

**RECEIVED**

**Dec 18 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable Joan H. Toal  
Acting Circuit Court Judge

Appellate Case No. 2023-000727

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

v.

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

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

v.

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

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

Third-Party Defendants,

of which

Payne & Keller Company, by and through its Receiver Peter D. Protopapas, is the .....

Respondent,

and

AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company f/k/a Stonewall Insurance Company, individually and as successor in interest to Stonewall Surplus Lines Insurance Company; Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company; and Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company are the .....

Appellants.

TRAVELERS’ RESPONSE IN OPPOSITION TO MOTION FOR SANCTIONS PURSUANT TO RULE 269

## INTRODUCTION

The Receiver's motion is meritless, and the Court should see it for what it is: an abject attempt to close the courthouse doors to and chill legitimate advocacy by parties who challenge the creation of receiverships and the scope of the Receiver's actions. Despite the Receiver's attempt at misdirection, the law is still the law, and the Court should resoundingly deny the Receiver's efforts to silence Travelers from asserting its legitimate rights of appellate recourse.

The thrust of the Receiver's motion is that Travelers and other insurance carriers are making filings "designed only to delay the disposition of this case and actions in contempt of this Court's September 8, 2023 Order." (Mot. at 1.) This is absurd. Travelers has fought hard for its right to have this appeal proceed notwithstanding the Receiver's oft-repeated requests for sanctions and requests for the Court to dismiss this appeal. One thing appears obvious: the Receiver does not want any appellate scrutiny of the trial court's rulings and of his conduct as a receiver. He instinctively labels any advocacy by Travelers (or anyone else) as frivolous, meritless, brought with the intent to delay, and worthy of sanction, and he does so in an apparent attempt to pressure adverse parties out of protecting their positions and interests. That is patently improper.

Travelers only desires to have the trial court's rulings and the Receiver's actions be promptly reviewed and addressed by this Court in accordance with the South Carolina Appellate Court Rules and long-settled South Carolina law. To suggest anything to the contrary is untrue, and the Receiver's motion should be denied.

## ARGUMENT

### **I. Travelers and others have rightly relied on Appellate Rule 205 and its prohibition on the trial court from exercising jurisdiction over issues on appeal.**

On April 28, 2023, Travelers noticed an appeal of the trial court's order that both continued the receivership over Payne & Keller—a Texas company that dissolved in 1986 and, therefore, has

been immune from litigation since 1989 as a matter of Texas law—and modified the scope of the receivership. It appealed that order as a matter of right under South Carolina Code § 14-3-330(4), which provides for immediate appeals of any order “granting, continuing, modifying, or refusing the appointment of a receiver.” The General Assembly allows such orders to be immediately appealed for numerous reasons, including because receiverships are “drastic” and exceedingly rare, as they involve the seizure of the property of another. *See, e.g., Richland Cty. v. S.C. DOR*, 422 S.C. 292, 313, 811 S.E.2d 758, 769 (2018) (reiterating that appointing a receiver is “is a drastic remedy, and should be granted only with reluctance and caution”); *Vasiliades v. Vasiliades*, 231 S.C. 366, 376, 98 S.E.2d 810, 815 (1957) (warning that the “refusal of revocation [of a receivership], under changed circumstances, is also drastic”).

As a matter of standard appellate practice, the April 28, 2023 Notice of Appeal was supposed to freeze the circumstances at the trial level so that the Court could properly evaluate the issues presented in this appeal, including *inter alia*: whether the trial court had jurisdiction to create this receivership in the first place, whether the receivership was rightly allowed to continue, whether the trial court erred in finding that the Receiver had made a prima facie showing that Payne & Keller was dissolved as a result of “fraud,” and whether the trial court erred in retroactively applying a Texas statute despite the Texas Constitution’s express prohibition against retroactive legislation. All of these issues strike at whether this Receiver can even exist or function as a matter of law, and they are all properly before this Court on appeal.

Because these issues are currently before the Court, Travelers objected to further proceedings at the trial level that involved the Receivership, as the trial court lacks power to address issues that would interfere with this Court’s “exclusive jurisdiction.” Rule 205, SCACR.

Travelers is not making a novel argument—this is black-letter South Carolina law. *See, e.g., Stokes-Craven Holding Corp. v. McKenzie*, 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’” (quoting *Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App. 2012))) (emphasis supplied by the Supreme Court); *Morris v. Morris*, 295 S.C. 37, 40, 367 S.E.2d 24, 26 (1988) (“This Court has exclusive jurisdiction over an appeal upon the service of a Notice of Intent to Appeal.”); *Tillman*, 398 S.C. at 255 & n.3, 728 S.E.2d at 51 & n.3 (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”); *Binkley v. Burry*, 352 S.C. 286, 294, 573 S.E.2d 838, 843 (Ct. App. 2002) (“Once an appeal is filed, the appellate court has exclusive jurisdiction over the matter.”); Jean H. Toal, *et al.*, *Appellate Practice in South Carolina* 121 (3d ed. 2016) (confirming that “[t]he appellate court obtains exclusive jurisdiction over the appeal upon service of the notice of appeal”).<sup>1</sup>

Travelers believes that the trial court has wrongly ignored the plain language of Rule 205 and the State’s unbroken jurisprudence on this point. While this appeal has been pending, the trial court—at the plaintiff’s request and with the Receiver’s consent—issued a further ruling that purports to convert the “prima facie” findings of its order on appeal into conclusive factual findings (without discovery, without trial, and without jurisdiction to even take up the point) that Payne & Keller engaged in fraudulent behavior in Texas in 1986 when it went out of business. And the Receiver—without any notice to Travelers or its co-appellants—secretly took that non-final order

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<sup>1</sup> The Receiver has never responded to this argument or identified any authority to the contrary.

to a Texas state court and pretended that it was entitled to full faith and credit. The impropriety of those maneuvers is presently being litigated before the Texas state court.

In other words, while this appeal has been pending, the Receiver actively worked to create chaos of the appellate process by changing the foundation of the issues that are on appeal and that have been within this Court’s “exclusive jurisdiction” since April. And he did so without giving notice to Travelers, its co-Appellants, or anyone else.

On October 16, 2023, Travelers and its co-appellants timely filed Rule 59 motions with the trial court after it entered the order purporting to unwind Payne & Keller’s corporate dissolution. They had no awareness of the Receiver’s procedurally and legally improper actions in Texas until October 23, 2023, when the Receiver made a “Notice of Filing” in South Carolina of a “Certificate of Revocation of Dissolution” that the Texas Secretary of State issued regarding Payne & Keller in reliance on the trial court’s intervening, improper order. Travelers and its co-appellants then filed their “Emergency Motion to Enforce Rule 205” with this Court *that same day*. And Travelers and its co-appellants obviously did not want any delay—they sought relief from this Court the very day they learned there was a problem, and they specifically called the motion an “Emergency” that needed immediate attention.

On November 21, 2023, this Court denied the motion to enforce Rule 205 because the trial court’s improper order is not yet before the Court. But that motion was obviously made in good faith and does not come close to sanctionable conduct.

For one, the Appellate Court Rules are designed to prevent exactly what is happening below so that the appellate courts can review a static record and a static set of issues on appeal, rather than forcing both the parties and the Court to hit a moving target. *See, e.g.*, Rule 205, SCACR (“Upon 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.”); *id.* Rule 210(c) (“The Record shall not, however, include matter which was not presented to the lower court or tribunal.”); *id.* Rule 210(h) (“Except provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal.”).

Likewise, the law in South Carolina is that trial courts lack authority to construe the Appellate Court Rules unless those rules specifically allow the trial court to do so, which Rule 205 does not. *See generally Kearney v. Allen*, 287 S.C. 324, 328, 338 S.E.2d 335, 337 (1985) (“As no procedure is specified [in the Appellate Court Rules, then known as the Supreme Court Rules], authority to resolve such a dispute is vested in the Supreme Court, not the Circuit Court.”); *see also State v. Cooper (In re Cooper)*, 342 S.C. 389, 398, 536 S.E.2d 870, 876 (2000) (extending the *Kearney* rule to the Court of Appeals, and holding that “the Court of Appeals has the power and authority to rule upon issues arising under SCACR”).

Accordingly, Travelers sought immediate—“Emergency”—relief from this Court, which has “exclusive jurisdiction” over the issues on appeal and is the only court that has “the power and authority” to enforce the controlling Appellate Court Rule. That this Court deferred ruling until after the trial court rules on the pending motion for reconsideration and the improper order is also presented on appeal does not somehow write Rule 205 and the battery of case law enforcing it out of South Carolina jurisprudence. And it certainly does not render Travelers’ motion sanctionable.

## **II. The Receiver’s constant refrain about a “stay” is irrelevant.**

To further smear Travelers and its counsel, the Receiver states that they have acted “in contempt of this Court’s September 8, 2023 Order,” and he peppers the rest of his motion with similarly-charged rhetoric. (Mot. at 1; *see, e.g., id.* at 2 (“refused to abide by the September 8,

2023 Order”); *id.* at 6 (“ignored this Court’s September 8 ruling”); *id.* at 12 (“refused to abide by this Court’s September 8, 2023 Order”); *id.* at 18 (“disregard of orders”).) This, too, is absurd.

First, the below-signed counsel regularly appears before this Court in all manner of cases, and he has the highest respect for it. No one is acting “in contempt” of any ruling of this Court.

Second, the September 8th order does not mention Rule 205, nor does it address this Court’s “exclusive jurisdiction” in any way. Both the Supreme Court and this Court have previously recognized that the existence of a “stay” below is fundamentally distinct from the absence of jurisdiction below. *See, e.g., Arnal v. Fraser*, 371 S.C. 512, 519, 641 S.E.2d 419, 422 (2007) (“Because Father’s payment of child support and medical expenses as required by the final divorce order were not stayed by the appeal, the family court retained jurisdiction to enforce those payments. However, the family court did not have jurisdiction to modify matters in the final divorce order that were on appeal.” (citing Rule 205, SCACR)) (emphasis supplied by the Supreme Court); *Tillman*, 398 S.C. at 255, 728 S.E.2d at 51 (“Thus, the existence or nonexistence of a stay under Rule 241 does not control the family 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 241(a).”) (cleaned up); *see also* Toal, *Appellate Practice in South Carolina* 121 (“Note that the existence or nonexistence of a stay under Rule 241 does not control the [trial] 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 241(a).” (citing *Tillman*)).<sup>2</sup>

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<sup>2</sup> The Receiver has never responded to this argument or identified any authority to the contrary.

A jurisdictional prohibition trumps any notion of a discretionary stay; this is basic law, as it relates to a court's power to act. *See Limehouse v. Hulsey*, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013) (discussing jurisdiction and noting that without it, “a court cannot proceed at all in any cause” (quoting 32A Am. Jur. 2d *Federal Courts* § 581 (2007))). And South Carolina's appellate courts have been clear that when the trial court acts without jurisdiction because an issue is pending on appeal, such an order is void *ab initio*. *See, e.g., Arnal*, 371 S.C. at 518–19, 521–22, 641 S.E.2d at 422, 423–24 (2007) (holding various parts of a trial court order issued after an appeal was taken were “void *ab initio*” because the trial court “did not have jurisdiction to modify matters in the final divorce order that were on appeal,” as Rule 205 prohibits the trial court from “issu[ing] orders that affect an issue on appeal”) (emphasis supplied by the Supreme Court); *Wingate v. Wingate*, 289 S.C. 574, 575, 347 S.E.2d 878, 878 (1985) (holding that a family court's order reducing alimony payments “is void” because “alimony was an issue on appeal from the divorce decree” and “this Court had exclusive jurisdiction over the alimony issue”); *Wilson v. Walker*, 340 S.C. 531, 540, 532 S.E.2d 19, 23 (Ct. App. 2000) (vacating a contempt order “for lack of jurisdiction because the trial court issued it while an earlier order on which the contempt order was based was on appeal”).<sup>3</sup>

Nor is the Receiver correct when he argues that the Court has already addressed this point. No doubt, the Appellants raised Rule 205's jurisdictional bar when responding to the Receiver's “motion to clarify” that there was not an “automatic stay” in place over the receivership due to the pendency of this appeal. The Receiver makes much of this fact, copying-and-pasting heavily from the Appellants' arguments on that motion. (*E.g.*, Mot. at 5–6.) But it is equally true that the September 8th Order did not mention or address this point.

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<sup>3</sup> The Receiver has never responded to this argument or identified any authority to the contrary.

As a matter of South Carolina law, a court’s silence on a point does not resolve an issue; at the trial level, Travelers would have had to file a Rule 59 motion to address the silence and generate an actual decision on the point, but such a procedural device is unavailable before this Court. *Compare I’On, LLC v Town of Mt. Pleasant*, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724–25 (2000) (describing the process for issue preservation at the trial level), *with* 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 a party’s appeal.”).<sup>4</sup>

When the circuit court issued its intervening ruling, the issue appeared to become ripe, prompting the Appellants to file their Emergency Rule 205 motion. Now, with the jurisdictional point remaining unaddressed, Travelers and its co-appellants have no choice but to continue relying on the plain language of Rule 205, along with the unbroken line of authority enforcing its jurisdictional bar exactly as it is written: *Stokes-Craven, Arnal, Tillman, Morris, Binkley, Wingate, Wilson*, and even Justice Toal’s treatise. This is simply not a close call, and it is outrageous to suggest that Travelers or its counsel are acting “in contempt” of any ruling by this Court.

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<sup>4</sup> Notably, the Receiver’s current motion for sanctions is largely copied from his opposition to the Appellants’ Emergency Motion to Enforce Rule 205, which he ended by asking for sanctions and even cited Rule 269, SCACR. (Receiver’s Opposition Mem. at 11 & n.4, 17.) The Court, of course, did not sanction the Appellants when it resolved the emergency motion, and there was absolutely no reason to do so. But using the Receiver’s own logic, his current motion for sanctions is nothing but a “veiled attempt to seek reconsideration” (Mot. at 5) of the Court’s rightful refusal to sanction the Appellants for simply trying to protect their rights under black-letter South Carolina law. In addition to being frivolous on its face, the motion for sanctions can be stricken pursuant to Rule 221(c), SCACR, alone.

**III. The Receiver initiated proceedings in Texas, where Travelers has naturally asked a Texas court to interpret and enforce Texas law regarding a Texas company.**

In yet another beyond-the-pale accusation, the Receiver claims that the Appellants have made a “spurious affront to the South Carolina judiciary” by “the initiation of legal action in Texas against the Receiver.” (Mot. at 11.) This is untrue, and Travelers is surprised by the boldness with which the Receiver makes this misrepresentation to the Court.

The Receiver himself left South Carolina and began proceedings in Texas in order to domesticate the trial court’s non-final order purporting to unwind Payne & Keller’s corporate dissolution in Texas in 1986. He did so in secret and did not give Travelers or the other Appellants any notice of those efforts, which forced them to move to intervene in the Receiver’s Texas proceedings for purposes of challenging his improper attempt to domesticate a non-final judgment issued by a court lacking jurisdiction. The Receiver’s “Notice of Domestication of a Foreign Order” that began proceedings in Texas is attached, which he never served on Travelers or the other Appellants, even though they are parties to this case and, in fact, are the parties who have opposed his actions. (Ex. A.)

By order dated December 1, 2023, Judge Sandill of the Harris County District Court granted those motions to intervene despite the fact the Receiver “omitted [them] as original parties to this action” in Texas. (Ex. B, at 2.) The Receiver has appealed that decision, but the underlying point remains: Travelers didn’t “initiate” legal action in Texas, and it certainly hasn’t made a “spurious affront to the South Carolina judiciary.”

Rather, it is the Receiver himself who left South Carolina for Texas without notifying the other parties to this case. Once Travelers became aware of those secret proceedings, Travelers rightly intervened and asked a Texas court to address questions arising under Texas law regarding a long-ago-dissolved Texas business, which is hardly an unusual request. *Cf.* Rule 244(h), SCACR

(permitting South Carolina’s appellate courts to certify “questions of law to the highest court of any state” when the issue presented in South Carolina is controlled by the law of another state).

Such a litigation decision is in no way inconsistent with Travelers’ arguments to this Court, as the Receiver wrongly implies. (*E.g.*, Mot. at 10–11.) To state the obvious, the South Carolina Appellate Court Rules do not control the jurisdiction of a Texas trial court, and asking a Texas trial court to construe Texas law involving a Texas company has nothing to do with whether a South Carolina circuit court can proceed on an issue when that same issue is pending before the South Carolina Court of Appeals.

Nor should the Court credit the Receiver’s argument on Pages 8 and 9 that “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.”

For one, despite the Receiver’s ambiguous reference to “the insurers,” the Receiver knows that Travelers was not involved in that matter or litigation decision—which, incidentally, resulted in a dismissal of Payne & Keller from that lawsuit, a result the Receiver should celebrate rather than chastise.

But more fundamentally, the Receiver’s posturing on that issue assumes he should have had a role in guiding litigation about Payne & Keller in Texas in the first place. This is an incorrect assumption. As a matter of South Carolina law (as well as a basic point of federalism under the United States Constitution), his receivership appointment has no extraterritorial reach. *See, e.g., Frink v. Nat’l Mut. Fire Ins. Co.*, 90 S.C. 544, 549, 74 S.E. 33, 35 (1912) (“That a receiver has no extra territorial authority is too well settled to require the citation of authority.”); *Pollock v. B.&L. Ass’n*, 48 S.C. 65, 74, 25 S.E. 977, 980 (1896) (reciting that “a receiver has no extra territorial

power of official action, none of which the Court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property," that "[r]eceivers appointed by one jurisdiction are not entitled as of right to recognition in other jurisdictions, and courts of equity cannot acquire extra territorial jurisdiction over property by appointing receivers," and "[t]he power of a receiver only extends to the boundaries of the territorial jurisdiction of the court appointing him") (cleaned up).

The bottom line is this: Travelers has done absolutely nothing wrong with respect to this litigation, whether in Texas or South Carolina. The Receiver's use of a sanctions motion in this Court to smear and silence Travelers is improper, and the Court should not condone it.

#### **IV. Other appellate litigation is irrelevant to this case.**

The Receiver clearly believes that habitually copying-and-pasting a chart of all appellate filings by anyone who has ever had a disputed issue with any of the two-dozen receiverships spawned from the South Carolina Asbestos Docket over the last four-plus years will convince the Court into thinking some action is needed. This is yet another attempt to bully adversaries into silence.

For the sake of clarity, Travelers was involved in only a small handful of the filings on the Receiver's chart, and each of those filings was essential to protect Travelers' or its affiliates' rights or to ensure issues were fully preserved for eventual appellate review. In rare instances more than three years ago, it made filings to alert the Supreme Court to events happening below and asked it to exercise its discretion to assist in the moment (Entries 1, 7). In another, it filed a protective notice of appeal with this Court to ensure that it timely triggered appellate jurisdiction (Entry 5). In two instances, it made appellate filings to confirm that the circuit court could not do what it was

attempting to do—and Travelers succeeded in each of those instances (Entries 8, 11). Another entry comes from a traditional appeal, just like this case (Entry 27).

Travelers reiterates that it would welcome the opportunity to discuss any of its own filings with this Court or the Supreme Court, but the Receiver’s generic chart of filings by other litigants cannot possibly serve as a basis for this Court to take any action against Travelers.

**V. Travelers is ready for this appeal to proceed.**

Finally, the Receiver suggests that Travelers has missed a briefing deadline or otherwise engaged in “dilatory tactics” to “delay[] briefing for ten weeks.” (Mot. at 7.) This is incorrect.

According to C-Track, the Clerk of Court has designated this appeal “Held in Abeyance”:

Case Information: 2023-000727			
<b>Court:</b>	Court of Appeals	<b>Classification:</b>	Appeal - Common Pleas - Other
<b>Short Title:</b>	Lenora Childers v. Davis Mechanical Contractors, Inc. <a href="#">View Full Title</a>	<b>Case Status:</b>	Held in Abeyance
<b>Consolidated:</b>			
<b>Filed Date:</b>	04/28/2023	<b>Oral Argument Date:</b>	
<b>Disposition Date:</b>		<b>Disposition Type:</b>	
<b>Remittitur Date:</b>			
<b>Lower Court or Tribunal:</b>	Richland (2021CP4003484)		

Inquiries from the below-signed counsel to the clerk’s office regarding that designation have confirmed that this designation is the result of the fact that Zurich’s motion to be added to this appeal, filed on October 24, 2023, has not yet been resolved by the Court.

Travelers remains at the ready to proceed with briefing and preparing the appellate record as soon as the Court authorizes such filings. But in the meantime, it is disingenuous for the Receiver to pretend that Travelers has tried to delay this appeal when the appeal is on hold because of a motion filed by a different litigant.

**CONCLUSION**

The appellate process is essential to protecting the rights of parties from errors below. And the appellate process cannot be engaged fully if a litigant is unwilling to advocate its position on

contested issues. Silencing his adversaries appears to be the true goal of the Receiver's sanctions request.<sup>5</sup> It is frivolous on its face and loaded with ambiguous phrasing or outright misrepresentations designed to prejudice this Court against Travelers, its co-Appellants, and apparently anyone else who dares challenge the Receiver. The Court should deny that motion as forcefully as possible to protect the integrity of the entire litigation process.

Respectfully submitted,

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Attorneys for Petitioner Travelers Casualty and  
Surety Company

December 18, 2023

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<sup>5</sup> Trying to silence an adversary by suing its counsel or threatening sanctions has become routine for the Receiver. So far, he has sued the following lawyers or law firms through various receiverships: Wall, Templeton & Haldrup, PA (Case No. 2019-CP-40-02285); Fox Rothschild, LLP, Stephanie Flynn, Robert Baum, McGivney Kluger Clark & Intoccia, PC, Robert Thackston, and Lathrop GPM (Case No. 2023-CP-40-02034); Baker & Patterson, LLP, and Kenneth C. Baker (Case No. 2023-CP-40-05203); and Locke Lord, LLP (Case No. 2021-CP-40-02727). This motion for sanctions is consistent with the Receiver's attempts to misuse the judiciary to silence adversaries.

# 2023-70875 / Court: 127

CAUSE NO. \_\_\_\_\_

**LENORA CHILDERS, individually and** § **IN THE DISTRICT COURT OF**  
**as Personal Representative of the Estate** §  
**of LEWIS C. CHILDERS,** §  
§  
§  
v. § **HARRIS COUNTY, TEXAS**  
§  
**PAYNE & KELLER COMPANY, by and** §  
**its duly-appointed Receiver, PETER D.** §  
**PROTOPAPAS,** § **\_\_\_\_\_ JUDICIAL DISTRICT**

## NOTICE OF DOMESTICATION OF A FOREIGN ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

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

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

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

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

1330 Laurel Street  
Columbia, South Carolina 29201

-and-

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

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

Respectfully submitted,

**MORGAN, LEWIS & BOCKIUS LLP**

By: /s/ Brady Edwards

Brady Edwards

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**ATTORNEYS FOR THE RECEIVER**

Unofficial Copy Office of Marilyn Burgess District Clerk

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

STATE OF TEXAS

§

COUNTY OF HARRIS

§

§

*KNOW ALL MEN BY THESE PRESENTS:*

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

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

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

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

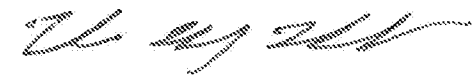
"Lenora Childers may be served, by and through her attorney of record, by serving Theile McVey at 1330 Laurel Street, Columbia, South Carolina 29202.

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

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

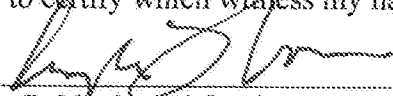
*FURTHER AFFIANT SAYETH NAUGHT.*

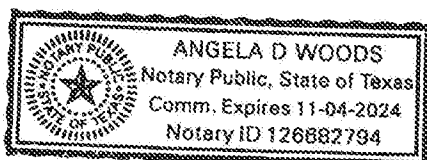
X

  
\_\_\_\_\_  
Noah M. Horwitz, Affiant

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

X

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



### Automated Certificate of eService

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Noah Horwitz on behalf of Noah Horwitz

Bar No. 24116537

noah.horwitz@morganlewis.com

Envelope ID: 80515901

Filing Code Description: Petition

Filing Description: Notice of Domestication of Foreign Order

Status as of 10/12/2023 11:34 AM CST

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Theile McVey		tmcvey@kassellaw.com	10/12/2023 10:18:57 AM	SENT
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2023-70875 / Court: 127

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

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

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

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

**STATUS OF RECEIVERSHIP ON APPEAL**

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

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

### **BACKGROUND**

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

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

these liabilities in direct violation of the statutory duties it owed creditors to make adequate provision for these liabilities.

For example, in 1981, Payne & Keller worked on an insulation replacement project for Archer Daniels Midland (“Archer Daniels”). Archer Daniels initially awarded this project to another firm. After its workers went on strike, Archer Daniels cancelled that initial contract and assigned the remainder of the work to Payne & Keller. Payne & Keller also worked on valve replacements at a Citgo Petroleum Corporation facility in Westlake/Lake Charles, Louisiana, *see Seeney v. Citgo Petroleum Corp.*, 848 F.2d 664, 666 (5th Cir. 1988), which has since been the subject of asbestos litigation. *See Bourque v. Anco Insulations, Inc.*, 25 So. 3d 1008 (La. App. 3 Cir. 2009).

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

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

related personal injury claims were filling court dockets. In the Eastern District of Texas alone, more than 3,000 asbestos-related personal injury claims had been filed by 1981. *See Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353, 1354 (E.D. Tex. 1981), *reversed in part*, 681 F.2d 334 (5th Cir. 1982).

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

Immediately after this decision was issued (on July 31, 1986), Payne & Keller began taking steps to dispose of its assets and dissolve. On September 29, 1986, Payne & Keller's parent company executed a Specific Guaranty with Payne & Keller and the entity that purchased its assets, guaranteeing certain aspects of Payne & Keller's performance under a purchase

and sale agreement. The sale was initially intended to close the next day, on September 30, 1986, but was delayed. In the interim, on October 1, 1986, Charter filed a proof of claim on behalf of the dioxin plaintiffs in the bankruptcy proceeding. Only six days later, Payne & Keller sold its assets and began completing the rest of its dissolution-related paperwork:

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

Payne & Keller dissolved before the Charter dioxin claims matured and, contrary to the representations it made to the Secretary of State, failed to make adequate provision for the payment of either those claims or the variety of other occupational injury claims that it had faced—

and reasonably expected that it would face for many decades in the future. Because the company therefore dissolved as a result of (at the very least) constructive fraud, the termination of its corporate existence should be revoked, and pursuant to section 11.153 of TBOC.

### LAW AND ANALYSIS

Section 11.153 of the TBOC<sup>1</sup> 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,

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<sup>1</sup> 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.

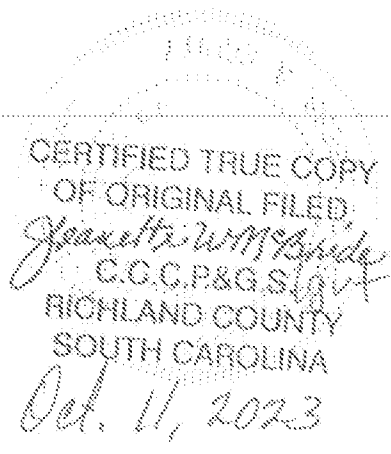
**CONCLUSION**

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]**

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Richland Common Pleas

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

So Ordered

Jean H. Toal

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

Unofficial Copy Office of Marilyn Burgess District Clerk

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



Civ. P. 329b(c), (e); *Mindis Metals, Inc. v. Oilfield Motor & Control, Inc.*, 132 S.W.3d 477, 483 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (“A motion contesting foreign judgment operates as motion for new trial.”).

National Union and Travelers timely intervened and filed their Motions within the 30-day deadline set forth in Rule 329b(a). They are proper parties to this action. That National Union and Travelers were omitted as original parties to this action, notwithstanding their status as parties to the underlying South Carolina action in which the October 5, 2023 order was entered, does not deprive this Court of jurisdiction to consider their Motions on the merits. Accordingly, the Court currently maintains plenary power.

A hearing on the merits of the Motions shall take place on December/~~January~~ 13, 2023 <sup>at noon</sup> unless, by that date, a writ of mandamus has issued directing this Court that it lacks plenary jurisdiction.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 2023.

Signed:   
12/1/2023  
\_\_\_\_\_  
JUDGE RAVI K. SANDILL

## Automated Certificate of eService

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Christina Pena on behalf of Ayesha Najam

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Envelope ID: 82017558

Filing Code Description: No Fee Documents

Filing Description: 2023.11.28 National Union Cover Letter to Proposed Order

Status as of 11/28/2023 3:32 PM CST

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Dec 18 2023

SC Court of Appeals

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PROOF OF SERVICE

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I, the undersigned of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Travelers Casualty and Surety Company, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specific below by emailing them at the addresses below:

Pleading(s): Travelers' Response in Opposition to Motion for Sanctions Pursuant to Rule 269

Parties Served:

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*Counsel for Proposed Intervenor Zurich American Insurance Company*

By: /s/ M. Todd Carroll

December 18, 2023