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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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

Case No. 2021-CP-40-03484

Appellate Case No. 2023-000727

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

v.

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

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

v.

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

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

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

and

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

and

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

**RESPONDENT'S RETURN TO ZURICH'S MOTION TO BE ADDED TO APPEAL
AND THEIR JOINDER IN SUPPORT OF EMERGENCY MOTION TO CLARIFY AND
ENFORCE RULE 205**

Respondent Payne & Keller Company, By and Through its Duly Appointed Receiver, Peter D. Protopapas ("the Receiver") hereby submits this Return to the Motion by Underlying Third-Party Defendant Zurich American Insurance Company ("Zurich") to be Added to Appeal. In the Motion, Zurich requests the Court add it "to this appeal as an appellant for the purpose of protecting its interests in matters occurring subsequent to the perfecting of the appeal." (Mot. at 3.) Zurich separately filed a Joinder in Support of Emergency Motion to Clarify and Enforce Rule 205, stating its belief that the relief sought in the emergency motion filed by Appellants "is necessary to protect the jurisdiction of this Court and to ensure the orderly disposition of this appeal." (Joinder at 3.)

While Zurich claims it seeks to “protect the jurisdiction of this Court,” it simultaneously seeks to improperly extend the jurisdiction of the Court to itself. As Zurich notes in the caption of its motion, it is an underlying third-party defendant in this case. Therefore, it could have appealed the order of the circuit court as Appellants did. However, it did not, and the time for filing a notice of appeal of the order currently on appeal has passed. Zurich has not appealed any order of the circuit court and, therefore, cannot be retroactively added as an appellant in this case because it has now decided it would like to seek some sort of relief in this Court related to the underlying order. *See* Rule 202, SCACR (defining an appellant as “[t]he party appealing”); Rule 203, SCACR (“A party intending to appeal must serve and file a notice of appeal and otherwise comply with these Rules.”). It is foundational to our rules of appellate procedure that a party who wishes to appeal to this Court must properly file and serve a notice of appeal. In fact, “[t]he requirement of service of the notice of appeal is *jurisdictional*, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.” *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008) (emphasis added). This motion by Zurich is another attempt in a long line of attempts by insurers in receivership cases to improperly seek relief in the appellate courts of our state in contravention of governing rules and procedure. The Receiver respectfully requests the Court deny Zurich’s motion to be added into this appeal.

In addition to improperly requesting to be added into this appeal, Zurich has filed a joinder in support of Appellants’ emergency motion to clarify and enforce Rule 205. The Receiver incorporates his October 27, 2023 return to the emergency motion in response to Zurich’s joinder. Additionally, after filing the return, the Receiver became aware of the attached filing by Appellant

Travelers Casualty and Surety Company, f/k/a the Aetna Casualty and Surety Company (“Travelers”) in the Texas court on October 27, 2023. Exhibit A.

While Appellants and Zurich all contend this Court has exclusive jurisdiction to make rulings involving the Payne & Keller receivership and seek emergency relief to that effect, at least one insurer—an appellant in this case, Travelers—is contemporaneously attempting to circumvent South Carolina courts by pursuing the same issues on appeal before a court in Texas. *Id.* For example, in the 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 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 here. 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 (i) 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.

Travelers’ initiation of legal action in Texas against the Receiver seeking to invalidate the Receivership is not only inconsistent with its position that this Court has exclusive jurisdiction of these issues, it is a violation of the *Barton* doctrine, which bars a party from litigating 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 B.

Accordingly, the Receiver requests the Court reject the insurers' attempts to mischaracterize and rewrite this Court's September 8, 2023 Order and mandate insurers comply with the directives issued by this Court¹. As such, the Court should deny Appellants' Motion to Clarify and Enforce Rule 205 and Zurich's motion to be added into this appeal.

(Signature page follows)

¹ The Receiver notes Travelers and other insurers continue to rely on Rule 205 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 Exhibit C, Email from B. Gottschall (on behalf of Republic Insurance refusing to produce witnesses for depositions due to an appeal in the Davis Mechanical receivership case, C/A No. 2022-CP-40-06627); Exhibit D, October 23, 2023 filing by Travelers, C/A No. 2023-CP-40-02979 (arguing the circuit court lacks jurisdiction due to Rules 205 and 241 of the South Carolina Appellate Court Rules in the Asbestos Corporation Limited receivership); Exhibit E, October 23, 2023 filing by Century Indemnity Company and Federal Insurance Company, C/A No. 2023-CP-40-02979 (arguing the circuit court lacks jurisdiction due to Rule 205 in the Asbestos Corporation Limited receivership); Exhibit F, October 23, 2023 filing by Continental Insurance Company, C/A No. 2023-CP-40-02979 (same); October 23, 2023 filing by Travelers, C/A No. 2023-CP-40-02979 (seeking protective order in the Asbestos Corporation Limited receivership); Exhibit G, Email from A. Rebollo (on behalf of Aviva Insurance Co of Canada refusing to produce witnesses for deposition and refusing to withdraw motion for protective order in Atlas receivership case, C/A No. 2022-CP-40-03834); Exhibit H, Email from K. Bell (on behalf of Chubb arguing Rule 205 prevents discovery depositions in Atlas receivership case, C/A No. 2022-CP-40-03834); Exhibit I, August 9, 2023 filing by Goldfein & Joseph, P.C., C/A 2023-CP-40-03540 (arguing the action is inappropriate due to an appeal of the order appointing receiver for Atlas Turner, Inc. f/k/a Atlas Asbestos Company, Ltd.).

Respectfully submitted,

s/Jonathan M. Robinson

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November 3, 2023.

Exhibit A

CAUSE NO. 2023-70875

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

§
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§

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

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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

rgilbreath@hpylaw.com

Envelope ID: 81068532

Filing Code Description: Motion for New Trial

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

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

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Brady Edwards		brady.edwards@morganlewis.com	10/27/2023 4:34:06 PM	SENT
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Associated Case Party: Travelers Casualty and Surety Company

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

Exhibit B

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 C

From: Brandon R. Gottschall <BRG@swblaw.com>
Sent: Thursday, October 26, 2023 5:50 PM
To: Brian Barnwell <BB@rplegalgroup.com>; Luxton, Steven A. <steven.luxton@morganlewis.com>
Cc: Mark V. Gende <MVG@swblaw.com>
Subject: RE: Green v. 3M Co. v. Republic: Deposition transcript (Rough) of Thomas Barriball

[EXTERNAL EMAIL]
Brian and Steve,

I responded to Jon Robinson too but wanted to let you know separately since we've been talking today. I have confirmed we will not be presenting the witnesses next week based on the appeal.

Thanks, let us know of any questions.

Best

Brandon



Brandon Gottschall | *Member*
Sweeney, Wingate & Barrow, P.A.

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Exhibit D

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

TED EVERETTE MITCHELL, individually and
as Executor of the Estate of PATSY ANN
MITCHELL,

2022-CP-40-02979

Plaintiffs,

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

v.

3M Company, et al.,

Defendants.

ASBESTOS CORPORATION LIMITED, by
and through its duly appointed Receiver, Peter
D. Protopapas,

Third-Party Plaintiff,

v.

CENTURY INDEMNITY COMPANY, et al.,

Third-Party Defendants.

**THIRD-PARTY DEFENDANT TRAVELERS CASUALTY AND SURETY COMPANY'S
NOTICE OF MOTION AND MOTION TO STAY OR DISMISS THE THIRD-PARTY
CLAIMS OF THE PURPORTED RECEIVER FOR ASBESTOS CORPORATION
LIMITED AND TO DISSOLVE THE RECEIVERSHIP**

Third-Party Defendant Travelers Casualty and Surety Company f/k/a The Aetna Casualty
and Surety Company ("Travelers"), by and through undersigned counsel, hereby moves: (1) for

an order that this third-party case is stayed and that this Court lacks jurisdiction over it pursuant to Rules 205 and 241 of the South Carolina Appellate Court Rules (“SCACR”); or (2) in the alternative, for an order pursuant to Rules 12 and 14 of the South Carolina Rules of Civil Procedure (“SCRCP”), S.C. Code Ann. § 15-65-10, and the other authorities discussed herein (i) dismissing all claims asserted against Travelers in the Third-Party Complaint of Defendant/Third-Party Plaintiff “Asbestos Corporation Limited, By and Through Its Duly Appointed Receiver Peter D. Protopapas” (“ACL” or the “Receiver”) and (ii) vacating the Order appointing Peter Protopapas as the Receiver of ACL’s “insurance assets” and dissolving the ACL Receivership in its entirety.

INTRODUCTION

ACL is an active Canadian corporation. It does not have any assets or property in South Carolina, and it has never conducted any business activities in South Carolina. This Court nonetheless appointed a South Carolina lawyer, Mr. Protopapas, as the Receiver of ACL’s “insurance assets.” It did so primarily as a discovery sanction. The Court found that ACL had failed to participate adequately in discovery in a South Carolina tort case as to which there is no personal jurisdiction over ACL, so the Court held ACL in contempt, struck its pleadings, defaulted it, and appointed Mr. Protopapas as its “insurance assets” Receiver. ACL has appealed the order appointing Mr. Protopapas (the “Appointment Order”) as well as the predicate order holding ACL in contempt and striking its pleadings. The appeal remains pending before the South Carolina Court of Appeals. Despite the pending appeal, ACL’s contested Receiver, ostensibly acting on ACL’s behalf, filed a third-party coverage complaint against Travelers and ACL’s other alleged insurers. ACL’s appeal acts to automatically stay the Appointment Order, including the Receiver’s purported authority to file a third-party coverage action on ACL’s

behalf, and it divests this Court of jurisdiction over matters affected by the appeal. If, however, the Court finds that the Appointment Order is not stayed, and that it has jurisdiction to rule on matters affected by the pending appeal, including the validity of the Receivership, the Court must dismiss the Receiver's third-party claims against Travelers, vacate the Appointment Order, and dissolve the ACL Receivership in its entirety. The grounds for Travelers' motion are summarized below.

First, because the validity of the Receivership is on appeal, Rules 205 and 241, SCACR, preclude the Receiver from pursuing and this Court acting on the Receiver's Third-Party Complaint. *See* Rule 241(a), SCACR ("As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision."); Rule 205, SCACR ("Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal"). Under Rule 241, SCACR, ACL's appeal of the Appointment Order acts to automatically stay the Receiver's appointment—the sole basis for his purported authority to bring his third-party claims against Travelers in this case. The Receiver cannot pursue claims on ACL's behalf while the validity of his appointment is on appeal. Further, regardless of the existence of a stay, this Court is divested of jurisdiction to act on matters affected by the appeal under Rule 205, SCACR, including the threshold issue of whether the Receivership was proper in the first place.

Second, if the Court does not agree that the Third-Party Complaint is stayed, and the Court believes it has jurisdiction to rule on matters that are affected by ACL's pending appeal, the Court should vacate its Appointment Order and dissolve the ACL Receivership in its entirety. This Court does not have the power to appoint a Receiver over an active foreign corporation such

as ACL, which has no property in South Carolina. The power of a receiver is no greater than that of the court that appointed him, and it extends only to the boundaries of the territorial jurisdiction of the appointing court, here, South Carolina. ACL is and always has been a Canadian corporation. It has no assets or property in South Carolina over which this Court, and by extension the Receiver, has any power to act. Insurance policies allegedly issued to ACL, a Canadian company, by insurance companies domiciled outside of South Carolina, are not assets or property located in South Carolina. The Appointment Order was thus improper and must be revoked. For the same reasons, the Receiver is without authority or standing to pursue any claims on ACL's behalf.

Third, the Court lacks personal jurisdiction over Travelers. Travelers is not incorporated in South Carolina, does not have its principal place of business in South Carolina, and is not otherwise "essentially at home" in South Carolina. The Court thus does not have general personal jurisdiction over Travelers. The Court also cannot exercise specific personal jurisdiction over Travelers, because the Receiver's third-party claims do not arise out of or relate to any contacts between Travelers and South Carolina.

Fourth, there is no justiciable case or controversy between the Receiver and Travelers. The Receiver's Third-Party Complaint includes three declaratory judgment claims against Travelers. In those claims, the Receiver seeks (i) a declaration that Travelers has to produce ACL's alleged liability insurance policy documents to the Receiver, (ii) declarations of the parties' rights and obligations under those alleged policies, and (iii) a declaration that Travelers must compensate the Receiver in connection with the defense of asbestos suits. These claims are purely hypothetical, speculative, and abstract. There is no concrete dispute for this Court to resolve as to Travelers.

Fifth, the Receiver's third-party claims are improper under Rule 14(a), SCRCP, because they are not "derivative" of ACL's alleged tort liability to the underlying plaintiff, Mr. Mitchell. A defendant/third-party plaintiff must have a substantive claim against the third-party defendant that is founded upon derivative liability, *i.e.*, the outcome of the principal claim must impact the third-party defendant's liability. Here, the Receiver's claims against Travelers are not at all "derivative"; rather, they seek relief directly against Travelers, independent of Mr. Mitchell's asbestos tort claims.

Accordingly, Travelers respectfully requests that this Court either (i) issue an order confirming that the Appointment Order is stayed and that this Court is currently divested of jurisdiction over matters relating to the validity of the ACL Receivership or, in the alternative, (ii) issue an order dismissing the ACL Receiver's third-party claims against Travelers with prejudice, vacating the Appointment Order, and dissolving the ACL Receivership in its entirety.

BACKGROUND

This Court appointed Mr. Protopapas as the Receiver of ACL's "insurance assets" in the *Tibbs* asbestos tort case. *See* Ex. A (Order on Plaintiffs' Motion to Appoint a Receiver, dated Sept. 8, 2023, in *Tibbs v. 3M Company*, No. 2023-CP-40-01759 (S.C. Ct. Common Pleas)). The Court did so at the request of the underlying asbestos tort plaintiffs, even though ACL is an active foreign corporation that was actively defending itself in the case. Specifically:

- On May 17, 2023, ACL filed a motion to dismiss the Tibbs plaintiffs' Amended Complaint for lack of personal jurisdiction. *See* Ex. B.
- On July 19, 2023, the Court denied ACL's motion to dismiss. *See* Ex. C.
- On July 26, 2023, the Tibbs plaintiffs filed a motion to hold ACL in contempt and to strike its pleadings, arguing ACL had failed to participate in discovery. *See* Ex. D.

- On July 28, 2023, the Tibbs plaintiffs filed a motion asking the Court to appoint Mr. Protopapas as ACL's receiver "as soon as practically possible" after striking ACL's pleadings. *See* Ex. E.
- On August 2, 2023, ACL filed an answer to the Tibbs plaintiffs' Amended Complaint. Ex. F.
- On August 9, 2023, ACL filed an opposition to the Tibbs plaintiffs' motions to hold ACL in contempt, to strike its pleadings, and to appoint Mr. Protopapas as receiver. Ex. G. Among other things, ACL explained that it provided certain written and document discovery in response to Plaintiff's discovery requests, but that it could not provide a Rule 30(b)(6), SCRCP, witness because there are no individuals alive who are capable of responding to the examination topics. ACL also explained that, as a Canadian corporation whose office is located in Quebec, it could not provide certain discovery to Plaintiff without risking criminal or civil penalties under the Quebec Business Concerns Record Act.
- On September 8, 2023, at 8:43 a.m., the Court issued an Order holding ACL in contempt and striking its pleadings for its "refusal to participate in meaningful discovery." Ex. H.
- On September 8, 2023, at 8:44 a.m., the Court issued its Appointment Order. The Court found ACL in default (because the Court had struck its answer) and appointed Mr. Protopapas as the Receiver of ACL's "insurance assets." Ex. A.

On September 13, 2023, ACL filed a Notice of Appeal with the South Carolina Court of Appeals as to this Court's Appointment Order as well as the Order holding ACL in contempt and striking its pleadings. Ex. I. The appeal remains pending.

Turning to the instant case, on May 17, 2023, Plaintiff Ted Everette Mitchell, individually and as executor of the estate of Patsy Ann Mitchell, filed an Amended Complaint against dozens of asbestos tort defendants, including ACL. Mr. Mitchell alleges that he developed lung cancer as a result of his exposure to asbestos. Am. Compl. ¶¶ 1-11. As to ACL, he alleges that it "mined, 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, raw asbestos

fibers present at numerous jobsites in South Carolina and North Carolina.” Am. Compl. ¶ 31. He seeks damages against ACL and the other defendants for their alleged tortious conduct.

On June 19, 2023, ACL filed a motion to dismiss Mr. Mitchell’s Amended Complaint for lack of personal jurisdiction. *See generally* ACL’s June 19, 2023 Memorandum In Support of Motion to Dismiss First Amended Complaint for Lack of Personal Jurisdiction; *see also* Richard Dufour Affidavit dated June 16, 2023 (filed June 19, 2023) (“Dufour Affidavit”). ACL argued that Mr. Mitchell failed to make a prima facie showing that ACL is subject to either general or specific personal jurisdiction in South Carolina. ACL’s motion to dismiss and the accompanying Dufour Affidavit explain that ACL is a Canadian corporation that has never conducted any business activities in South Carolina. ACL’s motion to dismiss remains pending.

On September 19, 2023—approximately a week after ACL appealed the Appointment Order—the Receiver, purportedly on ACL’s behalf, filed his Third-Party Complaint in this case against Travelers and other alleged ACL insurers. *See* Third-Party Compl. dated Sept. 19, 2023. The Receiver’s Third-Party Complaint includes three declaratory judgment claims against Travelers and the other Third-Party Defendants. In Count I, the Receiver seeks a declaration that ACL’s insurance policy documents 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 Party Compl. ¶ 36. In Count II, the Receiver seeks a declaration that Travelers and ACL’s other alleged insurers “issued primary and/or excess general liability coverage to ACL, subject to the per occurrence and aggregate limits of those policies, and that those Third-Party Defendants have an unlimited supplemental duty to defend or reimburse defense costs.” As part of Count II, the Receiver also seeks a host of coverage-related declarations “as to the interpretation and meaning of the insurance policies” allegedly issued to

ACL. *Id.* ¶¶ 38-39. In Count III, the Receiver seeks a declaration that Travelers and the other insurers “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.” *Id.* ¶ 48. The Third-Party Complaint makes no mention of the fact that the validity of the Receivership is on appeal.

ARGUMENT

I. Given ACL’s Pending Appeal, the Appointment Order is Stayed and This Court Lacks Jurisdiction Over Matters Affected by the Appeal

Under Rules 205 and 241(a), SCACR, the service of a notice of appeal (i) divests the trial court of jurisdiction over matters affected by the appeal and (ii) automatically stay the matters decided in the orders on 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, 532 (S.C. 2016) (Toal, J., concurring) (“Pursuant to Rule 205, the service of a notice of appeal divests the trial court of jurisdiction over matters affected by the appeal” (citing Rule 205, SCACR)); *Lancaster v. Georgia-Pacific Corp.*, 403 S.C. 136, 137 (S.C. 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 (S.C. 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”); Rule 241(a), SCACR (“the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. . . .”). Thus, ACL’s appeal automatically stays the relief granted in the Appointment Order, including the authority of the Receiver to pursue his third-party claims in this case on ACL’s behalf, and it divests this Court of jurisdiction over matters affected by the appeal, including the validity of the Receivership.

Indeed, the Receiver’s right to sue is wholly dependent on, and derivative of, his authority as Receiver—the foundational issue now on appeal. *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.”). The Receiver lacks standing to administer or liquidate ACL’s alleged insurance policies or to otherwise pursue his third-party claims on ACL’s behalf while the appeal is pending. *See Joseph v. S.C. Dep’t of Lab., Licensing & Regul.*, 417 S.C. 436, 467, 790 S.E.2d 763, 779 (2016) (“Standing to sue is a fundamental requirement in instituting an action.”); *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) (discussing the “stringent standing test”); *Brock v. Bennett*, 313 S.C. 513, 519, 443 S.E.2d 409, 413 (Ct. App. 1994) (“No justiciable controversy is presented unless the plaintiff has standing to maintain the action,” and thus “[o]nce it is determined a plaintiff has no standing to prosecute, the court must dismiss the action.”).

In short, Receiver cannot pursue his third-party claims while the validity of his appointment is on appeal; and, even if he could, under Rule 205, SCACR, this Court is deprived of jurisdiction over matters affected by the appeal, including the legality of the Receivership.

II. This Court Does Not Have the Power to Appoint a Receiver Over a Foreign Corporation Like ACL, Which Has No Assets or Property in South Carolina

If the Receiver's third-party action is not stayed (it is), and the Court finds it somehow has not been divested of jurisdiction over matters affected by the appeal (it has), the Court should vacate its Appointment Order, dissolve the Receivership, and dismiss the Receiver's third-party claims against Travelers with prejudice.

A. Because ACL Is a Foreign Corporation with No Property in South Carolina, the Appointment Order Was Improper and Should Be Vacated

“That a receiver has no extraterritorial authority is too well settled to require the citation of authority.” *Frink v. National Mut. Fire Ins. Co.*, 74 S.E. 33, 36 (S.C. 1912). South Carolina law is clear: a South Carolina court has no power or jurisdiction to appoint a receiver over a foreign corporation that has no assets in the State. *See Boynton v. Consol. Indem. & Ins. Co.*, 185 S.E. 731, 737 (S.C. 1936) (reversing appointment of receiver because there was a “total failure of any proof” that the foreign company “has property in this state”); *Pollock v. Carolina Interstate Bldg. & Loan Ass’n*, 25 S.E. 977, 980 (S.C. 1896) (“The power of a receiver only extends to the boundaries of the territorial jurisdiction of the court appointing him.” (quotation omitted)).

This authority is consistent with United States Supreme Court precedent recognizing that a receiver appointed by a state court has jurisdiction only over assets within that state. *See Booth v. Clark*, 58 U.S. 322, 332 (1854) (holding with respect to a New York appointed receiver, “[i]ndeed, whatever may be the receiver’s rights under a creditor’s bill, to the possession of the

property of the debtor in the State of New York, or the permissions which may be given to him to sue for such property, we understand the decisions of that State as confining his action to the State of New York.”); *Hale v. Allinson*, 188 U.S. 56, 68 (1903) (“We do not think anything has been said or decided in this court which destroys or limits the controlling authority of” *Booth*); *Great Western Mining & Mfg. Co. v. Harris*, 198 U.S. 561 (1905) (a “receiver’s right to sue in a foreign jurisdiction is not recognized upon principles of comity, and the court of his appointment can clothe him with no power to exercise his official duties beyond its jurisdiction.”).

Many other cases are in accord. *See, e.g., McGraw v. Mott*, 179 F. 646, 654 (4th Cir. 1910) (“the receiver appointed by the court in one state has no power to take charge of, sell, or dispose of property in another state, or to institute suits in the courts of such other state, except by way of comity”; “[t]hat a receiver is an officer of the court appointing him, and can exercise no power or maintain any legal status except within the territorial limits of the court, is settled.”); *Coltrane v. Templeton*, 106 F. 370, 375 (4th Cir. 1901) (“The receiver appointed in the Maryland district has no extraterritorial existence.”); *Fowler v. Osgood*, 141 F. 20, 24 (8th Cir. 1905) (“the only method for reaching the property or assets of an insolvent corporation in a jurisdiction foreign to that where the receiver in chancery is appointed is by resort to an ancillary receivership where the property or asset sought to be recovered has its situs or where the debtor resides.”); 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 misapplication of assets of the

foreign corporation within the state, and if necessary, to appoint a receiver of the assets”) (collecting cases); 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.”).

In their motion to appoint a receiver over ACL, the Tibbs plaintiffs relied on S.C. Code §§ 15-65-10(4) and (5). *See* Ex. E at 2-4. The Appointment Order likewise appears to have relied on both provisions, though the Court only specifically cited S.C. Code § 15-65-10(5). *See* Ex. A at 2-4 (discussing and quoting both statutory provisions). Neither provision allows for the appointment of the Receiver here.

1. S.C. Code § 15-65-10(4) Does Not Apply Because ACL Is a Solvent Canadian Corporation With No In-State Property

Under S.C. Code § 15-65-10(4), a “receiver may be appointed by a judge of the circuit 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.” This provision is inapplicable and cannot be used to justify the appointment of a Receiver over ACL for at least two reasons: (1) ACL has not been “dissolved,” it is not “insolvent or in imminent danger of insolvency,” and it has not “forfeited its corporate rights”; and (2) ACL is a foreign corporation that does not have any “property within this State,” *i.e.*, South Carolina.

Far from satisfying the requirements of S.C. Code § 15-65-10(4), which allows for the appointment of a receiver over a corporation that “has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights,” ACL is an active Canadian corporation. *See, e.g.*, Dufour Aff. ¶ 2. There is no evidence that it has been dissolved, that it is

insolvent or in imminent danger of insolvency, or that it has forfeited its corporate rights.

Thus, S.C. Code § 15-65-10(4) does not apply.

Because ACL is a foreign corporation, the Court's authority to appoint a Receiver over ACL is limited to its "property within this State," if any. *See* S.C. Code § 15-65-10(4). But ACL has no "property within this State." There is no evidence of any ACL property anywhere in South Carolina. To the contrary, the record evidence shows that ACL has never had any property in South Carolina. *See, e.g.*, ACL's Memorandum of Law in Support of Its Motion to Dismiss dated June 19, 2023, at 2-4 (citing Dufour Affidavit). There is thus no property in South Carolina over which this Court, and by extension the Receiver, may act.

The Court's Appointment Order suggests that the statutory reference to "property within this State" is somehow "not a limitation on the Receiver's authority in this case." Ex. A at 4. In the Court's view, "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," and "[t]hese same principles of comity support a state court's authority to vest a statutory receiver to assert an insolvent corporation's rights of action." *Id.* The Court's reasoning does not support its conclusion. On its face, South Carolina's receivership statute limits this Court's authority to appoint a receiver over a foreign corporation to situations where the corporation has "property within this State." S.C. Code § 15-65-10(4). Principles of comity only underscore the impropriety of extraterritorial, foreign receiverships. *See supra* at 10-12 (collecting cases).

To support its expansive reading of South Carolina's receivership statute, the Court misstates the United States Supreme Court's holding in *Porter v. Sabin*, 149 U.S. 473 (1893):

This Court's view of the scope of a 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.”

Ex. A at 3-4 (purporting to quote *Porter*, 149 U.S. at 480) (emphasis provided by this Court).

But that is not what *Porter* held. This Court’s bracketed addition of two words—“[is]” and “[and]”—materially changes *Porter*’s holding. Rather than hold that “the whole property of the corporation [is] within the jurisdiction of the court which appointed the receiver,” the Supreme Court actually held that a receivership court only has jurisdiction over property that is “within the jurisdiction of the court which appointed the receiver[.]” *See Porter*, 149 U.S. at 479 (“The whole property of the corporation 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, remains in its custody, to be administered and distributed by it.” (emphasis added)). *Porter* does not support this Court’s conclusion that a South Carolina state court judge has the power to appoint a receiver over foreign property. In fact it says just the opposite and is entirely consistent with all of the other authorities discussed above. That a South Carolina state court has no jurisdiction over foreign property is not subject to legitimate debate. It is black-letter law.

ACL’s alleged insurance policies are not South Carolina property. The situs of intangible property such as a contractual obligation under an insurance policy is the domicile of the debtor/obligor (Travelers or the other alleged insurers), whose domicile is its state of incorporation or principal place of business—neither of which is South Carolina. *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.’” (quotation omitted)); *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.” (citations omitted)); *Long v. Baldt*, 464 F. Supp. 269, 273 n. 3 (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, not South Carolina. *See* Third-Party Compl. ¶ 5; *see also* Ex. J, Affidavit of Ann B. Mulcahy ¶ 3. Likewise, none of the other Third-Party Defendants are alleged to be domiciled in South Carolina. *See* Am. Third-Party Compl. ¶¶ 2-4. Insurance policies allegedly issued to ACL in Canada by non-South Carolina insurance companies are not South Carolina property.

In *Howard v. Allen*, the South Carolina Supreme Court held that liability insurance policies are not property subject to attachment in this State. *See Howard v. Allen*, 254 S.C. 455, 459, 176 S.E.2d 127, 128 (S.C. 1970) (“We are not convinced that the contractual obligations of defendant’s insurer are a debt subject to attachment under the law of this state and a review and analysis of decisions from other states would, we think, serve no useful purpose.”). This holding makes perfect sense, as the “insurer owes the insured nothing until the liability of the insured and the amount thereof has been determined.” *Id.*

Because ACL is a foreign corporation that does not have any in-state property, the Appointment Order was improper and must be vacated.

2. S.C. Code Ann. § 15-65-10(5) Does Not Authorize the Receiver’s Appointment

S.C. Code Ann. § 15-65-10(5) provides that a South Carolina court may appoint a receiver “[i]n such other cases as are provided by law or may be in accordance with the existing practice, except as otherwise provided in this Code.” The appointment of the Receiver here was not consistent with law or “existing practice.” Indeed, far from it.

As already explained, this Court has no power or jurisdiction to appoint a receiver over a foreign corporation that does not have any property in this State. The United States Constitution, United States Supreme Court precedent, and South Carolina Supreme Court precedent forbid it. *See supra* at 10-12; *see also, e.g., Doctors Hosp. of Augusta, L.L.C. v. CompTrust AGC Workers' Comp. Trust Fund*, 371 S.C. 5, 9 (S.C. 2006) (Toal, C.J.) (“the principle that state statutes generally have no extra-territorial effect remains a foundation of the respect for individual sovereignty the states must share with one another.”); 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.”); U.S. Const. art. I, § 8 (reserving to Congress the authority “to regulate Commerce . . . among the several States”).

The circumstances of this case also did not warrant the appointment of a Receiver over an active foreign corporation. ACL appeared in this case and the *Tibbs* case and was actively defending itself. ACL contested the Court’s personal jurisdiction and explained why it could not provide all of the discovery sought, yet the Court proceeded to hold ACL in contempt, strike its pleadings, default it, and appoint a Receiver over it—all at the urging of asbestos tort plaintiffs. The appointment of a Receiver in these circumstances is entirely inconsistent with South Carolina law and practice.

South Carolina law is clear that “[t]he appointment of a receiver is a drastic remedy, and should be granted only with reluctance and caution.” *Midlands Util., Inc. v. S.C. Dep’t of Health & Env’t Control*, 301 S.C. 224, 228 (S.C. 1989) (citation omitted). “[A]s a rule, a receiver will not be appointed during the progress of a cause, unless there is the strongest reason to believe

that the plaintiff is entitled to the relief demanded in his complaint, and there is danger that the property will be materially injured before the case can be determined.” *Richland Cnty. v. S.C. Dep’t of Revenue*, 422 S.C. 292, 313 (S.C. 2018). “This court, not only has often said that an adjudication of a receivership is a harsh and drastic remedy, one to be granted only with great caution . . . but it has also, time after time, indicated that the receiver appointed should be untrammelled in his relations, entirely indifferent between the parties, and absolutely fair and impartial, for the receiver not only represents all the parties interested in the estate, but he is an officer of the court.” *Penn. Mut. Life Ins. Co. v. Cudd*, 172 S.E. 787, 788-89 (S.C. 1934); *see also, e.g., Booth*, 58 U.S. at 331 (“A receiver is an indifferent person between parties He is appointed in behalf of all parties”); *Va.-Carolina Chem. Co. v. Hunter*, 84 S.C. 214, 224, 66 S.E. 177, 180 (1909) (concluding that a receiver who is not “entirely impartial,” but who instead serves as an “agent[] of the plaintiff, actively pressing its claims against the defendant,” cannot continue service as a receiver); 65 Am. Jur. 2d Receivers § 9 (2023) (“The appointment of a receiver is an extraordinary remedy, considered harsh, dangerous, severe, and drastic, only to be made cautiously, reluctantly, and with circumspection in cases of clear necessity to protect the plaintiff’s property interests and rights. In general, a receiver should only be appointed in extreme cases, and clear and urgent cases when necessary for the protection of the parties and on a clear showing of a danger of irreparable loss or a danger of material injury.” (footnotes and citations omitted)). Nothing about the Court’s Appointment Order here is consistent with existing practice.

Contrary to the Court’s assertion that ACL engaged in some sort of “moral fraud” that justified the appointment of a Receiver, *see* Ex. A at 3, ACL was well within its rights to contest personal jurisdiction. Actively defending oneself in a lawsuit is not fraud. Discovery obstacles

posed by the existence of mandatory foreign statutes are not fraud. The Court cites *Virginia Carolina Chemical v. Hunter*, 84 S.C. 214 (1909), for the proposition that “where, as here, a debtor, solvent or otherwise, ‘is trying to defeat his creditors by an act or course of conduct which indicates moral fraud—a conscious intent to defeat, delay or hinder creditors in the collection of debts—then a court will grant any relief within its jurisdiction appropriate and effective to protect creditors against the fraud without requiring the creditor to run the risk of losing his debt from the delay of obtaining judgment and return of nulla bona on the execution.” Ex. A at 3. The Court then held that “where there is active wrongdoing and illegal refusal to comply with this Court’s orders, the appointment of a receiver is appropriate.” *Id.* *Virginia Carolina Chemical* is inapposite. To begin, ACL is not a debtor; the asbestos tort plaintiffs have no judgment against ACL and may never receive one. Further, there is no evidence that ACL engaged in a “conscious intent to defeat, delay or hinder creditors in the collection of debts.” Nor is there any evidence that ACL defrauded anyone, much less acted “illegal[ly].” ACL did not outright refuse to engage in any discovery or ignore complaints against it; rather, it appeared and defended itself and provided discovery responses within the parameters of what it believed it was able to give without running afoul of the Quebec Business Concerns Records Act. *See* ACL’s Opposition to Motion for Contempt, to Strike and Appoint a Receiver, filed Aug. 9, 2023, at 2-4 (discussing discovery ACL provided to plaintiffs); *id.* at 6-10 (arguing the Act prohibits ACL under threat of criminal or civil contempt from providing records located in Quebec).

In short, the appointment of the Receiver was not consistent with law or existing practice, and so the appointment was not appropriate under S.C. Code Ann. § 15-65-10(5).

B. South Carolina's Insurance Choice of Law Statute, S.C. Code § 38-61-10, Does Not Apply

As an apparent fallback position, the Court's Appointment Order says that "[e]ven assuming ACL's interpretation of §15-65-10 is correct, to the extent they exist, ACL's Insurance Assets would be intended to protect the lives, interests and property within South Carolina," and so, under S.C. Code § 38-61-10, "the insuring assets are subject to the laws of South Carolina, including the duly appointed Receiver." Ex. A at 4-5. Not true. S.C. Code § 38-61-10 does not apply here.

S.C. Code § 38-61-10 is a choice of law statute. It provides that "[a]ll contracts of insurance on property, lives, or interests in this state are considered to be made in the State and all contracts of insurance the applications for which are taken within this State are considered to have been made within this State and are subject to the laws of this State." It does not override South Carolina's receivership statute or the prohibition on extraterritorial receiverships over foreign property.

Any reliance on *Sangamo Weston, Inc. v. National Surety Corporation*, 307 S.C. 143 (S.C. 1992), *see* Ex. A at 5, is misplaced. *Sangamo*, like the choice of law statute itself, addressed choice of law questions. It did not hold that insurance policies issued to nonresident defendants are property within South Carolina. Unlike the instant case, the policy at issue in *Sangamo* involved a company that manufactured products in South Carolina, and the suit arose out of those South Carolina manufacturing operations. *See id.* at 146. The *Sangamo* Court made clear that "Sangamo's interest and property located outside of this state are not at issue here." *Id.* at 148. By contrast, all of ACL's property is located outside of this State—this case only involves out-of-state property.

To the extent the Court believes ACL's insurance policies insure lives, property, or interests in South Carolina merely because they may provide liability coverage to ACL for injuries that occurred in South Carolina, that too would be insufficient to trigger the choice of law statute. For example, in *Unisun Insurance Company v. Hertz Rental Corporation*, 312 S.C. 549, 436 S.E.2d 182 (Ct. App. 1993), the Court of Appeals held that an automobile liability policy and its uninsured motorist coverage was not subject to South Carolina's insurance choice of law statute even though the automobile collision happened in South Carolina. The contract was negotiated in New York for a car rented from a location in New York. That the claimant drove the vehicle to South Carolina where the accident occurred was insufficient. *Id.* at 552, 436 S.E.2d at 184. Many other South Carolina courts have reached the same result.¹

There is simply no basis for this Court to appoint a receiver over ACL. The Appointment Order should be vacated, and the Receiver's third-party claims should be dismissed.²

III. The Court Lacks Personal Jurisdiction Over Travelers

Under Rule 12(b)(2), SCRCP, 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-

¹ See, e.g., *Gordon v. Colonial Ins. Co. of Calif.*, 342 S.C. 152, 536 S.E.2d 376 (Ct. App. 2001) (holding South Carolina insurance choice of law statute did not apply to policy issued in Virginia to Virginia resident even though collision occurred in South Carolina); *Russell v. McGrath*, 135 F. Supp. 3d 427 (D.S.C. 2015) (holding South Carolina insurance choice of law statute did not apply to policy issued in Florida for car registered in Florida with a Connecticut license plate even though claimant was a college student in South Carolina renting an apartment in South Carolina); *Yeager v. Allstate Ins. Co.*, 2010 WL 680429 (D.S.C. Feb. 23, 2010) (holding South Carolina insurance choice of law statute did not apply to policy issued to Georgia resident with Georgia license and registration even though accident occurred in South Carolina while driving for work in South Carolina and claimant lived part-time in South Carolina with her boyfriend).

² Travelers incorporates by reference the arguments ACL made in opposing and objecting to the Court's appointment of a Receiver over ACL.

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 does not 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").³

³ *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

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* Third-Party Compl. ¶ 5; *see also* Ex. J, Mulcahy Affidavit at ¶ 3. The only way this Court can have general personal jurisdiction over Travelers is if the Receiver can meet his 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. The Receiver cannot possibly meet his burden here.

The Receiver does not even allege that Travelers is subject to general jurisdiction in South Carolina, let alone explain how it could be. That is reason alone to reject any argument that Travelers is 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 Affidavit of Ann B. Mulcahy:

- Travelers is a corporation with its principal place of business and state of incorporation outside of South Carolina (*see* Ex. J at ¶¶ 3, 7);
- 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 ¶ 7);
- Travelers does not own or rent office space in South Carolina (*see id.* at ¶ 7);
- Travelers does not have any loan applications with South Carolina banks or financial institutions (*see id.* at ¶ 7); and
- Travelers does not hold meetings of directors in South Carolina (*see id.* at ¶ 7).

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).

Simply put, Travelers is not “at home” in South Carolina, and the Receiver does not assert otherwise. Travelers’ limited contacts with South Carolina relate solely to its insuring relationship with certain South Carolina businesses and residents. And ACL, a Canadian 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, the Receiver 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). The Receiver does not come close to alleging specific jurisdiction facts sufficient to satisfy his burden as to either the “power” 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 business activities in South Carolina in connection with the instant claims, given that there are no factual allegations or evidence that Travelers did anything in South Carolina that could serve as the basis for the Receiver’s third-party claims against Travelers.

In his Third-Party Complaint, the Receiver alleges baldly 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 Plaintiff.” Third-Party Compl. ¶ 6. 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, the Receiver cannot demonstrate the minimum, claim-specific contacts between Travelers and South Carolina necessary to meet the constitutional

requirements of due process. The Receiver's third-party claims against Travelers do not arise from or relate to Travelers' contacts with South Carolina. The Receiver 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 any ACL-related activities at residents of South Carolina, or that the Receiver's third-party claims against Travelers in this case arise out of any such in-state activities. Indeed, as discussed above, ACL is not and has never been a South Carolina company, and Travelers and the other insurance companies that allegedly issued policies to ACL are domiciled outside of South Carolina. *See, e.g., H.J. Baker & Bro.*, 70 S.E. at 433 ("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." (quotation omitted)); *Af-Cap Inc.*, 383 F.3d at 371-72 ("[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." (citations omitted)); *Long*, 464 F. Supp. at 273 n. 3 ("the situs of the debt lies with the debtor"). Further, Travelers, a Connecticut insurance company, is not alleged to have ever manufactured, distributed, or sold any ACL-related asbestos or asbestos-containing products in South Carolina or elsewhere.

The Receiver cannot argue that Travelers should have somehow foreseen that ACL, a Canadian corporation with no operations in South Carolina, would be subject to asbestos tort lawsuits in South Carolina. But regardless, such 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)). The Receiver 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)). 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).⁴ 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 the Receiver fails to allege facts sufficient to demonstrate that Travelers conducted activities in South Carolina that serve as the basis for his third-party claims against

⁴ *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).

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 Also 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 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 entirely unrelated to the facts and circumstances of the Receiver’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. J, Mulcahy Affidavit ¶¶ 3, 5, 7. In addition, ACL was never a South Carolina company, and Travelers is not alleged to have done anything in or directed to South Carolina that forms the basis for the Receiver’s third-party claims against Travelers in this case. Indeed, the Receiver’s claims are premised on liability insurance policies that were allegedly issued to a Canadian corporation with no operations or property in 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 underlying tort case and the third-party

coverage case can proceed unaffected without Travelers. If anything, the parties, particularly Plaintiff, would be inconvenienced if the Receiver is allowed to implead Travelers, as it would expand unnecessarily the scope of the case and delay its ultimate resolution, thereby prejudicing Plaintiff and wasting party and judicial resources.

Finally, South Carolina's interest in exercising jurisdiction over Travelers here is virtually nonexistent. "[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). ACL is a Canadian corporation with no property in South Carolina, and Travelers is a foreign corporation whose in-state activities are entirely unrelated to Plaintiff's claims.

Thus, even if the Receiver could establish the minimum contacts necessary to meet the constitutional requirements of due process under the power prong (it cannot), the Court should not exercise jurisdiction over Travelers under the fairness prong because it would be neither reasonable nor fair.

IV. The Receiver's Third-Party Claims Are Non-Justiciable

Even if the Court were to find that it can exercise personal jurisdiction over Travelers, the Receiver's third-party claims should nonetheless be dismissed for failure to state a claim because they do not present an actual, justiciable controversy. "At the outset of any action for a declaratory judgment it must be determined whether the pleadings state a cause of action." *West v. West*, 263 S.C. 146, 148-49 (1974) (citations omitted). "The existence of an actual controversy is necessary in order to invoke the jurisdiction of the court for a declaratory judgment." *Id.* "A justiciable controversy is described as a concrete and substantial controversy

and not merely a dispute of a contingent, hypothetical, or abstract character.” *Id.* The Receiver’s three declaratory judgment claims against Travelers are purely hypothetical and abstract; there is no legitimate case or controversy, and the Receiver’s claims should be dismissed under Rule 12(b)(6).

A. Count I Should Be Dismissed

In his first cause of action, the Receiver asks this Court to declare that any insurance policies Travelers issued to ACL “are the property of ACL to be administered by the Receiver” and that any such policy documents “shall be delivered immediately to the Receiver to be maintained in his sole possession for his unrestricted use in carrying out his duties.” Third-Party Compl. ¶¶ 35-36. The Receiver fails to allege a single fact to show that there is a justiciable controversy on this issue. He does not even allege that he requested the policy documents from Travelers and that Travelers refused to provide them. In any event, Travelers has already offered to produce to the Receiver the ACL policies referenced in paragraph 27 of the Receiver’s Third-Party Complaint. In this situation, it is indisputable that there is no ripe controversy, which requires, among other things, that “there is a definite assertion of legal rights and a positive legal duty with respect thereto, which are denied by the adverse party.” *Power*, 255 S.C. at 153-54; *see also, e.g., West*, 263 S.C. at 150 (“Although we adhere to the policy of liberally construing the declaratory judgment statute, this does not mean that this Court will entertain suits which, after adjudication, settle no legal rights of the parties. To do so would be to render advisory opinions, and thus, would be beyond the intended purpose and scope of a declaratory judgment.”).

B. Count II Should Be Dismissed

In his second cause of action, the Receiver seeks a declaration that Travelers “issued primary and/or excess general liability coverage to ACL,” as well as declarations as to the “interpretation and meaning” of those policies, including that Travelers has an “unlimited supplemental duty to defend or reimburse defense costs.” *See* Third-Party Compl. ¶¶ 38-39. There is no live case or controversy on this issue.

The relief the Receiver seeks is hypothetical and speculative; in effect, he is asking this Court to issue advisory opinions. He fails to allege facts demonstrating a specific, concrete matter for juridical resolution. Rather, he asserts generically that Travelers has a duty to defend or reimburse defense costs with respect to the “ACL Asbestos Suits,” after which he seeks various coverage declarations as to those lawsuits. *See* Third-Party Compl. ¶¶ 8, 39. Yet he never identifies the lawsuits at issue, other than “the instant suit filed by Ted Everette Mitchell, individually and as Executor of the Estate of Patsy Ann Mitchell.” *Id.* ¶ 8. The Receiver fails to identify any particular pending asbestos action as to which these issues have allegedly arisen and as to which an actual controversy currently exists vis-à-vis Travelers. Without identification of specific actions and the specific facts in each action, the Third-Party Complaint does not present a concrete matter for judicial resolution. Instead, it improperly seeks abstract, hypothetical, and contingent declarations.

Indeed, the duty to defend cannot be determined without identification of the specific lawsuits at issue. It is the most basic of principles that, “the duty of a liability insurance company to defend a claim brought against its insured [is] determined by the allegations of the third party’s complaint.” *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 15 (Ct. App. 1994), *aff’d*, 321 S.C. 310 (1996). Similarly, issues relating to any duty to indemnify

cannot be adjudicated in a vacuum. *See Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 595 (2013). The Receiver has not identified the particular lawsuits as to which he seeks relief, let alone the allegations of the complaints therein, and thus this Court cannot issue the declarations the Receiver seeks in Count II.

C. Count III Should Be Dismissed

Finally, in his third cause of action, the Receiver seeks a declaration that Travelers “must fairly compensate the Receiver for the substantial time, effort, and expenses expended in connection with the defense of asbestos suits potentially covered under [Travelers’] policies and to further declare that this obligation is unlimited.” Third-Party Compl. ¶ 48. Although the Receiver alleges that “[a]n actual and justiciable controversy exists between the Receiver and the Third-Party Defendants,” *see id.* ¶ 44, this vague and conclusory allegation is not supported by a single factual allegation. The Receiver does not even allege that he has asked Travelers to compensate him or that Travelers has refused any such request.

Again, this claim amounts to nothing more than an impermissible request for an advisory opinion. *See Booth v. Grissom*, 265 S.C. 190, 192 (1975) (“It is elementary that the courts of this State have no jurisdiction to issue advisory opinions.”). This Court cannot and should not declare, without any grounding in any supposed legal duty, that Travelers has to pay the Receiver for “unlimited” expenses he has supposedly incurred, or may incur in the future, in connection with any number of cases that have been or may be brought against ACL at any time. Further, because the Appointment Order was improper to begin with and must be revoked, the Receiver is not entitled to compensation for work he has supposedly done on behalf of ACL.

V. The Third-Party Claims Are Improper Under SCRCP 14 Because They Do Not Seek To Establish, and Are Not Based On, Liability Derivative of Plaintiff's Tort Claims

Rule 14 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.” Rule 14(a), SCRCP (emphasis added). Under this Rule, “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).⁵ “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

⁵ Rule 14 of the Federal Rules of Civil Procedure is substantially the same as Rule 14 of the SCRCP. “In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules.” *Maybank v. BB&T Corp.*, 787 S.E.2d 498, 510 (S.C. 2016) (citation omitted).

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

Here, the Receiver’s claims against Travelers are not derivative of or dependent on Plaintiff’s tort claims against ACL. The Receiver does not and cannot allege that Travelers, an insurer, is derivatively liable if ACL is found responsible for Plaintiff’s alleged asbestos exposure. Nor does the Receiver allege that Travelers has any obligation to Plaintiff.

Indeed, rather than seeking to establish derivative liability, the Receiver’s claims seek relief directly from and against Travelers. The claims are not specific to Plaintiff and are not based on derivative liability at all; 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)).

To reiterate, Plaintiff's underlying case is a tort lawsuit related to alleged asbestos exposure. It has nothing to do with insurance policy obligations. Travelers' alleged insuring relationship with ACL is not claimed to have caused Plaintiff's injuries—nor could it—and Plaintiff has yet to establish that ACL has any liability to Plaintiff.

“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 Receiver cannot implead Travelers in a direct asbestos tort case, especially before ACL's liability has been determined.

In short, the Receiver's third-party claims against Travelers improperly ask this Court for contract-related judicial declarations unrelated to Plaintiff's asbestos tort action and not premised on derivative liability. Travelers, therefore, cannot be impleaded, and the third-party claims against Travelers must be dismissed.

CONCLUSION

For all the foregoing reasons and others appearing in the record, Travelers respectfully requests that this Court either stay this action pending resolution of ACL's appeal or dismiss the Receiver's third-party claims against Travelers with prejudice and dissolve the ACL Receivership.

Respectfully submitted,

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Company

October 23, 2023

Exhibit A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
JOHN A. TIBBS and	)	C/A NO. 2023-CP-40-01759
MARGARET B. TIBBS	)	
	)	<i>In Re:</i>
Plaintiff,	)	Asbestos Personal Injury Litigation
	)	Coordinated Docket
v.	)	
	)	
3M COMPANY, et al.	)	
	)	
Defendants.	)	

ORDER ON PLAINTIFFS' MOTION TO APPOINT A RECEIVER

This order follows the Court's order finding Asbestos Corporation Ltd. ("ACL") in contempt of court and striking ACL's pleadings. Before the Court is Plaintiffs' Motion to Appoint a Receiver over ACL's insurance assets.

BACKGROUND

For the reasons set for below, the Court grants Plaintiffs motion to appoint a receiver over the Insurance Assets¹ of ACL and to allow the Receiver to assume control of the defense of asbestos claims made against Asbestos Corporation, Ltd in the United States. Peter Protopapas is appointed as receiver over those Insurance Assets and the Court expects anyone or any entity having information or materials which are reasonably calculated to lead to the discovery of admissible evidence to cooperate with this Court's Receiver in locating and marshalling those assets. Further, Mr. Protopapas is tasked with tendering current and future claims from Plaintiffs suffering from

¹ This term is defined below.

asbestos disease brought against ACL to which those policies are responsive. Finally, Mr. Protopapas is tasked with the control of the defense of those claims for ACL.

PROCEEDURAL BACKGROUND

On July 19, 2023, this Court ordered ACL to fully answer discovery and to provide a corporate representative for deposition. The Court further held that failure to do so would result ACL being held in contempt. Subsequently, this Court held ACL in contempt and, as a sanction, struck the pleadings of ACL. The Court based its contempt order on ACL's flat refusal to comply with this Court's orders to produce documents, a witness or otherwise participate in discovery.

Now, having struck ACL's answer, ACL is in default.²

LAW AND ANALYSIS

A. Appointment of a Receiver is Appropriate and Warranted

The South Carolina receivership statute provides in relevant part that a receiver may be appointed in cases in accordance with "existing practice." S.C. Code Ann. 15-65-10(5).³

² The process of actually entering default judgment is merely a ministerial process. In the absence of an answer, default is nothing more than that ministerial act. *Stark Truss Co., Inc. v. Superior Const. Corp.* 360 S.C. 503 (Ct. App. 2004)

³ A receiver is also available to carry a judgment into effect, which is the practical result of the coming default following the striking of ACL's answer.

Historically, receivers are appointed by courts sitting in equity in order to ensure a fair result. *First Carolinas Joint Stock Land Bank of Columbia v. Knotts*, 191 S.C. 384 (1939). Indeed, “[t]he right to have a receiver appointed is an ancient one” *Pelzer v. Hughes*, 27 S.C. 408 (1887) But where, as here, ACL’s answer has been struck, and thus only a ministerial action being left for ACL to be in judgment, a receiver to take possession of and, to the extent necessary, litigate ACL’s insurance assets as well as to assume control of the defense of asbestos claims made against ACL in the United States is exactly the type of historical circumstances, the Court’s of this state have found appropriate. Specifically, where, as here, a debtor, solvent or otherwise,

is trying to defeat his creditors by an act or course of conduct which indicates moral fraud-a conscious intent to defeat, delay or hinder creditors in the collection of debts-then a court will grant any relief within its jurisdiction appropriate and effective to protect creditors against the fraud without requiring the creditor to run the risk of losing his debt from the delay of obtaining judgment and return of nulla bona on the execution.

Virginia Carolina Chemical v. Hunter, 84 S.C. 214 (1909).

Here it is exactly the moral fraud of ACL’s personal jurisdiction claims, exposed by decades of opinions dismissing those very assertions and ACL’s continued refusal to participate in this that warrants the appointment of a receiver. Thus, where there is active wrongdoing and illegal refusal to comply with this Court’s orders, the appointment of a receiver is appropriate.

As Plaintiffs have requested, a receiver appointed here would have the authority to administer “any insurance assets” including “any claims related to the actions or failure to act of ACL’s insurance carriers.” The Receiver would assume control of the defense of asbestos claims made against ACL in the United States. This Court’s view of the scope of a 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).

That the South Carolina receivership references “property within this state” is not a limitation on the Receiver’s authority in this case. 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 to assert an insolvent 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 Dep. 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 pursuant to Delaware law would be afforded “full faith and credit”). That is the authority given to be given the receiver here.

That authority includes the insurance assets of ACL, including the right to assume control of the defense of asbestos claims made against ACL in the United States and tender claims to applicable insurance policies. Even assuming ACL’s interpretation of §15-65-10 is correct, to the extent they exist, ACL’s Insurance Assets ² would be intended to protect the lives, interests and property within South Carolina. The result is that the insuring assets are subject to the laws of South Carolina, including the duly appointed Receiver.

² For purpose of clarity, this Court defines “Insurance Assets” as any insurance policy, proceeds of insurance policies, claims relating to such insurance policies, including but not limited to, claims relating to any breaches of duty relating to those policies, information relating to those insurance policies including, but not limited to mail, files of counsel, or other information which is reasonably calculated to lead to the discovery of admissible evidence about those insurance policies or any other assets which are related to, touch or are otherwise relevant to such insurance.

S.C. Code Ann §38-61-10 states that

[a]ll contracts of insurance on property, lives, or interests in this state are considered to be made in the State and all contracts of insurance the applications for which are taken within this State are considered to have been made within this State and are subject to the laws of this State.

In interpreting §38-61-10, the South Carolina Supreme Court held that “[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.” *Sangamo Weston v. Nat’l Sur. Corp.*, 307 S.C. 143, 149, 414 S.E.2d 127, 130 (1992) (Toal, C.J). The result is that “South Carolina substantive law governs [the insuring assets of ACL]” *Id.* Thus, the appointment of a receiver over those assets is appropriate.

B. Due Process has not and will not be violated

ACL continues to ignore the jurisprudence of this state which directly addresses its due process argument. Just as here, *Sangamo* argued that §38-61-10 was “unconstitutional.” *Id.* at 131. The South Carolina Supreme Court there opined that

insuring property, lives and interests in South Carolina constitutes a significant contact with this state. South Carolina has a substantial interest in who bears the liability for operations conducted in this state which result in injury to South Carolina property and citizens. Although the parties are not residents of this state, both parties availed themselves of the law of South Carolina when they respectively provided or received insurance on interests located in this state.

Id. ACL sold its products throughout the United States well knowing that it would end up in the workplaces of working men and women throughout the nation, including sales, specifically to South Carolina. Therefore, under the statutory scheme of this state and its interpreting precedent, whatever insuring assets of ACL exist and related claims are subject to the substantive law of

South Carolina and nothing about that result is violative of due process.

POWERS OF THE RECEIVER

As set forth above, the powers afforded to the receiver here are all related to the insurance assets of ACL. Therefore, this Court hereby orders that Peter Protopapas be and hereby is appointed Receiver in this case with the power and authority fully administer all insurance assets of Asbestos Corporation, Ltd. and any subsidiaries, accept service on behalf of ACL, engage counsel on behalf of ACL, to assume control of the defense of asbestos claims made against ACL in the United States, and take any and all steps necessary to protect the interests of ACL whatever they may be. This order includes the right and obligation to administer any insurance or indemnification assets of ACL as well as any claims related to the actions or failure to act of ACL insurance carriers or other entities, including, but not limited to the officers, directors and/or shareholders of ACL against which the ACL may have claims.

In addition to the powers of the Receiver set forth herein, the Receiver shall have the following rights, powers and authority, insofar as they are related to the discovery of and recovery of insurance assets, to: 1) open any mail which is reasonably believed to contain information relating to insurance assets addressed to the defendant and addressed to any business owned by the ACL; redirect the delivery of any such mail addressed to the ACL or any business of the ACL, so that such mail may come directly to the receiver; 2) endorse and cash all checks and negotiable instruments payable to ACL relating to insurance assets; 3) obtain from any financial institution, bank, credit union, savings and loan or title, credit bureau or any other third party, any financial records belonging to or pertaining to the insurance assets of ACL; 4) hire any person necessary to accomplish any right or power under this Order; 5) to assume control of the defense of asbestos claims made against ACL in the United States; and 6) take all action necessary to gain access to

all storage facilities, safety-deposit boxes, real property, and leased premises wherein any property of ACL may be situated, and to review and obtain copies of all documents related to insurance assets of ACL.

The Court expects the Receiver to investigate the existence of all insurance or indemnifications coverages or claims relating thereto which are potentially available to ACL. The Receiver will provide potential insurers or indemnifiers 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 ACL or any entity for whom ACL did work or supplied materials or licensed products or the use thereof as an "additional insured" under coverage written to another entity). The Court expects all insurers or indemnifiers to comply with subpoenas issued by this Court and its Receiver in effectuating these thorough searches.

This Court notes that under the *Barton* doctrine, suit against the Receiver outside of this Court is expressly prohibited.

CONCLUSION

For the foregoing reasons, the appointment of a receiver for ACL to marshal all of the available insurance assets, including claims related thereto and any other property subject to this receivership of ACL and its subsidiaries, successors, and assigns, is appropriate. Moreover, the Court authorizes Mr. Protopapas to assume the control of the defense of all litigation matters pending in the United States against ACL. Peter Protopapas is hereby appointed the receiver over ACL consistent with this order.

IT IS SO ORDERED.

[JUDGE'S SIGNATURE PAGE FOLLOWS]



Richland Common Pleas

Case Caption: John A Tibbs , plaintiff, et al vs 3M Company , defendant, et al

Case Number: 2023CP4001759

Type: Order/Appointment of Receiver

So Ordered

Jean H. Toal

Exhibit B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
JOHN A. TIBBS and	)	C/A NO. 2023-CP-40-01759
MARGARET B. TIBBS	)	
	)	In Re:
Plaintiffs,	)	Asbestos Personal Injury Litigation
	)	Coordinated Docket
v.	)	
	)	
3M COMPANY, et al,	)	
	)	
Defendants.	)	

MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION
OF DEFENDANT ASBESTOS CORPORATION LIMITED

Defendant Asbestos Corporation Limited (“ACL”), on behalf of itself, by and through undersigned counsel, hereby moves to dismiss Plaintiffs’ Amended Complaint pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure on the ground that this Court lacks personal jurisdiction over it.

1. Plaintiffs’ Amended Complaint alleges that John A. Tibbs developed lung cancer as the result of exposure to, among other things, various asbestos-containing products or raw asbestos materials.¹

2. Plaintiffs' Amended Complaint lists ACL “as a Product Defendant” and alleges that ACL “mined... asbestos...present at numerous jobsites in South Carolina and North Carolina.”²

3. Plaintiffs further allege that their claims against Asbestos Corporation Limited arises out of Asbestos Corporation Limited’s “business activities” in the State of South Carolina.³

4. Plaintiffs have failed to make a *prima facie* showing that ACL is subject to either

¹ Pl.’s Am. Compl. at ¶¶ 1,3,11.

² Pl.’s Am. Compl. at ¶ 32.

³ Pl.’s Am. Compl. at ¶ 32.

general or specific personal jurisdiction in South Carolina. Whether a foreign defendant, such as ACL, is subject to this Court's personal jurisdiction is an individualized analysis that is dependent on the facts of each case. *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). At the pretrial stage Plaintiffs bear the burden of establishing personal jurisdiction either by factual allegations in the complaint or in affidavits. *Id.* Where a defendant moves to dismiss for lack of jurisdiction, the court may look to affidavits and other evidence to determine whether jurisdiction exists. *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 150, 723 S.E.2d 835, 839 (Ct. App. 2012). Here, Plaintiff's generic and conclusory jurisdiction allegations are just that: bare boilerplate statements, unsupported by fact, which are insufficient to establish this Court's jurisdiction over ACL. *Id.* at 150-51, 723 S.E.2d at 839 ("The repeating of the statute is insufficient to support a finding of personal jurisdiction ... [a] prima facie showing of personal jurisdiction can be made through *factual* allegations in the complaint or through affidavits").

5. First, the Court does not have general personal jurisdiction over ACL because it does not have continuous and systematic contacts with South Carolina such that it is essentially "at home" in this state. *See Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007); *see also* S.C. Code Ann § 36-2-802. ACL is not a South Carolina corporation and does not have its principal place of business in South Carolina; therefore, it is not subject to general jurisdiction in South Carolina.⁴ *See e.g., Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) ("With respect to a corporation, the place of incorporation and principal place of business are 'paradig[m] ... bases for general jurisdiction.'")

6. Second, Plaintiffs have not shown that this Court has specific personal jurisdiction over ACL. Specific personal jurisdiction is granted pursuant to South Carolina's long arm statute,

⁴ Plaintiffs correctly state that ACL "was and is a corporation organized and existing under the laws of the county of Canada, with its principal place of business in Canada." Pl.'s Am. Compl. at ¶ 32.

S.C. Code Ann § 36-2-803, which has been construed to extend to the outer limits of the due process clause. *Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508. Due process requires (1) that minimum contacts exist between ACL and South Carolina such that maintaining the suit does not offend “traditional notions of fair play and substantial justice” and (2) that the exercise of jurisdiction be reasonable and fair. *Id.* at 491-492, 611 S.E.2d at 508. When examining whether exercise of jurisdiction would be reasonable and fair, the Court must examine (1) the duration of ACL’s activities in South Carolina, (2) the character and circumstances of ACL’s acts, (3) the inconvenience resulting to ACL by either conferring or refusing jurisdiction, and (4) South Carolina’s interest in exercising jurisdiction. *Id.* at 492, 611 S.E.2d at 508.

7. Plaintiffs have not shown, and cannot show, ACL has sufficient minimum contacts with South Carolina. “A minimum contacts analysis requires a court to find 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. v. S. Commerce Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 131 (1992). *See also Bristol-Meyers Squibb Co. v. Superior Court of California, San Francisco County*, 582 U.S. 255, 263 (2017); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, at 296-297 (1980); *Hanson v. Denckla*, 357 U.S. 235, 251, 253 (1958). ACL has not purposefully directed any activities at South Carolina that the cause of action arises out of or related to; therefore, there are not sufficient minimum contacts with South Carolina to render this Court’s exercise of personal jurisdiction permissible under the Due Process Clause. *See Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478 (“Due process requires some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state.”)

8. Because the Court lacks both general personal jurisdiction and specific personal jurisdiction over ACL, Plaintiffs’ Amended Complaint must be dismissed with respect to ACL.

This Motion is based upon, and may be further supplemented with, applicable pleadings, discovery, affidavits, exhibits, deposition transcripts, controlling law, supporting memoranda of law, and such other and further material as the Court may deem appropriate. ACL's participating in discovery prior to a hearing on this Motion shall not be construed as a waiver by ACL of any rights, defenses, or objections, including lack of personal jurisdiction, all of which are expressly reserved.

/s/Jonathan H. Dunlap

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Asheville, North Carolina
May 17, 2023

Exhibit C

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

C/A NO. 2023-CP-40-01759

JOHN A. TIBBS and)
MARGARET B. TIBBS)
))
Plaintiffs,)
v.)
))
ATLAS TURNER, INC., *et al.*,)
))
Defendants.)
_____)

ORDER DENYING ASBESTOS CORPORATION'S MOTION TO DISMISS

Asbestos Corporation Ltd (ACL)'s Motion to Dismiss for lack of personal jurisdiction was heard on July 10, 2022. ACL contends that this Court lacks specific jurisdiction. ACL has refused to participate in any jurisdictional discovery. Despite ACL's refusal, Plaintiffs submitted evidence of ACL's sales of its asbestos product directly into South Carolina. Therefore, ACL's Motion to Dismiss is DENIED. ACL is ordered to answer discovery and to produce a 30(b)(6) witness by July 24, 2023. Failure to answer the Court ordered discovery and to provide a corporate representative for deposition shall result in ACL being held in contempt.

IT IS SO ORDERED.

[JUDGE'S SIGNATURE PAGE FOLLOWS]



Richland Common Pleas

Case Caption: John A Tibbs , plaintiff, et al vs 3M Company , defendant, et al

Case Number: 2023CP4001759

Type: Order/Other

So Ordered

Jean H. Toal

Exhibit D

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

JOHN A. TIBBS and	)	C/A NO. 2023-CP-40-01759
MARGARET B. TIBBS	)	
	)	
Plaintiffs,	)	
v.	)	
	)	
ASBESTOS COMPANY, LTD., <i>at al.</i> ,	)	
	)	
Defendants.	)	

**PLAINTIFFS' MOTION TO HOLD ASBESTOS COMPANY, LTD. IN
CONTEMPT AND TO STRIKE ACL'S PLEADINGS**

Asbestos Company, Ltd. ("ACL") is a defendant in the above referenced matter. On July 10, 2023, this Court, in open court ordered ACL to fully answer discovery and appear for a deposition so that this matter could be prepared for trial. On July 19, 2023, this Court entered an Order stating: "Failure to answer the Court Ordered discovery and to provide a corporate representative for deposition shall result in ACL being held in contempt."

ACL failed to produce a witness as ordered by the Court. ACL has also refused to identify a witness or a date on which it will produce a witness. Moreover, ACL has wholly failed to produce any documents as requested by the 30(b)(6) notice properly served on it.

ACL has made clear it does not intend to participate in this matter and that this Court's orders on discovery will continue to be ignored. Plaintiffs request that this Court hold ACL in contempt of Court. Further, should this Court hold ACL in contempt, Plaintiff requests that the Court strike ACL's pleadings.

LAW AND ANALYSIS

A determination of contempt resides in the sound discretion of the trial judge. *Hook v. South Carolina Dept. of Health and Environmental Control*, 439 S.C. 52 (Ct. App. March 15, 2023). “Courts have no more important function to perform in the administration of justice than to ensure their orders are obeyed.” *Id.* The power of a court to punish for contempt “is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice.” *Miller v. Miller*, 375 S.C. 443 (Ct. App. 2007).

“The rights of discovery provided by the Rules give the trial lawyer the means to be prepared for trial.” *Downey v. Dixon*, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987). “Where these rights are not accorded, prejudice must be presumed and, unless the party who has failed to submit to discovery can show a lack of prejudice,” sanctions must be imposed. *Id.* Without adequate sanctions, discovery procedures would be ineffectual. *Id.* As a result, over leniency must be avoided. *Id.* “If a party fails to obey an order or provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment.” *Griffin Grading & Clearing, Inc. v. Tire Serv. Equipment Mfg. Co., Inc.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999).

“In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice.” *Id.* at 199, 511 S.E.2d at 719. In *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997), the South Carolina Court of Appeals stated “[t]he entire thrust of the discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party.” *Id.* “Discovery

sanctions are imposed to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent.” *Creighton v. Coligny Plaza Ltd. P’ship*, 334 S.C. 96, 123, 512 S.E.2d 510, 524 (Ct. App. 1998).

ACL has failed to produce a witness. ACL has refused to produce any discovery documents responsive to the South Carolina standard discovery. ACL contends that it may send old corporate testimony that has little to no bearing on this case. Indeed, ACL, like its sister corporation Atlas Turner, has made clear it does not intend to comply with this Court’s orders. Given this intentional and willful refusal to participate in discovery, Plaintiffs request that the Court strike Atlas’ pleadings.

[Signature appears on the following page.]

Respectfully submitted,

/s/ Theile B. McVey

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ATTORNEYS FOR PLAINTIFFS

July 26, 2023

Columbia, South Carolina

Exhibit E

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
JOHN A. TIBBS and	)	C/A NO. 2023-CP-40-01759
MARGARET B. TIBBS	)	
	)	In Re:
Plaintiffs,	)	Asbestos Personal Injury Litigation
v.	)	Coordinated Docket
	)	
ATLAS TURNER, INC., <i>at al.</i> ,	)	PLAINTIFFS' MOTION FOR THE APPOINTMENT
	)	OF A RECEIVER
Defendants.	)	
	)	

On July 19, 2023, this Court entered an order denying Asbestos Company, Ltd.'s ("ACL") motion to dismiss for lack of personal jurisdiction. The Court further ordered ACL to fully answer discovery and to produce a corporate representative for deposition. The Court stated: "Failure to answer the Court ordered discovery and to provide a corporate representative for deposition shall result in ACL being held in contempt."¹ As a result, Plaintiffs have moved for an Order holding ACL in contempt and to strike ACL's pleadings as a result of their failure to participate in discovery in violation of the Court's Orders. Should the Court strike ACL's pleadings, Plaintiffs submit this motion to appoint a Receiver and would respectfully show the court as follows:

BACKGROUND

As this Court has already seen, ACL supplied asbestos to companies and contractors throughout the southeastern United States, including, without limitations, to companies and contractors in North and South Carolina. Plaintiffs served discovery on ACL in the form of interrogatories and deposition notices with document requests. Despite having specifically sold to

¹ See Order Denying Asbestos Corporation's Motion to Dismiss Entered July 19, 2023. Exhibit 1

companies in South Carolina, ACL demurred and alleged that this court had no personal jurisdiction over it because it is a Canadian company.

After briefing and a hearing, this Court overruled ACL's objections and ordered it to produce a fully prepared witness and documents. ACL refused. ACL has been clear that it does not intend to comply with this Court's order to fully answer discovery or to produce a witness or otherwise participate in this litigation.

LAW AND ARGUMENT

If this Court determines that the appropriate sanction for ACL's contempt is the striking of ACL's answer, Plaintiffs next move this court for an order appointing a receiver over ACL. This motion is made pursuant to S.C. Code §§ 15-65-10(4) and (5).

ACL is a company organized and existing under the laws of Canada, with its principal place of business in Canada. At all times relevant, ACL was involved in all elements of the global asbestos industry, but in particular, mining many thousands of tons of raw asbestos fiber in Canada and then selling it to the most dominant manufacturers of asbestos-containing products in the United States—substantial quantities of which were used in South Carolina. ACL also concocted a scheme to avoid its legal responsibilities to persons injured from using those end products. Rather than defending its conduct in front of juries in the United States, ACL decided to simply contest personal jurisdiction and, where it loses that battle, they simply refuse to participate in cases in which they are a named defendant. Although ACL stiff-arms its creditors in the United States—namely, workers exposed to asbestos and asbestos containing products manufactured and/or sold by ACL—and absconded to Canada, certain of its insurance assets appear to remain. There is no evidence which suggests that ACL currently operates in any way to do anything other than to defend and indemnify lawsuits, thus, making ACL nothing more than an insurance company.

Plaintiffs believe, that like ACL's sister company, Atlas, ACL is refusing to tender the defense to its' insurance carriers.² This pattern of conduct of both ACL and Atlas is clearly intended to leave victim's of their conduct without any recourse against them. The appointment of a receiver to control ACL's defense in US asbestos litigation, tender ACL's claims to its' carriers and marshal ACL's insurance assets and satisfy claims is therefore the appropriate remedy.

LAW AND ARGUMENT

South Carolina Code § 15-65-10(4) 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 ACL has intentionally fled the United States to avoid its liabilities and obligations to its creditors and to the extent it ever properly qualified itself to do business in South Carolina has forfeited those rights. *See, e.g.,* Black's Law Dictionary (11th ed. 2019), *forfeiture* ("loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty") Thus, appointment of a receiver over ACL and its affiliates is appropriate under subsection (4).

South Carolina Code §15-65-10(5), moreover, states that:

A receiver may be appointed by a judge of the circuit court, either in or out of court:
... (5) In such other cases as are provided by law or may be in accordance with the existing practice

Section 15-65-10(5) reflects an "old practice" of equity and "important principle of law" to correct injustice, particularly "when a debtor is trying to defeat his creditors by an act or course of conduct which indicates moral fraud—a conscious intent to defeat, delay, or hinder his creditors in the

² See Motion to Clarify Receivership Order to Assume Control over the Defense of Atlas Turner's United States Asbestos Litigation filed in Welch v. Atlas Turner: Civil Action No: 2022-CP-40-03824 filed on July 25, 2023, attached as Exhibit 2.

collection of their debts.” *Va.-Carolina Chem. Co. v. Hunter*, 66 S.E. 177, 179 (S.C. 1909). Thus, if a business “disposes of large resources” but “leaves . . . debts unpaid”—while “set[ting] creditors at arm’s length by refusing . . . to take any interest in the satisfaction of their claims”—then there is a prima facie case of fraud warranting appointment of a receiver. *Id.* at 180 (citing *Miller v. Hughes*, 12 S.E. 419 (S.C. 1890)). It is respectfully submitted that the appointment of a receiver over ACL is appropriate under subsection (5) because ACL engaged in an intentional scheme to defraud its creditors by refusing to appear or accept service in the United States after being faced with substantial asbestos-related liabilities.

Section 15-65-20 requires four days’ notice of this application be provided to the party to the action whose property is sought to be put in the hands of the receiver. Plaintiffs, concurrently herewith, have provided copies of this motion to ACL’s counsel.

CONCLUSION

As set forth above, ACL refuses to comply with this Court’s orders. The sanction for that action should be the striking of ACLs’ answer. After ACL’ answer is stricken, this court should enter an order appointing a receiver as soon as practically possible. Plaintiffs respectfully suggest that Peter Protopapas be appointed the receiver over ACL.

Respectfully submitted,

/s/ Theile B. McVey

Theile B. McVey (SC Bar No. 16682)

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ATTORNEYS FOR PLAINTIFFS

July 28, 2023
Columbia, South Carolikna

Exhibit F

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
JOHN A. TIBBS AND MARGARET B. TIBBS ,	)	CASE NO. 2023-CP-40-01759
	)	
	)	In Re:
PLAINTIFFS,	)	Asbestos Personal Injury Litigation
	)	Coordinated Docket
vs.	)	
	)	
3M COMPANY, ET AL.,	)	
	)	
DEFENDANTS.	)	
	)	

ANSWER TO FIRST AMENDED COMPLAINT
ON BEHALF OF ASBESTOS CORPORATION LIMITED

Subject to and without waiving its Motion to Dismiss for Lack of Personal Jurisdiction, Defendant Asbestos Corporation Limited (“ACL” or “Defendant”), by and through the undersigned counsel, and presents the following Answers and Defenses to Plaintiffs’ First Amended Complaint (“Complaint”).

GENERAL DENIAL

Each and every allegation of the Complaint is expressly denied unless specifically admitted, qualified, or explained herein.

RESPONSE TO GENERAL ALLEGATIONS

1. ACL is without sufficient information or knowledge to form a belief as to the truth of the allegations in paragraph 1 and, therefore, denies the allegations.

2. ACL denies the allegations in paragraph 2, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 2 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations. Defendant specifically denies that this Court has jurisdiction over it in this case.

3. ACL denies the allegations in paragraph 3, including all subparts, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 3 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations. Defendant specifically denies that this Court has jurisdiction over it in this case.

4. ACL denies the allegations in paragraph 4, including all subparts, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 4 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations. Defendant specifically denies that this Court has jurisdiction over it in this case.

5. ACL denies the allegations in paragraph 5, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 5 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations. Defendant specifically denies that this Court has jurisdiction over it in this case.

6. ACL denies the allegations in paragraph 6, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 6 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations. Defendant specifically denies that this Court has jurisdiction over it in this case.

7. ACL denies the allegations in paragraph 7, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 7 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations. Defendant specifically denies that this Court has jurisdiction over it in this case.

8. ACL denies the allegations in paragraph 8, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 8 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations. Defendant specifically denies that this Court has jurisdiction over it in this case.

9. ACL denies the allegations in paragraph 9, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 9 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations. Defendant specifically denies that this Court has jurisdiction over it in this case.

10. ACL denies the allegations in paragraph 10, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 10 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations. Defendant specifically denies that this Court has jurisdiction over it in this case.

11. ACL denies the allegations in paragraph 11, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 11 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations. Defendant specifically denies that this Court has jurisdiction over it in this case.

12. ACL is without sufficient information or knowledge to form a belief as to the truth of the allegations in paragraph 12 and, therefore, denies the allegations.

13. ACL denies the allegations in paragraph 13, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 13 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations. Defendant specifically denies that this Court has jurisdiction over it in this case.

14. ACL denies the allegations in paragraph 14, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 14 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations. Defendant specifically denies that this Court has jurisdiction over it in this case.

15. ACL denies the allegations in paragraph 15, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 15 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations. Defendant specifically denies that this Court has jurisdiction over it in this case.

16. ACL denies the allegations in paragraph 16, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 16 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

17. ACL denies the allegations in paragraph 17, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 17 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

18. ACL denies the allegations in paragraph 18, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 18 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

19. ACL denies the allegations in paragraph 19, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 19 state legal conclusions or are not directed at

ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

20. Paragraph 20 affirmatively disclaims any cause of action related to (a) any United States armed forces service, (b) any federal enclave, (c) the United States Constitution or any federal law or regulations, and (d) federal admiralty or maritime law. To the extent that Plaintiffs' allegations of exposure to asbestos against ACL derive from service in the United States armed forces or at any federal enclave, or to the extent that Plaintiff attempts to assert a claim against ACL that arises under federal law or regulation or under federal admiralty or maritime law, those allegations are now expressly waived and the Complaint must be dismissed as to ACL. ACL denies any remaining allegations in paragraph 20.

RESPONSE TO THE PARTIES

21. ACL denies the allegations in paragraph 21, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 21 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

22. The allegations in paragraph 22 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

23. The allegations in paragraph 23 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

24. The allegations in paragraph 24 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

25. The allegations in paragraph 25 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

26. The allegations in paragraph 26 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

27. The allegations in paragraph 27 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

28. The allegations in paragraph 28 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

29. The allegations in paragraph 29 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

30. The allegations in paragraph 30 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

31. The allegations in paragraph 31 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

32. Defendant ACL admits it is a Canadian corporation organized and existing under the laws of Canada, that its principal place of business is in Quebec, and that it is headquartered in the Province of Quebec. ACL denies the remaining allegations contained in paragraph 32. Defendant specifically denies that the Court has jurisdiction over it in this case.

33. The allegations in paragraph 33 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

34. The allegations in paragraph 34 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

35. The allegations in paragraph 35 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

36. The allegations in paragraph 36 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

37. The allegations in paragraph 37 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

38. The allegations in paragraph 38 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

39. The allegations in paragraph 39 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

40. The allegations in paragraph 40 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

41. The allegations in paragraph 41 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

42. The allegations in paragraph 42 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

43. The allegations in paragraph 43 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

44. The allegations in paragraph 44 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

45. The allegations in paragraph 45 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

46. The allegations in paragraph 46 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

47. The allegations in paragraph 47 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

48. The allegations in paragraph 48 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

49. The allegations in paragraph 49 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

50. The allegations in paragraph 50 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

51. The allegations in paragraph 51 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

52. The allegations in paragraph 52 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

53. The allegations in paragraph 53 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

54. The allegations in paragraph 54 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

55. The allegations in paragraph 55 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

56. The allegations in paragraph 56 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

57. The allegations in paragraph 57 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

58. The allegations in paragraph 58 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

59. The allegations in paragraph 59 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

60. The allegations in paragraph 60 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

61. The allegations in paragraph 61 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

62. The allegations in paragraph 62 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

63. The allegations in paragraph 63 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

64. The allegations in paragraph 64 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

65. The allegations in paragraph 65 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

66. The allegations in paragraph 66 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

67. The allegations in paragraph 67 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

68. The allegations in paragraph 68 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

69. The allegations in paragraph 69 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

70. The allegations in paragraph 70 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

71. The allegations in paragraph 71 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

72. The allegations in paragraph 72 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

73. The allegations in paragraph 73 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

74. The allegations in paragraph 74 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

75. The allegations in paragraph 75 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

76. The allegations in paragraph 76 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

77. The allegations in paragraph 77 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

78. The allegations in paragraph 78 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

79. The allegations in paragraph 79 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

80. The allegations in paragraph 80 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

81. The allegations in paragraph 81 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

82. The allegations in paragraph 82 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

83. The allegations in paragraph 83 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

84. The allegations in paragraph 84 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

85. The allegations in paragraph 85 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

86. The allegations in paragraph 86 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

87. The allegations in paragraph 87 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

88. The allegations in paragraph 88 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

89. The allegations in paragraph 89 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

90. The allegations in paragraph 90 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

91. The allegations in paragraph 91 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

92. The allegations in paragraph 92 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

93. The allegations in paragraph 93 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

94. The allegations in paragraph 94 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

95. The allegations in paragraph 95 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

96. The allegations in paragraph 96 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

97. The allegations in paragraph 97 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

98. The allegations in paragraph 98 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

99. The allegations in paragraph 99 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

100. The allegations in paragraph 100 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

101. The allegations in paragraph 101 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

102. The allegations in paragraph 102 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

103. The allegations in paragraph 103 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

104. The allegations in paragraph 104 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

105. The allegations in paragraph 105 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

106. The allegations in paragraph 106 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

107. The allegations in paragraph 107 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

108. The allegations in paragraph 108 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

109. The allegations in paragraph 109 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

110. The allegations in paragraph 110 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

111. The allegations in paragraph 111 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

112. The allegations in paragraph 112 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

113. The allegations in paragraph 113 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

114. The allegations in paragraph 114 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

115. The allegations in paragraph 115 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

116. The allegations in paragraph 116 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

117. The allegations in paragraph 117 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

118. The allegations in paragraph 118 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

119. The allegations in paragraph 119 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

120. The allegations in paragraph 120 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

121. The allegations in paragraph 121 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

122. The allegations in paragraph 122 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

123. The allegations in paragraph 123 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

124. The allegations in paragraph 124 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

125. The allegations in paragraph 125 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

126. The allegations in paragraph 126 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

127. The allegations in paragraph 127 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

128. ACL denies the allegations in paragraph 128, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 128 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations. Defendant specifically denies that this Court has jurisdiction over it in this case.

RESPONSE TO BACKGROUND FACTS

129. ACL denies the allegations in paragraph 129, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 129 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

130. ACL is without sufficient information or knowledge to form a belief as to the truth of the allegations in paragraph 130 and, therefore, denies the allegations.

131. ACL denies the allegations in paragraph 131, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 131 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

132. ACL denies the allegations in paragraph 132, insofar as the allegations pertain to ACL. As to those allegations contained in paragraph 132 that contain allegations about Plaintiff John A. Tibbs's work history, ACL is without sufficient information or knowledge to form a belief as to the truth of the allegations, and it therefore denies the allegations. Any remaining allegations in paragraph 132 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations. Defendant specifically denies that this Court has jurisdiction over it in this case.

133. ACL denies the allegations in paragraph 133, insofar as the allegations pertain to ACL. As to those allegations contained in paragraph 133 that contain allegations about Plaintiff John A. Tibbs's work history, ACL is without sufficient information or knowledge to form a belief as to the truth of the allegations, and it therefore denies the allegations. Any remaining allegations in paragraph 133 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations. Defendant specifically denies that this Court has jurisdiction over it in this case.

134. ACL denies the allegations in paragraph 134, insofar as the allegations pertain to ACL. As to those allegations contained in paragraph 134 that contain allegations about Plaintiff John A. Tibbs's work history, ACL is without sufficient information or knowledge to form a belief as to the truth of the allegations, and it therefore denies the allegations. Any remaining allegations in paragraph 134 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations. Defendant specifically denies that this Court has jurisdiction over it in this case.

135. ACL denies the allegations in paragraph 135, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 135 state legal conclusions or are not directed at

ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations. Defendant specifically denies that this Court has jurisdiction over it in this case.

136. ACL denies the allegations in paragraph 136, insofar as the allegations pertain to ACL. As to those allegations contained in paragraph 136 that contain allegations about Plaintiff John A. Tibbs's father's work history, ACL is without sufficient information or knowledge to form a belief as to the truth of the allegations, and it therefore denies the allegations. Any remaining allegations in paragraph 136 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations. Defendant specifically denies that this Court has jurisdiction over it in this case.

137. ACL denies the allegations in paragraph 137, insofar as the allegations pertain to ACL. As to those allegations contained in paragraph 137 that contain allegations about Plaintiff John A. Tibbs's father's work history, ACL is without sufficient information or knowledge to form a belief as to the truth of the allegations, and it therefore denies the allegations. Any remaining allegations in paragraph 137 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations. Defendant specifically denies that this Court has jurisdiction over it in this case.

138. ACL denies the allegations in paragraph 138, insofar as the allegations pertain to ACL. As to those allegations contained in paragraph 138 that contain allegations about Plaintiff John A. Tibbs's father's work history, ACL is without sufficient information or knowledge to form a belief as to the truth of the allegations, and it therefore denies the allegations. Any remaining allegations in paragraph 138 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations. Defendant specifically denies that this Court has jurisdiction over it in this case.

139. ACL denies the allegations in paragraph 139, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 139 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations. Defendant specifically denies that this Court has jurisdiction over it in this case.

140. ACL denies the allegations in paragraph 140, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 140 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

141. ACL denies the allegations in paragraph 141, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 141 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

142. ACL denies the allegations in paragraph 142, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 142 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

143. ACL denies the allegations in paragraph 143, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 143 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

144. ACL denies the allegations in paragraph 144, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 144 state legal conclusions or are not directed at

ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

RESPONSE TO THE FIRST CAUSE OF ACTION
(Product Liability: Negligence)

145. Responding to paragraph 145, ACL incorporates by reference, as if fully set forth herein, its responses to the preceding allegations of the Complaint.

146. ACL denies the allegations in paragraph 146, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 146 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

147. ACL denies the allegations in paragraph 147, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 147 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

148. ACL denies the allegations in paragraph 148, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 148 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

149. ACL denies the allegations in paragraph 149, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 149 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

150. ACL denies the allegations in paragraph 150, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 150 state legal conclusions or are not directed at

ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

151. ACL denies the allegations in paragraph 151, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 151 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

152. ACL denies the allegations in paragraph 152, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 152 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

153. ACL denies the allegations in paragraph 153, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 153 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

154. ACL denies the allegations in paragraph 154, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 154 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

155. ACL denies the allegations in paragraph 155, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 155 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

156. ACL denies the allegations in paragraph 156, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 156 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

157. ACL denies the allegations in paragraph 157, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 157 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

158. ACL denies the allegations in paragraph 158, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 158 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

159. ACL denies the allegations in paragraph 159, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 159 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

160. ACL denies the allegations in paragraph 160, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 160 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

RESPONSE TO THE SECOND CAUSE OF ACTION

(Product Liability: Strict Liability – S.C. Code Ann. § 15-73-10, et seq.)

161. Responding to paragraph 161, ACL incorporates by reference, as if fully set forth herein, its responses to the preceding allegations of the Complaint.

162. ACL denies the allegations in paragraph 162, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 162 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

163. ACL denies the allegations in paragraph 163, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 163 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

164. ACL denies the allegations in paragraph 164, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 164 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

165. ACL denies the allegations in paragraph 165, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 165 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

166. ACL denies the allegations in paragraph 166, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 166 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

167. ACL denies the allegations in paragraph 167, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 167 state legal conclusions or are not directed at

ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

168. ACL denies the allegations in paragraph 168, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 168 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

169. ACL denies the allegations in paragraph 169, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 169 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

170. ACL denies the allegations in paragraph 170, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 170 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

171. ACL denies the allegations in paragraph 171, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 171 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

172. ACL denies the allegations in paragraph 172, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 172 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

173. ACL denies the allegations in paragraph 173, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 173 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

174. ACL denies the allegations in paragraph 174, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 174 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

175. ACL denies the allegations in paragraph 175, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 175 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

176. ACL denies the allegations in paragraph 176, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 176 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

177. ACL denies the allegations in paragraph 177, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 177 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

RESPONSE TO THE THIRD CAUSE OF ACTION
(Vicarious Liability of Defendants Based upon Respondeat Superior)

178. Responding to paragraph 178, ACL incorporates by reference, as if fully set forth herein, its responses to the preceding allegations of the Complaint.

179. ACL denies the allegations in paragraph 179, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 179 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

180. ACL denies the allegations in paragraph 180, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 180 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

181. ACL denies the allegations in paragraph 181, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 181 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

182. ACL denies the allegations in paragraph 182, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 182 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

183. ACL denies the allegations in paragraph 183, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 183 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

184. ACL denies the allegations in paragraph 184, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 184 state legal conclusions or are not directed at

ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

185. ACL denies the allegations in paragraph 185, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 185 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

186. ACL denies the allegations in paragraph 186, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 186 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

187. ACL denies the allegations in paragraph 187, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 187 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

188. ACL denies the allegations in paragraph 188, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 188 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

189. ACL denies the allegations in paragraph 189, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 189 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

190. ACL denies the allegations in paragraph 190, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 190 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

191. ACL denies the allegations in paragraph 191, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 191 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

192. ACL denies the allegations in paragraph 192, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 192 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

193. ACL denies the allegations in paragraph 193, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 193 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

194. ACL denies the allegations in paragraph 194, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 194 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

RESPONSE TO THE FOURTH CAUSE OF ACTION
(Premises Liability: Negligence as to Premises Owner/Contractor)

195. Responding to paragraph 195, ACL incorporates by reference, as if fully set forth herein, its responses to the preceding allegations of the Complaint.

196. ACL denies the allegations in paragraph 196, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 196 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

197. ACL denies the allegations in paragraph 197, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 197 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

198. ACL denies the allegations in paragraph 198, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 198 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

199. ACL denies the allegations in paragraph 199, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 199 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

200. ACL denies the allegations in paragraph 200, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 200 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

201. ACL denies the allegations in paragraph 201, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 201 state legal conclusions or are not directed at

ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

202. ACL denies the allegations in paragraph 202, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 202 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

203. ACL denies the allegations in paragraph 203, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 203 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

204. ACL denies the allegations in paragraph 204, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 204 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

205. ACL denies the allegations in paragraph 205, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 205 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

206. ACL denies the allegations in paragraph 206, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 206 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

213. ACL denies the allegations in paragraph 213, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 213 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

RESPONSE TO THE SIXTH CAUSE OF ACTION
(Negligence as to Design Defendants)

214. Responding to paragraph 214, ACL incorporates by reference, as if fully set forth herein, its responses to the preceding allegations of the Complaint.

215. The allegations in paragraph 215, including all subparts, are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

216. The allegations in paragraph 216 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

RESPONSE TO THE SEVENTH CAUSE OF ACTION
(Negligent Design Services Against Design Defendants)

217. Responding to Paragraph 217, ACL incorporates by reference, as if fully set forth herein, its responses to the preceding allegations of the Complaint.

218. The allegations in paragraph 218 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

219. The allegations in paragraph 219, including all subparts, are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

220. The allegations in paragraph 220 are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

RESPONSE TO THE EIGHTH CAUSE OF ACTION

(Product Liability: Breach of Implied Warranties – S.C. Code Ann. § 36-2-314)

221. Responding to paragraph 221, ACL incorporates by reference, as if fully set forth herein, its responses to the preceding allegations of the Complaint.

222. ACL denies the allegations in paragraph 222, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 222 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

223. ACL denies the allegations in paragraph 223, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 223 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

224. ACL denies the allegations in paragraph 224, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 224 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

RESPONSE TO THE NINTH CAUSE OF ACTION

(Fraudulent Misrepresentation)

225. Responding to paragraph 225, ACL incorporates by reference, as if fully set forth herein, its responses to the preceding allegations of the Complaint.

226. ACL denies the allegations in paragraph 226, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 226 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

227. ACL denies the allegations in paragraph 227, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 227 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

228. ACL denies the allegations in paragraph 228, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 228 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

RESPONSE TO THE TENTH CAUSE OF ACTION
(Conspiracy, Concert of Action – Defendant Metropolitan Life Insurance Company)

229. Responding to paragraph 229, ACL incorporates by reference, as if fully set forth herein, its responses to the preceding allegations of the Complaint.

230. ACL denies the allegations in paragraph 230, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 230 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

231. ACL denies the allegations in paragraph 231, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 231 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

232. ACL denies the allegations in paragraph 232, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 232 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

233. ACL denies the allegations in paragraph 233, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 233 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

234. ACL denies the allegations in paragraph 234, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 234 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

235. ACL denies the allegations in paragraph 235, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 235 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

236. ACL denies the allegations in paragraph 236, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 236 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

237. ACL denies the allegations in paragraph 237, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 237 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

238. ACL denies the allegations in paragraph 238, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 238 state legal conclusions or are not directed at

ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

239. ACL denies the allegations in paragraph 239, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 239 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

240. ACL denies the allegations in paragraph 240, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 240 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

241. ACL denies the allegations in paragraph 241, including all subparts, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 241 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

242. ACL denies the allegations in paragraph 242, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 242 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

243. ACL denies the allegations in paragraph 243, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 243 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

RESPONSE TO THE ELEVENTH CAUSE OF ACTION
(Loss of Consortium)

244. Responding to paragraph 244, ACL incorporates by reference, as if fully set forth herein, its responses to the preceding allegations of the Complaint.

245. ACL is without sufficient information or knowledge to form a belief as to the truth of the allegations in paragraph 245 and, therefore, denies the allegations.

246. ACL denies the allegations in paragraph 246, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 246 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

247. ACL denies the allegations in paragraph 247, insofar as the allegations pertain to ACL. Any remaining allegations in paragraph 247 state legal conclusions or are not directed at ACL, and therefore no response is required. To the extent a response is required, ACL denies the allegations.

**RESPONDING TO PLAINTIFFS’
AD DAMNUM AND/OR PRAYER FOR RELIEF**

248. ACL denies the allegations contained in the paragraph beginning with “Wherefore” and following underneath the “PRAYER FOR RELIEF” immediately following paragraph 247 of the Complaint, as well as those nine (9) subparagraphs following that “Wherefore” paragraph of the Complaint, insofar as the allegations therein are directed against it.

- a. As to the remainder of the allegations, they do not apply to this Defendant, and therefore, this Defendant does not respond to same. To the extent that these paragraphs of the Complaint state legal conclusions, no response is required to

those legal conclusions, but to the extent that one is required at this time, this Defendant denies the same.

FOR A FIRST DEFENSE

249. This Court lacks both general and specific personal jurisdiction over ACL. Plaintiffs cannot meet the requirements of the South Carolina Long Arm Statute or the traditional due process requirements to assert personal jurisdiction over ACL in South Carolina.

FOR A SECOND DEFENSE

250. Plaintiffs' Complaint fails to state facts sufficient to constitute a cause of action against ACL and therefore must be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

251. Plaintiffs' claims, in whole or in part, are barred by any applicable statutes of limitations and/or repose.

FOR A FOURTH DEFENSE

252. Plaintiffs' fraudulent misrepresentation claim must be dismissed because they failed to plead circumstances allegedly constituting fraud or mistake with particularity, as required by Rule 9(b) of the South Carolina Rules of Civil Procedure.

FOR A FIFTH DEFENSE

253. Plaintiffs' claims are barred by the doctrines of waiver, estoppel, laches, and unclean hands.

FOR A SIXTH DEFENSE

254. Plaintiffs voluntarily and knowingly assumed the risk of incurring any of the injuries or damages alleged and, therefore, are not entitled to recover from ACL.

FOR A SEVENTH DEFENSE

255. Plaintiffs' claims are barred, in whole or in part, by the comparative negligence of the Plaintiffs or Plaintiff John A. Tibbs's father; in the alternative, any award to Plaintiffs should be reduced by the percentage that the Plaintiffs' or Plaintiff John A. Tibbs's father's conduct caused Plaintiffs' damages.

FOR AN EIGHTH DEFENSE

256. Any injury or damage suffered by Plaintiffs was due to or caused by unforeseen intervening or superseding events for which ACL is not responsible and, therefore, Plaintiffs' claims should be barred or reduced accordingly.

FOR A NINTH DEFENSE

257. Any damages suffered by Plaintiffs were caused by the acts or omissions of third parties and are not attributable to ACL.

FOR A TENTH DEFENSE

258. Plaintiffs' claims are barred, in whole or in part, because Plaintiffs failed to mitigate their damages.

FOR AN ELEVENTH DEFENSE

259. ACL did not owe any recognized legal duties to the Plaintiffs or Plaintiff John A. Tibbs's father, and Plaintiffs' claims fail to state facts sufficient to make a legally cognizable cause of action against it. Therefore, Plaintiffs cannot recover against ACL.

FOR A TWELFTH DEFENSE

260. ACL's actions were at all times reasonable, appropriate, and in conformance with reasonable, ordinary, and due care.

FOR A THIRTEENTH DEFENSE

261. Should the jury find that ACL was in any way a contributing proximate cause to the accident in question, which is denied, then ACL's liability was less than fifty percent of the total fault and it should be liable only for that percentage of the indivisible damages determined by the jury or trier of fact pursuant to S.C. Code Ann. § 15-38-15.

FOR A FOURTEENTH DEFENSE

262. ACL is entitled to have the jury apportion fault to all potential tortfeasors, regardless of whether the other potential tortfeasors were named as defendants or are parties to the case. Denial of a full and fair apportionment of fault would deprive ACL of its constitutional rights to due process, equal protection, and a jury trial.

FOR A FIFTEENTH DEFENSE

263. Plaintiffs or Plaintiff John A. Tibbs's father were not exposed to any asbestos materials through any act or omission of ACL or, if any exposure occurred, which is denied, the exposure was of such insufficient quantities, at such infrequent intervals, for such short periods of time, or under such conditions as to amount to no proximate cause of Plaintiffs' damages, if any, as a matter of law. Therefore, ACL denies that any of its products or any alleged action or inaction on its part damaged or injured Plaintiffs or Plaintiff John A. Tibbs's father in any manner or at any time.

FOR A SIXTEENTH DEFENSE

264. Plaintiffs and others misused or improperly used the products allegedly manufactured and/or sold by ACL, if any exist, and such misuse or improper use proximately caused or contributed to, in whole or in part, the alleged conditions described in the Complaint and the alleged damages Plaintiffs claim were sustained, and, therefore, ACL is not liable for any injuries or damages claimed by Plaintiffs.

FOR A SEVENTEENTH DEFENSE

265. ACL is not liable to Plaintiffs with respect to the injuries alleged in the Complaint because such injuries, if any, were caused by pure accident in terms of law.

FOR AN EIGHTEENTH DEFENSE

266. There is a lack of joinder of one or more parties who should or must be joined and, without the joinder of these proper parties, complete relief cannot be accorded among those already attempted to be made parties to this civil action.

FOR A NINETEENTH DEFENSE

267. To the extent that Plaintiffs have received payment from any alleged joint tortfeasor in full satisfaction of any of the alleged injuries and/or claims against ACL and/or other alleged joint tortfeasors, Plaintiffs' claims are barred by the defenses of payment and accord and satisfaction.

FOR A TWENTIETH DEFENSE

268. Should Plaintiffs recover, ACL is entitled to and hereby requests an offset in any amounts Plaintiffs have obtained through settlements with others.

FOR A TWENTY-FIRST DEFENSE

269. Plaintiffs' Complaint fails to set forth a claim for punitive damages upon which relief may be granted.

FOR A TWENTY-SECOND DEFENSE

270. Pursuant to S.C. Code Ann. § 15-32-520, ACL hereby requests trial bifurcation on the issues of actual damages and punitive damages. To the extent the Court submits the question of punitive damages to the jury, the award of punitive damages, if any, is subject to the caps and limitations set forth in S.C. Code Ann. § 15-32-530, and ACL pleads and incorporates all

defenses, limitations on damages, and other privileges contained in S.C. Code Ann. §§ 15-32-520 and 15-32-530 as if fully stated herein verbatim.

FOR A TWENTY-THIRD DEFENSE

271. To the extent Plaintiffs' Complaint asserts a demand for punitive damages, ACL specifically incorporates by reference any and all standards of limitations regarding the determination and/or enforceability of punitive damage awards that arose in the decisions of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

FOR A TWENTY-FOURTH DEFENSE

272. Plaintiffs are not entitled to an award of punitive damages because, among other reasons, such damages violate the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that:

- (a) The South Carolina judiciary's ability to correct a punitive damages award at the appellate level is inconsistent with due process guarantees;
- (b) Any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;
- (c) To the extent an award of punitive damages is excessive, such award violates due process guarantees;
- (d) The jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantee;
- (e) Even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness; and
- (f) The claim for punitive damages violates the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and Article I, Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth and status of ACL

FOR A TWENTY-FIFTH DEFENSE

273. ACL at all times used reasonable care, skill, and diligence and complied with generally established and accepted standards in the industry.

FOR A TWENTY-SIXTH DEFENSE

274. ACL had no duty to warn Plaintiffs or Plaintiff John A. Tibbs's father of the risks and dangers, if any, associated with asbestos or asbestos-related products. ACL further had no post-sale duty to warn under South Carolina law.

FOR A TWENTY-SEVENTH DEFENSE

275. There has been no concert of action between ACL and any of the other named defendants. The defendants are not joint tortfeasors and, therefore, ACL may not be held jointly and severally liable with the other named defendants.

FOR A TWENTY-EIGHTH DEFENSE

276. If Plaintiffs sustained the injuries and/or damages alleged, which is denied, then such injuries and/or damages were proximately caused by the acts and/or omissions of Plaintiffs' employers with respect to the maintenance of a healthy and safe work site and environment, which were under the employers' exclusive control and possession.

FOR A TWENTY-NINTH DEFENSE

277. Venue is improper in this action. ACL reserves its rights to move for dismissal and/or transfer of the action based on improper and/or inconvenient venue and further reserves its rights to seek application of the law of the appropriate venue on all issues, including but not limited to statute of limitations, statute of repose, and punitive damages.

FOR A THIRTIETH DEFENSE

278. Plaintiffs' Complaint should be dismissed for its failure to comply with the requirements of section 44-135-10 et seq. of the South Carolina Code, also known as the "Asbestos and Silica Claims Procedure Act of 2006," because Plaintiffs have failed to make the prima facie showing required by the Act. In the alternative, the case should not be placed on any active trial

docket and should not be the subject of any discovery until Plaintiffs comply with the provisions of the Act.

FOR A THIRTY-FIRST DEFENSE

279. ACL is not liable to Plaintiffs because Plaintiffs' injuries were not caused by any products manufactured, sold, or otherwise placed into the stream of commerce by ACL.

FOR A THIRTY-SECOND DEFENSE

280. To the extent that any of the foregoing affirmative defenses would preclude recovery on the claims asserted on behalf of Plaintiff John A. Tibbs, Plaintiff Margaret B. Tibbs's loss of consortium claims also fail because they are solely derivative of the claims asserted on behalf of Plaintiff John A. Tibbs.

FOR A THIRTY-THIRD DEFENSE

281. Plaintiffs cannot satisfy the frequency, regularity, and proximity test as to ACL under *Henderson v. Allied-Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007).

FOR A THIRTY-FOURTH DEFENSE

282. ACL is not liable to Plaintiffs because Plaintiffs' or Plaintiff John A. Tibbs's father's employer(s), union, or entities other than ACL were learned intermediaries and/or sophisticated users of the products in question who were warned of, were otherwise aware of, or should have been aware of the alleged potential risks and dangers inherent in the product(s), were in a position to understand and inform Plaintiffs or Plaintiff John A. Tibbs's father of the alleged risks, and had an independent duty to protect Plaintiffs or Plaintiff John A. Tibbs's father from, and/or warn Plaintiffs or Plaintiff John A. Tibbs's father of, any alleged potential risks or dangers, thereby relieving ACL of any alleged duty.

FOR A THIRTY-FIFTH DEFENSE

283. To the extent the injury complained of occurred outside South Carolina, under the doctrine of *lex loci delicti* or its analogues, the law of the state or non-state jurisdiction in which the injury occurred applies.

FOR A THIRTY-SIXTH DEFENSE

284. Plaintiffs' claims are barred by the applicable statutory or special employee/employer and/or workers' compensation laws.

FOR A THIRTY-SEVENTH DEFENSE

285. ACL had no duty to warn Plaintiffs or Plaintiff John A. Tibbs's father because the hazards of asbestos were open and obvious and Plaintiffs and Plaintiff John A. Tibbs's father and/or their employers knew or should have known of the hazard.

FOR A THIRTY-EIGHTH DEFENSE

286. ACL's alleged premises, if any are at issue, were or may have been under contract with or controlled by the United States Government or its agencies pursuant to contract. The knowledge of the United States Government or its agencies pertaining to the possible hazards to Plaintiffs was equal to or superior to that of ACL and, by reason thereof, ACL is not liable to Plaintiffs under any theory of law asserted in this civil action.

FOR A THIRTY-NINTH DEFENSE

287. If any alleged asbestos-containing products manufactured or supplied by ACL or used on premises owned or operated by ACL were involved or in any manner alleged in any of Plaintiffs' claims, ACL asserts that the products were abused, misused, or otherwise substantially altered or changed in their condition by others. ACL cannot be held liable for any injury or disease caused by any such abuse, misuse, or alteration.

FOR A FORTIETH DEFENSE

288. The allegations against ACL, regarding asbestos products allegedly having a legal connection with it, must be evaluated according to the state of the medical and industrial art and the state of the law existing at the pertinent time. ACL invokes all state-of-the-art defenses applicable to Plaintiffs' claims. Further, the state of the art, *i.e.*, the science of medicine, industrial hygiene and industrial application of asbestos-containing products, was at all material times such that ACL neither breached any duty allegedly owed to Plaintiffs or Plaintiff John A. Tibbs's father, nor did ACL know, nor could it have known, that the use of any asbestos-containing products and/or machinery requiring or calling for the use of asbestos and/or asbestos-containing products presented a foreseeable risk of harm to Plaintiffs or others.

FOR A FORTY-FIRST DEFENSE

289. Plaintiffs cannot recover against ACL under any failure to warn or inadequacy of warnings theory because, at all times pertinent to Plaintiffs' claims, Plaintiff or Plaintiff John A. Tibbs's father possessed or should have possessed sufficient knowledge which negated any need for any warning and/or were required to follow specific written safety procedures as established by the employer which negated the need or requirement for any such warning.

FOR A FORTY-SECOND DEFENSE

290. ACL pleads that punitive damages may not be awarded against it because to do that would violate the complicity rule which bars the imposition of vicarious liability for punitive damages with the exception of certain circumstances not applicable here. See Restatement (Second) of Torts § 909. Any acts, statements, representations or omissions by persons or entities other than ACL that caused damage to Plaintiffs, which ACL does not concede, were not authorized by ACL and were not performed or given with actual, implied, or apparent authority of ACL.

FOR A FORTY-THIRD DEFENSE

291. All of Plaintiffs' claims and issues contained therein are barred by the doctrines of collateral estoppel and *res judicata*.

FOR A FORTY-FOURTH DEFENSE

292. At all pertinent times, any asbestos-containing products supplied or used by ACL complied with all industry standards and all reasonable standards, as well as federal and state standards and regulations governing any asbestos-containing products, and as such the products were not unsafe, unfit, or unreasonably dangerous for normal use or operation.

FOR A FORTY-FIFTH DEFENSE

293. ACL is not liable for the acts or omissions of independent contractors.

FOR A FORTY-SIXTH DEFENSE

294. Plaintiffs' design defect claims are barred because no reasonable alternative design existed at the time Plaintiffs or Plaintiff John A. Tibbs's father allegedly encountered any product for which ACL may be responsible.

FOR A FORTY-SEVENTH DEFENSE

295. ACL is not legally responsible for products that it did not manufacture, sell, supply, or otherwise place in the stream of commerce; and ACL is not legally responsible for products manufactured, sold, or supplied by third parties, such as replacement parts or "after affixed" parts.

FOR A FORTY-EIGHTH DEFENSE

296. Plaintiffs lack capacity to sue ACL in South Carolina under the door closing statute, S.C. Code Ann. § 15-5-150.

FOR A FORTY-NINTH DEFENSE

297. Plaintiffs' strict liability claims are barred because any products at issue were placed into the stream of commerce prior to the enactment of S.C. Code Ann. § 15-73-10, which does not apply retroactively.

FOR A FIFTIETH DEFENSE

298. If Plaintiffs were injured by any products supplied or manufactured by ACL or any of its predecessors, or any products located on the alleged premises of ACL or any of its predecessors, which is denied, Plaintiffs or Plaintiff John A. Tibbs's father discovered any defect in the products and was aware of the dangers thereof but nevertheless proceeded unreasonably to make use of the same and is therefore barred from recovery by S.C. Code Ann. § 15-73-20.

FOR A FIFTY-FIRST DEFENSE

299. Plaintiffs cannot satisfy their burden to prove Plaintiff John A. Tibbs was exposed to asbestos from products attributable to ACL and cannot prove any such products contained asbestos.

FOR A FIFTY-SECOND DEFENSE

300. To the extent Plaintiffs prove that any products ACL sold or installed contained asbestos, which is denied, Plaintiffs cannot prove that the asbestos therein was in a friable form or otherwise inhalable by Plaintiff John A. Tibbs's.

FOR A FIFTY-THIRD DEFENSE

301. ACL adopts and asserts any and all applicable defenses asserted by any other defendant in this action.

JURY TRIAL DEMAND

This Defendant requests trial by jury by all issues so triable.

WHEREFORE, having fully responded to the allegations of Plaintiffs' Complaint and having asserted the above-noted other defenses, Defendant ACL requests of the Court as follows:

1. That Plaintiffs have and recover nothing from ACL by means of this action;
2. That ACL recover its costs for this action, including attorneys' fees and expenses;
and
3. For such other and further relief as the Court may deem just and proper.

*[signature page for Answer to First Amended Complaint on behalf of
Asbestos Corporation Limited, Case No. 2023-CP-40-01759]*

CLEMENT RIVERS, LLP

By: s/Stephen L. Brown

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Attorneys for Asbestos Corporation Limited

Charleston, South Carolina

Dated: August 2, 2023

Exhibit G

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
JOHN A. TIBBS AND MARGARET B. TIBBS ,	)	CASE NO. 2023-CP-40-01759
	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	MEMORANDUM IN OPPOSITION TO
	)	MOTION FOR CONTEMPT, TO STRIKE
	)	ANSWER AND APPOINT A RECEIVER
3M COMPANY, ET AL.,	)	
	)	
	)	
DEFENDANTS.	)	
	)	

The Defendant Asbestos Corporation Limited (“ACL”), subject to and without waiving its arguments and defenses including those related to a lack of personal jurisdiction, files this memorandum of law in opposition to Plaintiffs’ motions to hold it in contempt; to strike its pleadings and to appoint Peter Protopapas as a receiver pursuant to S.C. Code Ann. §§ 15-65-10(4) and (5).

ACL respectfully asserts its actions show no willful disobedience of the Court, but rather establish an attempt to comply with the Court’s ruling under the challenging circumstances presented. As such, it does not meet the standard for contempt, much less the willful and deliberate disobedience, which must be established to strike a party’s answer or responsive pleadings. Finally, contrary to Plaintiff’s assertion, if this Court determines that the appropriate sanction for ACL’s contempt is the striking of ACL’s answer, is not also appropriate for this Court to appoint a receiver. This is especially true when the proposed receiver is one suggested by Plaintiff’s counsel who serves in such role repeatedly and the entity over which he attempts to assert authority is an existing Canadian corporation with no assets in South Carolina and does not meet the requirements of S.C. Code Ann. §§ 15-65-10(4) or (5). A receiver must be

absolutely fair and impartial, for the receiver represents all parties interested but also is an officer of the court. *Penn. Mut. Life Ins. Co. v. Cudd*, 172 S.C. 88, 172 S.E. 787 (1934). Plaintiffs' motions should be denied.

STATEMENT OF THE FACTS

ACL is an existing Canadian corporation, which is located in the Province of Quebec. Based on the facts, evidence, law and arguments set forth in ACL's motion to dismiss and supporting memorandum of law, with exhibits which are incorporated herein by reference, ACL asserts there is no personal jurisdiction over it in South Carolina. While the Court and Plaintiffs' counsel disagree, there is no provision in the law which mandates ACL to acknowledge personal jurisdiction when it believes it does not exist. Likewise, ACL has been consistent in its position that it cannot produce a Rule 30(b)(6), SCRCF witness, as all such witnesses known to ACL have unfortunately passed away.

ACL filed a motion to dismiss for lack of personal jurisdiction. Plaintiffs attempted to notice a Rule 30(b)(6), SCRCF witness in this case. They were informed there were no individuals alive and capable of responding to the issues proposed. On July 10, 2023, this Court conducted a hearing on ACL's motion to dismiss and denied it. The Court went on to state "ACL is ordered to answer discovery and to produce a 30(b)(6) witness by July 24, 2023. Failure to answer the Court ordered discovery and to provide a corporate representative for deposition shall result in ACL being held in contempt." (July 19, 2023 Order p. 1).

ACL answered the court ordered discovery, which has been in place since Judge (now Justice) Hill presided over the asbestos court.¹ In addition, the undersigned counsel called Plaintiffs' counsel, Ms. McVey, in advance and advised her ACL has no living employee or

¹ Attached as Exhibit 1 is a copy of ACL's responses.

person who could satisfy this Court's requirements as to a Rule 30(b)(6), SCRCF witness. Counsel further informed her ACL would produce copies of depositions and transcripts from previous witnesses (which were obviously given before they passed away) in a good faith effort to show an attempt to comply with this Court's order. The only response received was "what am I supposed to do with them?"

The following transcripts were provided to Plaintiff:²

- A. William Callan: *Abercrombie v. Abex Corp., et al.*, Superior Court of the State of California, County of San Francisco, No. 941345, April 2, 1996, Tooker & Antz Court Reporters, 131 Steuart Street, Ste. 201, San Francisco, CA 94105, Brayton Purcell, 222 Rush Landing Rd, Novato, CA 94948; *Shaw v. Pittsburgh Corning Corp., et al.*, Superior Court of the State of Washington, County of King, No. 94-2-25707-2, September 14, 1995, Sharon Rindal & Assoc. Court Reporters, 10224 – 21st S.W., Ste. B, Seattle, Washington 98146; *Austin v. Johns-Manville, et al.*, U.S. District Court, New Jersey, No. 75-754, October 22, 1980 and November 24, 1980, Esquire Reporting Company, 41 East 42nd Street, New York, NY 10017; and *Bailey v. Johns-Manville, et al.*, Philadelphia Court of Common Pleas, May Term 1981, No. I675 (551), April 10 and 11, 1984, Lynn Mountain Court Reporters, James R. Kahn, Esq., Desjardins, Ducharme, et al., 635 Dorchester Blvd West, Montreal, Quebec, Canada.
- B. Marcel DeRouin: *Shaw v. Pittsburgh Coming Corp., et al.*, Superior Court of the State of Washington, County of King, No. 94-2-25707-2, September 14, 1995, Sharon Rindal & Assoc. Court Reporters, 10224 – 21st S.W., Ste. B, Seattle, Washington 98146.
- C. Ian Cadogan Campbell: *Austin v. Johns-Manville, et al.*, U.S. District Court, New Jersey, No. 75-754, September 7, 1976, Federal Court Reporters, Gelman & Gelman; *Ciccarelli v. Carey Canadian Mines, et al.*, U.S. District Court, Eastern District of Pennsylvania, No. 79-2122, September 27, 1979, Knipes-Cohen Association Reporters.
- D. George Alexander McCammon: *Hayes v. Johns-Manville, et al.*, U.S. District Court, Eastern Division of Missouri, No. 80-0706-C(B), April 7, 1982, Anna M. Lloyd, Court Reporter, Montreal, Canada; *In Re Johns-Manville Plantworker Cases*, New Jersey Superior Court, Middlesex County, No. L-37243-79, January 14, 1987, Anna M. Lloyd, Court Reporter, Montreal, Canada, Willentz, Goldman & Spitzer, 900 Route 9, P.O. Box 10, Woodbridge, N.J. 07095.
- E. Alex Sakiz: *Canadian Johns-Manville/Asbestos Corporation Limited Cases*, U.S. District Court, Northern District of Illinois, No. 77C3534, January 22, 1982, Anna Cordier, Court Reporter, Montreal, Canada.

² Copies are attached as Exhibit 2.

- F. Thomas Donald Johnson: *In Re Fibreboard Plantworker Asbestos Cases*, California Superior court, Alameda County, No. 537064-7, January 18, 19, 20, 1984, Vilaire & Associates, 4 est. Notre Dame, Bureau 603, Montreal, H2Y 1B8, Kazan, McClain, Edises, Simon & Abrams, 171 Twelfth Street, Third Floor, Oakland, CA 94607.
- G. Alain Dulude: *In Re Fibreboard Plantworker Asbestos Cases*, California Superior Court, Alameda County, No. 537064-7, January 26 and 27, 1984, Vilaire & Associates, 4 est. Notre Dame, Bureau 603, Montreal, H2Y 1B8.
- H. Jean-Marie Laliberte: *James & Elizabeth Scott v. 3M Company, et al.*, Superior Court of New Jersey, Middlesex County, Docket No.:L-7550-11 AS, March 2, 2015, Sonia Undseth, AD/T 590, KLJ Transcription Services, LLC, P.O. Box 8627, Saddle River, NJ 07663; March 3, 2015, Sandra Carbonaro, AC/T 259, KLJ Transcription Services, LLC, P.O. Box 8627, Saddle River, NJ 07663, William L. Kuzmin, Esq. Cohen, Placitella & Roth, 127 Maple Avenue, Red Bank, NJ 07701.

Two days later, counsel filed a motion to hold ACL in contempt and to strike ACL's pleadings. Two days after that motion was filed, Plaintiffs filed a Motion for the appointment of a Receiver. For the reasons set forth below, all of Plaintiffs' motions should be denied.

CONTEMPT IS NOT APPROPRIATE UNDER THE FACTS OF THIS CASE.

All courts have the inherent power to punish for contempt; however, contempt is an **extreme measure and the power to adjudge a party in contempt is not to be taken lightly.** *Hook v. South Carolina Dept. of Health and Environmental Control*, 439 S.C. 52, 74, 885 S.E.2d 442, 454 (Ct. App. 2023) (emphasis added). Even though a party is found to have violated a court order, the question of whether or not to impose sanctions remains a question for the court's discretion, which should be determined under the specific facts of the case in issue. *Id.*

Once the movant makes a *prima facie* showing by pleading an order and demonstrating noncompliance, the burden shifts to the respondent to establish its defense and inability to comply. *Id.* at 75, 885 S.E.2d at 454. Contempt results from willful disobedience of a court order. *Id.* at 75, 885 S.E.2d at 455 (emphasis added). A willful act is one done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent

to fail to do something the law requires to be done; that is to say with a bad purpose either to disobey or disregard the laws. *Id.* at 76, 885 S.E.2d at 455.

In its Order Denying ACL's Motion to Dismiss for lack of personal jurisdiction, this court held "ACL is ordered to answer discovery and to produce a 30(b)(6) witness by July 24, 2023. Failure to answer the Court ordered discovery and to provide a corporate representative for depositions shall result in ACL being held in contempt." (July 19, 2023 Order p. 1). Inability to comply is a defense to contempt.

ACL has no current or former employees to testify to the topics listed in the Rule 30(b)(6), SCRCF Notice.³ It does not maintain or possess records that would be necessary to educate a witness to be able to testify to matters contained in the Rule 30(b)(6), SCRCF Notice. To the extent that relevant records do exist, their production would be prohibited by the QBCRA as interpreted by the courts in Canada and the Province of Quebec, as discussed below.

If a corporation genuinely cannot provide an appropriate designee because it does not have the information, cannot reasonably obtain it from other sources, and still lacks knowledge after reviewing all available information, then its obligations under the Rule cease. *QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676, 690 (S.D. Fla. 2012). A party cannot produce documents it does not possess, and a party cannot create documents that do not exist and is not obligated to create new documents. *See United States v. Remain at Home Senior Care, LLC*, Case No. 1:17-cv-01493-JMC, at *5-6 (D.S.C. Jan. 14, 2022).

This Court can order it. Plaintiff can want it. ACL can do all in its power to comply, to the extent the laws of its home jurisdiction allow, but as nearly every circuit judge has told counsel at one hearing or another, the other side cannot produce that which it does not have. It

³ Plaintiffs' Second Amended Notice of Rule 30(b)(6), SCRCF Deposition with topics is attached as Exhibit 3.

cannot produce witnesses who are no longer with us. These same rules and common sense apply, even in this court. ACL has shown a good faith attempt to comply with this Court's order. It should not be held in contempt.⁴

The Quebec Business Concerns Records Act (QBCRA) Prohibits ACL Under Threat of Criminal and/or Civil Contempt from Providing Business Records, or Information from Business Records, Located in Quebec.

ACL is a Quebec corporation whose office is located in the province. Under Section 2 of the QBCRA, a copy of which is attached as Exhibit 4:

Subject to section 3, no person shall, pursuant to or under any requirement issued by any legislative, judicial, or administrative authority outside Quebec, remove or cause to be removed, or send or cause to be sent, from any place in Quebec to a place outside Quebec, any document or résumé or digest of any document relating to any concern.

The term "document" is defined as "any account, balance sheet, statement of receipts and expenditure, profit and loss statement, statement of assets and liabilities, inventory, report and any other writing or material forming part of the records or archives of a business concern." QBCRA, § 1(a). The term "concern" is defined as "any business concern in Quebec." QBCRA, § 1(b). The term "requirement" is defined as "any demand, direction, order, subpoena or summons." QBCRA § 1(c). The exception in Section 3 is limited to intra-company transfer in the normal course of business, the sale of securities, and as "authorized by any law of Quebec or of the Parliament of Canada, in accordance with their respective jurisdictions." QBCRA, § 3. Any person who infringes the provisions of Section 2 **shall** be guilty of contempt of court. QBCRA §

⁴ The court's July 19, 2023 order is less than clear whether contempt is automatic or dependent upon the examination of the attempts by ACL to comply with this court's order ("Failure to answer the Court ordered discovery and to produce a 30(b)(6) witness...shall result in ACL being held in contempt."). An automatic ruling of contempt without an examination of steps taken towards compliance would be inconsistent with South Carolina law. *Skywaves Corp. v. Branch Banking and Trust Co.*, 423 S.C. 432, 814 S.E.2d 643 (Ct. App. 2018). (In determining the appropriateness of a sanction, the court should not go beyond the necessities of the situation to foreclose a decision on the merits.)

5 (emphasis added). Quebec courts have made clear that other Quebec “concerns” like ACL are subject to criminal and/or civil penalties if they produce, in United States litigation, information or documents from their files in Quebec.⁵

ACL acknowledges that two decisions by the federal district court in South Carolina have ruled unfavorably as to the QBCRA: *Lyons v. Bell Asbestos Mines, Ltd.*, 119 F.R.D. 384 (D.S.C. 1988); and *Central Wesleyan College v. W. R. Grace & Co.*, 143 F.R.D. 628 (D.S.C. 1992). With due respect to the judges in each case, those cases failed to accurately assess the operation of the QBCRA upon Quebec entities like ACL and the potential exposure they faced for compliance. Moreover, while this Court seems limited by these opinions, neither is binding authority, nor controlling.

The South Carolina federal courts’ interpretations in *Lyons* and *Central Wesleyan* understate the liability of a company in ACL’s position under the QBCRA and the dilemma it faces when called upon to produce documents and a witness in a Rule 30(b)(6), SCRCF situation like the one at issue. Such decisions only show that ACL is stuck between the proverbial “rock and a hard place.” It is stuck between facing mandatory contempt of court in its domicile or suffering contempt and not only displeasing this Court if it does not produce a witness to Plaintiffs’ satisfaction, but having this Court strike its answer and attempt to appoint a receiver that in no manner complies with the laws of Quebec or South Carolina. While the goal is never to displease a court, ACL has no choice in this matter. It can face contempt of court in Quebec where it is located and does business as an ongoing concern or have this Court attempt to place it under a receivership by virtue of a statute that has no applicability in a state with no personal jurisdiction over it.

⁵ The transcripts produced to Plaintiffs came from sources in the United States and thus their production does not violate the QBCRA.

ACL takes its discovery obligations seriously, but asks this Court to recognize and consider that it cannot please both masters at the same time. Other courts have recognized this conundrum.

In *Jenness v. Turner and Newall Ltd.*, No. 83-61-L (D. N.H. Dec. 5, 1984), a copy of which is attached as Exhibit 5, plaintiff served interrogatories to ACL to investigate how much raw asbestos ACL sold to her employer. ACL admitted that it had sold asbestos to the plaintiff's employer but could not "give the detailed answers that are required to be given to plaintiff's interrogatories without reference to [ACL's] business records located in Canada." *Id.* at p. 2. As a result, the plaintiff moved for sanctions against ACL when it did not comply with the court's discovery order. The U.S. District Court for the District of New Hampshire described ACL's predicament: ACL found itself "between the Scylla of the criminal sanctions of the [QBCRA] and the Charybdis of the civil sanctions of this Court." *Id.* at p. 2. Considering ACL's quandary, the *Jenness* court found that ACL had "made a good faith effort to comply with this Court's order to answer the interrogatories" and that ACL's "fear that answering the interrogatories or giving the depositions would violate the [QBCRA] to be well founded." *Id.* at p. 3. The court ordered ACL to answer the plaintiff's interrogatories from documents and information that existed outside Quebec, but ruled that ACL did not have to answer the interrogatories from documents and information contained within Quebec. *Id.* at pp. 3-4.

Similarly, in *Maryland v. Keene Corp.*, No. 1108600 (Md. Cir. Ct. July 10, 1986), a copy of which is attached as Exhibit 6, ACL sought a protective order from the plaintiff's discovery due to threat of sanctions under the QBCRA. Exhibit 6, at pp. 1-2. The *Keene* court concluded that because the QBCRA's potential penalties were "an annoyance, embarrassment and undue burden" to ACL, the court was "not convinced that it [wa]s necessary for ACL to face" the

QBCRA's sanctions. *Id.* at p. 2. The court ordered that any of ACL's United States-based documents and information were discoverable but that "ACL's Canadian documents should enjoy the full protection which this Court can afford to them...." *Id.* at 3.

Further, in *Fears v. Cassair Mining, Corp.*, No. 91-98C(5) (E.D. Mo. Jan. 5, 1993), a copy of which is attached as Exhibit 7, the U. S. District Court for the Eastern District of Missouri did not find the analysis in *Lyons* persuasive because it did not deal with the Canadian courts' interpretation of the QBCRA or with the prior rulings of American courts. Rather, it adopted the *Jenness* and *Keene* courts' reasoning, concluding that "the approach taken by [those] courts is equitable and just in that it provides a broad opportunity for plaintiffs to achieve the discovery to which they are entitled without exposing [ACL] to criminal sanctions in Quebec." Exhibit 7, at p. 3. The *Fears* court allowed discovery into ACL's documents and information contained in the United States but upheld the QBCRA's prohibition on discovery into ACL's Quebec documents and information. *Id.*

Because ACL faces criminal and/or penalties if it violates the QBCRA or contempt and severe sanctions including default and a purported receivership, the Court should make a comity analysis using the factors set forth in *Societe Nationale Industrielle Aerospatiale v. United States District Court for Southern District of Iowa*, 482 U.S. 522, 107 S.Ct. 2542 (1987) (*Aerospatiale*) and Restatement (Third) of Foreign Relations Law of the United States, § 442 (1987) (Restatement).⁶ In *Aerospatiale*, the Supreme Court dealt with a French "Blocking

⁶ ACL acknowledges that the court in *Lyons* referenced *Aerospatiale* in relation to the QBCRA. *Id.*, 119 F.R.D. at 389 (D.S.C. 1988). Further, in *Lyons*, although Judge Anderson ruled unfavorably as to the QBCRA, he referenced *Aerospatiale* and noted that consideration "of foreign law problems in a discovery context is required in dealing with sanctions to be imposed for disobedience", thereby acknowledging that any punishment should not necessarily immediately go to the most severe sanction available but should take into account the conflicting legal obligations faced by the party. *Lyons*, 119 F.R.D. at 389.

Statute.” The Court directed that district courts could find their guide to a comity analysis using factors articulated in the *Restatement. Aerospatiale*, 482 U.S. at 544, footnote 28. These factors are (1) the importance to the...litigation of the documents or other information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.

A comity analysis using the factors set forth in *Aerospatiale* supports relief for ACL. The information requested is unrelated to the primary case, but centers more on an effort to establish insurance coverage for the purported receiver. As for the second factor – the degree of specificity – many of Plaintiffs’ requests are overly broad.⁷ Plaintiff cannot show and ACL has established to the extent any such documents exist, they would be in Quebec. Plaintiff has shown it attempted no alternatives legal means to try to obtain any information in issue. Finally, this information does not undermine important interests of South Carolina.

APPOINTMENT OF A RECEIVER IS INAPPROPRIATE FROM A LEGAL, JURISDICTIONAL AND STATUTORY BASIS.

Plaintiff moves ever so rapidly to assert, with no relevant or applicable case law, that this Court should attempt to place ACL under a receivership.⁸ ACL is a Canadian Corporation located in the Province of Quebec. As set forth in ACL’s prior Motion to Dismiss for Lack of Personal Jurisdiction and Memorandum of Law with Exhibits, this Court has no jurisdiction or authority to

⁷ See Plaintiffs’ Second Amended Notice of Rule 30(b)(6), SCRCF Deposition of ACL and Subpoena Duces Tecum, attached as Exhibit 3.

⁸ The motion is not clear as to whether this is purportedly an “insurance asset” receivership as on appeal in *Welch* or some other form of receivership. The relief sought does not comply with the statutory provisions cited.

place on ongoing Canadian corporation into a South Carolina based receivership. While Plaintiffs make allegations with absolutely no evidentiary basis, such as “ACL has intentionally fled the United States to avoid its liabilities’ or that it is “trying to defeat [its] creditors by an act or course of conduct which indicates moral fraud...”, and is ACL “refuses to accept service in in the United States after being faced with substantial asbestos-related liabilities.”

As stated earlier, Plaintiffs and this Court want ACL to give up or walk away from its personal jurisdictional arguments. It will not do so. Plaintiff has no judgment against ACL. Even if this court holds ACL in default, it does not follow as this Court stated in *Welch* that a default judgment is a ministerial act. *Beckham v. Durant*, 300 S.C. 329, 387 S.E.2d 701 (Ct. App. 1989). *In re Estate of Weeks*, 329 S.C. 251, 495 S.E.2d 454 (Ct. App. 1997). (Party requesting judgment by default is not entitled to one as a matter of right even when the defendant is technically in default.”). As such, ACL does not meet the requirements of S.C. Code Ann. § 15-65-10(4). Likewise, there is no way the action of attempting to appoint a receiver could be deemed “in accordance with the existing practice.” S.C. Code Ann. § 15-65-10(5) is not satisfied. Finally, S.C. Code Ann. § 15-65-10 (4) limits itself to “property within this State of foreign corporations.” Plaintiff seeks this Court to declare a receivership that is not limited by the boundaries of this state, but also is not limited by the borders of this country. This Court and the South Carolina Legislature lack such authority. A receivership may not be put into place legally. Appointment of a receiver is a “harsh and drastic remedy, one to be granted only with great caution.” *Penn. Mut. Life Ins. Co. v. Cudd*, 172 S.C. 88, 172 S.E. 787 (1934). Any order to do so would be null and void.

CONCLUSION

For the foregoing reasons, the Court should not hold ACL in contempt; should not strike its answer and should not attempt to place it in an illegal and void receivership.

[Signature page for Memorandum in Opposition to Motion for Contempt, to Strike Answer and Appoint a Receiver Case No. 2023-CP-40-01759]

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Attorneys for Asbestos Corporation Limited

Charleston, South Carolina

Dated: August 9, 2023

Exhibit H

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
JOHN A. TIBBS and	)	C/A NO. 2023-CP-40-01759
MARGARET B. TIBBS	)	
	)	<i>In Re:</i>
Plaintiff,	)	Asbestos Personal Injury Litigation
	)	Coordinated Docket
v.	)	
	)	
3M COMPANY, et al.	)	
	)	
Defendants.	)	

ORDER HOLDING ATLAS ASBESTOS COMPANY, LTD. IN CONTEMPT

Asbestos Corporation, Ltd. (“ACL”) is a defendant in the above referenced matter. On July 10, 2023, this Court, in open court ordered ACL to fully answer discovery and appear for a deposition so that this matter could be prepared for trial. On July 19, 2023, this Court entered an Order stating: “Failure to answer the Court ordered discovery and to provide a corporate representative for deposition shall result in ACL being held in contempt.”

ACL failed to produce a witness as ordered by the Court. ACL has also refused to identify a witness or a date on which it will produce a witness. Moreover, ACL has failed to fully answer discovery and provide documents ordered to be produced by this Court.

ACL has made it clear that it does not intend to participate in this matter and that this Court’s orders on discovery will continue to be ignored. Plaintiffs moved to have this Court hold ACL in contempt and, as a sanction, to strike ACL’s answer.

LAW AND ANALYSIS

A determination of contempt resides in the sound discretion of the trial judge. *Hook v. South Carolina Dept. of Health and Environmental Control*, 439 S.C. 52 (Ct. App. March 15, 2023). “Courts have no more important function to perform in the administration of justice than to ensure their orders are obeyed.” *Id.* The power of a court to punish for contempt “is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice.” *Miller v. Miller*, 375 S.C. 443 (Ct. App. 2007).

“The rights of discovery provided by the Rules give the trial lawyer the means to be prepared for trial.” *Downey v. Dixon*, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987). “Where these rights are not accorded, prejudice must be presumed and, unless the party who has failed to submit to discovery can show a lack of prejudice,” sanctions must be imposed. *Id.* Without adequate sanctions, discovery procedures would be ineffectual. *Id.* As a result, over leniency must be avoided. *Id.* “If a party fails to obey an order or provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment.” *Griffin Grading & Clearing, Inc. v. Tire Serv. Equipment Mfg. Co., Inc.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999).

“In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice.” *Id.* at 199, 511 S.E.2d at 719. In *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997), the South Carolina Court of Appeals stated “[t]he entire thrust of the discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party.” *Id.* “Discovery sanctions are imposed to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those

who might be tempted to such conduct in the absence of such a deterrent.” *Creighton v. Coligny Plaza Ltd. P’ship*, 334 S.C. 96, 123, 512 S.E.2d 510, 524 (Ct. App. 1998).

Here there is no dispute that ACL has violated this Court’s orders. Moreover, ACL has indicated that it does not intend to comply with those orders in the future. In light of ACL’s position, this Court has no choice but to find ACL in contempt of court. ACL has failed to produce a witness. ACL has refused to participate in meaningful discovery. It has refused to produce documents. Given this intentional and willful refusal to participate in discovery, the Court hereby strikes ACL’s pleadings.

IT IS SO ORDERED.

[JUDGE’S SIGNATURE PAGE FOLLOWS]



Richland Common Pleas

Case Caption: John A Tibbs , plaintiff, et al vs 3M Company , defendant, et al

Case Number: 2023CP4001759

Type: Order/Sanctions

So Ordered

Jean H. Toal

Exhibit I

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Richland County
Court of Common Pleas
Jean Hoefer Toal, Circuit Court Judge

Case No. 2023-CP-40-01759

John A. Tibbs and Margaret B. Tibbs,

Respondents,

v.

3M Company; 4520 Corp., Inc.; A.O. Smith Corporation; A.W. Chesterton Company; ABB Inc.; Air & Liquid Systems Corporation; AiW-2010 Wind Down Corp.; Amentum Environment & Energy, Inc.; Anchor/Darling Valve Company; Armstrong International, Inc.; Asbestos Corporation Limited; ASCO, L.P.; Atlas Asbestos Co; Atlas Turner, Inc.; AWT Air Company, Inc.; Bahnson, Inc.; Banner Industries International, Inc.; Banner Industries, LLC; Banner Industries Of N.E., Inc.; Barretts Minerals Inc.; Beaty Investments, Inc.; Bechtel Corporation; The Bonitz Company; Brand Insulations, Inc.; BW/IP Inc.; Canvas Ct, LLC; Cape PLC; Carboline Company; CB&I Laurens, Inc.; Cleaver-Brooks, Inc.; Consolidated Electrical Distributors, Inc.; Copes-Vulcan, Inc.; Covil Corporation; Crane Instrumentation & Sampling, Inc.; Crosby Valve, LLC; Daniel International Corporation; Davis Mechanical Contractors, Inc.; Dezurik, Inc.; Duke Energy Carolinas, LLC; Duke Energy Corporation; Eaton Corporation; Ellington Insulation Company, Inc.; Emerson Electric Co.; Fisher Controls International LLC; 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 Cable Corporation; General Cable Industries, Inc.; General Electric Company; Gould Electronics Inc.; Goulds Pumps, Incorporated; Goulds Pumps LLC; Great Barrier Insulation Co.; Grinnell LLC; Hajoca Corporation; Howden North America Inc.; HPC Industrial Services, LLC; IMO Industries Inc.; ITT LLC; Joy Global Underground Mining LLC; K-Mac Services Incorporated; Metropolitan Life Insurance Company; Mine Safety Appliances Company, LLC; MP Supply, Inc.; The Nash Engineering Company; Occidental Chemical Corporation; Paramount Global; Patterson Pump Company; PECW Holding Company; Pfizer Inc.; Piedmont Insulation, Inc.; Plastics Engineering Company; Presnell Insulation Co., Inc.; Redco Corporation; Riley Power Inc.; Rockwell Automation, Inc.; RSCC Wire & Cable LLC; Schneider Electric USA, Inc.; Sequoia Ventures Inc.; Spirax Sarco, Inc.; SPX Corporation; 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; TE Wire & Cable LLC; Thermo Electric Company, Inc.; Union Carbide Corporation; Valves And Controls Us, Inc.; Velan Valve Corp.; Viking

Pump, Inc.; Vistra Intermediate Company LLC; The William Powell Company Wind
Up, Ltd.; Yuba Heat Transfer LLC; Zurn Industries, LLC,

Defendants,

Of which Asbestos Corporation Limited, is

Appellant.

NOTICE OF APPEAL

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*Purported receiver for “insurance assets” of Asbestos Corporation Limited per Order being
appealed*

Defendant Asbestos Corporation Limited hereby appeals the following orders of the Honorable Jean Hoefer Toal, Circuit Court Judge, copies of which are attached hereto:

- **Order Holding Atlas Asbestos in Contempt and Striking Pleadings**, filed September 8, 2023;
- **Order on Plaintiffs' Motion to Appoint a Receiver**, filed September 8, 2023;

Copies of the appealed orders are attached hereto and incorporated herein by reference. Appellant received written notice of entry of the most recent order on September 8, 2023.

Respectfully submitted,
CLEMENT RIVERS, LLP

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*Attorneys for Appellant Asbestos
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Charleston, South Carolina

September 13, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
JOHN A. TIBBS and	)	C/A NO. 2023-CP-40-01759
MARGARET B. TIBBS	)	
	)	<i>In Re:</i>
Plaintiff,	)	Asbestos Personal Injury Litigation
	)	Coordinated Docket
v.	)	
	)	
3M COMPANY, et al.	)	
	)	
Defendants.	)	

ORDER ON PLAINTIFFS' MOTION TO APPOINT A RECEIVER

This order follows the Court's order finding Asbestos Corporation Ltd. ("ACL") in contempt of court and striking ACL's pleadings. Before the Court is Plaintiffs' Motion to Appoint a Receiver over ACL's insurance assets.

BACKGROUND

For the reasons set for below, the Court grants Plaintiffs motion to appoint a receiver over the Insurance Assets¹ of ACL and to allow the Receiver to assume control of the defense of asbestos claims made against Asbestos Corporation, Ltd in the United States. Peter Protopapas is appointed as receiver over those Insurance Assets and the Court expects anyone or any entity having information or materials which are reasonably calculated to lead to the discovery of admissible evidence to cooperate with this Court's Receiver in locating and marshalling those assets. Further, Mr. Protopapas is tasked with tendering current and future claims from Plaintiffs suffering from

¹ This term is defined below.

asbestos disease brought against ACL to which those policies are responsive. Finally, Mr. Protopapas is tasked with the control of the defense of those claims for ACL.

PROCEEDURAL BACKGROUND

On July 19, 2023, this Court ordered ACL to fully answer discovery and to provide a corporate representative for deposition. The Court further held that failure to do so would result ACL being held in contempt. Subsequently, this Court held ACL in contempt and, as a sanction, struck the pleadings of ACL. The Court based its contempt order on ACL's flat refusal to comply with this Court's orders to produce documents, a witness or otherwise participate in discovery.

Now, having struck ACL's answer, ACL is in default.²

LAW AND ANALYSIS

A. Appointment of a Receiver is Appropriate and Warranted

The South Carolina receivership statute provides in relevant part that a receiver may be appointed in cases in accordance with "existing practice." S.C. Code Ann. 15-65-10(5).³

² The process of actually entering default judgment is merely a ministerial process. In the absence of an answer, default is nothing more than that ministerial act. *Stark Truss Co., Inc. v. Superior Const. Corp.* 360 S.C. 503 (Ct. App. 2004)

³ A receiver is also available to carry a judgment into effect, which is the practical result of the coming default following the striking of ACL's answer.

Historically, receivers are appointed by courts sitting in equity in order to ensure a fair result. *First Carolinas Joint Stock Land Bank of Columbia v. Knotts*, 191 S.C. 384 (1939). Indeed, “[t]he right to have a receiver appointed is an ancient one” *Pelzer v. Hughes*, 27 S.C. 408 (1887) But where, as here, ACL’s answer has been struck, and thus only a ministerial action being left for ACL to be in judgment, a receiver to take possession of and, to the extent necessary, litigate ACL’s insurance assets as well as to assume control of the defense of asbestos claims made against ACL in the United States is exactly the type of historical circumstances, the Court’s of this state have found appropriate. Specifically, where, as here, a debtor, solvent or otherwise,

is trying to defeat his creditors by an act or course of conduct which indicates moral fraud-a conscious intent to defeat, delay or hinder creditors in the collection of debts-then a court will grant any relief within its jurisdiction appropriate and effective to protect creditors against the fraud without requiring the creditor to run the risk of losing his debt from the delay of obtaining judgment and return of nulla bona on the execution.

Virginia Carolina Chemical v. Hunter, 84 S.C. 214 (1909).

Here it is exactly the moral fraud of ACL’s personal jurisdiction claims, exposed by decades of opinions dismissing those very assertions and ACL’s continued refusal to participate in this that warrants the appointment of a receiver. Thus, where there is active wrongdoing and illegal refusal to comply with this Court’s orders, the appointment of a receiver is appropriate.

As Plaintiffs have requested, a receiver appointed here would have the authority to administer “any insurance assets” including “any claims related to the actions or failure to act of ACL’s insurance carriers.” The Receiver would assume control of the defense of asbestos claims made against ACL in the United States. This Court’s view of the scope of a 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).

That the South Carolina receivership references “property within this state” is not a limitation on the Receiver’s authority in this case. 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 to assert an insolvent 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 Dep. 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 pursuant to Delaware law would be afforded “full faith and credit”). That is the authority given to be given the receiver here.

That authority includes the insurance assets of ACL, including the right to assume control of the defense of asbestos claims made against ACL in the United States and tender claims to applicable insurance policies. Even assuming ACL’s interpretation of §15-65-10 is correct, to the extent they exist, ACL’s Insurance Assets ² would be intended to protect the lives, interests and property within South Carolina. The result is that the insuring assets are subject to the laws of South Carolina, including the duly appointed Receiver.

² For purpose of clarity, this Court defines “Insurance Assets” as any insurance policy, proceeds of insurance policies, claims relating to such insurance policies, including but not limited to, claims relating to any breaches of duty relating to those policies, information relating to those insurance policies including, but not limited to mail, files of counsel, or other information which is reasonably calculated to lead to the discovery of admissible evidence about those insurance policies or any other assets which are related to, touch or are otherwise relevant to such insurance.

S.C. Code Ann §38-61-10 states that

[a]ll contracts of insurance on property, lives, or interests in this state are considered to be made in the State and all contracts of insurance the applications for which are taken within this State are considered to have been made within this State and are subject to the laws of this State.

In interpreting §38-61-10, the South Carolina Supreme Court held that “[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.” *Sangamo Weston v. Nat’l Sur. Corp.*, 307 S.C. 143, 149, 414 S.E.2d 127, 130 (1992) (Toal, C.J). The result is that “South Carolina substantive law governs [the insuring assets of ACL]” *Id.* Thus, the appointment of a receiver over those assets is appropriate.

B. Due Process has not and will not be violated

ACL continues to ignore the jurisprudence of this state which directly addresses its due process argument. Just as here, *Sangamo* argued that §38-61-10 was “unconstitutional.” *Id.* at 131. The South Carolina Supreme Court there opined that

insuring property, lives and interests in South Carolina constitutes a significant contact with this state. South Carolina has a substantial interest in who bears the liability for operations conducted in this state which result in injury to South Carolina property and citizens. Although the parties are not residents of this state, both parties availed themselves of the law of South Carolina when they respectively provided or received insurance on interests located in this state.

Id. ACL sold its products throughout the United States well knowing that it would end up in the workplaces of working men and women throughout the nation, including sales, specifically to South Carolina. Therefore, under the statutory scheme of this state and its interpreting precedent, whatever insuring assets of ACL exist and related claims are subject to the substantive law of

South Carolina and nothing about that result is violative of due process.

POWERS OF THE RECEIVER

As set forth above, the powers afforded to the receiver here are all related to the insurance assets of ACL. Therefore, this Court hereby orders that Peter Protopapas be and hereby is appointed Receiver in this case with the power and authority fully administer all insurance assets of Asbestos Corporation, Ltd. and any subsidiaries, accept service on behalf of ACL, engage counsel on behalf of ACL, to assume control of the defense of asbestos claims made against ACL in the United States, and take any and all steps necessary to protect the interests of ACL whatever they may be. This order includes the right and obligation to administer any insurance or indemnification assets of ACL as well as any claims related to the actions or failure to act of ACL insurance carriers or other entities, including, but not limited to the officers, directors and/or shareholders of ACL against which the ACL may have claims.

In addition to the powers of the Receiver set forth herein, the Receiver shall have the following rights, powers and authority, insofar as they are related to the discovery of and recovery of insurance assets, to: 1) open any mail which is reasonably believed to contain information relating to insurance assets addressed to the defendant and addressed to any business owned by the ACL; redirect the delivery of any such mail addressed to the ACL or any business of the ACL, so that such mail may come directly to the receiver; 2) endorse and cash all checks and negotiable instruments payable to ACL relating to insurance assets; 3) obtain from any financial institution, bank, credit union, savings and loan or title, credit bureau or any other third party, any financial records belonging to or pertaining to the insurance assets of ACL; 4) hire any person necessary to accomplish any right or power under this Order; 5) to assume control of the defense of asbestos claims made against ACL in the United States; and 6) take all action necessary to gain access to

all storage facilities, safety-deposit boxes, real property, and leased premises wherein any property of ACL may be situated, and to review and obtain copies of all documents related to insurance assets of ACL.

The Court expects the Receiver to investigate the existence of all insurance or indemnifications coverages or claims relating thereto which are potentially available to ACL. The Receiver will provide potential insurers or indemnifiers 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 ACL or any entity for whom ACL did work or supplied materials or licensed products or the use thereof as an "additional insured" under coverage written to another entity). The Court expects all insurers or indemnifiers to comply with subpoenas issued by this Court and its Receiver in effectuating these thorough searches.

This Court notes that under the *Barton* doctrine, suit against the Receiver outside of this Court is expressly prohibited.

CONCLUSION

For the foregoing reasons, the appointment of a receiver for ACL to marshal all of the available insurance assets, including claims related thereto and any other property subject to this receivership of ACL and its subsidiaries, successors, and assigns, is appropriate. Moreover, the Court authorizes Mr. Protopapas to assume the control of the defense of all litigation matters pending in the United States against ACL. Peter Protopapas is hereby appointed the receiver over ACL consistent with this order.

IT IS SO ORDERED.

[JUDGE'S SIGNATURE PAGE FOLLOWS]



Richland Common Pleas

Case Caption: John A Tibbs , plaintiff, et al vs 3M Company , defendant, et al

Case Number: 2023CP4001759

Type: Order/Appointment of Receiver

So Ordered

Jean H. Toal

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

JOHN A. TIBBS and) C/A NO. 2023-CP-40-01759
MARGARET B. TIBBS)
) *In Re:*
Plaintiff,) Asbestos Personal Injury Litigation
) Coordinated Docket
v.)
)
3M COMPANY, et al.)
)
Defendants.)

ORDER HOLDING ATLAS ASBESTOS COMPANY, LTD. IN CONTEMPT

Asbestos Corporation, Ltd. (“ACL”) is a defendant in the above referenced matter. On July 10, 2023, this Court, in open court ordered ACL to fully answer discovery and appear for a deposition so that this matter could be prepared for trial. On July 19, 2023, this Court entered an Order stating: “Failure to answer the Court ordered discovery and to provide a corporate representative for deposition shall result in ACL being held in contempt.”

ACL failed to produce a witness as ordered by the Court. ACL has also refused to identify a witness or a date on which it will produce a witness. Moreover, ACL has failed to fully answer discovery and provide documents ordered to be produced by this Court.

ACL has made it clear that it does not intend to participate in this matter and that this Court’s orders on discovery will continue to be ignored. Plaintiffs moved to have this Court hold ACL in contempt and, as a sanction, to strike ACL’s answer.

LAW AND ANALYSIS

A determination of contempt resides in the sound discretion of the trial judge. *Hook v. South Carolina Dept. of Health and Environmental Control*, 439 S.C. 52 (Ct. App. March 15, 2023). “Courts have no more important function to perform in the administration of justice than to ensure their orders are obeyed.” *Id.* The power of a court to punish for contempt “is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice.” *Miller v. Miller*, 375 S.C. 443 (Ct. App. 2007).

“The rights of discovery provided by the Rules give the trial lawyer the means to be prepared for trial.” *Downey v. Dixon*, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987). “Where these rights are not accorded, prejudice must be presumed and, unless the party who has failed to submit to discovery can show a lack of prejudice,” sanctions must be imposed. *Id.* Without adequate sanctions, discovery procedures would be ineffectual. *Id.* As a result, over leniency must be avoided. *Id.* “If a party fails to obey an order or provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment.” *Griffin Grading & Clearing, Inc. v. Tire Serv. Equipment Mfg. Co., Inc.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999).

“In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice.” *Id.* at 199, 511 S.E.2d at 719. In *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997), the South Carolina Court of Appeals stated “[t]he entire thrust of the discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party.” *Id.* “Discovery sanctions are imposed to penalize those whose conduct may be deemed to warrant such a sanction, and to deter those

who might be tempted to such conduct in the absence of such a deterrent.” *Creighton v. Coligny Plaza Ltd. P’ship*, 334 S.C. 96, 123, 512 S.E.2d 510, 524 (Ct. App. 1998).

Here there is no dispute that ACL has violated this Court’s orders. Moreover, ACL has indicated that it does not intend to comply with those orders in the future. In light of ACL’s position, this Court has no choice but to find ACL in contempt of court. ACL has failed to produce a witness. ACL has refused to participate in meaningful discovery. It has refused to produce documents. Given this intentional and willful refusal to participate in discovery, the Court hereby strikes ACL’s pleadings.

IT IS SO ORDERED.

[JUDGE’S SIGNATURE PAGE FOLLOWS]



Richland Common Pleas

Case Caption: John A Tibbs , plaintiff, et al vs 3M Company , defendant, et al

Case Number: 2023CP4001759

Type: Order/Sanctions

So Ordered

Jean H. Toal

Electronically signed on 2023-09-07 15:53:57 page 5 of 5

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Richland County
Court of Common Pleas
Jean Hoefer Toal, Circuit Court Judge

Case No. 2023-CP-40-01759

John A. Tibbs and Margaret B. Tibbs,

Respondents,

v.

3M Company; 4520 Corp., Inc.; A.O. Smith Corporation; A.W. Chesterton Company; ABB Inc.; Air & Liquid Systems Corporation; AiW-2010 Wind Down Corp.; Amentum Environment & Energy, Inc.; Anchor/Darling Valve Company; Armstrong International, Inc.; Asbestos Corporation Limited; ASCO, L.P.; Atlas Asbestos Co; Atlas Turner, Inc.; AWT Air Company, Inc.; Bahnson, Inc.; Banner Industries International, Inc.; Banner Industries, LLC; Banner Industries Of N.E., Inc.; Barretts Minerals Inc.; Beaty Investments, Inc.; Bechtel Corporation; The Bonitz Company; Brand Insulations, Inc.; BW/IP Inc.; Canvas Ct, LLC; Cape PLC; Carboline Company; CB&I Laurens, Inc.; Cleaver-Brooks, Inc.; Consolidated Electrical Distributors, Inc.; Copes-Vulcan, Inc.; Covil Corporation; Crane Instrumentation & Sampling, Inc.; Crosby Valve, LLC; Daniel International Corporation; Davis Mechanical Contractors, Inc.; Dezurik, Inc.; Duke Energy Carolinas, LLC; Duke Energy Corporation; Eaton Corporation; Ellington Insulation Company, Inc.; Emerson Electric Co.; Fisher Controls International LLC; 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 Cable Corporation; General Cable Industries, Inc.; General Electric Company; Gould Electronics Inc.; Goulds Pumps, Incorporated; Goulds Pumps LLC; Great Barrier Insulation Co.; Grinnell LLC; Hajoca Corporation; Howden North America Inc.; HPC Industrial Services, LLC; IMO Industries Inc.; ITT LLC; Joy Global Underground Mining LLC; K-Mac Services Incorporated; Metropolitan Life Insurance Company; Mine Safety Appliances Company, LLC; MP Supply, Inc.; The Nash Engineering Company; Occidental Chemical Corporation; Paramount Global; Patterson Pump Company; PECW Holding Company; Pfizer Inc.; Piedmont Insulation, Inc.; Plastics Engineering Company; Presnell Insulation Co., Inc.; Redco Corporation; Riley Power Inc.; Rockwell Automation, Inc.; RSCC Wire & Cable LLC; Schneider Electric USA, Inc.; Sequoia Ventures Inc.; Spirax Sarco, Inc.; SPX Corporation; 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; TE Wire & Cable LLC; Thermo Electric Company, Inc.; Union Carbide Corporation; Valves And Controls Us, Inc.; Velan Valve Corp.; Viking

Pump, Inc.; Vistra Intermediate Company LLC; The William Powell Company Wind
Up, Ltd.; Yuba Heat Transfer LLC; Zurn Industries, LLC,

Defendants,

Of which Asbestos Corporation Limited, is

Appellant.

PROOF OF SERVICE

**** Counsel identified on next page ****
CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
Russell G. Hines (SC Bar No. 72100)
James D. Gandy, III (SC Bar No. 11925)
25 Calhoun Street, Suite 400
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(843) 720-5488
*Attorneys for Appellant Asbestos
Corporation Limited*

I, Stephen L. Brown, of Clement Rivers, LLP, attorneys for Appellants, hereby certify that **NOTICE OF APPEAL** was served on all other parties to this appeal on September 13, 2023, via email (see attached) to their following counsel of record:

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Purported receiver for “insurance assets” of Asbestos Corporation Limited per Order being appealed

I also certify that a copy of this **NOTICE OF APPEAL** is this day, September 13, 2023, being E-Filed with the lower court (which will also, i.e., in addition to service by email, effect service of the notice today on Respondent’s above-identified counsel of record via the E-Filing System).

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Stephen L. Brown
Stephen L. Brown (SC Bar No. 66468)
Attorneys for Appellants

Charleston, South Carolina

September 13, 2023

Bell, Pollyana (Polly)

From: Bell, Pollyana (Polly)
Sent: Wednesday, September 13, 2023 3:52 PM
To: Theile McVey; jrutkoski@kassellaw.com; achapman@dobslegal.com; 'dhumen@dobslegal.com'; pdp@rplegalgroup.com; jchandler@rplegalgroup.com; bb@rplegalgroup.com
Cc: Brown, Stephen L.; Griffith, Jr., Stephen; Hines, Russell; Gandy, III, James D. (Tripp); Justman, Aimee
Subject: Tibbs v. 3M Company et al. Notice of Appeal; 2023-CP-40-01759 (CR 230595)
Attachments: Notice of Appeal - Tibbs v. 3M Company et al..pdf; 9-8-23-Order Holding Atlas Asbestos Company in Contempt.pdf; 9-8-23-Order on Plts' Mtn to Appoint a Receiver.pdf

Enclosed please find Appellant Asbestos Corporation Limited's Notice of Appeal and the orders referenced therein for service upon you in the above-referenced matter.

Thank you,

Pollyana Bell
Project Assistant
Commercial Litigation Practice Group
Phone:(843)720-5488 | Fax:(843)579-1369



CLEMENT RIVERS, LLP
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Exhibit J

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

TED EVERETTE MITCHELL, individually and
as Executor of the Estate of PATSY ANN
MITCHELL,

Plaintiffs,

v.

3M Company, et al.,

Defendants.

ASBESTOS CORPORATION LIMITED, by
and through its duly appointed Receiver, Peter
D. Protopapas,

Third-Party Plaintiff,

v.

CENTURY INDEMNITY COMPANY, et al.,

Third-Party Defendants.

2022-CP-40-02979

In Re:

Asbestos Personal Injury Litigation
Coordinated Docket

**AFFIDAVIT OF ANN B. MULCAHY IN SUPPORT OF THIRD-PARTY DEFENDANTS
TRAVELERS CASUALTY AND SURETY COMPANY'S MOTION TO DISMISS**

STATE OF CONNECTICUT

COUNTY OF HARTFORD

1. My name is Ann B. Mulcahy. I am employed as Associate Group General Counsel of The Travelers Indemnity Company, located in Hartford, Connecticut. In addition, I am an Assistant Corporate Secretary of Travelers Casualty and Surety Company. In that role, I am familiar with the nature of the business and corporate structure of Third-Party Defendant Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company ("Travelers").

2. I am over 18 years of age. The facts stated herein are based on my personal knowledge or have been confirmed by me in the course of my regular duties, and are, to the best of my knowledge, true and correct. I am authorized to make this Affidavit on behalf of Travelers.

3. Travelers is organized under the laws of Connecticut and has its principal place of business in Connecticut.

4. Travelers's operations are managed principally in Connecticut, not South Carolina.

5. None of Travelers's senior officers or directors are located in South Carolina.

6. Travelers's direct written premiums in South Carolina are immaterial to its financial positions.

7. In addition, Travelers:

a. is not incorporated or headquartered in South Carolina;

- b. does not have its principal places of business in South Carolina;
- c. has no employees in South Carolina;
- d. does not own or rent office space in South Carolina;
- e. has no loan applications with South Carolina banks or financial institutions;
- and
- f. does not have meetings of directors in South Carolina.

8. Travelers is an insurance company. It does not and, to my knowledge, has not, owned, or operated any industrial plant.

FURTHER AFFIANT SAYETH NOT.

TRAVELERS CASUALTY AND SURETY COMPANY

Ann B. Mulcahy

Ann B. Mulcahy
Assistant Corporate Secretary

Subscribed and sworn to before me, the undersigned authority on this 20th day of October, 2023.

Lori H. Cabrila
Notary Public



Exhibit E

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

TED EVERETTE MITCHELL,
individually and as Executor of the Estate
of PATSY ANN MITCHELL,

Plaintiffs,

v.

3M COMPANY, *et al.*,

Defendants.

ASBESTOS CORPORATION LIMITED,
by and through its duly appointed Receiver,
Peter D. Protopapas,

The Receiver,

v.

CENTURY INDEMNITY COMPANY, as
successor to CCI Insurance Company, as
successor to Insurance Company of North
America, *et al.*,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL DISTRICT

Civil Action No. 2022-CP-40-02979

**NOTICE OF MOTION AND MOTION
BY CENTURY INDEMNITY
COMPANY AND FEDERAL
INSURANCE COMPANY TO
ENFORCE RULE 205, SCACR, OR, IN
THE ALTERNATIVE, TO DISMISS
AND/OR STRIKE THE THIRD-PARTY
COMPLAINT**

TO: BRIAN M. BARNWELL, ESQUIRE, ATTORNEY FOR THE RECEIVER, AND TO THE RECEIVER ABOVE-NAMED.

YOU WILL PLEASE TAKE NOTICE THAT Third-Party Defendants Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America (“Century”) and Federal Insurance Company (“Federal”) (collectively, the “Chubb Defendants”), by and through their undersigned counsel, do hereby move for an Order that this third-party action by Peter D. Protopapas, the receiver appointed over Asbestos Corporation Limited (the “Receiver”), cannot proceed because, pursuant to Rule 205, SCACR, this Court lacks jurisdiction over matters affected by the pending appeal of the validity of the appointment of the Receiver, which of necessity extends to the Receiver’s prosecution of this third-party action. In the alternative, the Chubb Defendants move pursuant to Rule 12(b)(1), Rule 12(b)(6), Rule 12(b)(7), and Rule 14(a) of the South Carolina Rules of Civil Procedure for an Order dismissing, striking, and/or severing the claims against the Chubb Defendants in the Receiver’s Third-Party Complaint.

This motion is based upon the following specific grounds:

1. Plaintiffs filed an action against Asbestos Corporation Limited (“ACL”) and several other defendants in this Court, asserting bodily-injury claims related to alleged exposure to asbestos-containing materials (the “Mitchell Action”). See Third-Party Compl. ¶ 8.

2. On September 8, 2023, over ACL’s objections, the Court appointed Peter D. Protopapas as the receiver of ACL’s insurance assets. On September 13, ACL appealed the receivership order. On September 19, the Receiver filed a Third-Party Complaint against several insurers, including the Chubb Defendants. The Third-Party Complaint alleges that “alleged bodily injury resulting from the Asbestos Allegations has resulted in suits against ACL (‘ACL Asbestos Suits’), including the instant suit filed by Ted Everette Mitchell, individually and as Executor of the Estate of Patsy Ann Mitchell.” *Id.*

3. The Receiver's causes of action for declaratory judgment seek a total of fourteen different declarations relating to policies allegedly issued by the Chubb Defendants (the "Alleged Chubb Policies") and policies issued by several other insurers.

This Court Is Divested of Jurisdiction

4. Given ACL's appeal of the order appointing receivership, upon which the Third-Party Complaint is based, this Court is divested of jurisdiction of the entire third-party proceeding under Rule 205. Rule 205 provides that "the appellate court shall have exclusive jurisdiction over the appeal" except that the trial court may proceed "with matters not affected by the appeal." Rule 205, SCACR. "[T]he existence or nonexistence of a stay under Rule 241 does not control the [lower] court's power to proceed with the action . . . Rather the lower court's power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a matter affected by the appeal under Rules 205 and 241(a)." *See Tillman*, 398 S.C. at 255 (internal quotations and alterations omitted). This rule applies to matters affected by the appeal in any proceeding. *See Stokes–Craven Holding Corp. v. Robinson*, 416 S.C. 517 (2016) (applying ouster of jurisdiction to separate action with a common party whose claims were based upon the outcome of the appealed order). Thus, this Court is divested of jurisdiction over any matters in this third-party action that are affected by ACL's appeal of the receivership. Because the Third-Party Complaint was brought by the Receiver whose appointment is on appeal, the entire third-party action is "affected by the appeal." The Court should issue an order confirming that it cannot proceed with the third-party action and the Receiver cannot continue to prosecute his claims until ACL's appeal is resolved.

5. To the extent the Court disagrees that the scope of Rule 205 precludes the Receiver from proceeding with the third-party action pending the disposition of the appeal by the Court of Appeals, the Court should nonetheless exercise its discretion to stay the proceeding. Courts have broad discretion to stay proceedings as part of their inherent power to control their own dockets. *See, e.g., Avoki v. City of Chester*, S.C., 2020 WL 1080439, at *4 (D.S.C. Mar. 6, 2020). One of

the causes of action relates to the rights of the Receiver appointed over ACL. Whether or not the Receiver has authority over ACL affects the propriety of the entire Third-Party Complaint brought by and through that Receiver. It would be a waste for the parties and the Court to engage in the expensive and time-consuming discovery process if the third-party action does not survive ACL's appeal of its receivership. Thus, to conserve judicial and party resources, the Court should stay the case until ACL's appeal is resolved.

Dismissal Is Warranted Under Rule 12(b)(1)

6. If the third-party action is not stayed, the Receiver's claims against the Chubb Defendants in the Third-Party Complaint should be dismissed because the Receiver lacks standing to bring the claims.

7. The Receiver was not properly appointed over ACL in this case and lacks standing to bring this Third-Party Complaint, on ACL's behalf, against the Chubb Defendants. *See S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 341 (2022) ("If a plaintiff lacks standing, he does not have the right to proceed to the merits of his claim against the defendant."). As such, the Third-Party Complaint must be dismissed because the Court lacks subject matter jurisdiction under Rule 12(b)(1). *See id.* at 340 ("A motion to dismiss for lack of standing challenges the court's subject matter jurisdiction.").

8. The Supreme Court limits the territorial authority of a receiver as only over property within the state in which he is appointed. *Booth v. Clark*, 58 U.S. 322 (1854). Recognizing this limitation, the General Assembly limited the creation of receiverships over foreign companies to property located within the State of South Carolina. S.C. Code § 15-65-10(4) (limiting receivership to "property within this State of foreign corporations"). Thus, without property located within the State, a receivership is improper.

9. On September 8, 2023, Peter D. Protopapas was appointed as Receiver of the insurance assets of ACL, over ACL's objections. To support the appointment, Plaintiffs claimed that the alleged insurance policies are property located in South Carolina. This argument fails

under South Carolina law. The South Carolina Supreme Court has already held that liability insurance policies are *not* property subject to in rem jurisdiction. *See Howard v. Allen*, 254 S.C. 455, 461 (1970) (rejecting in rem jurisdiction and finding that as long as an insurer’s “obligation to defend and indemnify are fully performed, there is nothing of economic value to which the insured may make claim, receive, or assign.”) (emphasis added).

10. An insurance asset is either located at the domicile of the creditor (ACL) or the debtor (the insurance company). *Chicago, R.I. & P. Ry. Co. v. Sturm*, 174 U.S. 710, 715–16 (1899). Alternatively, some courts have held for tax purposes that “the situs of intangible personal property is at the domicile of the owner.” *National Leather Co. v. Com.*, 256 Mass. 419, 424 (1926). Regardless of which rule applies, the insurance policies are not located in South Carolina.

11. Moreover, Plaintiffs present no evidence that any policies insured lives, interests, or property in South Carolina. ACL is a Canadian company that sold products from Canada and received payment in Canada. To the extent Plaintiffs allege that any policies insured lives, property or interests in South Carolina merely because the policies may provide liability coverage to an insured for injuries that occurred in South Carolina, South Carolina’s appellate courts have held that this is not enough. *See, e.g., Gordon v. Colonial Ins. Co. of Calif.*, 342 S.C. 152 (Ct. App. 2001) (holding South Carolina insurance choice of law statute did not apply to policy issued in Virginia to Virginia resident even though collision occurred in South Carolina).

12. ACL has no insurance assets within South Carolina over which the Receiver can properly take control. Thus, the Court lacks subject matter jurisdiction over the claims in the Third-Party Complaint, and the Third-Party Complaint must be dismissed.

Dismissal Is Warranted Under Rule 12(b)(6)

13. If the third-party action is not stayed, the claims against the Chubb Defendants in the Third-Party Complaint should be dismissed for failure to state a claim upon which relief can be granted.

14. Under Rule 12(b)(6), a claim must be dismissed if it fails to state facts sufficient to constitute a cause of action. SCRCP 12(b)(6). To state a cause of action for declaratory judgment, “a party must demonstrate a justiciable controversy.” *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71 (1995). A justiciable controversy exists “[w]here a concrete issue is present, and there is a definite assertion of legal rights and a positive legal duty with respect thereto, which are denied by the adverse party.” *Power v. McNair*, 255 S.C. 150, 153–54 (1970) (internal citation and quotation omitted). “An issue that is contingent, hypothetical, or abstract is not ripe for judicial review” and there must be “a real or actual controversy between the litigants at the time of the institution of the DJ Action.” *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 595 (2013) (internal citation and quotation omitted).

There Is No Justiciable Controversy as to Unidentified Policies

15. The Court should dismiss the claims against the Chubb Defendants to the extent they relate to unidentified policies. The Receiver alleges that the Chubb Defendants issued “at least the following policies to ACL that are responsive to this lawsuit.” See Third-Party Compl. ¶¶ 9, 21.

16. The Receiver’s claims relating to the unidentified policies seek declarations that are contingent, hypothetical, and abstract, and should be dismissed. See *Power*, 255 S.C. at 153–54 (no justiciable controversy where there is no “concrete issue” and “definite assertion of legal rights and a positive legal duty with respect thereto”) (internal citation and quotation omitted). At a minimum, those claims should be dismissed.

17. In the alternative, if the Court does not dismiss the claims relating to these unidentified policies, the Court should require the Receiver to provide a more definite statement pursuant to Rule 12(e). Rule 12(e) provides: “If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading.” SCRCP 12(e). The Receiver’s claims relating to unidentified policies are so vague and

ambiguous that the Chubb Defendants cannot even determine which policies it is referencing, let alone the terms and conditions of the policies and how they apply to these claims. At a minimum, the Receiver should be required to set forth the policy numbers and any other identifying information for the policies under which it is seeking coverage.

There Is No Justiciable Controversy Against the Chubb Defendants as to the Receiver's Document Requests

18. The Receiver's first cause of action, which seeks a declaration that "all policies, evidence of policies and documents relating to their placement, purchase and underwriting . . . are deemed to be 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," must be dismissed for several reasons. Third-Party Compl. ¶ 36.

19. The Receiver is not entitled to all documents relating to the policies' "placement, purchase and underwriting" because they are not ACL's property. The Receiver has not cited any South Carolina law that entitles an insured to "all documents" related to the placement, purchase, or underwriting of an insurance policy. That information contains sensitive proprietary information developed by the Chubb Defendants to place the policy. The Receiver might be entitled to these documents as a matter of discovery in litigation where those documents are relevant to the claims, but that entitlement does not make those documents the "property" of the Receiver.

20. The request that the policies be maintained in the Receiver's "sole possession" fails as a matter of law. As an initial matter, insurance policies are not a tangible piece of property capable of being possessed. *See, e.g., Shaff v. Farmers New World Life Ins. Co.*, 2017 WL 5643173, at *3 (C.D. Cal. Oct. 23, 2017) (noting that an "insurance policy is not tangible personal property" because it "lacks a physical existence"). Furthermore, such a declaration would divest the Chubb Defendants of their rights to control defense of the lawsuits against ACL and improperly expand the geographic limitations of the Receiver's authority. As a matter of South Carolina law, the Chubb Defendants—not the Receiver—retain the right to determine how their duties under the

policies are executed. *See, e.g., Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C.*, 433 F.3d 365, 374 (4th Cir. 2005). A declaration that the policies are in the “sole possession” of the Receiver “for his unrestricted use” would violate the Chubb Defendants’ rights to administer the defense of ACL against the various asbestos claims. Under South Carolina law, the Receiver’s authority is limited to administration of corporate “property within [South Carolina] of foreign corporations.” S.C. Code § 15-65-10(4). ACL is an active Canadian corporation. The Receiver’s geographic authority does not extend to any of the other states or countries where ACL might face lawsuits similar to the Mitchell Action. The Chubb Defendants, subject to all the terms and conditions of their policies, would potentially owe the same duties to protect ACL in these other jurisdictions. As such, because the Receiver lacks authority outside of South Carolina, he has no entitlement to a declaration of “sole possession” of the Alleged Chubb Policies for his “unrestricted use.”

21. In any event, the Receiver’s authority is currently being challenged on appeal and the Court should not determine his rights to documents related to insurance policies issued to ACL until that appeal is resolved.

22. Accordingly, the Receiver’s first cause of action for declaratory relief fails to state a claim upon which relief can be granted and should be dismissed with prejudice.

There Is No Justiciable Controversy as to Unidentified Claims

23. The Court should also dismiss the Receiver’s claims seeking coverage for unidentified suits.

24. As noted, a cause of action for declaratory judgment can only be maintained if there is a justiciable controversy, and an issue that is “contingent, hypothetical, or abstract is not ripe for judicial review.” *Rhodes*, 405 S.C. at 595 (internal citation and quotation omitted).

25. The Receiver alleges that “[t]he alleged bodily injury resulting from the Asbestos Allegations has resulted in suits against ACL (‘ACL Asbestos Suits’), including the instant suit filed by Ted Everette Mitchell, individually and as Executor of the Estate of Patsy Ann Mitchell.”

Third-Party Compl. ¶ 11. The Receiver seeks a declaration that the Third-Party Defendants are obligated to “defend ACL in full . . . against all asbestos suits alleging bodily injury during the Third-Party Defendants’ policy periods.” *Id.*, Prayer for Relief, ¶ C. Other than the Mitchell Action, however, the Receiver does not identify any of the specific “ACL Asbestos Suits” at issue.

26. Without identifying the specific actions and specific facts at issue, the Receiver cannot present a specific, concrete matter for judicial resolution; instead, it seeks declarations that are contingent, hypothetical, and abstract. South Carolina courts routinely deny plaintiffs’ requests for declarations such as these that relate to future or unidentified harms. *See, e.g., Thompson v. State*, 415 S.C. 560, 567 (2016) (declaration about what plaintiff would be required to do in the future “would be purely advisory” and “does not present a judicable controversy”); *Jowers v. S.C. Dept. of Health and Environmental Ctrl.*, 423 S.C. 343, 360 (2018) (plaintiff’s “claim for future injury is not ripe for our determination”); *Kiawah Prop. Owners Grp. v. The Public Serv. Comm’n of S.C.*, 357 S.C. 232, 243 (2004) (no “present, justiciable controversy” where plaintiff alleged only that a contract “may have some negative impact in the future”); *see also Brown-Thomas v. Hynie*, 441 F. Supp. 3d 180, 198 (D.S.C. 2019) (“In the majority of instances, a claim should be dismissed as unripe if the plaintiff has not yet suffered injury and any future impact remains wholly speculative.”) (quotations and citations omitted).

Dismissal Is Warranted Under Rule 12(b)(7)

27. The Third-Party Complaint should also be dismissed for failure to join all necessary and indispensable parties.

28. A motion to dismiss under Rule 12(b)(7) is appropriate where “a necessary party under Rule 19 should be joined for a just adjudication of the issues.” *BancOhio Nat’l Bank v. Neville*, 310 S.C. 323, 326 (1993). “The rule provides an affirmative defense for the failure to join any interested party who is subject to service of process, and who will not deprive the court of jurisdiction over the subject matter under Rule 19, SCRCP.” *Id.* “Once the defense of Rule

12(b)(7) is asserted, the proper course for the trial court is to determine the necessity of adding a new party under Rule 19 to insure a full adjudication of the controversy.” *Id.* at 328.

29. The Receiver has failed to join all necessary and indispensable parties to its action by failing to join all insurers that have issued policies that may provide coverage. Where multiple insurers cover the insured’s same liability for the same time period, all the insurers are indispensable parties to an adjudication as to coverage. *Evergreen Park Nursing & Convalescent Home, Inc. v. Am. Equitable Assur. Co.*, 417 F.2d 1113 (7th Cir. 1969) (absent insurers are indispensable parties, even though insurance contracts create separable obligations). This is even more pronounced in cases where insurers provide coverage for different periods. *See also Schlumberger Indus., Inc. v. Nat’l Sur. Corp.*, 36 F.3d 1274, 1286–87 (4th Cir. 1994) (“This potential for factual, as opposed to legal, ‘whipsaw’ argues strongly in favor of having one court adjudicate the entire matter with all the parties before it, and is, we think, sufficient to establish that [the insured’s] insurers are all both necessary and indispensable parties.”).

ACL’s Claims Should Be Stricken Pursuant to Rule 14(a)

30. The Receiver’s claims against the Chubb Defendants should also be stricken pursuant to Rule 14(a).

The Third-Party Complaint Is Not Asserted Against a Party “Who Is or May Be Liable to [the Defendant] for All or Part of the Plaintiff’s Claim”

31. Rule 14(a) provides that a defendant may commence a third-party complaint against a party “who is or may be liable to [the defendant] for all or part of the plaintiff’s claim.” SCRC P 14(a). To be proper, a third-party complaint must allege that the liability of the third-party defendant on the claim against it “is in some way dependent upon the outcome of the main claim.” *Laughlin v. Dell Fin. Servs., L.P.*, 465 F. Supp. 2d 563, 567 (D.S.C. 2006).¹ Rule 14 does not allow the defendant to assert a separate and independent claim, even if the claim arises out of the

¹ The Note to Rule 14 indicates that it was drafted to be “substantially the same as the Federal Rule 14,” so federal law is cited whenever squarely applicable.

same general set of facts as the main claim. *Id.* The Rule provides that “[a]ny party may move to strike the third-party claim, or for its severance or separate trial.” *Id.*

32. None of the claims here seek a ruling that the Chubb Defendants are liable to ACL for all or part of the tort claims by Plaintiffs. As discussed above, the Third-Party Complaint seeks declarations relating to unidentified claims against ACL, unrelated to the Mitchell Action. And even the claims relating to the Mitchell Action seek several declarations that are not alleged to be dependent on the outcome of the main claim in the Mitchell Action. For example, the Receiver seeks declarations regarding the defense obligations of the third-party defendants to ACL and “the interpretation and meaning of ACL’s insurance policies.” Third-Party Compl., Prayer for Relief, ¶ C. The Receiver’s allegations raise independent coverage issues unrelated to the Mitchell Action. The Receiver’s claims against the Chubb Defendants, therefore, are not properly asserted under Rule 14. *See Cruz v. Weber-Stephen Prods., LLC*, 2018 WL 296062, *3 (N.D. Tex. Jan. 4, 2018) (quoting *Majors v. Am. Nat’l Bank of Huntsville*, 426 F.2d 566, 568 (5th Cir. 1970)) (Rule 14 “is not designed as a vehicle for the trying together of separate and distinct causes of action, or for the introduction, into the main action, of several parallel but independent, actions, or separate and independent claims.”).

The Third-Party Lawsuit Will Unduly Complicate the Litigation and/or Prejudice the Parties

33. Third-party complaints may also be stricken or severed when the third-party lawsuit “will serve to complicate the litigation unduly or will prejudice other parties in any substantial way.” *Beach v. Hudson*, 380 S.E.2d 869, 871 (S.C. App. 1989); *see also Ballard v. S. Cotton Oil Co.*, 145 F. Supp. 886, 887 (E.D.S.C. 1956) (applying South Carolina law and refusing to permit the interpleader because injecting insurance into a trial would be prejudicial to the insurer).

34. Here, the Third-Party Complaint clearly complicates this litigation by adding three new causes of action seeking fourteen different declarations and adding four parties as third-party defendants. These additional claims and third-party defendants “would all but submerge the plaintiffs’ claim,” and should be stricken. *See Beach*, 380 S.E.2d at 871 (striking third-party

complaint because court deemed that adding four additional parties and seven causes of action would unduly complicate the litigation).

35. The Third-Party Complaint will also substantially prejudice the Chubb Defendants. Under South Carolina law, prejudice arises when the third-party complaint “introduce[s] unrelated issues and unduly complicate[s] the original suit.” *Id.* Furthermore, as commentators and courts have observed, a defendant and its insurer may be prejudiced if insurance is injected into a tort action because the jury “may decide to increase the damages awarded to plaintiff” if it is “aware of the insurance company’s existence.” 6 C. Wright, A. Miller & M. Kane, 6 Fed. Prac. & Proc. Civ. § 1443 (3d ed.).

36. In *Cox v. E. I. Du Pont de Nemours & Co.*, 39 F.R.D. 47, 51 (W.D.S.C. 1965), for example, the United States District Court held that “reference to any liability insurance, in cases of this nature, are inadmissible and prejudicial.” As a result, the District Court dismissed a third-party action in which E.I. Du Pont sought coverage under an insurance policy. Although the District Court in that case addressed the issue under North Carolina law, South Carolina applies the same rule barring reference to insurance in a tort case. *See, e.g., Bartwell v. Willis Const. Co.*, 259 S.C. 20, 24 (1972) (“It is well established that the fact that a defendant is protected by insurance or indemnity bond from liability in an action for damages shall not be known to the jury. The reason of the rule is to avoid prejudice in the verdict . . .”) (citation omitted); Rule 411, SCRE (“Evidence that a person was or was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully”); *Todd v. Joyner*, 385 S.C. 509, 514 (2008) (“The reasoning behind this rule was to avoid prejudice in the verdict, which might result from the jury’s knowledge that insurance, and not the defendant, would be responsible for paying any resulting award of damages.”) (citation omitted); *Crocker v. Weathers*, 240 S.C. 412, 424 (1962) (“The long-established rule of our decisions is that the fact that a defendant is protected from liability in an action for damages by insurance shall not be made known to the jury.”).

37. Indeed, other courts applying the South Carolina Rules and their federal counterparts have repeatedly held that claims involving insurance coverage should not be combined in the same action as the underlying tort claims against the insured. *See Builders Mut. Ins. Co. v. Island Pointe, LLC*, 431 S.C. 93 (2020) (affirming denial of insurer's motion to intervene in tort action and trial court's decision "to leave all coverage issues to a subsequent declaratory judgment action"); *Thomas v. Tramaine-Frost*, 2017 WL 9287004, at *3 (D.S.C. Jan. 12, 2017) (severing negligence claims against an alleged tortfeasor from coverage claims against an insurer); *Todd v. Cary's Lake Homeowners Ass'n*, 315 F.R.D. 453 (D.S.C. 2016) (severing tort claims from claims against insurer); *Cramer v. Walley*, 2015 WL 3968155, *4–5 (D.S.C. June 30, 2015) (holding that claims for negligent operation of automobile should not be joined with claim against insurer for declaratory judgment on coverage).

38. Under these circumstances, the claims against the Chubb Defendants in the Receiver's Third-Party Complaint should be stricken or, in the alternative, severed into a separate action.²

This motion is based upon the memorandum of support to be filed later, the statutes and case law of the State of South Carolina, the pleadings filed in this matter, and such other material as may be properly received by the Court in connection therewith.

[SIGNATURE PAGE FOLLOWS]

² The Third-Party Complaint's joinder of claims against the Chubb Defendants with the claims against other insureds, insurers, and other parties is also improper under Rule 20. The claims against these other parties are not alleged to arise out of the same transaction, occurrence, or series of transactions or occurrences.

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*Counsel for Third-Party Defendants Century
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Company*

October 23, 2023

Exhibit F

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Ted Everette Mitchell, individually and as
Executor of the Estate of Patsy Ann Mitchell,

Plaintiffs,

v.

3M Company, et al.,

Defendants.

Asbestos Corporation Limited, By and Through
Its Duly Appointed Receiver Peter D.
Protopapas,

Third-Party Plaintiff,

v.

Century Indemnity Company, as successor to
CCI Insurance Company, as successor to
Insurance Company of North America; The
Continental Insurance Company; Federal
Insurance Company; and Travelers Casualty
and Surety Company fka The Aetna Casualty
and Surety Company;

Third-Party Defendants.

Case No. 2022-CP-40-02979

**NOTICE OF MOTION AND MOTION
BY THE CONTINENTAL INSURANCE
COMPANY TO DISMISS, STAY,
AND/OR STRIKE THE THIRD-PARTY
COMPLAINT, OR, IN THE
ALTERNATIVE, TO SEVER THE
THIRD-PARTY COMPLAINT OR, IN
THE FURTHER ALTERNATIVE, FOR
A MORE DEFINITE STATEMENT**

**TO: BRIAN M. BARNWELL, ESQUIRE, ATTORNEY FOR THE THIRD-PARTY
PLAINTIFF**

YOU WILL PLEASE TAKE NOTICE that Third-Party Defendant The Continental Insurance Company ("Continental"), by and through its undersigned counsel, does hereby move: (1) for an order dismissing or staying this third-party action pursuant to South Carolina Appellate Court Rules 205 and 241; and (2) if this third-party action is not dismissed or stayed pursuant to

Rule 205 or 241, for an order dismissing and/or striking the claims against Continental in the Third-Party Complaint (the “Third-Party Complaint” or “TPC”) pursuant to South Carolina Rules of Civil Procedure 12(b)(6) and 14(a) or, in the alternative, severing such claims, or, in the further alternative, requiring a more definite statement pursuant to SCRCP 12(e). The grounds for this motion, which are discussed more fully in Sections I through IV herein, may be summarized as follows.

First, Asbestos Corporation Limited (“ACL”) is the subject of two closely related orders by this Court. On September 8, 2023, the Court held ACL in contempt and struck its pleadings in *Tibbs v. 3M Company, et al.*, No. 2023-CP-40-01759 (Cir. Ct. – Richland Cty., S.C.). On the same day, the Court entered a second order in the *Tibbs* action that was predicated on the first order and appointed Peter D. Protopapas as Receiver for ACL. ACL promptly filed a notice of appeal on September 13, 2023 as to both orders. This notice of appeal established the exclusive jurisdiction of the Court of Appeals and automatically stayed the effect of both orders. Nevertheless, despite the notice, Mr. Protopapas on September 19, 2023 filed the present third-party action against Continental and other insurers. The Third-Party Complaint relied entirely on authority granted to Mr. Protopapas pursuant to the appealed orders that ACL had challenged. Because this action was filed at a time when the authority of Mr. Protopapas to act as Receiver was stayed, the Third-Party Complaint was void ab initio and should be dismissed. In the alternative, because the third-party action unquestionably will be affected by the appeal, it lies within the exclusive jurisdiction of the Court of Appeals and is automatically stayed pursuant to Rules 205 and 241.

Second, the claims asserted against Continental by the Receiver in the Third-Party Complaint relate to an insurance policy that Continental allegedly issued to ACL. This complaint alleges that an unspecified number of lawsuits for asbestos-related bodily injury have been filed

against ACL based on its historic operations that included the sale of asbestos-containing products and asbestos materials. These allegations do not state an actual justiciable controversy with Continental, and also do not involve claims by a party to the original action asserting that Continental is or may be liable to Third-Party Plaintiff for all or part of the claims of the underlying Plaintiff Ted Everette Mitchell, individually and as Executor of the Estate of Patsy Ann Mitchell (“Plaintiff”). Accordingly, if the third-party action is not dismissed or stayed pursuant to SCACR 205 and 241, the claims against Continental should be dismissed and/or stricken under SCRCP 12(b)(6) and 14, or, in the alternative, severed into a separate action, or, in the further alternative, subject to an order requiring a more definite statement under SCRCP 12(e).

BACKGROUND

This is an asbestos personal injury action. On May 17, 2023, Plaintiff filed an Amended Complaint that included ACL. The Amended Complaint alleges injury as a result of exposure to asbestos and asserts that ACL “is liable for damages stemming from its own tortious conduct[.]” Amended Complaint, ¶13.

On September 8, 2023, in a separate asbestos action (*Tibbs*), this Court entered two orders regarding ACL. By its Order of September 8, 2023, the Court held ACL in contempt of court and struck its pleadings in the *Tibbs* action (the “Contempt Order”). Then, by a second Order also entered in the *Tibbs* action on September 8, 2023, the Court appointed Peter D. Protopapas as Receiver for ACL to “marshal all of the available insurance assets” for ACL and take other actions specified in the order (“Receivership Order”).

As the basis for the Receivership Order, the Court cited and relied upon its Contempt Order holding ACL in contempt of court and striking ACL’s answer. The Receivership Order stated that “where, as here, ACL’s answer has been struck, and thus only a ministerial action being left for

ACL to be in judgment, a receiver to take possession of and, to the extent necessary, litigate ACL's insurance assets as well as to assume control of the defense of asbestos claims made against ACL in the United States is exactly the type of historical circumstances, the Court's of this state have found appropriate." Receivership Order, p.3. The Court further found that "where there is active wrongdoing and illegal refusal to comply with this Court's orders, the appointment of a receiver is appropriate." *Id.*

On September 13, 2023, ACL filed a notice of appeal as to the Contempt Order on which the appointment of the Receiver was predicated, as well as the Receivership Order itself.¹

Nevertheless, on September 19, 2023, Mr. Protopapas (who himself was not a party to this lawsuit and took no action to join it) filed a purported Third-Party Complaint in this action. The Third-Party Complaint asserts multiple causes of action against four insurers alleged to have issued policies to ACL that are "responsive to this lawsuit." TPC, ¶¶9, 15, 21, 27. It seeks declarations requiring the third-party defendants to compensate him "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." *Id.* ¶48. It also seeks, among other things, an array of abstract, hypothetical, and contingent declarations that do not present a specific, concrete matter for judicial resolution. *Id.* ¶¶39-40 & Prayer for Relief.

In conjunction with filing the Third-Party Complaint, Mr. Protopapas immediately served voluminous and wide-ranging discovery requests. As to Continental, this onerous discovery entails 183 separate requests (27 interrogatories and 156 document requests), the vast majority of

¹ The orders attached to and incorporated in the Notice of Appeal are: "Order Holding Atlas Asbestos Company, Ltd. in Contempt" (September 8, 2023) and "Order on Plaintiffs' Motion to Appoint a Receiver" (September 8, 2023).

which demand information on subjects that go far beyond the *Mitchell* suit or the policy allegedly issued to ACL.

ARGUMENT

I. **The Third-Party Action Should Be Dismissed Or Stayed Pursuant To Rules 205 and 241**

Rule 205 provides as follows:

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.

Rule 205, SCACR. Pursuant to this Rule, “the service of a notice of appeal divests the trial court of jurisdiction over matters affected by the appeal.” *Stokes-Craven Holding Corp. v. McKenzie*, 416 S.C. 517, 532 (2016); *accord Tillman v. Oakes*, 398 S.C. 245, 255 (2012). “Affected” as used in the rule has been defined as “to produce an effect on; to influence in some way.” *Stokes-Craven*, 416 S.C. at 534, quoting *Black’s Law Dictionary* 68 (10th ed. 2014).

Here, Mr. Protopapas seeks to use the jurisdiction of this Court to prosecute a third-party action and use the discovery tools attendant to that judicial proceeding. He does so even though the third-party action against the third-party defendants seeks to exercise authority that depends wholly upon his appointment by the Receivership Order predicated upon the Contempt Order. The third-party action was expressly brought by Mr. Protopapas as “duly appointed receiver” for ACL. TPC, p.1. This appointment, as discussed above, was based upon the Contempt Order holding ACL in contempt and striking its answer. Under these circumstances, this third-party action unquestionably will be “affected” by the appeal of the Contempt Order and the Receivership Order. This Court therefore lacks jurisdiction to proceed with the third-party action and discovery therein,

and the Receiver cannot proceed with such litigation activity during the pendency of the appeal.

In addition, the impact of the pending appeal extends further in this matter. Rule 241(a) provides as follows:

As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree, or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Rule 241(a), SCACR. Under the terms of this Rule, the matters decided in the appealed orders and the relief ordered therein were automatically stayed by the notice of appeal. This stay extends to any action taken pursuant to the relief granted by the appealed order. Accordingly, as of September 13, 2023, any authority of Mr. Protopapas to take action as Receiver was stayed. Under these circumstances, the Third-Party Complaint filed in this action on September 19, 2023 was void ab initio and should be dismissed.

It should be noted that, under the circumstances of the present matter, the application of Rules 205 and 241 is not altered by SCRCP Rule 62(a). Rule 62 is entitled “Stay of Proceedings to Enforce a Judgment” and subsection (a) is entitled “Automatic Stay: Exceptions – Injunctions, Receivership, and Accountings.” Rule 62(a) provides that “no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry.” This rule has an exception stating that “an interlocutory or final judgment . . . 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.” Rule 62(a), SCRCP.

Importantly, Rule 62(a) only addresses the application of a “stay.” It does not purport to

abridge or alter the exclusive jurisdiction of the Court of Appeals. Rule 205 provides no exceptions other than for “matters not affected by the appeal.” Because this third-party action is undeniably “affected by the appeal,” Rule 205 is thus dispositive and sufficient in itself to require suspension of the Receiver’s attempt to litigate the third-party action in this Court.

In addition, although consideration of Rule 241 is not necessary to grant this motion, the application of Rule 241(a) in the present matter is also not altered by Rule 62(a).

Rule 62(a) only applies to “execution . . . upon a **judgment** [and] . . . proceedings . . . for its enforcement.” Likewise, the rule’s exception in pertinent part applies only to “an interlocutory or final **judgment . . . in a receivership action.**” “Judgment” as defined in Rule 54(a) “includes any decree or order which dismisses the action as to any party or finally determines the rights of any party.” See *Gateway Enters., Inc. v. S.C. Dept. of Revenue*, 341 S.C. 103, 106 (2000) (stating that Rule 62(a) “applies only to judgments as defined in Rule 54(a)”) (quoting Wright & Miller, *Federal Practice and Procedure*, Section 2902 (2d ed. 1995)).

By its own terms, Rule 62(a) does not apply to the present matter. The Receivership Order does not dismiss any action. It does not purport to finally determine the rights of any party. The Receivership Order accordingly is not a “judgment” within the meaning of this rule and the present action does not involve any execution or enforcement of a “judgment.”²

Furthermore, as pertinent here, the Receivership Order was not a stand-alone order

² The limited scope of Rule 62(a) is further apparent from S.C. Code Section 14-3-450. This statute expressly provides that “[i]n the case of an appeal under item (4) or Section 14-3-330 [which authorizes the appeal of orders or decrees “granting, continuing, modifying, or refusing the appointment of a receiver”], the proceedings **in other respects** in the court below shall not be stayed during the pendency of the appeal unless otherwise ordered by the court below” (emphasis added). Thus, if a case includes “other” aspects that do not involve the appointment of a receiver, the unaffected aspects may not be stayed, but Section 14-3-450 leaves no doubt that the stay applies to the receivership appointment when it is appealed.

concerning an insolvent entity. It involved a viable entity – and was expressly dependent upon findings and rulings set forth on the Contempt Order holding ACL in contempt of court and striking ACL’s answer. That order was entered prior to the appointment of a Receiver and made no reference whatsoever to a receivership. The Contempt Order plainly was not a judgment “in a receivership action.” As such, the Contempt Order unquestionably is not subject to the Rule 62(a) exception. Because this non-receivership order has been appealed, all “matters decided” in the Contempt Order and the Receivership Order predicated thereon were and are stayed, including the appointment of the Receiver and the Receiver’s actions purportedly based on his authority thereunder.

For the above reasons, no legitimate reason exists in this matter to disregard the exclusive jurisdiction of the Court of Appeals under Rule 205 and the automatic stay under Rule 241(a). To the contrary, it plainly would be inequitable, inefficient, and a waste of judicial resources to litigate insurance coverage issues raised by the Receiver before the threshold challenges to the orders relating to the receivership appointment have been resolved. Although the application of Rules 205 and 241 is automatic and does not require an order by this Court, the Receiver’s insistence upon prosecuting this litigation has made it necessary for Continental to raise the matter at this time. As the Receiver filed the Third-Party Complaint after the service of the notice of appeal, this Court should dismiss this action and affirm that the Contempt Order, the Receivership Order, and the Receiver’s authority to act, including his filing and prosecution of claims and discovery against Continental in this third-party action, were and continue to be stayed. This Court also should affirm that the exclusive jurisdiction over this matter lies with the Court of Appeals. Further, under the particular circumstances of this action and even if the Court disagrees that the scope of Rules 205 and 241 requires a dismissal or stay, the Court should exercise its discretion to

stay this proceeding.

II. The Claims In The Third-Party Complaint Against Continental Should Be Dismissed Under Rule 12(b)(6)

If the third-party action is not dismissed or stayed pursuant to Rule 205 or 241, the claims against Continental in the Third-Party Complaint should be dismissed for failure to state a claim upon which relief can be granted.

To state a cause of action for declaratory judgment, “a party must demonstrate a justiciable controversy.” *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71 (1995). A justiciable controversy exists “[w]here a concrete issue is present, and there is a definite assertion of legal rights and a positive legal duty with respect thereto, which are denied by the adverse party.” *Power v. McNair*, 255 S.C. 150, 153-54 (1970) (internal quotation and citation omitted). “An issue that is contingent, hypothetical, or abstract is not ripe for judicial review,” and there must be “a real or actual controversy between the litigants at the time of the institution of the DJ Action.” *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 595 (2013) (internal citation and quotation omitted).

The Third-Party Complaint fails to allege facts demonstrating an actual justiciable controversy with Continental, and the First, Second and Third Causes of Action should accordingly be dismissed as to Continental. The Receiver asserts that Continental has a duty to defend or reimburse defense costs with respect to the “ACL Asbestos Suits.”³ TPC, ¶¶8, 38-39, 44-45, 48. Yet the Third-Party Complaint never fully identifies the lawsuits at issue. See TPC, ¶8, Prayer for Relief. The Third-Party Complaint uses generic and nonspecific phrases, such as “ACL Asbestos Suits” and “asbestos suits potentially covered under the Third-Party Defendants’ policies” to refer to the lawsuits in which a justiciable controversy purportedly exists, TPC, ¶¶8, 39, 43, 44, 48, but

³ Paragraph 8 only refers to “the instant suit filed by Ted Everette Mitchell, individually and as Executor of the Estate of Patsy Ann Mitchell.”

never defines or identifies these lawsuits. Likewise, the Third-Party Complaint seeks declarations on various insurance coverage issues concerning these unspecified lawsuits. With the exception of the *Mitchell* suit, the Receiver fails to identify any particular pending asbestos action as to which he contends these issues have arisen and as to which an actual controversy currently exists with Continental. Without identification of specific actions and the specific facts in each action required to allege a present controversy with Continental, the Third-Party Complaint does not present a specific, concrete matter for judicial resolution, but rather seeks declarations that are abstract, hypothetical, and contingent.

The duty to defend, which is the subject of multiple declarations sought in the Second and Third Causes of Action, cannot be determined without identification of the specific lawsuit at issue. Under basic principles of law, “the duty of a liability insurance company to defend a claim brought against its insured [is] determined by the allegations of the third party’s complaint.” *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 15 (Ct. App. 1994), *aff’d*, 321 S.C. 310 (1996). The Receiver has not identified the particular lawsuits as to which he seeks relief – let alone the allegations of the complaints therein – and relief thus cannot be granted on these declarations concerning the duty to defend.⁴ Similarly, issues relating to any duty to indemnify (TPC, ¶39) also cannot be adjudicated in a vacuum. *See Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 595 (2013). Accordingly, the declaratory judgment claims by the Receiver against Continental should be dismissed pursuant to Rule 12(b)(6).

⁴ The First Cause of Action seeks a declaration that Continental and the other third-party defendants must provide the Receiver with copies of responsive policies. The Third-Party Complaint does not allege that any justiciable controversy exists in this regard. The absence of such an allegation is dispositive because one of the requirements for a ripe controversy is that “there is a definite assertion of legal rights and a positive legal duty with respect thereto, which are denied by the adverse party.” *Power*, 255 S.C. at 153-54.

The Third-Party Complaint includes a request for a declaration as to present and future Receiver's fees and expenses. The Receiver requests declarations that Continental must compensate the Receiver for "asbestos suits potentially covered under the Third-Party Defendants' policies" and that "this obligation is unlimited" but fails to identify the underlying asbestos suits, nor could it identify such future lawsuits. TPC, ¶48. Such an indefinite request about unknown and unknowable underlying lawsuits is an improper request for declaratory relief. As discussed above, the existence of an insurer's duty to defend cannot be determined without identification of the specific lawsuit(s) at issue and the allegations therein. In the absence of such allegations, there is no claim upon which relief can be granted and this request should be dismissed pursuant to Rule 12(b)(6).

III. The Claims In The Third-Party Complaint Against Continental Should Be Stricken Pursuant to Rule 14(a) or, in the Alternative, Severed

Rule 14(a) provides that a defendant may commence a third-party complaint against a party "who is or may be liable to [defendant] for all or part of the plaintiff's claim." Rule 14(a), SCRCF. The Rule further provides that "[a]ny party may move to strike the third-party claim, or for its severance or separate trial." *Id.*

Courts applying the South Carolina Rules and their federal counterparts have repeatedly held that claims regarding insurance coverage should not be combined in the same action as the underlying tort claims against the insured. *See Builders Mut. Ins. Co. v. Island Pointe, LLC*, 431 S.C. 93 (2020) (affirming denial of insurer's motion to intervene in tort action and trial court's decision "to leave all coverage issues to a subsequent declaratory judgment action"); *Thomas v. Tramaine-Frost*, 2017 U.S. Dist. LEXIS 29522 (D.S.C. Jan. 12, 2017) (severing negligence claims against an alleged tortfeasor from coverage claims against an insurer); *Todd v. Cary's Lake Homeowners Ass'n*, 315 F.R.D. 453 (D.S.C. 2016) (severing tort claims from claims against

insurer); *Cramer v. Walley*, 2015 U.S. Dist. LEXIS 84400 (D.S.C., June 30, 2015) (holding that claims for negligent operation of automobile should not be joined with claim against insurer for declaratory judgment on coverage).

A third-party complaint “must be derivative of the plaintiff’s claim because [d]erivative liability is central to the operation of Rule 14. 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.*” *Johnson v. M.I. Windows and Doors, Inc.*, No. 2:11-CV-0167, 2012 WL 1015798, at *2 (D.S.C. Mar 23, 2012) (emphasis in original) (internal citations and quotations omitted); *Laughlin v. Dell Fin. Servs., L.P.*, 465 F. Supp. 2d 563, 566 (D.S.C. 2006). Stated another way, a third-party complaint “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.” *CNH Industrial Capital America LLC v. Able Contracting, Inc.*, No. 9:16-cv-2520-RMG, 2017 WL 512453, at *1 (D.S.C. Feb. 7, 2017) (internal quotations omitted) (dismissing third-party complaint because claims were not derivative); *Johnson*, 2012 WL 1015798, at *2 (severing third-party complaint because claims were not derivative).

In this action, the Receiver improperly seeks to achieve this result by means of a third-party complaint under Rule 14. However, as noted above, this rule only permits impleader against a party “who is or may be liable to [defendant] for all or part of the plaintiff’s claim.” To be proper, a third-party complaint must allege that the liability of the third-party defendant on the claim against it “is in some way dependent upon the *outcome* of the main claim.” *Laughlin*, 465 F. Supp.

2d at 566.⁵ Rule 14 does not allow the defendant to assert a separate and independent claim, even if the claim arises out of the same general set of facts as the main claim. *Id.*

Here, none of the claims seek a ruling that Continental is liable to ACL for all or part of the tort claims by Plaintiff. As discussed above, the Third-Party Complaint does not seek any declaration specific to the claim of Plaintiff. Furthermore, the declaratory judgment claims do not seek any determination that Continental is liable for indemnification or any other claim that is alleged to be dependent on the outcome of the main claim in the *Mitchell* action. The Receiver's claims against Continental therefore are not properly asserted under Rule 14. *See Cruz v. Weber-Stephen Prods., LLC*, 2018 U.S. Dist. LEXIS 1243, at *6 (N.D. Tex. Jan. 4, 2018) (quoting *Majors v. Am. Nat'l Bank of Huntsville*, 426 F.2d 566, 568 (5th Cir. 1970)) (Rule 14 "is not designed as a vehicle for the trying together of separate and distinct causes of action, or for the introduction, into the main action, of several parallel, but independent, actions, or separate and independent claims.").

Furthermore, even in instances where the requirements of Rule 14 are satisfied (which they are not here), third-party complaints may still be stricken or severed when the third-party lawsuit "will serve to complicate the litigation unduly or will prejudice the other parties in any substantial way." *Beach v. Hudson*, 380 S.E.2d 869, 871 (S.C. App. 1989); *see Ballard v. S. Cotton Oil Co.*, 145 F. Supp. 886, 887 (E.D.S.C. 1956) (applying South Carolina law and refusing to permit the interpleader because injecting insurance into a trial would be prejudicial to the insurer). Here, the Third-Party Complaint clearly complicates this litigation by adding three new causes of action for declaratory judgment and adding four additional third-party defendants. By adding these claims,

⁵ The Note to Rule 14 indicates that it was drafted to be "substantially the same as the Federal Rule" 14, so federal law is cited whenever squarely applicable.

the Third-Party Plaintiff will “all but submerge” Plaintiff’s original claim and should be stricken. *Beach*, 380 S.E.2d at 871 (striking third-party complaint because court deemed that adding four additional parties and seven causes of action would unduly complicate the litigation). Under South Carolina law, prejudice arises when the third-party complaint “introduce[s] unrelated issues and unduly complicate[s] the original suit.” *Id.* Furthermore, as commentators and courts have observed, a defendant’s insurer may also be prejudiced if insurance is injected into a tort action because, among other things, the jury “may decide to increase the damages awarded to plaintiff” if it is “aware of the insurance company’s existence.” 6 C. Wright, A. Miller & M. Kane, 6 Fed. Prac. & Proc. Civ. § 1443 (3d ed.). Additionally, Continental may be prejudiced by Receiver’s decision to seek relief as part of the underlying tort action to the extent it allows Plaintiff to take part in and/or be privy to discovery related to Continental and/or insurance related information that Plaintiff would otherwise not be entitled to, including but not limited to information about the investigation, defense, and resolution of underlying claims.

For these reasons, the claims by the Receiver against Continental in the Third-Party Complaint should be stricken or, in the alternative, severed into a separate action.

In addition, Rule 14 provides that a third-party action may be brought by “a defending party” in the original action. Mr. Protopapas is not a party to this action, and did not seek or receive permission from the Court to intervene in the case prior to filing the third-party action. Likewise, neither Mr. Protopapas nor ACL sought leave to file a third-party complaint. For these additional reasons, the Third-Party Complaint should be stricken.

IV. In The Further Alternative, The Court Should Require a More Definite Statement

In the further alternative, and to the extent that the Court does not dismiss, stay, strike, or sever the claims by the Receiver, Continental moves for a more definite statement pursuant to Rule

12(e). For the reasons set forth above, the allegations in the Third-Party Complaint are so vague and ambiguous that it is not reasonable to request Continental to frame a responsive pleading. At minimum, the Receiver should be required to 1) set forth each specific claim(s) asserted against ACL for which a declaration as to coverage is sought, 2) set forth each policy or policies that are allegedly implicated, and 3) set forth the specific facts and material policy terms that allegedly support the declaration sought and demonstrate that an actual dispute exists.

This motion is based upon the foregoing, such memorandum of support as may be filed later, the statutes and case law of the State of South Carolina, the pleadings filed in this matter, and such other material as may be properly received by the Court in connection therewith.

WHEREFORE, Continental respectfully requests that the Court:

- Issue an order that this third-party action is dismissed or, alternatively, stayed pursuant to Rules 205 and 241.
- If this action is not dismissed or stayed pursuant to Rule 205 or 241, issue an order dismissing the claims against Continental in the Third-Party Complaint pursuant to Rule 12(b)(6) and 14(a) or, in the alternative, severing such claims, or, in the further alternative, requiring a more definite statement pursuant to Rule 12(e).

Dated: October 23, 2023

GORDON REES SCULLY MANSUKHANI, LLP

By: s/ A. Victor Rawl, Jr.

A. Victor Rawl, Jr. (SC 09261)

Email: vrawl@grsm.com

40 Calhoun Street, Suite 350

Charleston, SC 29401

Telephone: 843-278-5900

*Counsel for Third-Party Defendant
The Continental Insurance Company*

Exhibit G

From: [Tony Rebollo](#)
To: [Peter Protopapas](#); [Steve Pugh](#)
Cc: [Brian Barnwell](#); [Edwards, Brady](#); [Danny Nieto](#); [Gonzalez, Gabrielle R.](#); [McCulloch Semlinger, Lauren A.](#); [Edwards, Brady](#); [John Chandler](#); [McCall, III, Duke K.](#); [Fuener, Paul](#); [Surman, Jr., Ralph C.](#); [Horwitz, Noah M.](#); [Jon Robinson](#); [Wilder Harte](#)
Subject: RE: Atlas Motion for Protective Order and Court of Appeals Order on Stay
Date: Tuesday, September 12, 2023 4:10:12 PM

[EXTERNAL EMAIL]

Peter:

We will not be withdrawing the Motion for Protective Order and, accordingly, do wish to have it heard by the Court. Consistent with the relief requested in the Motion, the deposition of Mark Royko, unilaterally noticed for September 15, 2023, will not go forward for the reasons set forth therein.

Thank you.

Anthony E. Rebollo
(803)576-3722

From: Peter Protopapas <pdp@rplegalgroup.com>
Sent: Friday, September 8, 2023 4:48 PM
To: Steve Pugh <SPugh@RichardsonPlowden.com>; Tony Rebollo <TRebollo@RichardsonPlowden.com>
Cc: Brian Barnwell <BB@rplegalgroup.com>; Edwards, Brady <brady.edwards@morganlewis.com>; Danny Nieto <danny@rplegalgroup.com>; Gonzalez, Gabrielle R. <gabrielle.gonzalez@morganlewis.com>; McCulloch Semlinger, Lauren A. <lauren.semlinger@morganlewis.com>; Edwards, Brady <brady.edwards@morganlewis.com>; John Chandler <jchandler@rplegalgroup.com>; McCall, III, Duke K. <duke.mccall@morganlewis.com>; Fuener, Paul <paul.fuener@morganlewis.com>; Surman, Jr., Ralph C. <ralph.surman@morganlewis.com>; Horwitz, Noah M. <noah.horwitz@morganlewis.com>; Jon Robinson <jon@smithrobinsonlaw.com>
Subject: Atlas Motion for Protective Order and Court of Appeals Order on Stay

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Counsel

We are in receipt of your motion for protective order asserting that this matter is somehow stayed. Attached is the Court of Appeals Order setting forth Receiverships are not stayed pending appeal.

Please advise if you will withdraw the motion, which is without basis, or if you wish to have it heard by the Court.

Sincerely

Peter Protopapas

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Exhibit H

From: [Kevin K. Bell](#)
To: [Fuener, Paul](#)
Cc: [Peter Protopapas](#); [Brian Barnwell](#); [Lindsay Valek](#); [Danny Nieto](#); [Edwards, Brady](#); [McCall, III, Duke K.](#); [Nes, W. Brad](#); [McCulloch Semlinger, Lauren A.](#); [Surman, Jr., Ralph C.](#); [Horwitz, Noah M.](#); [Jon Robinson](#); [Shanon Peake](#); [Dot Faulkenberry](#)
Subject: RE: Atlas Turner, Inc. v. Federal Insurance Company et al. - 9/20 Deposition of Armand Pace
Date: Friday, September 15, 2023 7:28:00 PM
Attachments: [image002.png](#)
[image003.png](#)

[EXTERNAL EMAIL]

Paul,

Good evening. In my last email, I asked for a call to discuss whether the third-party action and discovery could proceed in light of Rule 205, which applies irrespective of the automatic stay or the lack of an automatic stay of the order on appeal. Until we can have that call and either agree or disagree, we will not be going forward with a deposition of a Chubb witness. Do you have availability next week to discuss?

Regards,

Kevin

[Robinson Gray](#)



KEVIN K. BELL MEMBER

DIRECT 803.227.1111

[VCARD](#) [VIEW BIO](#)

[ROBINSONGRAY.COM](#)

2151 Pickens St.

PO Box 11449 (29211)

Columbia, SC 29201

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[Supporting Green](#) print wisely.

From: Fuener, Paul <paul.fuener@morganlewis.com>

Sent: Friday, September 15, 2023 10:15 AM

To: Kevin K. Bell <kbell@robinsongray.com>

Cc: Peter Protopapas <pdp@rplegalgroup.com>; Brian Barnwell <BB@rplegalgroup.com>; Lindsay Valek <Lindsay@rplegalgroup.com>; Danny Nieto <danny@rplegalgroup.com>; Edwards, Brady <brady.edwards@morganlewis.com>; McCall, III, Duke K. <duke.mccall@morganlewis.com>; Nes, W. Brad <brad.nes@morganlewis.com>; McCulloch Semlinger, Lauren A. <lauren.semlinger@morganlewis.com>; Surman, Jr., Ralph C. <ralph.surman@morganlewis.com>; Horwitz, Noah M. <noah.horwitz@morganlewis.com>; Jon Robinson <jon@smithrobinsonlaw.com>; Shanon Peake <shanonp@smithrobinsonlaw.com>; Dot Faulkenberry <dot@smithrobinsonlaw.com>

Subject: Atlas Turner, Inc. v. Federal Insurance Company et al. - 9/20 Deposition of Armand Pace

Kevin – Are the Chubb Defendants making Armand Pace available for deposition next week as noticed? If not, please let me know asap. Thanks.

Paul Fuener

Morgan, Lewis & Bockius LLP

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Exhibit I

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Atlas Turner, Inc. f/k/a Atlas Asbestos	)	CASE NO. 2023-CP-40-03540
Company, Ltd., By and Through Its Duly	)	
Appointed Receiver Peter D. Protopapas,	)	
	)	
PLAINTIFF,	)	
	)	MOTION TO DISMISS (SUBJECT TO
vs.	)	ALL MOTIONS AND RESERVATIONS
	)	SET FORTH BELOW)
Goldfein & Joseph, P.C.,	)	
	)	
DEFENDANT.	)	
	)	

Subject to and without waiving its jurisdictional defenses, the Defendant Goldfein & Joseph, P.C. (“G&J” or the “Firm”) hereby moves to dismiss the Summons and Complaint filed against it in the City of Philadelphia, State of Pennsylvania on the following grounds:

1. The Order upon which Mr. Protopapas allegedly relies on to bring this action is on appeal to the South Carolina Court of Appeals. As such, this action is inappropriate.

2. Pursuant to Rule 12(b)(2), this Court lacks personal jurisdiction over G&J. The facts necessary to establish the lack of jurisdiction are set forth in the Affidavit of Frederic L. Golfein, a copy of which is filed with this motion as **Exhibit A** and incorporated herein by reference. When a non-resident defendant attacks the allegations of a complaint based upon jurisdiction such as is the case here, the Court is not confined to the allegations of the complaint, but may resort to affidavits or other evidence to determine jurisdiction. *Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 2008).

3. This Court lacks general jurisdiction over G&J. To have such jurisdiction, G&J must have an enduring relationship with this state. To satisfy the enduring relationship of general jurisdiction, G&J’s contacts with South Carolina must be continuous, systematic, and substantial

As shown by the Affidavit of Frederic L. Goldfein, G&J does not have continuous, systematic, or substantial contacts with South Carolina. Moreover, allowing this lawsuit to proceed would offend the due process clause and protection of the Constitution.

4. This Court also lacks specific jurisdiction over any cause of action set forth in the Complaint arising from the Firm's contacts with South Carolina pursuant to the long-arm statute. The Affidavit of Frederic L. Goldfein establishes G&J as well as the alleged causes of action asserted by Mr. Protopapas do not meet any of the requirements of *S.C. Code Ann. §36-2-803*. As such, the due process requirements would also clearly not be satisfied or the fairness prongs required to satisfy specific jurisdiction.

5. This Court should further dismiss this action pursuant to Rule 12(b)(6), *SCRCP*, as the Complaint fails to state a viable cause of action. There is no justiciable controversy between the parties, thus rendering the purported declaratory judgment action void. A justiciable controversy is one that is appropriate for judicial determination. This case does not meet that requirement. Rather, it is an attempt to bring suit against an entity that is not subject to jurisdiction in South Carolina to obtain documents and information which the Plaintiff is not entitled to receive in this manner. Moreover, there is no case or controversy between Plaintiff and the firm. The case or controversy (if there is one) is between ACL and Mr. Protopapas. Questions of statutory interpretation standing alone do not give rise to a justifiable controversy. *Tourism Expenditure Review Comm. v. City of Myrtle Beach*, 403 S.C. 76, 742 S.E.2d 371 (2013)(per J. Kittredge). Plaintiff seeks to have this Court offer an interpretation of South Carolina's receivership statutes.

For the reasons set forth in this motion and the affidavit attached and incorporated as **Exhibit A**, Goldfein and Joseph, P.C. hereby moves that this Court dismiss this matter with prejudice. This motion may be further supported by a memorandum of law.

CLEMENT RIVERS, LLP

By: s/Stephen L. Brown

Stephen L. Brown (SC Bar No. 66468)

James D. Gandy, III (SC Bar No. 11925)

Stephen A. Griffith (SC Bar No.: 103744)

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Attorneys for Goldfein and Joseph, P.C.

Charleston, South Carolina

Dated: August 9, 2023

Exhibit A

STATE OF PENNSYLVANIA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF PHILADELPHIA	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
Atlas Turner, Inc. f/k/a Atlas Asbestos	)	CASE NO. 2023-CP-40-03540
Company, Ltd., By and Through Its Duly	)	
Appointed Receiver Peter D. Protopapas,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	AFFIDAVIT OF FREDRIC L. GOLDFEIN
	)	
Goldfein & Joseph, P.C.,	)	
	)	
Defendant.	)	
	)	

I, Fredric L. Goldfein, being first duly sworn, depose and states as follows:

1. My name is Fredric L. Goldfein. I am a shareholder in the firm of Goldfein and Joseph, PC ("GJ" or "the firm"). I make this affidavit based upon my own personal knowledge and information. I am authorized by the firm to make this affidavit in response to the lawsuit filed against it by Peter D. Protopapas in South Carolina. The filing of this affidavit in no manner waives the defenses raised in the firm's motion to dismiss.
2. GJ is a Philadelphia based law firm that practices in a variety of areas including civil litigation, professional liability, asbestos defense, commercial litigation and worker's compensation.
3. GJ maintains offices in Philadelphia , Pennsylvania; Wilmington, Delaware; and York, New York,;. The firm employs approximately 15 attorneys. None are licensed to practice in South Carolina. In addition, none of the firm's attorneys have ever sought admission, *pro hac vice* or otherwise in South Carolina because GJ does not practice law in South Carolina. GJ has never appeared in any litigation pending in South Carolina.

4. I have over 25 years of national litigation experience primarily defending major casualty, toxic tort and professional liability claims. I graduated from Villanova University School of Law, and receive my undergraduate degree from Columbia University. I am admitted to practice law in Pennsylvania, New York, as well as before the United States Supreme Court the United States Court of Appeals for the Third Circuit and the US District Courts in Pennsylvania and New York
5. I have never sought permission to appear in any matter in the courts of South Carolina.
6. I have not visited South Carolina for over 30 years. My last visit was a social visit and in no manner involved my profession as an attorney. Neither I nor GJ have any enduring relationships in anyway with South Carolina.
7. Likewise, neither I nor GJ have any continuous and systematic contacts with South Carolina.
8. None of the provisions of the South Carolina long arm statute are applicable to my firm or this purported lawsuit. Specifically, we do not transact business within South Carolina; we do not contract or supply services or things in South Carolina; we have not been involved, or have not been alleged to be involved in the commission of a tortious act in all or in part in South Carolina; we do not regularly conduct or solicit business, or engage in any other persistent course of conduct in South Carolina , nor do we derive substantial revenue from goods used or consumer services rendered in South Carolina. Likewise, we do not have any contracts to insure any person, property or risk located within South Carolina at the time of contracting. We have not entered into any contract to be performed in whole or in part by either party and we do not

produce manufacture or distribute goods with a reasonable expectation that the goods would be used or consumed within South Carolina.

9. For the reasons, set forth above, the firm does not have minimum contacts with the state of South Carolina such that the maintenance of a lawsuit, particularly the lawsuit in issue, would not offend traditional notions of fair play or substantial justice. The firm has directed no activities to residents of South Carolina. Furthermore, under the fairness prong, the firm's duration with any activities in South Carolina is nonexistent.
10. The mere fact that we represent Atlas Turner, Inc., but not in litigation pending in South Carolina, does not establish personal jurisdiction. To find to the contrary would be inconsistent with general notions of fairness, due process and fair play. Attorneys who handle specific matters for clients would be subject to jurisdiction in every state where their client was ever sued.
11. Peter Protopapas filed this lawsuit against my firm, indicating that he has requested documents related to Atlas Turner, Inc. in his purported capacity as an alleged receiver for the "insurance assets" for Atlas Turner, Inc. He indicates I have ignored him and not responded in providing him with the document sought. The order appointing him receiver for the "insurance assets" of Atlas Turner, Inc. is currently on appeal to the Court of Appeals for the State of South Carolina. It is my understanding that there is a stay in place that would prevent the firm from providing any documents to him assuming it possessed the materials sought.
12. Contrary to the unsupported allegations in the declaratory judgment filed by Mr. Protopapas and his law firm, I do not believe there is a justiciable controversy between

him and my firm. Rather, any controversy would be between him and Atlas Turner, Inc. which is a Canadian corporation. Although my firm provides services to Atlas Turner, Inc. in certain matters, the firm is not the entity which maintains the various records which he seeks to obtain.

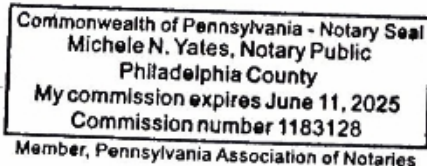
13. Just as Protopapas may argue that the firm has, on prior occasions, entered into negotiations on behalf of Atlas Turner, Inc. with plaintiffs in other states, the firm has never done so inside South Carolina. More importantly, the courts have held that merely entering into a contract or negotiating a contract inside South Carolina, without more, is not enough to establish minimum contacts for purposes of jurisdiction.

Further the Affiant sayeth not.


FREDRIC L. GOLDFEIN

SWORN to before me this 9th
day of August, 2023.

Michele N. Yates (SEAL)
Notary Public for Pennsylvania
My Commission Expires: _____



RECEIVED

Nov 03 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2021-CP-40-03484

Appellate Case No. 2023-000727

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

v.

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

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

v.

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

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

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

and

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

and

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

PROOF OF SERVICE

I certify that a true copy of Respondent's Return to Zurich's Motion to be Added to Appeal and Joinder in Support of Emergency Motion to Clarify and Enforce Rule 205 in this case has been served on the following, this 3rd day of November, 2023, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to Rule 262(a)(1), SCACR, and *RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022)*, S.C. Sup. Ct. Order dated May 6, 2022.

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*Attorneys for Respondent Payne &
Keller Company, By and Through its
Duly Appointed Receiver, Peter D.
Protopapas*

November 3, 2023

From: [Shanon Peake](#)
To: [wsawyer@murphygrantland.com](#); [bb@rplegalgroup.com](#); [John B. White, Jr.](#); [Marghretta Shisko](#); [Edwards, Brady](#); [scott.schutte@morganlewis.com](#); [Chris Jones](#); [todd.carroll@wbd-us.com](#); [elizabeth.oneill@wbd-us.com](#); [hlee@steptoe.com](#); [kbell@robinsongray.com](#)
Cc: [dblack@murphygrantland.com](#); [lindsay@rplegalgroup.com](#); [Nicole Rice](#); [crjlegal@gmail.com](#); [donna.yingling@wbd-us.com](#); [wbd.scasbestos@wbd-us.com](#); [Jon Robinson](#); [Murrell Smith](#); [Dot Faulkenberry](#)
Subject: RE: Lenora Childers v. Davis Mechanical Contractors, Inc. - 2023-000727
Date: Friday, November 3, 2023 4:09:00 PM
Attachments: [Return to Zurich's Motion to be Added into Appeal, 3.pdf](#)
[POS Return to Zurich, 2.pdf](#)
[Exhibits, 1.pdf](#)

Good Afternoon,

Please find attached for service the Receiver's Return to Zurich's Motion to be Added to Appeal and Joinder in Support of Emergency Motion to Clarify and Enforce Rule 205.

Thanks,
Shanon

SMITH ROBINSON
Forward thinking. Results driven.
Smith Robinson Holler DuBose and Morgan, LLC
www.SmithRobinsonLaw.com

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Attorney at Law

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