, Lloyd's Underwriters and London Market Insurers, Stonewall, and Reliance (the "Insurers").

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

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

56. Plaintiff seeks a judicial declaration that all policies, evidence of policies and documents relating to their placement, purchase and underwriting, and claims handling, including but not limited to such documents in the possession of defendants are the property of the Receiver and shall be delivered immediately to the Receiver to be maintained in his sole possession.

SECOND CAUSE OF ACTION
DECLARATORY JUDGMENT

57. Plaintiff incorporates by reference paragraphs 1 through 50 as if repeated verbatim herein.

58. The Receiver seeks a declaration and order that defendants American General, Zurich, and Aetna issued primary general liability coverage to Payne & Keller, subject to the per occurrence and aggregate limits of those policies, and that defendants have an unlimited supplemental duty to defend or to pay or reimburse defense costs.

59. The Receiver seeks a further declaration and order that defendants National Union, Continental, Lexington, Hartford, Dependable, Birmingham, Lloyd's Underwriters and

London Market Insurers, and Stonewall issued umbrella coverage to Payne & Keller that "drops down" to provide "first dollar" coverage in the event there is no primary coverage, or in the event such coverage is unavailable or not responding, subject to the per occurrence and aggregate limits of those policies.

60. The Receiver seeks a further declaration as to the interpretation and meaning of the insurance policies that defendants American General, Zurich, Aetna, National Union, Continental, Lexington, Hartford, Dependable, Birmingham, Lloyd's Underwriters and London Market Insurers, and Stonewall issued to Payne & Keller (the "Payne & Keller Insurance Policies"), as follows:

a. The Payne & Keller Insurance Policies cover all Payne & Keller Asbestos Suits that allege bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of the policy periods;

b. Each Payne & Keller asbestos suit "triggers" the Payne & Keller Insurance Policies as long as an asbestos plaintiff alleges injury during the period of the policy;

c. Payne & Keller may select the policy or policy years to which to assign or allocate in full each Payne & Keller Asbestos Suit-related loss;

d. In the case of any claimed ambiguity in any Payne & Keller Insurance policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Payne & Keller Insurance Policies;

e. Defense costs for the Payne & Keller asbestos suits are supplemental, and the payment of defense costs does not erode or impair any limit of liability of any of the Payne & Keller Insurance Policies;

f. If any allegation or cause of action in a Payne & Keller Asbestos Suit is potentially covered under the Payne & Keller Insurance Policies, then the insurer must fully defend or reimburse in full the costs of defending against all of the allegations and all of the causes of action in the complaint;

g. Each Payne & Keller Insurance Policy is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of Payne & Keller Asbestos Suits;

h. Each Payne & Keller Insurance Policy must indemnify covered Payne & Keller Asbestos Suits, in full, up to its "per occurrence" limit, regardless of whether a continuing injury spans multiple policy periods;

i. The Payne & Keller Asbestos Suits that allege exposure to asbestos during Payne & Keller's work are subject only to the "per occurrence" limits of the Payne & Keller Insurance Policies;

j. Any aggregate limit on coverage in any of the Payne & Keller Insurance policies is a limitation on coverage, and therefore each insurer has the burden to prove, based on the evidence, that a Payne & Keller Asbestos Suit is subject to the aggregate limit in the Payne & Keller Insurance Policies, if any; and

k. Each insurer has the burden to prove, based on the evidence, that any particular Payne & Keller Asbestos Suit is either a "products" claim or a "completed

operations" claim, as those terms are defined in the Payne & Keller Insurance Policies, in order for the insurer to disclaim coverage for a Payne & Keller Asbestos Suit against Payne & Keller otherwise alleging injury during any Payne & Keller Insurance policy period.

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

THIRD CAUSE OF ACTION
DECLARATORY JUDGMENT

62. Plaintiff incorporates by reference paragraphs 1 through 50 as if repeated verbatim herein.

63. At the time that Reliance was liquidated on October 3, 2001, the Guaranty Association became statutorily required to take on the liabilities of Reliance.

64. Plaintiff seeks the same declarations sought in paragraphs 58 and 60 of this Complaint against the Guaranty Association under the Reliance policies, and incorporates by references paragraphs 58 and 60 as though fully set forth against the Guaranty Association under the Reliance policies.

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

FOURTH CAUSE OF ACTION
BREACH OF CONTRACT

66. Plaintiff incorporates by reference paragraphs 1 through 50 as if repeated verbatim herein.

67. Payne & Keller was insured by one or more policies issued by defendants American General, Zurich, and Aetna.

68. Payne & Keller provided timely notice to defendants American General, Zurich, and Aetna of the Payne & Keller Asbestos Suits.

69. Defendants American General, Zurich, and Aetna unreasonably and without proper cause, have failed to defend Payne & Keller in the Payne & Keller Asbestos Suits as required by the policies they issued to Payne & Keller, and/or have failed to cooperate or consult with Payne & Keller in connection with their duty to defend fully their insured.

70. The foregoing failure of defendants American General, Zurich, and Aetna to provide a proper defense to Payne & Keller in the Payne & Keller Asbestos Suits has caused, and will continue to case, harm and damages to Payne & Keller, including, but not limited to, incurring legal fees that should be paid for by Defendants American General, Zurich, and/or Aetna.

FIFTH CAUSE OF ACTION
ACCOUNTING

71. Plaintiff incorporates by reference paragraphs 1 through 50 as if repeated verbatim herein.

72. Upon information and belief, Payne & Keller purchased insurance policies from Defendants American General, Zurich, Aetna, National Union, Continental, Lexington,

Hartford, Dependable, Birmingham, Lloyd's Underwriters and London Market Insurers, Stonewall, and Reliance during the periods 1965 to 1989.

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

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

SIXTH CAUSE OF ACTION
FAILURE TO PROCURE INSURANCE

75. Plaintiff incorporates by reference paragraphs 1 through 50 as if repeated verbatim herein.

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

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

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

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

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

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

SEVENTH CAUSE OF ACTION
DECLARATORY JUDGMENT

82. Plaintiff incorporates by reference paragraphs 1 through 50 as if repeated verbatim herein.

83. An actual and justiciable controversy exists between the Receiver for Payne & Keller and Defendants American General, Zurich, Aetna, National Union, Continental, Lexington, Hartford, Dependable, Birmingham, Lloyd's Underwriters and London Market Insurers, and Stonewall concerning defendants' obligations to Payne & Keller, including their obligations to pay for, or reimburse as ultimate net loss, the Receiver's defense of Payne & Keller.

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

85. Pursuant to S.C. Code Ann. § 15-65-100, the Receiver shall be allowed such commissions as may be fixed by the Court appointing the Receiver.

86. Pursuant to the Supreme Court of South Carolina's ruling in *Ex Parte Simons*, 289 S.C. 1, 344 S.E.2d 151 (1986), a Receiver's fee is based on the value of the Receiver's services and at the appointing Court's discretion.

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

88. Plaintiff respectfully requests this Court to declare that Defendants must fairly compensate Plaintiff for the substantial time, effort, and expenses Plaintiff expended in connection with the defense of asbestos suits potentially covered under the Defendants' policies and to further declare that this obligation is unlimited and shall continue as long as there is any Payne & Keller Asbestos Suit pending.

PRAYER FOR RELIEF

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

A. For Plaintiff's compensation in connection with the defense of asbestos suits against Payne & Keller in an amount set by this Court;

B. For an order requiring that Defendants provide to plaintiff complete and authentic copies of any general liability and excess liability insurance policies it issued to Payne & Keller together with all other documents and things relating to these policies, including (but not

limited to) certificates of insurance, underwriting manuals and documents, and claims files;

C. For an order requiring Defendants to defend Payne & Keller in full against all asbestos suits alleging bodily injury during the Defendants' policy periods unless and until either Defendants can show unequivocally, based on the evidence adduced in the litigation, that an exclusion in their respective policies otherwise bars coverage for a suit;

D. The Receiver seeks a further declaration as to the interpretation and meaning of the Payne & Keller insurance policies:

   i. The Payne & Keller Insurance Policies cover all Payne & Keller Asbestos Suits that allege any bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of its policy periods;

   ii. Each Payne & Keller asbestos suit "triggers" at least one Payne & Keller Insurance policy as long as an asbestos plaintiff alleges injury during the period of the policy;

   iii. Payne & Keller may select the policy or policy years to which to assign or allocate in full each Payne & Keller asbestos loss;

   iv. In the case of a claimed ambiguity in any Payne & Keller Insurance policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Defendants' policies, and Defendants bears the burden of proof as to any such ambiguity;

v. Defense costs for the Payne & Keller asbestos suits are supplemental, and the payment of defense costs does not erode or impair any limit of liability of any of the Payne & Keller Insurance policies;

vi. If any allegation in a Payne & Keller Asbestos Suit is potentially covered under the Payne & Keller Insurance Policies, then the insurer must defend or reimburse in full the costs of defending against all of the allegations and all of the causes of action in the complaint;

vii. Each Payne & Keller Insurance Policy is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of the Payne & Keller Asbestos Suits;

viii. Each Payne & Keller Insurance Policy must indemnify covered Payne & Keller Asbestos Suits, in full, up to its "per occurrence" limits, regardless of whether a continuing injury spans multiple policy periods;

ix. The Payne & Keller Asbestos Suits that allege exposure to asbestos during Payne & Keller's work are subject only to the "per occurrence" limits of the Payne & Keller Insurance policies;

x. Any aggregate limit on coverage in any of the Payne & Keller Insurance Policies is a limitation on coverage, and the insurers therefore have the burden to prove, based on the evidence, that a Payne & Keller Asbestos Suit is subject to the aggregate limit in the Payne & Keller Insurance Policies, if any; and

xi. Each insurer and the Guaranty Association has the burden to prove, based on the evidence, that any particular Payne & Keller Asbestos Suit is either a "products"

claim or a "completed operations" claim, as those terms are defined in the Payne & Keller Insurance Policies, in order for the insurer to disclaim coverage for a Payne & Keller Asbestos Suit against Payne & Keller otherwise alleging injury during the Payne & Keller insurance policy period;

E. For an order declaring that Defendant Guaranty Association is responsible for any and all amounts Reliance owes to Payne & Keller under the terms of their respective insurance policies;

F. For an order declaring that Defendants American General, Zurich, and Aetna are liable for the damages incurred by Payne & Keller due to their breaches of contract, including, but not limited to, reimbursing Payne & Keller for any legal fees and costs incurred by defending the Payne & Keller Asbestos Suits;

G. For an accounting of Defendants' past claims practices for claims against Payne & Keller and its Historic Affiliates, including but not limited to historical Payne & Keller Asbestos Suits;

H. For an order declaring that Defendant R.L. Jarrett or, in the alternative, Defendant U.S. Risk as it successor, breached its obligations by not procuring the appropriate insurance for Payne & Keller and is liable to the Receiver for money damages in an amount to be proven at trial; and

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

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

RIKARD & PROTOPAPAS, LLC

s/ Brian M. Barnwell
Brian M. Barnwell (SC Bar 78249)
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Attorney for the Plaintiff

This 23rd Day of November, 2021

EXHIBIT 10

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

v.

Davis Mechanical Contractors, Inc., et al.,

Defendants.

****

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

Third-Party Plaintiffs

v.

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

Third-Party Defendants

2021-CP-40-03484

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

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

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

PRELIMINARY STATEMENT AND BACKGROUND

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

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

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

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

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

On July 14, 2022, the Receiver filed a Second Amended Third-Party Complaint against Travelers[4] and the other insurance companies, even though the instant action is an *asbestos tort case* that has nothing to do with insurance coverage issues. The tort case was brought by plaintiff Lenora Childers, individually and as Personal Representative of the Estate Lewis C. Childers ("Childers"), pursuant to S.C. Gen. Stat. 15-51-10 *et seq.*, for the alleged wrongful death of Lewis C. Childers purportedly caused by exposure to asbestos and asbestos-containing products. *See generally* Pl.'s 1st Am. Compl. The defendants named in the Childers' complaint

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. The Court Lacks Personal Jurisdiction Over Travelers

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

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

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

A. The Court Does Not Have General Jurisdiction Over Travelers

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

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

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

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

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

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

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

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

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

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

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

B. The Court Lacks Specific Jurisdiction Over Travelers

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

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

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

1. The Power Prong Is Not Met

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

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

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

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

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

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

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

2. The Fairness Prong is Not Met

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- In Count I, a declaration that "Third-Party Defendants must fairly compensate the Receiver for the substantial time, effort, and expenses expended in connection with the defense of asbestos suits potentially covered under the Third-Party Defendants' policies and to further declare that this obligation is unlimited and shall continue as long as there are Asbestos Suits pending against Third-Party Plaintiffs." 2d Am. Third-Party Compl. ¶ 181.

- In Count II, a declaration that "all policies, evidence of policies and documents relating to their placement, purchase and underwriting, including, but not limited to, such documents in the possession of Third-Party Defendants are the property of the Receiver and shall be delivered immediately to the Receiver to be maintained in his sole possession for his unrestricted use in carrying out his duties." *Id.* at ¶ 185.

- In Count XI, "declarations, after thorough discovery regarding Rexel's and SKRLA's competing claims to the Payne & Keller insurance program, regarding the nature, extent, and priority (if any) of Rexel's and SKRLA's claims to the Payne & Keller insurance coverage so as to provide the Receiver with guidance and certainty as to how to go about carrying out his duties as the Receiver for Payne & Keller and to provide the Payne & Keller insurers with certainty and guidance as to the delineation of their rights and responsibilities as between Rexel and Payne & Keller in this regard." *Id.* at ¶ 233.

- In the Prayer for Relief, a "declaration as to the interpretation and meaning of the Third-Party Plaintiffs' insurance policies," ostensibly including any insurance policies Travelers issued to Payne & Keller. *Id.*, Prayer for Relief ¶ E.

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

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

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

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

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

> No action shall lie against the company [*i.e.*, Travelers] unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, *nor until the amount of the insured's [i.e., Payne & Keller's] obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company*. . . .
>
> *No person or organization shall have any right under this policy to join the company as a party to any action against the insured to determine the insured's liability, nor shall the company be impleaded by the insured or his legal representative*. . . .

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

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

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

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

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

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

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

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

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

impair any limit of liability of any of the Payne & Keller Insurance policies;	impair any limit of liability of any of the Third-Party Plaintiffs' Insurance policies;
vi. If any allegation in a Payne & Keller Asbestos Suit is potentially covered under the Payne & Keller Insurance Policies, then the insurer must defend or reimburse in full the costs of defending against all of the allegations and all of the causes of action in the complaint;	vi. If any allegation in a Third-Party Plaintiffs' Asbestos Suit is potentially covered under the Third-Party Plaintiffs' Insurance Policies, then the responsive insurer must defend or reimburse in full the costs of defending against all of the allegations and all of the causes of action in the complaint;
vii. Each Payne & Keller Insurance Policy is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of the Payne & Keller Asbestos Suits;	vii. Each Third-Party Plaintiffs' Insurance Policy is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of the Third-Party Plaintiffs' Asbestos Suits;
viii. Each Payne & Keller Insurance Policy must indemnify covered Payne & Keller Asbestos Suits, in full, up to its "per occurrence" limits, regardless of whether a continuing injury spans multiple policy periods;	viii. Each Third-Party Plaintiffs' Insurance Policy must indemnify covered Third- Party Plaintiffs' Asbestos Suits, in full, up to its "per occurrence" limits, regardless of whether a continuing injury spans multiple policy periods;
ix. The Payne & Keller Asbestos Suits that allege exposure to asbestos during Payne & Keller's work are subject only to the "per occurrence" limits of the Payne & Keller Insurance policies;	ix. The Third-Party Plaintiffs' Asbestos Suits that allege exposure to asbestos during Third-Party Plaintiffs' work are subject only to the "per occurrence" limits of the Third-Party Plaintiffs' Insurance policies;
x. Any aggregate limit on coverage in any of the Payne & Keller Insurance Policies is a limitation on coverage, and the insurers therefore have the burden to prove, based on the evidence, that a Payne & Keller Asbestos Suit is subject to the aggregate limit in the Payne & Keller Insurance Policies, if any; and	x. Any aggregate limit on coverage in any of the Third-Party Plaintiffs' Insurance Policies is a limitation on coverage, and the insurers therefore have the burden to prove, based on the evidence, that a Third-Party Plaintiffs' Asbestos Suit is subject to the aggregate limit in the Third-Party Plaintiffs' Insurance Policies, if any; and
xi. Each insurer and the Guaranty Association has the burden to prove, based on the evidence, that any particular Payne & Keller Asbestos Suit is either a "products" claim or a "completed operations" claim, as those terms are defined in the Payne & Keller Insurance	xi. Each insurer has the burden to prove, based on the evidence, that any particular Third-Party Plaintiffs' Asbestos Suit is either a "products" claim or a "completed operations" claim, as those terms are defined in the Third-Party Plaintiffs' Insurance

Policies, in order for the insurer to disclaim coverage for a Payne & Keller Asbestos Suit against Payne & Keller otherwise alleging injury during the Payne & Keller insurance policy period[.]	Policies, in order for the insurer to disclaim coverage for an Asbestos Suit against a Third Party Plaintiff otherwise alleging injury during the Third-Party Plaintiffs' insurance policy period.

Payne & Keller's third-party claims against Travelers here must be dismissed under SCRCP 12(b)(8), because they are substantially identical to Payne & Keller's claims against Travelers in the Federal Coverage Action. *See Condon*, 410 S.C. at 333 ("although the parties in this matter and the federal case are not identical, the principle underlying Rule 12(b)(8) of the South Carolina Rules of Civil Procedure that duplicative litigation should be avoided applies to this case.").

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

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

CONCLUSION

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

Respectfully submitted,

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August 24, 2022

EXHIBIT 11

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
LENORA CHILDERS, Individually and as Personal Representative of the Estate of LEWIS C. CHILDERS, Plaintiff, v. Davis Mechanical Contractors, Inc., et al., Defendants. ********** Flame Refractories, Inc., United Construction Co. of Rome, Inc., Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co., and Payne & Keller Company By and Through Their Duly Appointed Receiver Peter D. Protopapas, Third-Party Plaintiffs, v. Zurich American Insurance Company, et al., Third-Party Defendants.	Case No. 2021-CP-40-03484 **THE RECEIVER FOR PAYNE & KELLER'S RESPONSE TO THIRD-PARTY DEFENDANT TRAVELERS CASUALTY & SURETY COMPANY'S MOTION TO DISMISS THIRD-PARTY CLAIMS AND DISSOLVE THE PAYNE & KELLER RECEIVERSHIP**

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

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

I. INTRODUCTION

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

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

[1] On September 19, 2022, Defendants AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company; and Certain as yet Unnamed Underwriters at Lloyd's, London and Certain as yet Unnamed London Market Companies (the "Joining Defendants") filed a Joinder to Travelers' Motion, wherein they "join[ed] in and adopt[ed] by reference the issues and arguments raised in Argument Section I of Travelers' Motion (included on pages 6-14) as well as the factual recitations supporting those arguments." (Joining Defs.' Mot. at 3.) The Receiver submits this filing in response to that Joinder as well.

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

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

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

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

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

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

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

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

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

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

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

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

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

Sys. v. Shwarts, No. 10-18-00050-CV, 2019 WL 7374735, 2019 Tex. App. LEXIS 11278 (Tex. App.—Waco Dec. 31, 2019, pet. denied) (mem. op.), the Waco Court of Appeals reviewed the trial court's appointment of a receiver for a dissolved professional association more than three years after dissolution. Noting that the appointment would be affirmed "if it can be upheld on any legal theory that finds support in the evidence," the court determined it was appropriate under Section 64.001(6). *See id.* at *9.[2] That provision of the Texas receivership statute authorizes a court to appoint a receiver "in any other case in which a receiver may be appointed under the rules of equity." TEX. CIV. PRAC. & REM. CODE § 64.001(a)(6). The court of appeals upheld the trial court's determination that—in light of evidence of financial mismanagement of the dissolved entity's assets presented during an evidentiary hearing—appointment of a receiver was justified and necessary to oversee management of those assets and distributions.[3] *See Shwarts*, 2019 WL 7374735, at *11–12.

By recognizing that the broad statutory authorization granted to a receiver is distinct from the statutory limitations placed on the independent actions of dissolved corporations, these courts (as well as courts in other jurisdictions[4]) recognize the special role and broad responsibilities of a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Even at this early juncture in this case, there is ample evidence supporting a claim that, at the very least, constructive fraud occurred in connection with Payne & Keller's dissolution. Events surrounding Payne & Keller's dissolution suggest that the company terminated its corporate existence to avoid liability for both current and future toxic tort, silica, and asbestos personal liability claims, and Payne & Keller was keenly aware of those claims when the decision to dissolve Payne & Keller was made.

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

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

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

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

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

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

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

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

- On October 7, 1986, Payne & Keller executed its purchase and sale agreement, selling substantially all of its assets.

- Payne & Keller retained liabilities including those arising from its operations. Payne & Keller agreed to indemnify and hold its Buyer harmless for a range of claims, including "[c]laims for injury to or death of any person or damage to property relating to the business, operations or assets of Sellers or Shareholder or any of them or any subcontractor or supplier, regardless of tier, or any of them whether related to the Assigned Contracts or the Purchased Assets or otherwise based on facts, omissions or events that occurred prior to Closing." (Exhibit H, Purchase & Sale Agreement, ¶ 9(c).) Payne & Keller's parent agreed to maintain $6 million in insurance coverage for these claims for two years after closing and capped its overall liability to the Buyer to $5 million in the aggregate. (Exhibit G, Specific Guaranty, ¶¶ 8, 9.)

- On October 7, 1986, Payne & Keller changed its name to Frentex Enterprises Company ("Frentex"). Frentex filed its amended articles of incorporation on October 20, 1986. (Exhibit I, Amended Articles of Incorporation.)

- On October 27, 1986, Frentex adopted its articles of dissolution. (Exhibit J, Articles of Dissolution.)

- On December 3, 1986, Frentex filed its articles of dissolution and certificate of dissolution representing that "[a]ll debts, obligations and liabilities of the corporation have been paid, discharged, or adequate provision has been made thereof." (*Id.* at ¶ 5.) With thousands of potential dioxin claims pending, the limited parental guaranty was the only provision made for the payment of significant known current and decades of future liabilities.

- On January 16, 1987, the dioxin class claims in the Charter bankruptcy proceeding matured. The bankruptcy court entered an order approving settlement of the dioxin class claims against Charter. The court authorized an award of $5.275 million to the 1,105 personal injury dioxin claimants, $1 million to the State of Missouri, and $5 million to the United States Environmental Protection Agency for their dioxin-related contamination claims. *See In re Charter Co.*, 81 B.R. 90, 91 (M.D. Fla. 1987).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19–24.) This Court has repeatedly held—consistent with the South Carolina long-arm statute, S.C. Code Ann. § 36-2-803[7]—that insurers who enter insurance contracts covering risks within the state of South Carolina are subject to specific personal jurisdiction in South Carolina. *See*, *e.g.*, Exhibits K and L, Orders Denying Zurich's Motion to Dismiss, *Pavlish v. Covil Corp.*, No. 2019-CP-42-03968 (S.C. Com. Pl. June 26, 2020), and USF&G's Motion to Dismiss, *Protopapas v. Wall Templeton*, No. 2019-CP-40-02285 (S.C. Com. Pl. Sept. 15, 2020) (holding it is undisputed that the relevant insurers contracted with Covil to insure a risk located within South Carolina at the time of contracting), respectively.

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

- Certain of the insurance policies that Travelers issued to Payne & Keller are described by Travelers itself as "National Accounts" that cover the entire United States of America, including South Carolina. *See* Exhibit M, Excerpt of Aetna (Travelers) Comprehensive Liability Policy for the period March 1, 1979 to March 1, 1980 at 2 (declarations page stamped "NATIONAL ACCOUNT" and "NATIONAL ACCOUNT OFFICE"); *id.* at 6 ("policy territory" defined as "the United States of America, its territories or possessions, or Canada"). *See also* Exhibit N, Excerpt of Aetna (Travelers) Comprehensive Liability Policy for the period April 1, 1983 to April 1, 1986 (same).

- Additionally, as to Payne & Keller's work in South Carolina, the Receiver has uncovered evidence that Payne & Keller was "awarded new jobs in South Carolina" and sought to "add South Carolina . . . to P&K's WC and CL policies" in 1973. *See* Exhibit O, Sept. 29, 1973 (asking "what can we do about covering South Carolina").

- Payne & Keller applied for and obtained a Certificate of Authority to transact business in South Carolina. *See* Exhibit P, July 17, 1967 (Application for Amended Certificate of Authority).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Overlapping jurisdiction, sometimes in virtually identical cases, has long been the accepted practice: "Despite what may appear to result in a duplication of judicial resources, 'the rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *McLaughlin v. United Va. Bank*, 955 F.2d 930, 934 (4th Cir. 1992) (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)). Rule 12(b)(8) provides for dismissal if "another action is pending between the same parties for the same claim." Rule 12(b)(8), SCRCP. The Rule must be interpreted "narrowly such that the claim must be ***precisely or substantially the same*** in both proceedings in order for the drastic remedy of dismissal to be appropriate." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 106, 674 S.E.2d 524, 532 (Ct. App. 2009) (emphasis added). Indeed, "an action may be pleaded in abatement of a second suit only when between the same parties and in the same jurisdiction and with the same object." *Poston v. Home Ins. Co. of N.Y.*, 191 S.C. 314, 317–18, 4 S.E.2d 261, 262 (1939). Also, a Rule 12(b)(8) motion cannot prevail if, as here, one case is in state court and another in federal

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

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

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

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

Travelers' 12(b)(8) motion should also be denied because South Carolina courts have held that "an action may be pleaded in abatement of a second suit only when between the same parties and in the same jurisdiction and with the same object." *Poston*, 191 S.C. at 317–18, 4 S.E.2d at 262. Here, the parties are not in the same jurisdiction, and the claims are not "precisely or substantially the same in both proceedings." *Capital City*, 382 S.C. at 106, 674 S.E.2d at 532.

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

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

Rule 14(a), SCRCP, provides:

> At any time after commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

Dated: January 13, 2023

Respectfully submitted,

/s/ Marghretta H. Shisko

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EXHIBIT 12

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

v.

Davis Mechanical Contractors, Inc., et al.,

Defendants.

****

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

Third-Party Plaintiffs,

v.

Zurich American Insurance Company, et al.,

Third-Party Defendants.

Case No. 2021-CP-40-03484

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

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

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

appointed receiver, Peter D. Protopapas ("the Receiver"), filed a Response in Opposition to the Motion on January 13, 2023, and Travelers filed a Reply in Support of the Motion on January 25, 2023.[2] The Court heard oral arguments on the Motion during a January 27, 2023 hearing. After careful consideration of the parties' filings and arguments, and for the reasons stated below, Travelers' Motion is **DENIED**.

BACKGROUND

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

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

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

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

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

ANALYSIS

A. Standing

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

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

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

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

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

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

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

B. Personal Jurisdiction

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

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

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

C. Rule 14

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

D. Rule 12(b)(8)

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

CONCLUSION

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

[4] The Joining Defendants' motion is also denied.

IT IS SO ORDERED.

[JUDGE'S E-SIGNATURE PAGE FOLLOWS]

Richland Common Pleas

Case Caption: Lenora Childers , plaintiff, et al vs Davis Mechanical Contractors , defendant, et al

Case Number: 2021CP4003484

Type: Order/Other

So Ordered

Jean H. Toal

EXHIBIT 13

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-
Circuit Court Case No. 2021-CP-40-03484

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

v.

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

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

v.

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

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

of which

Payne & Keller Company, 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 of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; and The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company; are the..... Appellants.

NOTICE OF APPEAL

Please take notice that AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; and The Continental Insurance Company, individually and as

successor in interest to Harbor Insurance Company (hereinafter, "Appellants"), appeal the order captioned "Order Denying Third-Party Defendant Travelers Casualty and Surety Company's Motion to Dismiss Third-Party Claims and Dissolve the Payne & Keller Receivership," entered on March 31, 2023, in the above-captioned action. This order is immediately appealable pursuant to South Carolina Code § 14-3-330(4) because it specifically continues a receivership despite a motion to dissolve the receivership, and it modifies the scope of the receivership by authorizing the Receiver to investigate whether the Payne & Keller Company was properly dissolved in Texas in 1986.

Appellants received written notice of entry of this order on March 31, 2023, making this notice timely. Appellants further state that all necessary transcripts for this appeal have previously been ordered from and provided by the appropriate court reporters.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

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Counsel for Third-Party Defendants AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; and The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company.

April 28, 2023

EXHIBIT 14

The South Carolina Court of Appeals

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. Deans Company, Inc.; Payne & Keller Company; SFB, Incorporated; Stafford Insulation Company; Standard Insulation Company of N.C., Inc.; Systra Engineering, Inc.; United Construction Co. of Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co.; Defendants.

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

v.

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

Insurance Company, Individually and as Successor in interest to Harbor Insurance Company; Hartford Accident and Indemnity Company; Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company; National Union Fire Insurance Company of Pittsburgh, PA; Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc.; Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; Lexington Insurance Company; First State Insurance Company; Certain Underwriters at Lloyd's of London and Various London Market Companies; South Carolina Property and Casualty Insurance Guaranty Association; R.L. Jarrett (Underwriting) Agency, Inc.; U.S. Risk, LLC; Rexel USA, Inc.; and Compass Risk Services, LLC, Third-Party Defendants,

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

and

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

and

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

Appellate Case No. 2023-000727

ORDER

After careful consideration of the parties' memoranda on appealability, this appeal shall proceed. However, nothing in this order prevents the parties from raising the issues of appealability and standing in their briefs.

Respondent's motion to strike Appellants' May 25, 2023 filings is granted. The May 25, 2023 filings which were designated by Appellants as returns to Respondent's "motion to dismiss," are hereby stricken.

FOR THE COURT

Columbia, South Carolina

FILED
Aug 09 2023

cc:
Wesley Brian Sawyer, Esquire
Matthew Todd Carroll, Esquire
Mary Elizabeth O'Neill, Esquire
Harry Lee, Esquire
Brian Montgomery Barnwell, Esquire
John Belton White, Jr., Esquire
Marghretta Hagood Shisko, Esquire
Brady Edwards, Esquire
Scott Shutte, Esquire
Christopher Rutledge Jones, Esquire

EXHIBIT 15

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,	)	*In Re:* Asbestos Personal Injury Litigation Coordinated Docket
v.	)	
DAVIS MECHANICAL CONTRACTORS, INC., et al.	)	
Defendants.	)	

FINDINGS OF FACT AND CONCULSIONS 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 TBOC[1] 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

EXHIBIT 16

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.

APPELLANTS' EMERGENCY MOTION TO CLARIFY AND ENFORCE RULE 205

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INTRODUCTION

The circuit court appointed Respondent Peter D. Protopapas as the Receiver of Payne & Keller Company ("Payne & Keller"), a former Texas corporation whose existence was terminated by the state of Texas more than 30 years ago. Based on Payne & Keller's terminated status, which has never been challenged and which has precluded the company from being sued since 1989, Appellant Travelers Casualty and Surety Company ("Travelers") filed a motion to dissolve the Payne & Keller Receivership established by the South Carolina circuit court, because given the inability of anyone to sue Payne & Keller, continuation of the Receivership is unnecessary and improper.[1]

The circuit court denied Appellants' motion to dissolve the Receivership in an order dated March 30, 2023. The circuit court rejected Appellants' argument that Texas's statute of repose for claims against terminated Texas corporations like Payne & Keller precludes claims by or against Payne & Keller more than three years after the date of its dissolution, *i.e.*, 1989, thereby rendering the Receivership pointless and requiring its dissolution. Over Appellants' objections, the circuit court held that the Receiver had made a prima facie showing that Payne & Keller was terminated as a result of fraud or constructive fraud under a new Texas law, Section 11.153(a) of the Texas Business Organizations Code, such that Texas's three-year statute of repose does not apply to Payne & Keller. The court also rejected Appellants' argument that applying Section 11.153(a) would violate the Texas Constitution, as it specifically forbids the retroactive application of the

[1] Appellants AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; and The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company (hereinafter collectively referred to as "Other Insurers," collectively with Travelers as "Appellants") joined Travelers' motion to dissolve.

new statute. The circuit court's order also suggests that a South Carolina state court somehow has the power to revoke the termination of a foreign corporation and reinstate its corporate existence in another state as if the dissolution never happened.

Appellants have appealed the circuit court's order, and this Court has confirmed, on two separate occasions, that the appeal shall proceed. Thus, this Court has squarely before it the various issues raised by Appellants, including whether Texas's statute of repose applies to preclude claims by or against Payne & Keller. Per Rule 205, SCACR, this Court's jurisdiction over the issues on appeal is exclusive—the circuit court is divested of jurisdiction over all matters affected by the appeal, including issues regarding Payne & Keller's supposedly fraudulent termination and the application of Texas's statute of repose.

Unfortunately, after this Court confirmed that it was moving forward with the appeal, the circuit court issued an order on October 5, 2023, that expressly addresses and relies on its own view of the issues on appeal. Specifically, the circuit court's October 5, 2023 order states that Payne & Keller's Texas termination was improper and must be revoked because "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." The order relies on arguments copied-and-pasted from the Receiver's opposition to Travelers' motion to dissolve the Receivership. It purports to affirmatively revoke Payne & Keller's termination and to reinstate its corporate existence in Texas.

The circuit court issued its October 5, 2023 order revoking Payne & Keller's termination with the clear awareness that its order addressed and decided issues that were no longer within its jurisdiction. In briefing and at oral argument, Travelers and other parties made clear to the circuit court that per Rule 205, SCACR, these issues are exclusively before this Court, *i.e.*, the order

addressed and decided matters affected by this appeal and, as such, the circuit court is divested of jurisdiction over them. The circuit court effectively conceded this point during hearings in July and August 2023, acknowledging its lack of jurisdiction. Yet the circuit court abandoned that position without warning and issued an order that directly addresses and decides matters that are already within the exclusive jurisdiction of this Court.

To make matters worse, Appellants learned today, October 23, 2023, that the Receiver, without notice to any other party, provided the Texas Secretary of State with a copy of the circuit court's October 5, 2023 order, and asked her to enforce the order and formally revoke Payne & Keller's corporate termination. The Texas Secretary of State apparently issued a "Certificate of Revocation of Dissolution" on October 12, 2023, which the Receiver provided to the circuit court and Appellants for the first time earlier today. These subsequent actions stemming from the circuit court's order further impair one of Payne & Keller's and Appellants' main defenses regarding Payne & Keller's dissolution status and the applicability of Texas's statute of repose—issues that have been on appeal to this Court and are within this Court's exclusive jurisdiction since April 28, 2023, when Appellants filed their notices of appeal.

Appellants do not make this motion lightly. But because the circuit court has chosen to intrude on this Court's exclusive jurisdiction, and the Receiver has taken follow-up actions that further interfere with key issues on appeal, Appellants respectfully move for an emergency order from this Court that enforces Rule 205, SCACR, and enjoins the circuit court and the Receiver from any further efforts to proceed with matters affected by this appeal. Appellants also request that the current deadlines in this appeal be held in abeyance pending resolution of this motion, because if the circuit court's October 5, 2023 order is effective, and the Texas Secretary of State's

October 12, 2023 "Certificate of Revocation" is viewed as controlling despite the circumstances under which it was obtained, it will materially change critical issues in this appeal.

PROCEDURAL BACKGROUND

Ms. Childers Sues Payne & Keller in South Carolina Circuit Court

Payne & Keller is a former Texas corporation that dissolved in 1986 and was terminated by law in 1989. (App. Vol. I 1-5, Dissolution Papers for Frentex Enterprises Company of Texas, f/k/a Payne & Keller Company (Nov. 25, 1986).) Despite its terminated status, on July 14, 2021, the underlying plaintiff in this case, Lenora Childers, commenced an asbestos personal injury case against Payne & Keller and various other defunct companies in South Carolina circuit court. (App. Vol. I 6-44, Compl. dated July 14, 2021, in *Childers v. Davis Mechanical Contractors, Inc.*, Case No. 2021-CP-40-03484.) The apparent purpose of suing only defunct companies was to create a series of unlawful nationwide receiverships.

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

On August 23, 2021, Ms. Childers filed a motion asking the 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 and has no property in South Carolina. (App. Vol. I 45-47, Mot. to Appoint dated Aug. 23, 2021.) Four days later, on August 27, 2021—without any notice to Appellants—the circuit court granted Ms. Childers' motion and appointed Mr. Protopapas as the Receiver for Payne & Keller despite the fact that that company no longer exists. (App. Vol. I 48-51, Order Appointing Receiver dated Aug. 27, 2021.) The circuit court did so without any hearing.[2] The Receiver, ostensibly acting on behalf of Payne & Keller, a terminated company

[2] Ms. Childers voluntarily dismissed one of the other nine named defendants. She filed motions seeking the appointment of Mr. Protopapas as a receiver over each of the other eight remaining defendants. The circuit court granted all of these motions without a hearing.

that cannot sue or be sued, subsequently filed an improper third-party insurance coverage complaint against Appellants and other alleged historical insurers of Payne & Keller. (App. Vol. I 52-135, Second Am. Third-Party Compl. dated July 14, 2022.)

Travelers Moves to Dissolve the Receivership

On August 24, 2022, Travelers filed a motion to dismiss the Receiver's third-party complaint and to dissolve the Receivership. (App. Vol. I 136-69, Mot. to Dismiss and Dissolve dated Aug. 24, 2022.) Other Insurers joined the motion to dissolve the Receivership. (App. Vol. I 170-73, Notice of Mot. and Joinder dated Sept. 19, 2022.) Travelers argued, 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, the South Carolina circuit court did not have the power to appoint a Receiver over Payne & Keller. The Receivership was improper from the start and must be dissolved.

The Receiver opposed Travelers' motion. (App. Vol. I 174-97, Receiver for Payne & Keller's Response to Travelers' Mot. to Dismiss and Dissolve dated Jan. 13, 2023.) Remarkably, in an effort to avoid Texas's 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), the Receiver speculated in his opposition brief that Payne & Keller may have engaged in some sort of fraud at the time of its 1986 dissolution, and argued that the circuit court—a state court located in South Carolina—should somehow reinstate Payne & Keller's corporate existence in another state, *i.e.*, Texas. (*Id.* at 181-86.)

The Circuit Court Denies Appellants' Motion to Dissolve

In a March 30, 2023 order, the circuit court denied Appellants' motion to dismiss and dissolve the Payne & Keller receivership. (App. Vol. I 198-207, Order Denying Mot. to Dismiss and Dissolve dated Mar. 30, 2023 (filed Mar. 31, 2023).) The March 30 order not only rejected the dissolution grounds Appellants raised and continued the Receivership, but it also modified the scope and purview of the Receivership by authorizing the Receiver to pursue his unpled fraud theory, with the ultimate goal of revoking Payne & Keller's termination in Texas. (*Id.* at 202.)

Appellants Appeal the Order Denying the Motion to Dissolve

On April 28, 2023, Appellants timely appealed the circuit court's order denying the motion to dissolve the Payne & Keller Receivership. The appeal remains pending before this Court. The appeal asks this Court to decide, among other things:

- Whether the circuit court erred by appointing a Receiver over Payne & Keller, a dissolved Texas corporation that does not have any property in South Carolina, and 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 "property within [South Carolina]" so as to justify 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 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 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.

On May 5, 2023, this Court asked the parties to file memoranda addressing the issue of appealability. In an Order dated August 9, 2023, the Court ruled: "After careful consideration of the parties' memoranda on appealability, this appeal shall proceed."

On August 23, 2023, the Receiver filed an "Expedited Motion to Clarify the Court's Order on Appealability." In his Motion to Clarify, the Receiver asked the Court to "clarify that the pendency of this appeal does not stay the underlying Receivership action and the Receiver may continue carrying out his court-appointed duties while this appeal is pending." (Mot. to Clarify at 5.). The Motion to Clarify did not reference the issue of jurisdiction under Rule 205, SCACR; rather, it was limited to the subject of a "stay" at the circuit court level.

On September 8, 2023, the Court issued an Order "clarify[ing] that Appellants' appeal of the circuit court's March 31, 2023 order denying their motion to dismiss third-party claims and dissolve the Payne & Keller receivership shall proceed" and "further clarify[ing] that the March 31, 2023 order is not stayed during pendency of this appeal." (Order dated Sept. 8, 2023 at 1.) The Court explained that "the receivership action and the receiver's ability to carry out his duties are not stayed." (*Id.*) Neither the Receiver's Motion to Clarify nor the Court's Order addressed the issue of *jurisdiction* under Rule 205, SCACR.

Ms. Childers Moves to Revoke Payne & Keller's Corporate Termination for the Exact Same Reasons Raised in the Receiver's Opposition to Appellants' 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. (App. Vol. I 208-214, Pl. Childers's Mot. to Revoke dated June 14, 2023.)

The motion was copied-and-pasted from the Receiver's opposition to Travelers' motion to dissolve the Receivership, which is now on appeal before this Court. (*Compare* App. Vol. I 209-13, Pl. Childers's Mot. to Revoke at 2-6, *with* App. Vol. I 182-86, Receiver's Opp'n to Travelers' Mot. to Dissolve at 9-13.) Travelers filed an opposition to Ms. Childers's motion to revoke on July 7, 2023, and Other Insurers joined in Travelers' opposition. (App. Vol. I 215-41, Travelers' Opp'n to Pl. Childers's Mot. to Revoke dated July 7, 2023); (App. Vol. I 242-43, Other Insurers' Joinder dated July 7, 2023.) The circuit court held a hearing on the motion on July 10, 2023, at which time it deferred ruling on the motion due to its admitted lack of jurisdiction, *i.e.*, because the Motion to Revoke depends on the resolution of matters that are pending before this Court in the present appeal. For example, the circuit court noted: "I am acutely aware of my role as a circuit court judge. I am not supposed to get outside my guard rails and that's what I don't want to do in connection with something that's pending in front of an appellate court." (App. Vol. I 312, July 10, 2023 Hearing Tr. at 69:7-11.) During a subsequent hearing on August 21, 2023, the Court once again declined to rule on the motion, also because of its lack of jurisdiction. (App. Vol. I 343, August 21, 2023 Hearing Tr. at 64:5-8.)

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

Despite all of this, on September 26, 2023, Ms. Childers's counsel emailed the 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" (the "proposed order"). (App. Vol. I 359-60, Email from Pl. Childers' Counsel dated September 26, 2023.) 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.

(App. Vol. I 361-62, Email from Travelers' Counsel dated Sept. 28, 2023.) The circuit court judge never responded to counsel's email and, instead, before the expiry of 10 days, entered the proposed order submitted by Ms. Childers's counsel. (App. Vol. I 363-71, Findings of Fact and Conclusions of Law on Pl.'s [sic] Mot. to Revoke the Termination of Payne & Keller Company dated Oct. 5, 2023.)

The Circuit Court Revokes Payne & Keller's Termination

The circuit court's October 5, 2023 order is substantially identical to Ms. Childers's proposed order. It purports to revoke Payne & Keller's termination and reinstate its corporate existence in Texas. The order is not only unconstitutional on its face, the circuit court plainly did not have jurisdiction to issue it under Rule 205, SCACR. On October 16, 2023, Appellants filed motions to vacate or reconsider the circuit court's order. (App. Vol. II 1-371, Motion to Vacate or Reconsider; App. Vol. III 1-231, Joinders.)

On October 20, 2023, the circuit court judge emailed the parties:

> Chief Justice Toal has scheduled a hearing on the Motion to Vacate or in the Alternative Motion to Reconsider the Court's October 5, 2023 Order filed by Certain Insurers and Travelers' Joinder. She would like to discuss whether she should consider reopening the matter, have an additional hearing at another date or now, and to discuss how to move forward regarding these latest filings. The hearing has been added to the agenda for October 25, 2023 at 9:30 AM.

(App. Vol. III 232-33, Oct. 20, 2023 Circuit Court Email; App. Vol. III 234-35, Oct. 20, 2023 Circuit Court Email.) The Receiver sent a response email asking the circuit court to "schedul[e] Payne & Keller's motions for a different day," even though the Receiver neither filed nor responded to the motion to revoke that was the subject of the scheduled hearing. (App. Vol. III 240, Oct. 20, 2023 Email from the Receiver.) Nonetheless, 35 minutes later, the circuit court approved the Receiver's request to cancel and reschedule the hearing. (App. Vol. III 242, Oct. 20,

2023 Circuit Court Email; App. Vol. III 243, Notice of Cancellation of Hearing.) The hearing has not been rescheduled. All of this occurred after the Receiver had without any form of notice secretly moved ahead in Texas unbeknownst to any other party.

The Receiver Secretly Asks the Texas Secretary of State to Enforce the Circuit Court's Order Revoking Payne & Keller's Termination Without Notice to Appellants or This Court

On October 23, 2023, the Receiver filed with the circuit court a "Notice of Filing," attaching a "Certificate of Revocation of Dissolution" of Frentex f/k/a Payne & Keller, dated October 12, 2023 and signed by the Texas Secretary of State. (App. Vol. III 246, Oct. 23, 2023 Notice of Filing and Oct. 12, 2023 Certificate of Revocation.) It appears the Receiver secretly sought and obtained this document from the Texas Secretary of State by providing the Secretary of State with a copy of the circuit court's October 5, 2023 order, and asking the Secretary of State to formally revoke Payne & Keller's termination. He did not provide any notice to Appellants or this Court of his conduct, which he says he did "[p]ursuant to the [circuit court's] previous rulings and instructions," (*id.*), notwithstanding the fact that issues regarding Payne & Keller's dissolution status and the applicability of Texas's statute of repose are on appeal and within this Court's exclusive jurisdiction.

ARGUMENT

Under Rule 205, SCACR, the circuit court did not have jurisdiction to rule on Ms. Childers's motion to revoke, because the matters raised in the motion are necessarily affected by this appeal, over which this Court has exclusive jurisdiction. As Travelers repeatedly explained to the circuit court (*see, e.g.*, App. Vol. I 216-17, Travelers' Opp'n to Pl. Childers's Mot. to Revoke at 2-3), Ms. Childers's motion to revoke is based entirely—almost word-for-word—on arguments Payne & Keller's Receiver made in his opposition to Travelers' motion to dissolve the

Receivership. The circuit court explicitly addressed the Receiver's termination-by-fraud arguments in its order, and those arguments are presently on appeal before this Court. As a result, under Rule 205, the circuit court did not have jurisdiction to address the motion to revoke or any other "matters affected by the appeal."

This jurisdictional point is not debatable—it is black-letter law. *See* Rule 205, SCACR ("Upon the service of the notice of appeal, the appellate court shall have *exclusive jurisdiction* over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal." (emphasis added)); *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 534, 787 S.E.2d 485, 494 (2016) (explaining that "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"); Jean H. Toal, *et al.*, *Appellate Practice in South Carolina* 121 (3d ed. 2016) (explaining that "[t]he appellate court obtains exclusive jurisdiction over the appeal upon service of the notice of appeal").

Despite the Receiver's efforts to have the appeal dismissed, this Court has rightly determined that the appeal shall proceed. *See* Order dated Aug. 9, 2023 ("this appeal shall proceed"); Order dated Sept. 8, 2023 (reiterating that the appeal "shall proceed"). Because Ms. Childers's motion to revoke asked the circuit court to issue an order to revoke Payne & Keller's Texas termination based on grounds squarely on appeal before this Court, the circuit court lacked the jurisdiction to issue the October 5 order, and it must be vacated or clarified to be without force or effect.

No one—not the circuit court, not Ms. Childers, and not the Receiver—can seriously suggest that the revocation-by-fraud issue raised in the motion to revoke is not a "matter affected by the appeal." Again, the Receiver first made this argument in his opposition to Travelers' motion to dissolve the Payne & Keller Receivership, the resolution of which is now on appeal. (App. Vol. I 216-17, 221-22, 227-29, Travelers' Opp'n to Pl.'s Mot. to Revoke at 2-3, 7-8, 13-15.) The Receiver did so in an effort to avoid Texas's statute of repose, which fully protects Payne & Keller from suit—and bars Payne & Keller or its Receiver from bringing suit against Appellants—and it has done so for over three decades. Effectively, the Receiver has asked the circuit court to revive potential liability for Payne & Keller that has been extinguished as a matter of law since 1989.

The circuit court accepted the Receiver's argument and denied Appellants' motion to dissolve. (App. Vol. I 202, Order Denying Mot. to Dissolve dated Mar. 30, 2023, at 5 (filed Mar. 31, 2023) ("this Court finds the Receiver has made a prima facie showing that Payne & Keller 'was terminated as a result of actual or constructive fraud,' § 11.153(a), and dismissal on the basis of the termination is unwarranted").) The circuit court's March 30 order authorized the Receiver to pursue his fraud theory with the ultimate goal of revoking Payne & Keller's termination under

Texas law. (*Id.* at 5.) Appellants appealed that order, but Ms. Childers then filed a copycat motion asking for the very relief the circuit court said it lacked jurisdiction to provide.

The circuit court's willingness to sign Ms. Childers's proposed order granting the motion to revoke is particularly disappointing, and surprising, given that the circuit court previously acknowledged the jurisdictional prohibition. (App. Vol. I 312, July 10, 2023 Hearing Tr. at 69:7-11 ("THE COURT: I am acutely aware of my role as a circuit court judge. I am not supposed to get outside my guard rails and that's what I don't want to do in connection with something that's pending in front of an appellate court. MR. LEE: It [*i.e.*, Rule 205 covers] matters affected by the appeal, not the same case, not the same claim, not the same motion, but -- THE COURT: It does say that."); *id.* at 36:3-4 ("THE COURT: The Court of Appeals is going have the right to make that finding [regarding constructive fraud]").) The circuit court also indicated that there would be another hearing before it decided whether to take any action on the motion to revoke. (*See id.* at 78:6-19 ("[MR. SAWYER:] Just for point of clarification, the impact holding pending a ruling by the court, will there be another hearing. I have points I wanted to put on the record, but I don't want to waste the court's time if we're going to have the Court of Appeals. THE COURT: Yes, I should say that and make that clear, that this is an adjourned proceeding, not a -- MR. SAWYER: We're not closing the book. THE COURT: Or a paused proceeding, I guess you could say. I am not declaring the hearing at an end. I am pausing it or adjourning it until I receive further information. Right now, my main concern is the Court of Appeals and my authority. . . .").) At that time, the circuit court judge refused to consider the motion, concluding "I am going to hold my ruling in abeyance until we hear from the Court of Appeals," because "I don't want to step beyond my boundaries with the Court of Appeals." (*Id.* at 75:8-9, 14-16.)

Simply put, the circuit court openly admitted its concern that it did not have jurisdiction to rule on Ms. Childers's motion to revoke because the issues raised in that motion are squarely before this Court. Nothing has changed.

As an apparent justification for violating Rule 205, SCACR, the circuit court's October 5 order granting the motion to revoke notes that the Payne & Keller Receivership action is not "stayed" (App. Vol. I 363-64, Order at 1-2), citing this Court's September 8, 2023 Order. But this Court's September 8, 2023 Order relates only to the subject of a stay, *not jurisdiction*. Order dated Sept. 8, 2023 ("the receivership action and the receiver's ability to carry out his duties are not stayed."). The existence of a stay does not address, and has nothing to do with, the circuit court's lack of *jurisdiction* to rule on Ms. Childers's motion when matters affecting that motion are on appeal. The absence of a stay obviously does not mean the presence of circuit court jurisdiction. Rule 205 and the case law enforcing it are clear that lower courts have no power to proceed with matters that are affected by a pending appeal. *See supra* at 11.

Simply put, the circuit court is and was divested of jurisdiction to rule on Ms. Childers's motion under Rule 205, and the question of a stay was irrelevant to that analysis:

> Note that the existence or nonexistence of a stay under Rule 241 does not control the [lower] court's power to proceed with the action and address matters not affected by the appeal. Rather, the lower court's power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a matter affected by the appeal under Rules 205 and 2041(a).

Toal, *Appellate Practice in South Carolina*, at 121 (citing *Tillman*).

As discussed above, without any notice to Appellants, the Receiver apparently provided the Texas Secretary of State with a copy of the circuit court's October 5, 2023 order, and asked her to enforce the order and formally revoke Payne & Keller's termination and reinstate its corporate existence in Texas. On October 12, 2023, the Texas Secretary of State issued a

"Certificate of Revocation," which purports to revoke Payne & Keller's termination as of October 12, 2023. The Receiver did not notify Appellants of the "Certificate of Revocation" until October 23, 2023, when he filed a "Notice of Filing" with the circuit court. He did so only after the circuit court indicated that it was reconsidering its October 5, 2023 order. (App. Vol. III 236-244, Circuit Court Email and the Receiver's Response.) This Court needs to step in immediately to stop any further efforts to undermine this Court's exclusive jurisdiction over the issues on appeal.

CONCLUSION

Appellants respectfully request that the Court issue an order enforcing its exclusive jurisdiction under Rule 205, SCACR, confirming that the circuit court did not have 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.

If the circuit court's October 5, 2023 order and the Receiver's efforts to use the Texas Secretary of State's October 12, 2023 "Certificate of Revocation" are allowed to continue, it would materially add to and change the issues in this appeal. As a result, Appellants respectfully request that the current deadlines in this appeal be held in abeyance pending resolution of this motion. Appellants also respectfully request that the Court grant this motion on an expedited basis so that the parties, this Court, and the circuit court can proceed with certainty as quickly and efficiently as possible.

Signature Page Attached

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

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Counsel for Appellants AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; and The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company.

October 23, 2023

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): Appellants' 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)
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Scott Shutte (scott.schutte@morganlewis.com)
Brady Edwards (brady.edwards@morganlewis.com)

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

October 23, 2023

EXHIBIT 17

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

CATHERINE S. HARRISON
CHIEF DEPUTY CLERK

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October 27, 2023

Mr. Matthew Todd Carroll, Esquire
1221 Main Street
Suite 1600
Columbia SC 29201

Re: Lenora Childers v. Davis Mechanical Contractors, Inc.
Appellate Case No. 2023-000727

Dear Counsel:

This will acknowledge receipt of the emergency motion to clarify and enforce rule 205.

By copy of this letter, opposing counsel is requested to file a return no later than ten (10) days from the date of this letter.

The time limits for perfecting the appeal will be held in abeyance pending the Court's decision. Accordingly, we decline to take action on the motions for an extension of time to file the appellants' initial brief and designation of matter.

Very truly yours,

CLERK

cc: Wesley Brian Sawyer, Esquire
Mary Elizabeth O'Neill, Esquire
Harry Lee, Esquire

Brian Montgomery Barnwell, Esquire
John Belton White, Jr., Esquire
Marghretta Hagood Shisko, Esquire
Brady Edwards, Esquire
Scott Shutte, Esquire
Christopher Rutledge Jones, Esquire
G. Murrell Smith, Jr., Esquire
Jonathan M. Robinson, Esquire
Shanon N. Peake, Esquire

EXHIBIT 18

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
LENORA CHILDERS, Individually and as Personal Representative of the Estate of LEWIS C. CHILDERS, Plaintiff, v. Davis Mechanical Contractors, Inc., et al, Defendants. ********** Flame Refractories, Inc., United Construction Co. of Rome, Inc., Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co., and Payne & Keller Company By and Through Their Duly Appointed Receiver Peter D. Protopapas, Third-Party Plaintiffs, v. Zurich American Insurance Company, et al; Third-Party Defendants.	Case No. 2021-CP-40-03484 **RECEIVER FOR PAYNE & KELLER COMPANY'S NOTICE OF FILING**

Peter Protopapas, the Receiver for Payne & Keller Company ("Payne & Keller"), hereby provides notice to the Court of the following:

Pursuant to this Court's previous rulings and instructions, the Receiver has obtained the following document from the Office of the Secretary of State of Texas. *See* October 12, 2023 Certificate of Revocation of Dissolution (a true and correct copy of which is attached hereto as Exhibit A).

Respectfully submitted,

s/ Brian M. Barnwell
Brian M. Barnwell SC Bar 78249
RIKARD & PROTOPAPAS, LLC
2110 N Beltline Blvd
Columbia, SC 29204
803.978.6111
bb@rplegalgroup.com

This 23rd day of October, 2023.

Corporations Section
P.O.Box 13697
Austin, Texas 78711-3697

Jane Nelson
Secretary of State

Office of the Secretary of State

CERTIFICATE OF REVOCATION OF DISSOLUTION OF

FRENTEX ENTERPRISES COMPANY OF TEXAS
17288200

The undersigned, as Secretary of State of Texas, hereby certifies that Court-Ordered Revocation of Dissolution for the above named entity has been received and entered into the records of this office.

ACCORDINGLY, the undersigned, as Secretary of State, and by virtue of the authority vested in the Secretary by law, hereby issues this Certificate of Revocation of Dissolution.

Dated: 10/12/2023

Effective: 10/12/2023

Jane Nelson
Secretary of State

EXHIBIT 19

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
PETER D. PROTOPAPAS, as Receiver, Administrative Plaintiff, v. **Davis Mechanical, et al**, Nominal Administrative Defendants.	In Re: Asbestos Personal Injury Litigation Coordinated Docket 2023-CP-40-01466 **ORDER GRANTING JOINT MOTION TO APPROVE A SETTLEMENT BETWEEN CENTURY INDEMNITY COMPANY AND THE RECEIVER FOR FLAME REFRACTORIES, INC. AND UNITED CONSTRUCTION CO. OF ROME, INC.**

This matter came before the Court on the joint motions of Peter D. Protopapas, as Receiver for Flame Refractories, Inc. and United Construction Co. of Rome, Inc. (collectively, the "Receiver" or "Flame") and Century Indemnity Company, in its own capacity and as successor to CCI Insurance Company, as successor to Insurance Company of North America (collectively, "Century") to approve a settlement between the Receiver and Century. Having considered the joint motion, together with the exhibits submitted with this motion, the Court hereby decides the matter on the filings and rules as follows:

ANALYSIS AND TREATMENT OF CONFIDENTIAL SETTLEMENT AGREEMENTS

The Receiver and Oakboro QSF, LLC, have entered into a confidential settlement agreement with Century. Flame and Century jointly have moved this Court to approve the settlement. The proposed settlement agreement provides that funds paid by Century as part of the settlement agreement will be deposited into the Oakboro QSF, a qualified settlement fund established pursuant to Treasury Regulation § 1.468B-1 for the defense of Flame asbestos bodily

injury suits and payment of Flame asbestos bodily injury claims, with this Court retaining continuing jurisdiction over the QSF. The Court has thoroughly reviewed the settlement agreement. The Receiver and Century have asked that the settlement agreement remain sealed.

In weighing the factors outlined in Rule 41.1(c) of the South Carolina Rules of Civil Procedure, the Court, while mindful of our state's public policy favoring the transparency of court proceedings, has reviewed the settlement agreement in detail *in camera* and all submissions related to this motion and finds the Receiver has met his burden to show sealing the settlement agreement is proper and necessary under Rule 41.1(c) of the South Carolina Rules of Civil Procedure. Specifically, the Court finds that, although the litigation of asbestos suits is of great public importance, the specific terms of the liquidation of Receiver assets arising from a settlement between the Receiver and the settling insurance company does not have great public significance.

The Court agrees with Receiver that the settlement agreement does not attempt to hide important or damaging information from the public and is only related to liquidating Receivership assets from the settling insurer. The Court holds that sealing the settlement agreement is necessary and beneficial to the public to ensure the longevity of the Oakboro QSF and allow for the fair and just compensation of injured parties who may have legitimate present and future claims against Flame due to asbestos-related injuries. This Court retains continuing jurisdiction over the Oakboro QSF and will be able to adjudicate any matter brought before the Court concerning this settlement and the payment of funds to the Oakboro QSF.

The premature disclosure of the specific details of this settlement agreement could be misappropriated and could chill the Receiver's ability to equitably liquidate other Receivership assets. Furthermore, the underlying asbestos litigation is still ongoing and sealing this settlement agreement will allow these asbestos cases to continue forward in the same manner in which other

cases move forward. The Court further finds sealing the settlement agreement is the best way to balance the potential harm to the settling parties with the public interest, and there are no other alternatives in this case to protect the private interests of the settling parties.

LIQUIDATION OF RECEIVERSHIP ASSETS AND APPROVAL OF SETTLEMENTS

"A sale of receivership property by the receiver, under an order of court, is a judicial sale." *Hannon v. Mechanics Bldg. & Loan Ass'n of Spartanburg*, 177 S.C. 153, 180 S.E. 873, 876 (1935). "The courts of this state have uniformly exercised the power to order that a receiver, duly appointed, shall sell the real estate and other property of the person or corporation whose assets are in the hands of receivers, in order to distribute the proceeds among creditors, stockholders, and other parties interested, and to liquidate and wind up the affairs of such insolvent person or corporation." *Id.* at 876. Moreover, "it is often of great importance that such assets should be disposed of by a receiver, duly appointed, because of his special knowledge of such assets and because the receiver takes manual possession and custody of the property for the purpose of disposing of it and distributing the proceeds." *Id.* Thus, when the Court deems it appropriate, it "may make an order to the receivers to sell at private sale, or the court may accept an offer made directly to the court, or it may ratify a sale already made." *Id.*

Like any contractual right, the insurance contracts at issue constitute property of Flame that may be liquidated by way of a sale. As part of the Settlement Agreement, Century has offered to buy back certain policies that it may have sold to Flame. Doing so will allow the insurance assets to be liquidated for use in the administration of the Receivership, and by the Oakboro QSF for the defense of Flame asbestos bodily injury suits and payment of Flame asbestos bodily injury claims.

The Receiver and Century are seeking approval for the Receiver to sell the Receivership's property. Specifically, the Receiver is selling the insurance policies issued by the settling insurer back to Century to fund a Qualified Settlement Fund. This Court has jurisdiction over the assets of Flame through its un-appealed and unchallenged Orders appointing Receiver dated August 27, 2021. Furthermore, South Carolina law vests this Court with discretion to dispose of the Receivership's assets and direct disposition of those assets.[1] The Court is further keeping continuing jurisdiction over Oakboro QSF, LLC and all of its assets.

FINDINGS OF FACT

1.1 The Receiver and Century have entered into a final comprehensive settlement agreement titled, "Confidential Settlement Agreement and Release" ("Settlement Agreement"). The Settlement Agreement resolves all disputes between Century and Flame under the relevant policies Century issued to Flame.

1.2 The Court is convinced the terms of the Settlement Agreement are the result of substantial arm's-length, good faith negotiations between the settling parties.

1.3 Permitting the sale of the insurance policies is an appropriate and efficient method of liquidating the insurance policy assets. The buyback will allow the Court, through the Receiver, to more easily manage Flame's assets and garner those assets for the defense and resolution of

[1] It is clear that this Court's jurisdiction extends over Flame's assets, which include its insurance policies. *See Buist v. Merchant's & Planter's Bank* 65 S.C. 487, 489, 43 S.E. 958, 959 (1903) (Receiver can liquidate property under Court supervision); *Clyburn v. Reynolds*, 31 S.C. 91, 105, 9 S.E. 973, 975 (1889) (Court can empower receivers to sell the assets of the receivership); *Montgomery & Crawford v Arcadia Mills*, 173 S.C. 464, 490, 176 S.E. 589, 599 (1934) (Receivership Court has the power to liquidate the rights of creditors pursuant to their priorities) *In re State ex rel Hutchinson*, 182 S.C. 369, 375, 189 S.E. 475, 477–78 (1937) (holding the power to appoint a receiver is vested in every circuit court of the State, and nowhere in the body of the law is there any limitation upon this authority); *Truesdell v. Johnson*, 144 S.C. 188, 142 S.E. 343, 345 (1928) (holding the effect of the appointment of the receiver is to take property and place it in the hands of a third party pending litigation); S.C. Code Ann. § 15-65-10.

future Flame asbestos bodily injury suits.

1.4 Likewise, to the extent Flame has any chose-in actions against Century, whether in tort, contract, law, or equity, the release of any and all such claims as part of the Settlement Agreement is an efficient means of liquidating those assets so that they may be properly managed under the receivership. Upon completion and funding of the settlement to the Oakboro QSF, Century's policies issued to Flame or under which Flame is entitled to benefits from Century, are deemed forever extinguished and all insurance coverage potentially available under the policies is fully exhausted such that no further insurance coverage will be available under the policies, and Century shall have no obligation to make any other payment of any type whatsoever under the policies, including no obligation to make any payments for Flame asbestos bodily injury suits in the form of defense, indemnity, or otherwise.

1.5 The Court approves the buyback of the policies and authorizes the Receiver to execute whatever documents are necessary to complete the sale of the policies back to Century, thereby forever extinguishing any contractual obligations Century may have owed to Flame under the insurance policies.

1.6 Upon completion and funding of the settlement to the Oakboro QSF, Century is forever relieved of any and all obligations it may owe in connection with Flame under the policies. All claims asserted by the Receiver or any other party to this action against Century shall be dismissed from this action with prejudice.

CONTRACTS WITH ATTORNEYS

In its capacity as the Receivership Court, this Court has directed the Receiver to marshal the assets of Flame to make such assets available to meet the costs and expenses of Flame's asbestos bodily injury suits, including Flame's insurance policies and proceeds. Further, in the order appointing the Receiver, this Court authorized the Receiver to "hire any person or company necessary to accomplish any right or power under this Order." The Court finds that the Receiver has been diligent in carrying out these duties.

Immediately following his appointment as the Receiver for Flame, Mr. Protopapas retained a team of well-regarded law firms to locate and secure insurance coverage for the Flame asbestos bodily injury suits. Given Flame's complete lack of financial resources, each of these law firms agreed to assume the significant risk of undertaking this representation on the basis of contingent fee contracts.

The Receiver entered into contingent fee contracts with the following highly qualified law firms: Morgan Lewis Bockius, LLP ("Morgan Lewis"), Smith Robertson LLP, and Rikard & Protopapas, LLC. Morgan Lewis is a global law firm and is highly skilled and experienced in asbestos litigation and in complex insurance coverage litigation. The Receiver also engaged lawyers from Smith Robertson, as well as from his own firm, Rikard & Protopapas, LLC, who are experienced in engaging in complex litigation and insurance coverage litigation.

Each of the law firms has fully performed its services under the contingency fee contracts, and as such, the Receiver seeks the Court's approval of the attorneys' contingency fee of thirty-three and one-third percent (33 1/3%) of the gross settlement amount between Flame and Century and approval of reimbursement costs incurred by the law firms to date. As such, the Court approves the attorneys' fee contracts and attorneys' fees in the amount of thirty-three and one-

third percent (33 1/3%) of the gross settlement amount between Flame and Century, in addition to approval of reimbursement for costs incurred to date. In light of the attorneys' fee awarded, in part, to the Receiver's law firm, that attorneys' fee will be in lieu of any Receiver fee for the Receiver's work to date.

IT IS THEREFORE ORDERED THAT

(1) The Court is convinced the terms of the Settlement Agreement are the result of substantial arm's-length, good faith negotiations between the settling parties;

(2) Permitting the sale of the insurance policies is an appropriate and efficient method of liquidating the insurance policy assets. The buyback will allow the Court, through the Receiver, to more easily manage Flame's assets and garner those assets for the defense and resolution of future Flame asbestos bodily injury suits;

(3) Likewise, to the extent Flame has any chose-in actions against Century, whether in tort, contract, law or equity, the release of any and all such claims as part of the Settlement Agreement is an efficient means of liquidating those assets so that they may be properly managed under the receivership;

(4) Flame and Century agree that upon funding of the settlement to Oakboro QSF, LLC, Century's policies issued to Flame or under which Flame is entitled to benefits from Century known and unknown are deemed forever extinguished and all insurance coverage potentially available under the policies is fully exhausted such that no further insurance coverage will be available under the policies, and Century shall have no obligation to make any other payment of any type whatsoever under the policies, including no obligation to make any payments for Flame asbestos bodily injury suits in the form of defense, indemnity, or otherwise;

(5) The Court approves the buyback of the policies and authorizes the Receiver to execute whatever documents are necessary to complete the sale of the policies back to Century, thereby forever extinguishing any contractual obligations Century may have owed to Flame under the insurance policies;

(6) Flame, Oakboro QSF, LLC and Century agree that claims of any asbestos bodily injury claimants, other insurers, or any other party against Century for contribution, indemnification, subrogation, spoliation, alter-ego, veil piercing, corporate successorship, bodily injury or other claims, whether in law or equity, shall be barred and directed to Oakboro QSF. The other parties to these cases, the underlying asbestos plaintiffs, do not object to this relief, and as such the Court approves and ratifies this agreement in connection with future asbestos filings, as noted above. Further, this Court is not making any determination on such claims if ever made;

(7) Flame, Oakboro QSF, and Century agree that any and all claims by underlying asbestos claimants, now and in the future, direct or derivative, against Century, including but not limited to "alter ego" or other veil piercing or corporate successorship claims, whether in law or equity, are barred and must be directed to Oakboro QSF. The underlying asbestos plaintiffs do not object to this relief, and as such the Court approves and ratifies this agreement in connection with streamlining future asbestos filings, as noted above. Further, this Court is not making any determination on such claims if ever made;

(8) Flame and Century agree that upon funding of the settlement to Oakboro QSF, LLC, that Century is forever relieved of any and all obligations it may owe in connection with Flame. The underlying asbestos plaintiffs do not object to this relief, and as such the Court approves and ratifies this agreement in connection with future asbestos filings, as noted above;

(9) Flame and Century agree that any and all claims against Century relating to obligations arising out of Flame's asbestos bodily injury suits or other bodily injury or property damage liabilities are forever ended, including any claims by any insurer of Flame asserting contribution, subrogation, indemnity, "other insurance," and similar rights and claims against Century. Neither the underlying asbestos plaintiffs nor any other party objects to this relief, and as such the Court approves and ratifies this agreement in connection with streamlining future asbestos filings, as noted above;

(10) The Receiver's Contracts with his lawyers are approved as set forth above; and

(11) The Court retains continuing jurisdiction over Oakboro QSF in accordance with Income Tax Regulation § 1.468B-1(c)(1) of all matters related to this Order.

IT IS SO ORDERED.

[JUDGE'S SIGNATURE PAGE FOLLOWS]

Richland Common Pleas

Case Caption: Peter D Protopapas vs Beaty Investments Inc , defendant, et al

Case Number: 2023CP4001466

Type: Order/Approval Of Settlement

So Ordered

Jean H. Toal

EXHIBIT 20

The South Carolina Court of Appeals

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. Deans Company, Inc.; Payne & Keller Company; SFB, Incorporated; Stafford Insulation Company; Standard Insulation Company of N.C., Inc.; Systra Engineering, Inc.; United Construction Co. of Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co.; Defendants.

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

v.

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

Insurance Company, Individually and as Successor in interest to Harbor Insurance Company; Hartford Accident and Indemnity Company; Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company; National Union Fire Insurance Company of Pittsburgh, PA; Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc.; Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; Lexington Insurance Company; First State Insurance Company; Certain Underwriters at Lloyd's of London and Various London Market Companies; South Carolina Property and Casualty Insurance Guaranty Association; R.L. Jarrett (Underwriting) Agency, Inc.; U.S. Risk, LLC; Rexel USA, Inc.; and Compass Risk Services, LLC, Third-Party Defendants,

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

and

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

and

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

Appellate Case No. 2023-000727

ORDER

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

Debbie H. Verdin

FOR THE COURT

Columbia, South Carolina

FILED
Sep 08 2023

cc:
Wesley Brian Sawyer, Esquire
Matthew Todd Carroll, Esquire
Mary Elizabeth O'Neill, Esquire
Harry Lee, Esquire
Brian Montgomery Barnwell, Esquire
John Belton White, Jr., Esquire
Marghretta Hagood Shisko, Esquire
Brady Edwards, Esquire
Scott Shutte, Esquire
Christopher Rutledge Jones, Esquire
G. Murrell Smith, Jr., Esquire

Jonathan M. Robinson, Esquire
Shanon N. Peake, Esquire

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Peter D. Protopapas, *as the Receiver for Payne & Keller Company*, Plaintiff, v. Zurich American Insurance Company; Travelers Casualty & Surety Company, *formerly known as Aetna Casualty & Surety Company*; Continental Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Medmarc Casualty Insurance Company; Berkshire Hathaway Specialty Insurance Company, *formerly known as Stonewall Insurance Company*; Lexington Insurance Company; Certain Underwriters at Lloyd's of London and Various London Market Companies; South Carolina Property and Casualty Insurance Guaranty Association; First State Insurance Company; and Birmingham Fire Insurance Company. Defendants.[1]	C/A No. 3:21-cv-04086-DCC **OPINION AND ORDER**

This matter is before the Court on Plaintiff's Motion to Remand. ECF No. 24. The Motion was referred to United States Magistrate Judge Paige J. Gossett for pre-trial handling and a Report and Recommendation ("Report"). ECF No. 154. On October 4,

[1] Defendants R.L. Jarrett (Underwriting) Agency, Inc. and U.S. Risk, LLC have been deleted from the caption to reflect their dismissal as parties to this action. ECF Nos. 176, 177.

2022, the Magistrate Judge held a hearing on the Motion. ECF No. 163. On October 20, 2022, the Magistrate Judge issued a Report recommending that the Motion to Remand be granted because not all properly joined and served Defendants validly joined in or consented to removal as required by 28 U.S.C. § 1446(b)(2)(A). ECF No. 167. Plaintiff filed objections to the Report. ECF No. 169. Defendant Travelers Casualty and Surety Company ("Travelers") filed a partial objection to the Report, in which Defendants Zurich American Insurance Company, Medmarc Casualty Insurance Company, and U.S. Risk, LLC (collectively, "the Objecting Defendants") joined. ECF Nos. 168, 170, 171, 172. Plaintiff and the Objecting Defendants filed Replies. ECF Nos. 173, 174, 175.

BACKGROUND

Plaintiff filed this action in the Richland County Court of Common Pleas on November 23, 2021, as the Receiver for Payne & Keller, a defunct corporation facing personal injury lawsuits by non-party claimants who were allegedly exposed to asbestos. ECF No. 1-1. Defendants removed the case to this Court on December 20, 2021, based on diversity jurisdiction under 28 U.S.C. § 1332. ECF No. 1.

On January 18, 2022, Plaintiff filed a Motion to Remand. ECF No. 24. Defendants filed Responses in Opposition, Plaintiff filed a Reply, and Defendants filed a Sur-Reply. ECF Nos. 47, 48, 49, 50, 52, 118, 145, 150. Both parties also filed supplemental briefing, and Travelers filed a Reply to Plaintiff's Supplement. ECF Nos. 141, 142, 143, 144. On October 20, 2022, the Magistrate Judge issued a Report recommending that the Motion to Remand be granted. ECF No. 167. Plaintiff and the Objecting Defendants filed

objections to the Report as well as Replies to the objections. ECF Nos. 168, 169, 170, 171, 172, 173, 174, 175.

STANDARD OF REVIEW

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. *See Mathews v. Weber*, 423 U.S. 261, 96 S. Ct. 549, 46 L. Ed. 2d 483 (1976). The Court is charged with making a de novo determination of any portion of the Report of the Magistrate Judge to which a specific objection is made. The Court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or recommit the matter to the Magistrate Judge with instructions. *See* 28 U.S.C. § 636(b). The Court will review the Report only for clear error in the absence of an objection. *See Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (stating that "in the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." (citation omitted)).

DISCUSSION

The Report contains a thorough recitation of the facts and the applicable law, which the Court incorporates by reference, except as specifically noted below. Because neither Plaintiff nor Defendants object to the Magistrate Judge's finding that Defendant South Carolina Property and Casualty Insurance Guaranty Association was fraudulently joined,

the Court finds no clear error concerning this portion of the Report and adopts the Report's finding that diversity jurisdiction exists.

A. Removal Generally

28 U.S.C. § 1441(a) provides, "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States . . . ." Removal under § 1441(a) is governed by the requirements of 28 U.S.C. § 1446(b)(2)(A), which instruct that "[w]hen a civil action is removed solely under section 1441(a), *all* defendants who have been *properly joined and served* must join in or consent to the removal of the action." *Id.* (emphasis added); *see also Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co.*, 736 F.3d 255, 259 (4th Cir. 2013) (noting "[t]he Supreme Court has construed these statutes to require all defendants in a case to join in or consent to removal"). "The burden of establishing federal jurisdiction is placed on the party seeking removal." *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994) (citing *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921)). Because removal jurisdiction raises significant federalism concerns, courts must strictly construe removal jurisdiction. *Bartnikowski v. NVR, Inc.*, 307 F. App'x 730, 739 (4th Cir. 2009). Thus, remand is necessary if federal jurisdiction is doubtful. *Mulcahey*, 29 F.3d at 151 (citing *In re Business Men's Assur. Co. of Am.*, 992 F.2d 181, 183 (8th Cir. 1993)).

B. Plaintiff's Objections

Plaintiff objects to the Magistrate Judge's interpretation of the *Barton* doctrine, insisting that the *Barton* doctrine bars a party from litigating a claim of or against a court-appointed receiver without first obtaining leave of the appointing court based on the Supreme Court's decision in *Porter v. Sabin*, 149 U.S. 473, 479–80 (1893). ECF No 169 at 5. The Court agrees. Albeit old law, *Porter* is clear that it is in the appointing court's discretion "to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere" and that the appointing court "may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit." *Porter*, 149 U.S. at 479. *Porter* further states "[t]he reasons are yet stronger for not allowing a suit against a receiver appointed by a state court to be maintained, or the administration by that court of the estate in the receiver's hands to be interfered with, by a court of the United States, deriving its authority from another government, though exercising jurisdiction over the same territory." *Id.* at 480.

Here, the receivership court has appointed a receiver who is attempting to preserve and collect assets of the defunct corporation as part of his fiduciary duty. This Court finds that *Barton*, and its subsequent application in *Porter*, act as a limitation on federal jurisdiction when a state court has previously exercised its authority by appointing a receiver to handle the administration of property; to allow this matter to continue in federal court would directly interfere with the exclusive jurisdiction of the receivership

court over this dispute. Accordingly, Plaintiff's objections are sustained, and the Court respectfully declines to adopt this section of the Report.

C. Objecting Defendants' Partial Objection

The Objecting Defendants challenge the Magistrate Judge's determination that they have failed to meet the requirements for removal under 28 U.S.C. § 1446(b)(2)(A). ECF No. 167 at 14. They argue first that under *Mayo v. Board of Education*, 713 F.3d 735, 741–42 (4th Cir. 2013), they have met this Circuit's standard for obtaining proper consent. ECF No. 168 at 3. Relying on *Mayo*, they assert that, because Defendant Travelers signed and filed a notice of removal "representing unambiguously that the other defendants consent[ed] to the removal," removal was proper under the Fourth Circuit's requirements. *Id.* However, this matter is distinguishable from *Mayo,* which concerned the risk of one defendant misrepresenting a co-defendant's decision to remove the case. *Mayo*, 713 F.3d at 742. The *Mayo* court's analysis is based on the premise that the defendants retained their right to remove and exercised their option to invoke that right, in contrast to the matter at hand. Simply because Defendants in this case have all authorized the removal of their case to federal court via a signed affidavit does not necessarily mean they each retained a right to do so and that their authorization was valid; Defendant Berkshire Hathaway's "service of suit" clause effectively waived its right to validly consent to removal for the reasons set forth below. As such, Defendants' affidavit does not satisfy the Fourth Circuit's standard for establishing compliance with 28 U.S.C. § 1446(b)(2)(A)'s requirements that all defendants who have been properly joined and served must join in or consent to the removal of the action.

The Objecting Defendants also argue that the Policy's "service of suit" clause does not act as a bar to removal. ECF No. 168 at 2. Specifically, they argue that 1) Plaintiff has provided limited evidence that this provision is in any other Defendants' policy; 2) the clause's jurisdictional language should be interpreted as a waiver of personal jurisdiction alone, rather than a waiver of one's right to remove to federal court, and 3) that Plaintiff has not sufficiently pled his complaint to trigger the clause's necessary "triggering events." *Id.* at 4–12. Upon review, the Court finds Plaintiff has provided sufficient evidence to merit remand. Plaintiff's allegations in conjunction with his filed supplement suggest to the Court that at least one Defendant (Berkshire Hathaway) is unable to consent to removal. ECF Nos. 141, 141-1. While there is a dispute as to which other, if any, Defendants have a "service of suit" clause with Plaintiff, Plaintiff has sufficiently established that Defendant Berkshire Hathaway is bound by one and thus could not consent to removal.

The "service of suit" language in Defendant Berkshire Hathaway's policy has been widely litigated across this Circuit, with courts consistently finding the clause acts as a waiver of an insurer's right to remove a case from the forum selected by the plaintiff. *See C3 Invs. of N.C., Inc. v. Ironshore Specialty Ins. Co.*, No. 2:19-cv-2609-DCN, 2020 U.S. Dist. LEXIS 24498, at *11 (D.S.C. Feb. 12, 2020) ("Most courts that have enforced service-of-suit provisions have done so in the context of removal, finding that an insurer waives its right to remove a matter to federal court where the relevant policy includes a service-of-suit provision and the insured brought suit in state court."); *see also Welborn v. Classic Syndicate Inc.*, 807 F. Supp. 388, 390 (W.D.N.C. 1992) ("Based upon the numerous cases which have held that service of suit clauses such as the one at issue

here act as waivers of the right to remove, the Court finds that the defendants have waived their removal rights in the insurance contract."); *Black & Decker, Inc. v. Twin City Fire Ins. Co.*, No. HAR 92-3352, 1993 U.S. Dist. LEXIS 2838, at *11 (D. Md. Feb. 9, 1993) ("[T]he specific language of the Service of Suit Clause, 'and will comply with all requirements to give such Court jurisdiction,' implies that [defendants] would not avail themselves of procedures like 28 U.S.C. § 1441(a) which would deprive a court of [the plaintiff's] choosing the opportunity to adjudicate the case."); *United States Fire Ins. Co. v. Arch Specialty Ins. Co.*, No. WDQ-08-1249, 2008 U.S. Dist. LEXIS 125175, at *6 (D. Md. July 15, 2008) ("Inclusion of a Service of Suit Clause in an insurance policy generally waives an insurer's right of removal."). This application is not unique to the Fourth Circuit, as multiple other circuits have held that "service of suit" provisions have acted as a waiver of a defendant's right to removal. *See, e.g., Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 160 (3d Cir. 2000); *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1206 (5th Cir. 1991); *In re Delta Am. Re Ins. Co.*, 900 F.2d 890, 894 (6th Cir. 1990). Based upon this Circuit's case law, the Court agrees that Defendant Berkshire Hathaway's "service of suit" clause acts as a waiver of its right to remove.

Next, the Objecting Defendants contend that the "service of suit" clause should be interpreted as a waiver of personal jurisdiction, rather than a waiver of its right to remove, based upon the remaining paragraphs listed in the "Service of Suit" section that detail how service of process should be perfected. ECF No. 168 at 6–7. They argue that for the right to removal to be waived, it must have been "clear and unequivocal," citing both *Grubb v. Donegal Mutual Insurance Company*, 935 F.2d 57, 59 (4th Cir. 1991) and

London Manhattan Company v. CSA-Credit Solutions of America, Incorporated, No. 2:08-cv-00465-PMD, 2008 U.S. Dist. LEXIS 38163, at *9 (D.S.C. May 9, 2008). ECF No. 168 at 9.

However, the facts of these cases are significantly different from the facts at hand. *Grubb* deals exclusively with a litigation-based waiver premised on the defendant's failure to immediately assert their right to removal after the dismissal of a necessary party. *Grubb*, 935 F.2d at 58. *London*, on the other hand, disputed whether a clause agreeing that the forum would be in "Charleston County, South Carolina" could include a federal court within Charleston County or whether the clause exclusively meant the state court. *London*, 2008 U.S. Dist. LEXIS 38163, at *2. Neither address contractual waiver, much less one that explicitly states that a party would "submit to the jurisdiction of any court of competent jurisdiction," as is the case here. ECF No. 167 at 14. In fact, other courts in this Circuit have held the "clear and unequivocal" standard cited by the Objecting Defendants is not appropriate in the realm of similar contractual waivers. *See, e.g., Welborn,* 807 F. Supp. at 390–91 ("We think the 'clear and convincing' [sic] standard so stringent as to be contrary to the right of parties to contract in advance regarding where they will litigate. A court simply should determine contractual waiver of the right to remove using the same benchmarks of construction and, if applicable, interpretation as it employs on resolving all preliminary contractual questions." (*citing Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207, 1218 n.15 (3d Cir. 1991))).

As such, courts should "resolve any such ambiguity against the insurer and in favor of the insured party." *Am. S.S. Owners Mut. Prot. & Indem. Ass'n v. Dann Ocean Towing,*

Inc., 756 F.3d 314, 319 (4th Cir. 2014); *see also Welborn*, 807 F. Supp. at 391 *("*Applying the basic contract construction principle that any ambiguities in a contract are to be resolved against the party who drafted the contract, this Court finds that the service of suit clause in the insurance contract waived the defendants' right to remove."); *Black & Decker, Inc.*, 1993 U.S. Dist. LEXIS 2838, at *11 ("Finally, had the sophisticated [Defendants], not unfamiliar with the insurance industry's widespread experience with the effects of Service of Suit clauses, desired to reserve the right of removal, they could have bargained for a clause 'reserving the insurer's right to remove to federal court.'" (internal citations omitted)). This Court likewise concludes that the "service of suit" clause waives removal and that any ambiguities as to the meaning of the clause should be resolved in favor of the insured.

Lastly, the Objecting Defendants argue the "triggering events" necessary for the "service of suit" clause to be applicable have not yet occurred, making any effect the clause has irrelevant. ECF No. 168 at 9–11. However, the Court agrees with the Magistrate Judge that this argument disregards Plaintiff's allegations. *See* ECF No. 1-1 at 16, 18 (expressly alleging that the Lloyds Defendants and Defendant Berkshire Hathaway have "failed to fully acknowledge or accept their insuring obligations"); *id.* at 27–30 (seeking damages against all defendants); *see also* ECF No. 23 at 16, 20 (same).

Given the waiver, and thus the inability to obtain valid consent from all defendants, Defendants have not adequately demonstrated they meet the requirement under § 1446(b)(2)(A) that all properly joined and served Defendants must join in or consent to

the removal of the action. Accordingly, the Objecting Defendants' partial objection to the Report is overruled.

CONCLUSION

For the reasons set forth above, the Court **SUSTAINS** Plaintiff's Objections [169], **OVERRULES** the Objecting Defendants' Partial Objection [168], and **ADOPTS IN PART** and respectfully **DECLINES TO ADOPT IN PART** the Report [167]. Accordingly, Plaintiff's Motion to Remand [24] is **GRANTED**. This case is hereby remanded to the Richland County Court of Common Pleas.

IT IS SO ORDERED.

s/ Donald C. Coggins, Jr.
United States District Judge

February 24, 2023
Spartanburg, South Carolina

EXHIBIT E

The Supreme Court of South Carolina

Ann Finch, Individually and as Executor of Estate of Franklin Finch; and Peter D. Protopapas as Court Appointed Receiver for Covil Corporation, Respondents,

v.

United States Fidelity and Guaranty Company; Zurich American Insurance Company; and Wall, Templeton & Haldrup, P.A., Defendants,

Of which United States Fidelity and Guaranty Company is the Petitioner.

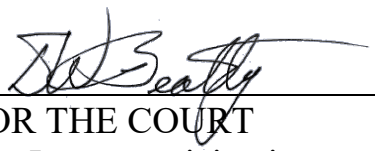
Appellate Case No. 2020-001670

ORDER

Respondent Peter D. Protopapas asks this Court to award sanctions and attorney's fees against Petitioner and its attorneys for filing a petition for a writ of prohibition with this Court. We deny the request.

We understand the complexity of the issues in this litigation, and we acknowledge parties in any given case have the right to protect and further their interests within the bounds of applicable rules and case law. Attorneys for the parties have an obligation to protect and further their clients' respective interests within the bounds of applicable rules and case law. We, in turn, expect the parties and their attorneys in this and any other case to fully cooperate with the trial court in order to ensure the case is tried or otherwise disposed of in a timely manner. Any action taken for the purpose of delaying the disposition of this case will, under appropriate

circumstances, merit the imposition of sanctions under Rule 269, SCACR.



C.J.

FOR THE COURT
Few, J., not participating

Columbia, South Carolina
March 9, 2021

cc: Theile Branham McVey, Esquire
Mark Weston Hardee, Esquire
Jonathan M. Robinson, Esquire
G. Murrell Smith, Jr., Esquire
Shanon N. Peake, Esquire
Jescelyn Tillman Spitz, Esquire
John Belton White, Jr., Esquire
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Christopher Rutledge Jones, Esquire
Austin Tyler Reed, Esquire
Matthew Todd Carroll, Esquire
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Susan Drake DuBose, Esquire
Michael S. Carnevale, Esquire
Andrew T. Frankel, Esquire
Mary Beth Forshaw, Esquire
Alan Turner, Esquire
Jonathan Marshall Holder, Esquire

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2021-CP-40-03484

Appellate Case No. 2023-000727

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

v.

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

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

v.

Zurich American Insurance Company (Individually and as Successor to Northern Insurance Company of New York, Maryland All American General Insurance Company, and Maryland Casualty Company); Allstate Insurance Company; John Tighe; Sean Antony Beatty; Dennis William Cahill; Catherine Ann Carlino; Andre Lefebvre; David Dean Shumway; Gil Chandler; Michael Davenport; Linda Young Pettigrew; Gwyn Wallace Fuller; Daniel Robert Keddie; Julie Ann Fortune; Michael John Crall; James Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.; Arrowpoint Capital Corp.; Admiral Insurance Company; Continental Insurance Company, Individually and as Successor in interest to Harbor Insurance Company; Hartford Accident and Indemnity Company; Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company; National Union Fire Insurance Company of Pittsburgh, PA; Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc.; Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance

Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; Lexington Insurance Company; First State Insurance Company; Certain Underwriters at Lloyd's of London and Various London Market Companies; South Carolina Property and Casualty Insurance Guaranty Association; R.L. Jarrett (Underwriting) Agency, Inc.; U.S. Risk, LLC; Rexel USA, Inc.; and Compass Risk Services, LLC, Third-Party Defendants,

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

and

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

and

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

PROOF OF SERVICE

I certify that a true copy of Respondent's Motion for Sanctions Pursuant to Rule 269 in this case has been served on the following, this 8th day of December, 2023, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to Rule 262(a)(1), SCACR, and *RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022)*, S.C. Sup. Ct. Order dated May 6, 2022.

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Attorneys for Respondent Payne & Keller Company, By and Through its Duly Appointed Receiver, Peter D. Protopapas

December 8, 2023.

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Subject:	Lenora Childers v. Davis Mechanical Contractors, Inc. - 2023-000727
Date:	Friday, December 8, 2023 5:44:00 PM
Attachments:	Motion for Sanctions, 4.pdf Exhibit A Texas Answer PK, 1.pdf Exhibit B 2023.10.27 Plea in Intervention - Motion to Vacate - Petition for Declaratory Judgment, 2.pdf Exhibit C 2023.11.13 NUF Plea in Intervention Motion to Vacate, 2.pdf Exhibit D - 2023.02.24 ECF 180 Opinion and Order on Remand, 2.pdf Exhibit E Finch v. USFG.deny sanctions.or.JJ, 2.pdf

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On behalf of Jon Robinson, please find attached for service the Receiver's Motion for Sanctions in the above matter.

Thank you,

SMITH ROBINSON
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