

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Case No. 2021-CP-40-03484

Appellate Case No. 2023-000727

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

v.

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

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

v.

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

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

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

and

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

and

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

**RESPONDENT'S RETURN TO MOTION FOR
CERTIFICATION BY THE SUPREME COURT**

Respondent Payne & Keller Company, By and Through its Duly Appointed Receiver, Peter D. Protopapas ("the Receiver"), hereby files this Return to Appellants' Motions for Certification by the Supreme Court.¹

The Receiver disagrees that this matter involves the type of issues of significant public interest and legal principles of major importance required by Rule 204(b) of the South Carolina

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 ("Certain Insurers") filed a Motion for Certification on January 2, 2024. Appellant Travelers Casualty and Surety Company ("Travelers") filed a Joinder to Motion for Certification by the Supreme Court on January 11, 2024. This Return addresses both the initial motion and the joinder.

Appellate Court Rules. A review of the motion for certification and the joinder shows that Appellants paint the issues involved in this appeal with a broad brush, seeking to obtain an advisory opinion from this Court on the asbestos docket as a whole. Appellants not only attempt to skip review by the South Carolina Court of Appeals, they also attempt to wrest issues that are currently under consideration by the circuit court to obtain appellate review before there is even a final order for this Court to review and obtain post-hoc appellate review of numerous orders establishing receiverships that were never challenged or appealed. Under the guise of a motion for certification pursuant to Rule 204, Appellants' real goal is for this Court to issue general guidance on broad issues not currently before the Court of Appeals in the semblance of an extraordinary writ in this Court's original jurisdiction.²

Appellants identify two issues they believe satisfy Rule 204's requirements—whether the circuit court can appoint a receiver over companies whose assets are insurance policies and whether the circuit court's order “reviving” Payne & Keller was proper. Appellants misstate the issues currently before the Court of Appeals, and it is imperative for this Court to understand what is on appeal in this case. It is the narrow issue of whether the circuit court properly denied Appellants' motions to dismiss the third-party claims brought by the Receiver and dissolve the receivership. In the order on appeal, 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

² Travelers admits this in its joinder, stating “That authority is typically exercised through a writ of certiorari, but the result would be the same here if the Court grants the Motion for Certification.” (Joinder at 6.) However, this is not true. Appellants moved to certify this appeal, so this Court's review would be limited to the issues currently on appeal in this case. Appellants have not moved for an original jurisdiction writ of certiorari and, in order to do so, they would need to identify specific issues from a specific case and properly serve it on all parties involved in that case. Rule 245, SCACR. Appellants cannot piggy-back other issues and cases that they wish to have reviewed into this appeal by way of a motion for certification.

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) of the South Carolina Rules of Civil Procedure does not prohibit the Receiver from asserting his third-party claims in the underlying action.

Despite Appellants' assertions, the March 31, 2023 order did not alter the corporate status of Payne & Keller. Therefore, hypothetical questions as to whether a South Carolina circuit court ultimately may alter the status of a dissolved Texas corporation are not properly before this Court at this time. In the order on appeal, the circuit court stated: "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." (App. 18.) In the order on appeal, the circuit court denied the motion to dismiss and found the Receiver's claims against Appellants could proceed.

While the circuit court did issue a subsequent order revoking the termination of Payne & Keller, that order is not on appeal and not properly before this Court. The circuit court issued that order on October 5, 2023, ruling on Plaintiff Lenora Childers's motion to revoke the termination of Payne & Keller after briefing and a hearing. Appellants and other insurer defendants filed motions to reconsider the October 5, 2023 order, which are still pending before the circuit court. Appellants have not taken any steps to have those motions heard. Appellants' inclusion of this order in the Appendix in this appeal is improper.

This is not the first time Appellants have sought to overturn the October 5, 2023 order without that order being properly before our appellate courts. On November 21, 2023, in this appeal, the Court of Appeals issued an order 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.”).

(App. 3–6.) Dissatisfied with the Court of Appeals’ ruling, Appellants filed this motion for certification to this Court, hoping to convince this Court that their appeal includes these issues and have the Court issue an opinion which would effectively overturn the October 5 order of the circuit court without its being properly before the Court.

Also improper is Appellants continued and blatant disregard for the South Carolina trial and appellate courts through the duplicitous filings across multiple jurisdictions seeking to achieve more favorable results, interlocutory and meritless appeals interposed for the purpose of delay, and attacks on the trial judge and appellate judges.³ Appellants fail to inform the Court that the same

³ Travelers continues to flaunt the Court of Appeals’ September 8, 2023 Order holding that the Receiver can carry out his court-appointed duties during the pendency of this appeal. In a recent hearing in Texas, Travelers’ South Carolina counsel argued the September 8, 2023 Order was not a valid order because it was signed only by Judge Verdin. (App. 7–10.) Travelers continues to go to great lengths to attempt to justify its willful disobedience of orders of courts in this state. Its modus operandi is to discredit and ignore orders it does not like. This is not the first time Travelers

issues they argue are of utmost importance for South Carolina have been feverishly pursued by Appellants in subsequently filed actions in Texas trial and appellate courts. Throughout the nine months this appeal has been pending, Appellants have been trying to avoid South Carolina courts and coordinating efforts in Texas to circumvent the circuit 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 and its counsel actively took the position that the instant appeal stayed the South Carolina trial court action because it addressed the dissolution of Payne & Keller,

and its counsel have impugned the validity of an order issued by a judge at the Court of Appeals. On January 6, 2021, Judge McDonald issued an order dismissing Travelers-affiliate United States Fidelity & Guaranty Company's ("USF&G") appeal from an interlocutory order of the circuit court. *Finch v. United States Fidelity & Guaranty Company*, Appellate Case No. 2020-001663. USF&G filed a petition for a writ of certiorari with this Court discounting the order because it was issued by "a single judge." *Finch v. United States Fidelity & Guaranty Company*, Appellate Case No. 2021-000462, Pet. for Writ of Cert. at 10. Rule 240(j) of the South Carolina Appellate Court Rules allows individual judges or justices to rule on any motion or petition on behalf of the Court.

the Baker & Patterson firm filed an answer on behalf of Payne & Keller in the Texas Action. (App. 92–93.) 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 exclusively before the South Carolina appellate courts, some of 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, Appellants put the same issues on appeal here before a court in Texas once again in a new filing. (App. 95–107.) Travelers sought a declaration from a Texas court that the Receiver was improperly appointed by the South Carolina circuit court and that the Texas statute of repose precludes the filing of any claims by or against Payne & Keller—**the very issues it requests rulings on now from this Court.** Travelers actively sought to have the Texas court dissolve the South Carolina receivership and appoint a new receiver in Texas. One of the Certain

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. These insurer-appointed lawyers also have initiated an action in Texas seeking to depose the Receiver’s insurance coverage counsel. *In re Kenneth C. Baker*, In the District Court of Harris County, Texas; 11th Judicial District; Cause No. 2023-82987.

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 naming a South Carolina asbestos plaintiff and the Texas Secretary of State as parties. (App. 110–38.) Recognizing the impropriety of these actions, National Union voluntarily dismissed these claims. (App. 645–50.) Appellants’ forum shopping in hopes of finding any court that will agree with their arguments is improper and should be rejected.

Throughout their filings, Appellants espouse how important they believe this matter is to Texas. However, as noted by the Texas Attorney General, the Texas Secretary of State disagrees. Recently, the Texas Secretary of State declined to be involved in the matter pursued by Appellants in Texas, stating “the Texas Secretary of State has no particular interest in the outcome of this case[.]” (App. 631–44.) As noted above, appellants then voluntarily dismissed their claims against the Texas Secretary of State. Furthermore, the Texas Judge has rejected the Appellants efforts to circumvent the South Carolina courts. The Texas court held a hearing on January 24, 2024, and refused to issue any orders related to Appellants’ attempts to pursue the action in Texas. The Texas Court’s jurisdiction to act lapsed on January 25, 2024, and the insurers’ motions were denied by operation of law.

Appellants’ assertions that this Court should step in because the Receiver is undermining Payne & Keller’s defenses are incorrect. To be sure, the insurers have unequivocally established in the Receivership cases that they will pursue any and all methods necessary to delay and prevent the Receiver from identifying company assets such as insurance policies, in order to avoid their contractual obligations to defend and indemnify their insureds from which they received premiums for decades. Appellants misconstrue the Receiver’s purpose and duties as one of protecting the insurers. The trial court appointed Peter Protopapas as the Receiver of Payne & Keller “pursuant

to the South Carolina Law with the power and authority [to] 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.” (App. 24–27.)

A receiver is an officer of the court through whom the court takes possession of the assets of the insolvent [entity] for the purpose of preventing their waste or destruction and of reducing them to such form as may be necessary for their ratable distribution among those who may be entitled thereto. . . . It follows that he has no personal interest in the property in his official character, except that which arises out of his responsibility in the faithful and correct discharge of his duties.

Peurifoy v. Gamble, 145 S.C. 1, 142 S.E. 788, 790 (1928). The Receiver for Payne & Keller is, therefore, an officer of the Court, deriving his authority from the circuit court and the Order of Appointment. Appellants misunderstand the role of the Receiver who is charged with addressing the past liabilities of Payne & Keller—whether that is good or bad for Payne & Keller’s legacy insurers. He has no obligation to portray Payne & Keller as a model corporation or to gloss over its past mistakes, but instead dutifully evaluates all information available to him to faithfully discharge his obligations to marshal the company’s assets. The Receiver evaluates information gathered through the investigation of historical sources as well as information brought to him by others, including the legacy insurers. When Payne & Keller’s legacy insurers presented the Receiver with their argument that Payne & Keller was dissolved and therefore could not be sued, it was the Receiver’s responsibility to research the insurers’ position—not to take it at face-value. The Receiver did his job and reported his findings to the Receivership Court that appointed him.

The Receiver represents the company seeking to recover its insurance proceeds from its historical insurers. He does not represent the interests of the insurers themselves.⁵

Appellants also fail to inform this Court that the defense counsel the insurers retained to represent Payne & Keller in asbestos litigation in South Carolina closely analyzed this defense and informed the insurers in December 2021 that it believed Payne & Keller did not have a legitimate defense under the Texas dissolution statute.⁶ (App. 651–60.) Defense counsel warned the insurers that raising the dissolution defense would be “unsuccessful at best, and detrimental to Payne and Keller at worst.” (*Id.*) Appellants and other legacy insurers in receivership cases continue to try to force the Receiver to raise meritless arguments and defenses to the detriment of the company in receivership all for the purpose of avoiding their own contractual insurance obligations.⁷ This is the exact type of conduct that led the circuit court to appoint receivers in these types of cases. *See Finch v. U.S. Fid. & Guar. Co.*, C/A No. 3:19-CV-01827, 2020 WL 2988944, at *4 (D.S.C. June 4, 2020) (“Nor can it be disputed that the decisions made by [law firm] and the Insurers resulted in a verdict against Covil in excess of \$30,000,000.”); *Protopapas v. Wall, Templeton & Haldrup, P.A.*, C/A No. 2020-001437, 2023 WL 8102870, at *1 (S.C. Ct. App. Nov. 22, 2023) (“In 2018,

⁵ In a case involving the Covil receivership and Travelers-affiliate USF&G, Chief Justice Toal (Ret.) held that the “Receiver is certainly under no obligation to advance frivolous arguments or to assert specious defenses to Covil’s asbestos cases,” and that “[n]on-Party USF&G’s contention that the Receiver . . . is undermining Covil’s asbestos defenses by refusing to behave unethically (at USF&G’s behest) is absurd.” (App. 43.)

⁶ As another example of their efforts to seek rulings in multiple jurisdictions, the insurers sought an order of the Texas court sealing this communication. However, the Texas court denied their motion to seal. (App. 661–63.)

⁷ In fact, in a recent opinion by the Court of Appeals in the Covil Receivership, the court found that a dissolution defense raised by Travelers-affiliate United States Fidelity & Guaranty Company was meritless. *Protopapas v. Wall, Templeton & Haldrup, P.A.*, No. 2020-001437, 2023 WL 8102870, at *6 (S.C. Ct. App. Nov. 22, 2023) (affirming the circuit court’s ruling that the statute of repose for dissolved companies does not preclude the Covil receivership or claims against Covil). USF&G has filed a petition for rehearing of this opinion.

Covil defaulted in two mesothelioma cases, and in November 2018, the special circuit court appointed Receiver to represent Covil's interests.”); *id.* at *3 (“The Receiver's need for clarification in considering Covil's potential future liability and proper available defenses relates concretely to the management of Covil's assets and is particularly pertinent to any claims handling or bad faith claims that may remain against USF&G. 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.”).⁸

While the Receiver disagrees that the requirements of Rule 204 are satisfied, the Receiver believes certification could aid the interests of judicial economy and conserve the parties’ time and resources by expediting appellate review. Pursuant to section 14-8-210 of the South Carolina Code, this Court may certify cases pending before the Court of Appeals for other reasons the Court “considers appropriate.” If the Court does certify this appeal, the Receiver requests that the Court reiterate the extraordinary nature of such relief and prevent insurers and other parties in current and future receivership appeals from attempting to delay the appellate process by requesting certification of every appeal involving a receivership. There are currently numerous appeals pending from orders appointing receivers or denying motions to dismiss and dissolve receiverships. *See, e.g.*, Appellate Case Nos. 2023-001461 (consolidated appeal involving seven notices of appeal), 2023-001096.

Throughout the years in various receivership cases, Appellants and other legacy insurers have dredged our state’s appellate court rules for procedural mechanisms they could twist to attempt to circumvent the circuit court’s rulings, delay adjudication in receivership cases, and

⁸ The extensive conduct of Travelers-affiliate USF&G and other insurers that led to the appointment of a receiver for Covil Corporation is further detailed in the attached January 8, 2020 order of the circuit court and includes intentionally destroying policy-related information to prevent its discovery in anticipation of litigation. (App. 49–71.)

prevent the Receiver from expeditiously fulfilling his court-ordered duties. There is a coordinated effort by insurance carriers to avoid the discovery of applicable insurance coverage, which the Receiver has been tasked to identify and marshal in connection with his appointments. In recent years, our appellate courts have seen an unprecedented number of interlocutory appeals and appellate motions practice filed in receivership actions by Appellants and other insurers in a coordinated attempt to frustrate the purpose of the receiverships and delay the disposition of these cases in the circuit court. The tortured procedural history of this appeal illustrates the escalating widespread efforts by insurers, including Appellants, to burden the appellate courts and halt progress in the circuit court. For instance, the current appeal has been pending for a period of nine months, and the insurers have yet to submit initial briefs.

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	<i>Zurich American Insurance Company v. CBS Corp.</i> , Appellate Case No. 2019-001651	Supreme Court	Denying petition for writ of certiorari filed by USF&G, Sentry, and Zurich related to interlocutory discovery order
2	10/16/2019	<i>Zurich American Insurance Company v. CBS Corp.</i> , 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	<i>Hartford Accident & Indemnity Company v. Covil Corporation</i> , Appellate Case No. 2019-001764	Court of Appeals	Appellant Hartford withdrew appeal

4	11/18/2019	<i>Hartford Accident and Indemnity Company v. Covil Corporation</i> , Appellate Case No. 2019-001758	Supreme Court	Granting request to withdraw petition for a writ of certiorari
5	2/13/2020	<i>Zurich American Insurance Company v. CBS Corporation</i> , 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	<i>Tracy Jolly Pavlish v. Covil, Hutto v. Covil, Hagan v. Covil, Rampey v. Covil, Reilly v. Covil, Jonas v. Covil, and Murphy v. Covil</i> , 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	<i>United States Fidelity & Guaranty Company v. Protopapas</i> , Appellate Case No. 2020-000791	Supreme Court	Dismissing petition for a writ of supersedeas because no appeal pending
8	7/30/2020	<i>United States Fidelity & Guaranty Company v. Protopapas (In re Roxanne Falls)</i> , 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	<i>Protopapas v. Wall, Templeton</i> , Appellate Case No. 2020-001322	Court of Appeals	Appellant's request for dismissal granted
10	12/15/2020	<i>Protopapas v. Wall Templeton</i> , Appellate Case No. 2020-001322	Court of Appeals	Appellant's (Zurich) request to withdraw its appeal granted
11	1/4/2021	<i>Finch v. United States Fidelity and Guaranty Co.</i> , Appellate Case No. 2020-001670	Supreme Court	Appellant withdrew its Petition for Writ of Prohibition
12	1/6/2021	<i>Finch v. United States Fidelity & Guaranty</i>	Court of Appeals	Dismissing appeal because underlying order not appealable

		<i>Company</i> , Appellate Case No. 2020-001663		
13	3/9/2021	<i>Finch v. United States Fidelity and Guaranty Co.</i> , 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	<i>Finch v. United States Fidelity & Guaranty Company</i> , Appellate Case No. 2020-001663	Court of Appeals	Petition to rehear dismissal of appeal denied
15	7/6/2021	<i>Finch v. United States Fidelity & Guaranty Co.</i> , Appellate Case No. 2021-000462	Supreme Court	Denying petition for a writ of certiorari
16	1/5/2022	<i>Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company</i> , Appellate Case No. 2020-001239	Court of Appeals	Affirming partial summary judgment for Covil
17	5/21/2021	<i>Protopapas v. Wall Templeton</i> , Appellate Case No. 2020-001437	Court of Appeals	Appellant consents to the Receiver’s motion to dismiss the <i>Hutto</i> claim in this appeal (remaining issues fully briefed)
18	8/9/2022	<i>Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company</i> , 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	<i>Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company</i> , Appellate Case No. 2022-000785	Supreme Court	Denying petition for a writ of certiorari.

20	11/15/2022	<i>Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company</i> , Appellate Case No. 2022-000761	Court of Appeals	Order denying petition for rehearing of August 9, 2022 dismissal of appeal
21	1/12/2023	<i>Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company</i> , Appellate Case No. 2022-001764	Supreme Court	Denying petition for writ of certiorari
22	2/8/2023	<i>Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company</i> , Appellate Case No. 2022-001722	Court of Appeals	Order dismissing appeal
23	6/6/2023	<i>Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company</i> , Appellate Case No. 2022-001722	Court of Appeals	Order denying petition for rehearing from 2/8/2023 dismissal of appeal
24	4/13/2023	<i>Southern Insulation Inc. v. OneBeacon, et al.</i> , Appellate Case No. 2023-000252	Court of Appeals	Order dismissing appeal as not immediately appealable
25	7/6/2023	<i>Southern Insulation Inc. v. OneBeacon, et al.</i> , Appellate Case No. 2023-000252	Court of Appeals	Order denying petition for rehearing from 4/13/2023 dismissal of appeal
26	11/7/2023	<i>Covil Corp. v. Pennsylvania National Mutual Casualty Insurance Company</i> , 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	<i>Covil Corp. v. United States Fidelity & Guaranty Company</i> , Appellate Case No. 2020-001437	Court of Appeals	Opinion affirming circuit court

28	12/1/2023	<i>Welch v. Atlas Turner, Inc.</i> , Appellate Case No. 2023- 001096	Court of Appeals	Order Denying Appellant's Motion to Confirm Automatic Stay or, Alternatively, Verified Petition for Supersedeas

Although non-meritorious, these appellate efforts have succeeded in the insurers' ultimate goal—delay at all costs.

Even in the infancy of the Asbestos Receiverships' efforts to identify assets under the then-newly appointed Asbestos Chief Judge, The Honorable Jean H. Toal, (C.J. 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 conduct was so egregious that it prompted this Court nearly three years ago 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.

(App. 1–2). 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.

Appellants continue to abuse the appellate process for the purposes of delay in this appeal. This abuse of the process not only has delayed the disposition of this case but has also wasted the scarce resources of this Court, the Court of Appeals, the circuit court, and the court-

appointed receiver. The Receiver has a motion for sanctions pending in this appeal against Appellants for their dilatory conduct, disregard for orders of the Court of Appeals, lack of candor to tribunals, and attempts to circumvent the courts of South Carolina. (App. 72–428.) The Receiver requests that this Court address and stop this conduct if it chooses to certify this appeal.

Additionally, if the Court certifies the appeal, the Receiver requests the Court dismiss it as interlocutory. Shortly after the notices of appeal were filed, the Court of Appeals requested that the parties file memoranda on appealability. The Receiver filed his memorandum on appealability on May 15, 2023, arguing the appeal should be dismissed because the order denying Appellants’ motions to dismiss and dissolve the receivership was an interlocutory order that was not immediately appealable. (App. 440–65.) Appellants filed memoranda arguing the appeal should proceed under section 14-3-330 of the South Carolina Code because the order continued and modified the receivership. (App. 467–630.) The Court of Appeals issued an Order on August 9, 2023, ruling the “appeal shall proceed.” (App. 11–13.) However, the Court of Appeals *did not find the order appealable*. Instead, it stated: “However, nothing in this order prevents the parties from raising the issues of appealability and standing in their briefs.” (*Id.*) The Receiver renews this request for the Court to dismiss the appeal because the order on appeal is an interlocutory order that is not immediately appealable.

Accordingly, although the Receiver disagrees that this case satisfies the requirements of Rule 204, the Receiver welcomes certification by this Court if the Court believes it is otherwise appropriate to address the concerning abuse of the appellate process perpetrated by Appellants and other insurers in receivership cases.

(Signature page follows)

Respectfully submitted,

s/Jonathan M. Robinson

G. Murrell Smith, Jr. (S.C. Bar # 66263)

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Attorneys for Respondent

January 26, 2024.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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.

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RETURN TO MOTION FOR CERTIFICATION**

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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.



FOR THE COURT
Few, J., not participating

C.J.

Columbia, South Carolina
March 9, 2021

cc: Theile Branham McVey, Esquire
Mark Weston Hardee, Esquire
Jonathan M. Robinson, Esquire
G. Murrell Smith, Jr., Esquire
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Mary Beth Forshaw, Esquire
Alan Turner, Esquire
Jonathan Marshall Holder, Esquire

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
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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
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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

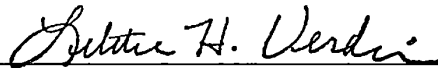
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and

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

ORDER

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 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 a party's appeal.").



FOR THE COURT

Columbia, South Carolina

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

FILED
Nov 21 2023

Marghretta Hagood Shisko, Esquire
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Shanon N. Peake, Esquire

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
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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
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Simmons; Arrowpoint Group, Inc.; Arrowpoint Capital
Corp.; Admiral Insurance Company; Continental

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

and

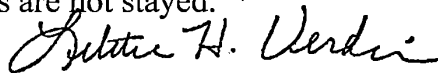
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and

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

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), SCRPC ("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.



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
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Shanon N. Peake, Esquire

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,
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Company; Standard Insulation Company of N.C., Inc.;
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Rome, Inc.; Wind Up, Ltd., Individually and as
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f/k/a Carolina Industrial Insulating Co.; Defendants.

Flame Refractories, Inc.; United Construction Co. of
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Keller Company, By and Through Their Duly Appointed
Receiver, Peter D. Protopapas, Third-Party Plaintiffs,

v.

Zurich American Insurance Company (Individually and
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Company, and Maryland Casualty Company); Allstate
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Dennis William Cahill; Catherine Ann Carlino; Andre
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Michael John Crall; James Francis Meehan; Larry Gene
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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;

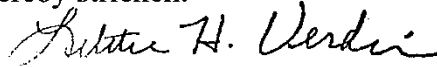
and

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

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

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

FILED
Aug 09 2023

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

Case No. 2021-CP-40-03484

v.

Davis Mechanical Contractors, Inc., et al.,

Defendants.

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

Third-Party Plaintiffs,

v.

Zurich American Insurance Company, et al.,

Third-Party Defendants.

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

This matter comes before the Court on Third-Party Defendant Travelers Casualty and Surety Company's ("Travelers") August 24, 2022 Motion to Dismiss Third-Party Claims and Dissolve the Payne & Keller Receivership.¹ Payne & Keller Company, by and through its duly

¹ On September 19, 2022, Defendants AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company; and Certain as yet

appointed receiver, Peter D. Protopapas (“the Receiver”), filed a Response in Opposition to the Motion on January 13, 2023, and Travelers filed a Reply in Support of the Motion on January 25, 2023.² The Court heard oral arguments on the Motion during a January 27, 2023 hearing. After careful consideration of the parties’ filings and arguments, and for the reasons stated below, Travelers’ Motion is **DENIED**.

BACKGROUND

On August 27, 2021, this Court entered an Order appointing Peter D. Protopapas as the Receiver for Defendant Payne & Keller Company on Plaintiff’s Motion to Appoint a Receiver. The Court’s Order vested the Receiver “with the power and authority [to] fully administer all assets of Payne & Keller” and, among other things, specifically instructed “the Receiver to investigate the existence of all insurance coverages potentially available to [Payne & Keller].” Thereafter, the Receiver discovered that Payne & Keller Company had conducted business under various corporate names before its dissolution. The Court accordingly granted the Receiver’s Motion to Clarify Order Appointing a Receiver for Payne & Keller Company on September 30, 2021, and entered an Order providing that “all of the Receiver’s duties and protections [in the August 7, 2021 Appointment Order] . . . extend[] to all of the P&K Entities and their predecessors, successors, affiliates, parents, assigns, and subsidiaries that may be discovered in the future.”

Pursuant to that authority, the Receiver initiated an insurance coverage action for Payne & Keller by way of a third-party action against multiple carriers in this case on February 23, 2022. Travelers appeared and filed a motion to dismiss the Receiver’s third-party claims and dissolve the Payne & Keller Receivership on August 24, 2022. After the Receiver served discovery requests

Unnamed Underwriters at Lloyd’s, London and Certain as yet Unnamed London Market Companies (the “Joining Defendants”) filed a Joinder to Travelers’ Motion.

² On January 26, 2023, the Joining Defendants filed a Joinder to Travelers’ Reply.

on Travelers, on November 16, 2022, Travelers moved for a protective order and again moved the Court for an order dissolving the Payne & Keller Receivership and dismissing Travelers from this case.

ANALYSIS

A. Standing

Travelers argues that the Receiver's third-party claims should be dismissed because the Receiver lacks standing to bring them. Specifically, Travelers first contends that under section 15-65-10 of the South Carolina Code, the Receiver only has authority over Payne & Keller property located within the State of South Carolina, and (according to Travelers) Payne & Keller's insurance policies are not property within this State. *See generally* § 15-65-10 ("A receiver may be appointed by a judge of the circuit court, either in or out of court . . . (4) When a corporation has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights, and, in like cases, of the property within this State of foreign corporations . . ."). Even assuming Travelers' interpretation of section 15-65-10 is correct, the Court finds the Receiver has alleged and presented sufficient evidence to demonstrate that Travelers issued insurance policies insuring Payne & Keller risks nationwide, including within South Carolina. Accordingly, the Receiver was properly appointed under section 15-65-10 and has standing to assert the third-party claims raised in this action. *See* S.C. Code Ann. § 38-61-10 ("All contracts of insurance on property, lives, or interests in this State are considered to be made in the State . . . and are subject to the laws of this State."); *Sangamo Weston v. Nat'l Sur. Corp.*, 307 S.C. 143, 149, 414 S.E.2d 127, 130 (1992) ("[I]t is immaterial where the contract was entered into. Further there is no requirement that the policyholders or insurers be citizens of South Carolina. What is solely relevant is where the property, lives, or interests insured are located.").

Travelers cites *Howard v. Allen*, 254 S.C. 455, 176 S.E.2d 127 (1970) for the proposition that insurance policies are not “property.” This case does not support Travelers argument. In *Howard v. Allen*, a personal injury plaintiff sought to attach, as a debt, the defense and indemnity obligations of an insurance policy covering the defendant tortfeasor. *Howard* does not speak to whether the Travelers insurance policies protective of Payne & Keller are property within South Carolina for the purposes of the receivership statute.

Travelers also argues that the Receiver lacks standing to bring the third-party claims on behalf of Payne & Keller because, as a Texas corporation that dissolved in 1986, Payne & Keller is no longer able to sue or be sued under Texas law. Travelers relies on Section 11.359(a) of the Texas Business Organizations Code, which provides that a “claim by or against a terminated filing entity is extinguished unless an action or proceeding is brought on the claim not later than the third anniversary of the date of termination of the entity.” However, that statute further provides, “Notwithstanding Subsections (a) and (b), the extinguishment of an existing claim with respect to a terminated filing entity as provided by this section is nullified if . . . the filing entity’s termination is revoked with retroactive effect under Section 11.153 . . .” § 11.359(c). And section 11.153 of the Texas Business Organizations Code allows a court to “order the revocation of termination of an entity’s existence that was terminated as a result of actual or constructive fraud.” § 11.153(a); *see also* § 11.153(b) (“If the termination of an entity’s existence is revoked under Subsection (a): (1) the revocation relates back to the effective date of the termination and takes effect as of that date; and (2) the entity’s status as an entity continues in effect as if the termination of the entity’s existence had never occurred.”).

Here, the Receiver has presented sufficient evidence at the pleading stage to support a claim that Payne and Keller’s 1986 dissolution was the result of, at least, constructive fraud. *See Resp.*

in Opp’n, 8–13. Specifically, the Receiver asserts that Payne & Keller “terminated its corporate existence to avoid liability for both current and future toxic tort, silica, and asbestos personal liability claims, and Payne & Keller was keenly aware of those claims when the decision to dissolve Payne & Keller was made.” *Id.* at 9. In support of this contention, the Receiver submitted evidence that, prior to its dissolution: Payne & Keller was exposed to significant potential liability resulting from its construction work at a time when the use of asbestos-containing products was prevalent, its insurers began to exclude coverage for asbestos-related claims, and it contracted to indemnify companies with which it did business for personal injury claims arising out of its work. *Id.* at 9–10. Further evidence indicates that Payne & Keller began the dissolution process in response to demands for indemnification by an oil company in bankruptcy concerning over a thousand personal injury claims arising out of exposure to dioxin, and Payne and Keller dissolved without taking the steps necessary to ensure those claims, and others it reasonably expected to face absent dissolution, would be paid. *Id.* at 11–12.

Travelers has not disputed the Receiver’s evidence or submitted any countervailing evidence regarding the circumstances surrounding its dissolution. Accordingly, this Court finds the Receiver has made a prima facie showing that Payne & Keller “was terminated as a result of actual or constructive fraud,” § 11.153(a), and dismissal on the basis of the termination is unwarranted. *See Latham v. Burgher*, 320 S.W.3d 602, 610 (Tex. App. 2010) (ruling a company’s dissolution, conducted shortly after receiving notice of an intended lawsuit against it and without setting aside funds to address the liability of the lawsuit, could support a finding of fraud). This Court does not, however, find that fraud has been conclusively proven, nor does the Court order the revocation of Payne & Keller’s termination at this time. Such a determination will be made after the parties have had the opportunity to explore this issue through the discovery process.

Relying on *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126 (Tex. 2010), Travelers argues that applying section 11.153 to Payne & Keller’s dissolution would violate Article I, Section 16 of the Texas Constitution. However, as the *Robinson* court explained, “No bright-line test for unconstitutional retroactivity is possible.” *Id.* at 145. Instead, the court outlined a three-factor analysis that must be conducted. *Id.* Moreover, Travelers’ retroactivity argument as to section 11.153 undercuts its reliance on section 11.359, which was also enacted well after Payne & Keller’s dissolution.³ The Court declines Travelers’ invitation to retroactively apply section 11.359 in Travelers’ favor to dismiss the Receiver’s third-party claims while simultaneously holding the retroactive application of section 11.153 would violate the Texas Constitution, especially given that the Texas legislature added subsection (b) to section 11.153 in response to the Fifth Circuit’s determination that revoking an entity’s dissolution would not revive claims extinguished by section 11.359. *See Boudreaux v. C J R Framing*, 744 F. App’x 208, 211 (5th Cir. 2018).

B. Personal Jurisdiction

Travelers argues that the Receiver’s claims should also be dismissed under Rule 12(b)(2), SCRCF, because this Court lacks personal jurisdiction over Travelers in this case. The Court disagrees and finds the Receiver has made a prima facie showing that personal jurisdiction over Travelers exists. *See Brown v. Inv. Mgmt. & Research*, 323 S.C. 395, 399, 475 S.E.2d 754, 756 (1996) (stating when a defendant seeks dismissal for lack of personal jurisdiction under Rule 12(b)(2), “the plaintiff has the burden of showing jurisdiction is properly asserted; however, the law is well-settled that at the pre-trial stage only a prima facie showing is required”). In addition

³ The Court further notes that a predecessor to the Texas Business Organizations Code—the Texas Business Corporation Act—contained a fraudulent termination provision similar to section 11.153.

to relevant allegations in the Second Amended Complaint, the Receiver has also presented evidence that Travelers contracted with Payne & Keller to insure risks in all states, including South Carolina, and that Payne & Keller was registered to do business in South Carolina and had performed work in South Carolina when Travelers issued its policies. *See* Resp. in Opp’n, at 15–17 & Ex. M–O. Travelers’ conduct in issuing such policies to Payne & Keller supports a finding of personal jurisdiction and precludes dismissal on this basis. *See* S.C. Code Ann. § 36-2-803(A) (“A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person’s . . . contracting to insure any person, property, or risk located within this State at the time of contracting”); *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (“It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State.”); *Ross v. Am. Income Life Ins. Co.*, 232 S.C. 433, 438-39, 102 S.E.2d 743, 745 (1958) (holding a single insurance policy mailed to an individual in this state was a sufficient contact to warrant the exercise of jurisdiction without violating Due Process).

C. Rule 14

Rule 14(a), SCRCF, 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), SCRCF, 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

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

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

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

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

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

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

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

AND IT SO ORDERED this _____ day of _____ 2021.

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



Richland Common Pleas

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

So Ordered

Jean H. Toal

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

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
ROXANNE FALLS, Individually and as)
Personal Representative of the Estate of)
CHARLOTTE GAYE SMITH,)
Plaintiffs,)
vs.)
CBS Corporation, et al.,)
Defendants.)
In Re:)
Receivership of Covil Corporation by and)
through its Receiver Peter D. Protopapas)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT
C/A NO.: 2015-CP-46-02155

**ORDER DENYING MOTIONS TO
RECONSIDER AND MOTION TO STAY**

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
TIMOTHY W. HOWE, Individually and as)
Personal Representative of the Estate of)
Wayne Ervin Howe, deceased, and Jeanette)
Howe,)
Plaintiffs,)
vs.)
Air & Liquid Systems Corporation, et al.,)
Defendants.)
In Re:)
Receivership of Covil Corporation by and)
through its Receiver Peter D. Protopapas)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT
C/A NO.: 2015-CP-46-03456

**ORDER DENYING MOTIONS TO
RECONSIDER AND MOTION TO STAY**

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
CHARLES T. HOPPER and REBECCA)
HOPPER,)
Plaintiffs,)
vs.)
Air & Liquid Systems Corporation, et al.,)
Defendants.)
In Re:)
Receivership of Covil Corporation by and)
through its Receiver Peter D. Protopapas)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
C/A NO.: 2019-CP-40-00076

**ORDER DENYING MOTIONS TO
RECONSIDER AND MOTION TO STAY**

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
JAMES MICHAEL HILL,)
Plaintiff,)
vs.)
Advance Auto Parts, Inc., et al.,)
Defendants.)
In Re:)
Receivership of Covil Corporation by and)
through its Receiver Peter D. Protopapas)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
C/A NO.: 2018-CP-40-04680

**ORDER DENYING MOTIONS TO
RECONSIDER AND MOTION TO STAY**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	C/A NO.: 2018-CP-40-04940
	)	
DENVER D. TAYLOR and JANICE	)	
TAYLOR,	)	ORDER DENYING MOTIONS TO
	)	RECONSIDER AND MOTION TO STAY
Plaintiffs,	)	
	)	
vs.	)	
	)	
Air & Liquid Systems Corporation, et al.,	)	
	)	
Defendants.	)	
	)	
In Re:	)	
	)	
Receivership of Covil Corporation by and	)	
through its Receiver Peter D. Protopapas	)	

This matter is before the Court on (1) Non-Party USF&G’s Motion to Reconsider, Alter, or Amend this Court’s Approval Order of April 10, 2020, (2) Non-Party USF&G’s April 20, 2020 Motion to Stay, and (3) Non-Party Zurich American Insurance Company’s Motion to Reconsider, Alter, or Amend Approval Order of April 10, 2020. In these motions and the extensive briefing and exhibits submitted in support thereof, non-party USF&G and non-party Zurich (“the Objecting Insurers”) complain that this Court granted joint motions filed by Peter D. Protopapas, as Receiver for Covil Corporation, an administratively revoked South Carolina corporation (the “Receiver”), Hartford Accident and Indemnity Company and First State Insurance Company (collectively “Hartford”), TIG Insurance Company, as successor to Ranger Insurance Company (“TIG”), and Sentry Insurance a Mutual Company (“Sentry”) (jointly the “Settling Insurers”) to (1) establish a Qualified Settlement Fund under Section 468B of the Internal Revenue Code of

1986, as amended (“I.R.C.”), (2) keep continuing jurisdiction over that Qualified Settlement Fund, and (3) approve the settlements between the Receiver and each of Hartford, TIG, and Sentry.

The Court has ruled that the Objecting Insurers are not parties to these actions, have failed to avail themselves of the procedures available to become parties to these actions, and therefore lack standing to file any objections in these actions. During the several weeks since this Court’s order, nothing has changed in this regard related to the Objecting Insurers’ lack of standing. Having considered the Objecting Insurers’ motions and the applicable responses, together with the exhibits submitted with these motions and responses, the Court hereby decides the matter on the filings and rules as follows:

I. FINDINGS RELATED TO CORONAVIRUS EMERGENCY PROCEDURES

On April 3, 2020, the South Carolina Supreme Court issued an Order providing guidance to the courts of South Carolina to help ensure the continued operation of the courts during the Coronavirus emergency. In the Order, the Supreme Court noted the impossibility of continuing the practice of conducting hearings on virtually all motions during this unprecedented time. The Supreme Court indicated South Carolina trial judges, after allowing all parties the opportunity to file responses to a motion, “may elect to not hold a hearing when the judge determines the motion may readily be decided without further input from the lawyers.” See April 3, 2020 Order of the South Carolina Supreme Court.

The Court finds these motions have been fully and exhaustively briefed, and, after reviewing all submissions, the Court further finds that hearings on these motions are not necessary and these motions may readily be decided without further input from the lawyers. Ruling on these motions is also in the best interest of the Receivership as delay in these perilous times imperils

assets of the Receivership and the proposed liquidation of those assets into a qualified settlement fund.

II. FINDINGS REGARDING PARALLEL FEDERAL PROCEEDINGS

In the case of *Covil Corporation By Its Duly Appointed Receiver, Peter D. Protopapas v. Zurich, USF&G et al.* in the United States District Court for the District of South Carolina, Spartanburg Division, CA No. 7:18-3291-BHH, United States District Judge Bruce Howe Hendricks issued an Opinion and Order dated February 27, 2020 in which she reviewed comprehensively the procedural complexities of the insurance coverage case before her involving claims and cross-claims regarding insurance coverage for policies issued or allegedly issued by various insurance companies to Covil at various times between the 1950s and 1993.

Judge Hendricks also detailed the responsibilities assigned to this Court regarding the trial of asbestos cases in South Carolina and the supervision of the Receivership of Covil. In her order, Judge Hendricks declined to issue a broad moratorium on further proceedings before this Court as the Receivership Court. Judge Hendricks found: “It is abundantly clear that Justice Toal, for whom the undersigned has the highest respect, has done and is doing her best to keep the underlying state tort suits moving forward appropriately without interfering with the coverage issues pending here.”

As this Court explained in its April 10, 2020 Order, this Court again intends to faithfully adhere to Judge Hendricks’ rulings and stay out of ruling on coverage matters that are before Judge Hendricks’ Court.

With regard to the proposed settlements, the three Settling Insurers were parties to the case pending before Judge Hendricks, but each Settling Insurer has now been dismissed

without prejudice from that proceeding. In each case, the settling parties indicated to Judge Hendricks that the requested dismissals were to be without prejudice because each settlement still required the approval of this Court. In addition, the Receiver filed with Judge Hendricks the proposed Orders submitted to this Court. The settling parties also advised Judge Hendricks that, upon the Receivership Court's approval, the parties would return to Judge Hendricks' Court in order to convert the dismissals without prejudice into final dismissals with prejudice. Objecting Insurers did not object to any of these motions even though the motions were predicated on this Court's considering the proposed Orders approving settlement to which they now object.

As to each settling insurer, Judge Hendricks signed the dismissals without prejudice on this basis, and as a result the settling insurers have all been dismissed from the above-referenced case in Judge Hendricks' court. Therefore, it is not possible for this Court to rule on the coverage matters pending before Judge Hendricks in regard to the settling insurers because these matters are no longer pending as to these settling parties.

Since this Court signed its April 10, 2020 Approval Order, Judge Hendricks has continued to dismiss claims as a result of the settlement agreements approved therein. See April 15, 2020 Order Dismissing Sentry without Prejudice from *Peter D. Protopapas, as Receiver for Covil Corporation v. Wall Templeton & Haldrup, P.A. et al.* in the United States District Court for the District of South Carolina, Columbia Division, CA No. 3:19-01635-BHH. As such, this Court will continue to meet its responsibilities for managing the South Carolina asbestos docket, and the Covil receivership, without interfering with issues subject to coverage litigation pending before Judge Hendricks.

III. OBJECTIONS TO THE QUALIFIED SETTLEMENT FUND

A Qualified Settlement Fund is a creature of statute based on Section 468B of the Internal Revenue Code. The establishment of a Qualified Settlement Fund serves to streamline the income tax treatment of a policyholder's settlement proceeds with an insurer, provided that the full amount of the settlement proceeds are dedicated to meeting the costs and liabilities associated with the insured risk. At the conclusion of such liability, any residual amounts in a Qualified Settlement Fund must be donated to one or more 501(c)(3) charitable institutions.

The use of a Qualified Settlement Fund is routine in the resolution of a complex insurance coverage dispute. The Receiver has satisfied the criteria established by Congress for establishing a Qualified Settlement Fund, and the QSF will remain subject to the ongoing jurisdiction and supervision of this Court. The Objecting Insurers cannot, and certainly have not even tried, to explain why they would benefit from the Settling Insurers' settlement payments being fully subject to payment of federal income tax. The Receiver is exercising financial prudence in implementing a tax planning structure for the receipt of these settlement funds. The Objecting Insurers' continued objections to this Court's approval of the Receiver's use of this ubiquitous tax planning vehicle are baseless.

IV. IMPACT OF PRIOR RECEIVERSHIP PROCEEDINGS

Non-Party USF&G waited until its Motion to Reconsider (and concurrently filed Motion to Stay) to lodge, for the first time, an objection to this Court's Approval order based on the existence of a prior receiver for Covil, Mr. Winston Lee. In lodging this objection, USF&G claims that it just recently discovered that Covil was "judicially dissolved" after the appointment of Winston Lee as Covil's general receiver. USF&G Mot. to Reconsider at 2; Mot. to Stay at 2.

However, based on the conclusive evidence submitted in connection with this motion, it is abundantly clear that USF&G and Zurich have been aware of the first Covil receivership since at least 1991. Yet, remarkably, USF&G waited over 28 years to raise this objection and now feigns to have only recently learned about this previous receivership proceeding. USF&G even goes so far as to blame Covil, a corporation that was administratively dissolved in 1993 and operated by the Objecting Insurers until the appointment of a Receiver in 2018, for not bringing this prior receivership to this Court's attention. USF&G is not being honest with this Court.

A. Background of Objecting Insurers' Knowledge of Prior Covil Receivership

In responding to Non-Party USF&G's objections, the Receiver for Covil established the following historic timeline related to USF&G's knowledge of this prior receivership.

In 1991, Greenville County Master in Equity, Judge Simmons appointed L. Winston Lee as Receiver in a case entitled: *In Re: The First Savings Bank, FSB v. Covil Corporation, Oxytherm, Inc., and Equitable Enterprises, a South Carolina General Partnership*: C/A 1991-CP-23-4445 (Greenville County). On November 14, 1991, the lawyer retained to defend Covil by the Objecting Insurers, Mr. Danny White, wrote to inform the Objecting Insurers that "Covil Corporation has now been placed in receivership and L. Winston Lee, as Receiver, has been charged with the responsibility to gather the assets of Covil Corporation for public auction on December 5, 1991." See Letter from Danny White dated November 14, 1991. David N. Kappus of Maryland Casualty n/k/a Zurich and Richard L. Teal of USF&G n/k/a Travelers were recipients of this correspondence. In this letter, Mr. White further explained, "Covil does not intend to dissolve as a corporation but rather, in fact, will remain a corporation which can sue and be sued."

Finally, White requested the permission of the insurers to “gather and store all personnel records and job files of Covil Corporation which have potential relevance to the asbestos litigation.”

On that same day in November of 1991, the Objecting Insurers’ appointed defense counsel Mr. White also wrote to Covil’s first receiver, L. Winston Lee, requesting permission to review Covil’s records and cautioning against their destruction. As to the potential destruction, Mr. White wrote, “Because of outstanding discovery requests against Covil and the potential for new lawsuits, I would suggest that the destruction of these records may violate current discovery orders and potentially be considered contempt of court.” *See id.* Historical records indicate that by April 15, 1992, White had made “arrangements to retrieve Covil’s personnel records and job files which may be of potential future relevance in this litigation,” and was “storing those files in [his] office.” *See* Letter from Danny White to Richard Teal, David Kappus, and Dave Christian, dated April 15, 1992.

Mr. White’s third letter of November 14, 1991 was addressed to counsel for the underlying asbestos personal injury plaintiffs. Enclosing a copy of the Receivership’s filing in Common Pleas of a Notice to Creditors, White informed the counsel that “[t]he Order indicates that there appears to be no assets available from which payment may be made to unsecured creditors.” *Id.* The letter ended, “You are placed on such notice of this receivership as you deem proper to protect the interests of your clients.” *Id.* After being advised of the Receivership and its status, Covil’s insurers continued to pay settlements to Covil asbestos personal injury claimants. *See* Letter from Kelly Brunker to John Truzzolino and Lori Sheppard dated September 15, 1994 (noting, “This serves to reiterate our September 9, 1994 conversation in reference to the disposition of Covil in the asbestos litigation,” and outlining the jointly-determined authority for payment of asbestos personal injury claims).

The L. Winston Lee receivership continued until the Master-in-Equity signed a Final Order on November 30, 1992. The Final Order accepted the Receivership Accounting, which included a listing of all receipts and disbursements undertaken by the receiver. The receipts for Covil during the receivership included \$562,500 for the sale of real estate, \$26,755.27 in auction proceeds, and \$80,209.74 in cash surrender value from New York Life, among others. *See id.* at 5. All remaining receivership funds, and all remaining accounts receivable of Covil, were assigned to First Savings Bank, which the receiver identified in his Final Report as a “priority line creditor.” *See id.* at 2-3; *see also*, Final Report of the Receiver at 4. All other Covil assets that were not receivership funds or accounts receivable were abandoned to the shareholders and partners of Covil. *See* (“That the abandonment by the Receiver of all remaining assets of the above-named Defendants is hereby approved”); (“That your Petitioner is informed and believes that any remaining assets of the Defendants are without monetary value and that your Petitioner should be authorized and directed to abandon any and all such remaining assets, if any, to the shareholders and partners of the Defendants.”).

More than six months after the Master-in-Equity entered the Final Order, on July 30, 1993, the South Carolina Secretary of State signed a Certificate of Revocation of Authority for Covil. The document indicates Covil was dissolved for failure to file its annual report and to pay its franchise tax. *See id.* No other document produced in this case demonstrates that the South Carolina Secretary of State prepared any document dissolving Covil Corporation prior to the Certificate of Revocation of Authority on July 30, 1993.

Apparently, the Objecting Insurers waited twenty-seven years to consult the public files of the prior receivership court. During that time, Covil-related litigation continued apace throughout the courts of South Carolina as well as in other states. Undeterred by this prior

receivership, the Objecting Insurers carried on with “business as usual” for Covil as an active litigant in numerous courts for decades – never mentioning anything to any of these many courts about this prior receivership until only a few days ago.

B. Impact of Prior Receivership on Current Receivership

Non-Party USF&G contends that its late objection based on the prior receivership “raises significant doubts as to whether the Receiver possesses the authority to sell Covil’s insurance policies back to the Settling Insurers, whether Covil is properly subject to suit in any of the underlying asbestos claims against Covil, and whether this Court’s November 2018 order appointing Mr. Protopapas as Covil’s Receiver should be vacated.” Mot. to Stay at 3.

As explained above, Non-Party USF&G lacks standing to complain about these proceedings. In light of Non-Party USF&G objection, the Court will state its rationale and rulings if it were to reach Non-Party USF&G’s objections.

In addition to being untimely, Non-Party USF&G’s objections are simply incorrect. It does not matter if Covil was administratively or judicially dissolved in the early 1990s. The current Covil Receiver was appointed under Section 15-65-10 of the South Carolina Code of Laws, which provides, “A receiver may be appointed by a judge of the circuit court ... (4) When a corporation has been dissolved . . .” *Id.* at 15-65-10(4). The statute does not require that the corporation was previously “administratively dissolved” or “judicially dissolved.” It just says dissolved. Thus, whether Covil was administratively or judicially dissolved in 1992, the current Receiver’s appointment is lawful. USF&G does not attempt to cite or explain away the plain language of Section 15-65-10.

USF&G also makes the erroneous assertion that the current Receiver may not administer Covil's assets because the prior Receiver is "the permanent Receiver of Covil Corporation." Mot. to Reconsider at 3; Mot. to Stay at 6. The Final Order, however (the one USF&G fails to cite) shows that the prior receiver was "discharged as Receiver."

USF&G also claims Section 33-14-107 "bars claims against a judicially dissolved entity that are asserted more than ten years following the entity's publication of notice of dissolution." Mot. to Reconsider at 3; Mot. to Stay at 6 (citing S.C. Code Ann. § 33-14-107(c)). USF&G urges this Court to find that "Covil no longer has any underlying liabilities in the asbestos suits." Mot. to Reconsider at 3; Mot. to Stay at 6. USF&G cites no authority for this proposition, instead noting that USF&G and Zurich "are still investigating these matters." *Id.*

USF&G fails to cite the rest of the statute. Section 33-14-107 plainly provides that "[u]nknown claims . . . may be enforced under this section (1) against the dissolved corporation to the extent of its undistributed assets." S.C. Code Ann. § 33-14-107(d)(1). Under all three types of dissolution, "A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs." S.C. Code Ann. § 33-14-105(a) (voluntary); *id.* at § 33-14-210(d) (administrative); *id.* at § 33-14-330(b) (judicial dissolution statute providing, "After entering the decree of dissolution, the court shall direct the winding up and liquidation of the corporation's business and affairs in accordance with Section 33-14-105").

The issues raised by USF&G have been thoroughly addressed by the Delaware Supreme Court *In the Matter of Krafft-Murphy*, 82 A.3d 696 (Del. 2013). The South Carolina Supreme Court has looked to Delaware case law to inform interpretation of the South Carolina Business Corporations Act. For example, in the 1975 case of *Santee Oil Co. v. Cox*, 265 S.C. 270, 272-273, 217 S.E.2d 789, 791 (1975), the South Carolina Supreme Court addressed an issue involving the South Carolina Business Corporations Act. It stated:

No prior decision of this Court has come to our attention which is at all helpful, but courts of other states, particularly the courts of Delaware, the home of so many corporations, have had fairly frequent occasions to define and apply such term under corporation law similar to ours.

Id. at 791. The Court then relied extensively on Delaware law to decide the matter at issue under the South Carolina Business Corporations Act. *Id.* at 791-92.

In the Matter of Krafft-Murphy, 82 A.3d 696 (Del. 2013) soundly rejects USF&G's position. There, similar to here, asbestos "tort claimants in lawsuits pending against [Krafft-Murphy] in other jurisdictions [sought] the appointment of a receiver to enable them lawfully to pursue those claims." *Id.* at 698. Krafft-Murphy had "formally dissolved in 1999" and its "only assets [were] its unexhausted insurance policies." *Id.* at 699. As here, the insurers in *Krafft-Murphy* attempted to argue that asbestos lawsuits were barred because of the dissolution. After a thorough analysis, the *Krafft-Murphy* Court held, "Delaware's dissolution statutes impose no generally applicable statute of limitations that would time-bar claims against a dissolved corporation by third parties." 82 A.3d at 698. The court also held "that as a *body corporate* a dissolved corporation ceases to exist and is not amenable to suit after the expiration of § 278's three year period. From that it does not follow, however, that § 278 extinguishes the corporation's underlying liability to third parties. To the contrary, § 279 enables a dissolved corporation to

(through a receiver) ‘sue and *be sued*’ after the expiration of the § 278 three year period.” *Id.* (footnotes omitted). The same is true in South Carolina.

The Delaware Supreme Court noted that its statutes expressly barred certain claims, but not the asbestos claims at issue in that case. *Id.* at 705. “The five and ten year claims planning periods were not intended to operate as general statutes of limitation.” *Id.* at 706. South Carolina’s statute applies the same way. *See* S.C. Code Ann. § 33-14-107(b)(3).

Moreover, there is no basis for USF&G’s assertion that the current Receivership is unnecessary. After the *Krafft-Murphy* Court noted that the “Insurers are continuing to defend those lawsuits on [Krafft-Murphy’s] behalf,” it found that the Insurers “cannot re-infuse the Corporation with a legal existence that by statute has terminated. The only means by which the Corporation may become re-empowered to defend its interests in the litigation is through the appointment of a receiver.” *Id.* at 710. USF&G also relies on *All Cases Against Sager Corp.*, 967 N.E. 2d 1203 (Ohio 2012). Mot. to Reconsider at 4. The *Sager* decision is an Ohio case applying Illinois law. It relies upon *Pielet v. Pielet*, 942 N.E.2d 606 (Ill App. 2010). *See Sager*, 967 N.E.2d at 1210. USF&G, however, may not rely on *Sager*, and should not have cited it to this Court, because the Illinois Supreme Court reversed the lower court in *Pielet v. Pielet*, 978 N.E.2d 1000 (Illinois 2012). *Id.* at 1013 (“the precedent in Illinois has consistently held that the survival provisions of section 12.80 and its antecedents may only be invoked in aid of a cause of action against a dissolved corporation where the cause of action accrued prior to the corporation’s dissolution.”).

In short, “*Krafft-Murphy* makes clear that there is no time limit on when a party can request a receiver be appointed to represent a dissolved corporation and there is no ten (10) year statute of limitations on bringing a suit against a dissolved corporation.” *United States v.*

Marmon Holdings, Inc., Civ. No. 2:10-cv-00526-EJL-CWD, 2015 WL 5822620, at *12 (D. Idaho Sept. 30, 2015).

Further, a review of the statutory history of the statute USF&G attempts to rely on to support its newly found, self-serving argument that Covil no longer has any underlying liabilities in asbestos cases in South Carolina due to its dissolution shows the statute was materially different at the time of Covil's dissolution. Even if the Court ignored the clear language in section 33-14-107(d), the sound analysis of the Delaware courts on this issue, and the fact that the Objecting Insurers appear to have themselves reanimated Covil for the past two decades, there is no basis for USF&G's argument that section 33-14-107(c) prohibits asbestos claims against the dissolved Covil.

The Court finds sections 33-14-107(a) and (b) are clearly inapplicable in the context of these asbestos claims against Covil. Further, section 33-14-107(c)(3) did not exist at the time of Covil's 1992 dissolution, and the Comments to section 33-14-107 show the General Assembly specifically chose not to adopt what is today subsection (c)(3), which addresses the bar of contingent claims and claims based on an event after dissolution, from the Model Act. In fact, the Comments note the clear legislative intent behind the version of the statute in effect at the time of Covil's dissolution was that "[t]he statute of repose only applie[d] to *claims existing at dissolution*." See South Carolina Reporter's Comments, S.C. Code Ann. 33-14-107. The General Assembly did not adopt subsection (c)(3) until 2004, and as such, this subsection, which did not exist until either eleven or twelve years after Covil's dissolution, clearly cannot apply.

The Court refuses to ignore the plain language of the statute and the clearly expressed legislative intent that section 33-14-107 does not bar claims that did not exist at the time of Covil's dissolution, regardless of whether Covil was dissolved in 1992 or 1993.

This Court appointed Mr. Protopapas as the Receiver for Covil Corporation, pursuant to South Carolina statute, to marshal Covil's assets and administer those assets for use in the defense of Covil's asbestos litigation. Given the unusual nature of latent occupational disease, the Court understands that Mr. Protopapas may find that he is required to serve in this role for years to ensure that Covil meets its obligations to future South Carolinians diagnosed with asbestos-related disease as a result of Covil's business operations.

The Objecting Insurers repeatedly insinuate that the Receiver's key role in these proceedings is to protect the Objecting Insurers from the contractual obligations that they voluntarily assumed when they sold insurance policies to Covil. This Court views the Receiver's role differently. As the Court's appointed receiver, Mr. Protopapas is charged with marshaling Covil's assets and prudently using those assets to address Covil's asbestos liabilities in a responsible fashion. This Court's appointed Receiver is certainly under no obligation to advance frivolous arguments or to assert specious defenses to Covil's asbestos cases. Non-Party USF&G's contention that the Receiver is somehow not cooperating with Covil's insurers and is undermining Covil's asbestos defenses by refusing to behave unethically (at USF&G's behest) is absurd.

This Court manages the South Carolina docket, and has observed Covil's behavior in numerous asbestos cases since Mr. Protopapas was appointed. From this Court's perspective, Mr. Protopapas has managed Covil's defense in those cases appropriately and professionally, while consistently meeting his obligations to Covil's insurers.

Having tried a Covil asbestos case to verdict, this Court is keenly aware of Covil's history and finds that this course of action – although it may take years to conclude - is equitable to all involved, including the insurers who sold liability insurance to Covil and to the people of

South Carolina who have been (and may in the future) diagnosed with asbestos-related diseases potentially attributable to Covil's business operations.

As to the Objecting Insurers, this Court again notes the extreme inconsistency in the positions advanced in objecting to the Court's establishment of the Covil QSF and approval of these three settlements. The Objecting Insurers knew about the previous receivership for almost three decades, yet USF&G waits until its motion to reconsider to raise an objection based on this previous receivership. At this late hour, USF&G now takes the position that the prior receivership may mean that Covil is not subject to suit in any underlying asbestos claim. *See* Motion to Stay at 2. The Court would note that USF&G, along with Zurich, animated an otherwise dissolved Covil for purposes of defending Covil's asbestos litigation from 1993 until 2018. In its role as the South Carolina Asbestos Court and as the trial court in a Covil asbestos case tried to verdict, this Court observed that the Insurers operated Covil without input from any policyholder, and they did so without ever raising this new claim that Covil was not subject to suit because of a prior receivership.

This late and seemingly frivolous objection simply raises additional questions about the propriety of the Objecting Insurers' management of Covil prior to 2018. If the Objecting Insurers really relied on the position that they now have asserted, they would not have animated an otherwise extinct Covil for twenty-five years. Having demonstrated their true view of Covil's role in asbestos litigation for more than two decades, USF&G now raises a last-minute objection that is entirely inconsistent with its course of conduct since 1993.

V. Objecting Insurers' Motion to Stay

USF&G also contends that these proceedings should be stayed. It asserts that a stay would not harm the Receiver. Once again, USF&G is simply not being honest with this Court. As noted in the Receiver's response, at the same time that USF&G advances its argument to stay the Receiver's settlements, USF&G is also demanding that the Receiver fund portions of underlying asbestos settlements. USF&G knows that the Covil QSF lacks funding to respond to these settlement demands, and USF&G is currently leading the effort to prevent the Covil QSF from receiving the proceeds from the sale of some of its insurance assets.

The Objecting Insurers object that they were not given time nor opportunity to file additional objections. This Court provided ample time for briefing on these matters and has never prohibited any such filings, despite how repetitive and voluminous many of the Objecting Insurers' filings have been.

The Objecting Insurers object that they have standing to behave as parties despite their oft-asserted status as non-parties. The fact remains that they are not parties, despite having had months to intervene in these proceedings. The case that they cite for the proposition that they need not be parties to object to these proceedings does not stand for this proposition at all. Contrary to the way that it was represented to this Court, the entity seeking relief in *Ross Development Corporation v. Fireman's Fund Insurance Co.*, 809 F.Supp. 2d 449 (D.S.C. 2011) was a third-party defendant (*i.e.*, a party) to the litigation described therein. Once again, the Objecting Insurers took liberties in representing authority to this Court.

The Objecting Insurers object that this Court's April 10, 2020 order impairs their contribution, indemnification, and subrogation rights. This Court already has addressed these

objections related to potential, future contribution rights. Perhaps USF&G said it best in its April 20, 2020 filing in Judge Hendricks' court: "USF&G does not, and cannot, know the extent of its contribution claims until its right to contribution is ripened by resolution of underlying claims...." See USF&G's April 21, 2020 Reply to Response in Opposition to Motion to Enforce Injunction at ECF 148 at 6, Case No. 7:18-cv-03291-BHH, in the United States District Court of South Carolina, Spartanburg Division. As this Court has observed before, this Court is charged with supervision of the South Carolina asbestos docket and the Covil receivership. The Receiver has reached settlements with three of Covil's insurers, and these parties seek approval and closure. The Objecting Insurers seek to prevent this settlement based on a theory that their future, possible, unknowable rights could be impaired. Yet USF&G did not even seek relief relating to these rights in the insurance coverage case pending with Judge Hendricks. See USF&G's January 18, 2019 Answer, ECF 39. Its motivation to assert future rights now is thus questionable.

Accordingly, this Court will not place its important business on hold while and until the Objecting Insurers' future potential rights "ripen" to the point that they are ready to have them adjudicated. The law of South Carolina favors settlements, and this Court has a complex asbestos docket to manage. The Receiver's significant settlements have already resulted in a decrease in litigation in multiple state and federal courts, and this Court stands ready to adjudicate contribution rights related to its asbestos docket and the Covil QSF that it will supervise should the necessity to adjudicate such rights ever materialize in any of this Court's cases.

Until such time, the Objecting Insurers cannot indefinitely block this Court's functions in defense of rights that they may, or may not, possess at some undetermined time in the future. Finally, the concept of subrogation, although mentioned frequently by the Objecting Insurers, is not at issue in these proceedings.

VI. Ruling

For the reasons stated above, this Court hereby **DENIES** Non-Party United States Fidelity and Guaranty Company's ("USF&G") April 20, 2020 Motion to Reconsider, Alter or Amend Approval Order; Non-Party USF&G's April 20, 2020 Motion to Stay; and Non-Party Zurich's April 20, 2020 Motion to Reconsider, Alter or Amend Approval Order.

AND IT SO ORDERED this ____ day of _____, 2020.

Jean H. Toal, Chief Justice of the Supreme
Court, Retired, acting as Circuit Court Judge

Columbia, South Carolina.



York Common Pleas

Case Caption: Charlotte Gaye Smith , plaintiff, et al VS CBS Corporation ,
defendant, et al
Case Number: 2015CP4602155
Type: Order/Other

IT IS SO ORDERED.

s/ Jean H. Toal #2758

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
ROXANNE FALLS, Individually and as)
Personal Representative of the Estate of)
CHARLOTTE GAYE SMITH,)
Plaintiffs,)
vs.)
CBS Corporation, et al.,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT
C/A NO.: 2015-CP-46-02155

**ORDER FOR RULE TO SHOW CAUSE
HEARING**

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
TIMOTHY W. HOWE, Individually and as)
Personal Representative of the Estate of)
Wayne Ervin Howe, deceased, and Jeanette)
Howe,)
Plaintiffs,)
vs.)
Air & Liquid Systems Corporation, et al.,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT
C/A NO.: 2015-CP-46-03456

**ORDER FOR RULE TO SHOW CAUSE
HEARING**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	C/A NO.: 2018-CP-40-04940
	)	
DENVER D. TAYLOR and JANICE	)	
TAYLOR,	)	
	)	
Plaintiffs,	)	ORDER FOR RULE TO SHOW CAUSE
	)	HEARING
vs.	)	
	)	
Air & Liquid Systems Corporation, et al.,	)	
	)	
Defendants.	)	
	)	
	)	

This matter comes before this Court by way of a Motion for a Rule to Show Cause initiated by Peter D. Protopapas, as the duly appointed Receiver of Covil Corporation (“Receiver”). The Receiver’s Motion for a Rule to Show Cause against United States Fidelity and Guaranty Company (“USF&G”), Zurich American Insurance Company (“Zurich”), and Sentry Insurance, a Mutual Company (“Sentry”) (collectively “Insurers”) seeks an order holding these Insurers in contempt for violating this Court’s (1) November 2, 2018 Order Appointing a Receiver for Covil Corporation;¹ (2) February 28, 2019 Order requiring Covil’s Insurers to attend mediation;² (3) September 19, 2019 Order requiring Covil’s Insurers to respond and produce required documents before September 30, 2019;³ and (4) October 28, 2019 Order for Rule to Show Cause.⁴

¹ See November 2, 2018, Order Appointing Receiver in *Taylor v. Air & Liquid, et al.* (C/A No. 2018-CP-40-04940).

² See February 28, 2019, Order Granting Plaintiff’s Motion to Compel Attendance at Mediation in *Nolen v. Daniel, et al.* (C/A No. 2016-CP-40-04184); *Greene v. Armstrong, et al.* (C/A No. 2016-CP-40-00173); *Thompson v. Armstrong, et al.* (2016-CP-40-2498); and *Taylor v. Air & Liquid, et al.* (C/A No. 2018-CP-04940).

³ See September 19, 2019, Order for Rule to Show Cause in *Hopper v. Air & Liquid, et al.* (C/A/No. 2019-CP-40-00076).

⁴ See October 28, 2019, Order for Rule to Show Cause in *Hopper v. Air & Liquid, et al.* (C/A/No. 2019-CP-40-00076).

The South Carolina Supreme Court appointed the undersigned to serve as the Chief Judge of Administrative Purposes over all asbestosis and asbestos litigation filed within the state court system. The asbestos litigation in South Carolina constitutes a significant number of complex multi-party cases. A typical case will include an injured plaintiff alleging that an asbestos-related cancer was caused by dozens of different defendants.

This Court has worked diligently to manage this docket and to organize this complicated statewide litigation into an orderly process whereby cases are assigned for trial in a predictable fashion. This process is designed to allow the litigants to participate in discovery in an orderly fashion to facilitate the evaluation of litigation positions well before trial, and to try the cases as necessary.

The Supreme Court's charge to this Court includes facilitating meaningful mediations of asbestos cases consistent with the South Carolina Rules of Alternative Dispute Resolution. The Rules mandate attendance at mediation of "a representative of the insurance carrier who is not the carrier's outside counsel and who has full authority to settle the claim" on behalf of any insured party against whom a claim is made. SCRADR 6(b)(4).

Although this Court manages a large asbestos docket involving scores of different defendants, the matters associated with defendant Covil Corporation have required a very significant amount of this Court's time and attention for the reasons explained in more detail below.

From the time of its original formation in or about 1954, Covil Corporation was engaged in the installation and removal of insulation in various industrial facilities across South Carolina. Covil's operations involved the installation, removal and disturbance of insulation materials, typically supplied, required or acquired by other parties. At pertinent times insulation materials contained asbestos and Covil's operations are alleged to have resulted in bodily injury to South Carolina citizens. In 1991, Covil's business failed and it ceased operations. Thereafter, in 1993 the State of South Carolina rescinded Covil's corporate charter for failing to file the appropriate documentation with the Secretary of State.

Despite Covil's failure as a going concern and its subsequent forfeiture of its corporate charter, it continued to be sued in numerous asbestos cases. Through the management of the South Carolina asbestos docket, this Court observed several irregularities in the way that Covil conducted itself in its litigation. In the fall of 2018, Covil inexplicably defaulted on two mesothelioma asbestos cases pending before this Court, and shortly thereafter on November 2, 2018, the undersigned appointed Peter D. Protopapas to serve as a Receiver for Covil Corporation to manage its affairs according to South Carolina law.

During the ensuing months, this Court conducted numerous hearings regarding issues related to Covil. Over time, it became clear to this Court that certain of Covil's primary insurers (USF&G, Zurich, and Sentry) were operating an otherwise defunct Covil for purposes of managing Covil's asbestos litigation and had been doing so for over two decades without any apparent involvement from the insured – Covil Corporation. For over two decades, these primary Insurers pretended to be Covil. The primary insurers never sought the appointment of a receiver to represent Covil's interests in the defense of its asbestos cases. In fact, despite numerous opportunities to do so, at no time did any of Covil's Insurers even disclose to this Court their scheme to operate Covil as an undisclosed alter ego of these insurance companies.

As Covil's Receiver began to undertake his responsibilities, it became evident to this Court that Covil's Insurers would not willingly cooperate with the Receiver.⁵ In fact, several of these Insurers went to great lengths to thwart the Receiver's efforts to understand the basic nature and amount of the asbestos insurance coverage available to Covil. As a result of the insurers' refusal to cooperate, the Receiver began to seek this Court's intervention to determine the nature and amount of insurance available to Covil for its asbestos litigation. This information is critical to the Receiver's ability to manage Covil's asbestos

⁵ The Court's discussion of Covil's Insurers does not apply to TIG Insurance Company, as successor in interest to Fairmont Specialty Company, formerly known as Ranger Insurance Company ("TIG"). Unlike Covil's other insurers, TIG has cooperated with this Court and the Receiver. After producing the requisite materials, TIG acknowledged its responsibilities and reached an amicable settlement with Covil's Receiver. The Court commends TIG and its counsel for their cooperation and professionalism throughout this process. The Court also dissolved its Order to Show Cause as it related to Hartford and notes that Hartford also has reached an agreement to resolve its differences with Covil's Receiver.

litigation and, specifically, to participate meaningfully in mediation sessions scheduled for Covil's asbestos cases as required by the South Carolina Rules of Alternative Dispute Resolution.

Proceedings before this Court on the issue of Covil's participation in mediation exercises have demonstrated a lack of clarity regarding what constitutes "full authority" for claims filed against Covil Corporation. This lack of clarity continually delays settlement, stalls negotiations, and slows the ability of this Court to manage the South Carolina asbestos docket. An inquiry into the insurance coverage of Covil Corporation is warranted to fully determine the amount of authority available for settlement of asbestos personal injury actions filed against Covil Corporation.

Over time, this Court entered a series of escalating orders designed to require the Insurers to produce relevant insurance information to Covil's Receiver and to participate in asbestos mediations as scheduled on the South Carolina docket. Although several asbestos cases have been resolved under this system, except as noted above in note 5, the Insurers have yet to comply with this Court's Orders regarding the full production of the relevant insurance information to Covil's Receiver. These Insurers' defiance of this Court's lawful orders has impeded Covil's Receiver in his work under this Court's mandate, has interrupted this Court's ability to manage the numerous asbestos cases pending on its docket, and has required this Court unnecessarily to expend valuable time and resources in numerous hearings designed to encourage these Insurers to conduct themselves in accordance with the basic tenets of well-established South Carolina law. The Court has experienced problems with these Insurers when they were animating an otherwise defunct Covil and controlling its behavior in asbestos litigation before the appointment of the Receiver. See Order Granting Plaintiff's Motion for New Trial in *Crawford v. Ceeleanese Corp.*, C/A No. 2017-CP-42-04429 (where this Court found that Covil's insurers had been improperly operating, controlling, and abusing Covil for many years).

Unfortunately, this Court's persistence and patience have been unsuccessful in causing these Insurers fully to disclose and produce the insurance information or the details concerning their respective insuring relationship with Covil to the Receiver for their insured, Covil. After numerous attempts to achieve

compliance, this Court scheduled a show cause hearing on November 12, 2019, where the Insurers were directed to appear to discuss by policy and annual period (or portion thereof) the original and remaining limits of Covil's insurance policies under all applicable coverage parts, including separately as to the product liability/completed operations coverage part and the operations/premises coverage part and to provide an accounting of the amounts paid in settlement for each claim paid or settled, who authorized payment, under what coverage parts of the policies settlements or judgments were paid, documentation or other evidence supporting the analysis and characterization of claims as products/completed operations or operations/premises claims, method of allocation of settlements or judgments paid among Insurers, policies and policy years and if no payment was made because of a denial of coverage, the stated basis at the time of settlement for such denial. With the exceptions noted above in note 5, the Insurers failed and refused to comply with this order.

In sum, after months of work by this Court and its Receiver, it appears to this Court that these Insurers have refused to provide complete policy limits and settlement authority information to their insured's Receiver, even after this Court ordered the Insurers to provide the information by September 30, 2019, under penalty of perjury, and again in a show cause hearing scheduled on November 12, 2019. Despite their assertions in their memoranda submitted to this Court following the November 12, 2019 hearing, the Court has given the Insurers ample opportunity to respond to Receiver's arguments and explain to the Court why they should not be held in contempt for failing to abide by this Court's September 19, 2019 Order. Despite these Insurers not complying with the clear terms of the September 19, 2019 Order to respond to the areas of inquiry under the penalty of perjury by September 30, 2019, the Court allowed these Insurers to submit additional affidavits and evidence after the November 12, 2019 hearing. However, as the Court noted at the hearing, these Insurers were already in contempt of this Court's order by not providing proper responses under perjury by the September 30, 2019 deadline, and the supplemental submissions, although potentially helpful to the Court in making this ruling, do not necessarily cure the Insurers' contempt. The Court has diligently reviewed and considered the extensive filings submitted by both the

Receiver and these Insurers after the November 12, 2019 hearing. The Court finds the submissions by these Insurers are not relevant to, and do not cure, their contemptuous conduct. Rather, these filings have consumed additional countless hours of this Court's time while these Insurers continue to play games rather than comply with this Court's orders.

The Court is particularly concerned with the fact that these Insurers continue to claim ignorance surrounding their responsibility to their insured and their obligations under this Court's orders. The Court has held multiple hearings wherein the Court has allowed the Receiver and the Insurers to present arguments pertaining to these issues, and the Receiver has been trying to obtain the requested information since his appointment, well over a year ago. These Insurers cannot continue to plead ignorance in order to avoid the consequences of their own conduct and prolong the much-needed resolution of pending asbestos cases. The Insurers have continuously attempted to impede the Receiver's ability to determine the amounts of coverage available to Covil and have violated the South Carolina Alternative Dispute Resolution Rules by refusing to provide the Receiver with the necessary coverage information to fully participate in the mediation of these claims. In fact, because of these Insurers' obstinate refusal to comply with this Court's order and their past conduct, the Receiver has been forced to go to great lengths in order to present evidence to this Court and piece together the secondary evidence of insurance. While the Insurers have produced thousands of pages of documents, the production does not satisfy this Court's order as these Insurers have still not produced full coverage information or policies to the Receiver or fully disclosed the nature and extent of their insuring relationship.

During these hearings, the Court has been presented with evidence in the form of documents and sworn testimony indicating that Covil purchased products liability and completed operations liability insurance from USF&G (now a part of Travelers) from 1954 to 1964. Specifically, Palmer Covil (the founder of Covil Corporation) testified in a deposition in 1977 that Covil purchased USF&G general liability insurance coverage from 1954 to 1964. Moreover, Palmer Covil identified the Goldsmith Agency as the broker responsible for selling USF&G coverage to Covil. Former Lieutenant Governor Nick

Theodore provided an affidavit, as a former employee and partner of this agency, that he recalled selling USF&G insurance to Covil during this time period (until his agency lost the business to an agent selling insurance issued by Sentry). The Court finds this evidence and testimony to be persuasive, credible, and consistent with other known facts in this case.

On the other hand, USF&G reports only that it has been unable to locate these insurance policies. However, the Court has also been presented with evidence that USF&G undertook a systematic corporate program to destroy or discard its historical insurance policies which included policies and other related documentation from the period of time for which policies were issued to Covil as demonstrated by the evidence before this Court. In its arguments before the Court on November 12, 2019, and its memorandum submitted after the hearing, USF&G argues the Court should disregard its historical conduct because past conduct cannot be the basis of a finding of contempt. However, USF&G failed to inform the Court of the systematic destruction of policies until the Receiver brought the matter to the attention of the Court at the most recent hearing. The Court is concerned by the Insurers' failure to fully represent facts to the Court regarding the insurance coverage issued to Covil, especially considering that the Insurers acted as the alter ego of Covil for numerous years. The Court has given the Insurers ample opportunity to inform the Court of the necessary facts surrounding these coverage issues, and the Insurers have continuously refused to provide full information, misrepresented information, and attempted to prevent this Court from ruling on these issues.

The Court is deeply troubled by USF&G's historical behavior, including the widespread destruction of its insureds' insurance policies in an effort to evade liability under these policies. The Court is even more troubled by the fact that USF&G never mentioned, in numerous hearings on this very topic, that its policy destruction "purge" was the reason that USF&G is now unable to produce Covil's policies to the receiver. In this regard, USF&G has flagrantly defied this Court's orders and attempted to make a mockery of this Court's important work. Rarely, if ever, has this Court encountered such a degree of corporate

dishonesty as has been on display from USF&G during these proceedings. USF&G owes this Court a duty of candor, and should have been forthright.

The spoliation of evidence is the intentional, reckless, or negligent withholding, hiding, altering, fabricating, or destroying of evidence relevant to a current or reasonably anticipated legal proceeding. If proven, spoliation may be used to establish that the evidence was unfavorable to the party responsible. *Black's Law Dictionary* (8th Ed. 2004). The theory behind imposing sanctions for spoliation of evidence is that when a party destroys evidence, it is reasonable to infer that the party had “consciousness of guilt” or other motivations to avoid the evidence being heard or introduced to the jury.

A party bringing a motion for sanctions based on spoliation bears the burden of establishing three (3) independent elements before the Court may determine which sanction, if any, is appropriate. These elements are:

- (1) that the party having control over the evidence had a duty to preserve it at the time it was destroyed;
- (2) that the evidence was destroyed with a culpable state of mind; and
- (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Hawkins v. College of Charleston, 2013 WL 6050324, *2 (4th Cir. 2013) (quoting *Cytec Carbon Fibers, LLC v. Hopkins*, No. 2:11-cv-0217, 2012 WL 6044778 (D.S.C. Oct. 22, 2012)).

As to the first element, USF&G had a duty to preserve this evidence. “A party has a duty to preserve evidence during litigation and at any time ‘before the litigation when a party reasonably should know that evidence may be relevant to anticipated litigation.’” *Id.* at *3 (quoting *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)). There is a common law duty to preserve evidence, and a party can only be sanctioned for destroying evidence it had a duty to preserve. That duty arises when a party has notice that the party possesses evidence that is relevant to litigation or when a party should have known the evidence may be relevant to future litigation. Pre-litigation discussions or requests to inspect can also trigger a duty to preserve relevant evidence and it can be said that the obligation to preserve evidence

runs first to counsel, who then has an ethical obligation to notify and advise their client on its obligations to safeguard and preserve the evidence relevant to the litigation on a continuing basis.

Covil is unable to identify a specific date on which USF&G's duty to preserve records arose. However, by 1976, USF&G had received correspondence from Covil requesting USF&G to respond to an asbestos case, and by June 1983, USF&G had received correspondence from Covil serving as Covil's final written demand that USF&G afford a defense to Covil in an asbestos case. As a result of this exchange of correspondence, USF&G knew by at least June 1983 that its insurance policies issued to Covil would be highly relevant documents for years to come. Despite this fact, USF&G reports that it has been unable to locate the early policies issued to Covil – policies that it denies having issued – or an actual copy of a later policy that it admits to having issued to Covil.

The evidence demonstrates that USF&G cannot locate the early policies USF&G issued to Covil, or the later policy it admits having issued to Covil, because USF&G destroyed the policies. In 1984, the year after Covil's counsel demanded a defense from USF&G, which was facing a growing number of long-tail claims like the asbestos claims here, USF&G deliberately began purging old policies and policy information, including information on policy limits. To support its contentions regarding the destruction of policies, the Receiver submitted documents from the *Western MacArthur* litigation; most importantly the Pillsbury Report, which USF&G Filed in *Western MacArthur* litigation (*Western MacArthur Company v. General Accident Insurance Company of America*, Case No. 721595-7, In the Superior Court for Alameda County, California).⁶

⁶ The Pillsbury Report is an 85-page document, filed in *United States Fidelity & Guaranty Company, et al. v. American Re-Insurance Company, et al.* Index No. 604517/2002, in the Supreme Court of the State of New York, County of New York. An expert witness, Philip L. Pillsbury, Jr., of the New York law firm, Pillsbury and Levinson, was retained by the reinsurers of USF&G to evaluate, in the context of California bad faith and insurance practice, the potential exposure for damages, which USF&G faced in a jury trial in 2002. This material was presented by Covil, at the November 12, 2019 hearing to describe the significant corporate misconduct leading to USF&G's contention that it was unable to locate copies of Covil's early insurance policies, which the Receiver found highly probative of the key issues in the proceeding. There was no objection regarding the Court's consideration of the documents, and Defendant

As stated in the Pillsbury report, an April 30, 1984 memorandum from Charles Watson, then a Vice President of USF&G, the new document destruction policy mandated the “purging of *each* file, not just files that can be discarded in entirety,” required that doubts should be resolved “in favor of discarding unless there are legal restraints,” and admonished that “we must be absolutely sure that we have thoroughly cleaned existing files.” Similarly, a March 16, 1984 Department Circular detailing the Records Management Program noted: “All existing departmental files are to be in full compliance including having been completely purged of all obsolete and duplicate material.”

As detailed in the expert report of Philip Pillsbury, which USF&G filed on February 21, 2017 as an exhibit to its opposition to a motion in the *Western MacArthur* reinsurance matter then pending in New York, USF&G’s employees were given just two months to comply with the document destruction. Relying on USF&G’s historical records, Mr. Pillsbury also described the deposition testimony of Randolph Rohrbaugh, the USF&G Vice President of Quality Assurance, who testified that, at a meeting concerning the USF&G document destruction program among USF&G management and attorneys in 1984, “there was a discussion as to whether USF&G should retain its records information about insureds’ policies given that insureds would bear the burden of proof as to those policies.” See Pillsbury Report at 18.

In short, the evidence shows that USF&G plainly undertook its purge of policy-related materials in anticipation of litigation. Having destroyed its policy records, USF&G then could require its policyholders to provide copies of their policies to USF&G in order for USF&G to provide coverage. Beginning in the late 1980s, however, USF&G realized that policyholders could prove coverage for long-tail liability claims with secondary evidence, even if USF&G had destroyed the actual historical policy records in its possession. In his report in the reinsurance matter, Mr. Pillsbury describes the USF&G decision to reverse course on the document destruction policy. See Pillsbury Report at 18–19. Summarizing the deposition of Kenneth Ford, the USF&G in-house counsel in the Claims Legal Division, Mr. Pillsbury notes that Ford

USF&G and others requested the court allow them to submit further documentation. The court has considered the report and the additional insurers’ submissions in drafting this order.

“testified at deposition that USF&G decided to ‘stop the destruction’ after policyholders began to prove coverage for the long-tail claims with ‘partial information concerning a policy,’ and the burden was shifted to the insurer to prove there wasn’t a policy or at least to prove the policy terms, and USF&G was not able to rebut some of that information.” *Id.* at 19. The reversal of course apparently occurred after USF&G destroyed evidence of the coverage it had provided to Covil between 1954 and 1964 and the actual policy it admits to having issued to Covil in the 1976 to 1978 periods.

Recently produced documents from USF&G itself further support that had USF&G not destroyed its historical policies, it would have been able to locate coverage it issued to Covil in the 1950s and 1960s and the actual policy it admits to having issued to Covil in 1976 to 1978. USF&G Claims Register documents⁷ produced to the Receiver by USF&G on November 22, 2019, and December 5, 2019, over two months after this Court’s deadline for production, show USF&G paid claims on Covil policies made by third-party business entities such as Daniel Construction, Tennessee Eastman, Raburn Mills, First Baptist Church and Hicks & Ingle Company during the period from 1955 to 1962, further supporting the fact that USF&G issued general liability insurance coverage to Covil during this timeframe and, due to its conduct, has been unable to produce full and complete coverage information. Furthermore, although it claims to have what it calls a “certified” copy of the 1976 to 1978 primary policy it admits having issued to Covil, USF&G has not been transparent with either Covil or the court. This so-called “policy” is a collection of forms, not an actual insurance policy, and there is no competent proof of an aggregate limit for products or completed operations claims. USF&G’s use of the word “certified” is also misleading since the documents have no independent verification of their source or accuracy.

⁷ The Court understands that USF&G utilized Claims Registers to maintain an index of all paid claims, and specifically that an entry was not placed on a claims register until a clerk had reviewed the relevant insurance policy to ensure that there was coverage for the loss. An April 1947 booklet entitled “Claim Department Clerical Instructions” detailed USF&G’s instructions to clerical staff regarding entry of claims in the claims register: “After the clerk has checked the policy or bond information to determine if there is coverage for the loss, she enters it on the claim register as provided on that form. She assigns the number next in order to the last one used. A separate sheet is used on each class of claims for each month. A carbon copy of the claim register is sent to the Home Office on the first of each month on AL [Automobile Bodily Injury], L [Other Bodily Injury], C [Compensation], and MP [Miscellaneous Property Damage] claims.”

By failing to maintain documents relevant to pending and future asbestos personal injury and insurance litigation, USF&G had a culpable state of mind because it either intentionally or negligently destroyed the evidence. The destruction of the documentary evidence that Covil seeks significantly hampers Covil's Receiver's ability to reconstruct its insurance program and other information relevant to pending and future asbestos personal injury and insurance litigation.

The "culpable" state of mind requirement does not require willful destruction. Rather, the moving party need only show that the evidence was destroyed "knowingly, even without intent [to breach the duty to preserve it], or negligently." *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107–12 (2d Cir. 2001). "[T]he Fourth Circuit requires only a showing of fault, with the degree of fault impacting the severity of the sanctions." *Sampson v. City of Cambridge, Maryland*, 251 F.R.D. 172, 179 (D. Md. 2008) (citing *Silvestri*, 271 F.3d at 590).

Here, the evidence before the Court shows that USF&G's conduct of destroying or losing relevant documents satisfies the required minimum level of culpability needed for spoliation sanctions to be imposed. Because culpability encompasses everything from ordinary negligence to willful conduct, the culpable standard merely requires USF&G to have some degree of fault, which is the case in this matter. Whether the Court finds that USF&G was negligent, grossly negligent, or willful in destroying the evidence, the Court concludes that USF&G had a culpable state of mind when it spoliated the evidence at issue.

The last of the three independent elements, relevance to the party's claims, is also clearly present on these facts. Under Rule 401 of the South Carolina Rules of Evidence, "relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." "Evidence is relevant if it tends to establish or make more or less probable some matter at issue upon which it directly or indirectly bears." *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986). Thus, any evidence which assists a jury at arriving at the truth of an issue is relevant. The determination of the relevancy of evidence is largely

within the trial judge's discretion. *Strickland v. Coastal Design Assocs., Inc.*, 294 S.C. 421, 425, 365 S.E.2d 226, 228 (Ct. App. 1987).

Here, Covil has met its burden of showing the spoliated evidence is highly relevant to its case. The fact that USF&G destroyed or lost such evidence is extremely damaging to Covil's ability to reconstruct its insurance policies. As such, USF&G should not profit or benefit from its failure to preserve this evidence. Of course, Covil has no way of knowing precisely what has been destroyed. However, there is reason to believe that the destroyed evidence would have aided Covil's position, which has suffered irreparable prejudice due to USF&G's spoliation. USF&G is hereby ORDERED to produce ALL documents related to these issues, including all transcripts, from the *Western Asbestos* litigation, including the subsequent re-insurance litigation, to Covil's Receiver by January 13, 2020.

By destroying relevant evidence, USF&G has succeeded in hiding significant evidence of its insurance coverage and attempted to deprive Covil of the opportunity to present critical evidence of insurance coverage. Thus, the Court finds that USF&G spoliated relevant evidence and will issue an appropriate sanction to deter such conduct in the future and attempt to re-level the now uneven evidentiary playing field.

When a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party. *Gathers ex rel. Hutchinson v. S.C. Elec. & Gas Co.*, 311 S.C. 81, 83, 427 S.E.2d 687, 689 (Ct. App. 1993) (citing *Kershaw Cty. Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990)). Over the years, courts have found numerous sanctions to be appropriate for the spoliation of evidence. Courts have allowed adverse inferences to be drawn from the loss or destruction of relevant evidence, dismissed cases or stricken pleadings, issued fines plus attorney's fees and applied almost every other sanction available for the failure to provide discovery.

Among the tools that judges may use to combat spoliation is the adverse inference jury instruction/presumption. Giving the finder of fact the ability to decide what weight to place on the spoliation is the preferred practice in South Carolina. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 489 S.E.2d

679 (Ct. App. 1997). The presumption does not arise from the failure to present the evidence, but rather from the role that the spoliating party had in preventing it from being reviewed by the jury or court. When a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party. *Gathers v. S.C.E.&G. Co.*, 427 S.E.2d 687, 689 (S.C. Ct. App. 1993) (citing *Kershaw Cty. Bd. of Educ.*, 302 S.C. 390, 396 S.E.2d 369). Based on the evidence established by Covil's Receiver regarding the existence of Covil insurance coverage issued by USF&G, and based on the evidence demonstrating USF&G's spoliation of evidence regarding the existence of the coverage, this Court holds that USF&G's issued general liability insurance coverage to Covil Corporation on an annual basis, including products and completed operations coverage, between 1954 and 1964, without an aggregate limit of liability for damages paid for bodily injury or property damage. The court also makes a similar finding as to the 1976 to 1978 policy, SMP 490049.

Further, necessitated by the Supreme Court's charge to this Court to manage the South Carolina statewide asbestos litigation cases and as a direct result of these Insurers' recalcitrance in refusing to cooperate with this process, this Court and its Receiver are now left to discharge their respective duties by reconstructing the nature and scope of Covil's historical insurance program (without the cooperation of the Insurers) so as to facilitate the management of the South Carolina asbestos docket. In this effort, the Court will apply the following principles of South Carolina insurance law.

1. "Trigger of Coverage." The term "trigger of coverage" describes the necessary events for a liability policy to respond to a suit seeking damage because of bodily injury. The Court rules that the policies at issue respond to suits when bodily injury takes place during the policy period, regardless of when the event causing the injury took place and regardless of when the injury becomes known or knowable. All of an insured's policies in effect from a person's first exposure to asbestos through manifestation of an asbestos disease and, ultimately, to death cover the asbestos cases unless coverage is otherwise excluded. This approach is called a "continuous trigger of coverage" or an "injury in fact trigger of coverage" inasmuch as medical science established long ago that asbestos injuries begin upon first inhalation of

asbestos fibers and continue progressively thereafter. As respects asbestos injury and death suits, the “continuous trigger of coverage” and the “injury in fact trigger of coverage” yield the same result such that the court need not choose between these conceptually similar approaches. *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 45 (1996) (“We find no error in the trial court’s use of an injury-in-fact analysis to apply a continuous trigger.”).

2. The Distinction Between “Operations” and “Completed Operations.” The Court finds that the policies at issue contain separate and distinct coverage parts for “operations” and “completed operations.” As a general matter, the policies contain no aggregate limit of liability for the operations coverage part, although the Court has also held that the USF&G policies issued to Covil between 1954 and 1964 also contain no aggregate limit of liability for the products and completed operations coverage part as well. The operations coverage part for each one of the policies at issue in this case responds repeatedly to each and every “occurrence” without a total “cap” on the insurers’ liability to pay, subject only to a “per occurrence” limit of liability. The same is true of products and completed operations claims covered under the 1954 to 1964 USF&G policies. Most of the asbestos contracting claims against Covil invoke the operations coverage part because they did not result from its “completed operations.”

The insurers have conflated the separate “operations” coverage part with the “completed operations” coverage part and have applied their policies in a manner that has not been adopted by the state courts in South Carolina. The Court is aware that the insurers contend that aggregate limits of liability apply to any third party’s claim against Covil involving exposure to asbestos that took place before the *inception date* of their policies. The policies are not written in that manner, however. There is nothing in the definition of “completed operations” that focuses on the inception date of a policy.

This Court is aware that, in seeking to limit their obligations to Covil, the insurers would prefer to rely exclusively on federal decisions attempting to “guess” the view the Maryland Court of Appeals would take if the issue of interpreting the “completed operations” provisions of the policies were presented to it. The insurers take the position that the Fourth Circuit has “spoken” definitively on this issue. However,

this Court finds that federal decisions attempting to predict the interpretation of policy language under Maryland law are not pertinent to the determination of South Carolina law. This Court specifically finds that *In re Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004) is not the law of South Carolina.

This Court finds that the “completed operations hazard” described in the insurers’ policies, and the corresponding aggregate limits of liability in the policies that contain such aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos *after* Covil completed its installation or removal operations or work at a particular jobsite.

The Court holds that any aggregate limit of liability in the insurers’ policies applies only to suits seeking the recovery of damages for bodily injury where the plaintiff was exposed to asbestos attributed to Covil *after* Covil completed its work at a particular jobsite. No aggregate limits of liability apply to suits seeking the recovery of damages for bodily injury where the plaintiff was exposed to asbestos while Covil was performing work at a particular jobsite.⁸ See, e.g., *Travelers Cas. & Sur. Co. v. Gerling Global Reinsurance Corp. of Am.*, 419 F.3d 181, 184 (2d Cir. 2005) (“*Gerling*”) (“Operations” coverage “protected [the insured] from claims for asbestos-related injuries resulting from asbestos exposure on [the insured’s] premises or during its business operations, for example, injuries occurring during the installation or removal of asbestos products”); *Travelers Cas. & Sur. Co. v. Employers Ins. of Wausau*, 130 Cal. App. 4th 99, 114 n.6 (2005) (“Examples of injuries covered under the premises-operations coverage include injuries suffered by a shipyard worker while installing insulation at the insured’s facility and injuries caused by a subcontractor’s negligent construction of a wall that fell on a worker while the job was in progress.”).

⁸ Covil contends that policies in addition to those issued by USF&G between 1954 and 1964 do not contain any aggregate limits of liability at all. The court has not reached any conclusion as to this contention, except to conclude, in accordance with well-settled South Carolina law, that the burden is on the insurer to prove any limitation on coverage, including a limitation such as an aggregate limit of liability.

3. Burden Of Proof. The Insurers bear the burden of proving any exclusion or limitation of coverage, including the application of aggregate limits to particular suits and the “exhaustion” of the aggregate limits of liability in their policies.

The South Carolina Supreme Court has recognized that insurers bear the burden of proving the applicability of a coverage provision that limits their liability to their insured: “Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion’s applicability.” *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560 614 S.E.2d 611, 614 (2004) (citing *Boggs v. Aetna Cas. and Sur. Co.*, 272 S.C. 460, 252 S.E.2d 565 (1979)); *see also Auto Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 144–48, 781 S.E.2d 137, 141–44 (2015) (upholding circuit court decision to construe an ambiguous terms in favor of coverage, and noting that “ambiguous terms are to be construed strictly against the insurer”). Courts have held that this basic principle also applies to “limitations” on coverage. *Ins. Co. of N. Am. v. Kayser-Roth Corp.*, 770 A.2d 403 (R.I. 2001) (“[o]nce the insured makes a prima facie showing of coverage, ‘the insurer then bears the burden of proving the applicability of policy exclusions and limitations in order to avoid an adverse judgment.’” (quoting *Gen. Accident Ins. Co. v. Am. Nat’l Fireproofing, Inc.*, 770 A.2d 403, 416 (R.I. 1998))); *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1446 (3d Cir. 1996) (“[T]he insurer bears the burden of proving the applicability of any exclusions or limitations on coverage, since disclaiming coverage on the basis of an exclusion is an affirmative defense”).

Consequently, as to any individual asbestos lawsuit, it is the Insurers’ burden to prove that the suit seeks the recovery of damages that are subject to the aggregate limits of liability, if any, applicable to the “completed operations” provisions in their policies, where such aggregate limits have been proven by each particular Insurer as to each specific policy or policy period. By definition, aggregate limits restrict coverage. Accordingly, the insurers bear the burden of demonstrating that aggregate limits in their policies, if any, apply to any particular asbestos suits.

4. Occurrences. The policies at issue provide coverage for legal liabilities resulting from an

“occurrence.” An “occurrence” is typically defined as an accident, including exposure to substantially similar conditions, that results in bodily injury during the policy period. Covil faces allegations in numerous lawsuits that multiple asbestos injury and wrongful death “occurrences” have resulted from its asbestos “operations.” Covil is therefore entitled to multiple “per occurrence” limits of liability to resolve each of the asbestos suits.

The asbestos insulation operations suits against Covil are not repetitive products liability suits alleging exposure to asbestos from the same defective product. Instead, these suits allege that Covil’s operations exposed workers and other bystanders to asbestos. Courts have held that the type of asbestos operations claims against Covil resulted from multiple “occurrences” under the standard definition of “occurrence” used during the time of the insurers’ policies. *See, e.g., Gerling*, 419 F.3d at 184 (“[I]f claims arising from multiple occurrences triggered [operations] coverage, then Travelers was exposed to unlimited liability; each occurrence was subject to a \$1 million limit on liability, but there was no cap on total liability. Regardless of how much Travelers had paid for previous non-products occurrences under a single policy, each additional non-products occurrence under that policy subjected Travelers to liability anew.”).

5. Allocation of Losses to Covil’s Policies. Exposure to asbestos results in progressive injury spanning many years, thereby triggering coverage under multiple policies. Exposure to asbestos during the conduct of operations that results in bodily injury during the policy period or periods during which the operations were conducted also presents an allocation issue. And, here, Covil is in a Receivership, with no assets other than its insurance policies and proceeds, which also affects any allocation of loss since Covil itself cannot absorb any allocation of loss. Finally, the Court notes that the language of the policies typically requires the insurers to pay “all sums” – meaning everything – for which the insured is legally obligated to pay if a claimant sustains bodily injury during the period of the policy.

The Court is mindful of the South Carolina Supreme Court’s decision in *Crossman Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), and notes that it speaks generally to allocation of loss in a continuous injury situation such as asbestos-related disease but does not

address the particular circumstances presented by this Receivership, *i.e.*, the applicability of operations coverage and the impracticability of allocation of loss to Covil itself. Therefore, the Court will apply the rule of *Crossman Communities of N.C., Inc.* except in the case of operations claims where the policies in effect during the conduct of the operations will apply on an “all sums” basis. The Court also interprets *Crossman* such that allocation of loss will not be made to policy years when Covil does not have any available or responsive coverage.

Finally, each individual insurer will nevertheless be protected fully against the possibility that it paid too much on a single asbestos claim by its right to seek contribution from any other insurer, but not from Covil, whose policy also was triggered by the asbestos suit. This approach “ensures that [Covil] is indemnified by one [or more] insurer for the full extent of the loss up to the policy’s limits, but apportions liability among all insurers whose policies were triggered by the claimant’s asbestos-related bodily injury.” *Armstrong*, 45 Cal. App. 4th at 55.

This Court further finds that no aggregate limit of liability for product liability or completed operations claims has been or can be proven, and therefore no aggregate limit for product liability or completed operations claims exists, for the following Covil insurance policies:

<u>Policy Period</u>	<u>Insurer</u>	<u>Policy Number</u>
April 21, 1964 – April 21, 1965	Hardware Mutual Casualty Co.	39 04132 02 01
April 21, 1965 – April 1, 1966	Hardware Mutual Casualty Co.	39 04132 02 01
April 21 1966 – March 31, 1967	Hardware Mutual Casualty Co.	39 04132 02
March 31, 1967 – March 31, 1968	Hardware Mutual Casualty Co./Sentry	39 04132 07
March 31, 1968 – March 31, 1969	Hardware Mutual Casualty Co./Sentry	39 04132 07
March 31, 1969 - March 31, 1970	Hardware Mutual Casualty Co./Sentry	39 04132 07
March 31, 1974 – March 31, 1975	Maryland Casualty Company	41-206393
March 31, 1975 – March 31, 1976	Maryland Casualty Company	41-206393

March 31, 1976 – March 31, 1977	USF&G	SMP 490049
March 31, 1977 – March 31, 1978	USF&G	SMP 490049

This Court further orders that this Order be forwarded to the South Carolina Attorney General and to the South Carolina Department of Insurance for their consideration and further action, as they may deem appropriate.

AND IT SO ORDERED this 8 day of January, 2020.

Jean H. Toal, Chief Justice of the Supreme
Court, Retired, acting as Circuit Court Judge

Columbia, South Carolina.



York Common Pleas

Case Caption: Charlotte Gaye Smith , plaintiff, et al VS CBS Corporation ,
defendant, et al
Case Number: 2015CP4602155
Type: Order/Other

IT IS SO ORDERED.

s/ Jean H. Toal #2758

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Dec 08 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean Hoefer Toal, Chief Justice (Ret.) and Acting Circuit Court Judge

Case No. 2021-CP-40-03484

Appellate Case No. 2023-000727

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

v.

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

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

v.

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

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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 Appellants¹ 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)”⁴; 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.

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	<i>Zurich American Insurance Company v. CBS Corp.</i> ,	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	<i>Zurich American Insurance Company v. CBS Corp.</i> , 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	<i>Hartford Accident & Indemnity Company v. Covil Corporation</i> , Appellate Case No. 2019-001764	Court of Appeals	Appellant Hartford withdrew appeal
4	11/18/2019	<i>Hartford Accident and Indemnity Company v. Covil Corporation</i> , Appellate Case No. 2019-001758	Supreme Court	Granting request to withdraw petition for a writ of certiorari
5	2/13/2020	<i>Zurich American Insurance Company v. CBS Corporation</i> , 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	<i>Tracy Jolly Pavlish v. Covil, Hutto v. Covil, Hagan v. Covil, Rampey v. Covil, Reilly v. Covil, Jonas v. Covil, and Murphy v. Covil</i> , 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	<i>United States Fidelity & Guaranty Company v. Protopapas</i> , Appellate Case No. 2020-000791	Supreme Court	Dismissing petition for a writ of supersedeas because no appeal pending
8	7/30/2020	<i>United States Fidelity & Guaranty Company v. Protopapas (In re Roxanne Falls)</i> , 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	<i>Protopapas v. Wall, Templeton</i> , Appellate Case No. 2020-001322	Court of Appeals	Appellant's request for dismissal granted
10	12/15/2020	<i>Protopapas v. Wall Templeton</i> , Appellate Case No. 2020-001322	Court of Appeals	Appellant's (Zurich) request to withdraw its appeal granted
11	1/4/2021	<i>Finch v. United States Fidelity and Guaranty Co.</i> , Appellate Case No. 2020-001670	Supreme Court	Appellant withdrew its Petition for Writ of Prohibition
12	1/6/2021	<i>Finch v. United States Fidelity & Guaranty Company</i> , Appellate Case No. 2020-001663	Court of Appeals	Dismissing appeal because underlying order not appealable
13	3/9/2021	<i>Finch v. United States Fidelity and Guaranty Co.</i> , 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	<i>Finch v. United States Fidelity & Guaranty Company</i> , Appellate Case No. 2020-001663	Court of Appeals	Petition to rehear dismissal of appeal denied
15	7/6/2021	<i>Finch v. United States Fidelity & Guaranty Co.</i> , Appellate Case No. 2021-000462	Supreme Court	Denying petition for a writ of certiorari
16	1/5/2022	<i>Covil Corporation v. Pennsylvania National Mutual Casualty Insurance Company</i> , Appellate Case No. 2020-001239	Court of Appeals	Affirming partial summary judgment for Covil

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

25	7/6/2023	<i>Southern Insulation Inc. v. OneBeacon, et al.</i> , Appellate Case No. 2023-000252	Court of Appeals	Order denying petition for rehearing from 4/13/2023 dismissal of appeal
26	11/7/2023	<i>Covil Corp. v. Pennsylvania National Mutual Casualty Insurance Company</i> , 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	<i>Covil Corp. v. United States Fidelity & Guaranty Company</i> , Appellate Case No. 2020-001437	Court of Appeals	Opinion affirming circuit court
28	12/1/2023	<i>Welch v. Atlas Turner, Inc.</i> , 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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Attorneys for Respondent

December 8, 2023.

EXHIBIT A

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.

§
§
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§
§
§

127th JUDICIAL DISTRICT

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

§
§

HARRIS COUNTY, TEXAS

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

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

I.

STATUS OF INTERVENOR

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

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

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

II.

INTERVENOR'S INTEREST IN THIS ACTION

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

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

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

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

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

III.

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

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

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

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

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

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

3. Travelers Moves to Dissolve the Receivership

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

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

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

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

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

In a March 30, 2023 order, the circuit court denied Traveler’s motion to dissolve the Payne & Keller Receivership. The order not only rejected the obvious dissolution grounds Travelers raised, it also modified the scope and purview of the Receivership by authorizing the Receiver to pursue his new and unpleaded “fraud” theory, with the thinly-veiled goal of improperly revoking Payne & Keller’s termination in Texas. The South Carolina circuit court’s order also rejected Travelers’ argument that the retroactive application of Section 11-153(a) of the Texas Business Organizations Code, which was not added to the Code until 2021, would directly violate the Texas Constitution.

5. Travelers Appeals the Order Denying the Motion to Dissolve

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V.
PRAYER FOR RELIEF

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

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

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

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

Respectfully submitted,

/s/ Robert B. Gilbreath

Robert B. Gilbreath

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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

Unofficial Copy Office of Marilyn Burgess District Clerk

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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

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EXHIBIT C

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](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 Newline (June 10, 2021), <https://legalnewline.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 Incorporation). 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

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.); *Knighon 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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anajam@gibbsbruns.com

Caitlyn Cowan

State Bar No. 24120778

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GIBBS & BRUNS LLP

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Houston, Texas 77002

Telephone: (713) 650-8805

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
Noah Horwitz	24116537	noah.horwitz@morganlewis.com	11/13/2023 4:08:44 PM	SENT
Theile McVey		tmcvey@kassellaw.com	11/13/2023 4:08:44 PM	SENT
Peter D.Protopapas		pdp@rlegalgroup.com	11/13/2023 4:08:44 PM	SENT
Lindsay Valek		lindsay@rlegalgroup.com	11/13/2023 4:08:44 PM	SENT
Noah MHorwitz		noah.horwitz@morganlewis.com	11/13/2023 4:08:44 PM	SENT

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

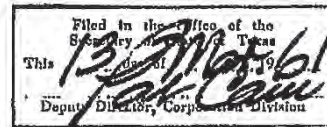
EXHIBIT 1

Unofficial Copy Office of Marilyn Burgess District Clerk

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
J. G. McCullough

A. A. Weber
A. A. Weber

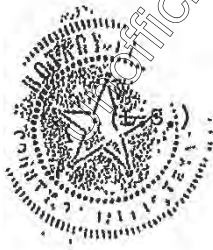
Joe T. Payne
Joe T. Payne

Paul F. Keller
Paul F. Keller

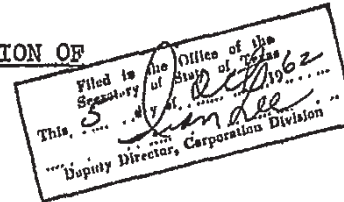
THE STATE OF TEXAS §
COUNTY OF HARRIS §

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



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

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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

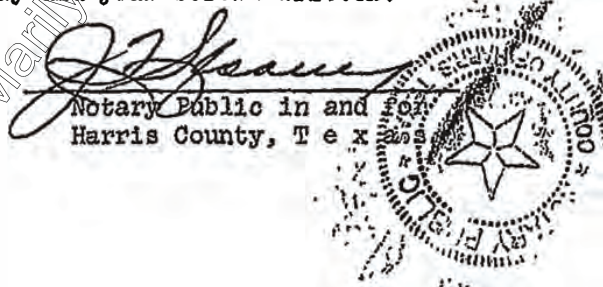
B-2

-8-

THE STATE OF TEXAS §
COUNTY OF HARRIS §

I, J. I. Seamus, a Notary
Public, do hereby certify that on this the 15th
day of September, 1962, personally appeared
before me Joe T. Payne, who declared that he is
President of the corporation executing the fore-
going document, and being first duly sworn, ac-
knowledgeed 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.



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EXHIBIT 2

Unofficial Copy Office of Marilyn Burgess District Clerk

DEC 30 1982

Clerk of the
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:

<u>Name of Corporation</u>	<u>State</u>	<u>Shares Outstanding</u>	<u>Shares Approving</u>
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:

<u>Name</u>	<u>Office</u>
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
Keigh C. Leake**

**Assistant Secretary
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: *W. Phillip*
President

By: *W. Henry*
Secretary

PAYNE & KELLER OF LOUISIANA, INC.

By: *W. Phillip*
President

W. Henry
Secretary

PAYNE & KELLER GULF COAST, INC.

By: *W. Phillip*
President

W. Henry
Secretary

I, Philip Pettus, 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.

Philip Pettus

Secretary

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

Muel M. Diaz

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

I, Philip Stidham, 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.

Philip Stidham
Secretary

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

Musine M. Dixon
NOTARY PUBLIC IN AND FOR
THE STATE OF Texas

1, Philip 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.

W. Stiles
Secretary

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

M. M. Dixon
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)

ELECTRONICALLY FILED - 2023 Oct 16 3:00 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4003484

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	FRENTX 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

Unofficial Copy Office of Marilyn Burgess District Clerk

ELECTRONICALLY FILED - 2023 Oct 16 3:00 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4003484

EXHIBIT 3

Unofficial Copy Office of Marilyn Burgess District Clerk

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.

Case No. 2021-CP-40-03484

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

**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, SCRCR, 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 again 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 Court 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 Appeals’ 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), SCRPC (“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 any work performed by Payne & Keller in South Carolina.

As discussed in the facts section above, discovery to date has failed to reveal any 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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October 16, 2023
Columbia, South Carolina

Unofficial Copy Office of Marilyn Burgess

EXHIBIT 4

Unofficial Copy Office of Marilyn Burgess District Clerk

DEC 03 1986

ARTICLES OF DISSOLUTION

**Clerk I N
Corporations Section**

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

1. The name of the Corporation is FRENTEX ENTERPRISES COMPANY OF TEXAS.
2. The names and respective addresses of its officers are:

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

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

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

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

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

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

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

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ELECTRONICALLY FILED - 2023 Oct 16 3:00 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4003484

DATED this the 27 day of October, 1986.

By: [Signature]
Bernard Gautier
Its President

By: [Signature]
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 necessary to effectuate the liquidation and dissolution of the Company.

U S D C R I C H L A N D

DATED: 10-27, 1986

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

By: [Signature]

Title: President

850:33

Unofficial Copy Office of Marilyn Burgess District Clerk

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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
FRENTX 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

ELECTRONICALLY FILED - 2023 Oct 16 3:00 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4003484

APP. 0196

0005600020



BOB BULLOCK
Comptroller

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STATE OF TEXAS
AUSTIN, 78774

NOVEMBER 25, 1986

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ELECTRONICALLY FILED - 2023 Oct 16 3:00 PM - RICHLAND - COMMON PLEAS - CASE#2021CP4003484

APP. 0197

EXHIBIT 5

Unofficial Copy Office of Marilyn Burgess District Clerk

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

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Columbia, South Carolina 29202

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tmcvey@kassellaw.com

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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 other 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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ATTORNEYS FOR PLAINTIFF

July 14, 2021

Columbia, South Carolina.

EXHIBIT 6

Unofficial Copy Office of Marilyn Burgess District Clerk

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.

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

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

May 9, 2023
Columbia, South Carolina.

EXHIBIT 7

Unofficial Copy Office of Marilyn Burgess District Clerk

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
LENORA CHILDERS , Individually and as	)	C/A NO. 2021-CP-40-03484
Personal Representatives of the Estate of	)	
LEWIS C. CHILDERS ,	)	<i>In Re:</i>
	)	Asbestos Personal Injury Litigation
Plaintiff,	)	Coordinated Docket
	)	
v.	)	
	)	
DAVIS MECHANICAL	)	<u>ORDER</u>
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 Hofer Toal, Chief Justice of the Supreme Court of
South Carolina (Retired), acting as Circuit Court Judge



Richland Common Pleas

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

So Ordered

Jean H. Toal

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

EXHIBIT 8

Unofficial Copy Office of Marilyn Burgess District Clerk

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)

Rikard & Protopapas, LLC

2110 N. Beltline Boulevard

Columbia, South Carolina 29204

Telephone: (803) 978-6111

pdp@rplegalgroup.com

***Receiver for the asbestos
Receiverships herein***

EXHIBIT 9

Unofficial Copy Office of Marilyn Burgess District Clerk

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)
Rikard & Protopapas, LLC
2110 N. Beltline Blvd.
Columbia, SC 29204
803.978.6111
bb@rplegalgroup.com

Attorney for the Plaintiff

This 23rd Day of November, 2021

Unofficial Copy Office of Marilyn Burgess District Court

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 cause, 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 its successor, breached its obligations by not procuring the appropriate insurance for Payne & Keller and is liable to the Receiver for money damages in an amount to be proven at trial; 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
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Attorney for the Plaintiff

This 23rd Day of November, 2021

Unofficial Copy Office of Marilyn Burgess District Clerk

EXHIBIT 10

Unofficial Copy Office of Marilyn Burges District Clerk

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

v.

Davis Mechanical Contractors, Inc., et al.,

Defendants.

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

Third-Party Plaintiffs

v.

Zurich American Insurance Company
(Individually and as Successor to Northern
Insurance Company of New York, Maryland
American General Insurance Company, and
Maryland Casualty Company), et al.

Third-Party Defendants

2021-CP-40-03484

In Re:

Asbestos Personal Injury Litigation
Coordinated Docket

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

Third-Party Defendant Travelers Casualty and Surety Company (improperly named as Travelers Casualty & Surety Company), formerly known as The Aetna Casualty and Surety Company (improperly named as Aetna Casualty & Surety Company) ("Travelers"), by and through undersigned counsel, hereby moves (1) pursuant to Rules 12 and 14 of the South Carolina Rules of Civil Procedure ("SCRCP"), to dismiss the claims asserted against Travelers in the Second Amended Third-Party Complaint¹ of Defendant/Third-Party Plaintiff Payne & Keller Company, through its receiver, Peter D. Protopapas² ("Payne & Keller" or the "Receiver")³ and (2) pursuant to S.C. Code § 15-65-10(4), to dissolve the Payne & Keller Receivership.

PRELIMINARY STATEMENT AND BACKGROUND

On November 23, 2021, Peter D. Protopapas, as Receiver for Payne & Keller, filed an insurance coverage action against Travelers and Payne & Keller's other historical, out-of-state

¹ Paragraph 1 of the Receiver's Second Amended Third-Party Complaint incorrectly states that the pleading is the "Third Amended Third-Party Complaint." In fact, it is the Second Amended Third-Party Complaint (although it is the third iteration of the Receiver's third-party complaint).

² The Receiver filed his Second Amended Third-Party Complaint in his capacity as the Receiver for Flame Refractories, Inc.; United Construction Co. of Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co.; Payne & Keller Company; and PBI QSF, LLC. All allegations and claims against Travelers, however, appear to have been asserted by the Receiver solely in his capacity as the Receiver for Payne & Keller, not any of the other entities.

³ Travelers understands that the Court has denied other third-party defendant insurers' motions to dismiss the Receiver's third-party claims via a July 14, 2022 email. That decision does not affect this Motion as Travelers is asserting several new grounds that require dismissal and were not raised in the other insurers' motions. To the extent any arguments asserted here were raised and denied in those prior motions, Travelers asserts them here to preserve its arguments and avoid potential waiver of any issue discussed herein.

insurers in the Court of Common Pleas of Richland County, South Carolina. *See Protopapas as Receiver for Payne & Keller Co. v. Am. Int'l Grp. et al.*, No. 2021CP4005768, Summons and Complaint for Declaratory Judgment and Breach of Contract, filed Nov. 23, 2021 (S.C. Ct. Common Pleas, Fifth Judicial Circuit). On December 20, 2021, Travelers removed the case to the United States District Court for the District of South Carolina, Columbia Division, because there is complete diversity of citizenship among the properly joined and served parties and the amount in controversy exceeds \$75,000. *See Protopapas as Receiver for Payne & Keller Co. v. Am. Int'l Grp. et al.*, No. 3:21-cv-04086-JMC, Dkt. No. 1 (Notice of Removal filed Dec. 20, 2021) (D.S.C.) (the "Federal Coverage Action"). On January 18, 2022, the Receiver filed an amended complaint in the Federal Coverage Action; Travelers then answered. *See id.* at Dkt. Nos. 23, 42. The Receiver also filed a motion to remand, along with a motion to stay the Federal Coverage Action pending resolution of the remand motion, both of which Travelers opposed. *See id.* at Dkt. Nos. 24, 47, 80, 119. Those motions have not been decided, and the Federal Coverage Action remains pending in federal court.

On July 14, 2022, the Receiver filed a Second Amended Third-Party Complaint against Travelers⁴ and the other insurance companies, even though the instant action is an *asbestos tort* case that has nothing to do with insurance coverage issues. The tort case was brought by plaintiff Lenora Childers, individually and as Personal Representative of the Estate Lewis C. Childers ("Childers"), pursuant to S.C. Gen. Stat. 15-51-10 *et seq.*, for the alleged wrongful death of Lewis C. Childers purportedly caused by exposure to asbestos and asbestos-containing products. *See generally* Pl.'s 1st Am. Compl. The defendants named in the Childers' complaint

⁴ The Second Amended Third-Party Complaint was served on Travelers on August 9, 2022 via the South Carolina Department of Insurance.

allegedly “manufactured, sold, and/or distributed asbestos-containing products or raw asbestos materials” and/or “controlled the work sites” where Childers was allegedly exposed to asbestos. *See id.* ¶ 3. Travelers is not named as a defendant, nor is any other insurance company, which is not surprising given that none of the insurance companies has ever manufactured, sold, or distributed asbestos-containing products. Nonetheless, the Receiver’s Second Amended Third-Party Complaint includes allegations and claims against Travelers and other insurers in an improper attempt to litigate here insurance coverage issues that are pending in the Federal Coverage Action.

The Receiver’s third-party claims against Travelers must be dismissed for several reasons.

First, the Receiver’s claims against Travelers must be dismissed because the Receiver lacks standing to assert claims against Travelers. Payne & Keller, according to the Receiver’s own filings, is a Texas corporation that dissolved in 1986. Under Texas corporate law, a dissolved corporation is not liable for post-dissolution claims and cannot sue or be sued with respect to any claim more than three years beyond dissolution. As a matter of settled receivership law, the Receiver stands in Payne & Keller’s shoes and does not acquire rights greater than those of Payne & Keller. Thus, the Receiver’s suit against Travelers is a nullity by operation of Texas corporate law. Moreover, even if the Receiver could bring suit, South Carolina law does not authorize nationwide receiverships over foreign corporations; it permits receiverships only with respect to property located within South Carolina. Insurance policies issued by Travelers to Payne & Keller in Texas are not property located in South Carolina.

What’s more, those lack of standing arguments also warrant dissolution of the Payne & Keller Receivership. First, because the law of Payne & Keller’s domicile (Texas) precludes any

suits by or against Payne & Keller brought after 1989, appointment of the Receiver here for the purpose of investigating and administering Payne & Keller's insurance assets was improper and must be undone. Second, the Receiver's third-party claims brought on behalf of Payne & Keller relate solely to alleged insurance assets of Payne & Keller under policies issued by foreign insurers; any insurance assets are property of the state where the debtor or obligor (*i.e.*, the insurers) are domiciled; and the Receiver admits that neither the debtor nor any of its insurers are domiciled in South Carolina. Thus, there is no South Carolina property over which the Receiver has any power—making a South Carolina Receiver powerless and a South Carolina receivership pointless and in need of dissolution.

Second, the Court lacks personal jurisdiction over Travelers. The Court has no general personal jurisdiction over Travelers because the company is not incorporated in South Carolina, it does not have its principal place of business in South Carolina, and it is not otherwise “essentially at home” in South Carolina. The Court also cannot exercise specific personal jurisdiction over Travelers because Payne & Keller's third-party claims against Travelers do not arise out of or relate to any contacts between Travelers and South Carolina.

Third, under SCRCP 14(a), a third-party claim may be asserted only against “a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.” A defendant acting as a third-party plaintiff must have a substantive claim against the third-party defendant founded upon derivative liability, *i.e.*, the outcome of the principal claim must impact the third-party defendant's liability. Here, Payne & Keller's third-party contract claims against Travelers are not “derivative” of Payne & Keller's alleged tort liability to Childers specifically. Rather, the third-party contract claims seek relief directly against Travelers, independent of Childers' claims, as demonstrated by the fact that Payne & Keller is pursuing

substantially identical relief in the first-filed Federal Coverage Action, a case to which Childers is not a party.

Finally, the third-party claims must be dismissed under SCRCP 12(b)(8), because the relief the Receiver seeks is the subject of the first-filed Federal Coverage Action, and the allegations and claims against Travelers in the instant case are substantially identical to those asserted there.

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

ARGUMENT

I. The Receiver Lacks Standing to Bring Claims Concerning Payne & Keller's Insurance Coverage Against Travelers, and Those Same Grounds Warrant Dissolution of the Payne & Keller Receivership.

"Standing to sue is a fundamental requirement in instituting an action." *Joseph v. S.C. Dep't of Lab., Licensing & Regul.*, 417 S.C. 436, 467, 790 S.E.2d 763, 779 (2016). In order for a party to have standing to bring an action, the party "must have a real, material, or substantial interest in the subject matter of the action." *Id.*; see also *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). "No justiciable controversy is presented unless the plaintiff has standing to maintain the action." *Brock v. Bennett*, 313 S.C. 513, 519, 443 S.E.2d 409, 413 (Ct. App. 1994). Thus, "[o]nce it is determined a plaintiff has no standing to prosecute, the court must dismiss the action." *Id.*

It is black-letter law that a plaintiff may not seek recovery on a claim that belongs to another, or that he otherwise lacks a right to bring. See, e.g., *Furman Univ. v. Livingston*, 244 S.C. 200, 204 (1964) ("It is fundamental that one without interest in the subject matter of a law suit has no legal standing to prosecute it."); *Duke Power Co. v. S.C. Pub. Serv. Comm'n*, 284

S.C. 81, 96 (1985) (“In order to have standing to present a case before the courts of this State, a party must have a personal stake in the subject matter of the lawsuit.”).

Here, the Receiver does not allege any personal right or interest in the matters asserted in his Second Amended Third-Party Complaint. Instead, his right to sue is wholly dependent on, and derivative of, his authority as Receiver for Payne & Keller, a Texas corporation that dissolved in 1986. *See Nat’l Cash Register Co. v. Burns*, 217 S.C. 310, 313, 60 S.E.2d 615, 617 (1950) (“A primary concept of the law of receivers is that a receiver stands in the shoes of the debtor . . .”); *In re Am. Slicing Mach. Co.*, 125 S.C. 214, 218, 118 S.E. 303, 304 (1923) (“[I]t is clear that the appointment by the Court can vest in the Receiver no greater interest than the insolvent possessed.”).

Moreover, because Payne & Keller is not a South Carolina corporation, the Court’s authority to appoint a receiver over Payne & Keller is limited to Payne & Keller’s in-state property. Under South Carolina law, a “receiver may be appointed by a judge of the circuit court, either in or out of court . . . [w]hen a corporation has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights, and, in like cases, of the **property within this State** of foreign corporations.” S.C. Code § 15-65-10(4) (emphasis added).

These two bedrock principles of South Carolina receivership law doom the claims the Receiver seeks to assert on behalf of Payne & Keller for two distinct reasons. First, under Texas corporate law, a dissolved corporation cannot sue or be sued more than three years after its dissolution. That means the Receiver, standing in Payne & Keller’s shoes, cannot sue Travelers here. Second, even if the Receiver could sue on behalf of Payne & Keller contrary to Texas law, Payne & Keller’s insurance policies are not property of Payne & Keller located within South

Carolina, and therefore the Receiver lacks standing to administer or liquidate Payne & Keller's insurance policies.

A. Payne & Keller Cannot Sue or Be Sued Under Texas Law, So Payne & Keller's Claims Against Travelers Fail as a Matter of Law and Dissolution of the Payne & Keller Receivership Is Warranted.

Payne & Keller is a Texas corporation that dissolved in 1986. *See* Ex. A to Plaintiffs' Motion to Appoint a Receiver over Payne & Keller Co. Pursuant to S.C. Code § 15-65-10(4). Texas law provides that dissolved corporations are liable only for "existing claims." Tex. Bus. Orgs. Code Ann. § 11.351. Moreover, such claims can only be brought for three years after dissolution. *Id.* § 11.359; *see, e.g., Durham Clinic, P.A. v. Barrett*, 107 S.W.3d 761, 762 (Tex. App. 2003) (claim against dissolved corporation was barred because it was brought more than three years post-dissolution; under the statute, "a corporation shall not be liable for any claim other than an existing claim"); *Boudreaux v. U.S. Framing*, No. 6:17-cv-0517, 2017 WL 6758448 (W.D. La. Nov. 21, 2017), *aff'd sub nom. Boudreaux v. C J R Framing Inc.*, 744 F. App'x 208 (5th Cir. 2018) ("[U]nder Texas law, a dissolved corporation is not liable for a post-dissolution claim."). Thus, Payne & Keller has an absolute defense to any personal injury tort claims that may now be brought against it.

In addition, a dissolved corporation may bring suit only within three years of the date of its dissolution. Under Texas corporate law, a "terminated filing entity continues in existence *until the third anniversary of the effective date of the entity's termination only* for purposes of: (1) prosecuting or defending in the terminated filing entity's name an action or proceeding brought by or against the terminated entity." Tex. Bus. Orgs. Code Ann. § 11.356(a) (emphasis added); *see also id.* § 11.359(a) ("[A]n existing claim *by or against* a terminated filing entity is extinguished unless an action or proceeding is brought on the claim not later than the third anniversary of the date of termination of the entity.") (emphasis added).

Again, Payne & Keller dissolved in 1986. Its ability to sue lapsed in 1989. See *Emmett Props. v. Halliburton Energy Servs.*, 167 S.W.3d 365, 369-70 (Tex. App. 2005) (“[Plaintiff] was a ‘dissolved corporation’ with a dissolution date of February 12, 1999. As such, [Plaintiff] was required to bring suit on its claims within three years of this date, which was February 12, 2002. [Plaintiff], however, did not file suit until June 13, 2002, more than three years after the dissolution date. Therefore, [Plaintiff’s] claims were extinguished under article 7.12, section C, and the trial court properly granted the appellees’ motion for summary judgment.”)⁵; *Brooks v. Binger*, 2019 WL 3023226, at *2 (Tex. App. July 11, 2019) (“The trial court’s purported adjudication of claims by B2 Towing in a lawsuit commenced more than 26 years after B2 Towing’s dissolution amounted to a nullity. . . .”); see also *Carter v. Harvey*, 525 S.W.3d 420, 426 (Tex. App. 2017) (same). Appointment of a receiver cannot create a right to sue that does not exist under the Texas statutes that govern Payne & Keller’s corporate existence. See *Nat’l Cash Register Co.*, *supra*; *In re Am. Slicing Mach. Co.*, *supra*. Therefore, the Receiver lacks the authority to bring claims on behalf of Payne & Keller and his claims against Travelers must be dismissed for lack of standing.

As shown above, Texas law is clear that Payne & Keller may not sue or be sued at this point. *In re All Cases Against Sager Corp.*, 967 N.E.2d 1203, 1209 (Ohio 2012) (“We concur. The question of whether a dissolved foreign corporation has the capacity to sue or be sued is a matter determined by the law of the state of incorporation.”). And because Payne & Keller is no longer amenable to suit, foreign courts lack authority under the Full Faith and Credit Clause of

⁵ *Emmett* cites article 7.12 of the Texas Business Corporations Act (“TBCA”), the predecessor statute to the current Texas Business Organizations Code (“TBOC”). The TBOC replaced the TBCA on January 1, 2010 but made no substantive changes to TBCA article 7.12. See *Boudreaux v. U.S. Framing*, No. CV 6:17-0517, 2017 WL 6758448, at *3 (W.D. La. Nov. 21, 2017).

the United States Constitution to appoint a receiver over Payne & Keller for claims not pending before 1989. *Id.* at 1211 (“The authority to appoint a receiver for a dissolved foreign corporation is subject to constitutional limitations, notably the Full Faith and Credit Clause, obliging us to recognize Illinois corporation law as barring claims filed against Sager that were not pending on June 17, 2003. Thus, the court is without authority to appoint a receiver to ‘accept the process of claims, process defenses and marshal assets’ on behalf of the Sager Corporation, as the trial court ruled.”).

In *Sager*, the Ohio Supreme Court reversed an Ohio court’s appointment of a receiver for a defunct foreign corporation in an identical situation as here. *In re Sager*, 967 N.E.2d at 1211. *Sager* involved a plaintiff that sought appointment of a receiver to access Sager’s insurance assets to compensate the claimant for asbestos-related injuries. *See id.* at 1205. Sager was an Illinois corporation that dissolved in 1998. *Id.* Illinois law set a five-year post-dissolution window for claims to be brought by or against dissolved corporations, meaning Sager was amenable to suit until 2003. *Id.* But the claimants did not bring suit against Sager until 2007. *Id.* Sager sought summary judgment, in part arguing that the appointment of a receiver violated the Due Process, Commerce, and Full Faith and Credit Clauses of the United States Constitution. *Id.* The trial court and intermediate appellate court both disagreed and affirmed the receiver’s appointment. *Id.* Reversing the intermediate appellate court, the Ohio Supreme Court held that the Ohio trial court was “without authority to appoint a receiver” over foreign-domiciled Sager because “[t]he authority to appoint a receiver for a dissolved foreign corporation is subject to constitutional limitations, notably the Full Faith and Credit Clause” and the court was “oblig[ed] ... to recognize Illinois corporation law as barring claims filed against Sager that were not pending on June 17, 2003.” *Id.* at 1211. The Ohio Supreme Court also noted that “the existence

of an insurance policy is irrelevant” where “[n]o cause of action which accrues after dissolution may be brought against a dissolved corporation.” *Id.*

The principles underlying *Sager* forcefully demonstrate that this Court lacks the authority to appoint a receiver for Payne & Keller, because the company has not been amenable to suit under the laws of its state of incorporation (Texas) since 1989. Because Texas law bars Payne & Keller from suing or being sued, the Full Faith and Credit Clause of the United States Constitution requires this Court to honor Texas corporate law and prevents it from appointing a receiver over Payne & Keller in contravention of Texas law. Thus, the receivership must be dissolved.

Dismissal is also warranted by the fact, as observed in *Sager*, that insurance policies are worthless where a dissolved foreign corporation is immune from suit. *In re Sager*, 967 N.E.2d at 1211. Here, as Plaintiffs admit, “all that remains of Payne & Keller is its insurance coverage.” Pl.’s Mot. to Appoint a Receiver over Payne & Keller Co. Pursuant to S.C. Code § 15-65-10(4) at 1 (Aug. 23, 2021).

B. Because the Travelers Insurance Policies Are Not Property of Payne & Keller in South Carolina (Nor Are Any of the Other Insurers’ Policies), the Receiver Lacks Standing to Sue Travelers and the Receivership Must Be Dissolved.

Even if the Receiver could bring claims on behalf of Payne & Keller contrary to Texas law, his authority is circumscribed by South Carolina law, which strictly confines the powers of South Carolina receivers of foreign corporations to the corporation’s in-state property.

It is undisputed that Payne & Keller is not a South Carolina corporation. *See* 2d Am. Third-Party Compl. ¶ 1 (citing Ex. D, Order (identifying Payne & Keller as a dissolved “Texas

corporation”).⁶ The statute under which the Receiver was appointed—S.C. Code § 15-65-10(4)—does not authorize general receiverships over corporations not incorporated in South Carolina. It only permits South Carolina courts to appoint receivers for such foreign corporations to the extent of their “property within this state.” The South Carolina Supreme Court has confirmed that this statute means what it says: if a foreign corporation has property within South Carolina, a South Carolina court may appoint a receiver over that in-state property; if a foreign corporation has no in-state property, no receiver may be appointed. *See Boynton v. Consol. Indem. & Ins. Co.*, 185 S.E. 731, 737 (S.C. 1936) (reversing appointment of receiver where there was a “total failure of any proof” that the foreign company “has property in this state”).

The circumscribed nature of state receiverships over foreign corporations is a basic principle of state receivership law. *See, e.g.*, 17A FLETCHER CYC. CORP. § 8554, *Jurisdiction and power to appoint receivers—General receivers* (“But where the corporation has no property in the state, there would be nothing for the receiver to take under control, and the appointment would be an idle act that the courts cannot be called upon to perform.”) (collecting cases); *id.* § 8555, *Receivers to take charge of local assets* (“While denying the power to appoint a general receiver, the authorities agree that equity has jurisdiction to prevent the dissipation and

⁶ Nor are any of the entities “related to the historic operations of Payne & Keller Company” to which the Payne & Keller Receivership was extended pursuant to the September 30, 2021 Order Granting the Receiver for Payne & Keller Company’s Motion to Clarify the Receiver Order. *See* 2d Am. Third-Party Compl. ¶ Ex. E (Order Granting The Receiver For Payne & Keller Company’s Motion To Clarify The Receiver Order). That order identifies several companies, all of which were incorporated in either Texas or Louisiana, not South Carolina. *See* Payne & Keller, Inc. (Ex. A, Texas corporation); Payne & Keller of Louisiana, Inc. (Ex. B, Louisiana corporation); Bayou Maintenance, Inc. (Ex. C, Louisiana corporation); Bayou Maintenance and Constructors, Inc. (Ex. D, Louisiana corporation); Payne & Keller Gulf Coast, Inc. (Ex. E, Louisiana corporation); Frentex Enterprises Company (Ex. F, Texas corporation); and Frentex Enterprises Company of Texas (Ex. G, Texas corporation).

misapplication of assets of the foreign corporation within the state, and if necessary, to appoint a receiver of the assets . . .”) (collecting cases); *see also* 75 C.J.S. RECEIVERS § 475 (“In accordance with the general rule as to extraterritorial rights, neither the court nor the receiver appointed by it has authority over property beyond the boundaries of its territorial jurisdiction.”). As a matter of clear South Carolina law, the Receiver may have authority with respect to Payne & Keller’s property located within the state of South Carolina, but he has no authority with respect to Payne & Keller’s out-of-state property.

Insurance policies issued to Payne & Keller (in Texas) by Travelers (in Connecticut) are not “property [of Payne & Keller] within [South Carolina]” as required under the South Carolina receivership statute. The situs of intangible property such as a contractual obligation under an insurance policy is the domicile of the debtor/obligor (here, Travelers), whose domicile is its state of incorporation or principal place of business (here, Connecticut). *See, e.g., H.J. Baker & Bro. v. Doe*, 70 S.E. 431, 433 (S.C. 1911) (“The general rule of law is well settled that for the purposes of founding administration, all simple contract debts are assets at the domicile of the debtor.”); *Af-Cap Inc. v. Republic of Congo*, 383 F.3d 361, 371–72 (5th Cir. 2004) (“[C]ourts consistently hold that the situs of a debt obligation is the situs of the debtor . . . [T]his rule’s general operation has been recognized by the Supreme Court.”); *Long v. Baldt*, 464 F. Supp. 269, 273 (D.S.C. 1979) (“the situs of the debt lies with the debtor”). Travelers is incorporated and has its principal place of business in Connecticut; it has few, if any, contacts with South Carolina, and all of the subject insurance policies were issued and delivered to Payne & Keller outside of South Carolina. *See infra* at § II; *see also* Ex. I (Declaration of Ann B. Mulcahy (“Mulcahy Decl.”)) at ¶¶ 3-6. Similarly, all other third-party defendant insurers are incorporated and maintain their principal places of business outside of South Carolina. *See* 2d Am. Third-Party

Compl. at ¶¶ 4-5, 7-14, 21-24. As a result, the subject contracts are plainly not “property [of Payne & Keller] within [South Carolina].” Accordingly, the Receiver has no standing to assert Payne & Keller’s rights or otherwise act on Payne & Keller’s behalf with respect to contracts of insurance between Travelers and Payne & Keller. The claims the Receiver asserts against Travelers in this action must be dismissed for this reason as well.

The Payne & Keller Receivership also must be dissolved for similar reasons. The Receiver’s Third-Party Claims, as they relate to Payne & Keller, relate solely to insurance assets. See 2d Am. Third-Party Compl. ¶¶ 142-174, Causes of Action 1, 2, 11, and “all that remains of Payne & Keller is its insurance coverage” (Pl.’s Mot. to Appoint a Receiver over Payne & Keller Co. Pursuant to S.C. Code § 15-65-10(4) at 1 (Aug. 23, 2021)). As discussed above, those assets are property of the state in which the issuing insurer is domiciled. See, e.g., *H.J. Baker*, 70 S.E. at 433; *Af-Cap*, 383 F.3d at 371–72; *Long*, 464 F. Supp. at 273. And the Receiver admits that none of Payne & Keller’s insurers are domiciled in South Carolina. See 2d Am. Third-Party Compl. at ¶¶ 4-5, 7-14, 21-24. Given that Payne & Keller has no property located in South Carolina for a receiver to administer, the Payne & Keller receivership has no point and must be dissolved.

II. The Court Lacks Personal Jurisdiction Over Travelers

Pursuant to SCRCP 12(b)(2), a court must grant a motion to dismiss where the plaintiff fails to allege plausible facts supporting the exercise of personal jurisdiction over the non-resident defendant. See *Power Prods. & Servs. Co., Inc. v. Kozma*, 665 S.E.2d 660, 664 (S.C. Ct. App. 2008). “The party seeking to invoke personal jurisdiction over a non-resident defendant . . . bears the burden of establishing jurisdiction.” *Id.* (citation omitted). “When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the court is

not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction.” *Id.* (citation omitted). “Personal jurisdiction over a nonresident defendant is a question to be resolved upon the facts of each particular case.” *Id.* (citation omitted). Because South Carolina’s long-arm statute has been interpreted to apply coextensively with the limits of due process, the sole question eventually “becomes whether the exercise of personal jurisdiction in this case would violate the strictures of due process.” *Id.* (citation omitted); *see also, e.g., S. Plastics Co. v. S. Com. Bank*, 423 S.E.2d 128, 130 (S.C. 1992) (“the question becomes whether the exercise of personal jurisdiction over the [nonresident defendant] comports with due process.”).

“Due process requires that there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Hidria, USA, Inc. v. Delo*, 783 S.E.2d 839, 843 (S.C. Ct. App. 2016) (quotation omitted). There are two prongs to the due process analysis: “(1) the ‘power’ prong, under which minimum contacts grant a court the ‘power’ to adjudicate the action; and (2) the ‘fairness’ prong, which requires the exercise of jurisdiction to be ‘reasonable’ or ‘fair.’” *Id.* (citation omitted). The plaintiff bears the burden of satisfying both; if either prong fails, the exercise of personal jurisdiction over the nonresident defendant fails to comport with the requirements of due process. *See id.* (citations omitted). Here, there is no basis for the Court to exercise either general or specific jurisdiction over Travelers.

A. The Court Does Not Have General Jurisdiction Over Travelers

“General jurisdiction is the State’s right to exercise personal jurisdiction over a defendant even though the suit does not arise out of or relate to the defendant’s contacts with the forum[.]” *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 655 S.E.2d 476, 478 (S.C. 2007) (citing

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 n. 15, 105 S. Ct. 2174, 85 L.Ed.2d 528 (1985)). A nonresident corporation must have substantial contacts with the forum state to support a court's exercise of general jurisdiction when the nonresident's contacts do not directly relate to the plaintiff's cause of action. See *Cockrell v. Hillerich & Bradsby Co.*, 611 S.E.2d 505, 508 (S.C. 2005) (citations omitted).

Subject to the constraints imposed by federal due process, general jurisdiction is determined under S.C. Code Ann. § 36-2-802, which states: "A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, doing business, or maintaining his or its principal place of business in, this State as to any cause of action." For general jurisdiction to attach, the foreign corporation's activities or affiliations within the forum state must be "so continuous and systematic as to render [it] essentially at home in the forum State." *Daimler AG v. Bauman*, 571 U.S. 117, 119 (2014) (citation and internal quotation marks omitted); see also *Companion Prop. & Cas. Ins. Co. v. U.S. Bank Nat'l Ass'n.*, 3:15-cv-01300-JMC, 2016 WL 6781057, at *5 (D.S.C. Nov. 16, 2016) ("general jurisdiction requires affiliations so continuous and systematic as to render [the foreign corporation] essentially at home in the forum State, i.e., comparable to a domestic enterprise in that State") (citation and internal quotation marks omitted). "[O]nly a limited set of affiliations with a forum" can satisfy the "essentially at home" requirement. *Daimler*, 571 U.S. at 137. Thus, in order to haul a nonresident corporation into court to answer for claims that have nothing to do with the corporation's activities in or contacts with the forum state, the corporation must have substantial contacts with the forum state. See *Gibson v. Confie Ins. Grp. Holdings, Inc.*, 2:16-CV-02872-DCN, 2017 WL 2936219, at *5 (D.S.C. July 10, 2017) ("The threshold level of contacts with the

forum state required for the exercise of general jurisdiction is significantly higher than for specific jurisdiction and must be fairly extensive.” (citation omitted)).

A corporation typically will only be found “at home” in its state of incorporation and the state in which it has its principal place of business. See *Sutton v. Motor Wheel Corp., LLC*, No. 3:17-01161-MGL, 2018 WL 2197535, at *3 (D.S.C. May 14, 2018) (citation omitted); see also *Daimler*, 571 U.S. at 137 (“the place of incorporation and principal place of business are ‘paradig[m] ... bases for general jurisdiction.’” (citations omitted)). Only “in an exceptional case” may “a corporation’s operations in a forum other than its formal place of incorporation or principal place of business [] be so substantial and of such a nature as to render the corporation at home in that State.” *Daimler*, 571 U.S. at 139 n. 19. This exception is very limited, and plaintiffs face a heavy burden in proving it applies. See *Daimler*, 571 U.S. at 138 (rejecting as “unacceptably grasping” the proposition that a party can be subject to general jurisdiction in every state in which it “engages in a substantial, continuous, and systematic course of business”).⁷

⁷ See also, e.g., *Companion Prop. & Cas. Ins. Co.*, 2016 WL 6781057, at *7 (noting a party asserting general jurisdiction under *Daimler*’s “exceptional case” exception “faces a heavy burden,” and rejecting argument that foreign corporation was at home in South Carolina (citations omitted)); *Maseng v. Lenox Corp.*, 483 F. Supp. 3d 360, 368-69 (D.S.C. 2020) (“Lenox’s contacts with South Carolina are limited to one retail store in Myrtle Beach, South Carolina and the marketing, distribution, and sale of its own products in various retail stores in South Carolina. The Myrtle Beach retail store is one of the 20 retail stores that Lenox operates in 12 states. . . . Thus, while this contact is certainly systematic and continuous, it is not substantial enough to render Lenox ‘at home’ in South Carolina.”); *Sunny Days Entm’t, LLC v. Traxxas, L.P.*, 376 F. Supp. 3d 654, 660-61 (D.S.C. 2019) (nonresident company that sold toys to South Carolina customers through brick and mortar stores and online not subject to general jurisdiction in South Carolina); *Fidrych v. Marriott Int’l, Inc.*, No. 2:17-2195-BHH, 2018 WL 9811052, at *6 (D.S.C. Aug. 3, 2018) (nonresident corporation with 90 hotels and certificate of authority to transact business in South Carolina not subject to general jurisdiction in South Carolina).

Here, there is no basis for the assertion of general jurisdiction over Travelers. Travelers is incorporated in and has its principal place of business in Connecticut. *See* Ex. I at ¶ 3. Thus, the only way this Court can have general personal jurisdiction over Travelers is if Payne & Keller can meet its heavy burden of showing that Travelers' contacts with South Carolina are so continuous and systematic as to render it essentially at home in South Carolina. Payne & Keller cannot possibly meet its burden here.

Payne & Keller does not so much as allege that Travelers is subject to general jurisdiction in South Carolina, let alone explain how or why it could be. That is reason alone to reject any argument that Travelers is somehow at home in South Carolina. But even if the Court were to look past this pleading deficiency, Travelers' limited activities in South Carolina are plainly insufficient to render it at home in South Carolina. As set forth in the accompanying declaration of Ann B. Mulcahy:

- Travelers is a corporation with its principal place of business and state of incorporation outside of South Carolina (*see* Ex. I at ¶¶ 3, 6);
- Travelers' business operations are managed principally from its Connecticut offices (*see id.* at ¶ 4);
- None of Travelers' senior officers or directors are located in South Carolina (*see id.* at ¶ 5);
- Travelers does not have employees in South Carolina (*see id.* at ¶ 6);
- Travelers does not own or rent office space in South Carolina (*see id.* at ¶ 6);
- Travelers does not have any loan applications with South Carolina banks or financial institutions (*see id.* at ¶ 6); and
- Travelers does not hold meetings of directors in South Carolina (*see id.* at ¶ 6).

Simply put, Travelers is not "at home" in South Carolina, and Payne & Keller does not assert otherwise. Travelers' limited contacts with South Carolina relate solely to its insuring

relationship with certain South Carolina businesses and residents. Notably, Payne & Keller, a defunct Texas corporation, is not one such business. Accordingly, because Travelers is not incorporated in South Carolina, does not have its principal place of business in South Carolina, and otherwise lacks the type of contacts needed to render it essentially at home in South Carolina, general jurisdiction does not exist.

B. The Court Lacks Specific Jurisdiction Over Travelers

Specific jurisdiction exists where the plaintiff's claims arise out of or relate to the defendant's substantial contacts with the forum state. *See Coggeshall*, 655 S.E.2d at 478 ("Specific jurisdiction is the State's right to exercise personal jurisdiction because the cause of action arises specifically from a defendant's contacts with the forum" (citation omitted)); *Maseng*, 483 F. Supp. 3d at 365 ("A defendant has minimum contacts with a jurisdiction sufficient to subject it to specific jurisdiction in the forum state if 'the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" (quotation omitted)). Because South Carolina's long-arm statute has been interpreted to be coextensive with the limits of due process, the dispositive question for purposes of specific jurisdiction is whether the exercise of jurisdiction would comport with due process. *See Coggeshall*, 655 S.E.2d at 478; *S. Plastics Co.*, 423 S.E.2d at 131.

As noted above, to comport with due process in the specific jurisdiction context, Payne & Keller must allege plausible facts sufficient to satisfy both the "power" prong and the "fairness" prong. *See Hidria, USA, Inc.*, 783 S.E.2d at 843. "The court must (1) find that the defendant has the requisite minimum contacts with the forum, without which, the court does not have the 'power' to adjudicate the action and (2) find the exercise of jurisdiction is reasonable or fair." *Power Prods. & Servs. Co.*, 665 S.E. 2d at 665 (citation omitted). "If either prong fails, the

exercise of personal jurisdiction over the defendant fails to comport with the requirements of due process.’” *Id.* (quotation omitted). Payne & Keller has not come close to alleging specific jurisdiction facts sufficient to satisfy its burden as to either the “power” prong or the “fairness” prong.

1. The Power Prong Is Not Met

“A minimum contacts analysis requires a court to find that the defendant directed its activities to a resident of this State and that the cause of action arises out of or relates to those activities.” *S. Plastics Co.*, 423 S.E.2d at 131 (citation omitted). Here, Travelers did not purposefully avail itself of the privileges of conducting activities in South Carolina in connection with the instant claims, given that there are no factual allegations or evidence that Travelers conducted activities in South Carolina that serve as the basis for Payne & Keller’s third-party claims against Travelers.

In its Second Amended Third-Party Complaint, Payne & Keller rotely alleges that “[t]his Court has jurisdiction over the matters alleged herein pursuant to S.C. Code Ann. §§ 36-2-802 and 36-2-803, Article V of the Constitution of the State of South Carolina, and the Court’s plenary powers,” and that “[t]his Court appointed Peter D. Protopapas as Receiver of Third-Party Plaintiffs.” 2d Am. Third-Party Compl. ¶ 25. There are no jurisdictional allegations specific to Travelers. This is reason alone to find that specific personal jurisdiction is lacking. *See Sullivan v. Hawker Beechcraft Corp.*, 723 S.E.2d 835, 839 (S.C. Ct. App. 2012) (the mere “repeating of the [long-arm] statute is insufficient to support a finding of personal jurisdiction”).

Beyond this pleading deficiency, Payne & Keller cannot demonstrate the minimum, claim-specific contacts between Travelers and South Carolina necessary to meet the constitutional requirements of due process. Payne & Keller’s third-party claims against

Travelers do not arise from or relate to Travelers' contacts with South Carolina. Payne & Keller seeks insurance coverage rulings that have nothing to do with Travelers' limited contacts with South Carolina. The Receiver has not alleged, and cannot allege, that Travelers directed its Payne & Keller-related activities at residents of South Carolina, or that Payne & Keller's third-party claims against Travelers in this case arise out of Travelers' in-state activities. Indeed, Payne & Keller is not and has never been a South Carolina company, and all of the subject insurance policies were issued and delivered to Payne & Keller outside of South Carolina. Travelers is not alleged to have ever manufactured, distributed, or sold any Payne & Keller-related asbestos or asbestos-containing products in South Carolina or elsewhere, and the insurance policies Travelers issued to Payne & Keller are not alleged to have caused Childers' asbestos injuries.

Moreover, even assuming Travelers could have foreseen that Payne & Keller would be subject to asbestos tort lawsuits in South Carolina, foreseeability alone is insufficient to establish personal jurisdiction. *See Cockrell*, 611 S.E.2d at 509 ("The foreseeability that is critical to due process analysis" is that "the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." (citation omitted)). Payne & Keller cannot avoid the absence of jurisdiction over Travelers by attempting to impute the South Carolina contacts of individual asbestos claimants (or others) to Travelers. The relevant contacts for jurisdictional purposes "must center on the contacts generated by the defendant and not on the unilateral actions of some other entity[.]" *Id.* at 508 (citation omitted); *see also Moosally v. W.W. Norton & Co., Inc.*, 594 S.E.2d 878, 885 (S.C. Ct. App. 2004) ("Because the due process requirements must be met as to each defendant, we must assess individually each defendant's contacts with South Carolina." (citations omitted)); *Walden v. Fiore*, 571 U.S. 277, 284 (2014)

(“the relationship must arise out of contacts that the ‘defendant *himself*’ creates with the forum State” (citation omitted) (emphasis in original)); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984). Indeed, the United States Supreme Court has made clear that the “unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984) (citations omitted).⁸ Thus, the contacts asbestos claimants or others may have had with South Carolina are irrelevant to the question whether Travelers has sufficient minimum contacts with South Carolina to give rise to specific personal jurisdiction over Travelers.

In short, because Payne & Keller fails to allege facts sufficient to show that Travelers conducted activities in South Carolina that serve as the basis for Payne & Keller’s third-party claims against Travelers in this case, the exercise of personal jurisdiction over Travelers would violate due process under the power prong of the due process analysis.

2. The Fairness Prong is Not Met

It would also be unreasonable and unfair for the Court to exercise personal jurisdiction over Travelers in this case. Under the fairness prong of the due process analysis, a court should consider: “(1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident’s acts; (3) the inconvenience resulting to

⁸ See also, e.g., *Wallace v. Yamaha Motors Corp.*, No. 9:19- cv-0730-DCN, 2019 WL 6170419, at *3 (D.S.C. Nov. 20, 2019) (finding personal jurisdiction could not be exercised over a nonresident motorcycle manufacturer for product liability claims stemming from a vehicular accident because “conduct of plaintiffs or third parties that creates a connection between the defendant and the forum state will be disregarded”); *Sutton v. Motor Wheel Corp.*, 2018 WL 2197535, at *5 (finding personal jurisdiction did not exist over the defendant, a tire manufacturer, based on the contacts of a distributor of defendant’s tires that was authorized to transact business in South Carolina).

the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State's interest in exercising jurisdiction." *Power Prods. & Servs. Co., Inc.*, 655 S.E.2d at 665 (citation omitted). Each of these considerations weighs in favor of declining to exercise jurisdiction over Travelers in this case.

With respect to the first two factors, Travelers' activities in South Carolina are not only limited, they are unrelated to the facts and circumstances of Payne & Keller's third-party claims against Travelers. As explained, Travelers is incorporated in Connecticut, its principal place of business is in Connecticut, none of its senior officers or directors are located in South Carolina, it does not have employees in South Carolina, and it does not own or rent office space in South Carolina. See Ex. I at ¶¶ 3-6. In addition, Payne & Keller was never a South Carolina company, and Travelers is not alleged to have done anything in South Carolina that forms the basis for Payne & Keller's third-party claims against Travelers in this case. Indeed, Payne & Keller's claims against Travelers are based on insurance policies that Travelers issued to Payne & Keller outside of South Carolina.

With respect to the third factor, no party would be inconvenienced if this Court were to find that it does not have jurisdiction over Travelers. The parties are litigating substantially identical claims in the first-filed Federal Coverage Action, which is pending in federal court in Columbia, South Carolina. Thus, the Receiver will have no reason to complain if his substantially identical claims are dismissed in this case. If anything, the parties to this asbestos tort case—particularly Childers—would be inconvenienced if the Receiver is allowed to implead Travelers and other insurers. Permitting the Receiver to pursue his duplicative third-party claims would expand unnecessarily the scope of the case and delay its ultimate resolution, thereby prejudicing Childers and the other parties, and wasting party and judicial resources.

Finally, South Carolina's interest in exercising jurisdiction here is minor. "[W]hile South Carolina has an interest in providing redress for its citizens, that interest is diminished when no business was transacted in this State and any contract formed was not to be performed in this State." *Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc.*, 402 S.E.2d 177, 181 (S.C. 1991). Payne & Keller has never been a South Carolina company, and all of the policy contracts were issued to Payne & Keller outside of South Carolina. Further, given the existence of the first-filed Federal Coverage Action now pending in South Carolina federal court, a court located in South Carolina will still hear and resolve substantially identical claims if this Court were to decline to exercise jurisdiction over Travelers in this case, as it should.

Under the facts of this case, even if Payne & Keller could establish the minimum contacts necessary to meet the constitutional requirements of due process under the power prong (it cannot), the Court cannot exercise jurisdiction over Travelers under the fairness prong because it would be neither reasonable nor fair.

III. The Third-Party Claims Are Improper Under SCRPC 14 Because They Cannot Establish, and Are Not Based On, Derivative Liability of Childers' Tort Claims

Rule 14 of the SCRPC 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 SCRPC 14] only if there is a basis to assert he is liable to the named defendant(s) for all or part of the plaintiff's claim." *Smith v. Tiffany*, 799 S.E.2d 479, 486 (S.C.

2017); *see also Gathings v. Robertson Brokerage Co., Inc.*, 367 S.E.2d 423, 426 (S.C. Ct. App. 1988) (“Rule 14 may be used only when the substantive law permits the defendant to shift some or all of his liability [on the principal claim] to the impleaded party.” (quotation omitted)).

“The third party claim must be derivative of the plaintiff’s claim because [d]erivative liability is central to the operation of Rule 14.” *CNH Indus. Cap. Am. LLC v. Able Cont., Inc.*, No. 9:16-cv-2520-RMG, 2017 WL 512453, at *1 (D.S.C. Feb. 7, 2017) (citation and internal quotation marks omitted).⁹ “It is not sufficient that the third-party claim is a related claim; the claim must be derivatively based on the original plaintiff’s claim.” *Id.* (quotation omitted). “Rule 14(a) does not allow the defendant to assert a separate and independent claim even though the claim arises out of the same general set of facts as the main claim.” *Id.* (quotation and other citation omitted). “In other words, impleader ‘must involve an attempt to pass on to the third party all or part of the liability asserted against the defendant.... An impleader claim may not be used to assert any and all rights to recovery arising from the same transaction or occurrence as the underlying action.’” *Id.* (quotation omitted). Thus, “[a] third-party claim may be asserted . . . only when the third party’s liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to the defending party.” *Id.* (citation omitted) (emphasis in original). “[A] third-party claim is ‘viable only where a proposed third party plaintiff says, in effect, ‘If I am liable to [the original] plaintiff, then my liability is only technical or secondary or partial, and the third party defendant is derivatively liable and must reimburse me for all or part ... of anything I must pay [the original] plaintiff.’” *For Life Prods.*,

⁹ Rule 14 of the Federal Rules of Civil Procedure is substantially the same as Rule 14 of the SCRCF. “In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules.” *Maybank v. BB&T Corp.*, 787 S.E.2d 498, 510 (S.C. 2016) (citation omitted).

LLC v. Universal Cos., Inc., No. 1:20CV00016, 2021 WL 1169532, at *4 (W.D. Va. Mar. 29, 2021) (quotation omitted).

Here, Payne & Keller's third-party *contract* claims against Travelers are not derivative of or dependent on Childers' *tort* claims against Payne & Keller. Payne & Keller does not and cannot allege that Travelers, an insurer, is derivatively liable if Payne & Keller is found responsible for Childers' alleged asbestos exposure. Nor does Payne & Keller allege that Travelers has any obligation to Childers.

Indeed, rather than seeking to establish derivative liability, the third-party claims seek relief directly from and against Travelers. Specifically, as to Travelers, the Receiver for Payne & Keller seeks the following relief:

- In Count I, a declaration that "Third-Party Defendants must fairly compensate the Receiver for the substantial time, effort, and expenses expended in connection with the defense of asbestos suits potentially covered under the Third-Party Defendants' policies and to further declare that this obligation is unlimited and shall continue as long as there are Asbestos Suits pending against Third-Party Plaintiffs." 2d Am. Third-Party Compl. ¶ 181.
- In Count II, a declaration that "all policies, evidence of policies and documents relating to their placement, purchase and underwriting, including, but not limited to, such documents in the possession of Third-Party Defendants are the property of the Receiver and shall be delivered immediately to the Receiver to be maintained in his sole possession for his unrestricted use in carrying out his duties." *Id.* at ¶ 185.
- In Count XI, "declarations, after thorough discovery regarding Rexel's and SKRLA's competing claims to the Payne & Keller insurance program, regarding the nature, extent, and priority (if any) of Rexel's and SKRLA's claims to the Payne & Keller insurance coverage so as to provide the Receiver with guidance and certainty as to how to go about carrying out his duties as the Receiver for Payne & Keller and to provide the Payne & Keller insurers with certainty and guidance as to the delineation of their rights and responsibilities as between Rexel and Payne & Keller in this regard." *Id.* at ¶ 233.
- In the Prayer for Relief, a "declaration as to the interpretation and meaning of the Third-Party Plaintiffs' insurance policies," ostensibly including any insurance policies Travelers issued to Payne & Keller. *Id.*, Prayer for Relief ¶ E.

These are direct claims against Travelers; they are not based on derivative liability and, as a result, they are not actionable under SCRCP 14. *See Miller*, 445 S.E.2d at 447 (explaining that, because third-party claims are dependent on derivative liability, “no right exists to implead a third-party defendant who is *directly* liable to the [third-party] plaintiff.” (citation omitted) (emphasis in original)). Payne & Keller’s third-party claims against Travelers seek broad insurance coverage contract rulings, including a declaration that Travelers “must fairly compensate the Receiver” for time spent defending “asbestos suits” generally (2d Am. Third-Party Compl. ¶ 181), a declaration that “all policies, evidence of policies and documents relating to their placement, purchase and underwriting . . . are the property of the Receiver and shall be delivered immediately to the Receiver (*id.* ¶ 185), and a declaration regarding “Rexel’s competing claims to the Payne & Keller insurance program” (*id.* ¶ 233). These claims are not specific to Childers and are not based on derivative liability.

Again, the instant case is a tort lawsuit related to alleged asbestos exposure. It has nothing to do with insurance policy obligations. Travelers’ insuring relationship with Payne & Keller is not alleged to have caused Childers’ injuries—nor could it. Childers is a stranger to the insurance contracts Travelers issued to Payne & Keller, and Childers has yet to establish that Payne & Keller has any liability to Childers.

“It is hardly necessary to cite cases or authorities to the effect that in a tort action, suit must first be brought against the insured or party claimed to be liable, and that an insurance carrier cannot be joined in such a suit, or suit brought individually against such a company; and in fact, it is universally forbidden that any evidence or reference be made to the fact that the defendant is protected by insurance.” *Ford v. Glens Falls Indem. Co. of Glens Falls, N.Y.*, 80 F. Supp. 347, 348 (E.D.S.C. 1948). Indeed, recognizing the distinct set of facts and issues relevant

to tort claims as opposed to contract claims, courts in South Carolina have long held that liability issues and insurance coverage issues should be litigated separately. *See Am. Fidelity Fire Ins. Co. v. Hood*, 37 F.R.D. 17, 24 (E.D.S.C. 1965) (dismissing tort cross-claims asserted in declaratory judgment action on insurance coverage because such claims did not arise from same transaction or occurrence as declaratory judgment claims); *Ex Parte Builders Mutual Ins. Co.*, 847 S.E.2d 87, 110-111 (S.C. 2020) (affirming trial court's decision to deny insurers' motions to intervene in underlying tort action, and recognizing that a separate declaratory judgment action is the proper forum to resolve insurance coverage issues).

The Payne & Keller insurance contracts themselves likewise reflect the parties' agreement that Payne & Keller cannot implead Travelers in a direct asbestos tort case before Payne & Keller's liability has been determined. For example, in a liability insurance policy Travelers issued to Payne & Keller for the policy period April 1, 1983 to April 1, 1986, the parties agreed that:

No action shall lie against the company [i.e., Travelers] unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, *nor until the amount of the insured's [i.e., Payne & Keller's] obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company. . . .*

No person or organization shall have any right under this policy to join the company as a party to any action against the insured to determine the insured's liability, nor shall the company be impleaded by the insured or his legal representative. . . .

Ex. H, at TRAV_SUB_002207 (policy number 61 AL 473361 SRA) (emphasis added).

In short, Payne & Keller's third-party claims against Travelers improperly ask this Court for contract-related judicial declarations unrelated to Childers' asbestos tort action and not

premised on derivative liability. Travelers, therefore, cannot be impleaded, and the third-party claims against Travelers must be dismissed.

IV. Payne & Keller’s Third-Party Claims Should Be Dismissed Under SCRCP 12(b)(8) Because They Are Duplicative of Payne & Keller’s Claims Against Travelers in the First-Filed Federal Coverage Action

Under SCRCP 12(b)(8), “[a] defendant may seek dismissal of an action . . . when another action is pending between the same parties for the same claim.” *Babb v. Shaw*, No. 2011-UP-440, 2011 WL 11735697, at *1 (S.C. Ct. App. Oct. 11, 2011) (citation and internal question marks omitted). “[T]he principle underlying Rule 12(b)(8) . . . [is] that duplicative litigation should be avoided[.]” *State ex rel. Wilson v. Condon*, 410 S.C. 331, 333 (S.C. 2014) (Toal, C.J.). “Avoiding concurrent litigation in both the courts of this state and the Federal District Court will foster wise judicial administration and conserve judicial resources.” *Id.* (citation omitted); see also, e.g., *Corbett v. City of Myrtle Beach*, 521 S.E.2d 276, 281 (S.C. Ct. App. 1999) (holding dismissal pursuant to SCRCP 12(b)(8) was appropriate where the “claim involves the same parties and is based upon the same facts and circumstances”).

As the following table demonstrates, the allegations and claims in both cases are substantially identical as to Travelers.

Allegations and Relief Sought as to Travelers in the Federal Coverage Action	Allegations and Relief Sought as to Travelers in the Instant Case
¶ 30 Defendant Aetna issued general liability policies to Payne & Keller (“The Aetna Policies”). The Aetna Policies have standard terms and conditions. The Aetna Policies have a duty to defend Payne & Keller against any and all Payne & Keller Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false or fraudulent. The duty to	¶ 149 Defendant Aetna issued general liability policies to Payne & Keller (“The Aetna Policies”). The Aetna Policies have standard terms and conditions. The Aetna Policies have a duty to defend Payne & Keller against any and all Payne & Keller Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false or fraudulent. The duty to

defend is joint, several, indivisible and supplemental. The Aetna Policies require Aetna fully to defend any Payne & Keller Asbestos Suit alleging bodily injury during any Aetna Policy period. The Aetna Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Aetna Policy Period. It is the burden of Aetna to prove any limitation on or exclusion of coverage. Specifically, Aetna issued primary general liability coverage to Payne & Keller for at least the seven policy periods March 1, 1978 – April 1, 1985.	defend is joint, several, indivisible and supplemental. The Aetna Policies require Aetna fully to defend any Payne & Keller Asbestos Suit alleging bodily injury during any Aetna Policy period. The Aetna Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Aetna Policy Period. It is the burden of Aetna to prove any limitation on or exclusion of coverage. Specifically, Aetna issued primary general liability coverage to Payne & Keller for at least the seven policy periods March 1, 1978 – April 1, 1985.
¶ 31 Aetna has failed to fully acknowledge or accept its insuring obligations under the Aetna Policies. An actual and justiciable dispute exists between these parties.	¶ 150 Aetna has failed to fully acknowledge, delineate or accept its insuring obligations under the Aetna Policies between Rexel and Payne & Keller or between SKRLA and Payne & Keller. An actual and justiciable dispute exists between these parties.
Count I – Declaratory Judgment ¶ 62 Plaintiff seeks a judicial declaration that all policies, evidence of policies and documents relating to their placement, purchase and underwriting, and claims handling, including but not limited to such documents in the possession of defendants, are the property of the Receiver and shall be delivered immediately to the Receiver to be maintained in his sole possession.	Count II – Declaratory Judgment ¶ 185 Third-Party Plaintiffs seek a judicial declaration that all policies, evidence of policies and documents relating to their placement, purchase and underwriting, including, but not limited to, such documents in the possession of Third-Party Defendants are the property of the Receiver and shall be delivered immediately to the Receiver to be maintained in his sole possession for his unrestricted use in carrying out his duties.
Count VII – Declaratory Judgment ¶ 94 Plaintiff respectfully requests this Court to declare that defendants must fairly	Count I – Declaratory Judgment ¶ 181 The Receiver respectfully requests this Court to declare that Third-Party Defendants must

compensate plaintiff for the substantial time, effort, and expenses plaintiff expended in connection with the defense of asbestos suits potentially covered under the defendants' policies and to further declare that this obligation is unlimited and shall continue as long as there is any Payne & Keller Asbestos Suit pending.	fairly compensate the Receiver for the substantial time, effort, and expenses expended in connection with the defense of asbestos suits potentially covered under the Third-Party Defendants' policies and to further declare that this obligation is unlimited and shall continue as long as there are Asbestos Suits pending against Third Party Plaintiffs.
Prayer for Relief ¶ D The Receiver seeks a further declaration as to the interpretation and meaning of the Payne & Keller insurance policies: i. The Payne & Keller Insurance Policies cover all Payne & Keller Asbestos Suits that allege any bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of its policy periods; ii. Each Payne & Keller asbestos suit "triggers" at least one Payne & Keller Insurance policy as long as an asbestos plaintiff alleges injury during the period of the policy; iii. Payne & Keller may select the policy or policy years to which to assign or allocate in full each Payne & Keller asbestos loss; iv. In the case of a claimed ambiguity in any Payne & Keller Insurance policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the defendants' policies, and defendants bear the burden of proof as to any such ambiguity; v. Defense costs for the Payne & Keller asbestos suits are supplemental, and the payment of defense costs does not erode or	Prayer for Relief ¶ E As described in detail above, the Receiver seeks a further declaration as to the interpretation and meaning of the Third-Party Plaintiffs' insurance policies: i. The Third-Party Plaintiffs' Insurance Policies cover all Third-Party Plaintiffs' Asbestos Suits that allege any bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of its policy periods; ii. Each Third-Party Plaintiffs' asbestos suit "triggers" at least one Third-Party Plaintiffs' Insurance policy as long as an asbestos plaintiff alleges injury during the period of the policy; iii. Third-Party Plaintiffs may select the policy or policy years to which to assign or allocate in full each asbestos loss; iv. In the case of a claimed ambiguity in any Third Party Plaintiffs' Insurance policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Third Party Defendants' policies, and Third-Party Defendants bear the burden of proof as to any such ambiguity; v. Defense costs for the Third-Party Plaintiffs' asbestos suits are supplemental, and the payment of defense costs does not erode or

impair any limit of liability of any of the Payne & Keller Insurance policies; vi. If any allegation in a Payne & Keller Asbestos Suit is potentially covered under the Payne & Keller Insurance Policies, then the insurer must defend or reimburse in full the costs of defending against all of the allegations and all of the causes of action in the complaint; vii. Each Payne & Keller Insurance Policy is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of the Payne & Keller Asbestos Suits; viii. Each Payne & Keller Insurance Policy must indemnify covered Payne & Keller Asbestos Suits, in full, up to its “per occurrence” limits, regardless of whether a continuing injury spans multiple policy periods; ix. The Payne & Keller Asbestos Suits that allege exposure to asbestos during Payne & Keller’s work are subject only to the “per occurrence” limits of the Payne & Keller Insurance policies; x. Any aggregate limit on coverage in any of the Payne & Keller Insurance Policies is a limitation on coverage, and the insurers therefore have the burden to prove, based on the evidence, that a Payne & Keller Asbestos Suit is subject to the aggregate limit in the Payne & Keller Insurance Policies, if any; and xi. Each insurer and the Guaranty Association has the burden to prove, based on the evidence, that any particular Payne & Keller Asbestos Suit is either a “products” claim or a “completed operations” claim, as those terms are defined in the Payne & Keller Insurance	impair any limit of liability of any of the Third-Party Plaintiffs’ Insurance policies; vi. If any allegation in a Third-Party Plaintiffs’ Asbestos Suit is potentially covered under the Third-Party Plaintiffs’ Insurance Policies, then the responsive insurer must defend or reimburse in full the costs of defending against all of the allegations and all of the causes of action in the complaint; vii. Each Third-Party Plaintiffs’ Insurance Policy is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of the Third-Party Plaintiffs’ Asbestos Suits; viii. Each Third-Party Plaintiffs’ Insurance Policy must indemnify covered Third- Party Plaintiffs’ Asbestos Suits, in full, up to its “per occurrence” limits, regardless of whether a continuing injury spans multiple policy periods; ix. The Third-Party Plaintiffs’ Asbestos Suits that allege exposure to asbestos during Third-Party Plaintiffs’ work are subject only to the “per occurrence” limits of the Third-Party Plaintiffs’ Insurance policies; x. Any aggregate limit on coverage in any of the Third-Party Plaintiffs’ Insurance Policies is a limitation on coverage, and the insurers therefore have the burden to prove, based on the evidence, that a Third-Party Plaintiffs’ Asbestos Suit is subject to the aggregate limit in the Third-Party Plaintiffs’ Insurance Policies, if any; and xi. Each insurer has the burden to prove, based on the evidence, that any particular Third-Party Plaintiffs’ Asbestos Suit is either a “products” claim or a “completed operations” claim, as those terms are defined in the Third-Party Plaintiffs’ Insurance

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 Complaint here when the insurance coverage litigation was removed to federal court and became the Federal Coverage Action. Thus, the Third Amended Complaint should be seen for what it is—pure jurisdictional

gamesmanship. This is an additional reason that counsels in favor of dismissing the Receiver's third-party claims here in favor of the first-filed Federal Coverage Action.

CONCLUSION

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

Respectfully submitted,

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August 24, 2022

EXHIBIT 11

Unofficial Copy Office of Marilyn Burges District Clerk

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 jurisdictions⁴) recognize the special role and broad responsibilities of a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Even at this early juncture in this case, there is ample evidence supporting a claim that, at the very least, constructive fraud occurred in connection with Payne & Keller’s dissolution. Events surrounding Payne & Keller’s dissolution suggest that the company terminated its corporate existence to avoid liability for both current and future toxic tort, silica, and asbestos personal liability claims, and Payne & Keller was keenly aware of those claims when the decision to dissolve Payne & Keller was made.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Travelers' arguments under Rules 12(b)(8) and 14(a), SCRCF, 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, SCRCF. 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), SCRCF, provides:

At any time after commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff’s claim against him.

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

Dated: January 13, 2023

Respectfully submitted,

/s/ Marghretta H. Shisko

Marghretta H. Shisko (S.C. Bar No. 100106)

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EXHIBIT 12

Unofficial Copy Office of Marilyn Burges District Clerk

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

Case No. 2021-CP-40-03484

v.

Davis Mechanical Contractors, Inc., et al.,

Defendants.

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

Third-Party Plaintiffs,

v.

Zurich American Insurance Company, et al.,

Third-Party Defendants.

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

This matter comes before the Court on Third-Party Defendant Travelers Casualty and Surety Company's ("Travelers") August 24, 2022 Motion to Dismiss Third-Party Claims and Dissolve the Payne & Keller Receivership.¹ Payne & Keller Company, by and through its duly

¹ On September 19, 2022, Defendants AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company; and Certain as yet

appointed receiver, Peter D. Protopapas (“the Receiver”), filed a Response in Opposition to the Motion on January 13, 2023, and Travelers filed a Reply in Support of the Motion on January 25, 2023.² The Court heard oral arguments on the Motion during a January 27, 2023 hearing. After careful consideration of the parties’ filings and arguments, and for the reasons stated below, Travelers’ Motion is **DENIED**.

BACKGROUND

On August 27, 2021, this Court entered an Order appointing Peter D. Protopapas as the Receiver for Defendant Payne & Keller Company on Plaintiff’s Motion to Appoint a Receiver. The Court’s Order vested the Receiver “with the power and authority [to] fully administer all assets of Payne & Keller” and, among other things, specifically instructed “the Receiver to investigate the existence of all insurance coverages potentially available to [Payne & Keller].” Thereafter, the Receiver discovered that Payne & Keller Company had conducted business under various corporate names before its dissolution. The Court accordingly granted the Receiver’s Motion to Clarify Order Appointing a Receiver for Payne & Keller Company on September 30, 2021, and entered an Order providing that “all of the Receiver’s duties and protections [in the August 7, 2021 Appointment Order] . . . extend[] to all of the P&K Entities and their predecessors, successors, affiliates, parents, assigns, and subsidiaries that may be discovered in the future.”

Pursuant to that authority, the Receiver initiated an insurance coverage action for Payne & Keller by way of a third-party action against multiple carriers in this case on February 23, 2022. Travelers appeared and filed a motion to dismiss the Receiver’s third-party claims and dissolve the Payne & Keller Receivership on August 24, 2022. After the Receiver served discovery requests

Unnamed Underwriters at Lloyd’s, London and Certain as yet Unnamed London Market Companies (the “Joining Defendants”) filed a Joinder to Travelers’ Motion.

² On January 26, 2023, the Joining Defendants filed a Joinder to Travelers’ Reply.

on Travelers, on November 16, 2022, Travelers moved for a protective order and again moved the Court for an order dissolving the Payne & Keller Receivership and dismissing Travelers from this case.

ANALYSIS

A. Standing

Travelers argues that the Receiver's third-party claims should be dismissed because the Receiver lacks standing to bring them. Specifically, Travelers first contends that under section 15-65-10 of the South Carolina Code, the Receiver only has authority over Payne & Keller property located within the State of South Carolina, and (according to Travelers) Payne & Keller's insurance policies are not property within this State. *See generally* § 15-65-10 ("A receiver may be appointed by a judge of the circuit court, either in or out of court . . . (4) When a corporation has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights, and, in like cases, of the property within this State of foreign corporations . . ."). Even assuming Travelers' interpretation of section 15-65-10 is correct, the Court finds the Receiver has alleged and presented sufficient evidence to demonstrate that Travelers issued insurance policies insuring Payne & Keller risks nationwide, including within South Carolina. Accordingly, the Receiver was properly appointed under section 15-65-10 and has standing to assert the third-party claims raised in this action. *See* S.C. Code Ann. § 38-61-10 ("All contracts of insurance on property, lives, or interests in this State are considered to be made in the State . . . and are subject to the laws of this State."); *Sangamo Weston v. Nat'l Sur. Corp.*, 307 S.C. 143, 149, 414 S.E.2d 127, 130 (1992) ("[I]t is immaterial where the contract was entered into. Further there is no requirement that the policyholders or insurers be citizens of South Carolina. What is solely relevant is where the property, lives, or interests insured are located.").

Travelers cites *Howard v. Allen*, 254 S.C. 455, 176 S.E.2d 127 (1970) for the proposition that insurance policies are not “property.” This case does not support Travelers argument. In *Howard v. Allen*, a personal injury plaintiff sought to attach, as a debt, the defense and indemnity obligations of an insurance policy covering the defendant tortfeasor. *Howard* does not speak to whether the Travelers insurance policies protective of Payne & Keller are property within South Carolina for the purposes of the receivership statute.

Travelers also argues that the Receiver lacks standing to bring the third-party claims on behalf of Payne & Keller because, as a Texas corporation that dissolved in 1986, Payne & Keller is no longer able to sue or be sued under Texas law. Travelers relies on Section 11.359(a) of the Texas Business Organizations Code, which provides that a “claim by or against a terminated filing entity is extinguished unless an action or proceeding is brought on the claim not later than the third anniversary of the date of termination of the entity.” However, that statute further provides, “Notwithstanding Subsections (a) and (b), the extinguishment of an existing claim with respect to a terminated filing entity as provided by this section is nullified if . . . the filing entity’s termination is revoked with retroactive effect under Section 11.153 . . .” § 11.359(c). And section 11.153 of the Texas Business Organizations Code allows a court to “order the revocation of termination of an entity’s existence that was terminated as a result of actual or constructive fraud.” § 11.153(a); *see also* § 11.153(b) (“If the termination of an entity’s existence is revoked under Subsection (a): (1) the revocation relates back to the effective date of the termination and takes effect as of that date; and (2) the entity’s status as an entity continues in effect as if the termination of the entity’s existence had never occurred.”).

Here, the Receiver has presented sufficient evidence at the pleading stage to support a claim that Payne and Keller’s 1986 dissolution was the result of, at least, constructive fraud. *See* Resp.

in Opp'n, 8–13. Specifically, the Receiver asserts that Payne & Keller “terminated its corporate existence to avoid liability for both current and future toxic tort, silica, and asbestos personal liability claims, and Payne & Keller was keenly aware of those claims when the decision to dissolve Payne & Keller was made.” *Id.* at 9. In support of this contention, the Receiver submitted evidence that, prior to its dissolution: Payne & Keller was exposed to significant potential liability resulting from its construction work at a time when the use of asbestos-containing products was prevalent, its insurers began to exclude coverage for asbestos-related claims, and it contracted to indemnify companies with which it did business for personal injury claims arising out of its work. *Id.* at 9–10. Further evidence indicates that Payne & Keller began the dissolution process in response to demands for indemnification by an oil company in bankruptcy concerning over a thousand personal injury claims arising out of exposure to dioxin, and Payne and Keller dissolved without taking the steps necessary to ensure those claims, and others it reasonably expected to face absent dissolution, would be paid. *Id.* at 11–12.

Travelers has not disputed the Receiver’s evidence or submitted any countervailing evidence regarding the circumstances surrounding its dissolution. Accordingly, this Court finds the Receiver has made a prima facie showing that Payne & Keller “was terminated as a result of actual or constructive fraud,” § 11.153(a), and dismissal on the basis of the termination is unwarranted. *See Latham v. Burgher*, 320 S.W.3d 602, 610 (Tex. App. 2010) (ruling a company’s dissolution, conducted shortly after receiving notice of an intended lawsuit against it and without setting aside funds to address the liability of the lawsuit, could support a finding of fraud). This Court does not, however, find that fraud has been conclusively proven, nor does the Court order the revocation of Payne & Keller’s termination at this time. Such a determination will be made after the parties have had the opportunity to explore this issue through the discovery process.

Relying on *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126 (Tex. 2010), Travelers argues that applying section 11.153 to Payne & Keller's dissolution would violate Article I, Section 16 of the Texas Constitution. However, as the *Robinson* court explained, "No bright-line test for unconstitutional retroactivity is possible." *Id.* at 145. Instead, the court outlined a three-factor analysis that must be conducted. *Id.* Moreover, Travelers' retroactivity argument as to section 11.153 undercuts its reliance on section 11.359, which was also enacted well after Payne & Keller's dissolution.³ The Court declines Travelers' invitation to retroactively apply section 11.359 in Travelers' favor to dismiss the Receiver's third-party claims while simultaneously holding the retroactive application of section 11.153 would violate the Texas Constitution, especially given that the Texas legislature added subsection (b) to section 11.153 in response to the Fifth Circuit's determination that revoking an entity's dissolution would not revive claims extinguished by section 11.359. *See Boudreaux v. C J R Framing*, 744 F. App'x 208, 211 (5th Cir. 2018).

B. Personal Jurisdiction

Travelers argues that the Receiver's claims should also be dismissed under Rule 12(b)(2), 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), SCRCPP, 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]

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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 2023-03-30 14:34:37 page 10 of 10

EXHIBIT 13

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Apr 28 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-
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 Keddle; Julie Ann Fortune; Michael John Crall; James
Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.;
Arrowpoint Capital Corp.; Admiral Insurance Company;
Continental Insurance Company (Individually and as Successor in
interest to Harbor Insurance Company); Hartford Accident and

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

Third-Party
Defendants,

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

Unofficial Copy Office of Marilyn Burges District Clerk

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.

Robert H. Verdin

FOR THE COURT

Columbia, South Carolina

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

FILED
Aug 09 2023

EXHIBIT 15

Unofficial Copy Office of Marilyn Burges District Clerk

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

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

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

STATUS OF RECEIVERSHIP ON APPEAL

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

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

LAW AND ANALYSIS

Section 11.153 of the TBOC¹ authorizes a court to revoke a corporation's termination of its own corporate existence if that termination was "as a result of actual or constructive fraud." § 11.153(a) ("Notwithstanding any provision of this code to the contrary, a court may order the revocation of termination of an entity's existence that was terminated as a result of actual or constructive fraud."). Revocation of the corporate termination enables the corporate entity to pursue claims as if it were never dissolved. "[T]he revocation relates back to the effective date of the termination and takes effect as of that date. [and] the entity's status as an entity continues in effect as if the termination of the entity's existence had never occurred." *Id.* at §11.153(b)(1)–(2).

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

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

Castleberry v. Branscum KM, 721 S.W.2d 270, 273 (Tex. 1986), *superseded on other grounds by statute*, as recognized in *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444,

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

455 (Tex. 2008) (citations omitted). For example, dissolving a company after an attorney threatens to file a suit for damages suggests an intent to avoid liability and is evidence of actual fraud. See *Latham v. Burgher*, 320 S.W.3d 602, 610 (Tex. App.—Dallas 2010, no pet.) (“A rational juror could also have decided Latham’s conduct in dissolving the corporation in the face of Burgher’s claim represented dishonesty of purpose or an intent to deceive, i.e., actual fraud.”).

The story of Payne & Keller’s dissolution appears clear, there is ample evidence supporting a claim that, at the very least, constructive fraud occurred in connection with Payne & Keller’s dissolution. Events surrounding Payne & Keller’s dissolution suggest that the company terminated its corporate existence to avoid liability for both current and future toxic tort, silica, and asbestos personal liability claims, and Payne & Keller was keenly aware of those claims when the decision to dissolve Payne & Keller was made.

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

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

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

CONCLUSION

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

IT IS SO ORDERED.

[JUDGE'S E-SIGNATURE PAGE FOLLOWS]



Richland Common Pleas

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

So Ordered

Jean H. Toal

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

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

EXHIBIT 16

Unofficial Copy Office of Marilyn Burges District Clerk

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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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.*

Unofficial Copy Office of Marilyn Burgess District Clerk

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 "schem[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

RECEIVED

Oct 23 2023

SC Court of Appeals

PROOF OF SERVICE

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

Pleading(s): 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)
Christopher Jones (cjones@johnbwhitelaw.com)
Griffin Littlejohn Lynch (glynch@johnbwhitelaw.com)
Scott Shutte (scott.schutte@morganlewis.com)
Brady Edwards (brady.edwards@morganlewis.com)

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

October 23, 2023

EXHIBIT 17

Unofficial Copy Office of Marilyn Burges District Clerk



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

CATHERINE S. HARRISON
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

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,

A handwritten signature in blue ink, reading "Jenny A. Kitchings".
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

Unofficial Copy Office of Marilyn Burgess District Clerk

EXHIBIT 18

Unofficial Copy Office of Marilyn Burges District Clerk

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

Case No. 2021-CP-40-03484

Plaintiff,

**RECEIVER FOR PAYNE & KELLER
COMPANY'S NOTICE OF FILING**

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.

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.

Unofficial Copy Office of Marilyn Burgess District Clerk



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



A handwritten signature of Jane Nelson in black ink.

Jane Nelson
Secretary of State

EXHIBIT 19

Unofficial Copy Office of Marilyn Burges District Clerk

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,

In Re: Asbestos Personal Injury Litigation
Coordinated Docket

2023-CP-40-01466

v.

Davis Mechanical, et al,
Nominal Administrative Defendants.

**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

Electronically signed on 2023-06-05 17:00:42 page 10 of 10

ELECTRONICALLY FILED - 2023 Jun 06 8:50 AM - RICHLAND - COMMON PLEAS - CASE#2023CP4001466

EXHIBIT 20

Unofficial Copy Office of Marilyn Burges District Clerk

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

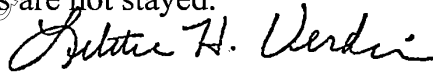
AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall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

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), SCRPC ("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.



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

Unofficial Copy Office of Marilyn Burgess District Clerk

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.



FOR THE COURT
Few, J., not participating

C.J.

Columbia, South Carolina
March 9, 2021

cc: Theile Branham McVey, Esquire
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Jonathan M. Robinson, Esquire
G. Murrell Smith, Jr., Esquire
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Susan Drake DuBose, Esquire
Michael S. Carnevale, Esquire
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Alan Turner, Esquire
Jonathan Marshall Holder, Esquire

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Dec 08 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean Hoefer Toal, Chief Justice (Ret.) and Acting Circuit Court Judge

Case No. 2021-CP-40-03484

Appellate Case No. 2023-000727

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

v.

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

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

v.

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

Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company; Lexington Insurance Company; First State Insurance Company; Certain Underwriters at Lloyd's of London and Various London Market Companies; South Carolina Property and Casualty Insurance Guaranty Association; R.L. Jarrett (Underwriting) Agency, Inc.; U.S. Risk, LLC; Rexel USA, Inc.; and Compass Risk Services, LLC, Third-Party Defendants,

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

and

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

and

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

PROOF OF SERVICE

I certify that a true copy of Respondent's 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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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](#)

On behalf of Jon Robinson, please find attached for service the Receiver's Motion for Sanctions in the above matter.

Thank you,



Dot Faulkenberry
Paralegal

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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May 15 2023

SC 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
MEMORANDUM ON APPEALABILITY**

Respondent Payne & Keller Company ("Payne & Keller"), by and through its duly appointed receiver, Peter D. Protopapas ("the Receiver"), respectfully submits the following memorandum on the issue of appealability as requested by the Court in its May 5, 2023 letter. Pursuant to Rule 240 of the South Carolina Appellate Court Rules, the Receiver respectfully requests that the Court dismiss the appeal brought by Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company ("Travelers"), as well as the appeal brought by: 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 (collectively, “the Joining Insurers”) because the trial court’s order denying their motions for dismissal and protection from discovery is not immediately appealable, and Appellants are not aggrieved parties.

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 Joining 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 Joining Insurers separately appealed the Order, and this Court subsequently consolidated the appeals.

DISCUSSION

I. The Order is not immediately appealable.

"The right of appeal arises from and is controlled by statutory law." *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). "An appeal ordinarily may be pursued only after a party has obtained a final judgment." *Id.* "The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by [section] 14-3-330 [of the South Carolina Code]." *Id.* "Absent a specialized statute, an order must fall into one of several categories set forth in [s]ection 14-3-330 in order to be immediately appealable." *Id.*

Here, the Order—which denied (1) Travelers’ motion to dismiss, (2) the Joining Insurers’ joinder to Travelers motion to dismiss, and (3) Travelers’ motion for protection from discovery—is neither final¹ nor an interlocutory order from which appeal may now be taken under section 14-3-330. As a result, the Order is not appealable. The Receiver respectfully requests that this appeal be immediately dismissed.

Section 14-3-330 allows immediate appellate review of only the following classes of interlocutory orders:

1. Those “involving the merits,” § 14-3-330(1);
2. Those “affecting a substantial right” when the order also “in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action,” “grants or refuses a new trial,” or “strikes out an answer or any part thereof or any pleading,” § 14-3-330(2);
3. Those “affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment,” § 14-3-330(3); and
4. Those “granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver,” § 14-3-330(4).

Additionally, “[t]he provisions of section 14-3-330 are narrowly construed and serve the underlying policy favoring judicial economy by avoiding ‘piecemeal appeals.’” *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019) (quoting *Hagood v. Sommerville*, 362

¹ See *Levi v. N. Anderson Cnty. EMS*, 409 S.C. 374, 385, 762 S.E.2d 44, 50 (Ct. App. 2014) (“The denial of a motion to dismiss has been consistently held not to be a final decision.”); *Ex parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005) (“[A] discovery order is not a final order because it leaves some further act to be done by the court before the rights of the parties . . . are determined.”).

S.C. 191, 196, 607 S.E.2d 707, 709 (2005)); *see also Tillman v. Tillman*, 420 S.C. 246, 250, 801 S.E.2d 757, 760 (Ct. App. 2017) (“To avoid circuitous litigation and needless appeals, we construe section 14-3-330 narrowly . . .”).

Because the Order does not fall under any of these categories when properly construed, Appellants’ appeals should be dismissed.

1. The Order is not appealable under section 14-3-330(1), (2), or (3).

First, the Order does not “involve the merits” under section 14-3-330(1). “An order [that] involves the merits is one that ‘must finally determine some substantial matter forming the whole or a part of some cause of action or defense.’” *Edwards v. SunCom*, 369 S.C. 91, 94, 631 S.E.2d 529, 530 (2006) (quoting *Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993)). Here, the Order does not finally determine *any* matter concerning *any* party’s causes of action or defenses—it merely allows this case to proceed to the discovery phase of the litigation. *See McLendon v. S.C. Dep’t of Highways & Pub. Transp.*, 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994) (“Like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue[s] raised by the motion can be raised again at a later stage of the proceedings. Therefore, the denial of a motion to dismiss is not directly appealable” (citation omitted)); *Hamm v. S.C. Pub. Serv. Comm’n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994) (“Discovery orders . . . are interlocutory and are not immediately appealable.”).

Next, the Order does not affect any of Appellants’ substantial rights and does not also “in effect determine[] the action and prevent[] a judgment from which an appeal might be taken or discontinue[] the action,” “grant[] or refuse[] a new trial,” or “strike[] out an answer or any part thereof or any pleading.” § 14-3-330(2). As a result, the Order is not immediately appealable

under section 14-3-330(2). *See, e.g., Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991) (“Avoidance of trial is not a ‘substantial right’ entitling a party to immediate appeal of an interlocutory order.”); *Du Pont v. Du Bos*, 33 S.C. 389, 394, 11 S.E. 1073, 1074-75 (1890) (“It is quite clear that the order here under review is not appealable . . . ; for even granting that it affects a substantial right, that is not sufficient, for it must also, in effect, determine the action and prevent a judgment from which an appeal might be taken, and this it certainly does not do.”).

Similarly, because the Order does not affect a substantial right of Appellants, it also does not fall within section 14-3-330(3). The Order was also not entered in a “special proceeding” or “after judgment.” § 14-3-330(3). Instead, the Order was entered in a typical civil action before judgment, and so section 14-3-330(3) is inapplicable. *See Allen v. Partlow*, 3 S.C. 417, 418 (1872) (observing a special proceeding is “any remedy *other than an action or ordinary proceeding* in a Court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence” (emphasis added)); *see also Smith v. Saye*, 131 S.C. 378, 381, 127 S.E. 568, 569 (1925) (distinguishing between a “special proceeding” and a “civil action”); Rule 3, SCRCP (“A civil action is commenced when the summons and complaint are filed with the clerk of court . . .”).

2. The Order is not appealable under section 14-3-330(4).

The Order also falls outside the scope of section 14-3-330(4) because it does not “grant[], continu[e], modify[], or refus[e] an injunction or grant[], continu[e], modify[], or refus[e] the appointment of a receiver.” § 14-3-330(4). No injunctions have been sought or entered here, and although the third-party claims in the underlying action are brought by Payne & Keller’s Receiver, the Order did not alter or affect the Receiver’s appointment in any way.

Based on the notices of appeal filed with this Court, Respondent expects that Appellants will argue the Order is appealable under section 14-3-330(4) because it “continues” and “modifies” Payne & Keller’s receivership.² However, Appellants are incorrect, and their attempts to manufacture appealability where none exists and frustrate the Receiver’s court-ordered efforts to marshal Payne & Keller’s assets—its insurance policies covering asbestos-related personal injury claims—should not be allowed.

a. Section 14-3-330(4) is concerned with “appointments,” not “receiverships.”

As an initial matter, the appealability statute only provides for immediate appellate review of orders affecting “the *appointment of a receiver*.” § 14-3-330(4) (emphasis added). Critically, the statute does not allow the interlocutory appeal of an order affecting “a receivership.” See *Aiken v. S.C. Dep’t of Revenue*, 429 S.C. 414, 420, 839 S.E.2d 96, 99 (2020) (“A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous” (quoting *State v. Smith (In re Decker)*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995))); *Hartford Accident & Indem. Co. v. Lindsay*, 273 S.C. 79, 85, 254 S.E.2d 301, 304 (1979) (“Full effect must be given to each section of a statute, giving words their plain meaning, and, in the absence of ambiguity, words must not be added or taken away.”).

Although, upon first glance, the distinction between orders affecting the appointment of a receiver and a receivership *per se* may appear illusory, upon closer examination, the distinction is real, reflected in the language of the appealability statute, and has been acknowledged as legally significant by South Carolina courts, which have recognized that the creation of a

² Both Travelers’ and the Joining Insurers’ notices of appeal assert the 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.”

receivership and the appointment of a receiver are separate acts. *See, e.g., In re Citizens' Exch. Bank*, 140 S.C. 471, 493, 139 S.E. 135, 143 (1927) (“The power of the Circuit Judge to designate a receiver is, clearly, a matter of discretion; perhaps even of more enlarged discretion than that of deciding in the first instance whether or not there should be a receivership.”); *S. Tr. Co. v. Cudd*, 166 S.C. 108, 113-14, 164 S.E. 428, 429-30 (1932) (“That the power to appoint a receiver is inherent in a Court of equity is fully realized and approved. Also that the matter of ordering a receivership is very much within the discretion of the Circuit Judge, is likewise well realized.” (citations omitted)).

A receiver acts on behalf of, as an officer of, the appointing court. *See Ex parte Cusaac*, 244 S.C. 572, 580, 137 S.E.2d 764, 768 (1964) (“A receiver represents the Court appointing him; he is an officer of the Court and is the agency through which the Court acts.”). Thus, the appealability statute rightly focuses on, and allows immediate appellate review of, orders conferring the authority of the court on an individual. *See Shapemasters Golf Course Builders, Inc. v. Shapemasters, Inc.*, 360 S.C. 473, 479, 602 S.E.2d 83, 87 (Ct. App. 2004) (“The refusal of a trial court to appoint a receiver should be immediately appealable because of the potential harm in not having an unbiased party to protect a corporation’s assets.”). Admittedly, orders concerning receiverships often will affect both the receivership itself and the appointment of a receiver simultaneously—for example, when a receivership is created and a receiver appointed, or when a receivership is dissolved and a receiver relieved of the appointment. However, such is not the case here. In the circuit court, Appellants argued Payne & Keller’s receivership itself was improper and sought the dissolution of the entire receivership. None of Appellants arguments related to the appointment of the Receiver as such; thus, the Order, which rejected those

arguments, does not fall within the ambit of section 14-3-330(4) when carefully read and properly interpreted.

b. Even if section 14-3-330(4) applies to “receiverships,” the Order did not “modify” or “continue” anything.

Even assuming section 14-3-330(4) applies to “receiverships” *per se*, the Order is nonetheless not immediately appealable because it did not “modify” or “continue” anything—either the Receiver’s appointment or Payne & Keller’s receivership as a whole.

i. The Order did not “modify” anything.

First, the Order did not “modify[] . . . the appointment of [Payne & Keller’s] receiver,” § 14-3-330(4), or Payne & Keller’s receivership generally. Appellants may contend that the Order expanded the scope of the receivership by authorizing the Receiver to investigate Payne & Keller’s 1986 dissolution; however, the Receiver was already authorized to conduct such an investigation when the Order was entered. *Cf. In re Fifty-Four First Mortg. Bonds*, 15 S.C. 304, 314 (1881) (“The authority of a receiver rests . . . in the orders of the court by which he is appointed.”).

When Payne & Keller’s receivership was created, the Receivership Court³ conferred very broad authority on the Receiver to act in Payne & Keller’s interest, giving him:

the power and authority [to] 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

³ The Supreme Court has ordered “that the Honorable Jean Hoefer Toal, retired Chief Justice of the Supreme Court, is hereby appointed to serve as the Chief Judge for Administrative Purposes over all asbestosis and asbestos litigation filed within the state court system.” S.C. Sup. Ct. Order dated May 28, 2019. Incidental to this appointment, Justice Toal has established several receiverships over now-defunct companies whose operations are alleged to have caused bodily injury to individuals through asbestos exposure.

claims related to the actions or failure to act of Payne & Keller's insurance carriers.

(Aug. 27, 2021 Order Appointing Receiver at 1, attached as Exhibit A (emphasis added).)

Investigating Payne & Keller's history, including its dissolution in 1986, is clearly encompassed by the powers the Receivership Court conferred upon the Receiver when he was initially appointed in August of 2021. Accordingly, the Order did not grant him such authority, nor did it "modify" the scope of Payne & Keller's receivership in any other way.

ii. The Order did not "continue" anything.

Similarly, the Order did not "continu[e] . . . the appointment of [Payne & Keller's] receiver," § 14-3-330(4), or Payne & Keller's receivership generally. In arguing the Order "continued" Payne & Keller's receivership, Appellants rely on an overly broad interpretation of section 14-3-330 that is contrary to precedent and would ultimately lead to numerous improper appeals out of the asbestos Receivership Court and from unrelated actions involving receiverships. *See Tillman*, 420 S.C. at 250, 801 S.E.2d at 760 ("To avoid circuitous litigation and needless appeals, we construe section 14-3-330 narrowly . . .").

The language of section 14-3-330(4) was first enacted into South Carolina law in 1901 (through Act 358) as section 11(4) of the Code of Civil Procedure.⁴ At the time, South Carolina

⁴ *See* 1901 S.C. Acts 623 ("*Be it enacted* by the General Assembly of the State of South Carolina: That section 11 of the Code of Civil Procedure of this State relating to the jurisdiction of the Supreme Court, be and the same is hereby amended by the addition thereto of the following subdivision to be numbered '4.'"); *id.* ("4. An interlocutory order or decree in the Court of Common Pleas, granting or continuing or modifying or refusing an injunction, or else granting or continuing or modifying or refusing the appointment of a Receiver hereafter granted in any action . . ."); *see also Williams v. Jones*, 62 S.C. 472, 481, 40 S.E. 881, 884 (1902) (ruling an order "was appealable before the act of 1901, 23 Stat., 623--for it involved the merits; and secondly, it was appealable under said act just quoted, for that act provides that the Supreme Court may review 'An interlocutory order or decree in the Court of Common Pleas, granting or continuing or modifying or refusing an injunction, or else granting or continuing or modifying or refusing the appointment of a receiver hereafter granted in any action'"). Although it has been

courts commonly appointed receivers on a temporary basis,⁵ and it was likewise common for such temporary receiverships to be extended or made permanent—or “continued.”⁶ This practice of “continuing” temporary receiverships still takes place in South Carolina. *See, e.g., Wilmington Trust Nat’l Assoc. v. Piedmont Center Owner, LLC et al.*, 2019 S.C. C.P. LEXIS 513, *1 (S.C. Ct. Comm. Pl., Greenville Cnty., Mar. 8, 2019) (“At the hearing held on March 8, 2019, Plaintiff submitted evidence and testimony from the interim Receiver in support of the **continued**

recodified several times, the relevant language of section 14-3-330(4) has remained a part of South Carolina’s statutory scheme from 1901 to the present day.

⁵ *See, e.g., Montgomery & Crawford, Inc. v. Arcadia Mills*, 173 S.C. 464, 483, 176 S.E. 589, 596 (1934) (“Judge Stoll signed the order making H. A. Ligon temporary receiver”); *Moore v. S. Mut. B. & L. Ass’n*, 50 S.C. 89, 93, 27 S.E. 543, 545 (1897) (“[O]n the 12th of February, 1897, a temporary receiver of the defendant association was appointed”); *Hughes v. Edisto Cypress Shingle Co.*, 51 S.C. 1, 21, 28 S.E. 2, 9 (1897) (“C. B. Free was, under the order of Judge Witherspoon, appointed as temporary receiver”); *Tillinghast v. Bos. & Port Royal Lumber Co.*, 39 S.C. 484, 486, 18 S.E. 120, 121 (1893) (noting a party “applied for and obtained an order for the appointment of a temporary receiver”); *see also Hand v. Savannah & C. R. Co.*, 17 S.C. 219, 274 (1882) (“It can hardly be necessary to say, what has been so often held, that the objects for the appointment of a receiver are temporary in their character.”); *see also* 1930 S.C. Civil Code § 5564 (“If it appears to the Court that the corporation is insolvent or in imminent danger of insolvency the Court may appoint a temporary receiver of the corporation pending dissolution.”); *Tardy’s Smith on Receivers* 2d, § 3 (1920) (distinguishing temporary and permanent receivers).

⁶ *See, e.g., Carroll v. Cash Mills*, 125 S.C. 332, 336, 118 S.E. 290, 291 (1923) (“On February 21, 1921, the temporary receivership was made permanent, by order of the Circuit Judge.”); *Wylie v. Commercial & Farmers’ Bank*, 63 S.C. 406, 408, 41 S.E. 504, 505 (1902) (“After answers were in, an application was made to have the temporary receiver made permanent receiver. This was ordered in June, 1899.”); *White v. Commercial & Farmers’ Bank*, 60 S.C. 122, 123, 38 S.E. 453, 454 (1901) (noting “a temporary receiver was appointed on the 3d day of February, 1900 (afterwards made permanent)”); *State v. Port Royal & Augusta R.R. Co.*, 45 S.C. 470, 477, 23 S.E. 383, 384 (1895) (“On the same day such temporary receiver was made permanent receiver.”); *see also* 75 C.J.S. *Receivers* § 79 (“According to the showing made, the court may make, or refuse to make, an order **continuing** a temporary receiver previously appointed.” (emphasis added)); *Stair v. Meissel*, 207 Ind. 280, 283, 192 N.E. 453, 454 (1934) (“It is, therefore, ordered by the court that the receivership herein be and the same is hereby **continued** and made permanent pending the determination of the main cause of action in this cause.” (emphasis added)); *Singer v. Goff*, 334 Mich. 163, 167, 54 N.W.2d 290, 292 (1952) (“Equity courts have inherent power to appoint a receiver, and it is a matter of discretion whether a receivership shall be **continued** or discontinued. The record in the instant case shows that, after the expiration of the 1-year period, the court issued various orders which necessarily imply a **continuance** of the Singer receivership.” (emphasis added) (citations omitted)).

Receivership, and requested that the Court extend the Receiver Order until subsequent order of this Court, in accordance with the terms of the Receiver Order, which are incorporated herein.” (emphasis added)). Accordingly, the language in section 14-3-330(4) allowing for the immediate appeal of orders “continuing . . . the appointment of a receiver” was not intended to apply to the current circumstance, in which a court simply rejects a third party’s attempt to challenge and dissolve a receivership. Instead, it was intended to apply to instances where a temporary receivership was explicitly extended in duration, whether made permanent or remaining as a temporary receivership with a later termination date.

For section 14-3-330(4) to allow the instant appeals of the Order—which did not “continue” Payne & Keller’s receivership, and at most,⁷ simply declined to dissolve it—the statute would need to contain appropriate alternative language, as other jurisdictions have done. *See, e.g.*, Okla. Stat. tit. 12, § 993(4) (allowing the immediate appeal of an order that “refuses to vacate the appointment of a receiver”); Mo. Rev. Stat. § 512.020(2) (allowing the immediate appeal of an order “refusing to revoke, modify, or change an interlocutory order appointing a receiver or receivers”); Kan. Stat. Ann. § 60-2102(a)(3) (allowing the immediate appeal of “[a]n order that . . . refuses to wind up a receivership”); 4 V.I.C. § 33(b) (“The Supreme Court of the Virgin Islands has jurisdiction of appeals from . . . (2) Interlocutory orders . . . refusing orders to wind up receiverships . . .”).

⁷ “[A]n appellate court should look to the effect of an interlocutory order to determine its appealability” *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011). Here, the Order had *no* effect on Payne & Keller’s receivership, whether to its duration, scope, the identity of the Receiver, or otherwise. Consequently, the Order does not warrant review by this Court. *See, e.g., Cobb v. Maccaro*, 310 S.C. 303, 306, 423 S.E.2d 156, 157 (Ct. App. 1992) (ruling the refusal to dissolve a mechanic’s lien was not immediately appealable).

Underlying and reinforcing Respondent’s interpretation of section 14-3-330(4) is an important consideration: that receivers, once appointed, should be able to carry out their court-ordered duties without other entities interfering by filing unnecessary, improper, and time-consuming appeals. If Appellants’ view of section 14-3-330(4) is accepted, insurers in the asbestos Receivership Court,⁸ and debtors to entities in receivership elsewhere, could invent any number of reasons why a receivership or a receiver’s appointment is improper, regardless of merit, move for dissolution of the receivership on that basis, and appeal the denial of such motions as orders “continuing” the receivership. In fact, under such a broad interpretation as Appellants would have this Court adopt, ordinary motions to dismiss and motions for summary judgment against a receiver’s claims containing a perfunctory argument that, upon dismissal or adjudication of the claims, the receivership should be dissolved, would be immediately appealable. This would upend foundational appealability law in South Carolina. *See Silverman v. Campbell*, 326 S.C. 208, 211, 486 S.E.2d 1, 2 (1997) (recognizing “it is well-settled that the

⁸ Regrettably, the non-meritorious appeal of unappealable orders has become common practice in South Carolina asbestos receivership litigation. *See, e.g., Ex Parte: Zurich Am. Ins. Co.*, Appellate Case No. 2019-001651 (appealing discovery orders directly to Supreme Court; appeal dismissed Oct. 16, 2019 upon initial review of appealed orders); *Ex parte: Hartford Accident & Indem. Co.*, Appellate Case No. 2019-001764 (appealing discovery order; dismissed Nov. 1, 2019 following motion to dismiss and subsequent withdrawal of appeal); *Ex Parte: U.S. Fid. & Guar. Co.*, Appellate Case No. 2020-000845 (appealing orders in case where appellant was not a party; dismissed July 30, 2020 upon motion); *Finch v. U.S. Fid. & Guar. Co.*, Appellate Case No. 2020-001663 (appealing bifurcation order; appeal dismissed Jan. 6, 2021 upon motion; certiorari denied July 6, 2021 in Appellate Case No. 2021-000462); *Covil Corp. v. Penn. Nat’l Mut. Cas. Ins. Co.*, Appellate Case No. 2022-000761 (appealing discovery orders; appeal dismissed Aug. 9, 2022 upon motion; certiorari denied Jan. 12, 2023 in Appellate Case No. 2022-001764); *Covil Corp. v. Penn. Nat’l Mut. Cas. Ins. Co.*, Appellate Case No. 2022-000785 (appealing same discovery orders directly to Supreme Court; certiorari denied Aug. 23, 2022); *Covil Corp. v. Penn. Nat’l Mut. Cas. Ins. Co.*, Appellate Case No. 2022-001722 (appealing order confirming non-jury trial; appeal dismissed Feb. 8, 2023 upon motion; petition for rehearing pending); *S. Insulation, Inc. v. OneBeacon Ins. Grp., Ltd.*, Appellate Case No. 2023-000252 (appealing order denying dismissal; appeal dismissed Apr. 13, 2023 upon motion; petition for rehearing pending).

denial of summary judgment is not directly appealable”); *McLendon*, 313 S.C. at 526 n.2, 443 S.E.2d at 540 n.2 (observing “the denial of a motion to dismiss is not directly appealable”).

Allowing such appeals would also stymie actions involving receiverships in the circuit court, as each appellant would argue that the receivership’s propriety affects the viability of the entire action. This is not what the legislature intended with respect to receiverships in enacting section 14-3-330(4), nor would it be consonant with the general rule that section 14-3-330 should be narrowly construed. *See Stone*, 426 S.C. at 295, 826 S.E.2d at 870; *Tillman*, 420 S.C. at 250, 801 S.E.2d at 760. The appropriate time to challenge the propriety of a receivership is at its outset—which section 14-3-330(4) explicitly allows by providing for the immediate appeal of orders “granting . . . the appointment of a receiver”—not now, years after the receivership has been established and the Receiver appointed.

In sum, section 14-3-330(4) does not afford Appellants any basis to appeal the Order, and their appeals should be immediately dismissed.

II. Appellants have no right to appeal the Order because they are not aggrieved parties.

Even assuming *arguendo* that the Order is appealable under section 14-3-330(4), Appellants are unable to seek appellate review because they are not aggrieved by the Receivership Court’s refusal to dissolve Payne & Keller’s receivership. *See* Rule 201(b), SCACR (“Only a party aggrieved by an order, judgment, sentence or decision may appeal.”); *State v. Looper*, 421 S.C. 384, 390, 807 S.E.2d 203, 206 (2017) (“Whether based on statute or case law, the overarching point remains—absent the presence of an exception to the final judgment rule, appealability is determined by a final judgment and an aggrieved party.”).

Although appellants undoubtedly would like Payne & Keller’s receivership to be dissolved and the underlying action against them dismissed, this desire does not give rise to a

right to appeal.⁹ Payne & Keller’s receivership, in and of itself, does not operate on Appellants’ rights of property or bear directly upon their interests. The creation of the receivership and the Receiver’s appointment merely put the Receiver in the place of Payne & Keller vis-à-vis Payne & Keller’s property.¹⁰ However, this affected only Payne & Keller’s property—it did not affect the property or any other right held by Appellants. The fact that Payne & Keller’s assets are its insurance policies, contracts to which Appellants are also parties, does not change this fact. The Receiver only possesses Payne & Keller’s rights and obligations under the policies, and the separate but corresponding rights and obligations of the Appellant insurers were unaffected by the creation of the receivership and the Receiver’s appointment.¹¹

⁹ See *State v. Cox*, 328 S.C. 371, 373, 492 S.E.2d 399, 400 (Ct. App. 1997) (“[A]ppellate review is limited to parties aggrieved by a judgment, order, or sentence below, and an aggrieved party is one who is injured in a legal sense or has suffered an injury to person or property.” (citations omitted)); *Ralph v. McLaughlin*, 432 S.C. 640, 649, 856 S.E.2d 154, 158 (2021) (“[A]n aggrieved party is one who is injured in a legal sense; one who has suffered an injury to person or property. . . . [A]n aggrieved party with[in the meaning of the] statute relating to appeals is a person who is aggrieved by the judgment or decree when it operates on his rights of property or bears directly upon his interest, the word aggrieved referring to a substantial grievance, a denial of some personal or property right or the imposition on a party of a burden or obligation.” (quoting *Cisson v. McWhorter*, 255 S.C. 174, 178, 177 S.E.2d 603, 605 (1970))).

¹⁰ 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 with respect to the property of the latter”); *In re Am. Slicing Mach. Co.*, 125 S.C. 214, 217-18, 118 S.E. 303, 304 (1923) (“The Receiver of an insolvent corporation represents, not only the corporation, but also its stockholders and creditors, and it is his duty to assert and protect the rights of each of these several classes of persons; he is regarded as a Trustee for them. . . . The property becomes a trust fund for the payment of debts, and the Receiver simply holds it for the benefit of those ultimately entitled, in law or equity, to it.”); *Bates v. S.C. Nat’l Bank*, 280 S.C. 599, 601, 313 S.E.2d 361, 362 (Ct. App. 1984) (“The property in the hands of the receiver is *in custodia legis*; the possession of the property by the receiver is the possession of the court which appointed him.”).

¹¹ See *Carwile v. Metro. Life Ins. Co.*, 136 S.C. 179, 195, 134 S.E. 285, 290 (1926) (“A receiver can acquire no other, greater, or better interest than the debtor had in the property.” (quoting *In re Am. Slicing Mach. Co.*, 125 S.C. at 218, 118 S.E. at 304)); *Nat’l Cash Register Co.*, 217 S.C. at 313, 60 S.E.2d at 617 (providing that property in a receiver’s possession “is subject to valid liens and other contractual obligations”); *id.* at 313-14, 60 S.E.2d at 617 (“The general rule is that the appointment of a receiver will not change any existing contractual relation or create any

That third parties are not injured in a legal sense by the establishment of a receivership is also reflected in the statutes governing receiverships. For example, before a receivership is created, notice of the application for the receivership must be given to the entity being placed into receivership and others claiming an interest in that entity's property. *See* S.C. Code Ann. § 15-65-20 ("No receiver of the property of any person or corporation shall be appointed by any court or judge, either in term time or at chambers, without notice of the application for such appointment to the party to the action whose property is sought to be put in the hands of a receiver and to any party to the action in possession of such property claiming an interest therein under any contract, lease or conveyance thereof from the alleged owner."). These are the parties that may be aggrieved by an order such as the one currently on appeal; however, notice need not be given to third parties like Appellants because they would not be similarly aggrieved.

And although the Receiver has brought claims against Appellants, that does not render the receivership *per se* as legally injurious to Appellants. *See Looper*, 421 S.C. at 389, 807 S.E.2d at 205 ("We, of course, take no exception to the notion that Petitioner was adversely impacted by the circuit court's order remanding the case for trial, but he was not aggrieved in a legal sense. *Cf. Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991) ('Avoidance of trial is not a 'substantial right' entitling a party to immediate appeal of an interlocutory order.')."). Consequently, the circuit court's refusal to dissolve Payne & Keller's receivership does not, standing alone, aggrieve Appellants.¹²

new contractual relation or right of action thereon, and a receiver can do nothing to impair a contract as between the parties thereto."); *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 343, 745 S.E.2d 90, 93 (2013) (holding an "[i]nsurer still retains all of its defenses and rights under [an] insurance contract" when an insured's rights under the contract, including claims against the insurer, are assigned to a third party).

¹² *See, e.g., Wildflower Nursery, Inc. v. Beasley*, No. 2016-UP-082, 2016 S.C. App. Unpub. LEXIS 98, at *3 (Ct. App. Feb. 24, 2016) ("As to the denial of Beasley's motion for the

In addition to the above South Carolina cases supporting Respondent's position, other jurisdictions have consistently held that a third party is not aggrieved by the imposition of a receivership.¹³ An opinion by the North Carolina Court of Appeals is particularly instructive. In *Haarhuis v. Cheek*, 820 S.E.2d 844 (2018), the defendant hit and killed a pedestrian with her

appointment of a receiver, we find Wildflower was not aggrieved by the circuit court's denial of that motion."); *cf. Powell v. Bank of Am.*, 379 S.C. 437, 448, 665 S.E.2d 237, 243 (Ct. App. 2008) ("Because the Bank has no interest in the escrowed funds, the Bank is not aggrieved by the trial court's apportionment of the funds between Cody and Elizabeth. We dismiss the Bank's appeal."); *Burns v. Gardner*, 328 S.C. 608, 617, 493 S.E.2d 356, 361 (Ct. App. 1997) ("The assessment of sanctions in this case does not affect any property right of the appellants, nor does it impose any burden or obligation on the appellants. Thus, we cannot say that the appellants are aggrieved by the imposition of sanctions against their attorney."); *Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 120-21, 754 S.E.2d 486, 490-91 (2014) (holding parties could not appeal the circuit court's approval of a settlement because they were not "aggrieved in any way by the settlement agreement").

¹³ See *MW Capital Funding, Inc. v. Magnum Health & Rehab of Monroe LLC*, No. 16-14459, 2019 U.S. Dist. LEXIS 127463, at *10 (E.D. Mich. July 31, 2019) ("The court is doubtful that a non-party creditor like MDHHS has standing to challenge the imposition of a receivership. MDHHS was not directly harmed by the imposition of the receivership, which affected Defendants' assets." (footnote omitted)); *Luckenbach v. Laer*, 212 P. 918, 920 (Cal. 1923) ("The appellants were in exactly the same position after the appointment of the receiver and the granting of permission to sue [appellants] as they were before. They were, or were not, liable to the Krempel-Preston Company and to its creditors, as the facts exist. The receiver is merely the minister of the corporation, acting under the direction of the court, in attempting to enforce such liability. In any action brought thereon by him, the appellants may interpose every defense they would have against the corporation. If they have a meritorious defense, they will, we may assume, defeat any recovery."); *Exch. Tr. Co. v. Okla. State Bank*, 259 P. 589, 593 (Okla. 1927) ("The Bank is not a party aggrieved. It is not, and was not, the owner or in possession of the mortgaged premises or crops raised thereon. It is not, under the order of appointment of the receiver, chargeable with any expense in connection with the receivership."); *Med. Device All., Inc. v. Ahr*, 988 P.2d 308, 310 (Nev. 1999) ("Where a receiver is appointed to oversee the operations of a corporation, the corporation is the aggrieved party and has a right to appeal from that order."); *Brenda Sue Steuer Revocable Tr. v. Strauss*, 2022-Ohio-3484, ¶ 13 (Ct. App. 2022) ("Strauss has asserted no interest in the property of Fairport Real Estate subject to the receivership. Accordingly, he cannot claim to be aggrieved by the imposition of the receivership."); *Needle v. Perfection Const. Co.*, 154 A. 878, 879 (N.J. 1931) ("It is to be observed that the corporation defendant has not appealed and is not complaining of the order appointing a statutory receiver. Just how the appellant as mortgagee is aggrieved by that order has not been made to appear. The order appointing a receiver had the legal effect of transferring property of the corporation to the receiver and it is not apparent that any injury will result to her by this change of position and title.").

vehicle while driving intoxicated. Plaintiff, the pedestrian's husband and administrator of her estate, received and accepted an offer by the defendant's insurer to release his claims against the defendant in exchange for payment within ten days of \$50,000, the defendant's insurance policy limits. However, soon after receiving the plaintiff's acceptance of the settlement offer, the insurer retained counsel to represent the defendant. The settlement payment was not timely made, and the plaintiff filed suit against the defendant. At trial, the jury entered a verdict against the defendant for \$4.25 million in compensatory damages and \$45,000 in punitive damages. When the judgment went unsatisfied, the plaintiff filed a motion to appoint a receiver for the defendant, who "possessed property in the form of unliquidated legal claims against [the insurer] and [counsel] for their actions in causing [the] defendant to be encumbered with a judgment of nearly \$4.3 million." *Id.* at 847. At a hearing on the motion, the trial court allowed, over the objections of the plaintiff, the insurer and counsel to argue against appointing a receiver. The trial court denied the request for a receiver, and on appeal, the North Carolina Court of Appeals considered whether the insurer and counsel had standing to challenge the appointment of a receiver. The *Haarhuis* court observed, "It is well settled that the debtor of a judgment-debtor lacks standing to object to the appointment of a receiver, as the debtor is not the 'party aggrieved' in the underlying action." *Id.* at 848. The court noted that the interests of the insurer and counsel were "entirely antagonistic" to those of the defendant because they were her potential debtors, and it added that they were not "legally aggrieved in the instant case by the appointment of a receiver." *Id.* at 849. Here, as in *Haarhuis*, the entity in receivership (Payne & Keller) possesses rights of action against its insurers, who oppose the receivership. And, as in *Haarhuis*, Appellants are not aggrieved by the mere existence of Payne & Keller's receivership.

Furthermore, assuming Appellants are aggrieved by the Order's denial of their requests for dismissal and protection from discovery, those rulings are clearly not appealable at this time. Therefore, those rulings in the Order do not render Appellants aggrieved parties with respect to the dissolution of Payne & Keller's receivership. *See Burns v. Gardner*, 328 S.C. 608, 617-18, 493 S.E.2d 356, 361 (Ct. App. 1997) ("Because the appellants are not aggrieved by the assessment of sanctions, they cannot pursue *the issue* on appeal. . . . Accordingly, *that portion* of the appellants' appeal relating to the sanctions assessed against their attorney is hereby dismissed." (emphasis added)); *Dunson v. Dunson*, 278 S.C. 210, 212, 294 S.E.2d 39, 40 (1982) ("The failure to sustain the wife's allegation of desertion has not prejudiced any of her rights. The award of the divorce on the ground of separation for one (1) year has not denied to her any personal or property right, nor has it imposed on her any burden or obligation. She has been properly declared entitled to alimony, from which there is no appeal. She is simply not an aggrieved party *in so far as this issue is concerned*." (emphasis added)).

Because Appellants are not aggrieved by the refusal to dissolve Payne & Keller's receivership, and the circuit court's other rulings in the Order are clearly not appealable, their appeals should be immediately dismissed.¹⁴

¹⁴ *See Cisson v. McWhorter*, 255 S.C. 174, 177-78, 177 S.E.2d 603, 605 (1970) ("Our statutory provision limiting appellate review to those who have been aggrieved by the judgment below is, in our opinion, a wise and well reasoned requirement, as our court is concerned with correcting errors that have practically wronged the appealing party. It, therefore, follows that it is our duty to reject an appeal that is prosecuted by a party who is not aggrieved in a legal sense by the judgment of the trial court."); *First Union Nat'l Bank v. Soden*, 333 S.C. 554, 565, 511 S.E.2d 372, 378 (Ct. App. 1998) ("A party cannot appeal from a decision which does not affect his interest, however erroneous and prejudicial it may be to the rights and interests of some other person.").

III. If these appeals are not immediately dismissed, consideration of Appellants' other grounds for dismissal in the circuit court is unwarranted.

As stated above, the denial of a motion to dismiss and orders concerning discovery are not immediately appealable. However, Respondent recognizes that this Court can, in its discretion, decide to consider non-appealable issues alongside an issue or order properly appealed. *See Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005) (“An order that is not directly appealable *may be* considered if there is an appealable issue before the court.” (emphasis added)). Notwithstanding this discretion, the South Carolina Supreme Court has explained that such non-appealable issues should have “a sufficient nexus or companionship [to the appealable issue(s)] to justify [the] exercise of immediate appellate review.” *Brown v. Cnty. of Berkeley*, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005). Here, there is no nexus between Appellants’ arguments concerning Payne & Keller’s receivership and their other arguments in pursuit of dismissal. Accordingly, if this Court decides to consider the receivership issue, it should decline to review Appellants’ remaining arguments ruled upon in the Order.

CONCLUSION

Because the Order is not appealable and did not aggrieve Appellants, Respondent respectfully requests that this Court immediately dismiss these appeals.

Respectfully submitted,

/s/ Christopher R. Jones

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Attorneys for Respondent

May 15, 2023

EXHIBIT A

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

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

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

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

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

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

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

AND IT SO ORDERED this _____ day of _____ 2021.

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



Richland Common Pleas

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

So Ordered

Jean H. Toal

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

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
May 15 2023

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Joan H. Toal
Acting Circuit Court Judge

Appellate Case No. 2023-000727
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, 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, formerly known as 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 the

Appellants.

RESPONSE TO COURT'S APPEALABILITY INQUIRY

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, “Appellants”), submit this Memorandum in response to the Court’s May 5, 2023 Request for memoranda addressing the issue of appealability.

SUMMARY

The Court has express statutory authority to hear this appeal because the Order continues and modifies a receivership. South Carolina Code § 14-3-330(4) states the Supreme Court “shall have appellate jurisdiction” and “shall review upon appeal” an “interlocutory order . . . granting, continuing, modifying, or refusing the appointment of a receiver.” The Circuit Court granted a motion to appoint a receiver over Payne & Keller Company (“Payne & Keller”). After the Receiver filed a Third-Party Complaint against them, Appellants and Travelers moved to dissolve the receivership. The Circuit Court denied that motion, thus continuing the receivership. The Order also modified the receiver’s role. Because the Order on appeal continued – and modified – the receivership, this appeal falls squarely within Section 14-3-330(4), and the Order is properly before this Court on appeal.

BACKGROUND

A. Payne & Keller was a Texas corporation that dissolved in 1986.

Payne & Keller was a Texas corporation located in Texas that dissolved in 1986, pursuant to Texas law. (Ex. A, Certificate of Dissolution, Dec. 3, 1986). While in business, Payne & Keller allegedly supplied and or installed insulation at various locations in the southeastern United States, some of which allegedly contained asbestos. (Ex. B, Pltfs’ Mot. to Appoint a Receiver, p. 1). Under Texas corporations law, Payne & Keller could only be sued for three years after its dissolution. Tex. Bus. Org. Code § 11.359(a). Thus, Payne & Keller has not been subject to suit since 1989.

B. Plaintiff files suit against defunct companies and seeks appointment of the Receiver over each and every defendant.

On July 14, 2021 – over thirty years after Payne & Keller dissolved – Plaintiff Lenora Childers, Individually and as Personal Representative of the Estate of Lewis Childers, filed a Summons and Complaint in the above-captioned matter in the Richland County Court of Common Pleas, within the South Carolina asbestos docket. Unlike a typical asbestos personal injury suit – which names dozens of defendants – this Summons and Complaint named only ten defendants, one of which was Payne & Keller Company. Over the following months, Plaintiff dismissed one defendant and proceeded to move for appointment of a receiver over each of the remaining nine defendants. The Circuit Court granted every motion. Thus, until recently,¹ all defendants in the case have been defunct companies under a receivership.

Plaintiff moved for the appointment of a receiver for Payne & Keller on August 23, 2021. Notice of the motion was only served on the South Carolina Secretary of State. Four days later, the Circuit Court entered an Order granting the motion and appointing Peter Protopapas to serve as the receiver. (Ex. C, Order Granting Motion to Appoint Receiver for Payne & Keller). The order directed the Receiver to “take any and all steps necessary to protect the interests of Payne & Keller” (Ex. C, Order Granting Motion to Appoint Receiver for Payne & Keller).

C. The Receiver files Third-Party Complaints against insurance companies and related entities.

On February 23, 2022, the Receiver filed an Amended Third-Party Summons and Complaint, naming over twenty-five third-party defendants, consisting of insurance companies,

¹ After Appellants and Travelers filed their respective Notices of Appeal – and almost two years after filing the initial Complaint – Plaintiffs filed a Motion for Leave to Amend, which will add over sixty new defendants.

agencies, and insurance company officers or directors. (Ex. D, Amended Third-Party Complaint). Appellants were among the third-party defendants named in the Amended Third-Party Complaint.

Appellants moved to dismiss the Amended Third-Party Complaint pursuant to Rules 12(b)(8), 12(b)(6) and Rule 14, and alternatively sought a stay and a more definite statement. The Circuit Court indicated in an email from the Court's law clerk that it was denying those motions, but it did not issue a written order. A consent Order noting that all arguments on those issues were preserved followed. This appeal does not involve the denial of those motions.

D. Traveler moves to dismiss and to dissolve the receivership, and Appellants join the portion of that motion seeking to dissolve the receivership.

On August 24, 2022, Travelers Casualty & Surety Company ("Travelers") filed a Motion to Dismiss Third-Party Claims and Dissolve the Payne & Keller Receivership. (Ex. E, Travelers' Motion). Appellants joined in the motion on September 19, 2022, joining to the portions of Travelers' motion that sought to dissolve the Receivership. (Ex. F, Appellants' Motion and Joinder, p. 3). The bases for the motion are straightforward. The receivership is legally invalid.

Under Texas law, a corporation has three years after its dissolution to sue or be sued. Tex. Bus. Org. Code § 11.359(a).² The statute acts as one of repose. The Full Faith and Credit Clause requires this Court to enforce the Texas law here – meaning Payne & Keller can neither sue nor be sued.

The Receiver stands in the shoes of Payne & Keller and has no greater rights than Payne & Keller. *See, e.g., National Cash Register Co. v. Burns*, 217 S.C. 310, 313, 60 S.E.2d 615, 617 (1950) ("A primary concept of law of receivers is that a receiver stands in the shoes of the debtor with respect to the property of the latter . . ."). Thus, the Receiver – standing in Payne & Keller's

² The law was the same at the time of Payne & Keller's dissolution. Tex. Code. Title 32, Art. 1396-7.12 (1984).

shoes –cannot not bring suit, and any suit asserted against Payne & Keller is subject to dismissal. Thus, the receivership is a nullity and should be dissolved.

South Carolina law also does not allow a South Carolina court to create a nationwide receivership over a foreign corporation that does not have any property in the State and that has not had any judgment entered against it. S.C. Code § 15-65-10(4). Payne & Keller did not have any property in this State, and no judgment has entered against the company. Thus, the receivership is legally invalid.

The Receiver filed a memorandum in opposition to Appellants’ and Travelers’ motions. Lacking any argument that the Receivership is valid when suit by and against Payne & Keller is barred by Texas law, the Receiver attempted to open up liability against Payne & Keller by arguing that somehow Payne & Keller’s dissolution – which took place over thirty-five years ago – was a fraudulent attempt to avoid liabilities such as this suit that was filed decades later. Plaintiff proffered no evidence to support this contention.

Travelers filed a Reply on January 25, 2023. Again, Appellants filed a joinder to Travelers’ Reply. (Ex. G, Appellants’ Joinder to Travelers’ Reply). As they did in the initial joinder, Appellants only joined in and adopted by reference the portions of Travelers’ Reply that addressed dissolution of the Receivership. (Ex. G, Appellants’ Joinder to Travelers’ Reply, p. 3).

On January 27, 2023, the Court heard arguments on the motions. On March 31, 2023, the Court entered its Order Denying Appellants’ and Travelers’ motions. (Ex. H, Order Denying Dissolution). This appeal followed.

ARGUMENT

Recognizing the unique harms that can result when an entity is placed into a receivership, the General Assembly long ago determined that the Supreme Court “shall have” jurisdiction and

“shall review upon appeal” any interlocutory order that grants, continues, modifies, or refuses the appointment of a receiver. The Circuit Court’s Order denied Appellants’ Motion to Dissolve the Receivership, thus continuing the unlawful receivership. Moreover, the Order Denying Dissolution fundamentally changed the Receiver’s role. Prior to the Order, the Receiver was ordered to “take any and all steps necessary to protect the interests of Payne & Keller.” Now, the Receiver is being allowed to try to show that Payne & Keller fraudulently procured its dissolution and that the company should lose the protections of a statute of repose. Therefore, the Order Denying Dissolution both continues and modifies the receivership, and the Order is immediately appealable.

I. Appellate courts have express statutory authority – and are required to – review interlocutory orders continuing or modifying receiverships.

South Carolina Code § 14-3-330(4) states:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in cases, and shall review upon appeal:

- (4) An interlocutory order or decree in a court of common pleas . . . granting, continuing, modifying, or refusing the appointment of a receiver.

Thus, the statute both authorizes appellate review -- “shall have appellate jurisdiction” – and mandates review – “shall review upon appeal” of the Order Denying Dissolution. *Id.*

South Carolina’s appellate courts have often found this statute grants appellate jurisdiction over interlocutory orders involving disputes over receiverships. *See Vasiliades v. Vasiliades*, 231 S.C. 366, 98 S.E.2d 810 (1957) (reviewing interlocutory order dissolving receivership even when other parts of the order on appeal were not yet reviewable); *Wrenn v. Wrenn*, 228 S.C. 588, 91 S.E.2d 267 (1956) (reviewing interlocutory order denying motion to appoint receiver); *Lyles v. Williams*, 96 S.C. 290, 80 S.E. 470 (1913) (reviewing interlocutory order denying appointment of

a receiver and dissolving an injunction). The Order Denying Dissolution falls squarely within the statute's grant of appellate review.

II. The General Assembly recognized the importance of immediate access to appellate review of orders continuing or modifying receiverships.

The procedural history of this case highlights one of the exact risks created when a receiver takes over a company – especially a dissolved corporation. Payne & Keller has long been dissolved. It has no risk of facing legal liability because Texas law provides that any suits against a dissolved corporation must be brought within three years of dissolution. Tex. Code. Title 32, Art. 1396-7.12 (1984) This statute of repose gives finality to the corporation. No shareholder or stakeholder in the dissolved Payne & Keller corporation would have any legitimate interest in invalidating that protection and opening the company up to legal liabilities more than thirty years after its dissolution. However, that is exactly what the Receiver is now trying to do.

To make the problem worse, no one with a legitimate interest in opposing the receivership received notice of the Motion for Appointment. As South Carolina has long recognized, the “appointment of a receiver is a drastic remedy, and should be granted only with reluctance and caution.” *Midlands Utility, Inc. v. SCDHEC*, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (1989). However, the Receiver here was appointed with no meaningful review. Plaintiff's Motion to Appoint a Receiver states that the only entity that received notice of the motion was the South Carolina Secretary of State. (Ex. B, Motion for Appointment, p. 2). The Order appointing the Receiver was entered a mere four days after the motion was filed. (Ex. C, Order Appointing Receiver).

Of course, the receivership impacts more than just Payne & Keller. Parties facing claims brought by the Receiver have an interest in the validity of the receivership. Because those parties will not receive notice at the time the receiver is initially appointed, their challenges to the

receivership will inevitably come in the form of a motion to dissolve or modify the receivership. Recognizing this reality, the General Assembly chose to include orders continuing or modifying receiverships within the ambit of reviewable interlocutory orders, and for good reason. By including orders continuing or modifying receiverships within the ambit of appealable, interlocutory orders, the General Assembly ensured that parties facing claims asserted by receivers – such as Appellants here – have an immediate ability to challenge the ongoing existence of the receivership and to access the State’s appellate courts on those issues without awaiting a final adjudication of the entire case.

III. The Order Denying Dissolution continues and modifies the Receivership.

Section 14-3-330 grants appellate jurisdiction for appeal of an order that continues or modifies a receivership. The Order Denying Dissolution does both.

Appellants and Travelers moved to dissolve the receivership for a number of reasons. Payne & Keller cannot bring suit because it has been dissolved for more than three years. Therefore, the receivership is invalid and the receiver – who stands in the shoes of Payne & Keller – lacks standing to sue. Moreover, the receivership in South Carolina over a Texas corporation that existed in Texas and was incorporated and ultimately dissolved under Texas law is improper. Payne & Keller did not own any property located in South Carolina, and there is no basis for the South Carolina court to take control over a Texas corporation.

Faced with the Motion to Dissolve, the Circuit Court had two options: (1) dissolve the Receivership; or (2) continue the Receivership. The Circuit Court chose the latter. It denied the Motion to Dissolve, thus continuing the Receivership. Therefore, this Court has appellate jurisdiction.

The Order also modifies the receivership. Specifically, the order creating the receivership directed the Receiver to “take any and all steps necessary to protect the interests of Payne & Keller whatever they may be.” (Ex. C, Order Appointing Receiver, p. 1). Any rational defendant facing lawsuits for personal injuries thirty-plus years after its dissolution would take steps necessary to raise and preserve its statute of repose defenses.

Rather than relying on the statute of repose – which plainly protects Payne & Keller’s interests – the Receiver opposed Appellants’ and Travelers’ motions by arguing that Payne & Keller somehow fraudulently dissolved with knowledge of potential, future asbestos liabilities. This argument directly contradicts the Receiver’s prior directive to protect Payne & Keller’s interests. The Order Denying Dissolution allows the Receivership to proceed in this entirely new and contrary direction. Now, the Receiver is expected to conduct discovery and to pursue a claim to undo the company’s dissolution. (Ex. H, Order Denying Dissolution, p. 5). Thus, in addition to continuing the legally invalid receivership, the Court’s Order also drastically modifies the Receivership.³

An interlocutory order is appealable if it has the effect of either continuing or modifying the Receivership. The Order Denying Dissolution here does both. Therefore, the matter is properly before this Court on appeal.

IV. The appeal is timely.

Appellants received written notice of entry of the Order Denying Dissolution March 31, 2023. Appellants filed the Notice of Appeal on April 28, 2023. Thus, the appeal was timely filed.

³ To be clear, Appellants deny that the dissolution can be undone. The Receiver relies upon a statute that was enacted years after Payne & Keller dissolved and years after Payne & Keller gained the protection of the statute of repose. The Texas Constitution prohibits retroactive application of the statute. However, this error of law will be dealt with in the merits brief.

CONCLUSION

For the above-stated reasons, this Court has jurisdiction to review the Order Denying Dissolution. Pursuant to the appealability statute, the Court “shall review upon appeal” orders continuing or modifying a receivership. The Order Denying Dissolution does just that. Therefore, the Order Denying Dissolution is subject to immediate appellate review.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

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May 15, 2023

PROOF OF SERVICE

I, the undersigned of the law offices of Murphy & Grantland PA, attorneys for Appellants, 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): Appellant's Response to Court's Appealability Inquiry

Parties Served:

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

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Counsel for Appellant Third-Party Defendant Travelers Casualty and Surety Company

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May 15, 2023



The State of Texas

SECRETARY OF STATE

The undersigned, as Secretary of State of the State of Texas, HEREBY CERTIFIES that the attached is a true and correct copy of the following described instruments on file in this Office:

FRENTX ENTERPRISES COMPANY OF TEXAS

Articles of Dissolution

December 3, 1986



IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, this

7th day of July, A. D. 19 87

EXHIBIT

A

Paul M. Quinn dh
Secretary of State

00056800197

FILED
In the Office of the
Secretary of State of Texas
JAN 03 1986

ARTICLES OF DISSOLUTION

Clerk IN
Corporations Section

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

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

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

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

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

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

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

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

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

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

00056000120

DATED this the 27 day of October, 1986.

By: [Signature]
Bernard Gautier
Its President

By: [Signature]
John J. King
Its Secretary

STATE OF TEXAS
COUNTY OF HARRIS

S
S
S

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.

[Signature]
Notary Public in and for
the State of Texas

My commission expires: _____

Printed Name of Notary

STATE OF TEXAS
COUNTY OF HARRIS

S
S
S

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.

[Signature]
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

3

00056800199

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

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

RESOLVED, that the resolutions of the Board of Directors recommending that the Company be dissolved and liquidated, be and the same are hereby adopted and approved in all respects; and be it

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

FURTHER RESOLVED, that when and as assets of the Company are reduced to cash, provision having been made for the debts and liabilities of the Company, distribution may be made to the shareholders of the Company from time to time, as partial distributions on account of the complete liquidation of the Company, in such amounts as the Board of Directors may from time to time determine; and be it

FURTHER RESOLVED that the proper officers of the Company be and they hereby are authorized and directed to take all such action as they may deem necessary or appropriate to consummate the liquidation and dissolution of the Company, including the execution and delivery of all documents necessary to effectuate the liquidation and dissolution of the Company.

0 0 0 0 0 0 0 0 0 0

DATED: 10-27, 1986

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

By: [Signature]

Title: President

850:33

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

**PLAINTIFF'S MOTION TO APPOINT A RECEIVER OVER PAYNE & KELLER
COMPANY PURSUANT TO S.C. CODE §15-65-10(4)**

Plaintiff, pursuant to S.C. Code §15-65-10(4), moves this Court to appoint a receiver over Payne & Keller Company. This entity is a defendant in the above-captioned action and the Plaintiff would respectfully show the Court as follows:

BACKGROUND

Payne & Keller Company ("Payne & Keller"), was a supplier and installers of asbestos insulation in the southeastern United States during the 1960s, 1970s, 1980s and 1990s. Payne & Keller is a dissolved Texas corporation.¹ With its dissolution, Payne & Keller leaves its creditors, namely the thousands of men and women it exposed to asbestos, without any meaningful entity to proceed against and, apparently, disposed of its assets without regards to those creditors. Now, apparently, all that remains of Payne & Keller is its insurance coverage.

Plaintiff requests that this Court appoint Peter Protopapas as the Receiver over Payne & Keller to determine what assets, including insurance coverage, is available Payne & Keller and

¹ See South Carolina Secretary of State business entities search information attached as Exhibit A.



that the receiver be granted such further and other powers as may be appropriate, including, but not limited to, the acceptance of service of claims, retaining counsel, making claims against insurance policies which may exist and otherwise wholly administrate all of the assets and attendant business of Payne & Keller .

LAW AND ARGUMENT

South Carolina Code §15-65-10(4) state states that a receiver may be appointed by a judge of the circuit court, either in or out of court:

. . . . (4) When a corporation has been dissolved, is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights, and in like cases, of the property within this state of foreign corporations . . .

It is undisputed that Payne & Keller, because of its dissolution/suspension, has forfeited their rights to do business in South Carolina.

Section 15-65-20 requires that notice of this application be provided to the party to the action whose property is sought to be put in the hands of a receiver. Plaintiff, concurrently herewith, has served copies of this motion on the South Carolina Secretary of State.²

CONCLUSION

For the foregoing reasons, the appointment of a receiver for Payne & Keller for all purposes, including, but not limited to taking possession of and disposing of any remaining assets of Payne & Keller is appropriate. Plaintiff requests that this Court issue an order appointing a receiver as soon as practicably possible and for such other and further relief to which they may be entitled. Plaintiff respectfully suggests that Peter Protopapas be appointed the receiver over Payne & Keller.

² Plaintiff served the South Carolina Secretary of State. *See* Affidavit of Charles W. Branham, III, Confirmation of Service Attached as Exhibit A.

Respectfully submitted,

s/Theile B. McVey

Theile B. McVey (SC Bar No. 16682)

KASSEL MCVEY ATTORNEYS AT LAW

1330 Laurel Street

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Jonathan M. Holder (SC Bar No. 77935)

Charles W. Branham, III (To be admitted *Pro Hac Vice*)

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ATTORNEYS FOR PLAINTIFF

August 23, 2021

Columbia, South Carolina.

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

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

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



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

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

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

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

AND IT SO ORDERED this ____ day of _____ 2021.

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



Richland Common Pleas

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

So Ordered

Jean H. Toal

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

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

2021-CP-40-03484

Plaintiff,

In Re:

Asbestos Personal Injury Litigation Coordinated
Docket

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.,

AMENDED SUMMONS

Defendants.

Flame Refractories, Inc., United Construction
Co. of Rome, Inc., Wind Up, Ltd., Individually
and as Successor-in-Interest to Pipe & Boiler
Insulation, Inc. f/k/a Carolina Industrial
Insulating Co., 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 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., and Compass Risk Services, LLC

Third-Party Defendants.

TO THE ABOVE-NAMED THIRD-PARTY DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Amended Third Party Complaint in this action, a copy of which is hereby served on you, and to serve a copy of your Answer to the said Amended Third-Party Complaint upon the subscribers at 2110 N. Beltline Blvd., Columbia, South Carolina 29204, within thirty (30) days after service hereof, exclusive of

the day of such service, and if you fail to answer the Amended Third-Party Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in such Amended Third-Party Complaint.

Respectfully submitted,

Dated: February 23, 2022

RIKARD & PROTOPAPAS, LLC

By: s./ Brian M. Barnwell

Brian M. Barnwell (SC Bar 78249)
Rikard & Protopapas, LLC
2110 N. Beltline Blvd.,
Columbia, South Carolina 29204
803.978.6111
bb@rplegalgroup.com

Attorneys for Third-Party Plaintiffs

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

2021-CP-40-03484

Plaintiff,

v.

In Re:

Asbestos Personal Injury Litigation Coordinated
Docket

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

AMENDED THIRD-PARTY COMPLAINT

Defendants.

Flame Refractories, Inc., United Construction
Co. of Rome, Inc., Wind Up, Ltd., Individually
and as Successor-in-Interest to Pipe & Boiler
Insulation, Inc. f/k/a Carolina Industrial
Insulating Co., 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 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., and Compass Risk Services, LLC

Third-Party Defendants.

COMES NOW Flame Refractories, Inc.; United Construction Co. of Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co., and Payne & Keller Company (collectively, "Third-Party Plaintiffs") by

and through their duly appointed receiver Peter D. Protopapas (the "Receiver"), complaining of the third-party defendants Zurich American Insurance Company (Individually and as Successor to Northern Insurance Company of New York, Maryland American General Insurance Company, and Maryland Casualty Company); Allstate Insurance Company; John Tighe; Sean Antony Beatty; Dennis William Cahill; Catherine Ann Carlino; Andre Lefebvre; David Dean Shumway; Gil Chandler, Michael Davenport; Linda Young Pettigrew; Gwyn Wallace Fuller; Daniel Robert Keddie; Julie Ann Fortune; Michael John Crall; James Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.; Arrowpoint Capital Corp.; Admiral Insurance Company; Continental Insurance Company (Individually and as Successor in interest to Harbor Insurance Company); Hartford Accident and Indemnity Company, Travelers Casualty & Surety Company f/k/a Aetna Casualty & Surety Company, National Union Fire Insurance Company of Pittsburgh, PA, Medmarc Casualty Insurance Company, Individually and as Successor in Interest to Dependable Insurance Company, Inc., Berkshire Hathaway Specialty Insurance Company f/k/a Stonewall Insurance Company, Individually and as Successor in interest to Stonewall Surplus Lines Insurance Company, Lexington Insurance Company, First State Insurance Company, Birmingham Fire Insurance Company, Certain Underwriters at Lloyd's of London and various London Market Companies, South Carolina Property and Casualty Insurance Guaranty Association, R.L. Jarrett (Underwriting) Agency, Inc., U.S. Risk, L.L.C., Rexel USA, Inc., and Compass Risk Services, LLC (collectively, "Third-Party Defendants"), who through undersigned counsel respectfully show unto the Court as follows:

PARTIES

1. The Third-Party Plaintiffs appearing by and through their duly appointed Receiver, who maintains his principal place of business in Richland County, South Carolina, bring this amended third-party complaint. This Court appointed the Receiver to undertake actions to administer all assets of the Third-Party Plaintiffs, including, without limitation, their insurance policies. *See* Ex. A, Flame Refractories Receivership Order; Ex. B, United Construction Receivership Order; Ex. C, Pipe & Boiler Receivership Order, Ex. D, Payne & Keller Receivership Order, and Ex. E, Payne & Keller Order Granting Payne & Keller Motion to Clarify.
2. The Receiver was appointed over Payne & Keller and entities related to the historic operations of Payne & Keller Company, including Payne & Keller, Inc.; Payne & Keller of Louisiana, Inc.; Bayou Maintenance, Inc.; Bayou Maintenance and Constructors, Inc.; Payne & Keller Gulf Coast, Inc.; Frentex Enterprises Company; and Frentex Enterprises Company of Texas (collectively “Payne & Keller”). This Court appointed the Receiver to administer all assets of Payne & Keller, including without limitation its insurance policies. (*See* Ex. D at 1–2 (“This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Payne & Keller as well as any claims related to the actions, or failures to act, of Payne & Keller’s insurance carriers.”); *see also* Ex. E.
3. The Receiver is informed and believes that Third-Party Defendant Zurich American Insurance Company (Individually and as Successor to Northern Insurance Company of New York, Maryland American General Insurance Company, and Maryland Casualty Company) is a

corporation organized under the laws of New York, with its principal place of business located in Illinois.

4. The Receiver is informed and believes that Third-Party Defendant Allstate Insurance Company is a corporation organized under the laws of Illinois, with its principal place of business located in Illinois.
5. The Receiver is informed and believes the following with regard to the individual Third-Party Defendants named in the complaint, all of whom hold roles at Arrowood, or held roles at Arrowood at relevant times (collectively, the "Individual Arrowood Third-Party Defendants"):
 - a. John Tighe ("Tighe") is, and at all relevant times has been, the President and Chief Executive Officer, and Chairman of the Board of Arrowood. Tighe owns 20% of Arrowpoint Capital.
 - b. Sean Anthony Beatty ("Beatty") is, and at all relevant times has been, a Senior Vice President and the Chief Financial Officer, as well as a director of Arrowood. Beatty owns 12.8% of Arrowpoint Capital.
 - c. Dennis William Cahill ("Cahill") is, and at all relevant times has been, a Senior Vice President and Planning Governance Executive, as well as director of Arrowood. Cahill owns 12.8% of Arrowpoint Capital.
 - d. Catherine Ann Carlino ("Carlino") is, and at all relevant times has been, a Senior Vice President, a Planning & Governance Executive, and a director of Arrowood.
 - e. Andre Lefebvre ("Lefebvre") is, and at all relevant times has been, a Senior Vice President and Financial Risk Officer, as well as a director of Arrowood.

- f. David Dean Shumway ("Shumway") is, and at all relevant times has been, a Senior Vice President and Chief Investment Officer, as well as a director of Arrowood.
 - g. Gil Chandler ("Chandler") is, and at all relevant times has been, a Vice President and Assistant Corporate Secretary, as well as a director of Arrowood.
 - h. Michael Davenport ("Davenport") is, and at relevant times has been, a Vice President and Controller, as well as a director of Arrowood.
 - i. Linda Young Pettigrew ("Pettigrew") is, and at all relevant times has been, the Corporate Secretary of Arrowood.
 - j. Gwyn Wallace Fuller ("Fuller") is, and at all relevant times has been, the Treasurer of Arrowood.
 - k. Daniel Robert Keddie ("Keddie") is a director, and all relevant times has been a Vice President and Chief Actuary (as well as the Appointed Actuary) of Arrowood.
 - l. Julie Ann Fortune ("Fortune") at relevant times was a Senior Vice President and Chief Claims Officer, as well as a director of Arrowood.
 - m. John Crall ("Crall") at relevant times was a director of Arrowood.
 - n. James Francis Meehan ("Meehan") was at relevant times a Senior Vice President and the General Counsel, as well as a director of Arrowood.
 - o. Larry Gene Simmons ("Simmons") was at relevant times a director of Arrowood.
- 6. The Receiver is informed and believes that Arrowpoint Group, Inc. is a Delaware corporation with its principal place of business in North Carolina.
 - 7. The Receiver is informed and believes that Arrowpoint Capital Corporation is a Delaware corporation with its principal place of business in North Carolina.

8. The Receiver is informed and believes that Admiral Insurance Company is a corporation organized under the laws of the state of Delaware with its principal place of business in New Jersey.
9. The Receiver is informed and believes that Continental Insurance Company (Individually and as Successor in interest to Harbor Insurance Company), is a corporation organized under the laws of the state of Illinois with its principal place of business in Pennsylvania.
10. The Receiver is informed and believes that Hartford Accident and Indemnity Company is organized under the laws of the state of Connecticut with its principal place of business in Connecticut.
11. Plaintiff is informed and believes that defendant First State Insurance Company ("First State" or "Hartford") is a corporation organized under the laws of the State of Connecticut, with its principal place of business located in the Commonwealth of Massachusetts. Further, First State agreed that "in any suit instituted against it upon this contract this Company will abide by the final decision of such Court or any Appellate Court in the event of an appeal." Moreover, by including the "service of suit clause" in its contract of insurance with Payne & Keller, Hartford has consented to the jurisdiction of this Court. In pertinent part, the Hartford Policies contain the following service of suit clause:

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

By virtue of the foregoing service of suit clause, First State agreed to comply with all requirements necessary to give this Court jurisdiction, and further agreed that all matters pertinent

to the instant dispute shall be determined by this Court. The portion of the “service of suit” clause which states that “all matters arising hereunder shall be determined in accordance with the law and practice of such Court” is a valid “choice of forum” clause. First State has consented to the jurisdiction of this Court and, accordingly, this action may not be removed or transferred to any other court.

12. Plaintiff is informed and believes that defendant Birmingham Fire Insurance Company (“Birmingham Fire”) is a corporation organized under the laws of New York with its principal place of business in New York.

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

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

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

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

responsible for the obligations of defendants National Union, Lexington, Birmingham Fire, Continental and Stonewall, all of whose claims decisions are also made by Resolute Management.

14. Plaintiff is informed and believes that the Guaranty Association is an association formed under the laws of South Carolina.
15. 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.
16. 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.
17. The Receiver is informed and believes that Rexel USA, Inc. is a corporation organized under the laws of Delaware with its principal place of business in the State of Texas.
18. The Receiver is informed and believes that Compass Risk Services, LLC is a limited liability company organized under the laws of Texas with its principal place of business in the State of Texas.
19. The Receiver believes that one or more additional insurance companies issued or may have issued policies of insurance to one or more of the Third-Party Plaintiffs that are responsive to the losses described herein ("Additional Third-Party Defendants"). Such Additional Third-Party Defendants may include one or more insurance companies managed by organizations located in New Hampshire, Massachusetts, or other jurisdictions. When the identities of these Additional Third-Party Defendants become known to Third-Party Plaintiffs, this Complaint may be amended *nunc pro tunc* to state the true identity of such Additional Third-Party Defendants.

JURISDICTION

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

VENUE

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. Third-Party Plaintiffs' historic operations, and the historic operations of their predecessors, included the installation, repair, replacement, removal, or disturbance of thermal insulation and other building materials. Those operations allegedly exposed persons to asbestos who thereby suffered bodily injury or personal injury (the "Asbestos Allegations"). The alleged bodily injury or personal injury resulting from the Asbestos Allegations has resulted in suits against Third-Party Plaintiffs ("Asbestos Suits"), including the instant suit filed by Lenora Childers, Individually and as Personal Representative of the Estate of Lewis C. Childers.

THIRD-PARTY PLAINTIFF CAROLINA INDUSTRIAL INSULATION

A. The Zurich Policies

23. Third-Party Defendant Zurich American Insurance Company (as Successor to Northern Insurance Company of New York) issued primary general liability policies (“The Zurich Policies”) to Carolina Industrial Insulation Co. (“Carolina Industrial”).¹ The Zurich Policies have standard terms and conditions. The Zurich Policies have a duty to defend or to reimburse defense costs on behalf of Carolina Industrial against any and all Carolina Industrial Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false, or fraudulent. The duty to defend is joint, several, indivisible, and supplemental. The Zurich Policies require Zurich fully to defend any Carolina Industrial Asbestos Suit alleging bodily injury during any Zurich Policy period. The Zurich Policies have a separate duty fully to indemnify Carolina Industrial from and against any and all Carolina Industrial Asbestos Suits with bodily injury taking place during any Zurich Policy period. It is the burden of Zurich to prove any limitation on or exclusion of coverage. Specifically, Zurich issued primary general liability coverage to Carolina Industrial for at least the three policy periods from January 1, 1973 – January 1, 1976.
24. The Receiver for Carolina Industrial continues to require all pertinent parties to conduct a diligent search for additional policies issued by Zurich or any of its predecessors, successors, subsidiaries, or affiliates. Should additional policies be located, this Amended Third-Party Complaint may be amended to include such additional Zurich Policies.

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

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

B. The Allstate Policies

26. Third-Party Defendant Allstate issued primary general liability policies to Carolina Industrial (“The Allstate Policies”). The Allstate Policies have standard terms and conditions. The Allstate Policies have a duty to defend or to reimburse defense costs on behalf of Carolina Industrial against any and all Carolina Industrial Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false or fraudulent. The duty to defend is joint, several, indivisible and supplemental. The Allstate Policies require Allstate fully to defend any Carolina Industrial Asbestos Suit alleging bodily injury during any Allstate Policy period. The Allstate Policies have a separate duty fully to indemnify Carolina Industrial from and against any and all Carolina Industrial Asbestos Suits with bodily injury taking place during any Allstate Carolina Industrial Policy Period. It is the burden of Allstate to prove any limitation on or exclusion of coverage. Specifically, Allstate issued primary general liability coverage to Carolina Industrial for at least the three policy periods January 1, 1970 – January 1, 1973.

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

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

C. The Continental Policies

29. On information and belief, Third-Party Defendant Continental issued general liability policies to Carolina Industrial (“The Continental Carolina Industrial Policies”). The Continental Carolina Industrial Policies have standard terms and conditions. The Continental Carolina Industrial Policies have a duty to defend or to reimburse defense costs on behalf of Carolina Industrial against any and all Carolina Industrial Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false, or fraudulent. The duty to defend is joint, several, indivisible, and supplemental. The Continental Carolina Industrial Policies require Continental fully to defend any Carolina Industrial Asbestos Suit alleging bodily injury during any Continental Carolina Industrial Policy period. The Continental Carolina Industrial Policies have a separate duty fully to indemnify Carolina Industrial from and against any and all Carolina Industrial Asbestos Suits with bodily injury taking place during any Continental Carolina Industrial Policy period. It is the burden of Continental to prove any limitation on or exclusion of coverage. Specifically, upon information and belief, Continental issued primary general liability coverage to Carolina Industrial for multiple policy periods between January 1, 1978 and January 1, 1983.
30. The Receiver for Carolina Industrial continues to require all pertinent parties to conduct a diligent search for additional policies issued by Continental or any of its predecessors, successors, subsidiaries or affiliates. Should such additional policies be located, this Amended Third-Party Complaint will be amended to include such additional Continental Carolina Industrial Policies.

31. Continental has failed, or will fail, fully to acknowledge or accept its insuring obligations under the Continental Carolina Industrial Policies. An actual and justiciable dispute exists between these parties.

THIRD-PARTY PLAINTIFF FLAME REFRACTORIES

D. The Admiral Policies

32. Third-Party Defendant Admiral Insurance Company issued general liability policies to Flame Refractories ("The Admiral Flame Refractories Policies"). The Admiral Flame Refractories Policies have standard terms and conditions. The Admiral Flame Refractories Policies have a duty to defend or to reimburse defense costs on behalf of Flame Refractories against any and all Flame Refractories Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false, or fraudulent. The duty to defend is joint, several, indivisible, and supplemental. The Admiral Flame Refractories Policies require Admiral fully to defend any Flame Refractories Asbestos Suit alleging bodily injury during any Admiral Flame Refractories Policy period. The Admiral Flame Refractories Policies have a separate duty fully to indemnify Flame Refractories from and against any and all Flame Refractories Asbestos Suits with bodily injury taking place during any Admiral Flame Refractories Policy period. It is the burden of Admiral to prove any limitation on or exclusion of coverage. Specifically, upon information and belief, Admiral issued primary general liability coverage to Flame Refractories for multiple policy periods between 1970 and April 1, 1987.
33. The Receiver for Flame Refractories continues to require all pertinent parties to conduct a diligent search for additional policies issued by Admiral or any of its predecessors, successors,

subsidiaries or affiliates. Should such additional policies be located, this Amended Third-Party Complaint will be amended to include such additional Admiral Flame Refractories Policies.

34. Admiral has failed to fully acknowledge or accept its insuring obligations under the Admiral Flame Refractories Policies. An actual and justiciable dispute exists between these parties.

E. The Hartford Policy

35. Third-Party Defendant Hartford Accident and Indemnity Company issued an excess liability policy to Flame Refractories² for at least one policy period from April 1, 1985 to April 1, 1986 (“The Hartford Flame Refractories Policy”). The Hartford Flame Refractories Policy has standard terms and conditions. It is the burden of Hartford to prove any limitation on or exclusion of coverage.

36. The Receiver for Flame Refractories continues to require all pertinent parties to conduct a diligent search for additional policies issued by Hartford or any of its predecessors, successors, subsidiaries or affiliates. Should additional policies be located, this Amended Third-Party Complaint may be amended to include such additional Hartford Flame Refractories Policies.

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

F. The First State Policies

38. Third-Party Defendant First State Insurance Company issued an excess liability policy to Flame Refractories for at least two policy periods: from April 1, 1978 to April 1, 1979 and from April 1, 1979 to June 1, 1979 (“The First State Flame Refractories Policy”). The First

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

State Flame Refractories Policy has standard terms and conditions. It is the burden of Hartford to prove any limitation on or exclusion of coverage.

39. The Receiver for Flame Refractories continues to require all pertinent parties to conduct a diligent search for additional policies issued by First State or any of its predecessors, successors, subsidiaries or affiliates. Should additional policies be located, this Amended Third-Party Complaint may be amended to include such additional First State Flame Refractories Policies.

THIRD-PARTY PLAINTIFF PIPE & BOILER INSULATION COMPANY

F. The Arrowood Policies

40. Arrowood Indemnity Company, formerly known as Security Insurance Company of Hartford, issued general liability policies to Pipe & Boiler (“The Arrowood Policies”). Specifically, Arrowood issued primary general liability coverage to Pipe & Boiler for at least the five policy periods January 1, 1981 – January 1, 1986, and issued umbrella coverage to Pipe & Boiler for at least the three policy periods January 1, 1983 – January 1, 1986.
41. Arrowood has failed fully to acknowledge or accept its insuring obligations under the Arrowood Policies. An actual and justiciable dispute exists between the Receiver and Arrowood.

i. The ownership and control of Arrowood³

42. Arrowood, formerly Royal Indemnity Company, was previously a member of the Royal & Sun Alliance USA, Inc. (“RSAUSA”) insurance group, whose ultimate parent was RSA Insurance Group plc. Arrowood is licensed to sell insurance in all 50 states.
43. In September 2003, RSAUSA announced a strategic change that resulted in the sale of the majority of its businesses under various renewal rights transactions. In 2004, RSAUSA also implemented a Plan of Reorganization and Consolidation that reduced the number of its insurance companies in the United States.
44. On March 3, 2007, Arrowpoint Capital, which was formed in 2006 and owned by Arrowood’s management and independent directors, purchased 100% of the interests of Arrowpoint General Partnership, the U.S. holding entity which owned all of the RSAUSA businesses. The approval of the transaction by the Delaware Department of Insurance (“DOI”) resulted in the Delaware Insurance Commissioner’s Order (“Order”) which subjected Arrowood to certain requirements. Those requirements included that Arrowood’s then parent, RSAUSA, provide Arrowood with a stop loss reinsurance agreement. According to a 2014 financial examination report for Arrowood issued by the Delaware DOI, by then, the RSAUSA stop loss reinsurance agreement had already become fully incurred, and there are no remaining limits of liability under the stop loss reinsurance agreement available for unpaid claims.
45. In addition, in accordance with the Order, Arrowood cannot pay dividends or sell or distribute assets in the ordinary course of business without the Delaware DOI’s approval (which the

³ The following allegations pertain specifically to the acts and omissions of the Individual Arrowood Third-Party Defendants, Arrowpoint Group, Inc., and Arrowpoint Capital Corp., herein collectively referred to as “the Arrowood Defendants.”

Individual Arrowood Third-Party Defendants have wrongfully circumvented or violated the order by paying themselves exorbitant salaries and benefits far outside the norm for insurance companies actively engaged in business, much less companies in runoff whose only business is adjusting claims).

46. The ownership structure of Arrowood has, and the officers and directors of Arrowood have, changed very little since 2007.

47. The Individual Arrowood Third-Party Defendants, in their capacities for Arrowood and as officers and directors of Arrowood's parent companies (Arrowpoint Group and Arrowpoint Capital), have maintained absolute control of Arrowood over the relevant years. Maintenance of such total control has been central to the Arrowood Third-Party Defendants' ability to engage in the wrongful conduct set forth in this complaint.

48. A critical component of the application of RSAUSA to spin off what is now Arrowood was the commitment of RSAUSA to infuse an additional \$287.5 million into the insurance companies for the specific stated purposes of payment of policyholder claims. As the then Delaware Insurance Commissioner concluded:

[I]n the event of continued adverse development beyond that projected by the Applicants (but consistent with the stressed financial conditions considered by the Department in its financial analysis, the British parent's \$287.5 million capital infusion may be barely sufficient to cover all outstanding claims.

In the Matter of The Proposed Acquisition of Royal Indemnity Company, Insurance Department of the State of Delaware, Docket No. 313, Decision and Final Order at 6 (Feb. 20, 2007).

49. Little did the (non-Delaware) insurance regulators know that the plan was or morphed into one to use a substantial part of that \$287.5 million not to pay policyholder claims but, instead, to wrongfully pay exorbitant salaries to Arrowood management and “management fees” to Arrowpoint.

ii. *Insurance companies are regulated to protect policyholders, and their officers, directors, and ultimate control persons owe the insurance companies’ policyholders a duty of care.*

50. Insurance companies are regulated to protect consumers. As the National Association of Insurance Commissioners (“NAIC”) has written:

The fundamental reason for government regulation of insurance is to protect American consumers. Insurance is more heavily regulated than other types of business because of the complexity of the insurance contracts, the lack of sufficient information for insurance consumers to adequately shop for prices and adequacy of coverage and because insurance contracts are generally contracts of adhesion. Conceptually insurance regulation is very simple. The public wants two things from insurance regulators. **They want solvent insurers who are financially able to make good on the promises they have made** and they want insurers to treat policyholders and claimants fairly. All regulatory functions will fall under either solvency regulation or market regulation to meet these two objectives. State insurance regulatory systems are accessible and accountable to the public and sensitive to local social and economic conditions. State regulation has proven that it effectively protects consumers and ensures that promises made by insurers are kept. Insurance regulation is structured around several key functions, including insurer licensing, producer licensing, product regulation, market conduct, financial regulation and consumer services.

NAIC and the Center for Insurance Policy and Research, State Insurance Regulation, available at https://www.naic.org/documents/topics_white_paper_hist_ins_reg.pdf, at 2 (last accessed Jan. 20, 2022) (emphasis added).

51. Indeed, the insurance statutes and regulations are designed to require the interests of policyholders to be of paramount concern for the officers, directors, and other persons who

exercise ultimate control over regulated and licensed insurance companies. For example, every state has detailed restrictions on transactions within an insurance holding company system (regulated by state insurance Holding Company Acts) to make sure that an insurance company does not improperly transfer funds to the detriment of policyholders. Another example is debt. If an insurance company wants to borrow money, unlike a non-regulated company, any such debt is subordinated to the interests of policyholders and evidenced by what is referred to as a "surplus note," such that repayment is subject to regulatory approval.

52. Insurers must be operated by individuals who are honest and trustworthy. Indeed, every year, the signatories to the Arrowood statutory financials must personally attest to the veracity of such information, stating:

The officers of this reporting entity being duly sworn, each depose and say that they are the described officers of said reporting entity, and that on the reporting period stated above, all of the herein described assets were the absolute property of the said reporting entity, free and clear from any liens or claims thereon, except as herein stated, and this statement, together with related exhibits, schedules, and explanations therein contained, annexed or referred to, is a full and true statement of all the assets and liabilities and of the condition and affairs of the said reporting entity as of the reporting period stated above, and of its income and deductions therefrom for the period ended, and have been completed in accordance with the NAIC Annual Statement Instructions and Accounting Practices and Procedures manual except to the extent that (1) state law may differ; or (2) that state rules or regulations require differences in reporting not related to accounting practices and procedures, according to the best of their information, knowledge, and belief, respectively. Furthermore, the scope of this attestation by the described officers also includes the related corresponding electronic filing with the NAIC, when required, that is an exact copy (except for formatting differences due to electronic filing) of the enclosed statement. The electronic filing may be requested by various regulators in lieu of or in addition to the enclosed statement.

See, e.g., Annual Statement as of December 31, 2020 of the Condition and Affairs of the Arrowood Indemnity Company at 1.

53. Insurance company accounting is slightly different than GAAP accounting. An insurer has assets and liabilities with the net difference called the “surplus” or “policyholders’ surplus.” Policyholders’ surplus (together with the company’s stated capital) is roughly equivalent to the net worth of the insurer. As liabilities for losses and expenses increase or assets decrease, the policyholders’ surplus is diminished.

54. Insurance companies must set loss reserves with integrity:

Reserves are liabilities. They reflect an insurer’s financial obligations with respect to the insurance policies it has issued. An insurer’s two major liabilities are loss reserves and unearned premium reserves. Loss reserves are an insurance company’s best estimate of what it will pay in the future for claims. Unearned premium reserves represent the premiums paid for coverage that has not yet been used because the policy has not expired. If the policy was cancelled by the policyholder, for example, the insurer would have to return the dollar amount of unused coverage.

Loss reserves are generally the largest liability on an insurer’s balance sheet. When a claim is filed, a reserve is established for payment of that claim. Property claims are usually clear-cut and are paid soon after a claim is filed. But with product liability and other so-called long tail coverages, the total harm caused may not be apparent for some time and the ultimate cost of claims may not be known for years, especially in complex cases that are litigated. In such cases, claims adjusters and actuaries continuously reevaluate costs as new information on the claim becomes available and adjust reserves accordingly based on their experience and judgment.

Companies pay considerable attention to their loss reserves. **Serious under-reserving may cause an insurer to over-estimate its policyholder surplus. . . . making its financial health appear better than it is.**

Insurance Information Institute, Financial Reporting, available at: <https://www.iii.org/publications/commercial-insurance/how-it-functions/financial-reporting> (last accessed Jan. 20, 2022) (emphasis added).

55. “Loss reserves” are estimates of unpaid losses that have been booked by an insurer to be paid in the future. There are, in the most general sense, two different types of loss reserves

established by property and casualty insurers. One is a case reserve for reported losses. A case reserve should be a good faith estimate of the amount for which a particular claim will ultimately be settled or adjudicated.

56. The other type of loss reserves that an insurer is required to establish is called “IBNR” or “incurred but not reported” loss reserves. IBNR is calculated by the insurer’s appointed actuary using various actuarial tools to estimate (a) losses that have occurred but have not been reported and (b) adverse development of case reserves on known losses (these are also at times referred to as “Bulk Reserves”).
57. In addition to loss reserves, insurance companies must establish reserves for expenses. There are two main types of expenses for a typical operating insurer. One is called “Allocated Loss Adjustment Expense” or “ALAE.” ALAE is generally attributed to the processing of specific insurance claims. Examples of ALAE are independent adjusters and outside defense counsel with respect to a particular claim.
58. In contrast, “Unallocated Loss Adjustment Expenses,” or “UALAE,” are internal costs and expenses incurred by an insurance company that cannot be associated with specific claims but are related to the claims adjustment process, such as administrative and internal expenses related to the settlement of claims. Examples of UALAE are employees acting in the capacity of claims managers handling claims, establishing loss reserves, providing authority to settle claims, and making coverage determinations.
59. “Incurred losses” are a combination of amounts that are paid for losses, together with loss reserves on reported claims. If an insurance company is adequately reserved, as unpaid losses become paid losses, the incurred amount should not materially change, as the amount simply

is recharacterized from a “reserved” amount to a “paid” amount. The same is true for loss adjustment expenses.

60. All of those reserves—incurred loss reserves, ALAE, ULAE, and IBNR/Bulk Reserves—in the aggregate are commonly referred to as the “carried reserves” of the insurer.

61. Every property and casualty insurer domiciled in Delaware, such as Arrowood, is required on a yearly and quarterly basis under 18 Del. Code § 526A to file with regulators an Annual Statement and Quarterly Statement, setting forth detailed information regarding, *inter alia*, its case reserves, IBNR and Bulk reserves, loss adjustment expenses, and “other underwriting expenses.” Every insurer must file those Statements with the regulators in every state in which it is licensed.

62. In addition, every insurer must annually file a Management Discussion and Analysis (“MD&A”). The purpose of the MD&A is to add qualitative information to the quantitative Annual Statement. As the Securities and Exchange Commission has explained,

The Commission has long recognized the need for a narrative explanation of the financial statements, because a numerical presentation and brief accompanying footnotes alone may be insufficient for an investor to judge the quality of earnings and the likelihood that past performance is indicative of future performance. MD&A is intended to give the investor an opportunity to look at the company through the eyes of management by providing both a short and long-term analysis of the business of the company.

Securities and Exchange Commission, Securities Act Release No. 6711 (April 24, 1987) [52 FR 13715].

63. Moreover, every property and casualty insurance company doing business in Delaware, unless exempt (which Arrowood is not), is required to submit to the Delaware DOI the opinion of an appointed actuary, entitled “Statement of Actuarial Opinion,” with supporting documentation

on a yearly basis with respect to the loss and expense reserves established and reported by the company. *See* 18 Del. Code. § 1132.

64. The critical role of the Appointed Actuary cannot be overstated, particularly for an insurer such as Arrowood which as of the spin-off had significant asbestos liabilities. The Appointed Actuary must be a member of a professional actuarial association that requires adherence to the same Code of Professional Conduct promulgated by the actuarial credentialing societies, requires adherence to the U.S. Qualification Standards, and participates in the Actuarial Board for Counseling and Discipline when its members are practicing in the U.S.
65. The Appointed Actuary must report to the Board of Directors each year on the items within the scope of the Actuarial Opinion. The Actuarial Opinion and the Actuarial Report must be made available to the Board of Directors. The Appointed Actuary must explicitly identify whether his/her actuarial opinion provides a reasonable determination of the insurer's reserves. In so doing, the Appointed Actuary must provide relevant comment paragraphs to address Company-Specific Risk Factors and the risk of material adverse deviation.
66. When the insurer's carried reserve amount is less than the minimum amount that the Appointed Actuary believes is reasonable, the Appointed Actuary should issue a Statement of Actuarial Opinion that the carried reserve amount does not make a reasonable provision for the liabilities associated with the specified reserves. In addition, the Appointed Actuary should disclose the minimum amount of reserves that the Appointed Actuary believes is reasonable.
67. As a matter of insurance law and/or regulation promulgated by the NAIC, other key elements of the work of the Appointed Actuary include:

- a. A description of the Appointed Actuary's relationship to the Company, with clear presentation of the Appointed Actuary's role in advising the Board of Directors and/or management regarding the carried reserves. The Actuarial Report should identify how and when the Appointed Actuary presents the analysis to the Board of Directors and, where applicable, to the officer(s) of the Company responsible for determining the carried reserves.
- b. An exhibit that ties to the Annual Statement and compares the Appointed Actuary's conclusions to the carried amounts consistent with the segmentation of exposure or liability groupings used in the analysis. The Appointed Actuary's conclusions include the Appointed Actuary's point estimate(s), range(s) of reasonable estimates, or both.
- c. An exhibit or appendix showing the change in the Appointed Actuary's estimates from the prior Actuarial Report, including extended discussion of factors underlying any material changes. The exhibit or appendix should illustrate the changes on a net basis but should also include the changes on a gross basis, if relevant. If the Appointed Actuary is newly appointed and does not review the work of the prior Appointed Actuary, then the Appointed Actuary should disclose this.
- d. Extended comments on trends that indicate the presence or absence of risks and uncertainties that could result in material adverse deviation.
- e. Extended comments on factors that led to unusual IRIS ratios for One-Year Reserve Development to Policyholders' Surplus, Two-Year Reserve Development to

Policyholders' Surplus, or Estimated Current Reserve Deficiency to Policyholders' Surplus, and how these factors were addressed in prior and current analyses.

iii. ***NAIC IRIS Ratios are designed to uniformly measure solvency and liquidity to highlight troubled companies for state insurance regulators.***

68. The NAIC Insurance Regulatory Information System (IRIS) is a collection of analytical solvency tools and databases designed to provide state insurance departments with an integrated approach to screening and analyzing the financial condition of insurers operating within their respective states. IRIS is intended to assist state insurance departments in targeting resources to those insurers in greatest need of regulatory attention.
69. The IRIS Ratios are a set of ratios designed to measure solvency and liquidity. They are calculated from insurers' annual statements that are filed with the NAIC, and insurers that fail four or more tests can be placed under the supervision of their domicile regulator.
70. IRIS Ratios are particularly important where an insurer, like Arrowood, is licensed nationally, since most regulators have limited resources and cannot spend significant time and attention on foreign insurers licensed but not domiciled in their state. The NAIC IRIS Ratios provide the non-domiciliary regulators with important guidance as to the financial wherewithal of the foreign insurer. If an insurer is outside of more than four (4) of the NAIC Ratios, the insurer will come to the attention of the non-domiciliary regulators as a troubled company.
71. Delaware insurance regulations also require that an "Enterprise Risk Report" be filed by the "ultimate controlling person" of an insurer, which here is Arrowood Capital:

The ultimate controlling person of an insurer required to file an enterprise risk report pursuant to Section 5004(1) of the Act shall furnish the required information on Form F, hereby made a part of these regulations.

19 Del. Reg. 642 (2016).

72. Enterprise Risk is a defined term in insurance regulation. Under Delaware regulations,

“Enterprise risk” – The term ‘enterprise risk’ shall mean any activity, circumstance, event or series of events, involving 1 or more affiliates of an insurer that, if not remedied promptly, is likely to have a material adverse effect upon the financial condition or liquidity of the insurer or its insurance holding company system as a whole, including, but not limited to, anything that would cause the insurer’s risk-based capital to fall into company action level as set forth in § 5803 of this title or would cause the insurer to be in hazardous financial condition as set forth in Section 3 of Department of Insurance Regulation 304 – Standards and Commissioner’s Authority for Companies Deemed to be in Hazardous Financial Condition [18 DE Admin. Code § 304-3.0].

18 Del. Code § 5001(4).

73. The foregoing statutory requirements were enacted to impose duties upon the officers, directors, and ultimate controlling persons of insurance companies doing business or domiciled in Delaware to protect the solvency of licensed insurers for the benefit of their policyholders.

74. In addition to the Delaware insurance laws, the Arrowood Third-Party Defendants at all times were well aware of Arrowood’s obligation to comply with the insurance laws and regulations in each state in which it was licensed to sell insurance (all 50 states in the case of Arrowood) and, according to Schedule T of Arrowood’s Annual Statement, Arrowood has, in varying amounts, significant insurance liabilities in every state other than North Dakota and Wyoming.

75. Insurers have a statutory obligation to be solvent. Under applicable Delaware law, Title 18, Chapter 59 § 5901(a), “The capital of a stock insurer . . . shall be deemed to be impaired, and the insurer shall be deemed to be insolvent, when such insurer is not possessed of assets at least equal to all liabilities and required reserves together with its total issued and outstanding capital stock, it a stock insurer, . . . required by this title to be maintained for the kind or kinds of insurance it is then authorized to transact.”

76. Under 18 Del. Code § 5802, Arrowood, like every Delaware domestic insurer, is required to prepare and submit by March 1 of each year to the Delaware Insurance Commissioner a report of its RBC levels as of the end of the calendar year just ended, “in a form as is required by the RBC instructions.” “RBC instructions” is a phrase defined as “the RBC report including risk-based capital instructions adopted by the NAIC [National Association of Insurance Commissioners]; as such, RBC instructions may be amended by the NAIC from time to time in accordance with the procedures adopted by the NAIC.” 18 Del. Code § 5802(9).

77. The NAIC has explained Risk Based Capital requirements as follows:

Risk-Based Capital (RBC) is a method of measuring the minimum amount of capital appropriate for a reporting entity to support its overall business operations in consideration of its size and risk profile. RBC limits the amount of risk a company can take. It requires a company with a higher amount of risk to hold a higher amount of capital. Capital provides a cushion to a company against insolvency. RBC is intended to be a minimum regulatory capital standard and not necessarily the full amount of capital that an insurer would want to hold to meet its safety and competitive objectives. In addition, RBC is not designed to be used as a stand-alone tool in determining financial solvency of an insurance company; rather it is one of the tools that give regulators legal authority to take control of an insurance company.

Federal Bar Association, “Insurance Tax Seminar Session 7A – Capital Planning: One Concept to Rule Them All,” available at <https://www.fedbar.org/wp-content/uploads/2019/12/Session-7A-PPT-REV-pdf-1.pdf> (last visited Jan. 20, 2022).

78. Thus, a Delaware regulated insurer has two different financial thresholds that it must maintain:

- a. It must, under § 5901, maintain “assets at least equal to all liabilities and required reserves,” and
- b. Pursuant to § 5801, maintain adequate Risk-Based Capital.

79. Although the statutory references obviously vary by state, the basic rules (as dictated by the NAIC) are the same.
80. If a regulated insurer does not maintain adequate surplus or comply with RBC rules, the regulators are required to assume control over the company.
81. Moreover, federal statutes impose harsh penalties when insurers knowingly and with the intent to deceive file with state regulators false financial statements. Indeed, officers and directors who willfully misappropriate funds from insurers can be personally liable under those same statutes. *See, e.g.*, 18 U.S.C. § 1033.

iv. *Pipe & Boiler purchased insurance policies issued by Arrowood.*

82. Security Insurance Company of Hartford issued primary general liability coverage to Pipe & Boiler for at least the two policy periods January 1, 1981 – January 1, 1983, which policies have been administered by Arrowood in runoff since 2007.
83. The officers, directors, Appointed Actuary, and other ultimate controlling persons had a duty to (a) operate Arrowood in a manner consistent with the insurance statutes and regulations of Delaware to protect the interests of Arrowood's policyholders and (b) make accurate and timely regulatory filings and disclosures.

v. *The Arrowood Third-Party Defendants' Conversion of Assets of Arrowood*

84. On March 4, 2007, John Tighe, then CEO of both Arrowpoint and Arrowood, announced,

Our focus has always been on our obligation to all of our policyholders – the successful completion of this transaction is a huge win for them . . . The transaction builds on the strong success we've achieved to date through our restructuring efforts and provides us with a solid foundation for taking the business forward. Most importantly, it represents an excellent outcome for our policyholders, who are the primary beneficiaries of the acquisition and the additional \$287.5 million it provides.

See “Arrowpoint Capital Finalizes Acquisition of Royal & SunAlliance USA Businesses, Arrowpoint Capital Press Release, March 4, 2007, available at <https://www.arrowpointcap.com/Arrowpoint/GetPrintPage.aspx?pageId=500> (last accessed Jan. 20, 2022).

85. In approximately 2007, Arrowood, with approximately \$3 billion in surplus, stopped writing new business and thus, other than investment income on its assets, ceased to have income from operations, and commenced to be engaged solely in the “runoff” of its claims. Arrowood wrote little-to-no new business in and after 2007.
86. Arrowood’s sole functions after it was put in runoff were (a) to operate the insurer in a legally compliant manner, and (b) to process and administer claims under insurance policies that had been issued when it was writing insurance, including the primary general liability policies it issued to Pipe & Boiler for at least the two policy periods January 1, 1981 – January 1, 1983.
87. But the Individual Arrowood Third-Party Defendants, in their management capacities for Arrowood and its parent companies (Arrowpoint Group and Arrowpoint Capital) consistently have failed to properly establish and maintain loss and expense reserves for known and unreported claims, which resulted in Arrowood’s statutory financial reports having an appearance of solvency that misrepresented the true nature of Arrowood’s deepening financial woes. The ongoing and consistent yearly under-reserving of losses and expenses allowed the Arrowood Third-Party Defendants to maintain the air of solvency and liquidity while millions of dollars in Arrowood funds were improperly and wrongfully transferred from Arrowood through exorbitant salaries, benefits, management fees to its parent companies, and expenses, all performed for the personal benefit of various present and former employees of Arrowood

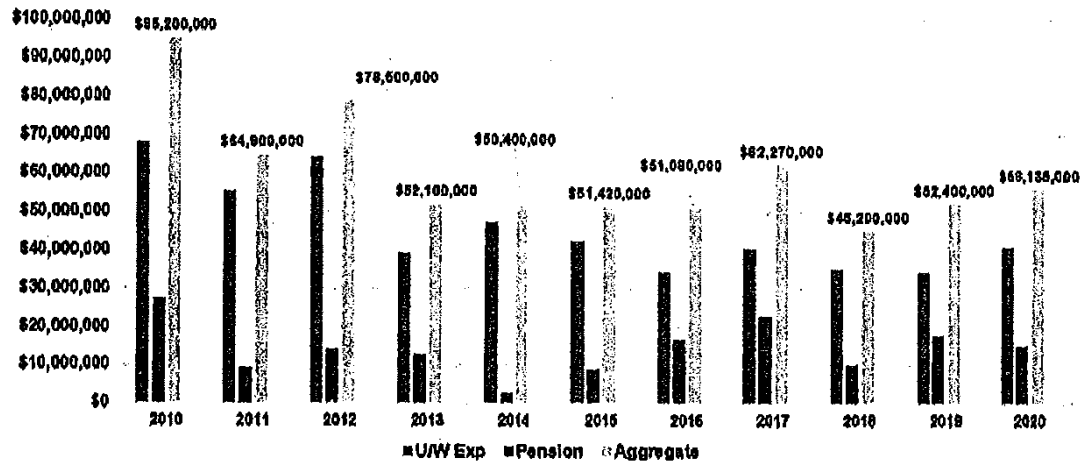
(including the Individual Arrowood Third-Party Defendants herein) as well as its parent companies (Arrowpoint Group and Arrowpoint Capital). The net result has been to cause Arrowood's policyholders' surplus to drop to the point that Arrowood's RBC Level under 18 Del. Code § 5801 is now at a precarious Company Action Level RBC as defined in that statute.

88. The true extent of the diversion of funds that should have been preserved for Arrowood's policyholders is to be determined through discovery; however, it is known from the annual MD&A filed with regulators regarding various pension plans for present and former employees that Arrowood maintains "a non-qualified deferred compensation plan for a select group of management and highly compensated employees." Arrowood Indemnity Co., Management's Discussion and Analysis of Financial Condition and Results of Operations for the Year Ended December 31, 2020, at 8. This plan may include Third-Party Defendants Tighe and Cahill, and probably a number of others of the Individual Arrowood Third-Party Defendants.
89. Arrowood management also employed other means to deplete or divert the assets of Arrowood to the detriment of its policyholders, but to the benefit of the Arrowood Third-Party Defendants.
90. Arrowood Indemnity was the 100% owner of another insurer, Arrowood Surplus Lines Insurance Company ("ASL"). As of December 31, 2011, ASL had a Policyholders' Surplus of \$184 million. The Arrowood Third-Party Defendants implemented a strategy to slowly upstream the \$184 million surplus of ASL. By 2015, \$120 million had been so (?) "upstreamed." However, Arrowood's 2015 MD&A filed with the regulators states that a dividend from ASL resulted in "additional unaffiliated equity, commodity and limited partnership holdings." (emphasis added). Any diversion to unaffiliated entities would

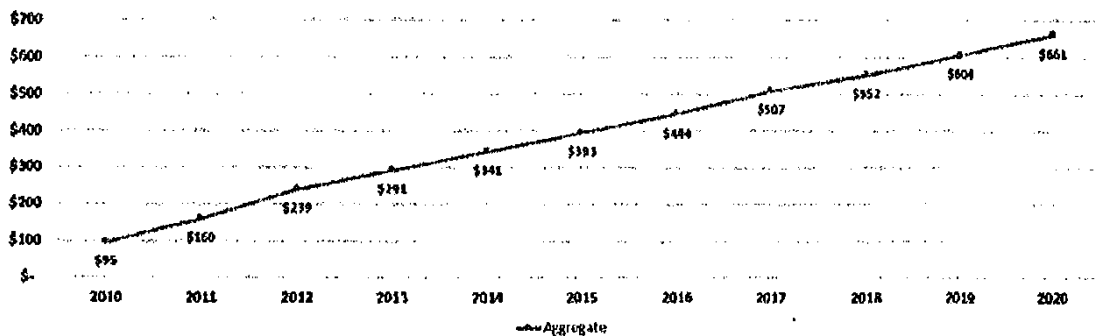
constitute an improper diversion of a material portion of the assets of Arrowood to the detriment of policyholders and to the benefit of the Arrowood Third-Party Defendants.

91. Arrowood was a party to a Tax Allocation agreement. That Tax Allocation agreement typically would have allowed the Arrowpoint Group to offset taxable gains against losses of Arrowood. There is no clear public record of Arrowood receiving its properly allocable portion of any such tax savings each year, but PwC's 2019 audit reflected that Arrowood took an unexplained \$7.7 million tax write-off of money due from its parent company, one of the Arrowood Third-Party Defendants herein.
92. The below charts, produced by Arrowood in its publicly filed Annual Statements, quantify some of the material amounts, both annually and in the aggregate, of untoward management fees, grossly excessive salaries, and other emoluments that the Arrowood Third-Party Defendants have distributed or diverted from the policyholders' surplus for the benefit of management (including, but not limited to, the Individual Arrowood Third-Party Defendants), Arrowpoint, and present and former Arrowood employees.

Other Underwriting Expense and Pension Costs and in the Aggregate



Other Underwriting Expense and Pension Costs and in the Aggregate



93. In 2007, Arrowood had total admitted assets of \$2,998,163,220. Those admitted assets steadily decreased between 2007 and 2020, to \$848,361,366 in 2020, despite the company having strong net investment gains. Indeed, between 2011 and 2020, Arrowood's net investment gain was as follows for each year:

Net Investment Gain	
2011	\$74,639,663
2012	\$64,643,502
2013	\$54,871,494
2014	\$63,288,306
2015	\$57,762,477
2016	\$48,650,645
2017	\$43,746,769
2018	\$50,921,661
2019	\$40,607,859
2020	\$34,958,745

94. With regard to policyholders, Arrowood's policyholders' surplus also has decreased significantly year after year. In 2007, Arrowood's policyholder surplus was \$445,627,238. The number steadily declined to \$94 million by 2020.

95. Arrowood also has consistently failed to set proper reserves for claims. Year after year, Arrowood has booked reserve deficiencies.

vi. *The Arrowood Defendants manipulated reserves as set forth in Schedule P to the Arrowood Annual Statement*

96. All insurance company annual statements contain a "Schedule P." The data within schedule P are organized by "Accident Year." "Accident Year" is typically defined as follows:

Accident Year Data – a method of arranging loss and exposure data of an insurer or group of insurers or within a book of business, so that all losses associated with accidents occurring within a given calendar year and all premium earned during that same calendar year are compared. Thus, regardless of individual policy periods and regardless of when a loss is reported or is paid, accident year data 2015 will include all premiums earned during 2015 and will include all losses occurring in 2015.

IRMI, Accident Year Data, available at <https://www.irmi.com/term/insurance-definitions/accident-year-data> (last accessed Jan. 20, 2022).

97. Schedule P provides details, both on an aggregate basis (Parts 1, 2, 3, and 4) and by Line of Business, of critical reserve information. Schedule P, Part 2 Summary provides the details of all Incurred Losses (including bulk reserves and IBNR), which guides the calculation of two of the twelve IRIS Ratios – the One-year and Two-year Adverse Development Ratios. The Schedule P, Part 2 Summary for 2020 is as shown here:

Annual Statement for the year 2020 of the **Arrowood Indemnity Company**

SCHEDULE P - PART 2 - SUMMARY

Years in Which Losses Were Incurred	Incurred Net Losses and Defense and Cost Containment Expenses Reported at Year End (\$000 omitted)										DEVELOPMENT	
	1	2	3	4	5	6	7	8	9	10	11	12
	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	One Year	Two Year
1. Prior.....	\$33,833	937,288	947,193	1,005,279	1,004,000	1,026,778	1,054,822	1,073,195	1,119,956	1,144,330	24,374	71,135
2. 2011.....	56,108	3,034	3,538	3,796	3,868	4,087	3,321	4,373	4,328	4,095	(233)	(277)
3. 2012.....	XXX	49,613	6,084	6,208	6,116	6,098	6,063	6,020	5,834	5,547	(287)	(473)
4. 2013.....	XXX	XXX	31,276	5,291	5,256	5,282	5,240	5,241	5,195	5,001	(194)	(240)
5. 2014.....	XXX	XXX	XXX	13,536	3,014	3,044	3,096	3,089	3,079	3,131	51	42
6. 2015.....	XXX	XXX	XXX	XXX	8,084	2,554	2,520	2,487	2,437	2,416	(21)	(71)
7. 2016.....	XXX	XXX	XXX	XXX	XXX	4,850	1,705	1,767	1,772	1,785	13	18
8. 2017.....	XXX	XXX	XXX	XXX	XXX	XXX	4,351	874	895	885	(10)	10
9. 2018.....	XXX	XXX	XXX	XXX	XXX	XXX	XXX	2,386	645	640	(5)	(1,746)
10. 2019.....	XXX	XXX	XXX	XXX	XXX	XXX	XXX	XXX	1,252	633	(619)	XXX
11. 2020.....	XXX	XXX	XXX	XXX	XXX	XXX	XXX	XXX	XXX	6,338	XXX	XXX
12. Totals.....											23,071	68,399

Arrowood Indemnity Company 2020 Annual Statement, at 63.

98. The One-Year Ratio (column 11) measures the development of unpaid losses and loss adjustment expenses based on loss adjustment expenses reported one year prior. The Two-Year Ratio (column 12) measures the development of loss and loss adjustment expenses reported two years ago. Negative results indicate that the reserves were deficient and have since adversely developed. Adverse developments evidence inadequate reserving.

99. This chart demonstrates that for each year going back to 2011, the oldest publicly available information, the Arrowood Third-Party Defendants failed to establish adequate Reserves, year after year, for multiple years. Because an insurer's management and its Appointed Actuary are

responsible for establishing a reasonable reserve estimate (and its auditor, PwC, is responsible for an independent verification of those reserves), this state of affairs for Arrowood should, at a minimum, be considered reckless conduct on the part of the Arrowood Defendants.

100. But the Arrowood Third-Party Defendants did not just fail to establish adequate reserves for “Prior Years.” To disguise the patent inadequacy of “Prior Year” reserves, so as not to have the appearance of deficient reserves on a cumulative basis, starting no later than 2007, the Arrowood Third-Party Defendants established a materially and clearly artificially large reserve in the first year of any given Accident Year, and then the next year, immediately reduce the Accident Year reserve by 90% or more. The net result of this machination was to make Arrowood’s overall reserves appear redundant when, in fact, they were significantly deficient. Added to this ruse as of year-end 2020 was the use of an artificial negative IBNR/Bulk reserve for Accident Year 2020 in the amount of \$17 million. When combined with the grossly inadequate Prior Year Reserves, the Arrowood Third-Party Defendants were able to mask two highly significant IRIS Ratios (the One-Year and Two-Year Adverse Development Ratios), which, in turn, avoided heightened scrutiny from ancillary regulators (*i.e.* all states other than Delaware), including South Carolina. The Arrowood Third-Party Defendants accomplished their goal, but could not have done so without a complicit actuary who filed properly to measure IBNR. That critical actuary was Daniel R. Keddie.

101. Arrowood appointed Keddie as its Appointed Actuary on March 14, 2004, and Keddie continued to serve in that role until his retirement on July 9, 2021. Arrowood Annual Statement General Interrogatories Part 1 – Common Interrogatories #11 (setting forth appointment).

102. Actuaries are subject to a uniform Code of Conduct, adopted by all five U.S.-based actuarial organizations. *See* American Academy of Actuaries 2009 Yearbook and Leadership Manual at 69. The Code of Conduct contains 14 Precepts, two of which are crucial to the instant analysis:

PRECEPT 1. An Actuary shall act honestly, with integrity and competence, and in a manner to fulfill the profession's responsibility to the public and to uphold the reputation of the actuarial profession

...

ANNOTATION 1-4. An Actuary shall not engage in any professional conduct involving dishonesty, fraud, deceit, or misrepresentation or commit any act that reflects adversely on the actuarial profession.

...

PRECEPT 8. An Actuary who performs Actuarial Services shall take reasonable steps to ensure that such services are not used to mislead other parties.

Id. at 70, 71.

103. Keddie ignored those Code of Conduct Precepts, and instead complied with the requirements of his fellow Third-Party Arrowood Defendants to the significant detriment of the Arrowood policyholders, including Pipe & Boiler, by issuing reports every year wrongfully attesting to the reasonableness of the Arrowood reserves.

104. Even though Keddie was credentialed as an Associate of the Casualty Actuarial Society at all material times and, as such, was bound by the Code of Conduct, his primary and critical role over the past 15 years was to facilitate the plan the Arrowood Third-Party Defendants hatched to consistently under-reserve all losses and expenses so that Arrowood assets would be used not for Arrowood's policyholders as legally required, but instead for the Arrowood Third-Party Defendants' benefit—to pay salaries and management fees to Arrowpoint.

105. Perhaps most troubling, over the last ten years, the expenses Arrowood characterizes as non-claim expenses have been astronomical. Between 2011 and 2020, the Arrowood Third-Party Defendants caused Arrowood to pay the following salaries (primarily to the Individual Arrowood Third-Party Defendants) and management fees (wrongfully paid to Arrowpoint, Arrowood's parent company), as set forth in Arrowood's statutory annual statements:

<u>Year</u>	<u>Salaries</u>	<u>Management Fees</u>
2011	\$22,711,734	\$2,007,592
2012	\$27,165,164	\$4,821,266
2013	\$28,563,024	\$4,539,749
2014	\$21,681,769	\$4,255,422
2015	\$26,790,534	\$4,763,587
2016	\$30,785,393	\$5,009,820
2017	\$26,919,005	\$5,064,432
2018	\$21,360,756	\$5,266,542
2019	\$20,266,145	\$4,909,334
2020	\$22,083,049	\$4,820,219
Total	\$248,326,594	\$45,457,963

106. That is, the Arrowood Third-Party Defendants caused Arrowood to pay nearly \$250 million in salaries—more than would be expected by an active insurance company the size of Arrowood, and far more than typically would be paid by a comparable property and casualty insurer in runoff during the relevant ten-year period – and over \$45 million in “management fees” to its owner (which were improper asset transfers). These monies, which Arrowood should have held and invested to meet its liabilities to its policyholders, as well as to injured asbestos plaintiffs, were taken from the company under false pretenses based on claim reserves that were underreported.

107. Furthermore, had the Arrowood Third-Party Defendants not wrongfully diverted millions of dollars from Arrowood, and instead kept that money with Arrowood to establish adequate

reserves for claims and invested the funds, Arrowood would have had substantially more money to adjust and pay claims, considering the investment gains that Arrowood realized with the funds that the Arrowood Third-Party Defendants did not wrongfully divert.

108. In its 2020 Management's Discussion and Analysis, signed by a number of the Individual Arrowood Third-Party Defendants, Arrowood admitted as follows:

The Company is required to maintain certain levels of capital and surplus. The minimum level is based on the individual lines of business for which the Company is licensed. As of December 31, 2020, the Company's RBC ratio, which is the ratio of the Company's adjusted capital to Authorized Control Level, is at the Company Action Level. As required, an RBC plan will be filed with the Delaware Department of Insurance. Discussions are ongoing with the Delaware Department of Insurance regarding the Company's business plan. The operations continue to have risks and uncertainties that could have a material adverse impact on the Company's capital position and ability to maintain capital in excess of regulatory RBC requirements including (i) credit risk of and/or potential disputes with reinsurers; (ii) adverse loss development on certain long-tail lines including workers compensation, asbestos and environmental and professional and general liability.

Arrowood Indemnity Company MD&A for the Year Ended December 31, 2020, at 6-7.

109. While the Delaware DOI, or another insurance department of another state, may require Arrowood to take action to correct its deficient financial circumstances, Pipe & Boiler is not confident that the Delaware DOI will do so in a timely fashion, nor that any other insurance regulator will act in time to remedy the situation.
110. For instance, the Individual Arrowood Third-Party Defendants' failure to post adequate reserves for Arrowood's claims has been a consistent and recurring problem. Indeed, between 2009 and 2014, Arrowood sustained a net underwriting loss of \$464 million. Between 2014 and 2018, Arrowood sustained a net underwriting loss of \$374 million.

111. Indeed, in addition to conceding that Arrowood's RBC Level is at Company Action Level under 18 Del. Code § 5801, Arrowood's 2020 Annual Statement shows that Arrowood has failed 6 of the 13 Insurance Regulatory Information System ("IRIS") tests. As the NAIC notes in its Insurance Regulatory Information Systems ("IRIS") Manual:

The NAIC Insurance Regulatory Information System (IRIS) is a collection of analytical solvency tools and databases designed to provide state insurance departments with an integrated approach to screening and analyzing the financial condition of insurers operating within their respective states. IRIS, developed by the state insurance regulators participating in NAIC committees, is intended to assist state insurance departments in targeting resources to those insurers in greatest need of regulatory attention.

...
IRIS helps by providing solvency tools and databases that highlight those insurers that merit the highest priority in the allocation of the state insurance regulators' resources, thus directing those resources to the best possible use.

NAIC Insurance Regulatory Information System (IRIS) Ratios Manual (2017 ed.) at 9.

112. Pipe & Boiler has tendered the asbestos bodily injury claims that have been filed against it to Arrowood for defense and indemnity coverage under the primary commercial general liability policies that it purchased between 1981 and 1983. Pipe & Boiler is not the only insured of Arrowood that has tendered such claims to Arrowood since 2019; Arrowood insured a number of other similarly situated companies which are seeking defense and indemnity for similar asbestos bodily injury claims. Yet, as evident in Schedule T of Arrowood's Annual Statements for 2019 and 2020, Arrowood has *reduced* its claim reserves ("Unpaid Losses") in 2019 (as compared to 2018), and again *reduced* its reserves in 2020 (as compared to 2019).
113. That is, Arrowood has not posted any realistic reserves for the hundreds (if not thousands) of claims that its insureds, including Pipe & Boiler, have tendered for defense and indemnity

coverage, and if and when such reserves are properly posted, Arrowood's financial situation will be shown to be that much worse.

114. The Delaware Insurance Code defines "Enterprise Risk" as follows:

"(4) 'Enterprise risk.' – The term 'enterprise risk' shall mean any activity, circumstance, event or series of events, involving 1 or more affiliates of an insurer that, if not remedied promptly, is likely to have a material adverse effect upon the financial condition or liquidity of the insurer or its insurance holding company system as a whole, including, but not limited to, anything that would cause the insurer's risk-based capital to fall into company action level as set forth in § 5803 of this title or would cause the insurer to be in hazardous financial condition as set forth in Section 3 of Department of Insurance Regulation 304 – Standards and Commissioner's Authority for Companies Deemed to be in Hazardous Financial Condition [CDR 18-300-304-3.0]."⁴

18 Del. Code § 5001(4).

115. While the Arrowood Third-Party Defendants, as the ultimate controlling persons of Arrowood, were required to file an annual Enterprise Risk Report with the Delaware Department of Insurance based on the facts set forth above, the Arrowood Third-Party Defendants failed to do so, or did not file such a report that accurately and completely sets forth the Enterprise Risk Arrowood faced, to the detriment of Pipe & Boiler and Arrowood's other policyholders.

vii. *The misleading Reports on Examination*

116. Every state conducts financial examinations of the insurers that it regulates. This is consistent with the obligation of the domiciliary state to protect policyholders. The purpose of

⁴ 18 DE Admin. Code § 304-3.0 sets forth the standards, either singly or a combination of two or more, that the Delaware Department of Insurance Commissioner may consider to determine whether the continued operation of an insurer transacting an insurance business in Delaware might be deemed to be hazardous to its policyholders, creditors, or the general public.

these financial examinations is to determine the insurer's fiscal condition and compliance with applicable laws and regulations.

117. In Delaware, the Bureau of Company Examination, Rehabilitation and Guaranty ("BERG") performs that examination function. BERG "is responsible for ensuring the financial health and stability of insurance companies in Delaware. It does so by analyzing and assessing the financial condition of insurance companies domesticated and doing business in Delaware in order to protect consumers and, if necessary, by managing, rehabilitating or liquidating financially impaired insurers." Delaware Department of Insurance Company Regulation (BERG), <https://insurance.delaware.gov/divisions/berg/> (last visited Jan. 20, 2022).

118. BERG clearly failed in the discharge of its responsibilities concerning Arrowood as it allowed the Arrowood Third-Party Defendants' reckless scheme to be implemented and maintained. Delaware will at times engage independent actuaries to provide assistance on financial examinations. Here, BERG retained and apparently relied upon INS Consultants, Inc. ("INS"), an independent consulting actuarial firm, to review and analyze the adequacy of the carried reserves of Arrowood as part of the state's financial examinations.

119. In reviewing the Arrowood reserves, the credentialed actuarial principals of INS were required to comply with the Actuarial Code of Conduct. They knew at all times that their work would be relied upon by the regulators of all states, not just Delaware. Indeed, the conclusion of the INS Report, dated October 18, 2019, states:

The assistance of the consulting actuarial firm, INS Consultants, Inc., the consulting information systems specialist firm, INS Services, Inc., the Company's outside audit firm, PwC, and the Company's management and staff was appreciated and is acknowledged.

Delaware Department of Insurance, Examination Report of the Arrowood Surplus Lines Insurance Company as of December 31, 2018, dated October 18, 2019. The same wording can be found in the 2015 Report on Examination for Arrowood as of December 13, 2014.

120. INS Consultants, Inc. and its credentialed principals knew, had reason to know, or should have known in 2015 and 2019 that the carried reserves of Arrowood were consistently, year after year, materially inadequate. And yet, both of those Reports on Examination are silent as to such reserve inadequacy. INS Consultants, Inc. at all times knew that if a company with assets and liabilities of the magnitude of Arrowood was required to significantly increase its carried reserves, that would adversely and materially impact its solvency, its RBC ratios, and its IRIS Ratios, and that, as a result, the regulators of other states would quickly focus their attention on Arrowood. BERG and others at the Delaware Department of Insurance knew that in such an event, other regulators would force Delaware to take action to stop the wrongful conduct of the Arrowood Third-Party Defendants.

viii. The Arrowood Third-Party Defendants cannot rely on safe harbors.

121. The Arrowood Third-Party Defendants believe that they have been artful in taking certain actions to protect their wrongful conduct from question. But they have been living with a false sense of security. They have no safe harbors for their wrongful conduct.
122. The first “safe harbor” that the Arrowood Third-Party Defendants will claim was Keddie’s conduct as the Appointed Actuary. Despite his legal and ethical obligations, despite the Schedule P machinations, and notwithstanding Arrowood’s patent and consistent under-reserving for the past 15 years, Keddie wrongfully attested to the “reasonableness” of Arrowood’s reserves upon which the Arrowood Third-Party Defendants would rely in the

annual Arrowood MD&A. One of the Arrowood Third-Party Defendants' most significant wrongful acts was their failure to properly reserve for Unallocated Loss Adjustment Expense. The Unallocated Loss Adjustment Expenses have been one of the most significant drivers of the losses Arrowood has sustained over the past 10 years.

123. Next, the Arrowood Third-Party Defendants may attempt to rely on the Delaware Department of Insurance's acquiescence as a "safe harbor." The Arrowood Third-Party Defendants surely will have made various regulatory filings seeking permission from the Delaware Department of Insurance to commit some of the conduct set forth herein. But regardless of whether the Arrowood Third-Party Defendants believed that they secured absolution by such filings, that does not vitiate in any manner their liability for their abandonment of their primary obligation to Arrowood's policyholders.

124. Pipe & Boiler alleges that all of its primary coverage provides an unlimited supplemental duty to defend, and provides "per occurrence" coverage for operations claims, with no limit to the number of occurrences. Pipe & Boiler also alleges that its umbrella coverage, when and if to the extent located and identified, provides for an unlimited supplemental duty to defend when there is no responsive primary coverage and that such umbrella coverage also responds on a per occurrence basis with no limit to the number of occurrences.

THIRD-PARTY PLAINTIFF PAYNE & KELLER

125. Payne & Keller's historic operations included the installation, repair, replacement, removal, or disturbance of thermal insulation and other building materials. Those operations allegedly exposed persons to asbestos who thereby suffered bodily injury (the "Asbestos Allegations"). The alleged bodily injury resulting from the Asbestos

Allegations has resulted in suits against Payne & Keller, including the instant suit and those referenced above (“Payne & Keller Asbestos Suits”).

Rexel’s Competing Claims to Payne & Keller’s Insurance Program

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

127. The Receiver is informed and believes that Rexel’s uncoordinated and competing claims to Payne & Keller’s insurance program will interfere with his efficient and orderly administration of his duties as the receiver for Payne & Keller. In carrying out his duties, Payne & Keller’s receiver has made inquiries about the role of Rexel and its competing claims to Payne & Keller’s insurance policies, but these inquiries have gone unanswered. Moreover, the existence of these competing claims from Rexel has thwarted, or will thwart, the Receiver’s efforts to reach agreements with certain of Payne & Keller’s insurers regarding their rights and obligations under these insurance policies. As such, a justiciable controversy exists between the Receiver for Payne & Keller and Rexel regarding the rights and responsibilities of each relative to the Payne & Keller insurance program. Similarly, a controversy exists between the Receiver for Payne & Keller and Rexel’s agent Compass Risk Services regarding the rights of Compass to submit claims to the Payne & Keller insurers without any communication or disclosing any information in response to requests for

information made by the Receiver for Payne & Keller. The Receiver seeks declaratory relief regarding these issues to guide his performance of his duties. The Receiver has joined the known Payne & Keller insurers to this action because their rights and responsibilities, as between the Receiver and Rexel, will be delineated herein.

1. The 1965 to 1973 Policies

128. During various policy periods from March 1, 1965 to March 1, 1973, Payne & Keller was insured by one or more primary insurers for which the Guaranty Association is responsible, including Reliance Insurance Company and Highlands Underwriting Insurance Company, the latter of which was subject to a liquidation order issued by the 23rd Judicial District, Travis County, dated October 29, 2021, and, upon information and belief, one or more existing defendants including defendant Maryland American General Insurance Company, all of which issued primary general liability policies to Payne & Keller (“The 1965 to 1973 Policies”). The 1965 to 1973 Policies have standard terms and conditions. The 1965 to 1973 Policies have a duty to defend Payne & Keller against any and all Payne & Keller Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false, or fraudulent. The duty to defend is joint, several, indivisible, and supplemental. These policies require the insurers fully to defend any Payne & Keller Asbestos Suit alleging bodily injury. These policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any portion of the 1965 to 1973 Policy periods.

129. The Guaranty Association and other pertinent defendant insurers have failed to fully acknowledge, delineate or accept their insuring obligations under the 1965 to 1973

Policies as between Rexel and Payne & Keller. An actual and justiciable dispute exists between and among these parties.

2. *The Zurich Policies*

130. Defendant Zurich, individually and as successor in interest to Maryland American General Insurance Company and Maryland Casualty Company, issued general liability policies to Payne & Keller (“The Zurich Policies”). The Zurich Policies have standard terms and conditions. The Zurich Policies have a duty to defend Payne & Keller against any and all Payne & Keller Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false, or fraudulent. The duty to defend is joint, several, indivisible, and supplemental. The Zurich Policies require Zurich fully to defend any Payne & Keller Asbestos Suit alleging bodily injury during any Zurich Policy period. The Zurich Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Zurich Policy period. It is the burden of Zurich to prove any limitation on or exclusion of coverage. Specifically, Zurich issued primary general liability coverage to Payne & Keller for at least the three policy periods from March 1, 1968 – March 1, 1971 and at least five policy periods March 1, 1973 – March 1, 1978, and may have issued such policies during earlier policy periods.

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

3. *The Aetna Policies*

132. 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.

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

4. The Continental Policies

134. 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.

135. Continental, by and through Resolute Management and NICO, has failed to fully acknowledge, delineate or accept its insuring obligations under the Continental Policies as between Rexel and Payne & Keller. An actual and justiciable dispute exists between these parties.

5. The National Union Policies

136. 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.

137. National Union, by and through Resolute Management and NICO, has failed to fully acknowledge, delineate or accept its insuring obligations under the National Union

Policies as between Rexel and Payne & Keller. An actual and justiciable dispute exists between these parties.

6. The Dependable Policy

138. 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.

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

7. The Stonewall Policies

140. 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.

141. Stonewall, by and through Resolute Management and NICO, has failed to fully acknowledge, delineate or accept its insuring obligations under the Stonewall Policies as between Rexel and Payne & Keller. An actual and justiciable dispute exists between these parties.

8. The Lexington Policy

142. 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.

143. Lexington, by and through Resolute Management and NICO, has failed to fully acknowledge, delineate or accept its insuring obligations under the Lexington Policy as between Rexel and Payne & Keller. An actual and justiciable dispute exists between these parties.

9. The First State Policies

144. Defendant First State issued at least four umbrella liability policies to Payne & Keller (“The Hartford Policies”). The Hartford Policies have standard terms and conditions. The Hartford Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Hartford Policy Period. It is the burden of First State to prove any limitation on or exclusion

of coverage. Specifically, First State issued umbrella liability coverage to Payne & Keller for at least the policy periods March 1, 1976—March 1, 1977, April 1, 1983—April 1, 1985, and May 15, 1985—April 1, 1986.

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

10. The Birmingham Fire Policies

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

147. Birmingham Fire, by and through Resolute Management and NICO, has failed to fully acknowledge, delineate or accept its insuring obligations under the Birmingham Fire Policies as between Rexel and Payne & Keller. An actual and justiciable dispute exists between these parties.

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

148. 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.

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

12. The Reliance Policies

150. On information and belief, Highlands Underwriters Insurance Company issued general liability policies to Payne & Keller including policy numbers GA 2038 (March 1, 1971 to March 1, 1972) and GA 2278 (March 1, 1972 to March 1, 1973).

13. The Highlands Policies and the Guaranty Association

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

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

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

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

153. R.L. Jarrett served as an insurance broker and underwriter to Payne & Keller, facilitating and issuing certain quota share policies in conjunction with other Third-Party Defendants herein, including at least First State and Lloyd’s.

154. 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

155. Third-Party Plaintiffs incorporate by reference paragraphs 1 through 28 as though fully set forth herein.

156. Peter Protopapas is the duly appointed Receiver of Third-Party Plaintiffs, giving him the power and authority fully to administer all assets of Third-Party Plaintiffs, accept service on behalf of Third-Party Plaintiffs, engage counsel on behalf of Third-Party Plaintiffs, and take any and all steps necessary to protect the interests of Third-Party Plaintiffs, whatever they may be. Since appointment, the Receiver has expended substantial time and incurred expenses to identify potential assets and responsive policies and to defend Third-Party Plaintiffs’ Asbestos Suits in fulfillment of his responsibilities as Receiver. The Receiver will continue to expend substantial time and incur expenses in connection with Third-Party Plaintiffs’ Asbestos Suits.

157. An actual and justiciable controversy exists between the Receiver and the Third-Party Defendant Insurers, including their obligations to pay for the Receiver's activities in connection with the defense of Third-Party Plaintiffs' Asbestos Suits.
158. Judicial declarations are necessary and appropriate at this time, under the circumstances alleged above, so that the Receiver may ascertain these rights against Third-Party Defendants.
159. 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.
160. 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.
161. The Receiver respectfully requests this Court to declare that Third-Party Defendants must fairly compensate the Receiver for the substantial time, effort, and expenses expended in connection with the defense of asbestos suits potentially covered under the Third-Party Defendants' policies and to further declare that this obligation is unlimited and shall continue as long as there are Asbestos Suits pending against Third-Party Plaintiffs.

SECOND CAUSE OF ACTION
DECLARATORY JUDGMENT

162. Third-Party Plaintiffs incorporate by reference paragraphs 1 through 28 as though fully set forth herein.
163. 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.

164. Upon information and belief, Third-Party Plaintiffs purchased insurance policies from Third-Party Defendant Insurers. These policies are the property of the Third-Party Plaintiffs.

165. Third-Party Plaintiffs seek a judicial declaration that all policies, evidence of policies and documents relating to their placement, purchase and underwriting, including, but not limited to, such documents in the possession of Third-Party Defendants are the property of the Receiver and shall be delivered immediately to the Receiver to be maintained in his sole possession for his unrestricted use in carrying out his duties.

THIRD CAUSE OF ACTION
DECLARATORY JUDGMENT

166. Third-Party Plaintiffs incorporate by reference paragraphs 1 through 28 as though fully set forth herein.

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

168. The Receiver seeks a further declaration as to the interpretation and meaning of the insurance policies that Third-Party Defendants Zurich, Continental, and Allstate issued to Carolina Industrial (the “Carolina Industrial Insurance Policies”), as follows:

- a. The Carolina Industrial Insurance Policies cover all Carolina Industrial Asbestos Suits that allege bodily injury, personal injury, injurious exposure, progression

of injury and/or disease, manifestation of illness, or death during any of the policy periods;

- b. Each Carolina Industrial asbestos suit “triggers” the Carolina Industrial Insurance Policies as long as an asbestos plaintiff alleges injury during the period of the policy;
- c. Carolina Industrial may select the policy or policy years to which to assign or allocate in full each Carolina Industrial Asbestos Suit-related loss;
- d. In the case of any claimed ambiguity in any Carolina Industrial Insurance policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Carolina Industrial Insurance Policies;
- e. Defense costs for the Carolina Industrial asbestos suits are supplemental, and the payment of defense costs does not erode or impair any limit of liability of any of the Carolina Industrial Insurance Policies;
- f. If any allegation or cause of action in a Carolina Industrial Asbestos Suit is potentially covered under the Carolina Industrial 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 Carolina Industrial Insurance Policy is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of Carolina Industrial Asbestos Suits;

- h. Each Carolina Industrial Insurance Policy must indemnify covered Carolina Industrial Asbestos Suits, in full, up to its “per occurrence” limit, regardless of whether a continuing injury spans multiple policy periods;
- i. The Carolina Industrial Asbestos Suits that allege exposure to asbestos during Carolina Industrial’s work are subject only to the “per occurrence” limits of the Carolina Industrial Insurance Policies;
- j. Any aggregate limit on coverage in any of the Carolina Industrial Insurance policies is a limitation on coverage, and therefore each insurer has the burden to prove, based on the evidence, that a Carolina Industrial Asbestos Suit is subject to the aggregate limit in the Carolina Industrial Insurance Policies, if any; and
- k. Each insurer has the burden to prove, based on the evidence, that any particular Carolina Industrial Asbestos Suit is either a “products” claim or a “completed operations” claim, as those terms are defined in the Carolina Industrial Insurance Policies, in order for the insurer to disclaim coverage for a Carolina Industrial Asbestos Suit against Carolina Industrial otherwise alleging injury during any Carolina Industrial Insurance policy period.

169. Actual and justiciable controversies therefore exist between Carolina Industrial and Third-Party Defendants Zurich, Continental, and Allstate concerning their obligations under the Carolina Industrial Insurance Policies.

FOURTH CAUSE OF ACTION
DECLARATORY JUDGMENT

170. Third-Party Plaintiffs incorporate by reference paragraphs 1 through 28 as though fully set forth herein.
171. The Receiver seeks a declaration and order that Third-Party Defendants Admiral and First State issued primary and excess general liability coverage to Flame Refractories, subject to the per occurrence and aggregate limits of those policies, and that Third-Party Defendant Admiral has an unlimited supplemental duty to defend, through the provision of appropriate and qualified defense counsel, and to pay or reimburse defense costs.
172. The Receiver seeks a further declaration as to the interpretation and meaning of the insurance policies that Third-Party Defendant Admiral and First State issued to Flame Refractories, as follows:
- a. The Flame Refractories Insurance Policies issued by Admiral and First State cover all Flame Refractories Asbestos Suits that allege bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of the policy periods;
 - b. Each Flame Refractories asbestos suit “triggers” the Flame Refractories Insurance Policies issued by Admiral and First State as long as an asbestos plaintiff alleges injury during the period of the policies;
 - c. Flame Refractories may select the policy or policy years to which to assign or allocate in full each Flame Refractories Asbestos Suit-related loss;
 - d. In the case of any claimed ambiguity in any Flame Refractories Insurance policy issued by Admiral and First State, such ambiguity shall be construed in favor of

the broadest coverage afforded under the Flame Refractories Insurance Policies issued by Admiral and First State;

- e. Defense costs for the Flame Refractories asbestos suits are supplemental, and the payment of defense costs does not erode or impair any limit of liability of any of the Flame Refractories Insurance Policies issued by Admiral and First State;
- f. If any allegation or cause of action in a Flame Refractories Asbestos Suit is potentially covered under the Flame Refractories Insurance Policies issued by Admiral and First State, then the insurer must fully defend or reimburse in full the costs of defending against all of the allegations and all of the causes of action in the complaint;
- g. Each Flame Refractories Insurance Policy issued by Admiral and First State is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of Flame Refractories Asbestos Suits;
- h. Each Flame Refractories Insurance Policy issued by Admiral and First State must indemnify covered Flame Refractories Asbestos Suits, in full, up to its “per occurrence” limit, regardless of whether a continuing injury spans multiple policy periods;
- i. The Flame Refractories Asbestos Suits that allege exposure to asbestos during Flame Refractories’ work are subject only to the “per occurrence” limits of the Flame Refractories Insurance Policies issued by Admiral and First State;

- j. Any aggregate limit on coverage in any of the Flame Refractories Insurance policies is a limitation on coverage, and therefore each insurer has the burden to prove, based on the evidence, that a Flame Refractories Asbestos Suit is subject to the aggregate limit in the Flame Refractories Insurance Policies issued by Admiral and First State, if any; and
 - k. Third-Party Defendant Admiral and First State have the burden to prove, based on the evidence, that any particular Flame Refractories Asbestos Suit is either a “products” claim or a “completed operations” claim, as those terms are defined in the Flame Refractories Insurance Policies issued by Admiral and First State, in order for the insurer to disclaim coverage for a Flame Refractories Asbestos Suit against Flame Refractories otherwise alleging injury during any Flame Refractories Insurance policy period.
173. Actual and justiciable controversies therefore exist between Flame Refractories and Third-Party Defendants Admiral and First State concerning their obligations under the Flame Refractories Insurance Policies issued by Admiral and First State.

FIFTH CAUSE OF ACTION
BREACH OF CONTRACT

174. Third-Party Plaintiff Flame Refractories incorporates by reference paragraphs 1 through 28 and 129 through 132 as though fully set forth herein.
175. Flame Refractories was insured by one or more policies issued by Third-Party Defendant Admiral. The Receiver for Flame Refractories provided timely notices to Third-Party Defendant Admiral of the Flame Refractories Asbestos Suits.

176. Third-Party Defendant Admiral unreasonably and without proper cause, has either failed to defend entirely or has failed to provide an appropriate defense for Flame Refractories in the Flame Refractories Asbestos Suits as required by the policies it issued to Flame Refractories.
177. The failure of Third-Party Defendant Admiral to provide a proper defense to Flame Refractories in the Flame Refractories Asbestos Suits has caused, and will continue to cause, harm and damages to Flame Refractories, including, but not limited to, incurring legal fees (or unnecessary legal fees) that should be paid for by Third-Party Defendant Admiral.

SIXTH CAUSE OF ACTION
BREACH OF CONTRACT

178. Third-Party Plaintiff Carolina Industrial incorporates by reference paragraphs 1 through 28 and 129 through 132 as though fully set forth herein.
179. Carolina Industrial was insured by one or more policies issued by Third-Party Defendants Zurich, Continental, and Allstate.
180. Carolina Industrial has provided or will provide timely notices to Third-Party Defendants Zurich, Continental, and Allstate of the Carolina Industrial Asbestos Suits.
181. Third-Party Defendants Zurich, Continental, and Allstate unreasonably and without proper cause, have failed or will fail to defend Carolina Industrial in the Carolina Industrial Asbestos Suits as required by the policies they issued to Pipe & Boiler.
182. The failure of Third-Party Defendants Zurich, Continental, and Allstate to provide a defense to Carolina Industrial in the Carolina Industrial Asbestos Suits has caused, and/or will continue to cause, harm and damages to Carolina Industrial, including, but not limited to,

incurring legal fees that should be paid for by Defendants Zurich, Continental, and/or Allstate.

SEVENTH CAUSE OF ACTION
UNFAIR OR DECEPTIVE TRADE PRACTICES AFFECTING COMMERCE

183. Third-Party Plaintiff Pipe & Boiler Insulation incorporates by reference paragraphs 29 through 113 as though fully set forth herein.
184. Prior to its dissolution, Pipe & Boiler was a North Carolina corporation.
185. Under N.C. Gen. Stat. § 75-1.1(a), unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
186. Under N.C. Gen. Stat. § 75-1.1(b), “commerce” includes all business activities, however denominated. The business of insurance falls within the ambit of “in commerce,” and people who buy insurance are consumers whose welfare Chapter 75 of the North Carolina Statutes was intended to protect. *See Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 469 (1986).
187. N.C. Gen. Stat. § 75-16 provides as follows: “if any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.”

188. N.C. Gen. Stat. § 58-63-15 defines unfair methods of competition and unfair or deceptive practices in the business of insurance. Subsection (5) thereof provides as follows:

False Financial Statements. - Filing with any supervisory or other public official, or making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false statement of financial condition of an insurer with intent to deceive.

Making any false entry in any book, report or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to whom such insurer is required by law to report, or who has authority by law to examine into its condition or into any of its affairs, or, with like intent, willfully omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer.

189. The Arrowood Defendants, and each of them, have violated N.C. Gen. Stat. § 58-63-15, and, therefore, N.C. Gen. Stat. Chapter 75, by making false statements in each of Arrowood's Annual Statements and other financial reports and documents to the extent, *inter alia*, that those documents stated or implied that moneys paid by Arrowood in the form of salaries to the Individual Arrowood Defendants, and management fees paid to Arrowpoint Group and/or Arrowpoint Capital, were legitimate payments by Arrowood, and failing to correctly state in those documents that such payments were, in reality, bogus payments made to loot Arrowood and siphon off its funds to line the pockets of the Arrowood Defendants, and otherwise unjustly enrich the Arrowood Defendants, at the expense and harm of policyholders, including Pipe & Boiler.

190. In addition, the Arrowood Defendants, and each of them, have violated N.C. Gen. Stat. § 75-1.1 by unfairly and deceptively looting Arrowood through exorbitant salaries, management fees, and other unreasonable expenses payable to the Arrowood Defendants,

causing Arrowood to become impaired and in violation of the applicable risk-based capital requirements and in a position where it cannot pay all current and future policyholder claims.

191. Pipe & Boiler has suffered actual injury as a result of the Arrowood Defendants' unfair and deceptive practices as alleged herein because Arrowood is now, as a direct and proximate result of the Arrowood Defendants' wrongful conduct, in a financial position where it will be unable to comply entirely with its defense and indemnity obligation to Pipe & Boiler. In short, as a direct and proximate result of the Arrowood Defendants' wrongful looting and filing of false financial statements, and other conduct as alleged herein, Arrowood will be placed in liquidation years after it should have been placed in receivership, which would have allowed for a solvent run-off, and years after the Arrowood Defendants improperly paid benefits to themselves, resulting in an insolvent winding up of the company. Pipe & Boiler will, at best, receive pennies on the dollar with respect to the insurance coverage that Pipe & Boiler is entitled to under its primary commercial general liability policies issued between 1981 and 1983. But for the Arrowood Defendants' conduct, the company would have been able to pay its claim obligations. As a direct and proximate result of the Arrowood Defendants' unfair and deceptive trade practices as alleged herein, Pipe & Boiler will not receive millions of dollars of insurance coverage for which it paid and to which it is entitled.

192. Pipe & Boiler has been injured and damaged as a result of the Arrowood Defendants' unfair and deceptive practices as alleged herein, in violation of N.C. Gen. Stat. § 75-1.1, and is therefore entitled to recover damages in an amount that will be proven at trial, is in excess

of any applicable jurisdictional limits, and is subject to treble damages under N.C. Gen. Stat. § 75-16.

193. Pipe & Boiler further seeks a declaration that the actions of the Arrowood Defendants with regard to Arrowood were in fact unfair and deceptive.

EIGHTH CAUSE OF ACTION
CONSTRUCTIVE TRUST

194. Third-Party Plaintiff Pipe & Boiler incorporates by reference paragraphs 29 through 113 and 142 through 152 as though fully set forth herein.

195. A constructive trust is a duty or relationship imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty, or some other circumstance, making it inequitable for him to retain it against the claim of the beneficiary or the constructive trust. A constructive trust is a fiction of equity, brought into operation to prevent unjust enrichment through the breach of some duty or other wrongdoing. There is a common, indispensable element in the many types of situations out of which a constructive trust is deemed to arise. This common element is some fraud, breach of duty, or other wrongdoing by the holder of the property.

196. The Arrowood Third-Party Defendants have taken possession of the property of Arrowood – to wit, funds – of which they should not have taken through their wrongful and deceptive acts as alleged herein.

197. The funds that the Arrowood Third-Party Defendants have wrongfully diverted from Arrowood should have remained with Arrowood so that the company would have had additional resources available to meet its contractual obligations to policyholders, including

Pipe & Boiler, and injured claimant third parties. The funds would have remained in Arrowood had the Arrowood Third-Party Defendants not filed false or misleading financial statements and prevented state insurance regulators from knowing the extent of problems and taking action to place the company into receivership. The proper and appropriate remedy under the circumstances here is for the Court to exercise its equitable power and authority to require the Arrowood Third-Party Defendants to return those funds that they have wrongfully diverted from Arrowood's policyholders in an amount to be proven at trial.

NINTH CAUSE OF ACTION
TORTIOUS INTERFERENCE WITH CONTRACT

198. Third-Party Plaintiffs incorporate by reference paragraphs 29 through 113 as though fully set forth herein.
199. Arrowood issued at least five contracts of insurance to Pipe & Boiler during the period January 1, 1981 to January 1, 1986.
200. As corporate officers and directors of Arrowood's parent companies, the Individual Arrowood Third-Party Defendants have maintained absolute control of Arrowood.
201. The Individual Arrowood Third-Party Defendants each were aware of the insurance contracts into which Arrowood had entered with insureds, including Pipe & Boiler.
202. Despite their knowledge of these contracts of insurance, the Individual Arrowood Third-Party Defendants, acting in their various roles as officers, directors, employees, and owners of Arrowood, intentionally made decisions and took actions that breached the insurance contracts between Arrowood and Pipe & Boiler.
203. For instance, the Individual Arrowood Third-Party Defendants, in their management capacities for Arrowood and its parent companies, consistently have failed to properly

establish and maintain loss and expense reserves for known and unreported claims, which resulted in Arrowood's statutory financials having an appearance of solvency that misrepresented the true nature of Arrowood's deepening financial woes.

204. The Individual Arrowood Third-Party Defendants' actions of looting Arrowood through exorbitant salaries, management fees, and other unreasonable expenses payable to the Individual Arrowood Third-Party Defendants, caused Arrowood to become impaired and in violation of the applicable risk-based capital requirements and in a position where it cannot pay all current and future policyholder claims.

205. There was no justification for the Individual Arrowood Third-Party Defendants' decisions not to properly report loss and expense reserves, and to divert funds that should have been preserved for Arrowood's policyholders, other than to feather the nests of the Individual Arrowood Third-Party Defendants, and to otherwise put the interests of the employees of Arrowood ahead of the interests of Arrowood's policyholders, including Pipe & Boiler.

206. As a direct and proximate result of the Individual Arrowood Third-Party Defendants' tortious interference with the contract between Arrowood and Pipe & Boiler as alleged herein, Pipe & Boiler will not receive millions of dollars of insurance coverage for which it paid and to which it is entitled.

TENTH CAUSE OF ACTION
NEGLIGENT SUPERVISION

207. Third-Party Plaintiff Pipe & Boiler incorporates by reference paragraphs 29 through 113 as though fully set forth herein.
208. Arrowpoint Group and Arrowpoint Capital employed or were otherwise responsible for the actions of each of the Individual Arrowood Third Party Defendants during their employment with Arrowood.
209. Arrowpoint Group and Arrowpoint Capital negligently supervised the actions of the Individual Arrowood Third-Party Defendants.
210. Arrowpoint Group and Arrowpoint Capital's negligent supervision caused harm to Pipe & Boiler by allowing the Individual Arrowood Third-Party Defendants to loot and siphon funds from Arrowood so that Arrowood no longer had sufficient resources available to meet its contractual obligations to policyholders, including Pipe & Boiler, and injured claimant third parties. As a direct and proximate result of Arrowpoint Group and Arrowpoint Capital's negligent supervision as alleged herein, Pipe & Boiler will not receive millions of dollars of insurance coverage for which it paid and to which it is entitled.

ELEVENTH CAUSE OF ACTION
DECLARATORY JUDGMENT

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

212. The Receiver is informed and believes that Rexel's uncoordinated and competing claims to Payne & Keller's insurance program will interfere with his efficient and orderly administration of his duties as the receiver for Payne & Keller. In carrying out his duties, Payne & Keller's receiver has made inquiries about the role of Rexel and its competing claims to Payne & Keller's insurance policies, but these inquiries have gone unanswered. Moreover, the existence of these competing claims from Rexel has thwarted, or will thwart, the Receiver's efforts to reach agreements with certain of Payne & Keller's insurers regarding their rights and obligations under these insurance policies. As such, a justiciable controversy exists between the Receiver for Payne & Keller and Rexel regarding the rights and responsibilities of each relative to the Payne & Keller insurance program. Similarly, a controversy exists between the Receiver for Payne & Keller and Rexel's agent Compass Risk Services regarding the rights of Compass to submit claims to the Payne & Keller insurers without any communication or disclosing any information in response to requests for information made by the Receiver for Payne & Keller. The Receiver seeks declaratory relief regarding these issues to guide his performance of his duties. The Receiver has joined the known Payne & Keller insurers to this action because their rights and responsibilities, as between the Receiver and Rexel, will be delineated herein.

213. The Receiver therefore seeks declarations, after thorough discovery regarding Rexel's competing claims to the Payne & Keller insurance program, regarding the nature, extent, and priority (if any) of Rexel'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.

PRAYER FOR RELIEF

WHEREFORE, Third-Party Plaintiffs, by and through their duly appointed Receiver, demand judgment against Third-Party Defendants as follows:

- A. For the Receiver's compensation in connection with the defense of asbestos suits against Third-Party Plaintiffs in an amount set by this Court;
- B. For an order requiring that Third-Party Defendants provide to the Receiver complete and authentic copies of any general liability and excess liability insurance policies they issued to Pipe & Boiler together with all other documents and things relating to these policies, including (but not limited to) certificates of insurance, underwriting manuals and documents, and claims files for the Receiver's unrestricted use in carrying out his duties;
- C. For an order requiring Third-Party Insurer Defendants Zurich, Continental, and Allstate to defend Pipe & Boiler in full against all asbestos suits alleging bodily injury during the Third-Party Defendants' policy periods unless and until either Third-Party Defendants can show unequivocally, based on the evidence adduced in the litigation, that an exclusion in their respective policies otherwise bars coverage for a suit;
- D. For an order requiring Third-Party Insurer Defendants Admiral and First to defend Flame Refractories in full against all asbestos suits alleging bodily injury during Third-Party Defendants Admiral's and First State's policy periods unless and until Third-Party Defendant Admiral or First State can show unequivocally, based on the evidence

adduced in the litigation, that an exclusion in its policies otherwise bars coverage for a suit;

E. As described in detail above, the Receiver seeks a further declaration as to the interpretation and meaning of the Third-Party Plaintiffs' insurance policies:

- i. The Third-Party Plaintiffs' Insurance Policies cover all Third-Party Plaintiffs' Asbestos Suits that allege any bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of its policy periods;
- ii. Each Third-Party Plaintiffs' asbestos suit "triggers" at least one Third-Party Plaintiffs' Insurance policy as long as an asbestos plaintiff alleges injury during the period of the policy;
- iii. Third-Party Plaintiffs may select the policy or policy years to which to assign or allocate in full each asbestos loss;
- iv. In the case of a claimed ambiguity in any Third Party Plaintiffs' Insurance policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Third-Party Defendants' policies, and Third-Party Defendants bear the burden of proof as to any such ambiguity;
- v. Defense costs for the Third-Party Plaintiffs' asbestos suits are supplemental, and the payment of defense costs does not erode or impair any limit of liability of any of the Third-Party Plaintiffs' Insurance policies;
- vi. If any allegation in a Third-Party Plaintiffs' Asbestos Suit is potentially covered under the Third-Party Plaintiffs' Insurance Policies, then the responsive insurer

must defend or reimburse in full the costs of defending against all of the allegations and all of the causes of action in the complaint;

- vii. Each Third-Party Plaintiffs' Insurance Policy is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of the Third-Party Plaintiffs' Asbestos Suits;
- viii. Each Third-Party Plaintiffs' Insurance Policy must indemnify covered Third-Party Plaintiffs' Asbestos Suits, in full, up to its "per occurrence" limits, regardless of whether a continuing injury spans multiple policy periods;
- ix. The Third-Party Plaintiffs' Asbestos Suits that allege exposure to asbestos during Third-Party Plaintiffs' work are subject only to the "per occurrence" limits of the Third-Party Plaintiffs' Insurance policies;
- x. Any aggregate limit on coverage in any of the Third-Party Plaintiffs' Insurance Policies is a limitation on coverage, and the insurers therefore have the burden to prove, based on the evidence, that a Third-Party Plaintiffs' Asbestos Suit is subject to the aggregate limit in the Third-Party Plaintiffs' Insurance Policies, if any; and
- xi. Each insurer has the burden to prove, based on the evidence, that any particular Third-Party Plaintiffs' Asbestos Suit is either a "products" claim or a "completed operations" claim, as those terms are defined in the Third-Party Plaintiffs' Insurance Policies, in order for the insurer to disclaim coverage for an Asbestos Suit against a Third-Party Plaintiff otherwise alleging injury during the Third-Party Plaintiffs' insurance policy period.

- F. For an order declaring that Third-Party Defendants Zurich, Continental, and Allstate are liable for the damages incurred by Carolina Industrial due to their breaches of contract, including, but not limited to, reimbursing Carolina Industrial for any legal fees and costs incurred by defending the Carolina Industrial Asbestos Suits.
- G. For an order declaring that Third-Party Defendant Admiral is liable for the damages incurred by Flame Refractories due to its breaches of contract, including, but not limited to, reimbursing Flame Refractories for any legal fees (or inappropriate legal fees) and costs incurred by defending the Flame Refractories Asbestos Suits.
- H. As to the Arrowood Defendants, compensatory and punitive damages in an amount to be proven at trial; and for a declaration that the actions of each of the Arrowood Defendants, together and individually, constituted unfair and deceptive practices.
- I. A constructive trust to recover the amounts that the Arrowood Defendants wrongfully diverted from Arrowood's policyholders, and a preliminary and permanent injunction prohibiting the Arrowood Defendants from further such diversions;
- J. Compensatory and punitive damages against The Individual Arrowood Defendants in an amount to be proven at trial;
- K. For an order outlining the orderly priority of claims as between Rexel and Payne & Keller with respect to the Payne & Keller insurers. Specifically, the Receiver therefore seeks declarations, after thorough discovery regarding Rexel's competing claims to the Payne & Keller insurance program, regarding the nature, extent, and priority (if any) of Rexel'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.

- L. For such other and further relief as the Court may deem just and proper, including pre-judgment and post-judgment interest as provided by South Carolina law.

Respectfully submitted,

Dated: February 23, 2022

RIKARD & PROTOPAPAS, LLC

By: s./ Brian M. Barnwell

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Attorneys for Third-Party Plaintiffs

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

2021-CP-40-03484

Plaintiff,

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

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



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

Third-Party Defendant Travelers Casualty and Surety Company (improperly named as Travelers Casualty & Surety Company), formerly known as The Aetna Casualty and Surety Company (improperly named as Aetna Casualty & Surety Company) ("Travelers"), by and through undersigned counsel, hereby moves (1) pursuant to Rules 12 and 14 of the South Carolina Rules of Civil Procedure ("SCRCP"), to dismiss the claims asserted against Travelers in the Second Amended Third-Party Complaint¹ of Defendant/Third-Party Plaintiff Payne & Keller Company, through its receiver, Peter D. Protopapas² ("Payne & Keller" or the "Receiver")³ and (2) pursuant to S.C. Code § 15-65-10(4), to dissolve the Payne & Keller Receivership.

PRELIMINARY STATEMENT AND BACKGROUND

On November 23, 2021, Peter D. Protopapas, as Receiver for Payne & Keller, filed an insurance coverage action against Travelers and Payne & Keller's other historical, out-of-state

¹ Paragraph 1 of the Receiver's Second Amended Third-Party Complaint incorrectly states that the pleading is the "Third Amended Third-Party Complaint." In fact, it is the Second Amended Third-Party Complaint (although it is the third iteration of the Receiver's third-party complaint).

² The Receiver filed his Second Amended Third-Party Complaint in his capacity as the Receiver for Flame Refractories, Inc.; United Construction Co. of Rome, Inc.; Wind Up, Ltd., Individually and as Successor-in-Interest to Pipe & Boiler Insulation, Inc. f/k/a Carolina Industrial Insulating Co.; Payne & Keller Company; and PBI QSF, LLC. All allegations and claims against Travelers, however, appear to have been asserted by the Receiver solely in his capacity as the Receiver for Payne & Keller, not any of the other entities.

³ Travelers understands that the Court has denied other third-party defendant insurers' motions to dismiss the Receiver's third-party claims via a July 14, 2022 email. That decision does not affect this Motion as Travelers is asserting several new grounds that require dismissal and were not raised in the other insurers' motions. To the extent any arguments asserted here were raised and denied in those prior motions, Travelers asserts them here to preserve its arguments and avoid potential waiver of any issue discussed herein.

insurers in the Court of Common Pleas of Richland County, South Carolina. *See Protopapas as Receiver for Payne & Keller Co. v. Am. Int'l Grp. et al.*, No. 2021CP4005768, Summons and Complaint for Declaratory Judgment and Breach of Contract, filed Nov. 23, 2021 (S.C. Ct. Common Pleas, Fifth Judicial Circuit). On December 20, 2021, Travelers removed the case to the United States District Court for the District of South Carolina, Columbia Division, because there is complete diversity of citizenship among the properly joined and served parties and the amount in controversy exceeds \$75,000. *See Protopapas as Receiver for Payne & Keller Co. v. Am. Int'l Grp. et al.*, No. 3:21-cv-04086-JMC, Dkt. No. 1 (Notice of Removal filed Dec. 20, 2021) (D.S.C.) (the "Federal Coverage Action"). On January 18, 2022, the Receiver filed an amended complaint in the Federal Coverage Action; Travelers then answered. *See id.* at Dkt. Nos. 23, 42. The Receiver also filed a motion to remand, along with a motion to stay the Federal Coverage Action pending resolution of the remand motion, both of which Travelers opposed. *See id.* at Dkt. Nos. 24, 47, 80, 119. Those motions have not been decided, and the Federal Coverage Action remains pending in federal court.

On July 14, 2022, the Receiver filed a Second Amended Third-Party Complaint against Travelers⁴ and the other insurance companies, even though the instant action is an *asbestos tort case* that has nothing to do with insurance coverage issues. The tort case was brought by plaintiff Lenora Childers, individually and as Personal Representative of the Estate Lewis C. Childers ("Childers"), pursuant to S.C. Gen. Stat. 15-51-10 *et seq.*, for the alleged wrongful death of Lewis C. Childers purportedly caused by exposure to asbestos and asbestos-containing products. *See generally* Pl.'s 1st Am. Compl. The defendants named in the Childers' complaint

⁴ The Second Amended Third-Party Complaint was served on Travelers on August 9, 2022 via the South Carolina Department of Insurance.

allegedly “manufactured, sold, and/or distributed asbestos-containing products or raw asbestos materials” and/or “controlled the work sites” where Childers was allegedly exposed to asbestos. *See id.* ¶ 3. Travelers is not named as a defendant, nor is any other insurance company, which is not surprising given that none of the insurance companies has ever manufactured, sold, or distributed asbestos-containing products. Nonetheless, the Receiver’s Second Amended Third-Party Complaint includes allegations and claims against Travelers and other insurers in an improper attempt to litigate here insurance coverage issues that are pending in the Federal Coverage Action.

The Receiver’s third-party claims against Travelers must be dismissed for several reasons.

First, the Receiver’s claims against Travelers must be dismissed because the Receiver lacks standing to assert claims against Travelers. Payne & Keller, according to the Receiver’s own filings, is a *Texas* corporation that dissolved in 1986. Under Texas corporate law, a dissolved corporation is not liable for post-dissolution claims and cannot sue or be sued with respect to any claim more than three years beyond dissolution. As a matter of settled receivership law, the Receiver stands in Payne & Keller’s shoes and does not acquire rights greater than those of Payne & Keller. Thus, the Receiver’s suit against Travelers is a nullity by operation of Texas corporate law. Moreover, even if the Receiver could bring suit, South Carolina law does not authorize nationwide receiverships over foreign corporations; it permits receiverships only with respect to property located within South Carolina. Insurance policies issued by Travelers to Payne & Keller in Texas are not property located in South Carolina.

What’s more, those lack of standing arguments also warrant dissolution of the Payne & Keller Receivership. First, because the law of Payne & Keller’s domicile (Texas) precludes any

suits by or against Payne & Keller brought after 1989, appointment of the Receiver here for the purpose of investigating and administering Payne & Keller's insurance assets was improper and must be undone. Second, the Receiver's third-party claims brought on behalf of Payne & Keller relate solely to alleged insurance assets of Payne & Keller under policies issued by foreign insurers; any insurance assets are property of the state where the debtor or obligor (*i.e.*, the insurers) are domiciled; and the Receiver admits that neither the debtor nor any of its insurers are domiciled in South Carolina. Thus, there is no South Carolina property over which the Receiver has any power—making a South Carolina Receiver powerless and a South Carolina receivership pointless and in need of dissolution.

Second, the Court lacks personal jurisdiction over Travelers. The Court has no general personal jurisdiction over Travelers because the company is not incorporated in South Carolina, it does not have its principal place of business in South Carolina, and it is not otherwise “essentially at home” in South Carolina. The Court also cannot exercise specific personal jurisdiction over Travelers because Payne & Keller's third-party claims against Travelers do not arise out of or relate to any contacts between Travelers and South Carolina.

Third, under SCRCP 14(a), a third-party claim may be asserted only against “a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.” A defendant acting as a third-party plaintiff must have a substantive claim against the third-party defendant founded upon derivative liability, *i.e.*, the outcome of the principal claim must impact the third-party defendant's liability. Here, Payne & Keller's third-party contract claims against Travelers are not “derivative” of Payne & Keller's alleged tort liability to Childers specifically. Rather, the third-party contract claims seek relief directly against Travelers, independent of Childers' claims, as demonstrated by the fact that Payne & Keller is pursuing

substantially identical relief in the first-filed Federal Coverage Action, a case to which Childers is not a party.

Finally, the third-party claims must be dismissed under SCRCP 12(b)(8), because the relief the Receiver seeks is the subject of the first-filed Federal Coverage Action, and the allegations and claims against Travelers in the instant case are substantially identical to those asserted there.

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

ARGUMENT

I. The Receiver Lacks Standing to Bring Claims Concerning Payne & Keller's Insurance Coverage Against Travelers, and Those Same Grounds Warrant Dissolution of the Payne & Keller Receivership.

"Standing to sue is a fundamental requirement in instituting an action." *Joseph v. S.C. Dep't of Lab., Licensing & Regul.*, 417 S.C. 436, 467, 790 S.E.2d 763, 779 (2016). In order for a party to have standing to bring an action, the party "must have a real, material, or substantial interest in the subject matter of the action." *Id.*; *see also Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). "No justiciable controversy is presented unless the plaintiff has standing to maintain the action." *Brock v. Bennett*, 313 S.C. 513, 519, 443 S.E.2d 409, 413 (Ct. App. 1994). Thus, "[o]nce it is determined a plaintiff has no standing to prosecute, the court must dismiss the action." *Id.*

It is black-letter law that a plaintiff may not seek recovery on a claim that belongs to another, or that he otherwise lacks a right to bring. *See, e.g., Furman Univ. v. Livingston*, 244 S.C. 200, 204 (1964) ("It is fundamental that one without interest in the subject matter of a law suit has no legal standing to prosecute it."); *Duke Power Co. v. S.C. Pub. Serv. Comm'n*, 284

S.C. 81, 96 (1985) (“In order to have standing to present a case before the courts of this State, a party must have a personal stake in the subject matter of the lawsuit.”).

Here, the Receiver does not allege any personal right or interest in the matters asserted in his Second Amended Third-Party Complaint. Instead, his right to sue is wholly dependent on, and derivative of, his authority as Receiver for Payne & Keller, a Texas corporation that dissolved in 1986. *See Nat’l Cash Register Co. v. Burns*, 217 S.C. 310, 313, 60 S.E.2d 615, 617 (1950) (“A primary concept of the law of receivers is that a receiver stands in the shoes of the debtor . . .”); *In re Am. Slicing Mach. Co.*, 125 S.C. 214, 218, 118 S.E. 303, 304 (1923) (“[I]t is clear that the appointment by the Court can vest in the Receiver no greater interest than the insolvent possessed.”).

Moreover, because Payne & Keller is not a South Carolina corporation, the Court’s authority to appoint a receiver over Payne & Keller is limited to Payne & Keller’s in-state property. Under South Carolina law, a “receiver may be appointed by a judge of the circuit court, either in or out of court . . . [w]hen a corporation has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights, and, in like cases, of the ***property within this State*** of foreign corporations.” S.C. Code § 15-65-10(4) (emphasis added).

These two bedrock principles of South Carolina receivership law doom the claims the Receiver seeks to assert on behalf of Payne & Keller for two distinct reasons. First, under Texas corporate law, a dissolved corporation cannot sue or be sued more than three years after its dissolution. That means the Receiver, standing in Payne & Keller’s shoes, cannot sue Travelers here. Second, even if the Receiver could sue on behalf of Payne & Keller contrary to Texas law, Payne & Keller’s insurance policies are not property of Payne & Keller located within South

Carolina, and therefore the Receiver lacks standing to administer or liquidate Payne & Keller's insurance policies.

A. Payne & Keller Cannot Sue or Be Sued Under Texas Law, So Payne & Keller's Claims Against Travelers Fail as a Matter of Law and Dissolution of the Payne & Keller Receivership Is Warranted.

Payne & Keller is a Texas corporation that dissolved in 1986. *See* Ex. A to Plaintiffs' Motion to Appoint a Receiver over Payne & Keller Co. Pursuant to S.C. Code § 15-65-10(4). Texas law provides that dissolved corporations are liable only for "existing claims." Tex. Bus. Orgs. Code Ann. § 11.351. Moreover, such claims can only be brought for three years after dissolution. *Id.* § 11.359; *see, e.g., Durham Clinic, P.A. v. Barrett*, 107 S.W.3d 761, 762 (Tex. App. 2003) (claim against dissolved corporation was barred because it was brought more than three years post-dissolution; under the statute, "a corporation shall not be liable for any claim other than an existing claim . . ."); *Boudreaux v. U.S. Framing*, No. 6:17-cv-0517, 2017 WL 6758448 (W.D. La. Nov. 21, 2017), *aff'd sub nom. Boudreaux v. C J R Framing Inc.*, 744 F. App'x 208 (5th Cir. 2018) ("[U]nder Texas law, a dissolved corporation is not liable for a post-dissolution claim."). Thus, Payne & Keller has an absolute defense to any personal injury tort claims that may now be brought against it.

In addition, a dissolved corporation may bring suit only within three years of the date of its dissolution. Under Texas corporate law, a "terminated filing entity continues in existence *until the third anniversary of the effective date of the entity's termination only* for purposes of: (1) prosecuting or defending in the terminated filing entity's name an action or proceeding brought by or against the terminated entity." Tex. Bus. Orgs. Code Ann. § 11.356(a) (emphasis added); *see also id.* § 11.359(a) ("[A]n existing claim *by or against* a terminated filing entity is extinguished unless an action or proceeding is brought on the claim not later than the third anniversary of the date of termination of the entity.") (emphasis added).

Again, Payne & Keller dissolved in 1986. Its ability to sue lapsed in 1989. *See Emmett Props. v. Halliburton Energy Servs.*, 167 S.W.3d 365, 369-70 (Tex. App. 2005) (“[Plaintiff] was a ‘dissolved corporation’ with a dissolution date of February 12, 1999. As such, [Plaintiff] was required to bring suit on its claims within three years of this date, which was February 12, 2002. [Plaintiff], however, did not file suit until June 13, 2002, more than three years after the dissolution date. Therefore, [Plaintiff’s] claims were extinguished under article 7.12, section C, and the trial court properly granted the appellees’ motion for summary judgment.”)⁵; *Brooks v. Binger*, 2019 WL 3023226, at *2 (Tex. App. July 11, 2019) (“The trial court’s purported adjudication of claims by B2 Towing in a lawsuit commenced more than 26 years after B2 Towing’s dissolution amounted to a nullity. . . .”); *see also Carter v. Harvey*, 525 S.W.3d 420, 426 (Tex. App. 2017) (same). Appointment of a receiver cannot create a right to sue that does not exist under the Texas statutes that govern Payne & Keller’s corporate existence. *See Nat’l Cash Register Co., supra*; *In re Am. Slicing Mach. Co., supra*. Therefore, the Receiver lacks the authority to bring claims on behalf of Payne & Keller and his claims against Travelers must be dismissed for lack of standing.

As shown above, Texas law is clear that Payne & Keller may not sue or be sued at this point. *In re All Cases Against Sager Corp.*, 967 N.E.2d 1203, 1209 (Ohio 2012) (“We concur. The question of whether a dissolved foreign corporation has the capacity to sue or be sued is a matter determined by the law of the state of incorporation.”). And because Payne & Keller is no longer amenable to suit, foreign courts lack authority under the Full Faith and Credit Clause of

⁵ *Emmett* cites article 7.12 of the Texas Business Corporations Act (“TBCA”), the predecessor statute to the current Texas Business Organizations Code (“TBOC”). The TBOC replaced the TBCA on January 1, 2010 but made no substantive changes to TBCA article 7.12. *See Boudreaux v. U.S. Framing*, No. CV 6:17-0517, 2017 WL 6758448, at *3 (W.D. La. Nov. 21, 2017).

the United States Constitution to appoint a receiver over Payne & Keller for claims not pending before 1989. *Id.* at 1211 (“The authority to appoint a receiver for a dissolved foreign corporation is subject to constitutional limitations, notably the Full Faith and Credit Clause, obliging us to recognize Illinois corporation law as barring claims filed against Sager that were not pending on June 17, 2003. Thus, the court is without authority to appoint a receiver to ‘accept the process of claims, process defenses and marshal assets’ on behalf of the Sager Corporation, as the trial court ruled.”).

In *Sager*, the Ohio Supreme Court reversed an Ohio court’s appointment of a receiver for a defunct foreign corporation in an identical situation as here. *In re Sager*, 967 N.E.2d at 1211. *Sager* involved a plaintiff that sought appointment of a receiver to access Sager’s insurance assets to compensate the claimant for asbestos-related injuries. *See id.* at 1205. Sager was an Illinois corporation that dissolved in 1998. *Id.* Illinois law set a five-year post-dissolution window for claims to be brought by or against dissolved corporations, meaning Sager was amenable to suit until 2003. *Id.* But the claimants did not bring suit against Sager until 2007. *Id.* Sager sought summary judgment, in part arguing that the appointment of a receiver violated the Due Process, Commerce, and Full Faith and Credit Clauses of the United States Constitution. *Id.* The trial court and intermediate appellate court both disagreed and affirmed the receiver’s appointment. *Id.* Reversing the intermediate appellate court, the Ohio Supreme Court held that the Ohio trial court was “without authority to appoint a receiver” over foreign-domiciled Sager because “[t]he authority to appoint a receiver for a dissolved foreign corporation is subject to constitutional limitations, notably the Full Faith and Credit Clause” and the court was “oblig[ed] ... to recognize Illinois corporation law as barring claims filed against Sager that were not pending on June 17, 2003.” *Id.* at 1211. The Ohio Supreme Court also noted that “the existence

of an insurance policy is irrelevant” where “[n]o cause of action which accrues after dissolution may be brought against a dissolved corporation.” *Id.*

The principles underlying *Sager* forcefully demonstrate that this Court lacks the authority to appoint a receiver for Payne & Keller, because the company has not been amenable to suit under the laws of its state of incorporation (Texas) since 1989. Because Texas law bars Payne & Keller from suing or being sued, the Full Faith and Credit Clause of the United States Constitution requires this Court to honor Texas corporate law and prevents it from appointing a receiver over Payne & Keller in contravention of Texas law. Thus, the receivership must be dissolved.

Dismissal is also warranted by the fact, as observed in *Sager*, that insurance policies are worthless where a dissolved foreign corporation is immune from suit. *In re Sager*, 967 N.E.2d at 1211. Here, as Plaintiffs admit, “all that remains of Payne & Keller is its insurance coverage.” Pl.’s Mot. to Appoint a Receiver over Payne & Keller Co. Pursuant to S.C. Code § 15-65-10(4) at 1 (Aug. 23, 2021).

B. Because the Travelers Insurance Policies Are Not Property of Payne & Keller in South Carolina (Nor Are Any of the Other Insurers’ Policies), the Receiver Lacks Standing to Sue Travelers and the Receivership Must Be Dissolved.

Even if the Receiver could bring claims on behalf of Payne & Keller contrary to Texas law, his authority is circumscribed by South Carolina law, which strictly confines the powers of South Carolina receivers of foreign corporations to the corporation’s in-state property.

It is undisputed that Payne & Keller is not a South Carolina corporation. *See* 2d Am. Third-Party Compl. ¶ 1 (citing Ex. D, Order (identifying Payne & Keller as a dissolved “Texas

corporation”).⁶ The statute under which the Receiver was appointed—S.C. Code § 15-65-10(4)—does not authorize general receiverships over corporations not incorporated in South Carolina. It only permits South Carolina courts to appoint receivers for such foreign corporations to the extent of their “property within this state.” The South Carolina Supreme Court has confirmed that this statute means what it says: if a foreign corporation has property within South Carolina, a South Carolina court may appoint a receiver over that in-state property; if a foreign corporation has no in-state property, no receiver may be appointed. *See Boynton v. Consol. Indem. & Ins. Co.*, 185 S.E. 731, 737 (S.C. 1936) (reversing appointment of receiver where there was a “total failure of any proof” that the foreign company “has property in this state”).

The circumscribed nature of state receiverships over foreign corporations is a basic principle of state receivership law. *See, e.g.*, 17A FLETCHER CYC. CORP. § 8554, *Jurisdiction and power to appoint receivers—General receivers* (“But where the corporation has no property in the state, there would be nothing for the receiver to take under control, and the appointment would be an idle act that the courts cannot be called upon to perform.”) (collecting cases); *id.* § 8555, *Receivers to take charge of local assets* (“While denying the power to appoint a general receiver, the authorities agree that equity has jurisdiction to prevent the dissipation and

⁶ Nor are any of the entities “related to the historic operations of Payne & Keller Company” to which the Payne & Keller Receivership was extended pursuant to the September 30, 2021 Order Granting the Receiver for Payne & Keller Company’s Motion to Clarify the Receiver Order. *See* 2d Am. Third-Party Compl. ¶ Ex. E (Order Granting The Receiver For Payne & Keller Company’s Motion To Clarify The Receiver Order). That order identifies several companies, all of which were incorporated in either Texas or Louisiana, not South Carolina. *See* Payne & Keller, Inc. (Ex. A, Texas corporation); Payne & Keller of Louisiana, Inc. (Ex. B, Louisiana corporation); Bayou Maintenance, Inc. (Ex. C, Louisiana corporation); Bayou Maintenance and Constructors, Inc. (Ex. D, Louisiana corporation); Payne & Keller Gulf Coast, Inc. (Ex. E, Louisiana corporation); Frentex Enterprises Company (Ex. F, Texas corporation); and Frentex Enterprises Company of Texas (Ex. G, Texas corporation).

misapplication of assets of the foreign corporation within the state, and if necessary, to appoint a receiver of the assets . . .”) (collecting cases); *see also* 75 C.J.S. RECEIVERS § 475 (“In accordance with the general rule as to extraterritorial rights, neither the court nor the receiver appointed by it has authority over property beyond the boundaries of its territorial jurisdiction.”). As a matter of clear South Carolina law, the Receiver may have authority with respect to Payne & Keller’s property located within the state of South Carolina, but he has no authority with respect to Payne & Keller’s out-of-state property.

Insurance policies issued to Payne & Keller (in Texas) by Travelers (in Connecticut) are not “property [of Payne & Keller] within [South Carolina]” as required under the South Carolina receivership statute. The situs of intangible property such as a contractual obligation under an insurance policy is the domicile of the debtor/obligor (here, Travelers), whose domicile is its state of incorporation or principal place of business (here, Connecticut). *See, e.g., H.J. Baker & Bro. v. Doe*, 70 S.E. 431, 433 (S.C. 1911) (“The general rule of law is well settled that for the purposes of founding administration, all simple contract debts are assets at the domicile of the debtor.”); *Af-Cap Inc. v. Republic of Congo*, 383 F.3d 361, 371–72 (5th Cir. 2004) (“[C]ourts consistently hold that the situs of a debt obligation is the situs of the debtor . . . [T]his rule’s general operation has been recognized by the Supreme Court.”); *Long v. Baldt*, 464 F. Supp. 269, 273 (D.S.C. 1979) (“the situs of the debt lies with the debtor”). Travelers is incorporated and has its principal place of business in Connecticut; it has few, if any, contacts with South Carolina, and all of the subject insurance policies were issued and delivered to Payne & Keller outside of South Carolina. *See infra* at § II; *see also* Ex. I (Declaration of Ann B. Mulcahy (“Mulcahy Decl.”)) at ¶¶ 3-6. Similarly, all other third-party defendant insurers are incorporated and maintain their principal places of business outside of South Carolina. *See* 2d Am. Third-Party

Compl. at ¶¶ 4-5, 7-14, 21-24. As a result, the subject contracts are plainly not “property [of Payne & Keller] within [South Carolina].” Accordingly, the Receiver has no standing to assert Payne & Keller’s rights or otherwise act on Payne & Keller’s behalf with respect to contracts of insurance between Travelers and Payne & Keller. The claims the Receiver asserts against Travelers in this action must be dismissed for this reason as well.

The Payne & Keller Receivership also must be dissolved for similar reasons. The Receiver’s Third-Party Claims, as they relate to Payne & Keller, relate solely to insurance assets. *See* 2d Am. Third-Party Compl. ¶¶ 142-174, Causes of Action 1, 2, 11, and “all that remains of Payne & Keller is its insurance coverage” (Pl.’s Mot. to Appoint a Receiver over Payne & Keller Co. Pursuant to S.C. Code § 15-65-10(4) at 1 (Aug. 23, 2021)). As discussed above, those assets are property of the state in which the issuing insurer is domiciled. *See, e.g., H.J. Baker*, 70 S.E. at 433; *Af-Cap*, 383 F.3d at 371–72; *Long*, 464 F. Supp. at 273. And the Receiver admits that none of Payne & Keller’s insurers are domiciled in South Carolina. *See* 2d Am. Third-Party Compl. at ¶¶ 4-5, 7-14, 21-24. Given that Payne & Keller has no property located in South Carolina for a receiver to administer, the Payne & Keller receivership has no point and must be dissolved.

II. The Court Lacks Personal Jurisdiction Over Travelers

Pursuant to SCRCP 12(b)(2), a court must grant a motion to dismiss where the plaintiff fails to allege plausible facts supporting the exercise of personal jurisdiction over the non-resident defendant. *See Power Prods. & Servs. Co., Inc. v. Kozma*, 665 S.E.2d 660, 664 (S.C. Ct. App. 2008). “The party seeking to invoke personal jurisdiction over a non-resident defendant . . . bears the burden of establishing jurisdiction.” *Id.* (citation omitted). “When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the court is

not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction.” *Id.* (citation omitted). “Personal jurisdiction over a nonresident defendant is a question to be resolved upon the facts of each particular case.” *Id.* (citation omitted). Because South Carolina’s long-arm statute has been interpreted to apply coextensively with the limits of due process, the sole question eventually “becomes whether the exercise of personal jurisdiction in this case would violate the strictures of due process.” *Id.* (citation omitted); *see also, e.g., S. Plastics Co. v. S. Com. Bank*, 423 S.E.2d 128, 130 (S.C. 1992) (“the question becomes whether the exercise of personal jurisdiction over the [nonresident defendant] comports with due process.”).

“‘Due process requires that there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.’” *Hidria, USA, Inc. v. Delo*, 783 S.E.2d 839, 843 (S.C. Ct. App. 2016) (quotation omitted). There are two prongs to the due process analysis: “‘(1) the ‘power’ prong, under which minimum contacts grant a court the ‘power’ to adjudicate the action; and (2) the ‘fairness’ prong, which requires the exercise of jurisdiction to be ‘reasonable’ or ‘fair.’” *Id.* (citation omitted). The plaintiff bears the burden of satisfying both; if either prong fails, the exercise of personal jurisdiction over the nonresident defendant fails to comport with the requirements of due process. *See id.* (citations omitted). Here, there is no basis for the Court to exercise either general or specific jurisdiction over Travelers.

A. The Court Does Not Have General Jurisdiction Over Travelers

“General jurisdiction is the State’s right to exercise personal jurisdiction over a defendant even though the suit does not arise out of or relate to the defendant’s contacts with the forum[.]” *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 655 S.E.2d 476, 478 (S.C. 2007) (citing

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 n. 15, 105 S. Ct. 2174, 85 L.Ed.2d 528 (1985)). A nonresident corporation must have substantial contacts with the forum state to support a court's exercise of general jurisdiction when the nonresident's contacts do not directly relate to the plaintiff's cause of action. *See Cockrell v. Hillerich & Bradsby Co.*, 611 S.E.2d 505, 508 (S.C. 2005) (citations omitted).

Subject to the constraints imposed by federal due process, general jurisdiction is determined under S.C. Code Ann. § 36-2-802, which states: "A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, doing business, or maintaining his or its principal place of business in, this State as to any cause of action." For general jurisdiction to attach, the foreign corporation's activities or affiliations within the forum state must be "so continuous and systematic as to render [it] essentially at home in the forum State." *Daimler AG v. Bauman*, 571 U.S. 117, 119 (2014) (citation and internal quotation marks omitted); *see also Companion Prop. & Cas. Ins. Co. v. U.S. Bank Nat'l Ass'n.*, 3:15-cv-01300-JMC, 2016 WL 6781057, at *5 (D.S.C. Nov. 16, 2016) ("general jurisdiction requires affiliations so continuous and systematic as to render [the foreign corporation] essentially at home in the forum State, *i.e.*, comparable to a domestic enterprise in that State") (citation and internal quotation marks omitted)). "[O]nly a limited set of affiliations with a forum" can satisfy the "essentially at home" requirement. *Daimler*, 571 U.S. at 137. Thus, in order to haul a nonresident corporation into court to answer for claims that have nothing to do with the corporation's activities in or contacts with the forum state, the corporation must have substantial contacts with the forum state. *See Gibson v. Confie Ins. Grp. Holdings, Inc.*, 2:16-CV-02872-DCN, 2017 WL 2936219, at *5 (D.S.C. July 10, 2017) ("The threshold level of contacts with the

forum state required for the exercise of general jurisdiction is significantly higher than for specific jurisdiction and must be fairly extensive.” (citation omitted)).

A corporation typically will only be found “at home” in its state of incorporation and the state in which it has its principal place of business. *See Sutton v. Motor Wheel Corp., LLC*, No. 3:17-01161-MGL, 2018 WL 2197535, at *3 (D.S.C. May 14, 2018) (citation omitted); *see also Daimler*, 571 U.S. at 137 (“the place of incorporation and principal place of business are ‘paradig[m] ... bases for general jurisdiction.’” (citations omitted)). Only “in an exceptional case” may “a corporation’s operations in a forum other than its formal place of incorporation or principal place of business [] be so substantial and of such a nature as to render the corporation at home in that State.” *Daimler*, 571 U.S. at 139 n. 19. This exception is very limited, and plaintiffs face a heavy burden in proving it applies. *See Daimler*, 571 U.S. at 138 (rejecting as “unacceptably grasping” the proposition that a party can be subject to general jurisdiction in every state in which it “engages in a substantial, continuous, and systematic course of business”).⁷

⁷ *See also, e.g., Companion Prop. & Cas. Ins. Co.*, 2016 WL 6781057, at *7 (noting a party asserting general jurisdiction under *Daimler*’s “exceptional case” exception “faces a heavy burden,” and rejecting argument that foreign corporation was at home in South Carolina (citations omitted)); *Maseng v. Lenox Corp.*, 483 F. Supp. 3d 360, 368-69 (D.S.C. 2020) (“Lenox’s contacts with South Carolina are limited to one retail store in Myrtle Beach, South Carolina and the marketing, distribution, and sale of its own products in various retail stores in South Carolina. The Myrtle Beach retail store is one of the 20 retail stores that Lenox operates in 12 states. . . . Thus, while this contact is certainly systematic and continuous, it is not substantial enough to render Lenox ‘at home’ in South Carolina.”); *Sunny Days Entm’t, LLC v. Traxxas, L.P.*, 376 F. Supp. 3d 654, 660-61 (D.S.C. 2019) (nonresident company that sold toys to South Carolina customers through brick and mortar stores and online not subject to general jurisdiction in South Carolina); *Fidrych v. Marriott Int’l, Inc.*, No. 2:17-2195-BHH, 2018 WL 9811052, at *6 (D.S.C. Aug. 3, 2018) (nonresident corporation with 90 hotels and certificate of authority to transact business in South Carolina not subject to general jurisdiction in South Carolina).

Here, there is no basis for the assertion of general jurisdiction over Travelers. Travelers is incorporated in and has its principal place of business in Connecticut. *See* Ex. I at ¶ 3. Thus, the only way this Court can have general personal jurisdiction over Travelers is if Payne & Keller can meet its heavy burden of showing that Travelers' contacts with South Carolina are so continuous and systematic as to render it essentially at home in South Carolina. Payne & Keller cannot possibly meet its burden here.

Payne & Keller does not so much as allege that Travelers is subject to general jurisdiction in South Carolina, let alone explain how or why it could be. That is reason alone to reject any argument that Travelers is somehow at home in South Carolina. But even if the Court were to look past this pleading deficiency, Travelers' limited activities in South Carolina are plainly insufficient to render it at home in South Carolina. As set forth in the accompanying declaration of Ann B. Mulcahy:

- Travelers is a corporation with its principal place of business and state of incorporation outside of South Carolina (*see* Ex. I at ¶¶ 3, 6);
- Travelers' business operations are managed principally from its Connecticut offices (*see id.* at ¶ 4);
- None of Travelers' senior officers or directors are located in South Carolina (*see id.* at ¶ 5);
- Travelers does not have employees in South Carolina (*see id.* at ¶ 6);
- Travelers does not own or rent office space in South Carolina (*see id.* at ¶ 6);
- Travelers does not have any loan applications with South Carolina banks or financial institutions (*see id.* at ¶ 6); and
- Travelers does not hold meetings of directors in South Carolina (*see id.* at ¶ 6).

Simply put, Travelers is not "at home" in South Carolina, and Payne & Keller does not assert otherwise. Travelers' limited contacts with South Carolina relate solely to its insuring

relationship with certain South Carolina businesses and residents. Notably, Payne & Keller, a defunct Texas corporation, is not one such business. Accordingly, because Travelers is not incorporated in South Carolina, does not have its principal place of business in South Carolina, and otherwise lacks the type of contacts needed to render it essentially at home in South Carolina, general jurisdiction does not exist.

B. The Court Lacks Specific Jurisdiction Over Travelers

Specific jurisdiction exists where the plaintiff's claims arise out of or relate to the defendant's substantial contacts with the forum state. *See Coggeshall*, 655 S.E.2d at 478 ("Specific jurisdiction is the State's right to exercise personal jurisdiction because the cause of action arises specifically from a defendant's contacts with the forum" (citation omitted)); *Maseng*, 483 F. Supp. 3d at 365 ("A defendant has minimum contacts with a jurisdiction sufficient to subject it to specific jurisdiction in the forum state if 'the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" (quotation omitted)). Because South Carolina's long-arm statute has been interpreted to be coextensive with the limits of due process, the dispositive question for purposes of specific jurisdiction is whether the exercise of jurisdiction would comport with due process. *See Coggeshall*, 655 S.E.2d at 478; *S. Plastics Co.*, 423 S.E.2d at 131.

As noted above, to comport with due process in the specific jurisdiction context, Payne & Keller must allege plausible facts sufficient to satisfy both the "power" prong and the "fairness" prong. *See Hidria, USA, Inc.*, 783 S.E.2d at 843. "The court must (1) find that the defendant has the requisite minimum contacts with the forum, without which, the court does not have the 'power' to adjudicate the action and (2) find the exercise of jurisdiction is reasonable or fair." *Power Prods. & Servs. Co.*, 665 S.E. 2d at 665 (citation omitted). "If either prong fails, the

exercise of personal jurisdiction over the defendant fails to comport with the requirements of due process.” *Id.* (quotation omitted). Payne & Keller has not come close to alleging specific jurisdiction facts sufficient to satisfy its burden as to either the “power” prong or the “fairness” prong.

1. The Power Prong Is Not Met

“A minimum contacts analysis requires a court to find that the defendant directed its activities to a resident of this State and that the cause of action arises out of or relates to those activities.” *S. Plastics Co.*, 423 S.E.2d at 131 (citation omitted). Here, Travelers did not purposefully avail itself of the privileges of conducting activities in South Carolina in connection with the instant claims, given that there are no factual allegations or evidence that Travelers conducted activities in South Carolina that serve as the basis for Payne & Keller’s third-party claims against Travelers.

In its Second Amended Third-Party Complaint, Payne & Keller rotely alleges that “[t]his Court has jurisdiction over the matters alleged herein pursuant to S.C. Code Ann. §§ 36-2-802 and 36-2-803, Article V of the Constitution of the State of South Carolina, and the Court’s plenary powers,” and that “[t]his Court appointed Peter D. Protopapas as Receiver of Third-Party Plaintiffs.” 2d Am. Third-Party Compl. ¶ 25. There are no jurisdictional allegations specific to Travelers. This is reason alone to find that specific personal jurisdiction is lacking. *See Sullivan v. Hawker Beechcraft Corp.*, 723 S.E.2d 835, 839 (S.C. Ct. App. 2012) (the mere “repeating of the [long-arm] statute is insufficient to support a finding of personal jurisdiction”).

Beyond this pleading deficiency, Payne & Keller cannot demonstrate the minimum, claim-specific contacts between Travelers and South Carolina necessary to meet the constitutional requirements of due process. Payne & Keller’s third-party claims against

Travelers do not arise from or relate to Travelers' contacts with South Carolina. Payne & Keller seeks insurance coverage rulings that have nothing to do with Travelers' limited contacts with South Carolina. The Receiver has not alleged, and cannot allege, that Travelers directed its Payne & Keller-related activities at residents of South Carolina, or that Payne & Keller's third-party claims against Travelers in this case arise out of Travelers' in-state activities. Indeed, Payne & Keller is not and has never been a South Carolina company, and all of the subject insurance policies were issued and delivered to Payne & Keller outside of South Carolina. Travelers is not alleged to have ever manufactured, distributed, or sold any Payne & Keller-related asbestos or asbestos-containing products in South Carolina or elsewhere, and the insurance policies Travelers issued to Payne & Keller are not alleged to have caused Childers' asbestos injuries.

Moreover, even assuming Travelers could have foreseen that Payne & Keller would be subject to asbestos tort lawsuits in South Carolina, foreseeability alone is insufficient to establish personal jurisdiction. *See Cockrell*, 611 S.E.2d at 509 ("The foreseeability that is critical to due process analysis" is that "the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." (citation omitted)). Payne & Keller cannot avoid the absence of jurisdiction over Travelers by attempting to impute the South Carolina contacts of individual asbestos claimants (or others) to Travelers. The relevant contacts for jurisdictional purposes "must center on the contacts generated by the defendant and not on the unilateral actions of some other entity[.]" *Id.* at 508 (citation omitted); *see also Moosally v. W.W. Norton & Co., Inc.*, 594 S.E.2d 878, 885 (S.C. Ct. App. 2004) ("Because the due process requirements must be met as to each defendant, we must assess individually each defendant's contacts with South Carolina." (citations omitted)); *Walden v. Fiore*, 571 U.S. 277, 284 (2014)

(“the relationship must arise out of contacts that the ‘defendant *himself*’ creates with the forum State” (citation omitted) (emphasis in original)); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984). Indeed, the United States Supreme Court has made clear that the “unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984) (citations omitted).⁸ Thus, the contacts asbestos claimants or others may have had with South Carolina are irrelevant to the question whether Travelers has sufficient minimum contacts with South Carolina to give rise to specific personal jurisdiction over Travelers.

In short, because Payne & Keller fails to allege facts sufficient to show that Travelers conducted activities in South Carolina that serve as the basis for Payne & Keller’s third-party claims against Travelers in this case, the exercise of personal jurisdiction over Travelers would violate due process under the power prong of the due process analysis.

2. The Fairness Prong is Not Met

It would also be unreasonable and unfair for the Court to exercise personal jurisdiction over Travelers in this case. Under the fairness prong of the due process analysis, a court should consider: “(1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident’s acts; (3) the inconvenience resulting to

⁸ See also, e.g., *Wallace v. Yamaha Motors Corp.*, No. 9:19-cv-0730-DCN, 2019 WL 6170419, at *3 (D.S.C. Nov. 20, 2019) (finding personal jurisdiction could not be exercised over a nonresident motorcycle manufacturer for product liability claims stemming from a vehicular accident because “conduct of plaintiffs or third parties that creates a connection between the defendant and the forum state will be disregarded”); *Sutton v. Motor Wheel Corp.*, 2018 WL 2197535, at *5 (finding personal jurisdiction did not exist over the defendant, a tire manufacturer, based on the contacts of a distributor of defendant’s tires that was authorized to transact business in South Carolina).

the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State's interest in exercising jurisdiction." *Power Prods. & Servs. Co., Inc.*, 655 S.E.2d at 665 (citation omitted). Each of these considerations weighs in favor of declining to exercise jurisdiction over Travelers in this case.

With respect to the first two factors, Travelers' activities in South Carolina are not only limited, they are unrelated to the facts and circumstances of Payne & Keller's third-party claims against Travelers. As explained, Travelers is incorporated in Connecticut, its principal place of business is in Connecticut, none of its senior officers or directors are located in South Carolina, it does not have employees in South Carolina, and it does not own or rent office space in South Carolina. *See* Ex. I at ¶¶ 3-6. In addition, Payne & Keller was never a South Carolina company, and Travelers is not alleged to have done anything in South Carolina that forms the basis for Payne & Keller's third-party claims against Travelers in this case. Indeed, Payne & Keller's claims against Travelers are based on insurance policies that Travelers issued to Payne & Keller outside of South Carolina.

With respect to the third factor, no party would be inconvenienced if this Court were to find that it does not have jurisdiction over Travelers. The parties are litigating substantially identical claims in the first-filed Federal Coverage Action, which is pending in federal court in Columbia, South Carolina. Thus, the Receiver will have no reason to complain if his substantially identical claims are dismissed in this case. If anything, the parties to this asbestos tort case—particularly Childers—would be inconvenienced if the Receiver is allowed to implead Travelers and other insurers. Permitting the Receiver to pursue his duplicative third-party claims would expand unnecessarily the scope of the case and delay its ultimate resolution, thereby prejudicing Childers and the other parties, and wasting party and judicial resources.

Finally, South Carolina's interest in exercising jurisdiction here is minor. "[W]hile South Carolina has an interest in providing redress for its citizens, that interest is diminished when no business was transacted in this State and any contract formed was not to be performed in this State." *Aviation Assocs. & Consultants, Inc. v. Jet Time, Inc.*, 402 S.E.2d 177, 181 (S.C. 1991). Payne & Keller has never been a South Carolina company, and all of the policy contracts were issued to Payne & Keller outside of South Carolina. Further, given the existence of the first-filed Federal Coverage Action now pending in South Carolina federal court, a court located in South Carolina will still hear and resolve substantially identical claims if this Court were to decline to exercise jurisdiction over Travelers in this case, as it should.

Under the facts of this case, even if Payne & Keller could establish the minimum contacts necessary to meet the constitutional requirements of due process under the power prong (it cannot), the Court cannot exercise jurisdiction over Travelers under the fairness prong because it would be neither reasonable nor fair.

III. The Third-Party Claims Are Improper Under SCRCP 14 Because They Cannot Establish, and Are Not Based On, Derivative Liability of Childers' Tort Claims

Rule 14 of the SCRCP provides that a defendant "as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to him for all or part of the plaintiff's claim against him.*" S.C. R. Civ. P. 14(a) (emphasis added). This means that "the third-party plaintiff must have a substantive claim against the third-party defendant founded upon derivative liability," and "[t]he outcome of the principal claim must impact the third-party defendant's liability[.]" *First Gen. Servs. of Charleston, Inc. v. Miller*, 445 S.E.2d 446, 447 (S.C. 1994) (citation omitted). "Consequently, a non-party is subject to impleader [under SCRCP 14] only if there is a basis to assert he is liable to the named defendant(s) for all or part of the plaintiff's claim." *Smith v. Tiffany*, 799 S.E.2d 479, 486 (S.C.

2017); *see also Gathings v. Robertson Brokerage Co., Inc.*, 367 S.E.2d 423, 426 (S.C. Ct. App. 1988) (“Rule 14 may be used only when the substantive law permits the defendant to shift some or all of his liability [on the principal claim] to the impleaded party.” (quotation omitted)).

“The third party claim must be derivative of the plaintiff’s claim because [d]erivative liability is central to the operation of Rule 14.” *CNH Indus. Cap. Am. LLC v. Able Cont., Inc.*, No. 9:16-cv-2520-RMG, 2017 WL 512453, at *1 (D.S.C. Feb. 7, 2017) (citation and internal quotation marks omitted).⁹ “It is not sufficient that the third-party claim is a related claim; the claim must be derivatively based on the original plaintiff’s claim.” *Id.* (quotation omitted). “Rule 14(a) does not allow the defendant to assert a separate and independent claim even though the claim arises out of the same general set of facts as the main claim.” *Id.* (quotation and other citation omitted). “In other words, impleader ‘must involve an attempt to pass on to the third party all or part of the liability asserted against the defendant.... An impleader claim may not be used to assert any and all rights to recovery arising from the same transaction or occurrence as the underlying action.’” *Id.* (quotation omitted). Thus, “[a] third-party claim may be asserted . . . *only when the third party’s liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to the defending party.*” *Id.* (citation omitted) (emphasis in original). “[A] third-party claim is ‘viable only where a proposed third party plaintiff says, in effect, ‘If I am liable to [the original] plaintiff, then my liability is only technical or secondary or partial, and the third party defendant is derivatively liable and must reimburse me for all or part ... of anything I must pay [the original] plaintiff.’” *For Life Prods.*,

⁹ Rule 14 of the Federal Rules of Civil Procedure is substantially the same as Rule 14 of the SCRCF. “In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules.” *Maybank v. BB&T Corp.*, 787 S.E.2d 498, 510 (S.C. 2016) (citation omitted).

LLC v. Universal Cos., Inc., No. 1:20CV00016, 2021 WL 1169532, at *4 (W.D. Va. Mar. 29, 2021) (quotation omitted).

Here, Payne & Keller's third-party *contract* claims against Travelers are not derivative of or dependent on Childers' *tort* claims against Payne & Keller. Payne & Keller does not and cannot allege that Travelers, an insurer, is derivatively liable if Payne & Keller is found responsible for Childers' alleged asbestos exposure. Nor does Payne & Keller allege that Travelers has any obligation to Childers.

Indeed, rather than seeking to establish derivative liability, the third-party claims seek relief directly from and against Travelers. Specifically, as to Travelers, the Receiver for Payne & Keller seeks the following relief:

- In Count I, a declaration that "Third-Party Defendants must fairly compensate the Receiver for the substantial time, effort, and expenses expended in connection with the defense of asbestos suits potentially covered under the Third-Party Defendants' policies and to further declare that this obligation is unlimited and shall continue as long as there are Asbestos Suits pending against Third-Party Plaintiffs." 2d Am. Third-Party Compl. ¶ 181.
- In Count II, a declaration that "all policies, evidence of policies and documents relating to their placement, purchase and underwriting, including, but not limited to, such documents in the possession of Third-Party Defendants are the property of the Receiver and shall be delivered immediately to the Receiver to be maintained in his sole possession for his unrestricted use in carrying out his duties." *Id.* at ¶ 185.
- In Count XI, "declarations, after thorough discovery regarding Rexel's and SKRLA's competing claims to the Payne & Keller insurance program, regarding the nature, extent, and priority (if any) of Rexel's and SKRLA's claims to the Payne & Keller insurance coverage so as to provide the Receiver with guidance and certainty as to how to go about carrying out his duties as the Receiver for Payne & Keller and to provide the Payne & Keller insurers with certainty and guidance as to the delineation of their rights and responsibilities as between Rexel and Payne & Keller in this regard." *Id.* at ¶ 233.
- In the Prayer for Relief, a "declaration as to the interpretation and meaning of the Third-Party Plaintiffs' insurance policies," ostensibly including any insurance policies Travelers issued to Payne & Keller. *Id.*, Prayer for Relief ¶ E.

These are direct claims against Travelers; they are not based on derivative liability and, as a result, they are not actionable under SCRCP 14. *See Miller*, 445 S.E.2d at 447 (explaining that, because third-party claims are dependent on derivative liability, “no right exists to implead a third-party defendant who is *directly* liable to the [third-party] plaintiff.” (citation omitted) (emphasis in original)). Payne & Keller’s third-party claims against Travelers seek broad insurance coverage contract rulings, including a declaration that Travelers “must fairly compensate the Receiver” for time spent defending “asbestos suits” generally (2d Am. Third-Party Compl. ¶ 181), a declaration that “all policies, evidence of policies and documents relating to their placement, purchase and underwriting . . . are the property of the Receiver and shall be delivered immediately to the Receiver (*id.* ¶ 185), and a declaration regarding “Rexel’s competing claims to the Payne & Keller insurance program” (*id.* ¶ 233). These claims are not specific to Childers and are not based on derivative liability.

Again, the instant case is a tort lawsuit related to alleged asbestos exposure. It has nothing to do with insurance policy obligations. Travelers’ insuring relationship with Payne & Keller is not alleged to have caused Childers’ injuries—nor could it. Childers is a stranger to the insurance contracts Travelers issued to Payne & Keller, and Childers has yet to establish that Payne & Keller has any liability to Childers.

“It is hardly necessary to cite cases or authorities to the effect that in a tort action, suit must first be brought against the insured or party claimed to be liable, and that an insurance carrier cannot be joined in such a suit, or suit brought individually against such a company; and in fact, it is universally forbidden that any evidence or reference be made to the fact that the defendant is protected by insurance.” *Ford v. Glens Falls Indem. Co. of Glens Falls, N.Y.*, 80 F. Supp. 347, 348 (E.D.S.C. 1948). Indeed, recognizing the distinct set of facts and issues relevant

to tort claims as opposed to contract claims, courts in South Carolina have long held that liability issues and insurance coverage issues should be litigated separately. *See Am. Fidelity Fire Ins. Co. v. Hood*, 37 F.R.D. 17, 24 (E.D.S.C. 1965) (dismissing tort cross-claims asserted in declaratory judgment action on insurance coverage because such claims did not arise from same transaction or occurrence as declaratory judgment claims); *Ex Parte Builders Mutual Ins. Co.*, 847 S.E.2d 87, 110-111 (S.C. 2020) (affirming trial court's decision to deny insurers' motions to intervene in underlying tort action, and recognizing that a separate declaratory judgment action is the proper forum to resolve insurance coverage issues).

The Payne & Keller insurance contracts themselves likewise reflect the parties' agreement that Payne & Keller cannot implead Travelers in a direct asbestos tort case before Payne & Keller's liability has been determined. For example, in a liability insurance policy Travelers issued to Payne & Keller for the policy period April 1, 1983 to April 1, 1986, the parties agreed that:

No action shall lie against the company [*i.e.*, Travelers] unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, *nor until the amount of the insured's [i.e., Payne & Keller's] obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.* . . .

No person or organization shall have any right under this policy to join the company as a party to any action against the insured to determine the insured's liability, nor shall the company be impleaded by the insured or his legal representative. . . .

Ex. H, at TRAV_SUB_002207 (policy number 61 AL 473361 SRA) (emphasis added).

In short, Payne & Keller's third-party claims against Travelers improperly ask this Court for contract-related judicial declarations unrelated to Childers' asbestos tort action and not

premised on derivative liability. Travelers, therefore, cannot be impleaded, and the third-party claims against Travelers must be dismissed.

IV. Payne & Keller’s Third-Party Claims Should Be Dismissed Under SCRCP 12(b)(8) Because They Are Duplicative of Payne & Keller’s Claims Against Travelers in the First-Filed Federal Coverage Action

Under SCRCP 12(b)(8), “[a] defendant may seek dismissal of an action . . . when another action is pending between the same parties for the same claim.” *Babb v. Shaw*, No. 2011-UP-440, 2011 WL 11735697, at *1 (S.C. Ct. App. Oct. 11, 2011) (citation and internal question marks omitted). “[T]he principle underlying Rule 12(b)(8) . . . [is] that duplicative litigation should be avoided[.]” *State ex rel. Wilson v. Condon*, 410 S.C. 331, 333 (S.C. 2014) (Toal, C.J.). “Avoiding concurrent litigation in both the courts of this state and the Federal District Court will foster wise judicial administration and conserve judicial resources.” *Id.* (citation omitted); *see also, e.g., Corbett v. City of Myrtle Beach*, 521 S.E.2d 276, 281 (S.C. Ct. App. 1999) (holding dismissal pursuant to SCRCP 12(b)(8) was appropriate where the “claim involves the same parties and is based upon the same facts and circumstances”).

As the following table demonstrates, the allegations and claims in both cases are substantially identical as to Travelers.

Allegations and Relief Sought as to Travelers in the Federal Coverage Action	Allegations and Relief Sought as to Travelers in the Instant Case
¶ 30 Defendant Aetna issued general liability policies to Payne & Keller (“The Aetna Policies”). The Aetna Policies have standard terms and conditions. The Aetna Policies have a duty to defend Payne & Keller against any and all Payne & Keller Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false or fraudulent. The duty to	¶ 149 Defendant Aetna issued general liability policies to Payne & Keller (“The Aetna Policies”). The Aetna Policies have standard terms and conditions. The Aetna Policies have a duty to defend Payne & Keller against any and all Payne & Keller Asbestos Suits alleging any potential for coverage, even if the Asbestos Allegations in such suits are groundless, false or fraudulent. The duty to

defend is joint, several, indivisible and supplemental. The Aetna Policies require Aetna fully to defend any Payne & Keller Asbestos Suit alleging bodily injury during any Aetna Policy period. The Aetna Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Aetna Policy Period. It is the burden of Aetna to prove any limitation on or exclusion of coverage. Specifically, Aetna issued primary general liability coverage to Payne & Keller for at least the seven policy periods March 1, 1978 – April 1, 1985.	defend is joint, several, indivisible and supplemental. The Aetna Policies require Aetna fully to defend any Payne & Keller Asbestos Suit alleging bodily injury during any Aetna Policy period. The Aetna Policies have a separate duty fully to indemnify Payne & Keller from and against any and all Payne & Keller Asbestos Suits with bodily injury taking place during any Aetna Policy Period. It is the burden of Aetna to prove any limitation on or exclusion of coverage. Specifically, Aetna issued primary general liability coverage to Payne & Keller for at least the seven policy periods March 1, 1978 – April 1, 1985.
¶ 31 Aetna has failed to fully acknowledge or accept its insuring obligations under the Aetna Policies. An actual and justiciable dispute exists between these parties.	¶ 150 Aetna has failed to fully acknowledge, delineate or accept its insuring obligations under the Aetna Policies between Rexel and Payne & Keller or between SKRLA and Payne & Keller. An actual and justiciable dispute exists between these parties.
Count I – Declaratory Judgment ¶ 62 Plaintiff seeks a judicial declaration that all policies, evidence of policies and documents relating to their placement, purchase and underwriting, and claims handling, including but not limited to such documents in the possession of defendants, are the property of the Receiver and shall be delivered immediately to the Receiver to be maintained in his sole possession.	Count II – Declaratory Judgment ¶ 185 Third-Party Plaintiffs seek a judicial declaration that all policies, evidence of policies and documents relating to their placement, purchase and underwriting, including, but not limited to, such documents in the possession of Third-Party Defendants are the property of the Receiver and shall be delivered immediately to the Receiver to be maintained in his sole possession for his unrestricted use in carrying out his duties.
Count VII – Declaratory Judgment ¶ 94 Plaintiff respectfully requests this Court to declare that defendants must fairly	Count I – Declaratory Judgment ¶ 181 The Receiver respectfully requests this Court to declare that Third-Party Defendants must

compensate plaintiff for the substantial time, effort, and expenses plaintiff expended in connection with the defense of asbestos suits potentially covered under the defendants' policies and to further declare that this obligation is unlimited and shall continue as long as there is any Payne & Keller Asbestos Suit pending.	fairly compensate the Receiver for the substantial time, effort, and expenses expended in connection with the defense of asbestos suits potentially covered under the Third-Party Defendants' policies and to further declare that this obligation is unlimited and shall continue as long as there are Asbestos Suits pending against Third Party Plaintiffs.
Prayer for Relief ¶ D The Receiver seeks a further declaration as to the interpretation and meaning of the Payne & Keller insurance policies: i. The Payne & Keller Insurance Policies cover all Payne & Keller Asbestos Suits that allege any bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of its policy periods; ii. Each Payne & Keller asbestos suit "triggers" at least one Payne & Keller Insurance policy as long as an asbestos plaintiff alleges injury during the period of the policy; iii. Payne & Keller may select the policy or policy years to which to assign or allocate in full each Payne & Keller asbestos loss; iv. In the case of a claimed ambiguity in any Payne & Keller Insurance policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the defendants' policies, and defendants bear the burden of proof as to any such ambiguity; v. Defense costs for the Payne & Keller asbestos suits are supplemental, and the payment of defense costs does not erode or	Prayer for Relief ¶ E As described in detail above, the Receiver seeks a further declaration as to the interpretation and meaning of the Third-Party Plaintiffs' insurance policies: i. The Third-Party Plaintiffs' Insurance Policies cover all Third-Party Plaintiffs' Asbestos Suits that allege any bodily injury, personal injury, injurious exposure, progression of injury and/or disease, manifestation of illness, or death during any of its policy periods; ii. Each Third-Party Plaintiffs' asbestos suit "triggers" at least one Third-Party Plaintiffs' Insurance policy as long as an asbestos plaintiff alleges injury during the period of the policy; iii. Third-Party Plaintiffs may select the policy or policy years to which to assign or allocate in full each asbestos loss; iv. In the case of a claimed ambiguity in any Third Party Plaintiffs' Insurance policy, such ambiguity shall be construed in favor of the broadest coverage afforded under the Third Party Defendants' policies, and Third-Party Defendants bear the burden of proof as to any such ambiguity; v. Defense costs for the Third-Party Plaintiffs' asbestos suits are supplemental, and the payment of defense costs does not erode or

impair any limit of liability of any of the Payne & Keller Insurance policies; vi. If any allegation in a Payne & Keller Asbestos Suit is potentially covered under the Payne & Keller Insurance Policies, then the insurer must defend or reimburse in full the costs of defending against all of the allegations and all of the causes of action in the complaint; vii. Each Payne & Keller Insurance Policy is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of the Payne & Keller Asbestos Suits; viii. Each Payne & Keller Insurance Policy must indemnify covered Payne & Keller Asbestos Suits, in full, up to its “per occurrence” limits, regardless of whether a continuing injury spans multiple policy periods; ix. The Payne & Keller Asbestos Suits that allege exposure to asbestos during Payne & Keller’s work are subject only to the “per occurrence” limits of the Payne & Keller Insurance policies; x. Any aggregate limit on coverage in any of the Payne & Keller Insurance Policies is a limitation on coverage, and the insurers therefore have the burden to prove, based on the evidence, that a Payne & Keller Asbestos Suit is subject to the aggregate limit in the Payne & Keller Insurance Policies, if any; and xi. Each insurer and the Guaranty Association has the burden to prove, based on the evidence, that any particular Payne & Keller Asbestos Suit is either a “products” claim or a “completed operations” claim, as those terms are defined in the Payne & Keller Insurance	impair any limit of liability of any of the Third-Party Plaintiffs’ Insurance policies; vi. If any allegation in a Third-Party Plaintiffs’ Asbestos Suit is potentially covered under the Third-Party Plaintiffs’ Insurance Policies, then the responsive insurer must defend or reimburse in full the costs of defending against all of the allegations and all of the causes of action in the complaint; vii. Each Third-Party Plaintiffs’ Insurance Policy is required to pay or reimburse all sums that the insured becomes legally obligated or reasonably required to pay as damages by reason of the Third-Party Plaintiffs’ Asbestos Suits; viii. Each Third-Party Plaintiffs’ Insurance Policy must indemnify covered Third- Party Plaintiffs’ Asbestos Suits, in full, up to its “per occurrence” limits, regardless of whether a continuing injury spans multiple policy periods; ix. The Third-Party Plaintiffs’ Asbestos Suits that allege exposure to asbestos during Third-Party Plaintiffs’ work are subject only to the “per occurrence” limits of the Third-Party Plaintiffs’ Insurance policies; x. Any aggregate limit on coverage in any of the Third-Party Plaintiffs’ Insurance Policies is a limitation on coverage, and the insurers therefore have the burden to prove, based on the evidence, that a Third-Party Plaintiffs’ Asbestos Suit is subject to the aggregate limit in the Third-Party Plaintiffs’ Insurance Policies, if any; and xi. Each insurer has the burden to prove, based on the evidence, that any particular Third-Party Plaintiffs’ Asbestos Suit is either a “products” claim or a “completed operations” claim, as those terms are defined in the Third-Party Plaintiffs’ Insurance

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 Complaint here when the insurance coverage litigation was removed to federal court and became the Federal Coverage Action. Thus, the Third Amended Complaint should be seen for what it is—pure jurisdictional

gamesmanship. This is an additional reason that counsels in favor of dismissing the Receiver's third-party claims here in favor of the first-filed Federal Coverage Action.

CONCLUSION

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

Respectfully submitted,

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Casualty and Surety Company (improperly
named as Aetna Casualty & Surety Company)

August 24, 2022

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

v.

Case No. 2021-CP-40-03484

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

**NOTICE OF MOTION AND JOINDER
TO THIRD-PARTY DEFENDANT
TRAVELERS CASUALTY AND
SURETY COMPANY'S MOTION TO
DISMISS THIRD-PARTY CLAIMS
AND DISSOLVE THE PAYNE &
KELLER RECEIVERSHIP**



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.

TO: BRIAN BARNWELL, ESQUIRE, ATTORNEY FOR THE THIRD-PARTY PLAINTIFF PAYNE & KELLER COMPANY, BY AND THROUGH PETER D. PROTOPAPAS, AND TO THE THIRD-PARTY PLAINTIFF ABOVE-NAMED:

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 (hereinafter collectively referred to as "Joining Defendants"), hereby move for dismissal pursuant to Rule 12(b)(1) and move to dissolve the Payne & Keller Receivership.

On August 24, 2022, Third-Party Defendant Travelers Casualty and Surety Company (hereinafter "Travelers") filed a Motion to Dismiss Third-Party Claims and Dissolve the Payne & Keller Receivership (hereinafter "Travelers' Motion"). In the interest of judicial economy and to avoid unnecessary duplication of briefing, the Joining Defendants join in and adopt by reference the factual recitations and legal authorities in support of certain arguments raised in Travelers' Motion.¹ Specifically, the Joining Defendants hereby join in and adopt 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.

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

¹ The Joining Defendants previously raised certain arguments in Motions to Dismiss and/or Strike or in the Alternative to Sever and/or Stay. In an Order entered on August 9, 2022, the Court denied those motions and held that the arguments raised in those motions were preserved as to the Second Amended Third-Party Complaint. This Motion and Joinder does not raise those issues which have already been addressed and preserved.

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.

September 19, 2022
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.

Case No. 2021-CP-40-03484

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

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



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.

TO: BRIAN BARNWELL, ESQUIRE, ATTORNEY FOR THE THIRD-PARTY PLAINTIFF PAYNE & KELLER COMPANY, BY AND THROUGH PETER D. PROTOPAPAS, AND TO THE THIRD-PARTY PLAINTIFF ABOVE-NAMED:

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 (hereinafter collectively referred to as "Joining Defendants"), respectfully submit this Reply in further support of the Motion to Dismiss and Motion to Dissolve the Payne & Keller Receivership.

On January 25, 2013, Third-Party Defendant Travelers Casualty and Surety Company (hereinafter "Travelers") filed a Reply in Support of its Motion to Dismiss Third-Party Claims and Dissolve the Payne & Keller Receivership (hereinafter "Travelers' Reply"). In the interest of judicial economy and to avoid unnecessary duplication of briefing, the Joining Defendants join in and adopt by reference the factual recitations and legal authorities in support of certain arguments raised in Travelers' Reply.¹ Specifically, the Joining Defendants hereby join in and adopt by reference the issues and arguments raised in Argument Section II.A. through II.C. of Travelers' Reply (included on pages 5-15) as well as the factual recitations and summaries supporting those arguments.

MURPHY & GRANTLAND, P.A.

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*Counsel for Third-Party Defendants AIG Property
 Casualty Company, formerly known as Birmingham*

¹ The Joining Defendants previously raised certain arguments in Motions to Dismiss and/or Strike or in the Alternative to Sever and/or Stay. In an Order entered on August 9, 2022, the Court denied those motions and held that the arguments raised in those motions were preserved as to the Second Amended Third-Party Complaint. This Motion and Joinder does not raise those issues which have already been addressed and preserved.

Fire 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.

January 26, 2023
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,

Case No. 2021-CP-40-03484

v.

Davis Mechanical Contractors, Inc., et al.,

Defendants.

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

Third-Party Plaintiffs,

v.

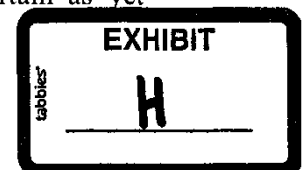
Zurich American Insurance Company, et al.,

Third-Party Defendants.

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

This matter comes before the Court on Third-Party Defendant Travelers Casualty and Surety Company's ("Travelers") August 24, 2022 Motion to Dismiss Third-Party Claims and Dissolve the Payne & Keller Receivership.¹ Payne & Keller Company, by and through its duly

¹ On September 19, 2022, Defendants AIG Property Casualty Company, formerly known as Birmingham Fire Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; The Continental Insurance Company, individually and as successor in interest to Harbor Insurance Company; and Certain as yet



appointed receiver, Peter D. Protopapas (“the Receiver”), filed a Response in Opposition to the Motion on January 13, 2023, and Travelers filed a Reply in Support of the Motion on January 25, 2023.² The Court heard oral arguments on the Motion during a January 27, 2023 hearing. After careful consideration of the parties’ filings and arguments, and for the reasons stated below, Travelers’ Motion is **DENIED**.

BACKGROUND

On August 27, 2021, this Court entered an Order appointing Peter D. Protopapas as the Receiver for Defendant Payne & Keller Company on Plaintiff’s Motion to Appoint a Receiver. The Court’s Order vested the Receiver “with the power and authority [to] fully administer all assets of Payne & Keller” and, among other things, specifically instructed “the Receiver to investigate the existence of all insurance coverages potentially available to [Payne & Keller].” Thereafter, the Receiver discovered that Payne & Keller Company had conducted business under various corporate names before its dissolution. The Court accordingly granted the Receiver’s Motion to Clarify Order Appointing a Receiver for Payne & Keller Company on September 30, 2021, and entered an Order providing that “all of the Receiver’s duties and protections [in the August 7, 2021 Appointment Order] . . . extend[] to all of the P&K Entities and their predecessors, successors, affiliates, parents, assigns, and subsidiaries that may be discovered in the future.”

Pursuant to that authority, the Receiver initiated an insurance coverage action for Payne & Keller by way of a third-party action against multiple carriers in this case on February 23, 2022. Travelers appeared and filed a motion to dismiss the Receiver’s third-party claims and dissolve the Payne & Keller Receivership on August 24, 2022. After the Receiver served discovery requests

Unnamed Underwriters at Lloyd’s, London and Certain as yet Unnamed London Market Companies (the “Joining Defendants”) filed a Joinder to Travelers’ Motion.

² On January 26, 2023, the Joining Defendants filed a Joinder to Travelers’ Reply.

on Travelers, on November 16, 2022, Travelers moved for a protective order and again moved the Court for an order dissolving the Payne & Keller Receivership and dismissing Travelers from this case.

ANALYSIS

A. Standing

Travelers argues that the Receiver's third-party claims should be dismissed because the Receiver lacks standing to bring them. Specifically, Travelers first contends that under section 15-65-10 of the South Carolina Code, the Receiver only has authority over Payne & Keller property located within the State of South Carolina, and (according to Travelers) Payne & Keller's insurance policies are not property within this State. *See generally* § 15-65-10 ("A receiver may be appointed by a judge of the circuit court, either in or out of court . . . (4) When a corporation has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights, and, in like cases, of the property within this State of foreign corporations . . ."). Even assuming Travelers' interpretation of section 15-65-10 is correct, the Court finds the Receiver has alleged and presented sufficient evidence to demonstrate that Travelers issued insurance policies insuring Payne & Keller risks nationwide, including within South Carolina. Accordingly, the Receiver was properly appointed under section 15-65-10 and has standing to assert the third-party claims raised in this action. *See* S.C. Code Ann. § 38-61-10 ("All contracts of insurance on property, lives, or interests in this State are considered to be made in the State . . . and are subject to the laws of this State."); *Sangamo Weston v. Nat'l Sur. Corp.*, 307 S.C. 143, 149, 414 S.E.2d 127, 130 (1992) ("[I]t is immaterial where the contract was entered into. Further there is no requirement that the policyholders or insurers be citizens of South Carolina. What is solely relevant is where the property, lives, or interests insured are located.").

Travelers cites *Howard v. Allen*, 254 S.C. 455, 176 S.E.2d 127 (1970) for the proposition that insurance policies are not “property.” This case does not support Travelers argument. In *Howard v. Allen*, a personal injury plaintiff sought to attach, as a debt, the defense and indemnity obligations of an insurance policy covering the defendant tortfeasor. *Howard* does not speak to whether the Travelers insurance policies protective of Payne & Keller are property within South Carolina for the purposes of the receivership statute.

Travelers also argues that the Receiver lacks standing to bring the third-party claims on behalf of Payne & Keller because, as a Texas corporation that dissolved in 1986, Payne & Keller is no longer able to sue or be sued under Texas law. Travelers relies on Section 11.359(a) of the Texas Business Organizations Code, which provides that a “claim by or against a terminated filing entity is extinguished unless an action or proceeding is brought on the claim not later than the third anniversary of the date of termination of the entity.” However, that statute further provides, “Notwithstanding Subsections (a) and (b), the extinguishment of an existing claim with respect to a terminated filing entity as provided by this section is nullified if . . . the filing entity’s termination is revoked with retroactive effect under Section 11.153 . . .” § 11.359(c). And section 11.153 of the Texas Business Organizations Code allows a court to “order the revocation of termination of an entity’s existence that was terminated as a result of actual or constructive fraud.” § 11.153(a); *see also* § 11.153(b) (“If the termination of an entity’s existence is revoked under Subsection (a): (1) the revocation relates back to the effective date of the termination and takes effect as of that date; and (2) the entity’s status as an entity continues in effect as if the termination of the entity’s existence had never occurred.”).

Here, the Receiver has presented sufficient evidence at the pleading stage to support a claim that Payne and Keller’s 1986 dissolution was the result of, at least, constructive fraud. *See Resp.*

in Opp'n, 8–13. Specifically, the Receiver asserts that Payne & Keller “terminated its corporate existence to avoid liability for both current and future toxic tort, silica, and asbestos personal liability claims, and Payne & Keller was keenly aware of those claims when the decision to dissolve Payne & Keller was made.” *Id.* at 9. In support of this contention, the Receiver submitted evidence that, prior to its dissolution: Payne & Keller was exposed to significant potential liability resulting from its construction work at a time when the use of asbestos-containing products was prevalent, its insurers began to exclude coverage for asbestos-related claims, and it contracted to indemnify companies with which it did business for personal injury claims arising out of its work. *Id.* at 9–10. Further evidence indicates that Payne & Keller began the dissolution process in response to demands for indemnification by an oil company in bankruptcy concerning over a thousand personal injury claims arising out of exposure to dioxin, and Payne and Keller dissolved without taking the steps necessary to ensure those claims, and others it reasonably expected to face absent dissolution, would be paid. *Id.* at 11–12.

Travelers has not disputed the Receiver’s evidence or submitted any countervailing evidence regarding the circumstances surrounding its dissolution. Accordingly, this Court finds the Receiver has made a prima facie showing that Payne & Keller “was terminated as a result of actual or constructive fraud,” § 11.153(a), and dismissal on the basis of the termination is unwarranted. *See Latham v. Burgher*, 320 S.W.3d 602, 610 (Tex. App. 2010) (ruling a company’s dissolution, conducted shortly after receiving notice of an intended lawsuit against it and without setting aside funds to address the liability of the lawsuit, could support a finding of fraud). This Court does not, however, find that fraud has been conclusively proven, nor does the Court order the revocation of Payne & Keller’s termination at this time. Such a determination will be made after the parties have had the opportunity to explore this issue through the discovery process.

Relying on *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126 (Tex. 2010), Travelers argues that applying section 11.153 to Payne & Keller’s dissolution would violate Article I, Section 16 of the Texas Constitution. However, as the *Robinson* court explained, “No bright-line test for unconstitutional retroactivity is possible.” *Id.* at 145. Instead, the court outlined a three-factor analysis that must be conducted. *Id.* Moreover, Travelers’ retroactivity argument as to section 11.153 undercuts its reliance on section 11.359, which was also enacted well after Payne & Keller’s dissolution.³ The Court declines Travelers’ invitation to retroactively apply section 11.359 in Travelers’ favor to dismiss the Receiver’s third-party claims while simultaneously holding the retroactive application of section 11.153 would violate the Texas Constitution, especially given that the Texas legislature added subsection (b) to section 11.153 in response to the Fifth Circuit’s determination that revoking an entity’s dissolution would not revive claims extinguished by section 11.359. *See Boudreaux v. C J R Framing*, 744 F. App’x 208, 211 (5th Cir. 2018).

B. Personal Jurisdiction

Travelers argues that the Receiver’s claims should also be dismissed under Rule 12(b)(2), 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

Electronically signed on 2023-03-30 14:34:37 page 10 of 10

RECEIVED

May 15 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
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Robert Keddie; Julie Ann Fortune; Michael John Crall; James
Francis Meehan; Larry Gene Simmons; Arrowpoint Group, Inc.;
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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'S RESPONSE REGARDING APPEALABILITY

The order on appeal is immediately appealable under South Carolina Code § 14-3-330(4) because it continues a receivership and modifies the scope of the Receiver's responsibilities, both over objections by Travelers and others.

BACKGROUND

The Payne & Keller Company was a Texas company that terminated in 1986 under Texas law by virtue of an order issued by the Texas Comptroller of Public Accounts. (App. 189–93, Dissolution Papers for Frentex Enterprises Company of Texas, f/k/a Payne & Keller Company (Nov. 25, 1986).)

In July 2021, Ms. Childers sued Payne & Keller in South Carolina as part of an asbestos personal injury suit, and she requested that the circuit court appoint a receiver for Payne & Keller, as well as numerous other companies. (App. 1, Mot. to Appoint Receiver.) The circuit court granted Ms. Childers’s motion, appointed a receiver for Payne & Keller, and directed him to “take any and all steps necessary to protect the interests of Payne & Keller whatever they may be.” (App. 4, Order Appointing Receiver at 1 (Aug. 27, 2021).)

The Receiver for Payne & Keller then filed suit against a host of Payne & Keller’s historic insurance carriers, including Travelers. In that case, the Receiver seeks declaratory relief against Travelers that it must turn over Payne & Keller’s old insurance policies to the Receiver and to resolve coverage issues regarding those policies. (App. 24–36, Am. Compl. in *Protopapas v. Am. Int’l Group*, Case No. 3:21-cv-4086-DCC (D.S.C.).) The carriers removed that suit to federal court, and procedural issues in that case are pending on appeal before the Fourth Circuit. *See generally Protopapas v. Am. Int’l Group*, Appeal No. 23-1339 (4th Cir.).

While the federal case was pending, the Receiver re-filed essentially the same claims against the carriers before the South Carolina circuit court, this time bolting them onto Ms. Childers’s case as purported third-party claims in a transparent attempt to dodge federal jurisdiction. (App. 46, Second Am. Third-Party Compl.) This procedural fencing is forbidden as a matter of South Carolina law, as declaratory judgments regarding an insurance policy’s terms are

not derivative claims allowed by Rule 14, SCRCP. In fact, the Supreme Court has specifically held that insurance carriers have no right to even voluntarily make themselves part of underlying tort cases in order to seek the type of declaratory rulings that the Receiver seeks. *Builders Mut. Ins. Co. v. Island Pointe, LLC*, 431 S.C. 93, 99–110, 847 S.E.2d 87, 91–96 (2020).

Travelers filed a motion to dismiss the third-party complaint and to dissolve the Payne & Keller receivership. But that motion was not based on a pleading technicality, such as the omission of a fact needed to support an element of a cause of action. Instead, it was based on Travelers’s contention that the receivership is a legal nullity and should no longer be allowed to exist. (App. 130, Travelers’s Mot. to Dismiss Third-Party Claims and to Dissolve the Payne & Keller Receivership.)

The basis for this argument is simple: Texas corporate law creates a repose period for terminated companies that bars any claim involving the company three years after it terminates. *See* Tex. Bus. Org. Code § 11.359(a) (providing that except in an inapplicable limited circumstance, “an 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”). The Full Faith and Credit Clause requires this Court to enforce Texas law here, and because the repose period for claims both for and against Payne & Keller closed in 1989, the receivership is a nullity as a matter of law and should be dissolved. *See generally In re All Cases Against Sager Corp.*, 967 N.E.2d 1203, 1207–11 (Ohio 2012) (vacating a receivership appointed by the trial court over a dissolved foreign company because the repose period had expired against any potential claims involving that company). Moreover, South Carolina law does not authorize nationwide receiverships over foreign entities like Payne & Keller. S.C. Code Ann. § 15-65-10(4).

In opposing dissolution of the receivership, the Receiver—based on speculation regarding Payne & Keller’s motivation for terminating the business—argued that he should be able to potentially unwind the corporate termination that took place in Texas 37 years ago. (App. 164, Payne & Keller’s Response.) That could create liability for Payne & Keller that has been extinguished as a matter of law since 1989.

The circuit court denied Travelers’s motion and accepted the Receiver’s invitation for a South Carolina court to scrutinize and revisit the termination of a Texas company from 1986. In so doing, the circuit court issued an order that (1) denied Travelers’s motion to dissolve the receivership, instead, continued the receivership; and (2) modified the scope of the receivership to no longer “protect the interests” of Payne & Keller, but instead to potentially expose Payne & Keller to liabilities that have been barred as a matter of law for over three decades. (App. 216, Order Denying Motion to Dismiss and Dissolve the Payne & Keller Receivership.) This appeal followed and is properly before the Court.

DISCUSSION

In South Carolina, any order—even an interlocutory order—“granting, continuing, modifying, or refusing the appointment of a receiver” is immediately appealable. S.C. Code Ann. § 14-3-330(4). And this immediate, regular appellate oversight makes perfect sense, as appointing a receiver is a “drastic remedy” that should only be done “with reluctance and caution” because it involves the judicial seizure of private property and placing it in the hands of someone else to manage—all while the receiver erodes those same limited resources by claiming a fee from them. *Midlands Util., Inc. v. S.C. DHEC*, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (1989). The order on appeal readily meets Section 330(4)’s terms for multiple reasons.

Continuing a Receivership: At the circuit court, Travelers expressly moved to discontinue the Payne & Keller receivership: “Thus, the receivership must be dissolved.” (App. 140, Travelers’s Mot. to Dismiss Third-Party Claims and to Dissolve the Payne & Keller Receivership at 11.) It reiterated this in its reply: “There is simply no basis for this receivership to continue. South Carolina, Texas, and federal constitutional law all prohibit it. The Court should dissolve the receivership (and dismiss Payne & Keller from this case) accordingly.” (App. 208, Reply in Support of Travelers’s Mot. to Dismiss and to Dissolve the Payne & Keller Receivership at 15.)

The circuit court denied that request and allowed the receivership to continue. Standing alone, that brings the order squarely within the scope of Section 14-3-330(4).

Modifying the Receivership: Not only did the circuit court continue the receivership despite Travelers’s objection, it fundamentally changed the scope of the receivership in a way that can only prejudice Payne & Keller. When the circuit court appointed the Receiver, it charged him with the duty to “take any and all steps necessary to protect the interests of Payne & Keller whatever they may be.” (App. 4, Order Appointing Receiver at 1 (Aug. 27, 2021).) But now the circuit court has authorized the Receiver “to explore this issue [of whether Payne & Keller was properly terminated] through the discovery process,” with an ultimate goal of “revo[king] Payne & Keller’s termination” under Texas law, which has barred any claims against Payne & Keller (and claims by Payne & Keller, for that matter) since 1989. (App. 220, Order Denying Motion to Dismiss and Dissolve the Payne & Keller Receivership at 5.)

This is a sea-change in the scope of the receivership and is prohibited as a matter of law. A South Carolina court does not have extraterritorial authority to reach into the affairs of Texas’s corporate law and undo an order of the Texas Comptroller of Public Accounts attesting to Payne & Keller’s termination, and to do so in order to create new potential liability for a Texas company.

See, e.g., 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.”); S.C. Code Ann. § 33-15-105(c) (“This title does not authorize this State to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state.”); *Carolina Trucks & Equip., Inc. v. Volve Trucks of N.A., Inc.*, 492 F.3d 484, 489–90 (4th Cir. 2007) (“The principle that state laws may not generally operate extraterritorially is one of constitutional magnitude. One state may not ‘project its legislation’ into another.”). And because the order fundamentally modifies the receivership, South Carolina Code § 14-3- 330(4) vests Travelers with the right to immediately appeal that order.

CONCLUSION

The appealability analysis is guided by “the effect of” the circuit court’s order. *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539–40, 773 S.E.2d 144, 146–47 (2015); *see also Williams v. Northwestern Sec. Life Ins. Co.*, 307 S.C. 462, 464–65, 415 S.E.2d 809, 810 (1992) (holding that an order denying a motion to dismiss was immediately appealable under South Carolina Code § 14-3-330(4) because it had the effect of disregarding an injunction required by North Carolina law, and reversing the trial court’s refusal to give Full Faith and Credit to foreign law, just as the circuit court has done here).

Here, the circuit court’s order continues a receivership that should be barred as a matter of constitutional law, and it empowers the Receiver to create potential liability for the company whose interests he had been charged to protect. Because the order has “the effect of” both “continuing” and “modifying” the receivership, it is immediately appealable under South Carolina Code § 14-3-330(4).

Respectfully submitted,

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May 15, 2023

RECEIVED

May 15 2023

SC Court of Appeals

PROOF OF SERVICE

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

Pleading(s): Travelers's Response Regarding Appealability and Accompanying Appendix

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May 15, 2023

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

v.

Davis Mechanical Contractors, Inc., et. al.,

Defendants.

Case No.: 2021-CP-40-03484

**RECEIVER FOR PAYNE AND KELLER
COMPANY'S NOTICE OF FILING**

YOU WILL PLEASE TAKE NOTICE that Peter D. Protopapas, as Receiver for Payne and Keller Company ("the Receiver"), hereby submits this Notice of Filing of the January 12, 2024 letter to The Honorable Ravi K. Sandill and Texas Secretary of State's Plea to the Jurisdiction associated with Cause No. 2023-70875 in the District Court of Harris County, Texas.

Respectfully submitted,

SMITH ROBINSON, LLC

s/ Jonathan M. Robinson

Jonathan M. Robinson

Shanon N. Peake

2530 Devine Street, 3rd Floor

Columbia, South Carolina 29205

Attorney for the Receiver

January 18, 2024

EXHIBIT A



THE OFFICE OF THE ATTORNEY GENERAL OF TEXAS

January 12, 2024

The Honorable Ravi K. Sandill
Judge, 127th District Court
Harris County Civil Courthouse
201 Caroline, 10th Floor
Houston Texas 77002

Via EfileTexas.gov

RE: 2023-70875; *Lenora Childers, individually and as Personal Representative of the Estate of Lewis C. Childers v. Payne & Keller Company, by and through its duly appointed Receiver, Peter D. Protopapas, et al.*

Dear Honorable Judge Sandill,

I write on behalf of the Texas Secretary of State (Third-Party Defendant), which entered its appearance through its January 4, 2024 Original Answer. This was followed by the undersigned's attendance at the January 5 remote hearing (which was held to consider: (1) the December 4, 2023 Motion to Seal Court Records and Opposed Request for Temporary Sealing Order filed by National Union and Travelers, (2) National Union's November 13, 2023 Motion to Vacate Domesticated Judgment, and (3) Travelers' October 27, 2023 Motion to Vacate).

As I indicated at the January 5 hearing, the Texas Secretary of State has no particular interest in the outcome of this case that causes it to wish to remain a party. It is not clear to the Secretary of State what practical benefit its presence could serve in resolving the dispute, which exists solely among the other parties; this conclusion remains unchanged even when considering the practical remedies that the Court could ultimately order among those parties.

The Texas Secretary of State naturally enjoys sovereign immunity that renders it immune from suit in this case, and nothing about the nature of the claims asserted by National Union against it alters this fact. It is for this reason that the Secretary of State has today filed the attached Plea to the Jurisdiction, seeking the dismissal with prejudice of all claims against it, based on the court's absence of subject matter jurisdiction over those claims.

The Texas Secretary of State respectfully requests that the Court take up its Plea to the Jurisdiction at the in-person hearing already scheduled for January 24, 2024 at 10 a.m., at which the Court is set to continue hearing

The Honorable Judge Sandill
RE: 2023-70875; *Childers v. Payne & Keller Company, et al.*
January 12, 2024
Page 2

argument on National Union's and Travelers' respective motions to vacate the domesticated South Carolina judgment.

We have previously reached out to the Court clerk to place the Plea to Jurisdiction on the Court's January 24 hearing agenda, but we were told that the calendar is full and that we should therefore inquire directly with Your Honor.

The Texas Secretary of State thanks you sincerely for your attention to this matter.

/s/ Thomas Bevilacqua
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Counsel for Third-Party Defendant,
Texas Secretary of State

Encl.: *Third-Party Defendant Texas Secretary of State's Plea to the Jurisdiction*

CERTIFICATE OF SERVICE

I certify that on January 12, 2024, the foregoing *Letter Requesting Hearing Setting for Third-Party Defendant Texas Secretary of State's Plea to the Jurisdiction* was filed with the Clerk of this Court and served on all the parties of record via EFileTexas.gov efilng service.

/s/ Thomas Bevilacqua
THOMAS BEVILACQUA
Assistant Attorney General

EXHIBIT B

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

TRAVELERS CASUALTY AND
SURETY COMPANY f/k/a THE
AETNA CASUALTY AND
SECURITY COMPANY and
NATIONAL UNION FIRE
INSURANCE COMPANY OF
PITTSBURGH, PA
*Intervenor and
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

HARRIS COUNTY, TEXAS

127TH JUDICIAL DISTRICT

**THIRD-PARTY DEFENDANT TEXAS SECRETARY OF STATE'S
PLEA TO THE JURISDICTION**

Third-Party Defendant the Texas Secretary of State files this Plea to the
Jurisdiction and hereby requests that this Court dismiss with prejudice all claims
asserted against it, for lack of subject matter jurisdiction.

I. Introduction

In its November 13, 2023 Plea in Intervention, Motion to Vacate Domesticated Judgment and Petition for Declaratory Judgment (hereinafter “Petition”), Intervenor-Plaintiff National Union Fire Insurance Company of Pittsburgh, Pa. (“National Union”) seeks, insofar as Third-Party Defendant the Texas Secretary of State is concerned, a judgment declaring that Payne & Keller Company (“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.” (Petition, ¶ 57(2)(b)) None of the other claims nor any other part of the relief requested in the Petition targets the Secretary of State.

Because the Secretary of State enjoys sovereign immunity, and that immunity has not been waived and is not overcome by the nature of National Union’s claims, this Court lacks jurisdiction over it. Accordingly, dismissal with prejudice of all claims against the Secretary of State is proper.

II. Factual and Procedural Background

By an October 5, 2023 decision entitled “Findings of Fact and Conclusions of Law on [Plaintiff Lenora Childers’s] Motion to Revoke the Termination of Payne & Keller Company” (“the Order”), the Hon. Jean H. Toal, sitting at the Court of Common Pleas for the Fifth Judicial District, County of Richland (South Carolina), found that Defendant Payne & Keller “committed, at a minimum, constructive fraud when dissolving,” and concluded therefrom that “revocation of the termination of Payne &

Keller pursuant to Section 11.153 of the Texas Business Organizations Code is appropriate.” (Order, p. 1; see also *id.* at 6 (“Because the company [...] dissolved as a result of (at the very least) constructive fraud, the termination of its corporate existence should be revoked, and [*sic*] pursuant to section 11.153 of TBOC.”))

On this basis, the South Carolina court granted Lenora Childers’s motion seeking revocation of the dissolution of Payne & Keller, and it “order[ed] that Payne & Keller Company be reinstated as provided by Section 11.153 of the TBOC.” (*Id.* at 8) As the Receiver noted (at p. 1) in its Notice of Domestication of a Foreign Order filed on October 12, 2023 with the instant Court, the South Carolina “Order reinstates Payne & Keller as a Texas corporation under Texas Business Organizations Code § 11.153.”

Although the South Carolina Order did not expressly address the question of the extent of its judicial power, if any, to act under the cited provision of the Texas Business Organizations Code, the Texas Secretary of State need not, for purposes of its present Plea to the Jurisdiction, opine on, *inter alia*, whether the domesticated decision was rendered by a court acting within the limits of its authority and subject matter jurisdiction, nor need the Secretary of State comment on the Order’s apparent domestication in Texas through Texas Civil Practice & Remedies Code Chapter 35 or on the limits, if any, to said Order’s effectiveness in Texas.

Moreover, while the South Carolina court’s factual findings are vigorously challenged by Nation Union in its Petition (and by Intervenor Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Security Company in its October 27,

2023 Plea in Intervention, Motion to Vacate, and Petition for Declaratory Judgment), it is not necessary, to obtain dismissal here, for the Secretary of State to make any comment, either in support or in opposition, concerning the findings of fact and law that underlie the October 5, 2023 South Carolina Order.

This is because National Union has not brought a constitutional challenge of any kind or claimed the existence of ultra vires conduct by a state actor; rather, it is seeking only the declaration of a right and corresponding action under a provision of the Texas Business Organizations Code. As such, the Secretary of State's sovereign immunity defense remains intact, and the fact that National Union is proceeding under the Uniform Declaratory Judgments Act (UDJA) does nothing to change that. This Court thus finds itself without subject matter jurisdiction over the claims against the Secretary of State.

III. Argument and Authorities

Intervenor-Plaintiff National Union seeks declaratory relief against Childers and the Secretary of State under the UDJA, Texas CPRC §§ 37.001 *et seq.* (Petition, ¶¶ 49, 55) National Union alleges that a dispute exists among the parties to the litigation about, among other matters, whether the South Carolina court acted properly in issuing the Order, whether that Order “has, or may have, the effect of reviving Payne & Keller from its terminated status,” “whether the Texas Secretary of State properly certified such reinstatement,” and whether the Order is enforceable in the instant Court. (Petition, ¶ 54)

National Union requests a declaratory judgment finding that the Order was ineffective to revoke Payne & Keller’s terminated status, that that company therefore “shall remain a terminated entity,” and, finally, that “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.” (Petition, ¶ 55; see also *id.* ¶ 57)

State agencies enjoy sovereign immunity, which deprives trial courts of subject matter jurisdiction over claims brought against them unless the state consents to suit by an act of the Legislature waiving immunity. *Texas Parks & Wildlife Dep’t v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011); *Texas Nat. Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 853-54 (Tex. 2002) (noting that any legislative consent to the state’s being sued must be expressed in clear and unambiguous language).

The UDJA does not contain a general waiver of sovereign immunity. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 552 (Tex. 2019). As the Texas Supreme Court has explained, the “UDJA does not enlarge the trial court’s jurisdiction but is ‘merely a procedural device for deciding cases already within a court’s jurisdiction.’” *Texas Dep’t of Transp. v. Sefzik*, 355 S.W.3d 618, 621-22 (Tex. 2011) (per curiam) (quoting *Sawyer Trust*, 354 S.W.3d at 388). The UDJA thus does not serve as a vehicle that allows a party to bring suit against the state or any of its agencies to seek “a declaration of his or her rights under a statute or other law or an interpretation of a statute or other law in general.” *Peniche v. Texas Dep’t of Public Safety*, 2023 Tex. App. LEXIS 2750, at *5-6 (Tex. App. – Houston [1st Dist.], no pet.). “Excepting

challenges [under the limited waivers of immunity of CPRC § 37.006] to the validity of franchises, ordinances, and statutes, suits requesting declaratory relief against the state or its agencies are barred – unless the legislature has waived their sovereign immunity for the particular claim at issue in a statute other than the Declaratory Judgments Act.” *Peniche*, 2023 Tex. App. LEXIS 2750, at *6.

This conclusion is in harmony with the consistent body of Texas caselaw finding that there exists no general right to sue a state agency for a declaration of rights. Claims that do not attack the validity of a statute, but which seek only to have a statute construed, or to obtain a declaration of rights thereunder, are barred by sovereign immunity. See *Sefzik*, 355 S.W.3d at 621-22; *Sawyer Trust*, 354 S.W.3d at 388; *IT-Davy*, 74 S.W.3d at 855-56; *City of McKinney v. Hank’s Restaurant Group, L.P.*, 412 S.W.3d 102, 111-12 (Tex. App. – Dallas 2013, no pet.); *Texas State Bd. of Veterinary Medical Examiners v. Giggelman*, 408 S.W.3d 696, 707 (Tex. App. – Dallas 2013, no pet.); *Rubalcaba v. Raymondville ISD*, No. 2016 WL 1274486, at *4 (Tex. App. – Corpus Christi-Edinburg Mar. 31, 2016, no pet.).

While sovereign immunity typically cannot serve to preclude jurisdiction in a suit challenging the constitutionality of a statute and seeking only equitable relief, *Patel v. Texas Dep’t of Licensing & Regul.*, 469 S.W.3d 69, 75-76; *Patino v. Texas Dep’t of Ins.-Div. of Workers’ Comp.*, 631 S.W.3d 163, 173 (Tex. App. – Houston [14th Dist.] 2020, no pet.), merely couching a claim in terms of declaratory relief does not itself in any way change the essential nature of the claim or neutralize the sovereign immunity defense, *Sawyer Trust*, 354 S.W.3d at 388; *Sefzik*, 355 S.W.3d at 621-22.

In this case, National Union seeks to use the UDJA to compel the Secretary of State to take certain action under Texas Business Organizations Code § 11.153(a). More specifically, National Union requests an order that would require the Secretary of State to amend its records relating to Payne & Keller to reflect it as a terminated entity. In other words, National Union is not challenging the constitutionality or otherwise attacking the validity of this provision of the Business Organizations Code. Instead, it is claiming entitlement to compel the Secretary of State to carry out an act under that provision.

Given that the UDJA does not include a general waiver of sovereign immunity, and considering, further, that National Union's claim is not constitutional in nature, the Court must necessarily conclude that it is without subject matter jurisdiction over the Secretary of State and that there is no basis for granting National Union's requested relief.

* * *

For these reasons, the Court is respectfully requested to dismiss all claims against the Secretary of State with prejudice.

Respectfully submitted,

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GRANT DORFMAN
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CERTIFICATE OF SERVICE

I certify that on January 12, 2024, the foregoing *Third-Party Defendant Texas Secretary of State's Plea to the Jurisdiction* was filed with the Clerk of this Court and served on all the parties of record via EFileTexas.gov efilng service.

/s/ Thomas Bevilacqua
THOMAS BEVILACQUA
Assistant Attorney General

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 appointed Receiver, PETER D.
PROTOPAPAS,

Defendant.

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA; and
TRAVELERS CASUALTY AND
SURETY COMPANY,

Intervenor-Plaintiffs,

v.

JANE NELSON, in her official capacity as
TEXAS SECRETARY OF STATE,

Third-Party Defendant.

IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

127th JUDICIAL DISTRICT

**NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA'S NOTICE
OF NON-SUIT OF ALL CLAIMS AGAINST JANE NELSON, IN HER OFFICIAL
CAPACITY AS TEXAS SECRETARY OF STATE, WITHOUT PREJUDICE**

Pursuant to Rule 162 of the Texas Rules of Civil Procedure, Intervenor-Plaintiff National Union Fire Insurance Company of Pittsburgh, PA ("National Union") hereby files this Notice of Non-Suit of All Claims Against Jane Nelson, in Her Official Capacity as Texas Secretary of State, Without Prejudice. National Union hereby nonsuits without prejudice all of its claims and causes of action in this case against Jane Nelson, in her official capacity as Texas Secretary of State.

Dated: January 25, 2024

Respectfully submitted,

/s/ Ayesha Najam

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CERTIFICATE OF SERVICE

I certify that, on January 25, 2024, a true and correct copy of the foregoing document was served on all counsel of record by using the Court's electronic filing system and in accordance with the Texas Rules of Civil Procedure.

/s/ Caitlyn G. Cowan

Caitlyn G. Cowan

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.

Rosa Brennan on behalf of Ayesha Najam

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Filing Code Description: Notice

Filing Description: National Union Fire Insurance Company Of Pittsburgh

Pa Notice Of Non-Suit Of All Claims Against Jane Nelson In Her Official

Capacity As Texas Secretary Of State Without Prejudice

Status as of 1/25/2024 12:24 PM CST

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Noah M Horwitz		noah.horwitz@morganlewis.com	1/25/2024 12:08:16 PM	SENT
Robert B Gilbreath		rgilbreath@hpylaw.com	1/25/2024 12:08:16 PM	SENT
Elizabeth O'Neill		Elizabeth.ONeill@wbd-us.com	1/25/2024 12:08:16 PM	SENT
Thomas Bevilacqua	793342	thomas.bevilacqua@oag.texas.gov	1/25/2024 12:08:16 PM	SENT

CAUSE NO. 2023-70875

**SPAPX
DISMX
APRX
11D**

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

Plaintiff,

vs.

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

Defendant.

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA

Intervenor-Plaintiff,

vs.

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

**AGREED ORDER ON DEFENDANT LENORA CHILDERS' SPECIAL APPEARANCE
AND MOTION TO DISMISS**

Before the Court is Defendant Lenora Childers', individually and as personal representative of the estate of Lewis Childers, Special Appearance and Motion to Dismiss. The Court has reviewed the Special Appearance and Motion to Dismiss, any response and had the benefit of argument of counsel.

For the reasons set forth on the record, the Court finds that the Special Appearance is well take and that the Motion to Dismiss should be and therefore is GRANTED. Lenora Childers is dismissed from this action for lack of personal jurisdiction.

SO ORDERED this ____ day of December 2023.

Signed:
12/13/2023



Honorable Ravi K. Sandill

Unofficial Copy Office of Marilyn Burgess District Clerk

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.

Teresa Gilliland on behalf of Charles Branham

Bar No. 24012323

tgilliland@dobslegal.com

Envelope ID: 82481198

Filing Code Description: Proposed Order

Filing Description: Agreed Order on Defendant Lenora Childers???

Special Appearance and Motion to Dismiss

Status as of 12/12/2023 11:36 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Brady Edwards		brady.edwards@morganlewis.com	12/12/2023 11:24:33 AM	SENT
Ayesha Najam		anajam@gibbsbruns.com	12/12/2023 11:24:33 AM	SENT
Caitlyn Cowan		ccowan@gibbsbruns.com	12/12/2023 11:24:33 AM	SENT
Erica Krennerich		ekrennerich@gibbsbruns.com	12/12/2023 11:24:33 AM	SENT
Brady Edwards	793021	brady.edwards@morganlewis.com	12/12/2023 11:24:33 AM	SENT
Kirby Lodholz	24070188	klodholz@scottpattonlaw.com	12/12/2023 11:24:33 AM	SENT
Troy Damon Chandler	24006982	troy@chandlermcnulty.com	12/12/2023 11:24:33 AM	SENT
Daniel Francis Patton	24013302	dpatton@scottpattonlaw.com	12/12/2023 11:24:33 AM	SENT
Noah Horwitz	24116537	noah.horwitz@morganlewis.com	12/12/2023 11:24:33 AM	SENT
Theile McVey		tmcvey@kassellaw.com	12/12/2023 11:24:33 AM	SENT
Peter D.Protopapas		pdp@rplegalgroup.com	12/12/2023 11:24:33 AM	SENT
Lindsay Valek		lindsay@rplegalgroup.com	12/12/2023 11:24:33 AM	SENT
Christina Pena		cpena@gibbsbruns.com	12/12/2023 11:24:33 AM	SENT
Noah MHorwitz		noah.horwitz@morganlewis.com	12/12/2023 11:24:33 AM	SENT
Robert BGilbreath		rgilbreath@hpylaw.com	12/12/2023 11:24:33 AM	SENT

Message

From: Patrick Cleary [Patrick.Cleary@bowmanandbrooke.com]
Sent: 12/14/2021 8:54:29 PM
To: Gruenthal, Amanda [agruenth@travelers.com]; Pearson, Marisa (Allianz Resolution Management US) [Marisa.Pearson@allianzrm-us.com]; Erwin, Christopher M [cmerwin@travelers.com]; Peter Protopapas [pdp@rplegalgroup.com]; Gary Weinberg [gweinberg@resolutemgmt.com]; Angela Strickland [Angela.Strickland@bowmanandbrooke.com]
CC: William Purnell [William.Purnell@bowmanandbrooke.com]
Subject: [External] RE: Childers, Bostain, Agner v. Payne & Keller - SC law on suing dissolved corporation

*** External Sender - Please Exercise Caution ***

Amanda,

Thanks for your email.

We have reviewed the Texas dissolution statute – there is nothing in that statute that impedes the ability for a TX dissolved corporation to be sued in another state. It does limit the dissolved/terminated corporations liability for claims. Texas Code 11.351 states that a “terminated filing entity is liable only for existing claims” and 11.358 provides a notice requirement that can shorten the period for resolving existing claims. Based on this review of the Texas statute, our conclusion is that it serves to limit claims against a corporation existing in Texas that are brought in a Texas state court. [Texas uses dissolved and terminated interchangeably.]

While Payne and Keller was a corporation domesticated in Texas, we know that it was a foreign corporation registered with the South Carolina Secretary of State until filing dissolution papers in November 1986. As such, Payne and Keller would have had a certificate of authority to do business in the state. We reviewed the S.C. Code of Laws regarding the effects of holding a certificate of authority to do business in S.C. The applicable section [Section 33-15-105(b)(titled Effect of certificate of authority)] provides that foreign corporations with valid certificate of authority have the same but no greater rights and privileges and are subject to the same duties, restrictions, penalties and liabilities now or later imposed on, a domestic corporation of like character. We have requested a copy of the Payne & Keller filings with the Secretary of State – they are \$18.00. Unfortunately, they are not available online. These filings will not include the certificate of authority, because P&K is no longer in good standing (because of its dissolution).

While we would certainly like to apply the Texas dissolution statute in these South Carolina actions, we believe it would be unsuccessful at best, and detrimental to Payne and Keller at worst.

We expect that Justice Toal would apply the provisions of the South Carolina dissolution statute to these claims. Payne & Keller was registered to business in South Carolina, and plaintiff’s claims arise from allegations that they were injured by Payne and Keller’s activities in South Carolina. South Carolina allows for dissolved companies to be sued unless the express requirements of the dissolution statute are applied. As previously mentioned, we think it is very unlikely that the Court would apply the benefits of the South Carolina dissolution statute to Payne and Keller. We also think it is extremely unlikely that Justice Toal would apply the benefits of the Texas dissolution statute to Payne and Keller; we reviewed case law to see there are any cases where South Carolina applied the laws of a foreign corporation’s state of incorporation and did not find anything.

As we may have previously discussed, even if we thought this approach had a chance on the merits, Justice Toal does not normally hear any dispositive motions until the eve of trial. Filing a motion in a given case to apply the Texas dissolution statute would not preclude Payne and Keller from having to conduct discovery, participate in depositions, and prepare for trial in that case. But filing such a motion would also undoubtedly raise the profile of Payne and Keller with Dean Omar, increasing the chances that we would become the target of discovery motions and aggressive 30(b)(6) depositions for that case. And if Justice Toal denies such a motion to apply the Texas dissolution statute, we would have to be willing to take a case to trial (or find some other means to file an appeal) to have another court review the matter – and much of our appellate bench

either worked for or was mentored by Justice Toal. We think it is unlikely that the current appellate bench would overrule a decision on a complex legal question that Justice Toal made.

Patrick

Patrick J. Cleary

Partner

P +1.803.726.7492 | M +1.843.206.5533

From: Gruenthal, Amanda <AGRUENTH@travelers.com>

Sent: Monday, December 13, 2021 12:25 PM

To: Patrick Cleary <Patrick.Cleary@bowmanandbrooke.com>; Pearson, Marisa (Allianz Resolution Management US) <Marisa.Pearson@allianzrm-us.com>; Erwin, Christopher M <CMERWIN@travelers.com>; Peter Protopapas <pdp@rplegalgroup.com>; Gary Weinberg <gweinberg@resolutemgmt.com>; Angela Strickland <Angela.Strickland@bowmanandbrooke.com>

Cc: William Purnell <William.Purnell@bowmanandbrooke.com>

Subject: RE: Childers, Bostain, Agner v. Payne & Keller - SC law on suing dissolved corporation

Angela,

I have reviewed Patrick Cleary's e-mail, the *Finch* case, and the SC statutes. In the *Covil-Finch* case, Covil was a SC company, and the NC Federal court applied the SC dissolution statutes to address the insurer's claims that the *Finch* case should have been barred based on Covil's dissolved status. We understand your analysis based on the application of SC's dissolution statutes as they would be applied to P&K. However, we do not see any analysis of TX's dissolution statute and its potential application to the subject cases.

Unlike, the situation presented by the *Finch* case, it is our understanding that P&K was a Texas corporation that was incorporated and then dissolved under Texas law. So can you explain why a SC court wouldn't look to, and/or apply Texas' dissolution statute to P&K, as it was Texas company and was dissolved in accordance with TX's law?

Also, in our last group call you referenced certain filings by either P&K and/or SC's Secretary of State that relate to P&K's "existence" for purposes of transacting business in SC. Please send us a summary of those filings, and any other information or documentation that you have obtained related to the same.

Thank you

Amanda Gruenthal | Senior Account Executive | SRG

Travelers

1301 East Collins Blvd. | 2nd Floor

Richardson, TX 75081

W: 214-570-6139 F: 214-570-6455



From: Patrick Cleary <Patrick.Cleary@bowmanandbrooke.com>

Sent: Wednesday, December 08, 2021 8:19 AM

To: Gruenthal, Amanda <AGRUENTH@travelers.com>; Pearson, Marisa (Allianz Resolution Management US) <Marisa.Pearson@allianzrm-us.com>; Erwin, Christopher M <CMERWIN@travelers.com>; Peter Protopapas <pdp@rplegalgroup.com>; Gary Weinberg <gweinberg@resolutemgmt.com>; Angela Strickland <Angela.Strickland@bowmanandbrooke.com>

Cc: William Purnell <William.Purnell@bowmanandbrooke.com>

Subject: [External] FW: Childers, Bostain, Agner v. Payne & Keller - SC law on suing dissolved corporation

*** External Sender - Please Exercise Caution ***

Patrick J. Cleary

Partner

P +1.803.726.7492 | M +1.843.206.5533

From: Angela Strickland <Angela.Strickland@bowmanandbrooke.com>

Sent: Thursday, October 21, 2021 3:16 PM

To: Gary Weinberg <gweinberg@resolutemgmt.com>; William Purnell <William.Purnell@bowmanandbrooke.com>; O'Brien, Tom <TWOBRIEN@travelers.com>; Pearson, Marisa (Allianz Resolution Management US) <Marisa.Pearson@allianzrm-us.com>; Hocutt, Sarah <sarah.hocutt@highlandsinsurance.com>; Chris Moss <chris.moss@compassriskllc.com>; Erwin, Christopher M <CMERWIN@travelers.com>

Cc: Patrick Cleary <Patrick.Cleary@bowmanandbrooke.com>; Ashley Lord <Ashley.Lord@bowmanandbrooke.com>

Subject: RE: Childers, Bostain, Agner v. Payne & Keller - SC law on suing dissolved corporation

Thanks, Gary, for this information. We are aware of that statute and pulled together some research related to its applicability here. Based on that research, we do not believe P&K's situation is what is anticipated by the statute. Below are some points and we are attaching the full statute sections, as well as a Covil opinion by the NC Fed Ct. that addresses this.

- S.C. Code of Laws § 33-14-106 governs *known* claims against dissolved corporations. All of the Plaintiff's claims were *unknown* at the time of effective dissolution, therefore, this section does not bar Plaintiff's claims.
- Section 33-14-107 governs *unknown* claims against dissolved corporations, and while, it provides for a five (5) or ten (10) year period, after which, unknown claims will be barred, there is a detailed notice requirement that must be abided by the dissolved corporation to publish the dissolution. That notice would have to be proven to get the benefit of the 5 or 10 year bar. However, even if the notice requirement is abided by, all unknown claims may be enforced against a dissolved corporation and its undistributed assets. In addition, Plaintiff's claims could not have been known within 5-10 years and this subsection has not been applied to latent disease claims and other states with similar provisions have declined to do so.
- South Carolina has not determined whether insurance policies act as undistributed assets in the context of dissolved corporations. However, S.C. Supreme Court has ruled liability insurance policies are undistributed assets in the context of personal estate claims. It is unlikely, the Court will apply a different ruling to dissolved corporations.

For additional context, the quote of the statute you sent in your original email was an incomplete quote. The actual statute reads as follows (emphasis to the part missing):

(b) The notice must:

- (1) be published once in a newspaper of general circulation in the county where the dissolved corporation's principal office (or, if none in this State, its registered office) is or was last located;
- (2) state that a claim against the corporation is barred unless a proceeding to enforce the claim is commenced within five years after the publication of the notice.
- (3) state that a claim against the corporation is barred unless a proceeding to enforce the claim is commenced within five years **after the publication of the notice.**

Please let us know if you have any additional questions or thoughts. We will continue to work diligently to protect Payne & Keller's interests and appreciate your continued support.

Angela

Angela G. Strickland

Co-Managing Partner

+1.803.726.7424

From: Gary Weinberg <gweinberg@resolutemgmt.com>

Sent: Thursday, October 21, 2021 7:35 AM

To: William Purnell <William.Purnell@bowmanandbrooke.com>; Angela Strickland <Angela.Strickland@bowmanandbrooke.com>; O'Brien, Tom <TWOBRIEN@travelers.com>; Pearson, Marisa (Allianz Resolution Management US) <Marisa.Pearson@allianzrm-us.com>; Hocutt, Sarah <sarah.hocutt@highlandsinsurance.com>; Chris Moss <chris.moss@compassriskllc.com>; Erwin, Christopher M <CMERWIN@travelers.com>

Cc: Patrick Cleary <Patrick.Cleary@bowmanandbrooke.com>; Ashley Lord <Ashley.Lord@bowmanandbrooke.com>

Subject: Childers, Bostain, Agner v. Payne & Keller - SC law on suing dissolved corporation

Will, Angela:

I located this tidbit on SC law and dissolved corporations. Please provide your insights and thoughts.

South Carolina

Under South Carolina law, "[d]issolution of a corporation does not . . . prevent commencement of a proceeding by or against the corporation in its corporate name." S.C. Code Ann. § 33-14-105(c)(5) (2015). For the purposes of being sued, South Carolina states that "[a] dissolved corporation continues its corporate existence," § 33-14-105(a), and a plaintiff may assert claims against a dissolved corporation for five years after that corporation's dissolution. § 33-14-107(b)(3). *Hudson v. New Idea Corp.*, Civil Action No. 5:15-cv-04314-JMC (D.S.C. Apr. 28, 2016).

Please contact me with any questions or concerns related to the captioned matter.

Sincerely,

Gary Weinberg

Account Manager

Resolute Management, Inc.

1617 JFK Boulevard

Suite 1160

Philadelphia, PA 19103

(267) 440-8978

gweinberg@resolutemgmt.com

From: William Purnell <William.Purnell@bowmanandbrooke.com>

Sent: Wednesday, October 20, 2021 2:14 PM

To: Gary Weinberg <gweinberg@resolutemgmt.com>; Angela Strickland <Angela.Strickland@bowmanandbrooke.com>; O'Brien, Tom <TWOBRIEN@travelers.com>; Pearson, Marisa (Allianz Resolution Management US) <Marisa.Pearson@allianzrm-us.com>; Hocutt, Sarah <sarah.hocutt@highlandsinsurance.com>; Chris Moss <chris.moss@compassriskllc.com>; Erwin, Christopher M <CMERWIN@travelers.com>; Peter Protopapas <pdp@rplegalgroup.com>; bb@rplegalgroup.com; Lindsay Valek <Lindsay@rplegalgroup.com>; Danny Nieto <danny@rplegalgroup.com>

Cc: Patrick Cleary <Patrick.Cleary@bowmanandbrooke.com>; Ashley Lord <Ashley.Lord@bowmanandbrooke.com>

Subject: RE: Childers [Payne & Keller] - Draft Answer and Update

[CAUTION EXTERNAL EMAIL]

Gary,

Thanks for the additional insight. Will do my friend.

Best,

Will

William D. Purnell

Partner

P +1.602.643.2496 | M +1.602.727.4896

From: Gary Weinberg <gweinberg@resolutemgmt.com>

Sent: Wednesday, October 20, 2021 11:11 AM

To: William Purnell <William.Purnell@bowmanandbrooke.com>; Angela Strickland <Angela.Strickland@bowmanandbrooke.com>; O'Brien, Tom <TWOBRIEN@travelers.com>; Pearson, Marisa (Allianz Resolution Management US) <Marisa.Pearson@allianzrm-us.com>; Hocutt, Sarah <sarah.hocutt@highlandsinsurance.com>; Chris Moss <chris.moss@compassriskllc.com>; Erwin, Christopher M <CMERWIN@travelers.com>; Peter Protopapas <pdp@rplegalgroup.com>; bb@rplegalgroup.com; Lindsay Valek <Lindsay@rplegalgroup.com>; Danny Nieto <danny@rplegalgroup.com>

Cc: Patrick Cleary <Patrick.Cleary@bowmanandbrooke.com>; Ashley Lord <Ashley.Lord@bowmanandbrooke.com>

Subject: RE: Childers [Payne & Keller] - Draft Answer and Update

Will:

That letter that CC'd Raymond H. Modesitt was dated May 11, 2009. Resolute took over this account in 2012, which would explain why we show no payments to the Wilkinson, Goeller, Modesitt, Wilkinson & Drummy, LLC firm. Hopefully, this is the firm we are looking for. Please keep us apprised of developments.

Sincerely,

Gary Weinberg

Account Manager

Resolute Management, Inc.

1617 JFK Boulevard

Suite 1160

Philadelphia, PA 19103

(267) 440-8978

gweinberg@resolutemgmt.com

From: William Purnell <William.Purnell@bowmanandbrooke.com>

Sent: Wednesday, October 20, 2021 2:00 PM

To: Gary Weinberg <gweinberg@resolutemgmt.com>; Angela Strickland <Angela.Strickland@bowmanandbrooke.com>; O'Brien, Tom <TWOBRIEN@travelers.com>; Pearson, Marisa (Allianz Resolution Management US) <Marisa.Pearson@allianzrm-us.com>; Hocutt, Sarah <sarah.hocutt@highlandsinsurance.com>; Chris Moss <chris.moss@compassriskllc.com>; Erwin, Christopher M <CMERWIN@travelers.com>; Peter Protopapas <pdp@rplegalgroup.com>; bb@rplegalgroup.com; Lindsay Valek <Lindsay@rplegalgroup.com>; Danny Nieto <danny@rplegalgroup.com>

Cc: Patrick Cleary <Patrick.Cleary@bowmanandbrooke.com>; Ashley Lord <Ashley.Lord@bowmanandbrooke.com>
Subject: RE: Childers [Payne & Keller] - Draft Answer and Update

[CAUTION EXTERNAL EMAIL]

Gary,

You are awesome! Thank you a great deal my friend.

Best,

Will

William D. Purnell

Partner

P +1.602.643.2496 | M +1.602.727.4896

From: Gary Weinberg <gweinberg@resolutemgmt.com>

Sent: Wednesday, October 20, 2021 10:58 AM

To: William Purnell <William.Purnell@bowmanandbrooke.com>; Angela Strickland <Angela.Strickland@bowmanandbrooke.com>; O'Brien, Tom <TWOBRIEN@travelers.com>; Pearson, Marisa (Allianz Resolution Management US) <Marisa.Pearson@allianzrm-us.com>; Hocutt, Sarah <sarah.hocutt@highlandsinsurance.com>; Chris Moss <chris.moss@compassriskllc.com>; Erwin, Christopher M <CMERWIN@travelers.com>; Peter Protopapas <pdp@rplegalgroup.com>; bb@rplegalgroup.com; Lindsay Valek <Lindsay@rplegalgroup.com>; Danny Nieto <danny@rplegalgroup.com>

Cc: Patrick Cleary <Patrick.Cleary@bowmanandbrooke.com>; Ashley Lord <Ashley.Lord@bowmanandbrooke.com>

Subject: RE: Childers [Payne & Keller] - Draft Answer and Update

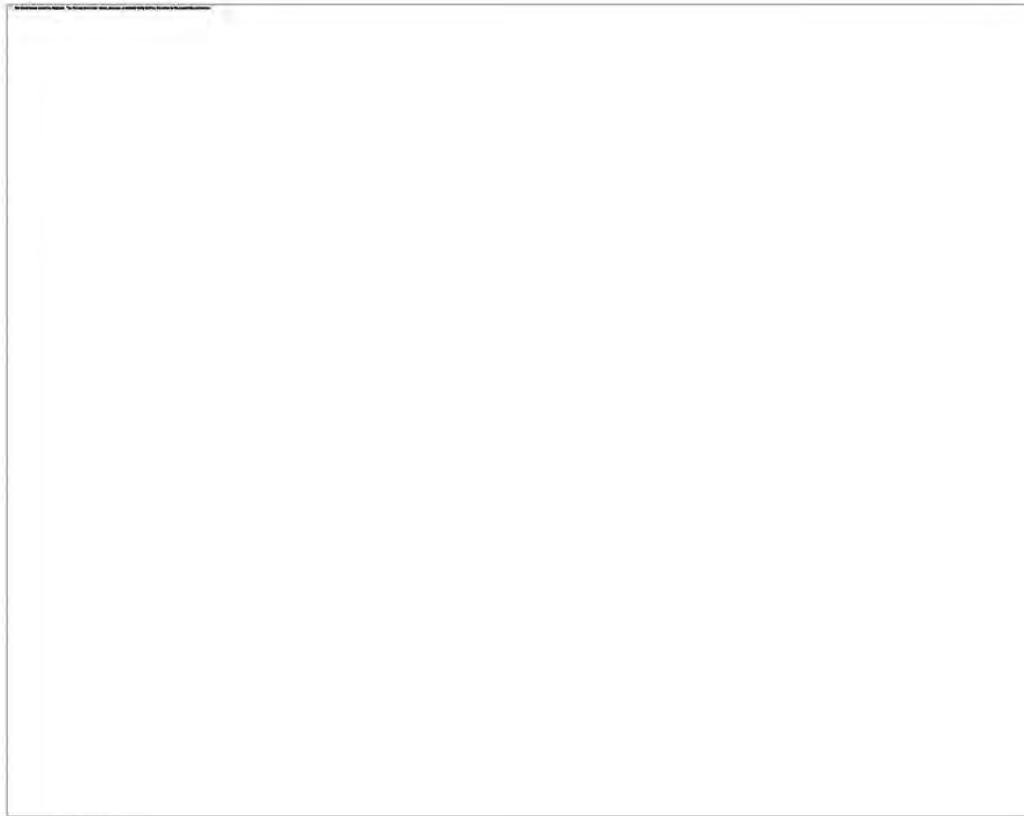
Will:

I located an acknowledgement letter in the claims for Lawrence Boman and Shirley Boman and Willie Martin and Betty Martin that was CC'd to an attorney in IN.

Raymond H. Modesitt
Wilkinson, Goeller, Modesitt, Wilkinson & Drummy, LLC
333 Ohio Street
P.O. Box 800
Terre Haute, IN 47808-0800

Might this be the attorney we are looking for? If so, would you please follow up with him.

Here's his profile on the web:



Sincerely,

Gary Weinberg
Account Manager
Resolute Management, Inc.
1617 JFK Boulevard
Suite 1160
Philadelphia, PA 19103
(267) 440-8978
gweinberg@resolutemgmt.com

From: Gary Weinberg
Sent: Wednesday, October 20, 2021 1:43 PM
To: William Purnell <William.Purnell@bowmanandbrooke.com>; Angela Strickland <Angela.Strickland@bowmanandbrooke.com>; O'Brien, Tom <TWOBRIEN@travelers.com>; Pearson, Marisa (Allianz Resolution Management US) <Marisa.Pearson@allianzrm-us.com>; Hocutt, Sarah <sarah.hocutt@highlandsinsurance.com>; Chris Moss <chris.moss@compassriskllc.com>; Erwin, Christopher M <CMERWIN@travelers.com>; Peter Protopapas <pdp@rplegalgroup.com>; bb@rplegalgroup.com; Lindsay Valek <Lindsay@rplegalgroup.com>; Danny Nieto <danny@rplegalgroup.com>
Cc: Patrick Cleary <Patrick.Cleary@bowmanandbrooke.com>; Ashley Lord <Ashley.Lord@bowmanandbrooke.com>
Subject: RE: Childers [Payne & Keller] - Draft Answer and Update

Will:

I reviewed AIG billing records on this account on the assumption that in the Indiana case you reference, there was at least one payment to defense counsel. There are only three firms to discuss. Foley Mansfield, which handles claim venued in IL for this account. They are a national firm with offices in Indianapolis. The other two are Jackson & Campbell,

PC, which is based in Washington D.C. and has offices in Virginia. The other firm is Chaffe McCall LLP, which has offices in Louisiana and Texas. It seems like Foley Mansfield is the firm to focus on. James Svajgl of Foley Mansfield, 312.254.3843 jsvajgl@foleymansfield.com is our IL contact. I will send an email out to James in a minute.

Do you have the name of the Plaintiff in the Indiana case?

Sincerely,

Gary Weinberg
Account Manager
Resolute Management, Inc.
1617 JFK Boulevard
Suite 1160
Philadelphia, PA 19103
(267) 440-8978
gweinberg@resolutemgmt.com

From: William Purnell <William.Purnell@bowmanandbrooke.com>
Sent: Wednesday, October 20, 2021 1:28 PM
To: Gary Weinberg <gweinberg@resolutemgmt.com>; Angela Strickland <Angela.Strickland@bowmanandbrooke.com>; O'Brien, Tom <TWOBRIEN@travelers.com>; Pearson, Marisa (Allianz Resolution Management US) <Marisa.Pearson@allianzrm-us.com>; Hocutt, Sarah <sarah.hocutt@highlandsinsurance.com>; Chris Moss <chris.moss@compassriskllc.com>; Erwin, Christopher M <CMERWIN@travelers.com>; Peter Protopapas <pdp@rplegalgroup.com>; bb@rplegalgroup.com; Lindsay Valek <Lindsay@rplegalgroup.com>; Danny Nieto <danny@rplegalgroup.com>
Cc: Patrick Cleary <Patrick.Cleary@bowmanandbrooke.com>; Ashley Lord <Ashley.Lord@bowmanandbrooke.com>
Subject: RE: Childers [Payne & Keller] - Draft Answer and Update

[CAUTION EXTERNAL EMAIL]

Gary,

Thank you for forwarding. I have reviewed a couple of the complaints forwarded. The rub is that we have not been able to find a case which required the defense of Payne and Keller on the merits of the claims. Typically, the wrong defendant was sued and local counsel were able to obtain a dismissal. It would be helpful to know the name of the firm that was assigned the Payne and Keller matter in Indiana, I believe, to assess the nature of the claim and/or what due diligence was performed to meet the discovery obligations. I have personally spoken to the attorneys in LA that represented Payne and Keller/Jacobs and the successor entity to the old Payne and Keller. Neither were able to identify any documents related to construction and maintenance projects. Thanks again for your support.

Best,

Will

William D. Purnell

Partner
P +1.602.643.2496 | M +1.602.727.4896

From: Gary Weinberg <gweinberg@resolutemgmt.com>
Sent: Wednesday, October 20, 2021 9:46 AM
To: Angela Strickland <Angela.Strickland@bowmanandbrooke.com>; O'Brien, Tom <TWOBRIEN@travelers.com>; Pearson, Marisa (Allianz Resolution Management US) <Marisa.Pearson@allianzrm-us.com>; Hocutt, Sarah

<sarah.hocutt@highlandsinsurance.com>; Chris Moss <chris.moss@compassriskllc.com>; Erwin, Christopher M <CMERWIN@travelers.com>; Peter Protopapas <pdp@rplegalgroup.com>; bb@rplegalgroup.com; Lindsay Valek <Lindsay@rplegalgroup.com>; Danny Nieto <danny@rplegalgroup.com>
Cc: William Purnell <William.Purnell@bowmanandbrooke.com>; Patrick Cleary <Patrick.Cleary@bowmanandbrooke.com>; Ashley Lord <Ashley.Lord@bowmanandbrooke.com>
Subject: RE: Childers [Payne & Keller] - Draft Answer and Update

Angela:

To the extent this helps, I have attached copies of the lawsuits we have in our file.

Sincerely,

Gary Weinberg
Account Manager
Resolute Management, Inc.
1617 JFK Boulevard
Suite 1160
Philadelphia, PA 19103
(267) 440-8978
gweinberg@resolutemgmt.com

From: Angela Strickland <Angela.Strickland@bowmanandbrooke.com>
Sent: Wednesday, October 20, 2021 12:34 PM
To: Gary Weinberg <gweinberg@resolutemgmt.com>; O'Brien, Tom <TWOBRIEN@travelers.com>; Pearson, Marisa (Allianz Resolution Management US) <Marisa.Pearson@allianzrm-us.com>; Hocutt, Sarah <sarah.hocutt@highlandsinsurance.com>; Chris Moss <chris.moss@compassriskllc.com>; Erwin, Christopher M <CMERWIN@travelers.com>; Peter Protopapas <pdp@rplegalgroup.com>; bb@rplegalgroup.com; Lindsay Valek <Lindsay@rplegalgroup.com>; Danny Nieto <danny@rplegalgroup.com>
Cc: William Purnell <William.Purnell@bowmanandbrooke.com>; Patrick Cleary <Patrick.Cleary@bowmanandbrooke.com>; Ashley Lord <Ashley.Lord@bowmanandbrooke.com>
Subject: Childers [Payne & Keller] - Draft Answer and Update

[CAUTION EXTERNAL EMAIL]

Dear all,

Please find attached for review the draft Answer to the Childers' Complaint on behalf of Payne & Keller Company. The Answer is due to be filed on 10/26. We have also attached the Complaint for ease of review.

Also, we wanted to provide the group with an update on our efforts to gather information related to Payne & Keller Company. The following is a non-exhaustive list of what has been completed and/or is ongoing.

- We have reached out to McGlinchey Stafford (represent Jacobs/new P&K) and The Frilot firm (represented new P&K) for access to old documents. Our understanding from the Frilot firm that there is a firm that represented the old P&K entity in an asbestos matter under the USF&G umbrella. We are working to try to track down the firm. Also we reached out to McGlinchey Stafford and were advised yesterday that Jacobs doesn't have any pre-1986 documents regarding any construction or maintenance projects. When McGlinchey first became involved in this asbestos litigation over 20 years ago they diligently searched for any such documentation, as it of course would have been very helpful in defending asbestos matters, but it had all been

discarded long before. So, regrettably Jacobs doesn't have any pre-1986 documentation to provide for the defense of Payne & Keller (or Jacobs' own defense for that matter).

- We have made contact with defense counsel for the following entities listed as workplaces for Childers for the purpose of getting an understanding if P&K is listed in any of their records for having done work at any of their facilities. We do not yet have returned calls from all.
 - Celanese (they operated multiple textile mills in the Carolinas)
 - Daniel Construction / Fluor Daniel
 - Duke Power
 - General Electric
 - We will continue to update requests to specific defendants and job sites identified in Complaints where P&K is named.
- We have taken the subpoenas and FOIAs issued by Mr. Protopapas' office to state agencies to inquire about information on P&K and organized those into a system to track all responses. If responses are not timely received on those subpoenas related to the underlying asbestos claim and/or P&K's prior work, we will follow up with those entities.
- We have gathered and are reviewing the available Louisiana and Texas business incorporation documents for Payne & Keller Company
- We have searched for any South Carolina and North Carolina business records for Payne & Keller Company. We are also searching for any licensing for work in either state.
- We are searching for Payne & Keller Company lawsuits.
- We have begun to answer Exhibit 1 and 4 of the standard discovery in SC for defendants. We will supplement these responses as appropriate.
- Review of the Payne and Keller Company purchase agreement.
- Reach out to Westburne Supply, to the extent they are still active, for any records applicable to Payne & Keller Company.
- Attempt to locate the persons listed on the Payne & Keller incorporation forms.

Thanks, Angela

Angela G. Strickland

Co-Managing Partner

+1.803.726.7424 | angela.strickland@bowmanandbrooke.com



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CAUSE NO. 2023-70875

LENORA CHILDERS, INDIVIDUALLY
AND AS PERSONAL
REPRESENTATIVE OF THE ESTATE
OF LEWIS C. CHILDERS,

IN THE DISTRICT COURT

HARRIS COUNTY, TEXAS

V.

PAYNE & KELLER COMPANY, BY
AND THROUGH ITS DULY-
APPOINTED RECEIVER, PETER D.
PROTOPAPAS,

127th JUDICIAL DISTRICT

ORDER DENYING MOTION TO SEAL COURT RECORDS

ON THIS DAY, the Court considered National Union Fire Insurance Company of Pittsburgh, PA's and Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Security Company's Motion to Seal Court Records and Opposed Request for Temporary Sealing Order pursuant to Texas Rule of Civil Procedure 76a (the "Motion").

After considering the evidence and law, the Motion, the Response, the Reply, if any, and the argument of counsel, if any, the Court determines the Motion should be DENIED.

IT IS THEREFORE ORDERED THAT the Motion to Seal Court Records and Opposed Request for Temporary Sealing Order is DENIED.

Signed on this _____ day of _____, 202_.

Signed: 
1/5/2024
HONORABLE JUDGE PRESIDING

Automated Certificate of eService

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

Noah Horwitz on behalf of Noah Horwitz

Bar No. 24116537

noah.horwitz@morganlewis.com

Envelope ID: 82488935

Filing Code Description: Proposed Order

Filing Description: Proposed Order Denying Motion to Seal Court Records

Status as of 12/12/2023 1:33 PM CST

Associated Case Party: National Union Fire Insurance Company of Pittsburgh, PA

Name	BarNumber	Email	TimestampSubmitted	Status
Ayesha Najam		anajam@gibbsbruns.com	12/12/2023 1:16:29 PM	SENT

Associated Case Party: National Union Fire Insurance Company of Pittsburgh, PA

Name	BarNumber	Email	TimestampSubmitted	Status
Ayesha Najam		anajam@gibbsbruns.com	12/12/2023 1:16:29 PM	SENT
Ayesha Najam		anajam@gibbsbruns.com	12/12/2023 1:16:29 PM	SENT
Ayesha Najam		anajam@gibbsbruns.com	12/12/2023 1:16:29 PM	SENT

Case Contacts

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Brady Edwards		brady.edwards@morganlewis.com	12/12/2023 1:16:29 PM	SENT

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Noah Horwitz on behalf of Noah Horwitz

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Envelope ID: 82488935

Filing Code Description: Proposed Order

Filing Description: Proposed Order Denying Motion to Seal Court Records

Status as of 12/12/2023 1:33 PM CST

Case Contacts

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Erica Krennerich		ekrennerich@gibbsbruns.com	12/12/2023 1:16:29 PM	SENT

Associated Case Party: Travelers Casualty and Surety Company

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RECEIVED

Jan 26 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean Hoefer Toal, Chief Justice (Ret.) and Acting Circuit Court Judge

Case No. 2021-CP-40-03484

Appellate Case No. 2023-000727

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

v.

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

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

v.

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

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

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

and

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

and

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

PROOF OF SERVICE

I certify that a true copy of Respondent's Return to Motion for Certification by the Supreme Court in this case has been served on the following, this 26th day of January, 2024, 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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(Signature page follows)

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*Attorneys for Respondent Payne & Keller
Company, By and Through its Duly
Appointed Receiver, Peter D. Protopapas*

January 26, 2024.

From: [Dot Faulkenberry](#)
To: ["Wesley B. Sawyer"; "todd.carroll@wbd-us.com"; "O'Neill, Elizabeth"; "hlee@steptoe.com"; "Brian Barnwell"; "Edwards, Brady"; "Schutte, Scott T."; "John B. White, Jr."; "Marghretta Shisko"; "Chris Jones"](#)
Cc: [Shanon Peake; Jon Robinson; Murrell Smith; "Lindsay Valek"; "Nicole Rice"](#)
Subject: Lenora Childers v. Davis Mechanical Contractors, Inc. - 2023-000727
Date: Friday, January 26, 2024 5:33:00 PM
Attachments: [Return to Motion for Certification, 5.pdf](#)
[Appendix Index w Exhibits, 1.pdf](#)

On behalf of Jon Robinson, please find attached for service a copy of the Respondent's Return to Motion for Certification that we are filing with the Court today.

Thank you,
Dot

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Forward thinking. Results driven.
Smith Robinson Holler DuBois and Morgan, LLC
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Dot Faulkenberry
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