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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, Circuit Court Judge

Case No. 2022-CP-40-03834
Appellate Case No. 2023-001096

Donna B. Welch, individually and as Personal Representative of the Estate of
Melvin G. Welch, deceased,

Respondent,

v.

Advance Auto Parts, Inc., American Honda Motor Co., Inc., Atlas Asbestos Co,
Atlas Turner, Inc. as successor to Atlas Asbestos Co, a foreign company, Bahnson,
Inc., Covil Corporation, Daniel International Corporation, Davis Mechanical
Contractors, Inc., Ellington Insulation Company, Inc., Fluor Constructors
International f/k/a Fluor Corporation, Fluor Constructors International, Inc., Fluor
Daniel Services Corporation, Fluor Enterprises, Inc., General Parts, Inc.
individually and as successor-in-interest to Carquest Corporation, Goodrich
Corporation f/k/a The B. F. Goodrich Company, The Goodyear Tire & Rubber
Company, Graybar Electric Company, Inc., Honeywell International, Inc.
individually and as successor-in-interest to Allied Signal, Inc., as successor to
Bendix Corporation, Morse Tec LLC f/k/a Borgwarner Morse Tec LLC, and
successor-by-merger to Borg-Warner Corporation, Occidental Chemical
Corporation as successor to Durez Corporation, O'reilly Automotive Stores, Inc.,
Paramount Global f/k/a Viacomcbs Inc., f/k/a CBS Corporation, a Delaware
corporation f/k/a Viacom, Inc., successor-by-merger to CBS Corporation, a
Pennsylvania corporation, f/k/a Westinghouse Electric Corporation, Pneumo Abex
LLC successor-in-interest to Abex Corporation, Redco Corporation f/k/a Crane
Co., Reinz Wisconsin Gasket LLC f/k/a and/or successor to Reinz Wisconsin
Gasket Co. and Wisconsin Gasket Manufacturing Co., a wholly owned subsidiary
of Dco LLC, Rust Engineering & Construction, Inc., Rust International Inc.,
Southern Insulation, Inc., Spirax Sarco, Inc., Union Carbide Corporation, Westrock
MWV, LLC individually and as successor-in-interest to Westvaco, ZF Active
Safety US Inc. f/k/a Kelsey-Hayes Company,

Defendants,

Of which Atlas Turner, Inc. is the

Appellant.

RECORD ON APPEAL
VOLUME 4 (PAGES 1466-1939)

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION NO. 2022-CP-40-03834
Melvin G. Welch and Donna B. Welch,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
3M Company, et al.,	)	
	)	
Defendants.	)	
	)	

**DEFENDANT ATLAS TURNER, INC.'S REPLY TO PLAINTIFFS' RESPONSE IN
OPPOSITION TO DEFENDANT ATLAS TURNER, INC.'S MOTION FOR
PROTECTIVE ORDER ON BEHALF OF ITSELF AND DEFENDANT ATLAS
ASBESTOS CO.**

Defendant Atlas Turner, Inc., sued incorrectly as successor to Atlas Asbestos Co., (“Atlas Turner” or “Defendant”), on behalf of itself and Defendant Atlas Asbestos Co.,¹ by and through its undersigned counsel, and pursuant to Rule 26(c) of the South Carolina Rules of Civil Procedure, files this Reply Memorandum of Law in further support of its Motion for Protective Order.

Relevant Background Facts

Plaintiffs filed the instant suit against Atlas Turner, a Canadian corporation, on July 25, 2022. Atlas Turner timely filed a Motion to Dismiss for lack of personal jurisdiction with an accompanying Memorandum in Support and supporting affidavit. Plaintiffs have subsequently amended their pleadings several times, filing the currently operative Third Amended Complaint

¹ Although Atlas Asbestos Co. and Atlas Turner, Inc. are named in the Third Amended Complaint as separate defendants, they are not separate companies. Atlas Asbestos Co. changed its name to Atlas Turner, Inc. Therefore, Atlas Asbestos Co. and Atlas Turner, Inc. are two different names for the same company, and the proper name of the company is Atlas Turner, Inc.

on November 3, 2022. In response to each amended pleading, Atlas Turner has timely filed Motions to Dismiss for lack of personal jurisdiction, supporting memoranda, and supporting affidavit. Further, Atlas Turner filed an Amended Memorandum in Support of its Motion to Dismiss accompanied by deposition transcripts and a second supporting affidavit on December 30, 2022.

On December 6, 2022, Plaintiffs served a Notice of 30(b)(6) deposition of Atlas Turner and Atlas Asbestos Co. and accompanying Subpoenas Duces Tecum, containing 74 noticed deposition topics and 23 document requests. In response, Atlas Turner filed a Motion for Protective Order and accompanying memorandum in support with exhibits on January 3, 2023. Atlas Turner requested that the Court stay discovery until the Court ruled on the Motion to Dismiss filed by Atlas Turner. In the event the Court denies the Motion to Dismiss, Atlas Turner requested that the Court rule that Atlas Turner is not required to designate or produce a corporate representative for deposition or produce information and documents sought by Plaintiffs in their 30(b)(6) Notice of Deposition.

On January 5, 2023, counsel for Atlas Turner sent an email to the Court and counsel of record and requested the Court hear its Motion to Dismiss, its Amended Memorandum in Support of Motion to Dismiss, and its Motion for Protective Order at the Court's regularly scheduled Motions Hearing on January 27, 2023 or, in the alternative, as soon as possible thereafter. A copy of this email is attached as Exhibit 1. Due to a scheduling conflict, Plaintiffs' counsel requested the motions be heard on another date and further requested two-weeks' time to file responses. In reply, counsel for Atlas Turner reiterated its request that the Court schedule a hearing on its Motion to Dismiss and Motion for Protective Order and requested that Atlas Turner be given a week after Plaintiffs' responses in which to file replies prior to such hearing. Plaintiffs did not

file a response to Atlas Turner's motion during the two weeks requested and, in fact, did not file a response until April 12, 2023 – three months after the expiration of the two weeks requested.²

On February 1, 2023, Plaintiffs cancelled the deposition of Atlas Turner and Atlas Asbestos Co. On March 16, Plaintiffs served a First Amended Notice of 30(b)(6) Deposition and Subpoena Duces Tecum to Atlas Asbestos Co. Atlas Turner responded with a second Motion for Protective Order and supporting memorandum with exhibits, which was filed on April 3, 2023. On April 4, 2023, Plaintiffs withdrew their First Amended Notice and served a Second Amended Notice of 30(b)(6) Deposition of Atlas Asbestos Co. and Subpoena Duces Tecum, to which Atlas Turner again responded with a Motion for Protective Order and supporting memorandum with exhibits, filed with this Court on April 6, 2023. Again, Plaintiffs did not file a response to Atlas Turner's Motions for Protective Order until April 12, 2023.

In sum, Atlas Turner has consistently maintained that it is not a proper party to this suit because the Court lacks personal jurisdiction over it. It has moved to dismiss each of Plaintiffs' pleadings pursuant to Rule 12(b)(2) SCRCF and for summary judgment pursuant to Rule 56, SCRCF, and on three separate occasions moved for a Protective Order which included an assertion that the Court lacks jurisdiction. Rather than proffering timely responses to Atlas Turner's motions or seeking to compel its participation in discovery, Plaintiffs waited until April 12, 2023, a mere 11 days before this case is scheduled for trial, to file responses. Despite the fact this case has been pending for over 8 months, and despite their assertions to the contrary, Plaintiffs have not produced any evidence, either documentary or by deposition testimony, indicating that Atlas Turner is subject to this Court's jurisdiction.

² On March 20, 2023, Atlas Turner also filed a Motion for Summary Judgment with a supporting memorandum asserting, amongst other grounds, lack of personal jurisdiction.

ARGUMENT

In their Response in Opposition, Plaintiffs argue that (1) the “Atlas entities” have failed to demonstrate good cause supporting entry of a protective order; (2) this Court may exercise specific personal jurisdiction over the “Atlas entities”; (3) the QBCRA does not prohibit the discovery sought from the “Atlas entities”; and (4) the principles of comity do not require this Court to enter a protective order absolving the “Atlas entities” from their discovery obligation. This Reply will address the jurisdictional issue first. Thereafter, this Reply will address the other points.

I. This Court Lacks Personal Jurisdiction Over Atlas Turner

Mr. Welch testified that he worked for Daniel Construction Company at the Chemstrand/Monsanto plant in Greenwood, South Carolina from the summer of 1965 until the summer of 1966.³ See excerpts from the October 14, 2023 trial deposition of Mr. Welch, which is attached as Exhibit 3 at pp. 13-14. He joined the United States Air Force in the second quarter of 1967 and got out of the Air Force in the first quarter of 1971.

As far as he knows, the insulators at the Chemstrand/Monsanto plant were employed by Daniel. See excerpt from October 11, 2022 deposition of Mr. Welch attached as Exhibit 4 at pp. 91-92. Other than the Chemstrand/Monsanto plant, he did not work at any other location where he saw the same type of insulation work take place throughout his career. See excerpts from his

³ Mr. Welch’s Social Security Itemized Statement of Earnings was received by defense counsel on March 29, 2023. It and the transmittal letter are attached as Exhibit 2. The Social Security document reflects that his employment with Daniel started in the fourth quarter of 1966 and ended in the second quarter of 1967. Further, he joined the Air Force in the second quarter of 1967 and got out of the Air Force in the first quarter of 1971.

October 7, 2023 discovery deposition attached as Exhibit 5 at p. 25. Thus, the relevant time period at issue is either 1965-1966 or late 1966 to early 1967. Also, Mr. Welch did not know the brand name or manufacturer of pipe insulation used at the Chemstrand/Monsanto plant. See Exhibit 5 at p. 18. Atlas also submitted an affidavit from Mr. Dufour dated December 28, 2023, in which Mr. Dufour states that Atlas has no records of sales to any company in South Carolina before 1968. Affidavit is attached as Exhibit 6.

Plaintiffs assert that Mr. Welch was exposed to Atlas asbestos-containing products and materials at the various industrial locations where Melvin Welch worked and that Atlas “conducted sales of asbestos-containing products to the very industrial locations where Melvin Welch worked....” See Plaintiffs’ Response in Opposition to Defendant Atlas Turner, Inc.’s Motion for Protective Order at pp. 10, 16. However, there is no evidence that supports this assertion. Plaintiffs attempt to rely on four exhibits (## 3, 4, 5 and 8) for their assertion; but their reliance is misplaced. Plaintiffs’ Exhibit 3 appears to be sales invoices to “other entities” that are a defendant in this case. Yet, the invoices are to Guy M. Beaty, a North Carolina Company, and one document does not indicate where the products would be used and the other two documents appear to be “PPG” documents. So, none of these documents has anything to do with the Monsanto/Chemstrand plant or any plant in South Carolina.

Plaintiffs’ Exhibit 4 purports to be sales from Atlas Asbestos Co. to Covil Corporation, which is a South Carolina company. However, the sales period runs from 1968 to 1973. So, the sales are after the relevant time period at issue, and also do not show any job sites, much less the Chemstrand/Monsanto plant. Plaintiffs’ Exhibit 5 purports to be Atlas Asbestos Co. sales to three South Carolina companies, but the sales are from 1968 or later, so they are after the relevant time period at issue. Also, they do not indicate any job sites, much less the Chemstrand/Monsanto site.

Finally, Plaintiffs' Exhibit 8 contains pages from a deposition of Andrew Richardson taken on May 11, 1987 in the *Cannon* case. It does not appear that Atlas was a defendant in the *Cannon* case. In any event, there is a reference to a job involving Limpet at the West Virginia Pulp and Paper Company in North Charleston, South Carolina dated 4-15-64. However, Mr. Richardson testified that a company named ACandS was the licensee for Limpet from 1962 until 1967. See excerpts from the deposition of Mr. Richardson, attached as Exhibit 7 at pp. 32-35. He testified that Atlas Asbestos Co. became the licensee in 1967. Mr. Richardson explained that he was using Atlas letterhead when he listed the 1964 job by ACandS because he was employed by Atlas when he made the list. See Plaintiffs' Exhibit 8 at pp. 53-54. More importantly, there is no reference to the Chemstrand/Monsanto plant.

Plaintiffs have not shown, and cannot show, that Atlas Turner has sufficient minimum contacts with South Carolina during the relevant time period. "A minimum contacts analysis requires a court to find the defendant directed its activities to a resident of the 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*, 137 S.Ct. 1773, 1780 (2017); *World-Wide Volkswagen Corp.*, 444 U.S. at 296-297; *Hanson v. Denckla*, 257 U.S. 235, 251, 253 (1958). There is no evidence Atlas Turner purposefully directed any activities at South Carolina during the relevant time period that the cause of action arises out of or relates to.

In order for a state court to exercise specific jurisdiction, the suit must arise out of or relate to the defendant's contacts with the forum. *Bristol-Myers Squibb Co.*, 137 S.Ct. at 1780. The Court went on to note that settled principles mandate that where no affiliation or connection exists between the defendant's contacts with the forum and the underlying claims "specific jurisdiction

is lacking regardless of a defendant's unconnected activities in the State...A corporation's continuous activity of some sorts within a state...is not enough to support the demand that the corporation be amenable to suits unrelated to that activity. *Id.* at 1781. Further, the defendant's activities must be its own and not the unilateral activities of another. *S. Plastics Co.*, 310 S.C. at 261, 423 S.E.2d at 131.

Here, there is no evidence that Atlas products were at the Chemstrand/Monsanto site in 1965-1966, or 1966-1967, or prior to that time. Also, there is no evidence to support a claim that Mr. Welch's causes of action arose out of or related to the defendant's contacts with the forum because Atlas had no contacts with the forum during the relevant time period at issue. Plaintiffs' attempt to rely on *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S.Ct. 1017 (2021). However, Atlas had no "relationship" with South Carolina in the relevant time period at issue, much less a "strong relationship" like Ford did with Montana and Minnesota. *See Ford Motor Co.*, 141 S.Ct. at 1028. Thus, this Court lacks personal jurisdiction over Atlas.

II. Atlas Turner Has Demonstrated Good Cause Supporting the Entry of a Protective Order.

Atlas Turner has demonstrated that it would suffer particularized harm if required to produce a witness, information, and documents. First, as asserted by Atlas Turner, production of a witness, information, and documents prior to a ruling by the Court would violate its due process rights and would force it to risk waiving its jurisdictional defense. This point was raised in its first Motion for Protective Order dated January 3, 2023, and in the two subsequent motions.

Ironically on the one hand, in Plaintiffs' Response in Opposition to Defendant Atlas Turner Inc.'s Motion for Protective Order, Plaintiffs allege that "Atlas has wholly refused to participate in discovery of any kind." *See* Plaintiffs' Response in Opposition to Atlas Turner, Inc.'s Motion for Protective Order at p. 1, footnote 1. However, in Plaintiffs' Opposition to

Defendant Atlas Turner, Inc. and Atlas Asbestos Co.'s Motion for Summary Judgment and Motion to Dismiss, Plaintiffs allege that Atlas waived or forfeited its personal jurisdiction defense by participating in litigation. Plaintiff's Opposition at pp. 8-11. The fact is that Atlas Turner requested a hearing every time it filed a motion to dismiss and every time it filed a motion for protective order. Counsel for Atlas did not appear at any depositions. Further, as discussed earlier, counsel for Atlas Turner specifically wrote the Court on January 5, 2023 and requested that the Court hear its motion to dismiss and its motion for protective order at the hearing scheduled on January 17, 2023. See Exhibit 1. Nevertheless, Plaintiffs' misplaced argument about waiver or forfeiture demonstrates the potential for particularized harm and potential prejudice.

In addition, in the event the Court denies the Motion to Dismiss, then requiring Atlas Turner to produce a corporate representative for deposition, or produce information or documents sought by the 30(b)(6) Notice, would subject Atlas Turner to further harm because of the Quebec Business Concerns Records Act (QBCRA).

III. The Quebec Business Concerns Records Act (QBCRA) Prohibits Atlas Turner Under Threat of Criminal Penalties from Providing Business Records, or Information, from Business Records in Quebec.

Plaintiffs argue that Atlas Turner has failed to articulate any prejudice that it will suffer from sitting for the deposition requested by Plaintiffs. See Plaintiffs' Response in Opposition to Defendant Atlas Turner, Inc.'s Motion for Protective Order at p. 9. However, Quebec court's have made clear that Quebec "concerns" would be subject to criminal penalties if they produced in U.S. litigation information or documents from their files in Quebec, and these opinions apply to Atlas Turner. The relevant cases are discussed in Defendant Atlas Turner Inc.'s Motion For Protective Order and Memorandum of Law in Support on Behalf of Itself and Defendant Atlas

Asbestos Co. at pages 11-12. Further, there is a discussion of *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. 1997). *Id.*, at p. 12, footnote 8.

IV. Based on the Unique Situation Involving Atlas Turner and the QBCRA, Atlas Turner is Entitled to Deferential Treatment Under the Comity Principles of International Law.

Plaintiffs argue that the principles of comity do not require this Court to enter a protective order absolving the Atlas entities from their “discovery obligations.” See Plaintiffs’ Response in Opposition to Defendant Atlas Turner, Inc.’s Motion for Protective Order at p. 20. However, Atlas Turner is not a typical asbestos defendant and this case has unique circumstances – including very short period of alleged exposure to Atlas products and literally no evidence supporting Plaintiffs’ allegations that Atlas asbestos-containing products were at the Chemstrand/Monsanto plant in Greenwood, South Carolina during the relevant time in question. Therefore, analyzing two of the factors set forth in *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 544, 1107 S.Ct. 2542 (1987) - the importance of the documents to the litigation and the availability of alternative means of securing the information – this Court should show deferential consideration for Atlas Turner. Plaintiffs have demonstrated that they were able to obtain documents and depositions from alternative sources without exposing Atlas to potential criminal penalties.

CONCLUSION

For the reasons stated above, Atlas Turner respectfully requests that this Court hear the Motion to Dismiss filed by Atlas prior to hearing the Motion for Protective Order and grant the Motion to Dismiss. Further, in the event the Court does not grant Atlas Turner’s Motion to Dismiss, the Court should rule that Atlas Turner is not required to designate or produce a

corporate representative for deposition, or produce information or documents sought by Plaintiffs' 30(b)(6) Notice, because Atlas Turner has no current employees, has no former employees or individuals with personal knowledge, and for the most part does not even maintain or possess the records necessary to educate a witness to be able to testify to matters contained in the 30(b)(6) Notice. Further, in the event this Court does not grant Atlas Turner's motion to dismiss, then the Court should rule that Atlas Turner is not required to designate or produce a corporate representative for deposition, or produce information or documents sought by the 30(b)(6) Notice, because of the QBCRA, which subjects Atlas Turner to criminal penalties in Quebec if it produces information or documents sought by Plaintiffs' 30(b)(6) Notice.

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Attorneys for Defendant Atlas Turner, Inc.

Columbia, South Carolina

April 18, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
MELVIN G. WELCH and DONNA B. WELCH,	)	C/A NO. 2022-CP-40-03834
	)	
Plaintiffs,	)	<i>In Re:</i>
	)	Asbestos Personal Injury Litigation
v.	)	Coordinated Docket
	)	
3M COMPANY, et al.	)	<u>PLAINTIFFS' MOTION FOR SANCTIONS</u>
	)	<u>AND FOR THE APPOINTMENT OF A</u>
Defendants.	)	<u>RECEIVER</u>

On May 11, 2023, this Court found Atlas Asbestos Company, Ltd. ("Atlas") in contempt of court for its failure to comply with this Court's orders. This Court ordered Plaintiffs to brief the issue of the appropriate sanctions. In compliance with this Court's order, Plaintiffs submit this motion and would respectfully show the court as follows:

BACKGROUND

As this Court has already seen, Atlas supplied asbestos containing insulation to insulation contractors throughout the southeastern United States, including, without limitations, to insulation contractors in North and South Carolina. It was based on these facts and the Plaintiffs' exposure to insulation from certain contractors to which Atlas supplied, including Covil Corporation and Beaty Investments, f/k/a Guy M. Beaty among others. Plaintiffs served discovery on Atlas in the form of interrogatories and deposition notices with document requests. *See* Third Amended Notice of Deposition of Atlas attached hereto as Exhibit A. Despite having specifically sold to contractors in South Carolina, Atlas 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 Atlas' objections and ordered it to produce a fully prepared witness and documents. Atlas refused. This Court held a status conference to consult with counsel for Atlas. At the hearing it was clear that Atlas had no intention of complying with this Court's orders, producing a witness or otherwise participating in this litigation.

LAW AND ARGUMENT

A. Motion to Strike

A trial court has the "option to completely strike [a defendant's] pleadings in [a] matter as a sanction for failure to cooperate in discovery." *Scott v. Greenville Housing Authority*, 353 S.C. 639 (Ct. App. 2003)(citing Rule 37(b)(2)(C)). Here, Atlas has wholly failed to obey this court's orders ordering it to participate in discovery. Moreover, Atlas has demonstrated that it does not intend to participate in this matter in any meaningful way.

Therefore, Plaintiffs request that this court enter an order striking Atlas' pleading.

B. Motion to Appoint a Receiver

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

Atlas is a company organized and existing under the laws of Canada, with its principal place of business in Canada. At all times relevant, Atlas 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. Atlas 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, Atlas decided to simply contest personal jurisdiction and, where it loses that battle, the simply refuses to participate in cases in which they are a named defendant. Although Atlas stiff-arms its creditors in the United States—namely, workers exposed to asbestos and asbestos containing products manufactured and/or sold by Atlas—and absconded to Canada, certain of its insurance assets appear to remain. There is no evidence which suggests that Atlas currently operates in any way to do anything other than to defend and indemnify lawsuits, thus, making Atlas nothing more than an insurance company. The appointment of a receiver to marshal Atlas’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 Atlas 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 Atlas 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 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 Atlas is appropriate under subsection (5) because Atlas 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 Atlas’ counsel.

CONCLUSION

As set forth above, Atlas refuses to comply with this Court’s orders. The sanction for that action should be the striking of Atlas’ answer. After Atlas’ 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 Atlas.

Respectfully submitted,

/s/ Aaron D. Chapman

Aaron D. Chapman (SC Bar No. 104485)

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ATTORNEYS FOR PLAINTIFFS

May 11, 2023
Dallas, Texas.

EXHIBIT A

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

MELVIN G. WELCH and)
DONNA B. WELCH)
Plaintiffs,)
v.)
3M COMPANY)
f/k/a MINNESOTA MINING AND)
MANUFACTURING COMPANY, et al.)
Defendants.)

C/A NO. 2022-CP-40-03834

**PLAINTIFFS' THIRD AMENDED NOTICE OF 30(b)(6) DEPOSITION OF
DEFENDANT ATLAS ASBESTOS CO. AND SUBPOENA DUCES TECUM**

TO: ALL DEFENDANTS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Plaintiffs, pursuant to Rule 30 of the South Carolina Rules of Civil Procedure, will take the videotaped deposition of the designated representative of Defendant **Atlas Asbestos Co.** on **April 24, 2023 at 10:00 am (ET)** and will take place at the location indicated below, at which time you are notified to appear and take part as you see fit and proper in such examination. The deposition will take place before a certified court reporter and videographer. If necessary, the deposition shall continue day to day.

DEPONENT: Atlas Asbestos Co.
DATE: Monday, April 24, 2023
TIME: 10:00 AM, EST.
ADDRESS: Kassel McVey; 1330 Laurel Street, Columbia, SC 29202

JOIN ZOOM MEETING

<https://us02web.zoom.us/j/81225112357?pwd=dko5ZU4vUC9wdHpaM1FVRFYxLyt6Zz09>

Meeting ID: 812 2511 2357
Passcode: 276891

One tap mobile

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Dial by your location

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[+1 253 215 8782](tel:+12532158782) US (Tacoma)

[+1 346 248 7799](tel:+13462487799) US (Houston)

[+1 360 209 5623](tel:+13602095623) US

[+1 386 347 5053](tel:+13863475053) US

[+1 507 473 4847](tel:+15074734847) US

[+1 564 217 2000](tel:+15642172000) US

Meeting ID: 812 2511 2357

Find your local number: <https://us02web.zoom.us/j/81225112357>

The deposition is to be taken for the purpose of discovery or for use at trial, or both. The topics to be covered at the deposition are listed in Exhibit “A” attached hereto. Pursuant to Rule 30(b)(5), Defendant is requested to produce documents responsive to the requests listed in Exhibit “B” also attached hereto. Pursuant to Rule 30(b)(5) the time for production of these documents is governed by Rule 34, which holds all responsive documents are due produced to Plaintiffs in 2 weeks from service, or specifically no later than April 20, 2023.¹

¹ Please note, previous document productions made by Defendants in separate cases have no impact on Plaintiffs’ document requests in their current case and may not be relied upon by Defendants as production of documents responsive to Melvin and Donna Welch’s requests included herein.

Respectfully submitted,

/s/ Aaron D. Chapman

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ATTORNEYS FOR PLAINTIFFS

April 20, 2023
Dallas, Texas.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was served on counsel for all parties via Certified U.S. Mail Return Receipt, U.S. Mail Standard First Class, and/or electronic mail this on April 20, 2023.

/s/ Aaron Chapman
Attorney for Plaintiffs

EXHIBIT A

For purposes of these topics, the following words shall have the following meanings: Definitions: "RECORD" or "RECORDS" or "DOCUMENT" or "DOCUMENTS" means any and all written, printed, typed, recorded or graphic material, however produced, or reproduced, stored, known to exist, by way of example and not by limitation, invoices, contracts evidencing purchase or receipt, ledger cards, material requests, communications, writings, printings, records, worksheets, abstracts, summaries, statistics, notes, market data, journals, ledgers, expense reports, specifications, contracts, contract bids, purchase orders, bills of lading, shipping orders, dock receipts, cancelled checks, computer print-outs, microfilm, microfiche, which in any way pertain to the document request made herein.

The terms "YOU" and "YOUR" mean responding party and all of its divisions, predecessors- in-interest, successors-in-interest, subsidiaries, parent companies, sister companies, joint ventures, partners and divisions thereof, including all current and former owners, employees, managers, officers, directors, agents, attorneys and any other person(s) acting upon its behalf.

The term "PERSON" and "PERSONS" means a natural person, firm, association, organization, partnership, business trust, limited liability company, corporation, or public entity.

The term "PREMISES AT ISSUE" means any of the following worksites where Melvin Welch worked during his career from approximately 1960s to 2000s including but not limited to:

1. K-Mart – Greenwood, SC
2. M&M Tire – Greenwood, SC
3. Western Auto – Greenwood, SC
4. Monsanto/Chemstrand Chemical Plant, Greenwood SC
5. Any other site identified by Melvin Welch
6. Any other site on which Melvin Welch's father worked

Please provide a corporate representative to be deposed on the following subject matters:

1. All information about tremolite, actinolite, or anthophyllite asbestos in the same ore from which your asbestos is mined.
2. The registered name of the answering Defendant as well as all prior names or predecessor entities by which the Defendant has existed. For each, the current address and the state of incorporation and whether or not it is an active corporation.
3. The full and correct name, the principal place of business and the state and date of incorporation of Defendant.
4. Whether Defendant has ever held a certificate of authority to do business in South Carolina and the addresses for your registered agents for service in South Carolina.

5. Whether Defendant has a registered agent currently in South Carolina. If yes, the full name and full address of the registered agent located in South Carolina.

6. Whether Defendant has ever owned, leased, rented or otherwise operated or used any real or personal property, facility, store or distribution center located in the State of South Carolina.

7. Whether any property and/or facility which Defendant owned, operated, or controlled had any connection to the manufacture, sale, purchase, distribution, advertisement, application, installation, removal, marketing, development and/or use of asbestos or asbestos-containing materials/products in the state of South Carolina.

8. The names and addresses of persons or entities in South Carolina to whom Defendant sold or distributed any asbestos or asbestos-containing material/product (including insulation contracting as a service, or insulation sold as a product, or otherwise), and the details around such sales.

9. Whether it is more likely than not that any asbestos or asbestos-containing materials or products (including insulation contracting as a service, or insulation sold as a product, or otherwise) sold or distributed by Defendant would be used by, or purchased by, any person or entity with its ultimate use in South Carolina and the basis for your answer.

10. All distributors or wholesalers of Defendant's asbestos and/or asbestos-containing product and/or asbestos covered product in South Carolina.

11. All products, other than asbestos or asbestos-containing products, Defendant has ever sold, distributed, or delivered for sale or distribution, to persons or entities in South Carolina

12. Any lawsuit or other legal action taken by Defendant in any Court in the State of South Carolina against any person or entity including, but not limited to, claims for damages, counterclaims, cross-claims, or third-party claims.

13. Any lawsuit against Defendant in the State of South Carolina or other legal action where Defendant was found subject to personal jurisdiction in the state of South Carolina.

14. Whether any of the contracts that Defendant entered into in the normal course of business contain a forum selection clause, including but not limited to, a clause specifying the forum in which a lawsuit must be filed in the event litigation occurs between Defendant and another party to the contract and if so, which jurisdiction(s) did you specify.

15. The complete present address of Defendant's principal place of business.

16. All documents and tangible things used, related to, or referred to in connection with the preparation of this deposition. For all such documents and tangible things state the number of the topic.

17. The identity of each person who has supplied any information or assisted in locating any documents or tangible things used in answering or responding to this notice, a year-by-year list of all positions or job titles held by each person.

18. The names and addresses of persons known to Defendant or to counsel that have knowledge concerning the jobsites of the Plaintiff or, otherwise, the facts of this case and indicate whether or not written or recorded statements have been taken from such witnesses and indicate who has possession, custody or control of such statements.

19. When and how Defendant first learned that inhalation of asbestos fibers can lead to the development of each of the following asbestos-related diseases:

- (a) asbestosis;
- (b) pleural plaques;
- (c) pleural thickening;
- (d) interstitial fibrosis;
- (e) scarring of the lungs;
- (f) colon cancer;
- (g) laryngeal cancer;
- (h) esophageal cancer;
- (i) lung cancer; and
- (j) mesothelioma (pleural, peritoneal, or pericardial)

20. All trade organizations, trade associations, and any other groups to which Defendant, Defendant's representative or Defendant's current or former employees belonged in which information relating to the hazards of asbestos or nuisance dust in general was discussed, disseminated, or in any way published before 1980. This list should include (but is not limited to) any membership in the American Hygiene Foundation, Industrial Hygiene Foundation, Chemical Manufacturer's Association (or its predecessor, the MCA), American Chemical Council, American Petroleum Institute, National Safety Council, American National Standards Institute (ANSI), Asbestos Information Association, Industrial Medical Association, American Society of Mechanical Engineers; American Society for Testing and Materials, Chlorine Institute, American Industrial Hygiene Association, National Insulation Manufacturers Association, Asbestos Textile Institute, Society of Automotive Engineers, Society of Petroleum Engineers, ACGIH, American Occupational Medicine Association, American Public Health Association, Friction Materials Standards Institute, Brake Lining Manufacturer's Association, American Medical Association, NIOSH and any state safety organizations. As to each listed group, please state:

- (a) the time period when Defendant, Defendant's representative or Defendant's current or former employee(s) was a member;
- (b) the identity of Defendant's employees, former employees, or representatives who attended any of the meetings held by each listed group, as well as the dates and locations of the meetings they attended;
- (c) the identity of Defendant's employees, former employees, or representatives who served on any committees or subcommittees of any listed group (e.g., a medical advisory committee or legal committee); and
- (d) the name of the committee or subcommittee on which such person served and the position occupied on the committee, if applicable.

21. The identity of each of Defendant's employees, former employees, or representatives who attended any proceeding, symposium, or conference of a scientific, medical, or technical nature, before 1972, during which information relating to the hazards of asbestos or nuisance dust in general was discussed, disseminated, or in any way published (e.g., the effects of human or non-human exposure to asbestos, populations at risk, etc.). A response to this topic should include any attendance at the Seventh Saranac Symposium in 1952, the Proceedings of the New York Academy of Sciences in October of 1964, any meetings held by any organization in Defendant's response to topic no. 2. For each person identified, the proceeding, symposium, or conference the person attended; the date and location of the proceeding, symposium, or conference; the identity of the person within Defendant's organization who received or was designated to receive the attending person's report of the information gathered at such proceeding, symposium, or conference; and the manner in which such reports were made.

22. Whether Defendant has ever been investigated or cited by OSHA or any other local, state, or federal governmental agency for any matter related to asbestos or asbestos exposure. If so, the dates of such investigations, the results that were communicated to Defendant, and the remedial measures (if any) which were undertaken by Defendant.

23. Whether and, if so, how Defendant stores its documents and records including but not limited to any document retention or document destruction policies throughout Defendant's history from inception to the present.

24. How Defendant's documents are stored, indexed, organized or maintained and identify all records custodians, librarians or other individuals who have presently or have had in the past access to Defendant's document repository.

25. Defendant's complete corporate history, including its ownership, sale, acquisition, or divestiture, and any mergers, acquisitions, consolidations, or other similar events involving Defendant at any time during its history.

26. The first time Defendant became familiar with the concept of a threshold limit value (TLV) or permissible excursion level (PEL), for airborne dust, and how was Defendant first made aware of this concept.

27. Information regarding each expert witness that Defendant may call during the trial of this case including:

- (a) The name, address, and job classification of each such witness;
- (b) The subject matter on which the expert is expected to testify; and
- (c) The substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds or bases for each opinion.

28. Whether any person filed a claim against a Worker's Compensation carrier covering Defendant or any of its subsidiaries or predecessor companies alleging that he/she contracted a disease from inhaling asbestos fibers and if so:

- (a) A list of the claims, including each claimant's name, address and the date each claim was filed, and including the caption and jurisdiction of the claim;
- (b) The disease alleged in each such claim;
- (c) A brief summary of the disposition of each such claim; and
- (d) The name, address, and title of the person having custody of the records pertaining to each such claim.

29. The identity and address of all of Defendant's insurers, past and present, including but not limited to policy specifics, such as claim limits, aggregate limits, policy limits and coverage dates.

30. All information regarding the first three (3) times Defendant was sued for damages related to exposure to asbestos from working with or around Defendant's products (including date of filing, jurisdiction, name of plaintiff, causes of action alleged, resolution outcome as to Defendant, etc.)

31. The financial condition of Defendant. (The court has ruled that at the discovery phase, the Defendant's net worth for the previous 2 calendar years is sufficiently responsive to this topic.)

32. The basis for the net worth value provided (this topic seeks the underlying data that supports or justifies the net worth value of Defendant for each given year, which will support how Defendant arrived at the net worth number provided).

33. The names, phone numbers and addresses of all lay witnesses whom Defendant presently intends to call to testify at trial, and the subject matter of their testimony and what connection each such person has with matters relevant to this lawsuit (e.g., former co-workers of Plaintiff, former plant manager of plant X, etc.) and whether the witness is within your control and if the witness is retained by counsel.

34. When Defendant first became aware of the Fleischer-Drinker Report and Dreessen Report and how Defendant learned of these Reports.

35. Whether Defendant contends that the fault of a person or entity other than this Defendant was a substantial contributing factor in the development of Plaintiff's (or Plaintiff's decedent's) mesothelioma. If Defendant's answer is anything other than no, the identify of all such entities and people by name.

36. Whether Defendant is asserting affirmative defenses in this case. If Defendant's answer is anything other than no, please:

- (a) State all facts in support of each affirmative defense;
- (b) Identify all witnesses with information in support of each affirmative defense; and
- (c) Identify all documents containing information in support of each affirmative defense.

37. Information regarding each and every piece of equipment or product that Defendant designed, specified, recommended, mined, manufactured, marketed, sold, supplied, distributed,

or patented that incorporated asbestos-containing parts or specified the use of asbestos or asbestos-containing products or otherwise utilized asbestos containing component parts in the design, manufacture, construction, erection, operation, service, and/or repair of such equipment including but not limited to:

- (a) the trade name or brand name of the product designed, specified, recommended, mined, manufactured, marketed, sold, supplied, distributed, or patented by Defendant;
- (b) a detailed description of the product, including a description of how and why the equipment involved the use of asbestos or asbestos-containing products;
- (c) the date the product was patented (if patented), placed on the market (if marketed), and the inclusive dates of the product's manufacture or sale (if manufactured or sold);
- (d) the physical and chemical composition of the product, including the type and/or brand name of asbestos contained in the product and the percentage or amount of asbestos in each product;
- (e) the date Defendant stopped designed, specified, recommended, mined, manufactured, marketed, sold, supplied, and/or distributing the product;
- (f) the date the product was removed from the market (if marketed) and no longer sold or distributed and the reasons therefore;
- (g) the date asbestos was removed from the product or no longer specified for use with the product, if ever, and the reasons for removing it;
- (h) the seller(s), distributor(s) and/or supplier(s) from whom Defendant purchased the asbestos used in each particular product, and the type (example: crocidolite, amosite, chrysotile) and quantity of asbestos Defendant purchased from each seller(s);
- (i) whether Defendant ever conducted any testing on the product to determine whether it posed any potential hazard to human or non-human health;
- (j) the plant or facility where the product was mined, manufactured, produced, or researched;
- (k) identity of the intended as well as foreseeable users of the product (such as insulators, helpers, pipefitters, boilermakers, welders, machinists, plasterers, drywall finishers, carpenters, shipwrights, etc.); and
- (l) a description of any warnings related in any way to asbestos that Defendant placed on the product or its packaging, operating manuals, brochures, catalogs, or other related printed material. This description should include the precise language of the warning, the size of the warning, the location on the product or its packaging where the warning was printed, and when the warning was first placed on the product. In addition, provide the explanation for why a warning or caution was added. If a warning was not given provide an explanation for why it was not given.

38. What year Defendant first began selling or distributing each asbestos-containing product. Please be specific for each asbestos-containing product manufactured, sold or distributed by you.

39. What year defendant last sold, distributed or manufactured an asbestos-containing product. Please be specific for each asbestos-containing product.

40. Description of each product identified in response to topic number 36, as to its color and physical characteristics and appearances.

41. As to each product identified in response to topic number 36, information describing how such product was packaged or supplied.

42. As to each product identified in response to topic number 36, whether such product was ever further distributed, marketed, packaged, labeled, or sold by companies or individuals other than Defendant. If so, the identity of such companies or individuals, the dates those companies or individuals further distributed, marketed, packaged, labeled, or sold Defendant's asbestos-containing products, and the identity of the specific asbestos-containing products involved.

43. As to any product of Defendant identified in response to topic number 36, whether such product was generally expected to reach or packaged to reach, the consumer or user without substantial change in the condition in which it was sold. If not, with respect to each such product, what way Defendant claims such product was to be altered or substantially changed after sale or distribution and before reaching the consumer or user.

44. As to any product of Defendant identified in response to topic number 36, whether or not Defendant contends that such product can be generally utilized without liberating asbestos fibers into the air. If so, please identify such product, generally describe the intended use of the product, and explain how such use would not tend to liberate asbestos fibers into the air.

45. As to any product of Defendant identified in response to topic number 36, whether Defendant ever used any type of written sales contract between Defendant and the buyer of such equipment. If so, whether or not such written sales contract ever include a clause that Defendant would agree to repair and/or service the equipment if necessary.

46. If Defendant ever recommended the use of any asbestos-containing product with any equipment made or sold by Defendant.

47. If it was foreseeable to Defendant, at the time each type or piece of equipment identified in response to topic number 36 above was released for sale and distribution, that the asbestos or asbestos-containing products recommended or specified for use with such equipment might be removed, stripped, ripped out, or replaced at some time after installation.

48. If Defendant ever sold asbestos-containing replacement parts for any of the equipment made or sold by you. If so, the part and when it was sold.

49. For each type or piece of equipment identified in response to topic number 36, whether asbestos gaskets were utilized as component parts. If so, when?

50. For each type or piece of equipment identified in response to topic number 36, whether

asbestos packing was utilized as a component part at any time. If so, when?

51. For each type or piece of equipment identified in response to topic number 36, whether at any time, was it necessary, required or recommended for asbestos insulation to be utilized in conjunction with any of your equipment. If so, when and under what circumstances.

52. The serial numbers for any of your equipment identified that are (1) located in South Carolina and (2) located at jobsites in states other than South Carolina identified in the work histories of the Plaintiffs previously provided.

53. Whether Defendant claims that any patent would cover any product listed in response to the topics above. If so, the number of the patent, the date same was issued and the number of each patent application that is pending.

54. Whether Defendant sold and/or distributed products containing asbestos to the employers of Plaintiff (or Plaintiff's decedent) or the premises at issue during the time listed or any time prior thereto. Please note that this includes asbestos fiber, thermal insulation, refractory asbestos products or cloth or spray products containing asbestos, as well as all asbestos- containing equipment, and/or asbestos containing replacement component parts.

55. If the answer to the preceding topic is in the affirmative:

- (a) The names of the products sold;
- (b) To whom the product was sold and shipped;
- (c) As to each of the above-mentioned products, please include the quantities of each shipped to each company during the applicable time period; the site to which each product was shipped; and the date of shipment;
- (d) As to each of the products mentioned above, produce in electronic format copies of:
 - (1) Any pertinent trademark, copy of such trademark, and the trademark registration number;
 - (2) The label, or copy of the label, used in the packaging of the particular product;
 - (3) A photograph of the product itself;
 - (4) Sales brochures, specification sheets, performance data, or other promotional material as well as any and all installation materials, data or brochures which would have accompanied or been distributed in connection with the installation, application, or use of each of the above-mentioned products;
 - (5) Any invoices, purchase orders, sales receipts or other documents which show sales of any products to the worksites of Plaintiff or the employers of Plaintiff during the time Plaintiff was employed or worked at the worksite or prior.
- (e) If you cannot provide all of the above documents, please indicate the name or names of the individuals having custody of said documents or copies thereof.

56. Whether Defendant sold any products containing asbestos or any asbestos fiber to any of the defendants in this suit or their predecessors. If so, what years, to whom, and in what

quantities.

57. Whether Defendant sold any products containing asbestos or any asbestos fiber to any of the employers of Plaintiff. If so, what years, to whom, and in what quantities.

58. Whether Defendant sold any products containing asbestos or any asbestos fiber to any of premises at issue. If so, what years, to whom, and in what quantities.

59. Whether there was a service company associated with servicing your asbestos-containing products. (for example, Fisher Controls International was associated with Fisher Service Company who would be hired by customers such as Duke Energy to service the Fisher valves at the Duke Energy plants).

60. If your answer to the preceding topic is in the affirmative, the full name of the service company, the locations of the service company properties of which you are aware, and geographical jurisdiction of each service company.

61. Whether Defendant ever mined, manufactured, marketed, produced, researched, sold, distributed, or patent any product which did not contain asbestos and which could be substituted for any asbestos-containing product. If so, the identity of such asbestos-free product, and state the date such product was first placed on the market.

62. When, if ever, Defendant became aware of asbestos-free substitutes or alternatives for each asbestos-containing product mined, manufactured, marketed, produced, researched, sold, distributed, or patented by Defendant (e.g. mineral wool), regardless of Defendant's belief of the viability of such substitutes or alternatives.

63. Each asbestos-free substitute or alternative for any asbestos-containing product mined, manufactured, marketed, produced, researched, sold, distributed, or patented by Defendant, and when Defendant believed an asbestos-free alternative was an adequate substitute for the asbestos-containing product. If Defendant contends that asbestos free substitutes were not viable, the basis of that contention.

64. Any information about efforts by Defendant to protect users of the asbestos-containing product(s) you approved, designed, specified, sold, supplied or distributed to the premises at issue, from potential hazards associated with the use of said asbestos containing-product(s), and any such precautions and actions taken by you.

65. The identity of all persons with knowledge of facts relevant to the presence or absence of asbestos and/or asbestos-containing products approved, designed, specified, sold, supplied or distributed by Defendant at any of the premises at issue where Plaintiff, Plaintiff's decedent, or (in a household exposure case) exposed family member was present and any information as to the nature of the individual's knowledge as it relates to this subject matter.

66. Beginning in the year that Defendant first manufactured, marketed, produced, researched, sold, distributed, or patented any asbestos-containing product, and continuing

through the presentday, the identity each person who has held the position of corporate medical director, corporate safety director, and corporate industrial hygienist, however characterized. For each person identified, the person's current or last known address and whether the person is currently alive or dead, if known.

67. Whether there are any documents, including but not limited to, invoices, billing records, sales records, contracts, purchase orders, or any other like document that reflect the distribution, approval, specification or sale of asbestos-containing products (1) to premises at issue in South Carolina and (2) to premises at issue in states other than South Carolina identified in the work history of the Plaintiff previously provided.

68. Information regarding any contention that asbestos-containing products you specified, approved, or supplied were not or could not have been sold, distributed or otherwise present at any of the premises at issue which Plaintiff claims exposure to asbestos, and the reasons for this contention and the underlying basis for it. Also, the identity of the individual or individuals who will testify to this contention and the underlying basis for their testimony.

69. Information regarding any contention that there is another entity who was in an equal or better position to warn users of any asbestos related dangers of any asbestos-containing product or equipment made or sold by Defendant and the identity of that entity, the reasons you believe that entity had knowledge regarding the dangers of asbestos, when you believe that knowledge was obtained and the reasons you contend that the entity was in an equal or better position than you to make users aware of asbestos dangers relating to your products or equipment.

70. All information relating to Defendant's knowledge of asbestos hazards.

71. Detailed information about all insurance policies available to Defendant for the damages in the *Welch* case, and/or for premises at issue in the *Welch* case.

72. What You (the company) did to prepare for this deposition (documents searched for, documents reviewed, people searched for, people interviewed, etc.)

73. What the witness, in particular, did to prepare for this deposition, including but not limited to specifically how the witness prepared to discuss subjects outside of his/her personal knowledge (considering the former job duties and/or time period when the deponent was employed by You, if any).

74. Information regarding document searches You (the company) has performed at any time for litigation involving asbestos (i.e. when the search occurred, where it occurred, by whom, results, total bates-stamp range applied to all documents produced, etc.).

75. Information regarding document searches You (the company) has performed in this particular case. (i.e. when the search occurred, where it occurred, by whom, results, bates-stamp range applied to all documents produced, etc.).

EXHIBIT B

For purposes of these requests, the following words shall have the following meanings:

The terms "RECORD" or "RECORDS" or "DOCUMENT" or "DOCUMENTS" means any and all written, printed, typed, recorded or graphic material, however produced, or reproduced, stored, known to exist, by way of example and not by limitation, invoices, contracts evidencing purchase or receipt, ledger cards, material requests, communications, writings, printings, records, worksheets, abstracts, summaries, statistics, notes, market data, journals, ledgers, expense reports, specifications, contracts, contract bids, purchase orders, bills of lading, shipping orders, dock receipts, cancelled checks, computer print-outs, microfilm, microfiche, which in any way pertain to the document request made herein.

The terms "YOU" and "YOUR" mean responding party and all of its divisions, predecessors-in-interest, successors-in-interest, subsidiaries, parent companies, sister companies, joint ventures, partners and divisions thereof, including all current and former owners, employees, managers, officers, directors, agents, attorneys and any other person(s) acting upon its behalf

The term "PERSON" and "PERSONS" means a natural person, firm, association, organization, partnership, business trust, limited liability company, corporation, or public entity.

The term "PREMISES AT ISSUE" means any of the following worksites where Melvin Welch worked during his career from approximately 1960s to 2000s including but not limited to:

1. K-Mart – Greenwood, SC
2. M&M Tire – Greenwood, SC
3. Western Auto – Greenwood, SC
4. Monsanto/Chemstrand Chemical Plant, Greenwood SC
5. Any other site identified by Melvin Welch
6. Any other site on which Melvin Welch's father worked

Please produce the following:

1. Please produce all documents that reference tremolite.
2. Please produce all documents that reference tremolite, actinolite, or anthophyllite asbestos in the same ore from which your asbestos is mined.
3. Please produce all documents showing any services provided by Defendant to the premises at issue or employers of Plaintiff during the same years Plaintiff alleges working at the premises.
4. Please produce all documents concerning any tests conducted by you or on behalf of you to determine potential health hazards associated with the use of or exposure to asbestos fibers

associated with any products Defendant specified, approved, sold to or used at any of the premises at issue.

5. Please produce all documents identifying each distributor or wholesaler located or authorized to sell or distribute asbestos-containing products for you (1) in or for South Carolina and (2) in or for any premises at issue outside of South Carolina identified in Plaintiff's work history previously provided. For each distributor or wholesaler, please produce documents containing the following information:

- (a) Name and last known address;
- (b) The years of, and the geographical area encompassed by the relationship;
- (c) Whether there was a written distributorship agreement;
- (d) Whether the distributorship was exclusive; and
- (e) The extent to which sales to customers in this state were handled through distributors or wholesalers located outside this state.

6. Please produce all documents identifying the names, phone numbers and addresses of all lay witnesses whom you presently intend to call to testify at trial, and briefly identify the subject matter of their testimony and what connection each such person has with matters relevant to this lawsuit (e.g., former co-workers of Plaintiff, former plant manager of plant X, etc.). Indicate if the witness is within your control and if the witness is retained by counsel.

7. Please produce all documents which identify each asbestos-containing product that Defendant designed, specified, sold, supplied or distributed to the premises at issue at any time before Plaintiff's last day of alleged work at said worksite. Please produce documents containing the following information:

- (a) the trade name or brand name of the product mined, manufactured, marketed, produced, researched, sold, distributed, and/or patented;
- (b) the date the product was patented (if patented), placed on the market (if marketed), and the inclusive dates of the product's manufacture or sale (if manufactured or sold);
- (c) the physical and chemical composition of the product, including the type of asbestos contained in the product and the percentage or amount of asbestos in each product;
- (d) the date Defendant stopped mining, manufacturing, marketing, producing, researching, selling, and/or distributing the product;
- (e) the date the product was removed from the market (if marketed) and no longer sold or distributed and the reasons therefore;
- (f) the date asbestos was removed from the product, if ever, and the reasons for removing it;
- (g) the seller(s), distributor(s) and/or supplier(s) from whom Defendant purchased the asbestos used in each particular product, and the type (example: amosite, chrysotile) and quantity of asbestos Defendant purchased from the seller(s);
- (h) whether Defendant ever conducted any testing on the product to determine whether it posed any potential hazard to human or non-human health;
- (i) the plant or facility where the product was mined, manufactured, produced, or researched;

- (j) the foreseeable users of the product (such as insulators, helpers, pipefitters, boilermakers, welders, machinists, plasterers, drywall finishers, carpenters, shipwrights, etc.); and
- (k) a description of any warnings that Defendant placed on the product or its packaging, operating manuals, brochures, catalogs, or other related printed material. This description should include the precise language of the warning, the size of the warning, the location on the product or its packaging where the warning was printed, and when the warning was first placed on the product. In addition, include the explanation for why a warning or caution was added. If a warning was not given provide an explanation for why it was not given.

8. As to any asbestos-containing product designed, specified, sold, supplied or distributed by Defendant to the premises at issue at any time, produce all documents which indicate such products were ever further distributed, marketed, packaged, labeled, or sold by companies or individuals other than Defendant.

9. Please produce all documents that support Defendant's contention that as to each asbestos-containing product approved, designed, specified, sold, supplied or distributed by Defendant for the premises at issue or employer of Plaintiff, such product was or was not to be altered or substantially changed after sale or distribution and before reaching the consumer or user.

10. Please produce all documents showing at the time each asbestos-containing product was approved, designed, specified, sold, supplied or distributed by Defendant, that the product or one or more of its components might be removed, stripped, ripped out, or replaced at some time after installation.

11. Please produce all documents showing when, if ever, did Defendant become aware of asbestos-free substitutes or alternatives for such product (e.g. mineral wool), regardless of Defendant's belief of the viability of such substitutes or alternatives.

12. Please produce all documents in Defendant's possession discussing any asbestos-free substitute or alternative for any asbestos-containing product approved, designed, specified, sold, supplied or distributed by Defendant.

13. If it is your contention that you took the proper precautions to protect users of the asbestos-containing product(s) you approved, designed, specified, sold, supplied or distributed to the premises at issue, please produce all documents which support this contention.

14. Please produce all sales documents, including but not limited to, invoices, billing records, sales records, contracts, purchase orders, or any other like document that reflect the distribution, approval, specification or sale of asbestos-containing products (1) to premises at issue in South Carolina and (2) to premises at issue in states other than South Carolina identified in the work history of the Plaintiff previously provided.

15. If it is your contention that asbestos-containing products you specified, approved, or supplied was not or could not have been sold, distributed or otherwise present at any premises at issue at which Plaintiff claims exposure to asbestos, please produce all documents which support this contention.

16. Please produce all documents concerning each and every piece of equipment that Defendant approved, designed, specified, sold, supplied or distributed to the premises at issue or employers of Plaintiff in which asbestos containing parts are used or specified or otherwise utilized asbestos containing component parts in the design, manufacture, construction, erection, operations, service, and/or repair of such equipment. Specifically, please produce documents providing the following information:

- (a) the trade name or brand name of the equipment approved, designed, specified, sold, supplied or distributed by Defendant;
- (b) the type and/or brand name of asbestos or asbestos-containing product specified for use with the equipment;
- (c) the date the equipment was placed on the market, and the inclusive dates of the equipment's manufacture, sale, and distribution;
- (d) a detailed description of the equipment, including a description of how and why the equipment involved the use of asbestos or asbestos-containing products;
- (e) the date Defendant stopped approving, designing, specifying, selling, supplying or distributing the equipment;
- (f) if applicable, the date the equipment was removed from the market and no longer sold or distributed and the reasons therefore;
- (g) if applicable, the date asbestos was no longer specified for use with the equipment, and the reasons for no longer specifying it;
- (h) if applicable, the seller from whom Defendant purchased the asbestos containing equipment, and the type (example: amosite, chrysotile) and quantity of asbestos utilized in the product;
- (i) whether Defendant ever conducted any testing on the equipment to determine whether the use of the product posed any potential asbestos-related hazard to human or non-human health;
- (j) the plants or facilities where the equipment was installed;
- (k) the foreseeable users of the equipment (such as insulators, helpers, pipefitters, boilermakers, welders, machinists, plasterers, drywall finishers, carpenters, shipwrights, etc.); and
- (l) a description of any warnings regarding asbestos present on the equipment or its packaging, operating manuals, brochures, catalogs, or other related printed material. This description should include the precise language of the warning, the size of the warning, the location on the equipment or its packaging where the warning was printed, and when the warning was first placed on the equipment. In addition, include the explanation for why a warning or caution was added. If a warning was not given provide an explanation for why it was not given.

17. As to any equipment identified in response to topic number 36, please produce any type of written sales contract between Defendant and the buyer of such equipment, including any agreement to repair and/or service the equipment.

18. Please produce all documents showing the sale, supply or distribution of any asbestos-containing replacement parts for any of the equipment approved, designed, specified, sold, supplied or distributed by you to the premises at issue or employers of the Plaintiff.

19. Please produce all documents that support your contention that for each type or piece of equipment identified in response to topic number 36, that asbestos insulation, was or was not necessary, required or recommended to be utilized in conjunction with any such equipment.

20. Please produce all documents showing the serial numbers for any equipment identified in your responses to topics above (1) located at the premises at issue or employers of Plaintiff in South Carolina and (2) located at premises at issue in states other than South Carolina identified in the work history of the Plaintiff previously provided.

21. If you contend that there is another entity who was in an equal or better position to warn users of any asbestos related dangers of any asbestos-containing product or equipment approved, designed, specified, sold, supplied or distributed by you to the premises at issue or employer(s) of Plaintiff, please produce all documents which support this contention.

22. Please produce all insurance policies available to Defendant for the damages in the *Welch* case, and/or for premises at issue in the *Welch* case.

23. Please produce all documents regarding Defendant's knowledge of asbestos hazards.

24. Please produce all documents reviewed by the witness, and any notes taken in review of such documents.

25. Please produce any written procedure for document searches, or notes taken during document searches or descriptions of document searches You (the company) has done at any time for litigation involving asbestos, including but not limited to the current case (i.e. when the search occurred, where it occurred, by whom, etc.).

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
Melvin G. Welch and Donna B. Welch,	)	C/A NO. 2022-CP-40-03834
	)	
Plaintiffs,	)	
	)	
vs.	)	<u>Atlas Turner Inc.'s Response and</u>
	)	<u>Objection to Plaintiffs' Motion to</u>
3M Company, et al.,	)	<u>Appoint A Receiver</u>
	)	
Defendants.	)	
	)	
	)	

Atlas Turner, Inc. ("Atlas")¹ objects to Plaintiffs' Motion to Appoint a receiver for Atlas. The Court lacks statutory and constitutional authority and jurisdiction to appoint a receiver over Atlas, which is a Canadian corporation headquartered in the Province of Quebec, with no assets or property located in South Carolina.

On May 11, 2023, Plaintiffs filed a motion asking the Court to enter a receivership order appointing a receiver over Atlas pursuant to S.C. Code § 15-65-10(4) or (5). As set forth more fully below, Atlas objects on two grounds: (1) there is no factual or legal basis under S.C. Code Ann. §15-65-10(4) or (5) to appoint a receiver; and (2) as presented previously to this Court in multiple filings,² which are fully adopted and incorporated herein, the Court lacks personal

¹ Although Atlas Asbestos Co. and Atlas Turner, Inc. are named in the Third Amended Complaint as separate defendants, they are not two separate companies. Atlas Asbestos Co. changed its name to Atlas Turner, Inc. Therefore, Atlas Asbestos Co. and Atlas Turner Inc. are two different names for the same company. The proper name of the sole defendant is Atlas Turner, Inc.

² The procedural history of this matter, with the name and date of Atlas' filings is summarized as follows:

- Plaintiffs filed the original complaint on July 25, 2022.

jurisdiction over it and there is no Atlas property or assets within South Carolina over which the Court can exercise jurisdiction.

-
- Atlas filed its Motion to Dismiss for Lack of Personal Jurisdiction with a Memorandum in Support and an affidavit from Richard Dufour dated September 7, 2022 (“9/7 Dufour Aff.”).
 - Plaintiffs amended the Complaint several times, and most recently filed their Third Amended Complaint on November 3, 2022.
 - Atlas timely filed Motions to Dismiss for Lack of Personal Jurisdiction and Memoranda in Support with the 9/7 Dufour Aff. for each amended complaint.
 - On December 30, 2022 Atlas filed an Amended Memorandum in Support of the Motion to Dismiss with exhibits, including a second affidavit from Richard Dufour dated December 28, 2022 (“12/28 Dufour Aff.”).
 - Atlas filed a Motion for Protective Order and Memorandum in Support on January 3, 2023, regarding a 30(b)(6) deposition noticed by Plaintiffs.
 - On January 5, 2023, counsel for Atlas requested that the Court hear at the January 27, 2023 Motions hearings or as soon as possible thereafter Atlas’ two pending motions. Due to a schedule conflict, Plaintiffs’ counsel requested that the motions be heard on another date and requested two weeks to respond. To accommodate opposing counsel, counsel for Atlas responded and requested that the Court schedule a hearing at the Court’s convenience on a date after January 27, 2023.
 - On March 20, 2023, Atlas filed a Motion for Summary Judgment (which included the Motion to Dismiss) and a Memorandum in Support with affidavits and other exhibits. Plaintiffs responded on April 12 with attached exhibits, and Atlas filed a reply on April 18.
 - At a hearing on April 19, 2023, the Court orally denied Atlas’ three pending motions. No written order or Form 4 order denying Atlas’ motions has been filed. Further, the case was continued to the August 28, 2023 trial term and notice was given that Mr. Welch had died on April 17, 2023, necessitating appointment of a Personal Representative and amendment of the pending complaint.

The 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 and Env'tl. Control*, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (1989). “[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 County v. SC. Dep't of Revenue*, 422 S.C. 292, 313, 811 S.E.2d 758, 769 (2018).

I. There is No Legal or Factual Basis in the Record for Appointment of a Receiver Under S.C. Code Ann. §15-65-10(4) or (5).

Plaintiffs’ receivership motion is predicated upon S.C. Code Ann. §15-65-10(4) & (5).³

Those subsections state:

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 property within this State of foreign corporations; and

(5) In such other cases as are provided by law or may be in accordance with the existing practice, except as otherwise provided in this Code.

Id.

In support of its motion, Plaintiffs make several demonstrably false assertions or assertions wholly unsupported by any evidence. First, Plaintiffs assert that Atlas mined “many thousands of tons of raw asbestos fibers” and sold raw asbestos to product manufacturers. (Pl.

³ Plaintiffs do not invoke the first three grounds for a receivership. There are no facts or law to support their invocation.

Receiver Mot., p. 2.) This statement is false. (9/7 Dufour Aff. ¶ 3 (“Atlas never mined or milled asbestos”), attached as Exhibit 1.)

Plaintiffs assert Atlas “stiff-arms its creditors in the United States” and “absconded to Canada.” (Pl. Receiver Mot., p. 3.) There is no evidence submitted with the motion or anywhere in the record before the Court showing Atlas has ever “stiff-armed” any creditor in the United States or anywhere in the world for that matter. Plaintiffs are not a creditor of Atlas. They have no judgment against Atlas. Not only is there no evidence that Atlas has not paid a judgment, there is no evidence that there even are any judgments.

In this case (and in others), Atlas has asserted the legitimate defense of lack of personal jurisdiction and is taking steps to fully protect and preserve that defense in this matter. Further, Atlas has not “absconded” to Canada. It is, as the record in this case shows, incorporated in Canada and operated from its principal place of business there and, when it was in the business of manufacturing products, shipped its products from Canada F.O.B. Montreal, Quebec, Canada with payment received in Canada. (9/7 Dufour Aff. ¶ 3, Exhibit 1.)

As to subsection (4), the language of the statute is plain. The first half of the provision, before the word “and,” lists four factual preconditions, one of which must exist before a receivership of any kind may be imposed. The second half of the statute differentiates the scope of the court’s power to act in the case of domestic, as opposed to foreign corporations, if one of the four factual circumstances exists that authorize a receivership in the first place. In that instance – “in like cases”—the court may only appoint a receiver to act upon “the property within this State of foreign corporations,” not generally assume control of the company or act upon any property belonging to it outside of South Carolina. This construction of the statute is consistent with United States Supreme Court precedent recognizing a receiver appointed by a state court has jurisdiction only over assets within that state. *Booth v. Clark*, 58 U.S. 322, 332, 15

L. Ed. 164 (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.”).

There is no evidence to support a finding that any one of the four necessary preconditions to appointment of a receiver under subsection (4) - dissolution, insolvency, imminent danger of insolvency, or forfeiture of corporate rights – exists. In their motion, Plaintiffs make the bald, unsupported assertion that Atlas “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.” (Pl. Receiver Mot., p. 3.) The record evidence is to the contrary or otherwise non-existent. Atlas is “a corporation incorporated and organized under the laws of Canada with its principal place of business in the Province of Quebec, Canada. (9/7 Dufour Aff. ¶ 3, Exhibit 1.) It has not dissolved or forfeited its corporate rights in its place of incorporation. Atlas, nor any subsidiary, ever was organized under South Carolina law. (9/7 Dufour Aff. ¶ 4, Exhibit 1.) Atlas never registered in or applied for authority to do business in South Carolina, never appointed a registered agent, maintained an office, opened a bank account, paid taxes or fees, or maintained any employees, officers or agents in South Carolina. (*Id.* at ¶¶ 4-6, Exhibit 1.) It never sought nor had any corporate rights in South Carolina to forfeit.

Atlas didn’t “flee the United States.” Its place of business has always been Canada and it sent its ordered product from there, F.O.B. Montreal, and received payment for its product there. (*Id.* at ¶ 3, Exhibit 1.)

There is no evidence of any kind in the record that Atlas is currently insolvent or in any imminent danger of being rendered insolvent. Plaintiffs, who make the motion, bear the burden of demonstrating the factual prerequisites for appointment of a receiver. Despite the fact that plaintiffs' counsel is a sophisticated and premier asbestos plaintiffs' law firm and has, in this very case in responding to Atlas' motions, demonstrated its ability to access information regarding Atlas' business operations from repositories of information collected about Atlas or its codefendants dealing with Atlas, it has not produced any document or witness indicating that Atlas has failed to pay judgments entered against it or otherwise demonstrate it is financially distressed. Atlas is actively defending this and other cases, which the law entitles it to do. In sum, there is no proof of any factual prerequisite to support appointment of a receiver despite the hyperbolic, and largely inaccurate statements of Plaintiffs to the contrary.

Further, even if there was record evidence of one of the four factual prerequisites to application of S.C. Code Ann. §15-65-10(4) (which Atlas denies), the court's power to act under that subsection—its subject matter jurisdiction—is limited by the statute to “property within this State” of Atlas, a foreign Corporation. *Id.* Atlas has no property “within this State.” As set forth in the 9/7 Dufour Aff., ¶¶ 5 & 6, Exhibit 1, Atlas has never had an office in South Carolina. It has never had a South Carolina bank account. It never owned real property in South Carolina. There is no property in South Carolina over which a court, and by extension a receiver, whose powers and jurisdiction are no greater than the court which appoints it, may act. There is no evidence of any Atlas property anywhere in South Carolina in the record before the Court.

In support of applying subsection (5), Plaintiffs again resort to hyperbole and inaccurate or unsupported statements. After quoting generally from two cases from the end of the Nineteenth century and beginning of the Twentieth Century, Plaintiffs assert Atlas is “engaged in

an intentional scheme to defraud its creditors by refusing to appear and accept service in the United States after being faced with substantial asbestos-related liabilities.” (Pl. Receiver Mot., p. 4.) There is no evidence that Atlas has defrauded any creditor. Plaintiffs are not creditors; they have no judgment and may never receive one, nor is there any other evidence of any unpaid creditor anywhere in the record of this case. It is obviously untrue that Atlas has refused to appear and accept service in the United States as Atlas has appeared in this very case and entered a defense of lack of personal jurisdiction, a perfectly legitimate defense under the Due Process Clause of the United States Constitution and the law of South Carolina and one it intends to fully pursue in this matter.

There is no evidence of any one factual predicate required to appoint a receiver under either subsection (4) or (5), or any evidence of any property of Atlas located within South Carolina upon which a court may act. Plaintiffs’ request for appointment of a receiver should be denied.

II. **The Appointment of a Receiver Over Atlas Would Violate The Due Process Clause of the United States Constitution Because the Court Lacks Personal Jurisdiction Over Atlas.**

“[T]he Fourteenth Amendment’s Due Process Clause ... limits the power of a state court to render a valid personal judgment against a nonresident defendant.” *Bristol-Meyers Squibb Co. v. Superior Court of California*, 582 U.S. 255, 261-62 (2017). “In order for a state court to exercise specific jurisdiction” under a state long-arm statute like S.C. Code Ann. §36-2-803, which purports to extend the state court’s jurisdiction to the full extent allowed by the Due Process Clause, *see S. Plastics co. v. S. Commerce Bank*, 310 S.C. 256, 260, 423 S.E.2d 129, 130-31 (1992), “the *suit*’ must ‘aris[e] out of or relate[e] to the *defendant*’s contacts with the

forum’.” *Bristol-Myers Squibb*, 582 U.S. at 262 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014); emphasis added).

A. A “Stream of Commerce” Theory is No Longer a Valid Basis for Asserting Specific Personal Jurisdiction Over a Non-Resident Defendant.

At the April 19 hearing on Atlas’ motions to dismiss, for summary judgment, and for a protective order, and at the status conference in which the Court orally held that Atlas was in contempt of the Court, the Court specifically referenced a “stream of commerce” theory of personal jurisdiction to support its denial of the motions, i.e., that Plaintiffs’ could satisfy their burden of proving due process simply by alleging in the complaint that Atlas placed its products into the stream of commerce and expected it to make its way to South Carolina. (See 5/4/2023 Hrg. Trans., p. 19, attached as Exhibit 2 (the transcript for the 4/19 hearing had not yet been received).) Since the South Carolina Supreme Court’s 2008 decision in *State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 666 S.E.2d 218 (2008) articulating a “stream of commerce” type of approach, *Id.* at 90, 666 S.E.2d at 222-23 (which involved a taxation matter, not a products liability suit), the United States Supreme Court has addressed the question of specific jurisdiction over a non-resident product manufacturer in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011); *Bristol-Myers*; and *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1025 (2021). In those decisions, the Supreme Court emphasized that, for specific jurisdiction, due process can only be satisfied if the suit is connected to the forum by the actions of the defendant, not by the actions of third parties. Here, there is a lack of allegations or evidence that could meet this standard.

To meet the power prong of the due process test for specific personal jurisdiction, the suit must arise out of or relate to the **defendant’s** contacts with the forum. See *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491–94, 611 S.E.2d 505, 509–10 (2005); *Ford*, 141 S. Ct. at 1025; *Bristol-Myers*, 137 S. Ct. at 1780; *J. McIntyre*, 564 U.S. at 881. Specifically, the court must “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*, 310 S.C. at 260, 423 S.E.2d at 131 (emphasis added); *see also Ford*, 141 S. Ct. at 1025. Specific personal jurisdiction cannot exist if the cause of action is unrelated to the ***defendant’s*** contacts with the forum. *Id.*

Since *Sumatra* was decided in 2008—in addition to *J. McIntyre, Bristol-Myers*, and *Ford*—the United States Supreme Court has spoken several times on issues of personal jurisdiction. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); *Walden v. Fiore*, 571 U.S. 277 (2014); *Daimler AG v. Bauman*, 571 U.S. 117 (2014). Taken together, these cases reinforce two principles: (1) a non-resident defendant cannot be subject to personal jurisdiction in a state based on the unilateral actions of third parties, and (2) the exercise of specific jurisdiction requires a plaintiff to establish that his claims are sufficiently related to minimum contacts formed by the defendant with the forum state to satisfy due process.

Further, the United States Supreme Court rejected “nationwide” stream of commerce jurisdiction in *J. McIntyre*, decided three years after *Sumatra*. Indeed, the argument advanced by Plaintiffs and utilized by the Court in denying Atlas’ motions to dismiss, summary judgment, and for a protective order—that, irrespective of how a product arrived in the state, specific jurisdiction exists in every state when a manufacturer allegedly targets the United States as a whole—is precisely the argument that the New Jersey Supreme Court accepted in *Nicastro v. McIntyre Machinery America, Ltd.*, 987 A.2d 575, 592 (N.J. 2010), which the United States Supreme Court later reversed. *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011). Notably, in reaching its conclusion, the New Jersey Supreme had cited to this Court’s opinion in *Sumatra* in support. 987 A.2d at 588, n.1.

Allowing the exercise of personal jurisdiction based on allegations that a defendant placed a product into the stream of commerce with knowledge or awareness or expectation it might make its way to South Carolina is inconsistent with the United States Supreme Court’s decisions. “[T]he mere unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.” *Helicopteros Nacionales de Colombia, S.A.*

v. *Hall*, 466 U.S. 408, 417 (1984). The “defendant’s conduct [] must form the necessary connection with the forum State that is the basis for its jurisdiction over him.” *Walden v. Fiore*, 571 U.S. 277, 285 (2014); see also *Cockrell*, 363 S.C. at 491–92, 611 S.E.2d at 508 (“[W]e conclude that South Carolina also does not have personal jurisdiction over the respondents in this case. The bats did not arrive in South Carolina through the respondents’ efforts.”); *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 334, 594 S.E.2d 878, 885 (Ct. App. 2004) (“The fruits of [defendant’s] labor . . . arrived in South Carolina not through his efforts, but through the efforts of others, and therefore cannot serve as the basis for jurisdiction.”).

B. Neither the Allegations of the Complaint Nor the Evidence Submitted by the Parties in Supporting or Opposing Atlas’ Motions Establish a Prima Facie Case of Specific Personal Jurisdiction.

“The question of personal jurisdiction over a nonresident defendant is one that must be resolved upon the facts of each particular case.” *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). At the pretrial stage, the burden is on the plaintiff to prove personal jurisdiction over a nonresident by a prima facie showing of jurisdiction either in the complaint or in affidavits. *Id.* at 491, 611 S.E.2d at 508. “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.” *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007).

1. Plaintiff’s Exposure Allegations

Plaintiffs allege that Mr. Welch suffered from mesothelioma caused by exposure to asbestos-containing insulation while working for Daniel Construction installing instruments at the Chemstrand/Monsanto plant in Greenwood, South Carolina. It is undisputed that Mr. Welch worked at this facility for less than a year, and that his employment at this plant began, at the

earliest, in 1965, and ended early in the second quarter of 1967. *See* excerpts from trial deposition of Mr. Welch taken October 14, 2022, attached as Exhibit 3 at pages 13-14; *see* Social Security print out, attached as Exhibit 4, at pages 1-2. He did not know the brand name or manufacturer of pipe insulation used at the Monsanto/Chemstrand plant. *See* excerpts from discovery deposition of Mr. Welch taken on October 11, 2022, attached as Exhibit 5 at p. 87; *see* excerpts from discovery deposition taken on October 7, 2022, attached as Exhibit 6 at p. 18. Not only did Plaintiff not identify Atlas products at the plant, nothing in the documents submitted by Plaintiffs, discussed *infra*, pp. 13-14 and Exhibit 8, and no witness/coworker or other testimony identify Atlas product at the plant at the relevant time period.

2. Plaintiff's Jurisdictional Allegations in the Operative Complaint.

The Third Amended Complaint contains four paragraphs that touch upon the issue of personal jurisdiction over defendants. (Third Amend. Compl. ¶¶ 2, 6, 9, and 27.) In the first three of these paragraphs, the allegations are conclusory and either apply to all Defendants named in the case or to a subset, "Product Defendants," not specifically to Atlas. Paragraph 27 actually names Atlas, but the allegation is again conclusory. It contains no facts concerning what business Atlas did in South Carolina, how Atlas carried out business allegedly done in South Carolina, or when any such business was supposedly done in South Carolina.

Settled precedent in this state requires the complaint to allege specific facts, not just conclusory allegations, to establish the contacts necessary to invoke specific jurisdiction. *See Power Prods. & Servs. Co., Inc. v. Kozma*, 379 S.C. 423, 433, 434, 436, 665 S.E.2d 660, 665–67 (Ct. App. 2008). In *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 723 S.E.2d 835, 838 (Ct. App. 2012), the complaint alleged that the court had personal jurisdiction based on the same kind of allegations as found in Plaintiffs' Third Amended Complaint:

[E]ach [defendant] has caused tortious injury within this State as set forth herein, and each regularly does or solicits business, or engages in a persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered in this State as contemplated under the statute.

Id. at 148, 723 S.E.2d at 835. The South Carolina Court of Appeals held that, even with a liberal construction of the long-arm statute and the complaint, the plaintiff had “failed to allege any facts that show that [the defendants] (1) have regular transactions of business or solicitation, (2) engage in a persistent course of conduct, (3) derive substantial revenue, or (4) consume goods or services rendered in South Carolina.” *Id.* at 151, 723 S.E.2d at 839 (emphasis added). Here, as in *Sullivan*, merely alleging general legal conclusions does not establish a prima facie case of personal jurisdiction. *Id.*

3. Atlas’ Evidence

In support of its motion to dismiss, motion for summary judgment and motion for a protective order, Atlas submitted two affidavits from Mr. Richard Dufour, one dated September 7, 2022, attached as Exhibit 1, and one dated December 28, 2022, attached as Exhibit 7.

Pertinent, actual facts from the affidavits pertaining to Atlas and South Carolina are as follows:

- Atlas manufactured asbestos containing products, but all sales of said products were made F.O.B. Montreal, Quebec, Canada and all payments were made to it in Quebec, Canada. Exhibit 1 at ¶3.⁴
- Atlas Turner never has been a corporation organized under the laws of South Carolina, and Atlas Turner has no subsidiary company that did business in South Carolina. Atlas Turner has never been, registered with South Carolina, nor has Atlas Turner ever applied for authority to do business in South Carolina. Exhibit 1 at ¶4.
- Atlas Turner has never appointed nor authorized any agent to accept process for it in South Carolina. Atlas Turner has never maintained an office in South Carolina. Atlas Turner had no bank accounts in South Carolina and it never owned any real

⁴ As previously noted, *supra*, pp. 3-4, Atlas never mined or milled raw asbestos contrary to the bald statement in Plaintiffs’ Receiver Motion, p. 2, to the contrary.

property in South Carolina. Atlas Turner has never transacted business South Carolina. Exhibit 1 at ¶5.

- Atlas Turner paid no taxes or fees in South Carolina and did not maintain any employees, officers or agents in South Carolina. Exhibit 1 at ¶6.

Most importantly, however, Atlas Turner has no records of sales to any company in South Carolina prior to 1968, much less any sales to the plant where Plaintiff worked or to the contractor for work installing asbestos products at the Monsanto plant while Plaintiff worked there. See 12/28 Dufour Aff, attached as Exhibit 7 at ¶12. Further, Atlas Turner never manufactured or sold any asbestos-containing brake material, clutch material, or gasket material. Id., Exhibit 7 at ¶13. Thus, Plaintiffs' causes of action did not arise out of or relate to **Atlas'** "contacts" with South Carolina because Atlas had no contacts with the forum or the sole place where Mr. Welch claims possible exposure to the type of products Atlas manufactured.

4. Plaintiffs' Alleged "Evidence" of Atlas Products at the Monsanto Plant

In Plaintiffs' Opposition, filed April 12, 2023, to Atlas' Motion for Summary Judgment and Motion to Dismiss, Plaintiffs included Exhibits 13-22 in an attempt to establish some contact by Atlas with Plaintiff and South Carolina during the relevant time period (before 1968) at the Monsanto plant. Assuming for sake of argument that Plaintiff could establish the admissibility of such documentation at trial,⁵ Atlas demonstrated in its document by document analysis of each piece of evidence submitted by Plaintiffs, which is incorporated into this memorandum by reference, that Plaintiffs' exhibits actually confirm Atlas' statements regarding sales of its products: there are no records of sales to any company in South Carolina prior to 1968; and

⁵ Atlas does not concede the authenticity (SCRE 901), relevance (SCRE 401, 402, & 403), requirement of personal knowledge (SCRE 602), hearsay (SCRE 801, 802), and other evidentiary objections that may be asserted against admission of these documents at trial of the case.

there are no records or any documents that show any Atlas products present at the Chemstrand/Monsanto plant during the relevant time at issue in this case, which is either 1965-66 or 1966 until early second quarter 1967. *See* Reply to Plaintiffs' Opposition (filed April 18, 2023), pages 11-16, attached as Exhibit 8.

While some of Plaintiffs exhibits show that Atlas— at various points in time – sold products to entities in South Carolina, simply showing Atlas sold products to the state is not sufficient to establish the Court has specific personal jurisdiction. South Carolina case law is clear: to establish specific personal jurisdiction over Atlas, Plaintiffs must show both sufficient minimum contacts with the forum and that Plaintiffs' claims arise out of those contacts. *S. Plastics*, 310 S.C. at 260, 423 S.E.2d at 131. *See also Bristol-Meyers*, 137 S.Ct. at 1780; *World-Wide Volkswagen Corp.*, 444 U.S. at 296-297; *Hanson v. Denckla*, 257 U.S. 235, 251, 253 (1958). The documents Plaintiffs provide fail to establish that any Atlas product was at the Monsanto plant before, or during, the time Mr. Welch worked there. Consequently, Plaintiffs have failed to show that Mr. Welch was exposed to asbestos from an Atlas product. Because there is no evidence that Mr. Welch was exposed to an Atlas product, his claims cannot be said to arise out of Atlas' contacts with this State. The motion to appoint a receiver over Atlas should be denied because the Court lacks personal jurisdiction over Atlas.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion to appoint a receiver.

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Columbia, South Carolina

May 15, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
MELVIN G. WELCH and DONNA B. WELCH,	)	C/A NO. 2022-CP-40-03834
	)	
Plaintiffs,	)	<i>In Re:</i>
	)	Asbestos Personal Injury Litigation
v.	)	Coordinated Docket
	)	
3M COMPANY, et al.	)	<u>REPLY IN SUPPORT OF PLAINTIFFS'</u>
	)	<u>MOTION FOR SANCTIONS AND THE</u>
Defendants.	)	<u>APPOINTMENT OF A RECEIVER</u>

Atlas Asbestos a/k/a Atlas Turner, Inc. ("Atlas"), an internal division of Bell Asbestos Mines, Ltd. ("Bell") until 1977¹, one of the largest miners of asbestos ever known, continues its deliberate and illegal disobedience of this Court's orders and now is intentionally making false statements to this tribunal in an effort to escape a problem it, and it alone, created.

A. Motion to Strike

On this Court's order, Plaintiffs filed their Motion for Sanctions. Plaintiffs specifically sought to, first, have this Court strike Atlas' answer. Motion at 2. And then, "[a]ssuming that this Court determines that the appropriate sanction for Atlas' contempt is the striking of Atlas' answer, Plaintiffs next move this court for an order appointing a receiver over Atlas." Motion at 2. Thus, although Plaintiffs have supplied this court with substantial evidence of Atlas's manufacture and supply of asbestos to Plaintiff's jobsites and throughout this state, once Atlas' answer is struck, they are deemed to have admitted all of the allegations in Plaintiffs complaint including exposure, causation and damages.

¹ See *McDaniel v. Armstrong World Industries*, 603 F.Supp.1337, 1340 (D.D.C. 1985)(discussing the corporate history and relationship of Atlas and Bell Asbestos Mines) attached as Exhibit A.

Nowhere in Atlas' response does Atlas object to the striking of its answer. Whatever else this Court does it should enter an order striking Atlas' answer forthwith. Once that is done, as further set forth below, Plaintiffs are creditors of Atlas, and a receivership should follow.

B. Atlas falsely claims to be defending this case.

Despite its illegal refusal to comply with this Court's orders and an order of contempt by, Atlas, now apparently with the aid of counsel, falsely writes in its response that "Atlas is actively defending this and other cases, which the law entitles it to do." Response at 6. Given Atlas' heretofore affirmative representations to this court that it would not participate in the litigation of this matter, including an affirmative refusal to produce documents or a deponent, this claim is stunning in its falsity. It is so stunning that the undersigned immediately attempted to get counsel for Atlas to clarify "in what way Atlas is participating in this case. For example, has atlas answered any discovery? Given a deposition? Produced any documents?" See Email from Theile McVey to David Traylor and Robert Meriwether, May 16, 2023, attached as Exhibit B. The only response to this issue was that Atlas would "need to get back [to plaintiffs' counsel] tomorrow." Presumably if Atlas said it was participating, it would not take a day to identify how, exactly,² Atlas is defending this case. Quite the opposite. It is refusing to comply with Court orders to defend this case.

C. Atlas falsely accuses plaintiffs of misleading this court.

(i) *Atlas Absconds to Canada*

Protestations to the contrary aside, Atlas, in the face of decades old precedent continues to assert a debunked personal jurisdiction defense and refuse to participate in this litigation.³ At least

² Atlas responded that it had filed its personal jurisdiction motions and an answer but did not agree to stop its contemptuous conduct. See Email from David Traylor, May 17, 2023, attached as Exhibit C.

³ Despite the multitude of decisions denying this personal jurisdictional defense, Atlas continues to insist that its assertion of that defense is "legitimate." Response at 4.

as early as the 1960s⁴ Atlas was selling its toxins to South Carolina without any warning to the citizens of this state.⁵ Despite having profited from its sales of these deadly products to this state, when the time comes to answer for their actions, Atlas hides in Canada under the debunked guise of the Quebec Business Concerns Record Act (“QBCRA”) and refuses this Court’s exercise of jurisdiction despite being afforded a full and fair hearing. *Cf. Lyons v. Bell Asbestos Mines, Ltd.* 119 F.R.D. 384 (D.S.C. 1998)(Anderson, J.)(debunking the personal jurisdiction defense based on QBCRA). Nor is this personal jurisdiction issue a close call. Atlas and its related companies have been losing this argument since at least 1985. *See, McDaniel v. Armstrong World Industries, supra; Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 143 F.R.D. 628, 645 (D.S.C. 1992) *aff’d*, 6 F.3d 177 (4th Cir. 1993) (Court “finds that Defendants have failed to make an adequate showing that the QBCRA is in fact applicable to Plaintiff’s discovery requests in the instant case or would preclude any discovery as may be approved by this court.”); *Lafferty v. Raymark*, 14 Phila. Co. Rptr. 111, 1986 WL 501491 (Pa. Dist. Court 1986), (rejecting Asbestos Corporation’s [yet another Atlas related entity] attempts to hide behind the QBCRA, concluding that “Asbestos Corporation, Limited is asking for an even more unfair advantage. They want to *totally* bar discovery of *all* documents in Canada. Their position is untenable.” (emphasis in original)); *Buttitta v. Allied Signal, Inc.*, No. A-5263-07T1, 2010 WL 1427273, at *23 (N.J. Super. Ct. App. Div. Apr. 5, 2010)(citing *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern District of Iowa*, 482 U.S. 522, 544, 107 S.Ct. 2542 (1987)). Indeed, it would not be a stretch at this point to call the advancement of this argument both fraudulent and brought in bad faith.

(ii) *Plaintiffs are creditors of Atlas*

⁴ All of the evidence attached to this reply is evidence independently uncovered by Plaintiffs because, as set forth in prior proceeding, Atlas refuses to participate in discovery in this matter.

⁵ *See* Sales Invoices and documents admitting sales by Atlas attached as Exhibit D.

Atlas also contends that Plaintiffs are not creditors of Atlas. Atlas fundamentally misunderstands the law and, more importantly the procedural posture of this case. Assuming that Atlas' answer is struck, as Plaintiffs requested this Court do first, Atlas has admitted all of Plaintiffs allegations, including causation and damages and, thus, owes Plaintiffs a yet to be determined amount of money.⁶ Thus, Plaintiffs are, in fact, creditors of Atlas.⁷

D. Atlas does have property in South Carolina

Atlas's contention that it does not have property in the state of South Carolina further demonstrates its ignorance of South Carolina law and the express rulings of this Court. This Court has previously addressed this exact issue in *Plant v. Whittaker Clark & Daniel*, 2022-CP-40-01265, Order of March 10, 2023; *see also* Transcript of Motion for Rehearing, April 18, 2023; *Childers v. Davis Mechanical*; 2021-CP-40-03484, Order March 31, 2023, collectively attached as Exhibit E.

As others before it have, Atlas argues that such a receivership order would be void because the Court would exceed its authority under South Carolina's receivership statute, S.C. Code §15-65-10(4).⁸ According to Atlas the statute provides that a receiver can only be appointed for a foreign corporation to the extent of their property within this state. However, the law does not limit a receiver's authority in this manner.

Even assuming Atlas' interpretation of section 15-65-10 is correct, Atlas's insuring assets

⁶ The entry of default for failure to answer is nothing more than a ministerial function. *Stark Truss Co., Inc. v. Superior Const. Corp.*, 360 S.C. 503 (2004).

⁷ Even if Atlas' answer was not struck Plaintiffs would still be creditors, albeit contingent or involuntary. *See e.g. In Re Twins, Inc.*, 295 B.R. 568 (S.C. Bkrtcy 2003)(citing *Levin v. Maya Constr. Co.* 78 F.4d 1395, 1399 (9th Cir. 1996) and finding litigation demands confer the status of contingent creditor on the plaintiff); *see also In re M McD, LLC*, 405 B.R. 555 (2009)(stating that "[i]nvoluntary creditors are defined as those who did not rely on anything when becoming creditors . . . Tort victims are classic examples."); .

⁸ Atlas contends that Plaintiffs have not met their burden on certain matters. Yet Atlas refuses to participate in any way in this case, including answering discovery. Atlas cannot use that failure to participate as a sword. While there is more than sufficient evidence in this matter to support any action the Court has been requested to take, the fact that Atlas refuses to answer questions is not a basis to exonerate Atlas.

would be intended to protect the lives and interests of those where Atlas sold its toxins, including South Carolina. The result is that whatever insuring assets are available to Atlas are subject to the laws of South Carolina, including a duly appointed receiver.

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 Atlas]” *Id.*

E. Existing practice

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).⁹

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, Atlas’ answer presumably having been struck, and thus only a ministerial action being left for Atlas to be in judgment, a receiver to take possession of and, to the extent necessary, litigate Atlas’ insurance assets is exactly the type of historical circumstances, the

⁹ A receiver is also available to carry a judgment into effect, which is the practical result of the coming default following the unopposed striking of Atlas’ answer.

Courts 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.

Here it is exactly the moral fraud of Atlas' personal jurisdiction claims, exposed by decades of opinions dismissing those very assertions. This Court denied the personal jurisdiction motion and ordered Atlas to appear for deposition, produce documents and comply with discovery. Atlas refused. Its willful disobedience¹⁰ of this Court's orders that should result in the striking of the answer also 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.

Indeed, 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 Atlas's insurance carriers." 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

¹⁰ Now apparently assisted in continuing that disobedience by counsel rather than withdrawing from a matter as appears mandatory by South Carolina Rules of Professional Conduct 1.16. Specifically comment 2 states

A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

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 principals 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.

F. Due Process has not and will not be violated

Atlas continues to ignore the jurisprudence of this state which directly addresses its due process argument. Atlas ignores, again, the teachings of the South Carolina Supreme Court in *Sangamo*.

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. Atlas sold its poison throughout the United States well knowing that it would end up in the workplaces of working men and women throughout the nation. Therefore, under the statutory scheme of this state and its interpreting precedent, whatever insuring assets of Atlas exist and related claims are subject to the substantive law of South Carolina and nothing about that result is

violative of due process.

CONCLUSION

For the foregoing reasons, the appointment of a receiver for Atlas to marshal all of the available insurance assets, including claims related thereto and any other property subject to this receivership of Atlas and its subsidiaries, successors, and assigns, is appropriate. Plaintiffs request that this Court issue an order appointing a receiver as soon as practicably possible and for such other and further relief to which they may be entitled. Plaintiffs respectfully suggest that Peter Protopapas be appointed the receiver over Atlas.

Respectfully submitted,

/s/ Aaron D. Chapman

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ATTORNEYS FOR PLAINTIFFS

May 17, 2023

Dallas, Texas.

EXHIBIT A

603 F.Supp. 1337
United States District Court,
District of Columbia.

Fletcher McDANIEL, et al., Plaintiffs,
v.
ARMSTRONG WORLD INDUSTRIES, et al.,
Defendants.

Civ. A. No. 83–3520.

|
March 14, 1985.

Kevin J. McCarthy, Upper Marlboro, Md., for A.C. & S., Inc.

H. Patrick Donohue, Rockville, Md., for Atlas Turner, Inc.,
& Bell Asbestos.

David P. Durbin, Washington, D.C., for Celotex Corp.

R.G. Guziak, Washington, D.C., for Nicolet, Inc.

Hopewell H. Darneille, III, Richard H. Saltsman,
Washington, D.C., for Turner & Newall, PLC.

Brock R. Landry, Washington, D.C., for U.S. Gypsum Co.

Edward J. Lopata, Washington, D.C., for W.R. Grace
Company.

Patrick James Attridge, Rockville, Md., for U.S. Mineral
Products Co.

Louis R. Moffa, Jr., Washington, D.C., for National Gypsum
Co.

MEMORANDUM OPINION

FLANNERY, District Judge.

This matter is before the court on the motions to dismiss filed by defendants Turner & Newall PLC (“T & N”) and Nicolet, Inc. (“Nicolet”), and the motion of defendants Atlas-Turner, Inc. (“Atlas”), and Bell Asbestos Mines, Ltd. (“Bell”) to dismiss or, in the alternative, for summary judgment. These motions allege that this court lacks personal jurisdiction over these defendants.

Synopsis

Action was brought against manufacturers, suppliers and sellers of asbestos and asbestos-related products, seeking recovery for injuries allegedly resulting from exposure. On defendants' motions to dismiss for lack of personal jurisdiction, the District Court, Flannery, J., held that: (1) “transacting business” provision of District of Columbia long-arm statute applies to tort actions as well as contract actions; (2) foreign manufacturers, licensees, and distributors of asbestos-related products that allegedly caused injury to plaintiff who was exposed to those products were “transacting business” in the District of Columbia within meaning of District's long-arm statute, even though at time of plaintiff's suit defendants had not had contacts with District for 12 years; (3) exercise of personal jurisdiction over these defendants would not violate due process; but (4) exercise of personal jurisdiction over successor-in-interest of asbestos product distributor that held license to distribute asbestos products in question would violate due process.

Order accordingly.

Procedural Posture(s): Motion to Dismiss; Motion to Dismiss for Lack of Personal Jurisdiction.

Attorneys and Law Firms

*1339 James F. Green, Peter T. Enslein, Ashcroft & Gerel,
Washington, D.C., for plaintiff.

Michael P. Chervenak, Rockville, Md., for Armstrong World
Industries.

BACKGROUND

Plaintiff Fletcher McDaniel was employed from 1950 to 1982 as a plasterer's helper. He alleges that he worked at various job sites in and around the District of Columbia where he was exposed to asbestos and asbestos-containing materials. As a direct result, plaintiff claims, he contracted a pulmonary disease. The defendants are manufacturers, suppliers and sellers of asbestos and asbestos-containing

McDaniel v. Armstrong World Industries, 603 F.Supp. 1337 (1985)

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products with which plaintiff alleges he came into contact. Plaintiff further alleges that defendants were negligent and failed to warn him of known dangers. He also sues on the theories of strict liability and breach of warranties. Plaintiff asserts that he was diagnosed as having this pulmonary disease in 1983. The intricate corporate structure involved in this case and its changing nature over time are critical in determining whether this court can exercise personal jurisdiction over these defendants. Significantly, none of the defendants has taken issue with plaintiffs' description of the corporate structure and distribution scheme involved in this case.

Turner & Newall was formed in 1920 through a merger of several United Kingdom manufacturers of asbestos-containing products, one of which was J.W. Roberts, Ltd. J.W. Roberts continued to function as a branch of T & N. In 1934, T & N acquired Atlas Asbestos Co., a Canadian corporation. In 1936, T & N completed the acquisition of Keasbey and Mattison Company ("K & M"), located in Ambler, Pennsylvania. Keasbey and Mattison owned Bell Mine in Thetford, Quebec. In 1937, T & N formed a wholly owned subsidiary, Bell Asbestos Mines, Ltd., for the purpose of acquiring Bell Mine.

By 1950, Keasbey and Mattison was manufacturing a wide range of asbestos-containing products. By that same year, T & N's distribution chain was so firmly entrenched *1340 that T & N informed its shareholders that Keasbey and Mattison distributors:

now embrace all the major trading areas of the nation, and serve to place the various Keasbey and Mattison products virtually at the doorsteps of retailers and ultimate users throughout the United States.

Turner & Newall brochure at 39 (quoted in Plaintiffs' Brief in Opposition to Defendant Turner & Newall PLC's Motion to Dismiss at 5).

In the 1930's, J.W. Roberts, a company for which T & N does not deny responsibility, developed a product known as Sprayed Limpet Asbestos. The manufacturing process took place in England and the product was distributed through a series of exclusive license agreements. Initially, J.W. Roberts granted Keasbey and Mattison the right to distribute Limpet

in the United States. In the late 1950's, Keasbey and Mattison entered into a sublicensing agreement with National Asbestos Co. ("National"), one of the companies for which Mr. McDaniel worked, for the Sprayed Limpet Asbestos process. National's territory under this agreement included the District of Columbia, and under this agreement, National regularly applied Sprayed Limpet Asbestos in buildings located in the District of Columbia.

In 1962, after selling Keasbey and Mattison, T & N, through J.W. Roberts, granted Armstrong Contracting and Supply Company an exclusive license for the Sprayed Limpet Asbestos process in the United States. Armstrong entered into a sublicense agreement with Krafft-Murphy to sell Limpet in an area that expressly included the District of Columbia. This sublicense agreement was subject to T & N's approval. Krafft-Murphy employed the plaintiff, Mr. McDaniel. T & N shipped Limpet for use in the District of Columbia to ports in Maryland and New Jersey. The Limpet was trucked from the ports to a Krafft warehouse or delivered directly to District of Columbia construction sites.

In 1967, the license held by Armstrong was transferred to Atlas Asbestos Co., an internal division of T & N's wholly owned subsidiary, Bell. In addition to being the licensee for the distribution of Limpet in the United States, Atlas manufactured Limpet. Most of the asbestos fiber used by Atlas in the manufacturing process was supplied by a subsidiary of T & N. The sublicense with Krafft-Murphy was also transferred from Armstrong to Atlas. Thereafter, Krafft-Murphy applied Limpet in buildings located in the District of Columbia throughout the period it served as sublicensee. Atlas frequently shipped Sprayed Limpet Asbestos ordered by Krafft-Murphy directly to District of Columbia jobsites by truck from Canada. On other occasions shipments were made to the Keasbey and Mattison warehouse in Virginia. In 1977 Atlas Asbestos Company became a separate corporate entity and changed its name to Atlas-Turner, Inc.

Defendants do not dispute the facts as set out above in any of their essentials. Defendant Turner & Newall contends that its lack of *present* contacts with the forum puts it out of the reach of the D.C. long-arm statute. Alternatively it argues that to find that this court can exercise personal jurisdiction over it would be a violation of due process. Defendants Atlas and Bell deny that this jurisdiction's long-arm statute covers

their activities, and argue, that if it does, they have no minimum contacts with the District of Columbia. Defendant Nicolet argues that jurisdiction cannot be found over it on the basis of the activities of Keasbey and Mattison.

DISCUSSION

In order for this court to find that it can exercise jurisdiction over these defendants it must make a two-pronged inquiry. First, the court must determine whether the D.C. long-arm statute permits the exercise of jurisdiction over these defendants. If so, then the court must inquire whether the exercise of jurisdiction over these defendants comports with constitutional due *1341 process requirements. *Gatewood v. Fiat, S.p.A.*, 617 F.2d 820, 823 (D.C.Cir.1980).¹

The D.C. long-arm statute provides in pertinent part:

(a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's—

- (1) transacting any business in the District of Columbia;
- (2) contracting to supply services in the District of Columbia;
- (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;
- (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia.

....

(b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

D.C.Code Ann. § 13-423 (1981)

Plaintiffs seek to assert jurisdiction over these defendants relying primarily on sections (a)(1), the “transacting

business” prong of the long-arm statute, and (a)(4), the “tort without, injury within,” prong of the long-arm statute. Plaintiffs rely principally on the “stream of commerce” theory of personal jurisdiction, under which it is held to be within this forum's long-arm statute and within the bounds of due process for a court to exercise personal jurisdiction over a corporate defendant if that defendant willingly causes items to be marketed in the forum.

Plaintiffs believe that this circuit's decision in *Stabilisierungsfonds Fur Wein v. Kaiser-Stuhl*, 647 F.2d 200 (D.C.Cir.1981), is dispositive of the case at bar. The defendants in *Kaiser-Stuhl* were Barossa, an Australian corporation that produced wine; Kaiser-Stuhl, its wholly owned Australian subsidiary; Victoire and Peartree, its two exclusive United States importers; and A & A Liquors, a District of Columbia liquor store. *Id.* at 202. The court found that the Australian defendants were subject to jurisdiction under section (a)(1) and alternatively under section (a)(4). *Id.* at 204, 206.

Initially, the court examined subsection (a)(1) and found that these foreign defendants were transacting business in the District of Columbia. It stated:

We are convinced that when the “transacting any business” language is read to extend to the limits of due process, it encompasses a case like the present one where a nonresident defendant ships goods to an intermediary with the expectation that the intermediary will distribute the goods in a region that includes the District of Columbia.

Id. at 205.

A. Defendants Turner & Newall PLC, Atlas and Bell

This court believes that except for the period of time that has elapsed between the last time the stream of commerce flowed into the District and the filing of this lawsuit, *Kaiser-Stuhl* would be dispositive of the current case. At no point have defendants Turner & Newall, Atlas, or Bell sought to distinguish their distribution scheme from that in *Kaiser-Stuhl* except to argue that both Krafft-Murphy and National were non-D.C. corporations which unilaterally brought T & N asbestos into the District after sales to them that did not

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take place in the District. The court rejects this argument that the acts of Krafft- *1342 Murphy and National in bringing the asbestos into the District and applying it and presumably selling it here, were actions which served to break the flow of the stream of commerce.² These companies were sublicensees approved by T & N and, as the record clearly demonstrates with respect to Krafft-Murphy, whose sublicense agreements expressly included the District of Columbia as a territory for the application of Sprayed Limpet Asbestos. The record further reveals that, as contemplated by these agreements, Sprayed Limpet Asbestos was applied in numerous buildings in the District of Columbia. Thus, the fact that the asbestos was ultimately applied in buildings here was not a fortuitous event, but was affirmatively welcomed by defendants. See *Kaiser-Stuhl, supra*, at 205.

Defendants claim that unlike *Kaiser-Stuhl* there is not a nexus between the transaction of business and the claim here sufficient to satisfy D.C.Code § 13-423(b) which requires that when jurisdiction over a person is based on § 13-423, which includes the transacting business prong, “only a claim for relief arising from acts enumerated in this section may be asserted.” Defendants’ argument is that an asbestos injury that arises from the placement of those products in the stream of commerce does not arise from the transaction of business. The court disagrees. This is not a case in which a plaintiff injured by product A, sues a defendant based on its transaction of business within a forum with regard to product B. It is indisputable that if Mr. McDaniel was injured by the defendants’ asbestos products, and if the defendants were transacting business within this jurisdiction with respect to those products, then the McDaniels’ claim arises from the defendants’ transaction of business in the District of Columbia.³

At oral argument Turner & Newall claimed that the (a)(1) prong cannot apply to tortious injuries that arise from transacting business because to so apply it would render the prongs that do deal with tortious conduct redundant. This court finds nothing in District of Columbia law that suggests that the “arising from” language should be limited solely to contract *1343 actions as defendants suggest. Such a limitation would be especially odd in light of the fact that the highest court of the District of Columbia has already ruled that the transacting business prong is coextensive with the due process clause. *Hummel v. Koehler*, 458 A.2d 1187,

1190 (D.C.1983) (citing *Mouzavires v. Baxter*, 434 A.2d 988, 991, 992 (D.C.1981), *cert. denied*, 455 U.S. 1006, 102 S.Ct. 1643, 71 L.Ed.2d 875 (1982)). In fact recent cases of the District of Columbia Court of Appeals suggest that the “transacting any business” prong is met as long as there are minimum contacts with the forum. See *Hummel, supra*, at 1190; *Smith v. Jenkins*, 452 A.2d 333, 336 (D.C.1982). Further, there may be cases in which, for example, tortious conduct outside the jurisdiction with an effect within could not be brought under (a)(1) because the claim does not arise out of the transacting of business here.⁴ In any event, there is no discernible principle which suggests that the various prongs of the long-arm statute were meant to be mutually exclusive. In *Kaiser-Stuhl*, for example, the court found alternative bases upon which the exercise of personal jurisdiction in that case could be justified. 647 F.2d at 204, 206. Finally, courts have had no trouble in finding that torts can arise from the transaction of business. See *Wimmer v. Koenigseder*, 128 Ill.App.3d 157, 83 Ill.Dec. 368, 470 N.E.2d 326 (1984); *Mohamed v. Michael*, 279 Md. 653, 370 A.2d 551 (1977); *State ex rel. Newport v. Wiesman*, 627 S.W.2d 874 (Mo.1982) (en banc).⁵ Thus, there is no reason to restrict jurisdiction based on the transacting business prong only to contract actions.

Having determined that this action arises from the transaction of business of defendants Turner & Newall, Atlas, and Bell, the court next considers what effect, if any, the lack of contacts for over twelve years should have on the analysis of jurisdiction under (a)(1). The court finds that this factor does not remove this court’s power under the long-arm statute to exercise jurisdiction over these defendants. First, the plain language of section (a)(1) does not require that the transaction of business occur at the time the suit is filed. Rather, (a)(1) is satisfied if the *claim* arises from the transacting of business. As discussed above, the court has found that this claim does so arise, and thus the exercise of jurisdiction is within the plain meaning of the statute. The question remains, however, whether the exercise of jurisdiction in this case under (a)(1) comports with the requirements of due process. The court finds that it does.

In determining whether the exercise of personal jurisdiction in a particular case violates due process, the Supreme Court has provided broad guidance which centers the court’s inquiry on whether the assertion of jurisdiction comports

with “traditional notions of fair play and substantial justice.” *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). The focus for application of this broad standard has been to consider whether there are “minimum contacts” between the defendant and the forum state. *International Shoe*, 326 U.S. at 316, 66 S.Ct. at 158, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S.Ct. 559, 564, 62 L.Ed.2d 490 (1980). In a products liability situation the “defendant’s conduct and connection with the forum [must be] such that he should reasonably anticipate being haled into court there.” *World-Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. at 567. In determining whether a particular exercise of jurisdiction is consistent with due process, the inquiry must focus on “the relationship among the defendant, the forum, and the litigation.” *1344 *Rush v. Savchuk*, 444 U.S. 320, 327, 100 S.Ct. 571, 577, 62 L.Ed.2d 516 (1980) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2580, 53 L.Ed.2d 683 (1977)). As the Supreme Court explained in *World-Wide Volkswagen*:

Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State’s interest in adjudicating the dispute ...; the plaintiff’s interest in obtaining convenient and effective relief ... at least when that interest is not adequately protected by the plaintiff’s power to choose the forum; the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies....

444 U.S. at 292, 100 S.Ct. at 564 (citations omitted). Even with these guiding concepts, however, it is still true that “the constitutional standard is easier to state than to apply.” *World-Wide Volkswagen*, 444 U.S. at 313, 100 S.Ct. at 568 (Marshall, J., dissenting).

The crux of defendants’ due process complaint is that it would violate due process to look to the time of the injury rather than to the time of the commencement of litigation in determining whether the defendants had minimum contacts with this forum.⁶ Defendants assert that they have had no

contact with this forum for a substantial amount of time—some twelve or so years—and thus should not be haled into court here. This complaint, however, which seems reasonable at first blush, sounds more like an argument that should be addressed to the issue of how a statute of limitations should be applied. But the issue before the court is one of personal jurisdiction, and in such a case the basic question is whether the connection between the defendant, the forum and the litigation renders it fair to hale these defendants into court in this forum. The court believes the exercise of personal jurisdiction against defendants Turner & Newall, Atlas, and Bell does comport with due process.

Defendants, in effect, are arguing that in addition to considering the relationship among the litigation, the forum and the defendant, a court must take an additional step and be sure that there are continuing contacts with the forum at the time the suit is filed. This court does not read the Supreme Court’s decisions as requiring any such mechanical approach to the question of fairness. In fact, any such requirement was conspicuously absent in *McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), where, in upholding the exercise of jurisdiction over the defendant insurance company, the Court declared: “It is sufficient for purposes of due process that the suit was based on a contract which *had* substantial connection with that State.” 355 U.S. at 223, 78 S.Ct. at 201 (emphasis added). The Court then added: “The contract *was* delivered in California, the premiums *were* mailed from there and the insured *was* a resident of that state when he died.” 355 U.S. at 223, 78 S.Ct. at 201 (emphasis added). Defendant Turner & Newall contends that the Supreme Court in its more recent personal jurisdiction cases such as *World-Wide Volkswagen*, *supra*, and *Rush v. Savchuk*, *supra*, has retreated somewhat from the expansive approach taken in *McGee* to the question of contacts. But none of the cases since *McGee* has added a requirement to the due process analysis that there be contacts at the time the suit is filed.

*1345 The cases upon which Turner & Newall rely to support the proposition that contacts must be measured at the time suit is filed are not helpful to this court. In none of those cases was the issue squarely before the court, and, in any event, the cases provide little or no analysis to support such a conclusion. See *Connecticut Artcraft Corp. v. Smith*, 574 F.Supp. 626, 630 (D.Conn.1983); *Lachman v. Bank of*

Louisiana in New Orleans, 510 F.Supp. 753, 757 (N.D.Ohio 1981); *In re Puerto Rico Air Disaster Litigation*, 340 F.Supp. 492, 498 & n. 19 (D.P.R.1972); *Henson v. Fred Harvey, Inc.*, 308 F.Supp. 218, 219 (E.D.Pa.1970); *Optico Corp. v. Standard Tool Co.*, 285 F.Supp. 46, 48 (E.D.Pa.1968); *Proler Steel Corp. v. Luria Brothers & Co.*, 225 F.Supp. 412, 413 (S.D.Tex.1964). Rather, for reasons stated above, the court finds more persuasive cases that have taken a view contrary to that in cases relied on by Turner & Newall here. See *Boeing Co. v. Spar Aerospace Products, Ltd.*, 380 F.Supp. 101, 106 (E.D.Pa.1974); *Johnston v. Gilley*, 50 N.C.App. 274, 273 S.E.2d 513, 516 (1981); *Collins v. Mize*, 447 S.W.2d 674, 675–6 (Tex.1969). To exercise personal jurisdiction over these defendants comports with the central reasoning of *International Shoe*:

[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

326 U.S. at 319, 66 S.Ct. at 160. Although the obligations that defendants incurred as a result of their transacting business within the District of Columbia are just now being called due, the timing of this suit does not alter the fact that the claim being brought here is intimately connected with this forum since this is where the alleged injury took place, and the injury allegedly arose out of the defendants' transaction of business here as that term has been applied in *Kaiser-Stuhl*. Further, the District of Columbia clearly has an interest in providing a forum for its citizens when injuries manifest themselves after a corporate defendant has ceased activities which relate to the District of Columbia. This is not a case in which a plaintiff brings a claim based on a recently suffered injury and comes to the forum claiming personal jurisdiction based on ancient contacts that do not relate to the injury; rather, here the injury was allegedly occurring simultaneously, for the most part, with the contacts on which plaintiffs seek to invoke the personal jurisdiction of this court. Thus, considering the relationship among the defendant, the forum and the litigation, this court concludes

that it comports with “traditional notions of fair play and substantial justice” to hale a defendant into court in the place where it transacted business at the time the injury complained of was taking place and where the injury arose from the defendants' transaction of business.⁷

B. Defendant Nicolet

The court reaches a different conclusion with respect to defendant Nicolet. Plaintiffs have not argued here that Nicolet also participated in the distribution scheme that brought the products into this jurisdiction. Nor have they argued that Nicolet's own contacts with the District of Columbia bring this defendant within the reach of the D.C. long-arm statute. Rather, plaintiffs have stated the legal conclusion that defendant Nicolet is the successor in interest to Keasbey & Mattison, a company over which the court could have asserted jurisdiction under the theory outlined earlier in this Memorandum Opinion. While in considering a motion to dismiss *1346 for lack of personal jurisdiction, the court may be required to resolve factual issues in favor of the party asserting jurisdiction, the plaintiffs have cited no case, and indeed there would be no case, that says the court must resolve legal issues in its favor. With respect to defendant Nicolet the plaintiffs have simply not met their burden of establishing a prima facie case of jurisdiction.

The crux of their jurisdictional claim against Nicolet is that it acquired the Industrial Products Division of Keasbey and Mattison, the division which manufactured Sprayed Limpet Asbestos, and therefore, as successors in interest, the court can use the contacts of K & M to exercise jurisdiction over Nicolet. In papers submitted to this court supported by affidavits, defendant Nicolet has declared “... that sprayed limpet asbestos was not part of the product line of the K & M Industrial Products Division when purchased by Nicolet, and that Nicolet has never, in fact, distributed a sprayed limpet asbestos product or any similar type sprayed asbestos product.” Response of Defendant, Nicolet, Inc. to Plaintiffs' Recent Notice of Filing in Support of Plaintiffs' Opposition to Pending Motions to Dismiss at 3 (filed June 4, 1984). At oral argument, plaintiffs did not suggest that it would contest this fact but rather pointed to the fact that Nicolet distributed asbestos-containing products using the Keasbey and Mattison logo. Transcript of Oral Argument, June 5, 1984 at 42. Significantly, the plaintiffs here have not attempted to

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assert jurisdiction over Nicolet based on exposure to any of Nicolet's products after the acquisition of assets of K & M, but rather rely solely on the activities of K & M with regard to Sprayed Limpet Asbestos.

This court need not here decide whether it is ever possible to use the successor in interest theory as a tool to assert personal jurisdiction because plaintiffs have not here adduced enough facts to bring within due process bounds the assertion of personal jurisdiction over defendant Nicolet. The court will grant Nicolet's motion to dismiss for lack of personal jurisdiction.

An appropriate Order accompanies this Memorandum Opinion.

ORDER

This matter is before the court on the motions to dismiss of defendants Turner & Newall PLC, and Nicolet, Inc., and the motion of defendants Atlas-Turner, Inc. and Bell Asbestos Mines, Ltd. to dismiss or, in the alternative, for summary judgment. For the reasons stated in the accompanying Memorandum Opinion, it is, by the court, this 13th day of March, 1985

ORDERED that the motion to dismiss of defendant Turner & Newall PLC is hereby denied; and it is further

ORDERED that the motion to dismiss of defendant Nicolet, Inc. is hereby granted; and it is further

ORDERED that the motion to dismiss of defendant Atlas-Turner, Inc. is hereby denied; and it is further

ORDERED that the motion to dismiss of defendant Bell Asbestos Mines, Ltd. is hereby denied; and it is further

ORDERED that because defendant has not demonstrated to this court that it can decide the issue of liability as a matter of law, the motion of defendant Atlas-Turner, Inc. for summary judgment is hereby denied; and it is further

ORDERED that because defendant has not demonstrated to this court that it can decide the issue of liability as a matter of law, the motion of Bell Asbestos Mines, Ltd. for summary judgment is hereby denied.

All Citations

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Footnotes

- ¹ There are cases in this jurisdiction that suggest that because the transacting business prong is coextensive with due process, a court can proceed directly to the constitutional issue. See *Hummel v. Koehler*, 458 A.2d 1187, 1190 (D.C.1983); *Smith v. Jenkins*, 452 A.2d 333, 336 (D.C.1982). Because the matter is not entirely free from doubt, however, the court will analyze the case using the two-step approach while noting that the result would be the same had it considered only the constitutional issue.
- ² To support the connection of these license agreements with the District of Columbia plaintiffs have supplied the affidavit of Richard W. Boyle, Secretary-Treasurer of the Krafft-Murphy Company. In his affidavit he explains that the National Asbestos Company ("National") was formed in the 1950's by the stockholders of Krafft-Murphy and that National shared office space and warehouse space with Krafft-Murphy. He declares that while the sublicense with Keasbey and Mattison was in effect National "regularly applied Sprayed Limpet Asbestos in buildings located in the District of Columbia." Boyle Affidavit at ¶¶4–6. In the early 1960's the activities of National were absorbed in one company called Krafft-Murphy. The Boyle affidavit declares that while the sublicense agreement with Armstrong was in effect Krafft-Murphy regularly applied Sprayed Limpet Asbestos in buildings in the District of Columbia. *Id.* ¶ 13. After the Armstrong license was assigned to Atlas, the Boyle affidavit declares that Krafft-Murphy continued to apply Limpet in the District of Columbia, and that this asbestos was ordered from Atlas in Canada. *Id.* ¶ 19. It appears reasonable to characterize Krafft-Murphy and National's transactions in the District of Columbia as sales when they contracted to apply Limpet here. Counsel for plaintiffs have so characterized the activities of Krafft-Murphy and National. See Plaintiffs' Reply to Defendant Turner & Newall PLC's Supplemental Memorandum in Support of Motion to Dismiss at 6. ("uncontested factual record in this case ... establishes that T & N's approved distributor, Krafft-Murphy, sold T & N's Limpet in the District of Columbia for a period spanning three decades"). The Boyle affidavit does not use the precise word "sale," but the court finds that the activities he describes are sufficient to come within the transacting business prong as analyzed in *Kaiser-Stuhl*.
- ³ Courts in other jurisdictions which have similar "arising from" language in their long-arm statutes have used various verbal formulas which support a view that the claim here arises from the defendants' transaction of business here. Illinois courts, for example, require that the claim "lie in the wake" of the defendant's commercial activities. *Jacobs/Kahan & Company v. Marsh*, 740 F.2d 587, 591 (7th Cir.1984) (applying Illinois law); *Wimmer v. Koenigseder*, 128 Ill.App.3d 157, 83 Ill.Dec. 368, 470 N.E.2d 326, 329 (1984). There can be little doubt that Mr. McDaniel's injuries if found to have been caused by the exposure to defendants' products lie in the wake of the defendants' decision to market asbestos products in the District of Columbia.
- ⁴ The stream of commerce theory may narrow the range of cases in which resort by a plaintiff to the (a)(4) prong will be necessary in order to support personal jurisdiction, but that reality in no way affects a determination whether (a)(1) should apply in a given case.
- ⁵ "Decisions applying Virginia and Maryland law are persuasive authority in the District of Columbia since Congress modeled the District's long-arm statute on the statutes of those neighboring states." *Kaiser-Stuhl*, *supra*, at 205 n. 13.
- ⁶ Absent the problem of timing presented here, this court would have no difficulty concluding that the exercise of jurisdiction over these defendants comports with due process. The point was conceded in *Kaiser-Stuhl*, 647 F.2d at 203, and other courts faced with similar distribution schemes have found the exercise of personal jurisdiction to be within the scope of due process requirements. See, e.g., *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081 (5th Cir.1984); *Nelson by Carson v. Park Industries, Inc.*, 717 F.2d 1120 (7th Cir.1983), *cert. denied*, 465 U.S.

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1024 104 S.Ct. 1277–78, 79 L.Ed.2d 682 (1984).

⁷ See also *Restatement (Second) of Conflict of Laws* § 48 (1971) (“A state has power to exercise judicial jurisdiction over a foreign corporation which has done business in the state, but has ceased to do business there at the time when the action is brought, with respect to causes of action arising from the business done in the state”).

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EXHIBIT B

Subject: Welch v. Atlas
Date: Tuesday, May 16, 2023 at 2:48:07 PM Central Daylight Time
From: Theile McVey
To: David Traylor, Robert Meriwether
CC: tbranham@dobslegal.com
Attachments: Atlas Turner Inc.'s Response and Objs to Pls' MTA a Receiver - Exhibit 5.pdf, Atlas Turner Inc.'s Response and Objs to Pls' MTA a Receiver - Exhibit 6.pdf, Atlas Turner Inc.'s Response and Objs to Pls' MTA a Receiver - Exhibit 7.pdf, Atlas Turner Inc.'s Response and Objs to Pls' MTA a Receiver - Exhibit 8.pdf, Atlas Turner Inc.'s Response and Objs to Pls' MTA a Receiver.pdf, Atlas Turner Inc.'s Response and Objs to Pls' MTA a Receiver - Exhibit 1.pdf, Atlas Turner Inc.'s Response and Objs to Pls' MTA a Receiver - Exhibit 2.pdf, Atlas Turner Inc.'s Response and Objs to Pls' MTA a Receiver - Exhibit 3.pdf, Atlas Turner Inc.'s Response and Objs to Pls' MTA a Receiver - Exhibit 4.pdf

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David:

I have to admit that I am stunned by this response. You accuse us of numerous falsehoods. Pretty shocking. But first, please let me know in what way Atlas is participating in this case. For example, has Atlas answered any discovery? Given a deposition? Produced any documents?

Second, did you read the motion to appoint a receiver? Did you see that we were seeking a receiver over Atlas' insurance assets? Did you see the South Carolina Supreme Court case and CJ Toal's prior rulings where insurance assets are the property of South Carolina when a person is injured in South Carolina like Welch?

Please respond by 5pm tomorrow so that we can file our reply.

Theile McVey
Kassel McVey
Post Office Box 1476
1330 Laurel Street
Columbia, South Carolina 29202
803.256.4242
tmcvey@kassellaw.com
www.kasselmcvay.com

Subject: RE: Welch v. Atlas

Date: Tuesday, May 16, 2023 at 4:42:22 PM Central Daylight Time

From: David Traylor

To: Theile McVey, Robert Meriwether

CC: tbranham@dobslegal.com

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Theile, I apologize, but I need to get back with you tomorrow. I will try to get back as soon as I can. Thank you.



DAVID G. TRAYLOR, JR. **PARTNER**
david.traylor@nelsonmullins.com

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1320 MAIN STREET | COLUMBIA, SC 29201

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From: Theile McVey <tmcvey@kassellaw.com>

Sent: Tuesday, May 16, 2023 4:42 PM

To: David Traylor <david.traylor@nelsonmullins.com>; Robert Meriwether <robert.meriwether@nelsonmullins.com>

Cc: tbranham@dobslegal.com

Subject: Re: Welch v. Atlas

Please let us know how Atlas is participating in this case as you say in the response. Thanks, Theile

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From: David Traylor <david.traylor@nelsonmullins.com>

Sent: Tuesday, May 16, 2023 4:41:18 PM

To: Theile McVey <tmcvey@kassellaw.com>; Robert Meriwether <robert.meriwether@nelsonmullins.com>

Cc: tbranham@dobslegal.com <tbranham@dobslegal.com>

Subject: RE: Welch v. Atlas

Dear Theile and Trey,

Please understand that nothing in the Response we submitted was intended to impugn you or your firms, and if the language was overly colorful, I regret that we did not edit more carefully before sending this out. I would be happy to talk with you, meet with you, or otherwise work to address your concerns, but I hope you know that this submission was NOT intended to be an ad hominem attack.



DAVID G. TRAYLOR, JR. **PARTNER**
david.traylor@nelsonmullins.com

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From: Theile McVey <tmcvey@kassellaw.com>
Sent: Tuesday, May 16, 2023 3:48 PM
To: David Traylor <david.traylor@nelsonmullins.com>; Robert Meriwether <robert.meriwether@nelsonmullins.com>
Cc: tbranham@dotslegal.com
Subject: Welch v. Atlas

◀External Email▶ - From: tmcvey@kassellaw.com

David:

I have to admit that I am stunned by this response. You accuse us of numerous falsehoods. Pretty shocking. But first, please let me know in what way Atlas is participating in this case. For example, has Atlas answered any discovery? Given a deposition? Produced any documents?

Second, did you read the motion to appoint a receiver? Did you see that we were seeking a receiver over Atlas' insurance assets? Did you see the South Carolina Supreme Court case and CJ Toal's prior rulings where insurance assets are the property of South Carolina when a person is injured in South Carolina like Welch?

Please respond by 5pm tomorrow so that we can file our reply.

Theile McVey
Kassel McVey
Post Office Box 1476
1330 Laurel Street
Columbia, South Carolina 29202
803.256.4242
tmcvey@kassellaw.com
<https://link.edgепilot.com/s/4d23b012/rquHS9IUUE6XpSiDRlwYUQ?u=http://www.kassellmcvey.com/>

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EXHIBIT C

Subject: Welch v. Atlas Turner, Inc.
Date: Wednesday, May 17, 2023 at 1:58:37 PM Central Daylight Time
From: David Traylor
To: Theile McVey (TMcVey@kassellaw.com), Trey Branham
CC: Robert Meriwether
Attachments: ~WRD0000.jpg

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Theile and Trey:

Following up on your questions, as to Atlas' participation in the Welch matter, Atlas accepted service of the complaint and the various amended complaints in the matter, entered an appearance by counsel through our firm, and filed motions to dismiss for lack of personal jurisdiction in response to the various complaints filed. Atlas also filed a motion for summary judgment and motions for a protective order in the matter regarding the discovery requested. After the motions to dismiss, motions for protective order, and motion for summary judgment were denied, Atlas filed an answer, again asserting lack of personal jurisdiction. Our filings are summarized in footnote two of our response and objection.

Upon reflection, it appears that the reference in your motion to Atlas not accepting service and not appearing was, in the overall context of the motion, intended to only refer to the particular instance of the deposition, and not the case as a whole, as we initially took it to mean and so responded. As we conceded at the hearing on May 4, Atlas did not provide a 30(b)(6) witness on the date specified, but stood upon its arguments set forth in its motions to dismiss, for summary judgment, and for a protective order. Our response was not intended to assert that our client had appeared for the deposition and we continue to concede that point and rely upon the reasons set forth in our filings for not doing so.

We are aware of the ruling on the motion to vacate the receivership that was ordered in the WCD case after judgment and the issue of insurers and insurance in that case. We believe this case is distinguishable and will address the issue as it comes up.

Regards,

David



DAVID G. TRAYLOR, JR. **PARTNER**
david.traylor@nelsonmullins.com
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From: Trey Branham <tbranham@dobslegal.com>
Sent: Tuesday, May 16, 2023 5:45 PM
To: David Traylor <david.traylor@nelsonmullins.com>
Cc: Theile McVey <TMcVey@kassellaw.com>; Robert Meriwether <robert.meriwether@nelsonmullins.com>
Subject: Re: Welch v. Atlas

David,

We will file our reply to this tomorrow. We wont be kind to the misrepresentations in this response.

You made the allegation. You dont need until tomorrow. But I certainly understand why you cant answer the question.

Charles W. Branham, III, P.C.
Dean Omar Branham Shirley, LLP
302 N. Market Street
Suite 300
Dallas, Texas 75202
214-722-5990
214-722-5991 (fax)
tbranham@dobslegal.com

Please note the new email address.

On May 16, 2023, at 4:42 PM, David Traylor <david.traylor@nelsonmullins.com> wrote:

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Theile, I apologize, but I need to get back with you tomorrow. I will try to get back as soon as I can. Thank you.

DAVID G. TRAYLOR, JR. **PARTNER**
david.traylor@nelsonmullins.com
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T 803.255.9439 F 803.256.7500
NELSONMULLINS.COM [VCARD](#) [VIEW BIO](#)

From: Theile McVey <tmcvey@kassellaw.com>
Sent: Tuesday, May 16, 2023 4:42 PM
To: David Traylor <david.traylor@nelsonmullins.com>; Robert Meriwether <robert.meriwether@nelsonmullins.com>
Cc: tbranham@dobslegal.com
Subject: Re: Welch v. Atlas

Please let us know how Atlas is participating in this case as you say in the response. Thanks,
Theile

Get [Outlook for iOS](#)

From: David Traylor <david.traylor@nelsonmullins.com>
Sent: Tuesday, May 16, 2023 4:41:18 PM
To: Theile McVey <tmcvey@kassellaw.com>; Robert Meriwether <robert.meriwether@nelsonmullins.com>
Cc: tbranham@dobslegal.com <tbranham@dobslegal.com>
Subject: RE: Welch v. Atlas

Dear Theile and Trey,

Please understand that nothing in the Response we submitted was intended to impugn you or your firms, and if the language was overly colorful, I regret that we did not edit more carefully before sending this out. I would be happy to talk with you, meet with you, or otherwise work to address your concerns, but I hope you know that this submission was NOT intended to be an ad hominem attack.

DAVID G. TRAYLOR, JR. **PARTNER**
david.traylor@nelsonmullins.com
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T 803.255.9439 F 803.256.7500
NELSONMULLINS.COM [VCARD](#) [VIEW BIO](#)

From: Theile McVey <tmcvey@kassellaw.com>

Sent: Tuesday, May 16, 2023 3:48 PM
To: David Traylor <david.traylor@nelsonmullins.com>; Robert Meriwether <robert.meriwether@nelsonmullins.com>
Cc: tbranham@dobslegal.com
Subject: Welch v. Atlas

◀**External Email**▶ - From: tmcvey@kassellaw.com

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Theile McVey
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EXHIBIT E

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
SARAH J. PLANT and PARKER	)	C/A NO. 2022-CP-40-01265
PLANT,	)	
	)	<i>In Re:</i>
Plaintiff,	)	Asbestos Personal Injury Litigation
	)	Coordinated Docket
v.	)	
	)	
AVON PRODUCTS, INC., et al.	)	
	)	
Defendants.	)	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
KELLY PAYNE CLARK and SHANNON	)	C/A NO. 2022-CP-40-01281
PAYNE LANCASTER, as Co-Executors of	)	
the Estate of SHELBY LINVILLE	)	<i>In Re:</i>
PAYNE, Deceased,	)	Asbestos Personal Injury Litigation
	)	Coordinated Docket
Plaintiffs,	)	
	)	
v.	)	
	)	
3M COMPANY et al.	)	
	)	
Defendants.	)	

ORDER ON PLAINTIFFS' MOTION TO APPOINT A RECEIVER

Plaintiffs have moved this Court to appoint a Receiver over Whittaker Clark & Daniel, Inc., ("WCD") pursuant to S.C. Code §15-65-10(4). For the reasons set forth below, this Motion

is GRANTED and Peter Protopapas, Esq. is, as of the signing of this Order appointed the receiver over Whittaker Clark & Daniels, Inc.

A. \$29,000,000 Jury Verdict

On Friday, March 3, 2023, a unanimous South Carolina jury held Whittaker Clark & Daniel, Inc. liable in an amount in excess of \$29,000,000 in favor of Sarah Plant, a 37 year old with 3 minor children who has been diagnosed and treated for advanced mesothelioma, and her husband Parker Plant.

During the course of this case, Whittaker Clark & Daniels, Inc. initially informed this Court that it had more than \$105,000,000 in unconditional assets available to it. Since that time, WCD has received verdicts against it in excess of \$48,000,000 and has informed this Court that the assets available to it have been precipitously reduced. Moreover, this Court is informed that WCD is currently set for trial in numerous trials in the next 60 days. Additionally, this Court is set to hear this year the above-captioned *Payne* case, in which WCD is also a defendant.

South Carolina Code §15-65-10(4) provides 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 . . .

Here the facts that have been made known to this Court through various filings in this case as well as during arguments in open court make clear that WCD is, at a bare minimum, in imminent danger of insolvency.

Moreover, South Carolina law provides that this Court may, upon four (4) days notice of an application, order the appointment of a receiver. S.C. §15-65-20. The instant motion was filed and served on WCD on March 6, 2022. Therefore, WCD has been on notice of this motion for more than five days and the Court is within its power to determine whether to appoint a receiver.

B. WCD's Financial Condition

A brief and basic summary of the facts relating to WCD's financial condition is warranted. WCD, for various periods of time, was a supplier of asbestos containing talc for use industrial settings as well as in a vast number of cosmetic products. As a South Carolina jury recently found, WCD knew that asbestos could be found in its talc. Even though it used inadequate testing methods, WCD was well aware of the differing levels of asbestos found in the talc that it supplied. Despite this knowledge, WCD fought for regulations that would permit asbestos in talc. Meanwhile, it warned no one that asbestos was in the talc it supplied. Instead, WCD certified that its talc was asbestos free, although the FDA later found WCD's certification to be misleading.

All the while in possession of this knowledge, in 2004, WCD sold off all of its assets to a company named Brenntag Specialties, Inc. See Affidavit of David J. Wheat. After this transaction, all that remained of WCD was its asbestos litigation liabilities and, perhaps, insurance policies. The corporate representative of WCD is Dennis Alan St. George. In 2017, Mr. St. George testified that "other than managing its claims," WCD has not actually been in the business of doing anything. Deposition of Dennis Alan St. George at 8-31-2017 at 10:20-11:1. The last time that WCD was in the business of doing anything other than managing claims was in 2004. *Id.* at 11:6-7. Indeed, WCD "does not have any employees and hasn't had any since February 27,

2004.” Deposition of Dennis Alan St. George, November 6, 2008 at 65:8-9. WCD’s sole purpose is “confined to administering its liabilities and claims against it.” *Id.* at 13:8-14. WCD is a subsidiary of SoCo West.¹ Deposition of Dennis Alan St. George December 3, 2013 at 8:24. In an unlikely coincidence, the last time SoCoWest had any employee was also February 27, 2004, the same day WCD sold all its assets. *Id.* at 9:12-17.

Moreover, Mr. St. George revealed that the president of WCD was a gentleman by the name of Raj Metha. *Id.* at 6:17-22. Mr. Metha is, or at least as of 2018, was, a vice president for National Indemnity Company. See Financial Examination Report of the National Indemnity Company dated May 23, 2018. National Indemnity Company is controlled by Berkshire Hathaway, Inc. and has been since 1967. *Id.* at 8. Also under the National Indemnity Company umbrella are several “Resolute” entities. *Id.* at 40. Resolute controls substantial portions of the insurance industry which covers asbestos liabilities for substantial numbers of defendants in asbestos litigation. It has repeatedly been sued by its insureds for its bad faith tactics.²

As of 2013 (9 years ago), WCD had only \$15,000,000 in the bank. Deposition of Alan St. George 12-3-13 at 7:21-25. This money is what was left from the 2004 transaction described above. As further set forth above, WCD has no employees, operations or anything that generates revenue. On April 19, 2021, WCD took a verdict of \$4,800,000 after having received a verdict of \$18,000,000 in 2016. See LA Jury Hits Talc Supplier with \$4.8 million asbestos verdict, Law 360, April 19, 2021. Then on December 9, 2021, WCD took a verdict in the amount of

¹ Although counsel for WCD has represented to this Court that WCD has, without the need for authorization, access to funds available to Soco West and Brilliant National Services, neither of those entities are parties to the above captioned cases and this Court presently does not have jurisdiction over those entities to enforce that representation.

² See e.g. Berkshire’s Asbestos Handling Draws Unwelcome Spotlight, November 4, 2013; Berkshire Hathaway Subsidiaries deny, delay asbestos, hazard claims, suits, insiders allege, October 7, 2013 found at https://youtu.be/Vco_tk6EQjg

\$76,000,000. WCD settled the matter before the jury reached a decision on the punitive damages. *See* Calif. Jury Awards Talc Plaintiffs \$76 million; Case Settles Before Punitives Phase, December 16, 2021. Now, as set forth above, WCD is facing nearly an additional \$50,000,000 in verdicts/judgments.

C. Appointment of a Receiver is Warranted

In light of the foregoing facts, this Court finds that the application is meritorious under the applicable statute because WCD appears to actually be insolvent and it is certainly in imminent danger of insolvency. Plaintiffs have requested an expedited ruling in this matter to preserve the status quo. That request is also meritorious and is therefore granted.

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

Additionally, while it is clear that the powers of a receiver are as broad as the law permits, given that there clearly appear to be related company transactions involved in this matter, the Court specifically authorizes the Receiver to investigate such transactions and actions of related companies and, where necessary and appropriate, in his professional judgment initiate legal actions against those entities, and where appropriate the officers and directors of those entities. Nothing in this order is intended to limit the power of the receiver to bring claims against any entity or individual, related or not.

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

Based on the Court's experience in other receivership matters, and in an effort to streamline these proceedings, the Court expects the Receiver to investigate the existence of all insurance coverages potentially available to the company in receivership as well as any other claims available

to WCD. The Court expects all insurers to comply with subpoenas issued by this Court and its Receiver in effectuating these thorough searches.

The Court further orders, pursuant to the *Barton* Doctrine³ and as the Receiver Court, that the Receiver or WCD may not be sued outside this Court without obtaining the Receiver's consent or an order of this Court prior to doing so.

Pursuant to the relative provisions of the statutory law and the emergency nature of this matter, this Court finds the expedited appointment of a receiver is appropriate in this case. That being said, the grant of Plaintiff's Motion to Appoint a Receiver over WCD is subject to a potential motion for reconsideration of this matter by Defendant, including but not limited to, reconsideration of the grant above of power, rights, and authorities to the receiver. If a reconsideration motion is made within the time limits specified by South Carolina Code and Rules of Civil Procedure, this Court will promptly set a hearing on this matter at its earliest convenience.

AND IT IS SO ORDERED.

[JUDGE'S E-SIGNATURE PAGE FOLLOWS]

³ A more fulsome discussion of the applicability of the *Barton* Doctrine can be found in a recently issued remand order remanding another receivership to this court on the basis of the *Barton* Doctrine. See Remand Order, *Protopapas v. Zurich, et al*, 3:21-CV-040866-DCC (D. S.C. February 24, 2023)(finding 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))



Richland Common Pleas

Case Caption: Sarah J Plant , plaintiff, et al vs Avon Products Inc , defendant, et al
Case Number: 2022CP4001265
Type: Order/Appointment of Receiver

So Ordered

Jean H. Toal

Electronically signed on 2023-03-10 15:39:59 page 8 of 8

ELECTRONICALLY FILED - 2023 Mar 10 4:44 PM - RICHLAND - COMMON PLEAS - CASE#2022CP4001265
ELECTRONICALLY FILED - 2023 May 17 6:15 PM - RICHLAND - COMMON PLEAS - CASE#2022CP4003834

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

KELLY PAYNE CLARK AND SHANNON PAYNE
LANCASTER, AS CO-EXECUTORS OF THE
ESTATE OF SHELBY LINVILLE PAYNE,

Plaintiffs,

vs.

C.A. No.: 2020-CP-40-01597

3M COMPANY, ET AL.,

Defendants.

SARAH J. PLANT AND PARKER PLANT

Plaintiffs,

vs.

C.A. No.: 2020-CP-40-01265

AVON PRODUCTS, INC., ET AL.,

Defendants.

*** UNOFFICIAL EXPEDITED TRANSCRIPT ***

POST-TRIAL MOTIONS

BEFORE THE HONORABLE
CHIEF JUSTICE (RET.) JEAN TOAL

DATE TAKEN: Monday, April 18, 2023

TIME START: 9:40 a.m.

TIME END: 1:29 p.m.

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

REPORTED BY: Sheri L. Byers, RPR
EveryWord, Inc.

APPEARANCES:

ATTORNEYS FOR THE PLAINTIFFS:

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BY: THEILE B. MCVEY, ESQUIRE
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803.256.4242
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ATTORNEYS FOR THE DEFENDANT
WHITAKKER CLARK & DANIELS:

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-and- M. KEVIN MCCARRELL, ESQUIRE
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864.751.7600
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GALLIVAN, WHITE & BOYD, P.A.
BY: GRAY T. CULBREATH, ESQUIRE
-and- CURTIS L. OTT, ESQUIRE
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803.779.1833
gculbreath@gwblawfirm.com
cott@gwblawfirm.com

I N D E X

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E X H I B I T S

(None were proffered.)

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P R O C E E D I N G S

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THE COURT: We are moving now to Sarah Plant and Parker Plant against Avon Products. These are post-trial motions by Whittaker Clark & Daniels. There are three.

The first is a motion for new trial absolute. The second is a motion for judgment notwithstanding the verdict, and the third is a motion for setoff and related relief.

There is, after this hearing concludes, another hearing that we'll discuss the matter of reconsideration and vacation of the receivership order. So we're starting first with Plant and the post-trial motions in Plant.

Have all lawyers given our court reporter, Amber Payne, your cards and who you represent? If not, please do so now.

Let me just say to begin with, I have read these voluminous notebooks, a transcript of the trial, my trial notes. I have taken all the flash drives and been through them, made marks on them and so forth, so I think I'm pretty well prepared, and I would very much appreciate it,

1 in light of what my schedule requirements are,
2 if we could move in an expeditious fashion. And
3 I know you all will try to do the very best you
4 can to effectuate that.

5 So I turn to Ms. Flynn as the moving party,
6 and first is the motion for new trial absolute.

7 MS. FLYNN: Yes, Your Honor.

8 THE COURT: You may proceed. And you can
9 proceed from there or the podium, whichever
10 suits you best.

11 Is it mic'd up at the podium?

12 MS. MCVEY: We can move it.

13 MS. FLYNN: Your Honor, Stephanie Flynn on
14 behalf of Whittaker Clark & Daniels. Just for
15 the Court and for everyone else, we have divided
16 up a little bit some of the arguments.

17 THE COURT: Certainly. And you run as you
18 have prepared. Any way you want to handle it is
19 fine.

20 MS. FLYNN: That sounds wonderful.

21 I will go ahead and start with a motion for
22 new trial, then I believe, Your Honor -- and
23 we've got multiple issues. I think there are
24 multiple issues actually that are both in the
25 new trial and the JNOV motions. I'm not going

1 to rehash them twice. If they're included in
2 both motions, I'm going to say it once and move
3 along.

4 The first issue I think I wanted to address
5 with the motion for a new trial, Your Honor, is
6 the exclusion of Dr. Attanoos.

7 We believe that the Court's exclusion of
8 Whittaker Clark & Daniels' key medical expert
9 completely hobbled Whittaker Clark & Daniels'
10 ability to present any evidence to refute the
11 Plaintiffs' theory of the case.

12 And the effect is essentially, Your Honor,
13 an adjudication by the Court that, one, that
14 mesotheliomas cannot arise in the absence of
15 asbestos exposure, and two, that Ms. Plant's
16 mesothelioma was caused by asbestos.

17 This is, as you know, a crucial
18 foundational element of the Plaintiffs' case,
19 and the Plaintiffs' burden of proof. And that
20 was essentially, in WCD's position, wiped away
21 before the trial even began.

22 THE COURT: Let me be sure I understand
23 exactly what you're saying. You're saying that
24 excluding Attanoos had the effect of a
25 determination by the Court that mesothelioma is

1 caused by asbestos. And what did you say the
2 other thing that the Court determined?

3 MS. FLYNN: That Ms. Plant's mesothelioma
4 specifically was caused by asbestos.

5 THE COURT: I thought I heard kind of a
6 negative side of that argument, but maybe I'm
7 misconstruing it. Go ahead.

8 MS. FLYNN: As this Court might recall, it
9 was three business days prior to the trial when
10 we had the motion in limine hearings. It was at
11 that time that WCD's medical expert,
12 Dr. Attanoos, was completely eliminated from the
13 trial. And the reasons that were set forth by
14 the Court at the time were twofold.

15 And one, first and foremost, was the
16 inability to follow instructions, and we
17 understood that to be a major issue for the
18 Court.

19 And secondly, there was an alleged lack of
20 foundation to opine about naturally-occurring or
21 idiopathic mesotheliomas.

22 At that point, it was our understanding
23 that the Court had not considered our response
24 in opposition to the motion, and that was
25 primarily due to the fact that our response was

1 only due the day before. We filed it around --
2 between 4 and 5:00, so it was just a factor of
3 how compressed the schedule was.

4 So we advised the Court of that during the
5 trial. We understood the Court would reconsider
6 our position based on that response, and
7 determine whether he was going to be admitted,
8 maybe perhaps under some of the limiting
9 circumstances that some of the other experts
10 were to be limited, or whether he would be
11 excluded entirely. And, of course, the Court
12 determined that he was going to be excluded
13 entirely.

14 After that occurred, we filed our motion to
15 reconsider the exclusion of Dr. Attanoos. And
16 our bases for that were threefold. And the
17 first and foremost was the Court's exclusion of
18 Dr. Attanoos based on its recollection of his
19 conduct in a prior trial. I think, among the
20 arguments we raised at that time, were that WCD
21 was not involved in the prior trial. We had not
22 been involved with Dr. Attanoos. We had not
23 proffered his testimony in a prior trial. And,
24 of course, the Plaintiff had not moved to
25 exclude him based on his prior conduct.

1 So essentially WCD had no notice that this
2 was even an issue before the Court and had no
3 ability to have responded to any concerns about
4 his conduct before the Court prior to that time.

5 But even then, had we gotten the prior
6 transcripts, which we did do, of the prior
7 trials, we went and got the prior transcripts,
8 and we reviewed those to see what the issue was.
9 And those didn't reflect what we understood the
10 Court's concerns to be. Those two transcripts
11 were two transcripts from the Bostic trial and
12 one from the Johnson trial.

13 And in none of those did we find that there
14 appear to be some kind of exchange between the
15 Court and Dr. Attanoos that would reflect, you
16 know, some disagreement while he was on the
17 stand.

18 So we understand that you've reviewed your
19 notes from that trial, the Court's notes and
20 your recollection, but those were not a part of
21 the record that we've had a chance to review,
22 and they're not a part of the record in this
23 case. So we believe that it was an improper
24 basis to exclude Dr. Attanoos based on the
25 Court's recollection of which we had no notice.

1 Secondly, Your Honor, I think the other,
2 the second part of our motion to reconsider the
3 exclusion was based on our response that we had
4 filed the day prior to the motion in limine
5 hearing. And that basically set forth the
6 arguments that we had included in that response.
7 I believe that it's false that there was a lack
8 of support for his opinions.

9 He had a 58-page report that outlines
10 everything that he had reviewed, and it ranged
11 from the testimony from the Plants, the mother,
12 the daughter, and her husband, the medical
13 records, the past medical history, family
14 medical history; the expert report of the
15 Plaintiffs' expert, Dr. Maddox; and the expert
16 reports of two mineralogists and two inhalation
17 toxicologists about the levels of exposure and
18 sources of talc, the sources of asbestos fibers
19 in talc.

20 So he had all of that information as to
21 what Ms. Plant claims she inhaled and used,
22 where those talc fibers -- where the fibers
23 supposedly came from. He had all of that
24 information.

25 And then, of course, he set forth an

1 extended summary of published peer-reviewed
2 research and articles relating to the causes of
3 mesothelioma, the incidence of spontaneous or
4 idiopathic mesotheliomas. And most importantly,
5 the role of germline mutations as a cause of
6 mesothelioma independent of any extrinsic
7 exposures from asbestos.

8 So saying that he didn't consider the fiber
9 type, whether talc was contaminated with
10 asbestos and studies on the risk of use of talc
11 products, we believe is false. I understand the
12 Court, obviously, doesn't agree with
13 Dr. Attanoos' opinions, but he was objectively
14 qualified to give them, and we believe they were
15 well supported by his testimony as set forth in
16 his report and in his deposition.

17 And thirdly, since it did not appear that
18 the Court had conducted or perhaps had reviewed
19 our motion in full, we had requested the
20 Daubert/council hearing in the event the Court
21 wanted to explore his opinions.

22 THE COURT: When do you say you requested a
23 Daubert hearing?

24 MS. FLYNN: In our motion to reconsider the
25 exclusion of Dr. Attanoos. It was set forth in

1 the briefing.

2 THE COURT: When was that submitted?

3 MS. FLYNN: That would have been
4 submitted -- I don't have the date on that. It
5 is probably in --

6 THE COURT: Submitted during trial, wasn't
7 it?

8 MS. FLYNN: Submitted during trial, yes,
9 ma'am.

10 THE COURT: All right. Well past the
11 deadline to deal with motions in limine and
12 other kinds of pretrial motions in a case that
13 was being tried in a very compressed time
14 situation.

15 But one of the other things is, who did you
16 have prepared to testify if a Daubert/council
17 hearing had been held on Dr. Attanoos?

18 MS. FLYNN: It would have been
19 Dr. Attanoos. We were trying to --

20 THE COURT: None of that was told to me as
21 this case was tried. Not once did you ask, "We
22 have Dr. Attanoos here. We want to put him on
23 the stand to have a Daubert hearing." None of
24 that was done.

25 MS. FLYNN: We believe, respectfully, it

1 was, Your Honor, as set forth in the briefing
2 that we submitted to you.

3 THE COURT: I understand what your briefing
4 was in the motion for reconsideration that was
5 done midway through the trial, way after any
6 time -- reasonable time. That's why I have
7 these pretrials.

8 MS. FLYNN: I completely understand, Your
9 Honor. And the factor of the timing is a factor
10 of how everything happened. And that's why the
11 procedural history is so important that
12 Dr. Attanoos was only excluded three days --
13 three business days before, so we were behind
14 the ball.

15 The Court was reconsidering based on our
16 response to the motion that we had submitted,
17 the response in opposition, so the Court took
18 that time. And then it was only after that when
19 the Court excluded him again that we said we
20 need to reconsider.

21 THE COURT: I understand, but in the motion
22 in limine to begin with, and that's the reason I
23 have these things beforehand, the Plaintiff
24 challenged tremendously the qualifications,
25 background, and knowledge of Dr. Attanoos. They

1 challenged Dr. Attanoos' ability to say anything
2 about Ms. Plant, because from their examination
3 of it, he had not even looked at her records.

4 They challenged him on his professional
5 ability, Watson versus Ford Motor Company, on
6 the basis that he's basically a reviewer. There
7 are a lot of witnesses like that. They don't do
8 any testing of their own. They review the works
9 of others, and then make conclusionary opinions
10 based on the work of others.

11 And finally, he wanted to express a
12 specific opinion about Ms. Plant with respect to
13 her alleged spontaneous idiopathic or
14 naturally-occurring mesothelioma. He had done
15 no hands-on research about that, and basically,
16 those things are I-don't-know opinions.
17 Idiopathic means I don't know. I can't assign a
18 thing. Naturally occurring is spontaneous, same
19 thing, I don't know, so therefore, it must be
20 naturally occurring or spontaneous.

21 So all that contention by Plaintiff was put
22 into play before -- before I ever conducted the
23 motion in limine hearing. You all knew for some
24 time before that that all things we ended up
25 going over again in reconsideration were

1 contentions the Plaintiff had made about
2 Dr. Attanoos well before the trial of this case.

3 MS. FLYNN: I think we well summarized
4 those and opposed those in our initial response
5 and showed that the Court -- showed that
6 Dr. Attanoos was well qualified, showed that he
7 would have said more than that, that germline
8 mutations, in fact, can cause extrinsically
9 without -- without an extrinsic factor like
10 asbestos exposure. And he was prevented from
11 doing that.

12 THE COURT: But he wasn't prevented by
13 anything I did. He was prevented because
14 nothing was brought up about it by means of
15 conducting any kind of council hearing, which
16 you had all information to do at the motion in
17 limine hearing.

18 That wasn't even asked for, requested,
19 brought up, or anything else, and then suddenly,
20 when I did what I was requested to do -- I mean,
21 these are not routine matter of fact sort of
22 hearings. I attend to each one of those
23 deliberately and look at the facts as they
24 appear in that case. And that's why I don't
25 understand the shock and amazement that said,

1 "Oh, you mean she's going to disqualify him?"

2 The expert in Watson versus Ford Motor
3 Company was an international expert in big naval
4 motors, well published, well researched and so
5 forth and so on, but he knew nothing about a
6 cruise control. That's what he was offered for.

7 And that's why our Court held that he was
8 not qualified by training and experience in that
9 particular area. And that is what I ruled in
10 Attanoos.

11 MS. FLYNN: I understand, Your Honor. I
12 think, just respectfully, we disagree. And to
13 the level of his qualifications on that topic, I
14 think we've submitted articles that he's
15 reviewed that were more than a page and a half
16 in length in our briefing.

17 THE COURT: I understand your argument, as
18 I have several times.

19 MS. FLYNN: Your Honor, we do think that
20 that error -- I did want to mention, Your Honor,
21 that we believe the door was open to
22 Dr. Attanoos multiple times during the trial.
23 In fact, on the first day and second day of
24 trial, Dr. Attanoos was mentioned by the
25 Plaintiffs' attorneys, both during opening

1 arguments, statements. They put him -- his
2 picture on a slide and said that the jury is
3 going to have a chance to meet him, when, in
4 fact, he was already excluded.

5 And then the second day, they asked
6 Dr. Brody about Dr. Attanoos. So we did raise
7 that later. We didn't object to it at the time,
8 because frankly, why wouldn't we want the door
9 to be opened to that, so I wouldn't object to
10 the Plaintiffs opening the door because we were
11 still battling as to whether Dr. Attanoos was
12 going to be able to testify or not at that
13 point. It was still up in the air and still
14 under the Court's consideration. So the fact
15 that they did that --

16 THE COURT: I disagree. I don't understand
17 that argument. I have ruled that he wasn't
18 going to testify. At best, all you had left was
19 a motion for reconsideration.

20 MS. FLYNN: Yes, Your Honor.

21 THE COURT: As I understood, when that case
22 began, I had ruled out the testimony of
23 Dr. Attanoos. And if you thought the door was
24 open by that, which was never argued even when
25 we argued reconsideration. This business that

1 the opening argument and the examination of
2 Brody opened the door is something that is a
3 post-trial matter that's been brought up.

4 MS. FLYNN: I do think the issue was raised
5 during side-bars with regard to the fact that
6 this was brought up and that Dr. Attanoos' name
7 was mentioned. However, for motions in limine,
8 those are always subject to the Court's
9 reconsideration throughout the trial based on
10 the evidence that comes down as that happens.

11 So even though we understood, and always
12 understood the Court's ruling, our hope was
13 always that the Court would reconsider. And
14 that's why we kept raising the issue and
15 bringing it to your attention, you know, again
16 and again.

17 The Plaintiffs, of course, never had moved
18 for the entire exclusion of Dr. Attanoos; they
19 had only moved for partial exclusion of his
20 opinions, certain of his opinions. So it was
21 the Court's sua sponte raising of all these
22 issues about his prior conduct that --

23 THE COURT: Well, Ms. Flynn, you know, I
24 have to make a decision with regard to each
25 expert that testifies as to whether by reason of

1 their training, education, and experience
2 they're going to be qualified as an expert,
3 whether any motion in limine is made or anything
4 else is done. I have to make that determination
5 before the jury and instruct the jury that they
6 may take, if I qualify him, as to what he's
7 qualified in, and what he can express an opinion
8 about.

9 So the concept that somehow or another
10 there's some gap in the record in that regard is
11 not correct. I would have had to qualify him.
12 He wasn't just going -- if I denied their motion
13 in limine in any way, I could have made the
14 decision on my own, which I did, not to qualify
15 this witness.

16 The Court is required to do that, whether
17 somebody asks for it or not. They just can't
18 get up here and express an opinion to the jury
19 unless I qualify them and say in what areas they
20 are qualified.

21 MS. FLYNN: Yes, Your Honor. Understood.

22 Our point on this is that it conclusively
23 determined the cause of Sarah Plant's
24 mesothelioma, and WCD was left with the only
25 option being to prove that talc did not cause

1 the disease. So for that basis, that's why we
2 have moved for a motion for a new trial based on
3 his exclusion.

4 Dr. Feingold is another issue, and it's a
5 very similar issue. And that he was allowed to
6 testify; however, he was not allowed to say
7 conclusively as to what the cause of Ms. Plant's
8 mesothelioma was.

9 The Plaintiffs sort of criticized WCD for
10 having, you know, weighed in late on the
11 challenge to his testimony during pretrial
12 hearings, but all of that was a factor again of,
13 A, the Court excluding Dr. Attanoos, and, B,
14 during the trial having to consolidate our
15 experts with other defendants'.

16 We are cognizant of the Court's desire for
17 there not be to duplicative testimony. For that
18 reason, we got together with all the defendants
19 that who were still left in the trial, and we
20 agreed to use one of the experts that one of the
21 other defendants had obtained, and that being
22 Dr. Feingold.

23 So at that point that's when we were able
24 to, you know -- that's why we didn't defend him
25 earlier because we hadn't retained him. But

1 it's tough to look at a criticism of us of not
2 having defended him when there was no basis for
3 us to do so back then. We believe we defended
4 Dr. Attanoos' qualifications, and we believe
5 that those arguments can equally apply to
6 Dr. Feingold and our request that he be able to
7 testify fully as to causation.

8 Plaintiffs represent, I guess, our ability
9 to use Dr. Feingold as a gracious accommodation
10 to us during the middle of trial. We think it
11 was far from that. We think that WCD was really
12 forced into that position to be using him and we
13 were behind the ball the entire time on being
14 able to --

15 THE COURT: Who forced you into doing that?

16 MS. FLYNN: By virtue of the exclusion of
17 Dr. Attanoos and by the virtue of consolidating
18 the experts and not being --

19 THE COURT: You knew that I had ruled that
20 Dr. Attanoos could not testify as that trial
21 began. You didn't count on Mary Kay settling,
22 and they settled.

23 MS. FLYNN: That's true.

24 THE COURT: That's on you. People can
25 settle in the middle of a trial, and Color

1 Techniques and Mary Kay settled. But that's how
2 you all chose to manage the trial. That's not
3 on some kind of coercion I put on anybody. I
4 allowed Dr. Feingold to testify but said, again,
5 because he knew nothing about Plant's specific
6 situation and was on the basis of his reviewing
7 kind of expertise, was going to simply say that
8 even though her treating physician say it's
9 mesothelioma caused by asbestos, that he was
10 going to say it was either germline, BRCA2,
11 something other than your talc.

12 He could talk about those things generally,
13 and he did. He expressed all kinds of opinions
14 about women's susceptibility and all kind of
15 things about his theories about mesothelioma
16 occurring in women and how rare it is and so
17 forth and so on.

18 But the idea that you are somehow coerced
19 with respect to Feingold when I made the ruling
20 before this trial started that I was not going
21 to allow Attanoos, you had plenty of time to
22 make arrangements on behalf of WCD independent
23 of anybody else in the case.

24 MS. FLYNN: And, Your Honor, again, I think
25 that part of the point is that motions in limine

1 can always be reconsidered, and the Attanoos
2 issue wasn't final for some time. In addition
3 to that, obviously, we were working with other
4 defendants and trying to abide by the Court's
5 rulings that we only present a consolidated
6 expert.

7 Yes, there were circumstances that were
8 unforeseen in that process, but we think that we
9 should have been able to fully defend and offer
10 Dr. Feingold's testimony. And he was able to
11 testify as to -- give rates of idiopathic and
12 spontaneous and those sorts of things, but
13 there's a difference between being allowed to
14 say some of those things that some mesotheliomas
15 are idiopathic and to suggest that some could be
16 caused by germline mutations.

17 There's a difference between that and being
18 able to say, no, Ms. Plant's mesothelioma was
19 based by a germline mutation, and it did not
20 have to result from an intrinsic exposure from
21 asbestos or from anybody else.

22 THE COURT: Right. I made the
23 determination he did not have the qualifications
24 necessary to make that statement with respect to
25 Ms. Plant.

1 MS. FLYNN: Understood.

2 THE COURT: And I made that determination
3 about Dr. Attanoos way before the case started.
4 Those guys have got overlapping kind of
5 expertise. They're both reviewers, they both
6 have this idiopathic, naturally-occurring,
7 germline kind of approach that they take to this
8 thing, but they don't have the specific
9 information about her condition that will allow
10 them to be an expert about her mesothelioma.
11 That was the ruling I made.

12 MS. FLYNN: And, Your Honor, the basis of
13 our motion for a new trial is we do respectfully
14 disagree. We think that they both looked at her
15 condition in great detail.

16 Dr. Attanoos reviewed more than 150
17 pathology slides through his lab, looking at
18 those and examining those, reviewing the medical
19 records, reviewing her testimony on exposure.
20 Reviewing all of the experts, the mineralogists,
21 the inhalation toxicologists for the defense.

22 We think that they had a very full picture,
23 and we think that they were both very well
24 qualified to testify as to causation
25 specifically. They had at least equal, if not

1 greater, qualifications than the Plaintiffs'
2 experts who were allowed to testify. And that's
3 the basis for a new trial.

4 THE COURT: I understand your argument.

5 MS. FLYNN: Yes, Your Honor.

6 Another ground related to Feingold as well,
7 is the use -- there was a slide, as you might
8 recall, that was in the middle of his testimony.
9 WCD had exchanged the PowerPoint slides with
10 opposing counsel prior to the presentation of
11 him -- his testimony. Objections were made.
12 Slides were removed from the slide deck.

13 No objections were lodged as to the
14 particular slide at issue, which was Exhibit
15 Number 12 or Slide Number 12, rather, which
16 referenced Dr. Maddox's findings on review of
17 the lung tissue.

18 The indented portion of that slide was a
19 direct, exact quote from Dr. Maddox's pathology
20 report. And the reason we wanted it was because
21 it reflected specifically that Dr. Maddox had
22 determined that there were no asbestos bodies
23 found. And that was the point of the slide.

24 The rest of it, the unindented portions
25 were Dr. Feingold's, and we do think it was made

1 very clear during the testimony that that was
2 his testimony. It was brought out that this is
3 your statement at the bottom, yes; this is
4 not --

5 THE COURT: The slide did not make that
6 distinction at all. His testimony might or
7 might not, but we were talking about the slide
8 as it appeared to the jury. And I made it clear
9 to the jury that that was -- the slide was not
10 composed of Dr. Maddox's opinions, that it was a
11 slide by Dr. Feingold, who expressed his
12 opinion, and had a quote in it from Maddox, and
13 that was the ruling.

14 MS. FLYNN: Understood, Your Honor.

15 THE COURT: What are you saying about the
16 ruling that --

17 MS. FLYNN: Our concern with that issue was
18 twofold. The jury was instructed that the slide
19 was misleading, which was very detrimental to
20 WCD's trust --

21 THE COURT: It was misleading.

22 MS. FLYNN: We do believe it was well
23 explained on the record, and the jury would have
24 understood and heard that. I mean, Dr. Feingold
25 distinctly said --

1 THE COURT: We just have a disagreement
2 about that.

3 MS. FLYNN: Understood, Your Honor.

4 We think that that error was compounded
5 during the jury instructions when it was later
6 raised and made a specific jury instruction as
7 to Dr. Feingold. Again, it highlighted some
8 perceived misconduct.

9 THE COURT: What jury instructions?

10 MS. FLYNN: The jury instruction had
11 specific instruction related to Dr. Feingold.
12 In fact, he was the only expert witness
13 mentioned in jury instructions. His name was
14 again raised during that instruction to the
15 jury, and it highlighted some perceived
16 misconduct about what he was allowed to testify
17 about.

18 So the problem was even though the jury had
19 already been told to disregard it, and we
20 believe that that was prejudicial enough, but to
21 raise it again and compound it in the jury --
22 the jury argument had the extra, you know, hit
23 against WCD, you know, that impeded our trust
24 with the jury. That was really the problem,
25 that it was raised again and highlighted again,

1 which we didn't believe to be proper.

2 And, Your Honor, I can move along from
3 Dr. Feingold, if you prefer.

4 THE COURT: Yes, please.

5 MS. FLYNN: Okay. Another ground for our
6 motion for a new trial is also actually included
7 in our JNOV is the addition of Dr. Longo's
8 testimony. We believe the admission of
9 Dr. Longo's testimony was improper. That it had
10 been properly excluded that the evidence was
11 insufficient for a reasonable jury to have found
12 causation.

13 Dr. Longo's opinions and test results
14 should have been excluded because they are first
15 premised on fundamentally flawed testing
16 methods. They have not been published or peer
17 reviewed, and they have not been shown to be
18 able to be replicated.

19 As the Court knows, Dr. Longo now uses a
20 testing method that was adopted by the Colorado
21 School of Mines. It isn't a newly discovered
22 way of testing talc. It was a method developed
23 in 1970s that was outlined in a memorandum that
24 was given to J&J, but it was never adopted by
25 any agencies, and there's no evidence it was

1 ever circulated through the scientific community
2 at all through literature or otherwise.

3 In fact, it was not until late 2018 or 2019
4 that Dr. Longo then took that method and started
5 modifying it and tweaking it to try to optimize
6 it in a way that he could find certain types of
7 asbestos fibers, namely chrysotile fibers.

8 Part of the problem is that Dr. Longo still
9 hasn't stopped tweaking it. What he is using
10 now is an unfinished and still-evolving
11 protocol. So after six or seven months of
12 trying to work on the finer points of this
13 method, he started issuing litigation reports
14 reflecting the finding of asbestos in talc
15 samples.

16 And part of the summaries that we saw with
17 the Court were summaries of Dr. Longo's testing
18 that included those findings of chrysotile in
19 the samples that he was able to test. But yet,
20 he's continuing to make adjustments. Like the
21 original method, the original Colorado School of
22 Mines Method, this new method that he has
23 concocted has never been published or peer
24 reviewed, and part of the reason is that, as he
25 has admitted, he's still seeing odd things about

1 it that he is trying to figure out.

2 So like the original, it's not been adapted
3 or used by any government agency. It has not
4 been certified by any organization or agency,
5 and no other experts are using this method.

6 Actually, it would be difficult for anybody
7 else to use this method because Dr. Longo admits
8 that while he's written the method down, he
9 refuses to share it. So he's literally
10 prevented anyone from checking him or assessing
11 reliability or reproducibility.

12 As this Court is well aware, South Carolina
13 uses Rule 702 for admission of expert testimony,
14 and the third prong and central feature of that
15 is, of course, reliability. And that's where we
16 really have the biggest issue.

17 Reliability is based on several factors.
18 It's based on first, publications of peer
19 review; second, prior application of the method
20 to the type of evidence involved; third, quality
21 control procedures that are used; and fourth,
22 consistency with recognized scientific laws and
23 procedures.

24 Dr. Longo can show none of those. As it
25 stands now, Dr. Longo's results by the use of

1 modified CSM method cannot be tested for
2 accuracy, period. He's still modifying it. He
3 won't share it. We don't know the error rate.

4 We know there are inconsistencies in test
5 results because Dr. Longo has shown different
6 results from testing of the same samples.

7 We don't know quality control procedures.
8 We have no way to check them, and that's frankly
9 frightening for a predominantly oriented
10 Plaintiffs' expert when you can't check his
11 methods and methodologies.

12 THE COURT: Ms. Flynn, the record is very,
13 very complete about you all's objection, both in
14 the pretrial and again renewed at the time of
15 Longo's testimony. I don't think we need to
16 track through every single bit of the
17 objections. They're on the record. I heard
18 them all. I ruled on them all.

19 MS. FLYNN: I understand, Your Honor. The
20 only point that I will make is to the extent
21 that there are individual techniques that are
22 peer reviewed or are -- you know, have been
23 properly vetted. We think it's the hodgepodge
24 of those techniques and the mashing up that he's
25 done, and that's where the real issue lies.

1 So with that said, I can move on to
2 something else.

3 THE COURT: All right.

4 MS. FLYNN: Probably flows next since I
5 mentioned Dr. Longo's reliance -- or summary of
6 his test results to talk about some of the
7 document issues that piled up during the trial.

8 THE COURT: The business records?

9 MS. FLYNN: The business records, yes, Your
10 Honor.

11 THE COURT: All right.

12 MS. FLYNN: I believe that's in some other
13 portion of my outline here.

14 THE COURT: 58 in your memo.

15 MS. FLYNN: Obviously, I am -- just as we
16 didn't do during the trial, I'm not going to
17 stand up here and go document by document. I
18 think the Court understands --

19 THE COURT: And I'm still not going to do
20 that.

21 MS. FLYNN: Understood. That's not a
22 problem at all.

23 Our position was made very clear in writing
24 as to the exhibits, and that's probably the
25 biggest point there. Our objections were made

1 prior to the admission of the exhibits into
2 evidence.

3 We did at some point during trial try to
4 narrow down our objections and come up with a
5 short list that basically said we understand
6 that the Court's ruling on certain -- you know,
7 we have objections, but the Court is going to
8 overrule those as to certain exhibits. And then
9 we made a short list after that that we said we
10 really think the Court needs to look at these.

11 And the day that we walked in to do that, I
12 understood the Court's ruling was that due to
13 timeliness issues and the speed of trial, that
14 our objections were going to be overruled on
15 that basis. Not necessarily because the Court
16 had considered it or read it document by
17 document, but that we were too late in making
18 those objections.

19 So we believe the Court should have taken
20 the time albeit during --

21 THE COURT: You say that's what I said on
22 the record was the timeliness?

23 MS. FLYNN: Right, Your Honor.

24 THE COURT: All right.

25 MS. FLYNN: And that's our point, rather

1 than ruling of the merits of the objections, the
2 Court ruled based on the lateness and the
3 timeliness issues.

4 One such exhibit we think is particularly
5 problematic, and I'll highlight that one just as
6 an example. It was Trial Exhibit Number 1683,
7 and it's something known as the Eiermann memo.
8 That document, in particular, I think we
9 mentioned in our briefing, was a document that
10 was found by a California Appellate Court in the
11 McNeil case to contain multiple levels of
12 hearsay.

13 And the California Appellate Court
14 overruled or overturned a punitive damages award
15 based on the admission of that document, which
16 it said shouldn't have been admitted.

17 So that's just one example of one of the
18 documents we would have reviewed on our short
19 list had we had that option. That exhibit got a
20 lot of billing during the trial. It was
21 mentioned at least three or four times in the
22 Plaintiffs' closing arguments, so we believe
23 that was harmful to WCD's defense.

24 As the Court knows, we also objected to the
25 summary charts. There were many of those. We

1 believe that rather requiring that the Plaintiff
2 show that all of the documents underlying the
3 summary charts were independently admissible,
4 that the burden was instead flipped and put on
5 WCD to prove the negative and show that there
6 was nothing to support the charts, which was, of
7 course, an impossible task.

8 The charts were over-inclusive. It had
9 data that was irrelevant to the case. They had
10 talc codes that were not at issue for any
11 product in the case. They had products that
12 were not at issue. So some of these summaries
13 were much longer than they should have been for
14 that reason, and the jury had to have been left
15 with the impression that they are just --
16 there's overwhelming evidence being submitted by
17 the Plaintiffs against WCD when, in fact, it was
18 a lot of the evidence that wasn't relative,
19 either because it was out of the wrong time
20 period or included products that just weren't at
21 issue in the case.

22 So not having been so limited and culled
23 down to the extent they were necessary and shown
24 to be supported by independently admissible
25 documents, WCD was prejudiced and there was

1 confusion of the issues and misleading of the
2 jury as a result of those.

3 I have a few other arguments to raise. I
4 think it's the last point in our new trial
5 motion is the Plaintiffs' presented inadmissible
6 evidence and arguments of acts or omissions of
7 separate corporations.

8 As the Court knows, WCD was only ever a
9 distributor of raw materials. Nonetheless,
10 during the cross-examination of Dennis
11 St. George, during closing arguments, Plaintiffs
12 presented evidence and argued vigorously about
13 the fact that WCD was a shareholder and owner of
14 other entities that included mines and milling
15 locations.

16 This, obviously, implied a significant
17 degree of knowledge and control by WCD, which
18 was not accomplished by the record. Just being
19 an owner or a shareholder in a corporation
20 doesn't make you wholly knowledgeable about
21 everything, all the ins and outs of that
22 corporation.

23 To be able to make such a showing,
24 Plaintiffs needed to show total domination and
25 control, but they were not required to do that,

1 so no such showing was ever made.

2 So the error ensued when the Plaintiffs
3 were allowed to present evidence and arguments
4 that WCD held the knowledge and was responsible
5 for the acts and omissions of any mining or
6 milling companies solely by ownership shares.

7 So we believe that that evidence should
8 have been inadmissible against WCD without an
9 alter ego or amalgamation analysis, and we
10 believe that WCD is entitled to a new trial on
11 that basis.

12 I think that that might cover the new trial
13 piece that I was going to argue.

14 THE COURT: Yes.

15 MS. FLYNN: I do have JNOV arguments, and I
16 don't know if you want to --

17 THE COURT: No, I want to resolve each --
18 there is one argument you have not covered in
19 your arguments, and that is what you led with,
20 which is this cumulative error argument.

21 I will just simply say to you right now,
22 that is a criminal law doctrine in this state.
23 I have never seen a civil case in which
24 cumulative error was used. Cumulative error is
25 a due process doctrine in criminal cases. In

1 civil cases, errors are errors, and you don't
2 get a new trial just because there are a lot or
3 a few. You get a new trial because of errors
4 that were made and what they -- how they
5 affected the verdict, if you're going to get a
6 new trial.

7 So you all quoted my appellate practice,
8 which accurately says it is a civil doctrine.
9 The one Court of Appeals case you cited, the
10 Lynch case, you said, you know, this is not a
11 doctrine of civil cases, but even if it were, it
12 wouldn't be a reason for reversing that
13 particular case.

14 So I just want to let you know, I will
15 certainly speak of that in the order I file
16 about this thing. I find nothing in what's been
17 filed by anybody that would lead me to believe
18 that a cumulative error approach could be used
19 to grant a new trial in a civil case like this.

20 MS. FLYNN: I understand the Court's
21 ruling, Your Honor. I believe Mr. Ott was going
22 to -- I don't want to steal his thunder and
23 double up on arguing that issue with you.

24 THE COURT: Well, was he planning to argue
25 it in this new trial thing?

1 MS. FLYNN: He is going to argue that piece
2 of it, Your Honor.

3 THE COURT: Okay. Well, I want to hear
4 brief arguments on it because we are already at
5 10:30 or 10:20. I don't want to extend this
6 unlimitedly and still have to hear from
7 Plaintiffs. But I do want to go motion by
8 motion on these things.

9 MS. FLYNN: Okay.

10 THE COURT: It is way too much to have to
11 assimilate what arguments are -- so I'm going to
12 rule on the motions as they came up.

13 MS. FLYNN: Yes, Your Honor.

14 THE COURT: Mr. Ott, who is going to argue
15 cumulative error?

16 MR. OTT: I am, Your Honor. We still have
17 probably, I think, a total of four issues to
18 discuss. Our order was for me to go --

19 THE COURT: More than what she's covered?

20 MR. OTT: Having to do with a couple of
21 jury instructions. I don't expect them to be
22 terribly long, Your Honor, but yes.

23 THE COURT: Where are they covered in the
24 memo?

25 MR. OTT: These would be covered,

1 obviously, the cumulative error, which you
2 already pointed out is number one.

3 MR. CULBREATH: I believe around page 47 or
4 48, we begin jury instructions, Your Honor. I
5 was going to address two of them briefly.

6 THE COURT: 47 or 48 in the jury
7 instructions?

8 MR. CULBREATH: In the new trial motion.
9 I'm sorry. They actually begin --

10 THE COURT: Okay. It's 48 and 47 --

11 MR. CULBREATH: It begins at --

12 THE COURT: Yeah.

13 MR. CULBREATH: 42, Your Honor.

14 THE COURT: Okay. So you all are arguing
15 things that I have already spent so much time
16 studying and ruling upon in this case, but come
17 up here briefly and argue them.

18 MR. CULBREATH: Your Honor, I wanted --
19 Gray Culbreath with Gallivan White & Boyd on
20 behalf of Whittaker Clark & Daniels. As you
21 know, I raised this issue at trial. Since the
22 trial, the Glenn case has come out.

23 THE COURT: Yes, sir.

24 MR. CULBREATH: Which said -- I know there
25 was some question when we were here before

1 whether there was a sophisticated intermediary
2 charge, which is what the Glenn case decided.
3 Your Honor rejected the charge that we proposed
4 based on the Lawing decision. I will just say
5 briefly this --

6 THE COURT: That's exactly what Glenn -- I
7 mean, Glenn is completely consistent with the
8 way I ruled. I ruled the same way in the Glenn
9 case, and it was upheld.

10 MR. CULBREATH: But there is a critical
11 factual distinction between this case and Glenn
12 and Lawing, and it's this: First of all,
13 they're both workplace injury cases. And what
14 happened in both of those cases, Lawing -- as I
15 told the Court, I tried Lawing.

16 In that case, my client bags the sodium
17 bromate. They send it from China. It gets to
18 Engelhard, the employer, in the same condition.

19 In Glenn, it's unclear from the opinion
20 reading Glenn, but it appears that gaskets and
21 valves get to Duke Power in substantially the
22 same condition, their packaging, et cetera.

23 Here the testimony in the record, it's
24 around page 50 of our brief, sets forth that WCD
25 sells the talc in bulk to many of the defendants

1 who were defendants in this case. And those
2 defendants then tested the talc, they repackaged
3 the talc, because obviously, Ms. Plant didn't
4 get a big 50-pound sack of talc at her house.
5 And then it was relabeled, repackaged,
6 opportunity to warn a sophisticated
7 intermediary, companies that have been sued for
8 this very thing of asbestos and talc.

9 And so it's our position that based on
10 those factual distinctions in comparing and
11 contrasting the cases that our appellate courts
12 have addressed thus far, that we were entitled
13 to the charge.

14 So that's my argument, Your Honor, in a
15 nutshell.

16 THE COURT: Well, all right. Sophisticated
17 user, first of all, Glenn is a case just like
18 your case.

19 MR. CULBREATH: Yes, Your Honor.

20 THE COURT: You know, there's not something
21 different about talc than it is about Glenn.
22 It's a manufacturer sending out a particular
23 product that is then used in the workplace.

24 In this particular case, there were never
25 any warnings of any kind about this talc and the

1 fact that it had asbestos in it to anybody.

2 But the other thing is, you can't use
3 sophisticated intermediary to avoid your
4 responsibility for putting into the stream of
5 commerce a product which injured or harms. And
6 there's -- I mean, I don't see how sophisticated
7 intermediary trumps any of the normal products
8 liability charges.

9 MR. CULBREATH: Your Honor, I think in this
10 circumstance, we put it in the stream of
11 commerce, but then it goes to a sophisticated
12 intermediary, companies that are frequently --
13 have knowledge of asbestos and talc, and if they
14 don't decide to warn --

15 THE COURT: No. In the Lawing case, these
16 people had warnings on these bags, but they then
17 shrinkwrapped them in a pallet that did not
18 allow any warnings to be seen. So it was as if
19 it had no warning at all. And those pallets
20 then came shrinkwrapped like that where you
21 couldn't see the hazard things into the
22 workplace.

23 And they sat there in the condition in
24 which they came from the Chinese factories and
25 was sitting on that plant floor with no

1 information about the fact that if you put a
2 spark on them, they were going to explode. And
3 that's what they did.

4 It was a warning situation and the ability
5 to warn in a way that would have advised
6 somebody looking at that pallet that there was
7 something dangerous in it.

8 MR. CULBREATH: But there, the packaging
9 never changed from the time it left the miner in
10 China until the time it got to Seneca at the
11 Engelhard plant.

12 Here, Ms. Plant was never going to see
13 whatever was or was not on the bag --

14 THE COURT: It's not a question of warning
15 the end user; it's a question of warning whoever
16 comes in contact with it. That's the
17 sophisticated intermediary. It's not a thing
18 that, you know, you can put it all on the person
19 you ship to even if you don't warn them about
20 any kind of dangers about it, and then it's up
21 to them to pass it on.

22 They didn't warn about it in the first
23 place, so I don't see how they can -- if they
24 advise the sophisticated intermediary of the
25 danger, that's one thing, but they didn't do.

1 And that that's why it wasn't favorable, and
2 that's the way we ruled in Lawing versus
3 Engelhard.

4 MR. CULBREATH: And, Your Honor, we could
5 debate Lawing all day.

6 THE COURT: We certainly could, but I
7 disagree with you, as I did when this case was
8 tried, about your analysis of some kind of
9 difference in these. But Glenn, I think only
10 underscores what was done.

11 MR. CULBREATH: And respectfully, for the
12 reasons I state, we disagree.

13 THE COURT: Okay. Very good.

14 MR. CULBREATH: Now, I'm going to turn to
15 the second issue, which is both a issue of jury
16 charge, as well as the ability to argue, and
17 that is -- has to do with the empty chair, and
18 Your Honor --

19 THE COURT: The what?

20 MR. CULBREATH: The empty chair doctrine.
21 And Your Honor and I have debated this many
22 times, and so I will not -- try not to replot
23 ground, but the statute, of course, is
24 15-38-15(D) and retains -- the defendant retains
25 the right to assert another potential tortfeasor

1 contributed to the alleged injury or damages
2 and/or may be liable for any or all of the
3 damages alleged.

4 Of course, contribute, according to the
5 Oxford Dictionary, is defined as help to bring
6 about, play a part, be partly responsible. The
7 statute is clear any or all contribute.

8 Here what the Court told us is both for the
9 purpose of the charge and the purpose of arguing
10 the empty chair that there was a requirement
11 that we establish that the empty chair be
12 100 percent at fault in order to argue that.

13 I know from prior arguments before Your
14 Honor, we've had this debate. I don't believe
15 the case law establishes that. I went back and
16 I read Tiffany and I read Machin over and over
17 again this weekend.

18 Of course, Machin dealt with the
19 application to a plaintiff employer -- or I'm
20 sorry, the plaintiff's employer, while Tiffany
21 dealt with third-party practice, and Tiffany
22 focused on 15-38-15(C). And obviously, there's
23 a lot of discussion about a hundred percent at
24 fault there.

25 But I think what's critical in looking at

1 the juris prudence since then is the Dawkins
2 versus Self case that Judge Williams wrote the
3 opinion, and he held Tiffany did not discuss the
4 empty chair defense or provide the parameters of
5 the defense. We talked a lot about these
6 parameters, but it doesn't seem to be anywhere.

7 And this hundred percent rule that Your
8 Honor has established, I understand the
9 arguments, but here the plaintiffs were allowed
10 to elicit testimony about --

11 THE COURT: The ruling, Mr. Culbreath, is
12 that if you want to point to the empty chair,
13 you have to say no matter what I did, my fault
14 is overcome by this separate fault of this empty
15 chair, and that's what caused the injury. It's
16 not a percentage deal. It's not a -- so you can
17 describe what that ruling is as a hundred
18 percent if you want to, but that's not really
19 what it is.

20 What it is, is no matter what your fault is
21 in terms of causation, the causation is
22 something that is completely the responsibility
23 of the empty chair. You all didn't present any
24 evidence on that, and you didn't propose to
25 present any evidence on that. You didn't tell

1 us who the empty chair was going to be or
2 anything else like that.

3 You just wanted an empty chair charge kind
4 of at the end of it. You laid no predicate in
5 the evidence as this case was tried that would
6 have supported any charge like that. There
7 wasn't anything that you put up that said no
8 matter what happens with Whittaker Clark &
9 Daniels, the cause of the injury suffered is the
10 wrong conduct of X, whoever that X is. You
11 didn't do that.

12 MR. CULBREATH: Well, Your Honor, I'm
13 looking at the trial transcript here where an
14 exchange with defense counsel looks like on
15 the --

16 THE COURT: You want to debate more about a
17 hundred percent. I understand what you're
18 saying there, and I understand what was said. I
19 clarified what I meant by that in the remarks I
20 just made. It is not going to be productive for
21 us to keep going around the horn. Your record
22 is very protected here --

23 MR. CULBREATH: All right, Your Honor.

24 THE COURT: -- about what you think, even
25 in the face of the Delaney what you think, even

1 in the face of Jolley about my view of Smith
2 versus Tiffany.

3 And that is what the Supreme Court and the
4 Court of Appeals are all about. If it were not
5 so, I wouldn't have had a job for 27 years, if
6 trial judges were all right. I don't take any
7 offense with the fact that you disagree with me
8 totally, but let's not beat that dead horse
9 anymore.

10 MR. CULBREATH: I'll close with this, Your
11 Honor. You said we didn't point to anyone
12 specifically.

13 THE COURT: Yes, sir, you did not.

14 MR. CULBREATH: Well, I'm looking. "You
15 guys can't mention the name of Mary Kay or
16 anybody else --"

17 THE COURT: You can't. Smith versus
18 Tiffany says you cannot unless you form the
19 predicate of saying they and they alone caused
20 the problem. You had nothing in the evidence
21 about Mary Kay and Color Techniques being the
22 cause of her condition, or you sure didn't cite
23 it to me at that time.

24 MR. CULBREATH: Your Honor, I would
25 disagree. I believe it's in the record, and I

1 believe we're preserved on that issue.

2 THE COURT: Yes, sir, you are.

3 MR. CULBREATH: And that the statute by
4 contemplating any or all contemplates that there
5 could be multiple empty chairs, and I'll leave
6 it at that.

7 THE COURT: Yeah, but you have to have
8 those empty chairs be the cause that absolves
9 you of any responsibility, because it -- that
10 cause and that cause alone or combination of
11 causes caused the injury, not you.

12 MR. CULBREATH: I understand.

13 THE COURT: And that is not in the record
14 at any place in my opinion.

15 MR. CULBREATH: I understand the Court's
16 position on that.

17 THE COURT: All right, sir.

18 MR. CULBREATH: Thank you.

19 MR. OTT: Good morning, Your Honor. Curtis
20 Ott here also for --

21 THE COURT: Welcome, Mr. Ott.

22 MR. OTT: Thank you very much.

23 THE COURT: A privilege to have you and
24 your colleagues, Ms. Flynn and Mr. Culbreath.

25 MR. OTT: Thank you, Your Honor.

1 The last two issues for the motion for new
2 trial were left for me. One, I think will be
3 very brief, and that is this ongoing debate
4 that's been had before about South Carolina
5 product liability law longstanding saying that
6 it is a requirement to prove proximate cause
7 which includes but-for causation.

8 There's no debate that the only case in
9 South Carolina until very recently where
10 frequency, regularity, and proximity was
11 borrowed and adopted was in the context of the
12 door-closing statute and whether an out-of-state
13 plaintiff has the capacity to sue under that
14 statute.

15 But there's never been a South Carolina
16 Supreme Court opinion or even a Court of Appeals
17 opinion that somehow in toxic tort cases that a
18 plaintiff is relieved of the requirement of
19 proving proximate cause, again, including
20 but-for causation, has been relaxed.

21 I know that that's been referenced both in
22 Jolley and Glenn, but until we have that
23 pronouncement, I think especially from the
24 Supreme Court, that proximate cause is done away
25 with in toxic court cases included but-for

1 causation and we're going to relax that, we
2 don't have that. And so we're going to continue
3 to push that issue, understanding the Court's
4 disagreement.

5 Unless the Court has any questions on that,
6 I'll move on.

7 THE COURT: Well, here's the only thing
8 I'll say about that. I use as my guideline for
9 all of these charges the charges that Gary Hill
10 used to give in these asbestos cases. He
11 preceded me at my appointment as the asbestos
12 judge of South Carolina. And he relied on the
13 judges that had previously given charges on
14 causation in asbestos cases, including Larry
15 Patterson, John Hayes, and others.

16 And there is one load star in the charges
17 that all use, and that is Henderson and Lohrmann
18 is the foundation for talking about proximate
19 cause, and for the frequency, regularity, et
20 cetera, charge. You all don't even object to
21 that charge anymore. It gets charged regularly
22 in every case we try, and that is the foundation
23 for what you call relaxation or ignoring of the
24 standard of but-for proximate cause.

25 But what Judge Gathers in two opinions now

1 has very studiously analyzed as an additional
2 dimension to proximate cause, as that term is
3 defined in asbestos or toxic tort litigation,
4 but he's not the only one to have come to that
5 conclusion. That's a broadly-held view
6 throughout the country in these toxic tort
7 cases.

8 And Lohrmann and its progeny are used all
9 the time and the rest of it, that but-for is not
10 the end of things with respect to how you
11 describe it. It doesn't eliminate. It doesn't
12 undermine. It simply says in this case you have
13 to have some frequency, not just a one-shot
14 proposition, but some frequency to the exposure
15 from a particular person's product in order for
16 that person to be viewed as someone liable.

17 What you all don't like about it is some of
18 the experts now that testify about the exposure
19 and how exposure contributes to the development
20 of the cancer. The defendants always take the
21 position that they want to use a kind of dose
22 response charge. The plaintiffs take the
23 position that it's a cumulative exposure.

24 And there's a lot of debate about that.
25 That's the battle of the experts. Every one of

1 us that tries these cases has to deal in
2 navigating that environment.

3 But quite honestly, unless you start saying
4 that you're no longer going to view Henderson
5 and Lohrmann as valid authority for the
6 foundation of these charges in these asbestos
7 cases, I don't think you have an argument that
8 is preserved. And you all cite those cases just
9 as much as the plaintiffs cite them.

10 So I don't really get the argument that
11 there's some profound change that those of us
12 who have been trying these toxic torts have made
13 to what is the way they're trying them all over
14 the country, including by many judges here in
15 South Carolina for years and years and years.

16 MR. OTT: Your Honor, to that, I would
17 respond, since I've been appearing in front of
18 Judge Hill and the limited times I've appeared
19 in front of Your Honor, I raised this issue. I
20 raised it to Judge Hill in the last trial I had
21 with him, and I think that was 2015, that there
22 is no relaxation, and that is Judge Gathers'
23 word in Jolley, of the requirement of but-for
24 causation.

25 That's not found in Henderson because

1 Henderson is not a but-for causation case. It's
2 a door-closing statute case about the parties'
3 capacity to sue versus what is required for a
4 plaintiff to prove a product liability case in
5 South Carolina. And that has traditionally and
6 historically always been but-for causation,
7 which is included, of course, in proximate
8 cause. So I'm not trying to --

9 THE COURT: But again, the analysis of this
10 issue of causation in toxic torts, even in South
11 Carolina, has well gone beyond any foundation of
12 door closing statute in that. That's a
13 completely different topic. We're now -- we're
14 talking now about what the standard is for
15 proving responsibility for a negative act in a
16 toxic tort environment.

17 MR. OTT: And I agree. And I think the
18 first written opinion in South Carolina to say
19 we are relaxing but for causation is Jolley.

20 THE COURT: Maybe that's the first time
21 that terminology of relaxing has been used, and
22 I'm sure that the Supreme Court of South
23 Carolina will deal with that when they get it.
24 But now you're asking me, who's been relying on
25 the same charges the judges have been giving for

1 a long time in this state whose foundation is
2 Henderson and Lohrmann to suddenly say, Hey, a
3 big flaw is now presented in the whole analysis
4 here, and therefore, reverse what you did in
5 this case.

6 I understand you're just preserving your
7 position, but a whole lot would have to change
8 in my opinion.

9 MR. OTT: Well, Your Honor that was the
10 reason for requesting the charge that we did on
11 proximate cause to include but-for, and of
12 course, that was not given. But I'm willing to
13 move along, if the Court permits.

14 THE COURT: Very good.

15 MR. OTT: So to address your
16 previously-raised issue about the cumulative
17 error doctrine in the context of the civil case,
18 of course, it unquestionably exists in criminal
19 cases. And the question was raised in Lynch by
20 the Court of Appeals about whether if it applies
21 in a civil case. Of course, Lynch went on to
22 evaluate the merits of the cumulative error
23 doctrine in that case and decided that the
24 requirements were not met, but it did address
25 them.

1 So if you wanted to boil it down, should
2 cumulative error doctrine apply in a civil case,
3 we can have that discussion. I frankly do not
4 think there should be much of a discussion
5 because it is designed to protect a fair trial
6 to the litigants and parties.

7 And it should not make a difference whether
8 we're in this courtroom under the guise of
9 general sessions or under the guise of common
10 pleas or whether we're in a different probate
11 court courtroom or a family court courtroom. We
12 should always be concerned that litigants get
13 fair trials.

14 And so if that issue is going to be
15 addressed, I hope that it will be decided in the
16 affirmative, that, yes, cumulative error
17 doctrine should apply in civil cases as well.

18 THE COURT: Is there any other state that
19 you know of that does that?

20 MR. OTT: Your Honor, I do not.

21 THE COURT: Yes, I don't either. And so
22 I'll simply say this: It is way above my pay
23 grade as a trial judge to suddenly announce that
24 cumulative error is going to be adopted in civil
25 trials as a foundation for an analysis of

1 whether a reversible error occurred, which is
2 what we're doing here. A fair trial is a part
3 of all the rules that are made. And all the
4 rules that require reversal in certain
5 instances.

6 The criminal context is different in many
7 respects, and the rules are different in many
8 respects. And that cumulative error rule is a
9 due process rule confined to the criminal
10 analysis as I -- as best I can tell all over the
11 country, and I did look at that as this thing
12 came up.

13 So your position is preserved. Like the
14 Court of Appeals, I don't think this is a case
15 in which it should be adopted in any event
16 because I don't think cumulative error occurred.
17 But it would be way beyond what I should be
18 doing as a judge trial to adopt a doctrine
19 that's never been adopted any place in a civil
20 case.

21 MR. OTT: And, Your Honor, I do want to say
22 that I have not researched it, and therefore, I
23 don't know what's done in other states. We do
24 have Lynch where it went on to address it, so I
25 think it's valid to go on and to address it.

1 I understand the Court's position, and I
2 also understand the Court's position that it
3 didn't commit any error. But we also have the
4 uncomfortable aspect of the notice of removal
5 that was filed and the Court's --

6 THE COURT: Nothing uncomfortable about it.
7 You can talk about it, if you want to. But the
8 bottom line was, Judge Anderson found that the
9 only basis for removing that action, which was
10 the contention that Plaintiff had consented to
11 the dismissal of Rite Aid was wrong when
12 Plaintiff had not consented to it, and that's
13 absolutely the truth. The Plaintiff vigorously
14 argued but said, "Because we were in a time
15 crunch, I presented the argument on that. We'll
16 abide by your ruling."

17 Judge -- both myself as the state court
18 judge and Judge Anderson as the federal judge
19 found it was an invalid argument and that it was
20 an invalid removal, and he sent it back. So
21 that's the beginning and end of that as far as
22 I'm concerned.

23 MR. OTT: Well, Your Honor, again, with due
24 respect, Your Honor commented on the propriety
25 of the motives of, you know, Whittaker Clark &

1 Daniels even engaging in that exercise.

2 THE COURT: Yes, sir. I didn't comment in
3 front of the jury about that, but yes, I
4 commented on it. And I agree, I believe with
5 all of my heart that it was for the purposes of
6 delay and some of the things that happened in
7 the trial, particularly when they didn't have
8 witnesses to use on their own when other parties
9 settled out, confirmed my opinion that they were
10 trying to delay the trial.

11 MR. OTT: But, Your Honor, there was no
12 finding by the only judge entitled to address
13 this that it was done in bad faith, that it was
14 sanctionable, that it was frivolous.

15 THE COURT: I didn't sanction anybody for
16 it either, nor did Anderson. But he found it
17 was an invalid, non-meritorious removal. That's
18 why he sent it back.

19 MR. OTT: I would disagree with the
20 characterization as non-meritorious because he
21 recognized on the record --

22 THE COURT: He said you all did a lot of
23 briefing of it and raised some serious issues,
24 and then his ruling was it was a non-meritorious
25 removal. That's why he sent the case back for

1 trial. Had he thought otherwise, he would have
2 kept it.

3 MR. OTT: And I understand, Your Honor, but
4 a defendant does have a constitutional right to
5 attempt to remove a case to federal court, and
6 we have many instances where that's done and
7 it's remanded for various reasons. It does not
8 mean that was frivolous, meritless, or bogus or
9 the like or that anyone should be --

10 THE COURT: So how were you harmed by any
11 kind of remarks on my part about this? What did
12 harm things considerably is that we had nine
13 days of this thing, and one day was already gone
14 for President's Day. We had a two-week term of
15 court. We had nine days to try this case. The
16 parties all knew way before we tried this case
17 there would be time limitations on this thing
18 and we would finish it in two weeks.

19 And to carve out two days for a
20 non-meritorious removal is something I was
21 unhappy about.

22 MR. OTT: And, Your Honor --

23 THE COURT: The rain falls on the just and
24 the unjust, but it put a big strain and stress
25 on everything in this case to have two days

1 taken out by something that had no merit.

2 MR. OTT: I won't -- I'm not going to agree
3 with the Court that it had no merit because
4 Judge Anderson said it did have some merit, and
5 they were tough substantive issues to decide.
6 That's his quote, and that it was unusually well
7 briefed and well argued by both parties. So I'm
8 going to stray away from that characterization.

9 THE COURT: But it was not meritorious,
10 Mr. Ott. I ruled against you.

11 MR. OTT: I'm not going to disagree there.
12 I can't disagree there. But as it's repeated
13 often in the response that this was frivolous,
14 that this was non-meritorious and the like, that
15 simply is not the case, and the, of course,
16 reference about who caused this problem and
17 paying penalty. And that, of course, is of
18 concern.

19 THE COURT: And how did that play out in
20 terms of anything that was done that you think
21 is a reversible error?

22 MR. OTT: Well, that was part of the
23 cumulative error, Your Honor.

24 THE COURT: I got you. If you can use that
25 doctrine. That's where it played out.

1 MR. OTT: Yes, Your Honor.

2 THE COURT: All right. Very good.

3 MR. OTT: Thanks, Your Honor.

4 THE COURT: All right, sir.

5 All right. Ms. McVey.

6 MS. MCVEY: I think our court reporter
7 might need a break.

8 THE COURT: Okay. Of course. Absolutely.
9 Let's come back at five after.

10 - - -

11 (A recess transpired.)

12 - - -

13 THE COURT: Okay. Ms. McVey.

14 MS. MCVEY: Thank you, Your Honor. Theile
15 McVey for the Plant family.

16 Judge, I am cognizant that you always read
17 everything that we submit, and so to be clear, I
18 want to make sure we are relying on the briefs
19 that we filed and all the exhibits, as well as
20 what occurred in the trial.

21 I'm going to try to address the issues that
22 Whittaker Clark & Daniels addressed hopefully in
23 that order, but hopefully they move around a
24 little bit.

25 I want to first start, though, with this

1 false premise of cumulative error. Number one,
2 I don't think it applies in civil cases, but
3 even if it does, this idea that Whittaker Clark
4 & Daniels argues in their briefing that you had
5 a pungent to punish Whittaker Clark & Daniels is
6 simply not true. The Court made rulings of the
7 merits based on South Carolina law, evidence,
8 and procedure.

9 And the Court should reject this narrative
10 strongly that Whittaker Clark & Daniels was
11 punished for the removal. But it is important
12 to talk about the removal because it affected
13 the case.

14 Whittaker Clark & Daniels removed the Plant
15 and the Payne cases -- those were both set to go
16 back to back. In other words, if Plant settled,
17 Payne would then start -- without any legitimate
18 basis. They did it in a way that was not only
19 in bad faith, it was unkind. It was viscous.
20 And they did it the morning that we were
21 supposed to start trial.

22 In the hearing they say -- when they stood
23 up and talked to Judge Anderson, this is a
24 eureka moment. It was so clear that this case
25 was removable because Theile McVey didn't argue

1 it. She gave up on Rite Aid. That's what they
2 said. It was a eureka moment. And that eureka
3 moment happened on February 15th, the pretrial
4 hearing.

5 They didn't file removal on the 15th or the
6 16th or the 17th or the 18th or 19th or the
7 20th. They did it the morning of the 21st when
8 we were supposed to start trial.

9 Now why did they do that? The only reason
10 they did it on that day was so that we would
11 lose our jury here. And they did that to a
12 plaintiff who was 37 years old, who was living,
13 who has three children under seven years old,
14 who is dying of a terminal cancer that they know
15 she has. That's what they did.

16 They did it when this family had flown into
17 town, when we were all in a hotel, when our
18 experts had come. They did it in bad faith, and
19 the timing alone shows you that.

20 If it were not for Judge Anderson, who
21 graciously, after we figured out who it was
22 assigned to that morning -- I woke that morning.
23 We were getting ready for trial, heading over to
24 the courthouse, when all of a sudden at
25 6:00 a.m. that morning, they send the notice of

1 removal saying, No worries, we've removed it.

2 And then we get in here on that, and
3 Whittaker Clark & Daniels' lawyer stands up and
4 says, "Good news, Judge. You don't have to
5 worry about this case. That's good news." When
6 Sarah Plant, who is dying of a terminal cancer,
7 is about to lose her trial date.

8 It took us all day to figure out who was
9 assigned that case. We briefed it. By the way,
10 they had been briefing it all weekend. Right?
11 The night before -- we started trial on Tuesday.
12 The night before at 7:00 p.m., we're talking
13 about what witnesses are coming that day.
14 That's what they did.

15 So the idea that this was not in bad faith
16 and malicious is untrue. And let me be clear,
17 the only reason that we did not move for
18 sanctions in front of Judge Anderson or in front
19 of this Court is because I didn't want another
20 appellate issue. I didn't want them to take it
21 right then from me and have Sarah Plant lose her
22 day in court because she has a terminal cancer.
23 That's the only reason.

24 Judge Anderson let them argue all the
25 things they were going to argue about this

1 eureka moment, and he ruled in 14 minutes.

2 Okay. It was in bad faith, and they know it.

3 But that does not mean that you treated
4 them any differently. What it did mean, as a
5 practical reality, is that we lost two days of
6 trial. And that only -- to be fair, and the
7 Court knows this and they know it, it only
8 punished the plaintiffs. We have the burden of
9 proof. We have to do everything, and the Court
10 said you have to do it in a very short period of
11 time.

12 This cumulative error that they whine
13 about, "We didn't have time, you didn't let us
14 make our objections." We filed motions to
15 preadmit exhibits on February 16th, long before
16 this trial started. They had all weekend to
17 look at those exhibits. They were Whittaker
18 Clark & Daniels exhibits.

19 And then we start -- you know why they
20 didn't look at them? Because they thought the
21 removal was going to work, and they weren't
22 going to try this case, so they didn't look at
23 them.

24 And then what they say is, "Judge, you
25 wouldn't let us make all these objections."

1 First, they wouldn't object, then they did
2 object and they objected to every single
3 document. Their own documents, they objected to
4 every single one of them.

5 I said, "Oh my goodness, Judge, they have
6 objected to every single one. This can't be
7 right."

8 And then we cite to it in our briefing.
9 And I'll get to it more specifically. But one
10 minute they said, "We object to all --" "We only
11 object to these 11." And the next day, they
12 say, "Oh, just kidding, we object to these 13,"
13 and then later in trial, they say, "We object to
14 these 16."

15 It is never clear. And in their briefing,
16 their post-trial motions, it's still not clear
17 what objections they objected to or didn't
18 object to.

19 You, though, had reviewed all 71, because
20 when we gave them the motion to preadmit, we
21 gave it to you. And in that motion to preadmit,
22 it had a whole column showing where it was
23 authenticated.

24 This is not a fair argument to make. What
25 they did is remove us so that we wouldn't get

1 our trial date, and then they said, "We're just
2 not going to do the work, and then you can't use
3 our exhibits."

4 The Court looked at them. They were
5 properly admitted as business records under a
6 variety of ways that I will talk to you about as
7 we get closer. But this cumulative error issue
8 is just not true, even if it applies in civil
9 cases.

10 So the removal, they were not punished for
11 it, but if I wasn't worried about an appeal
12 before Sarah could get her day in court, I would
13 have moved for sanctions and they would have
14 deserved it, and I think we would have gotten
15 them.

16 The Court in this case properly exercised
17 your discretion in limiting Whittaker Clark &
18 Daniels' experts. And of course, they focus on
19 Dr. Attanoos and Dr. Feingold. So let me
20 address both of those just briefly.

21 And, Judge, I know you've read everything,
22 so if you want me to move on ever, just tell me,
23 and I'm happy to go on.

24 But the reason why you limited
25 Dr. Attanoos is for two reasons. One, he did

1 not meet the standards under South Carolina law
2 of counsel and of Watson and Graves. That's the
3 first reason. That was the main reason.

4 The second is reason is that you had deep
5 experience with him. You had tried three cases
6 to verdict in which he was a witness, of which
7 you made similar rulings limiting his testimony,
8 which he clearly ignored.

9 And you represented, and I believe this to
10 be true, that you went back and looked at your
11 trial notes for Bostic or Johnson or maybe both,
12 where he ignored you and pointed to the jury and
13 said, I can tell you this, but she won't let me
14 or something to that effect. That's reflected
15 in your post-trial notes, which you put on the
16 record here.

17 But you also excluded him because he did
18 not review whether WCD's talc contained asbestos
19 or what fiber types were potentially associated
20 with WCD talc. WCD had testing -- its own
21 testing showing there was asbestos in its talc.

22 He didn't review studies determining the
23 amount of asbestos released from the normal and
24 unexpected use of these products. He did not
25 have a reliable scientific basis for his

1 opinions that the cause of Sarah's meso was
2 spontaneous or naturally occurring or due to her
3 genetics.

4 And, Judge, you will recall that you
5 reviewed everything they submitted in
6 opposition, all of the materials that he relied
7 on, and you found they do not support his
8 opinions. The stuff he said he relies on
9 doesn't actually say what he says it says.

10 The Court reviewed the supplemental
11 materials, you reviewed the excerpts from
12 depositions, from the two Bostic trials, the
13 excerpts from the Beth Anee Johnson trial, you
14 listened to WCD's arguments, and you looked at
15 all the reliance materials.

16 In short, you excluded him because what
17 Dr. Attanoos does, and to some extent
18 Dr. Feingold, is he says, "I'm going to say it's
19 naturally occurring because I'm going to not
20 look at anything that potentially shows another
21 source of exposure." That's what he does.

22 He did not look to determine whether or not
23 the products at issue in this case contained
24 asbestos. And so what he does is say, "She had
25 no exposure to asbestos. I refuse to look at

1 the products the Plaintiff say contained
2 asbestos; therefore, it had to be naturally
3 occurring."

4 He really relies on this spontaneous
5 opinion from the report from Bertram Price, and
6 Judge, you heard about this during trial. What
7 Bertram Price says is that saying the adjusted
8 pleural meso incidents, mesothelioma incidents,
9 in U.S. women from 1973 to 2008 have been
10 stable.

11 And what Price says and what Dr. Feingold
12 says is that any woman who has mesothelioma
13 currently in the United States, zero percent,
14 zero, none of them, were caused by exposure to
15 asbestos. They're naturally occurring.

16 That is just not reliably scientific. And
17 you saw the doctor actually blew up statistics
18 that show that the women's meso rate has
19 actually declined when it's going into
20 commercial products. So his scientific basis is
21 without any foundation, and you have to act as a
22 gatekeeper, which you did in this case and
23 rightly so.

24 You found that he was not qualified under
25 the Watson and the Graves case.

1 Now, Whittaker Clark & Daniels says you
2 should have held a Daubert hearing, that you
3 were required to do that. But they waived the
4 right to request that hearing at the motion in
5 limine hearing, in which Mr. Thackston argued
6 for WCD. He didn't ask you for a hearing, a
7 Daubert hearing on that issue.

8 In fact, Whittaker Clark & Daniels' counsel
9 was dismissive of the motion in total. He
10 didn't attempt to defend the foundation for his
11 opinions at all, if you go look at the
12 transcript. And he argued incorrectly that the
13 jury could evaluate whether or not there was a
14 scientific basis for his opinions, and our cases
15 say that's your role, that's not the jury -- for
16 the jury to decide.

17 The proponent of the scientific duty has
18 the responsibility to provide the Court with the
19 factual and scientific info the Court needs to
20 carry out its gatekeeping duty, and they did not
21 even attempt to proffer Attanoos until the sixth
22 day of trial, way past when it should have been
23 done.

24 So, Your Honor, we think that you properly
25 kept it out.

1 The only thing I will point out is that, in
2 all of their briefing, WCD has not said what a
3 Daubert hearing would have accomplished that you
4 didn't already know. Right? They haven't said,
5 well, he would have explained X, Y, and Z. They
6 didn't put it in their papers.

7 And, Judge, you reviewed all the underlying
8 data, and that's important because they
9 represented that his testimony would be similar
10 to what happened in Bostic and Johnson, which
11 you have heard about. That's what they said in
12 Court. You knew that.

13 And they cite to this Phillips case, and
14 that's a criminal case. And the error in that
15 case was in admitting the expert's opinion
16 without a sufficient effort by the proponent of
17 the evidence to provide the requisite
18 foundation.

19 That's different than what happened in this
20 case. You had all the underlying documents, way
21 more than you get in a deposition or even a
22 Daubert hearing. You had three trial
23 transcripts, you had a 60-page report, you had
24 all of the exhibits, all of which you received
25 and read in keeping them out.

1 The only thing I'll mention about
2 Dr. Attanoos is they never objected when his
3 name was mentioned in trial except for one time.
4 And that was when Dr. Brody and Dr. Brady was
5 asked, "Do you know Dr. Attanoos?" They
6 objected, you sustained the objection. Everyone
7 moved on. There was nothing prejudicial in
8 that.

9 Judge, I'll move on from Attanoos, unless
10 there's anything else you want me to talk about
11 with him.

12 THE COURT: All right.

13 MS. MCVEY: Let me move to Dr. Feingold.
14 Dr. Feingold did come in here and testify. He
15 was quite the character. That's the first time
16 I had seen him in trial. But I believe, and our
17 papers reflect, that Whittaker Clark & Daniels
18 waived any objection to limitation of
19 Dr. Feingold's testimony.

20 This was their decision, but Feingold was
21 not WCD's witness at the pretrial issue. He was
22 only a witness for Color Technologies when this
23 happened. And WCD acknowledges that Feingold
24 was only retained by them at the eleventh hour,
25 as you know, after Mary Kay settled and Mary

1 Kay's witnesses became unavailable to them.

2 We never objected to Feingold appearing for
3 Whittaker Clark & Daniels. So it's not just
4 that we were gracious, we also agreed not to ask
5 him, Hey, when were you retained by Whittaker
6 Clark & Daniels? We agreed to that. So you
7 could act like Feingold was your witness the
8 whole time. We never raised it in front of the
9 jury. And so I believe that was a fair thing to
10 do.

11 But once Feingold was Whittaker Clark &
12 Daniels' witness, they made no effort to
13 preserve any arguments about the admissibility
14 of the testimony or what the limitations should
15 be there. They didn't preserve that.

16 The Court never shifted the burden of
17 proving causation to Whittaker Clark & Daniels.
18 And there's a little bit of a distortion of the
19 record because obviously, the limitation on
20 Feingold, and I'll go through that, was quite
21 minimal.

22 They also had Christy Barlow testify.
23 Christy Barlow testified without limitation that
24 talc does not cause mesothelioma. They had the
25 other causation standard in there.

1 But the limitation on Dr. Feingold really
2 was quite minimal. You said he could testify
3 generally about cosmetic talc, he could testify
4 about asbestos in cosmetic talc. He could
5 testify about how asbestos in cosmetic talc
6 affects the contraction of mesothelioma.

7 The only thing you said he couldn't do was
8 to explain that there are -- I'm sorry, you said
9 he could testify that there are mesotheliomas
10 without known asbestos exposure. You let that
11 come in. You allowed him to testify regarding
12 rates of mesothelioma in women, which are
13 spontaneous or naturally occurring, and he said
14 there's zero mesotheliomas in women that are
15 asbestos occurring, that they are all naturally
16 occurring.

17 But you said, because Feingold had no
18 information about the talc products at issue, he
19 could not have information sufficient to testify
20 specifically about the cause of Ms. Plant's
21 mesothelioma. That was the one limitation.

22 But even with these limitations, Feingold
23 testified repeatedly that women do not have
24 mesothelioma caused by asbestos exposure.

25 And I don't want to wear anybody out, but

1 there's five quotes I want to give you really
2 quickly about what his testimony was.

3 Dr. Feingold testified, and all of these
4 are quotes, "There are essentially zero
5 asbestos-induced mesos in the U.S. for women.

6 "Since 2010 all or almost all cases of
7 mesothelioma in women were not called by
8 asbestos exposure. As of 2010, there's zero
9 asbestos-induced mesos in the U.S. in women.
10 The great majority of mesos in women are not
11 asbestos-induced.

12 "Meso is a bad disease caused by major
13 exposure that could not possibly ever occur from
14 the use of talc. There is no asbestos in talc.
15 Overwhelming evidence that there is no harmful
16 asbestos in talc."

17 He also testified, I think in violation of
18 your rulings, but he testified the plaintiff,
19 Ms. Plant, had no asbestos in her lungs, so I'm
20 not dead wrong. "It's overwhelming evidence
21 that this is a nonasbestos ideology. My opinion
22 is that this is not an asbestos-induced
23 mesothelioma." That's how he testified.

24 Whittaker Clark & Daniels was not limited
25 in presenting its defense. He gave tons of

1 testimonies I just read about this was not an
2 asbestos-related meso and that talc does not
3 contain asbestos, talc does not cause
4 mesothelioma. And he even gave a specific
5 opinion in violation.

6 Whittaker Clark & Daniels fails to mention,
7 of course, that it presented causation testimony
8 from Dr. Christy Barlow. She's an inhalation
9 toxicologist. And she testified that the amount
10 of asbestos in talc is far smaller than the
11 present -- that are present in the ambient air.

12 And she testified that Plant's exposure to
13 cosmetic talc did not contribute to her
14 mesothelioma.

15 Judge, that's a lot of causation testimony
16 they got to put up. The burden was not shifted
17 on their behalf.

18 I'm not going to go into the BRCA2
19 testimony very often. There's a difference in
20 saying that -- and this supported by the
21 literature, that the BRCA2 gene can make you
22 more susceptible to the effects of asbestos on
23 the body. But there's no evidence that the
24 BRCA2 gene causes the mesothelioma. That was a
25 distinction that we made. He was allowed to

1 testify to BRCA2, and he did at length about
2 what it is and what it does.

3 As to the slide containing Dr. Feingold's
4 slide where it had Dr. Maddox at the top of it
5 and it quoted from Dr. Maddox's report, and it
6 said, "Therefore, this is not an
7 asbestos-induced mesothelioma." On its face,
8 the slide is inaccurate. The only thing the
9 Court did was say that was not Dr. Maddox's
10 opinion. Dr. Maddox's opinion was the opposite
11 of that, which is factually true. They don't
12 dispute that.

13 The last thing that I will -- about
14 Dr. Feingold that I will address is the Court
15 instruction. They argue that the Court
16 instruction about Dr. Feingold's violation of
17 your order was not warranted.

18 They don't -- when you read their brief,
19 they don't really deny that Feingold violated
20 the order. They don't. What they want to say
21 is, you can't blame us. He was baited into
22 giving us that opinion, that the plaintiffs
23 asked a question that essentially baited him
24 into violating the Court's order.

25 Judge, number one, you look at the question

1 and his response, that's not what happened. But
2 two, Dr. Feingold knew well the parameters of
3 what your order was. If that was going to be an
4 issue, we should have had a side-bar. We should
5 have figured it out. That's not what he did.
6 He clearly violated your order.

7 The Court gave the instruction. Whittaker
8 Clark & Daniels did not object to the curative
9 instruction, did not argue that the instruction
10 was unfair, unwarranted, or unprejudicial.

11 Your Honor, again, we would argue that
12 Whittaker Clark & Daniels has waived this issue.

13 I want to make sure I'm going in the right
14 order. I was going to go -- because it's how
15 the new trial motion works, go through the jury
16 charges that they objected to, and then turn to
17 Dr. Longo and the summary charts.

18 THE COURT: I've got my own notes breaking
19 down everything. That's fine. That is in
20 accord with my notes.

21 MS. MCVEY: Okay. So two things. One,
22 Whittaker Clark & Daniels argues that they were
23 stripped of the empty-chair defense. First, the
24 jury was charged on the empty-chair defense.
25 It's the charge that we've used in Glenn and in

1 Jolley and others, which allows them to consider
2 who the other possible -- as you're looking at
3 their fault, you're allowed to consider other
4 people who may be at fault, and that's what the
5 charge says.

6 The problem for Whittaker Clark & Daniels
7 is, they never -- they never identified an empty
8 chair. They never said so-and-so is a cause of
9 this. They never did it. Because the problem
10 for Whittaker Clark & Daniels is they supplied
11 to a lot of companies, Mary Kay --

12 THE COURT: Yeah, they argue -- because
13 that's what I say is they never identified the
14 empty chair and they never argued that to the
15 jury at all. So I don't know what you would
16 have amounted an empty chair, anything more
17 specific if you weren't going to violate Smith
18 versus Tiffany and its interpretation of the
19 contribution statute.

20 But they say the empty chair is Mary Kay
21 and Color Techniques, and of course, they
22 offered a charge in that regard, which I did not
23 give.

24 MS. MCVEY: So you did give a charge about
25 they have alleged other folks are responsible.

1 You did give that charge. What you didn't put
2 is the names of Mary Kay and --

3 THE COURT: Mary Kay and Color Techniques,
4 that's correct.

5 MS. MCVEY: The problem for them, it is not
6 clear to me they're arguing that Mary Kay was at
7 fault, because Mary Kay had talc. They didn't
8 try this like, oh, there's -- "it's not my
9 asbestos, it is somebody else's asbestos" that
10 you normally see in these cases. They said this
11 is not an asbestos-induced mesothelioma. This
12 is naturally occurring.

13 So the empty chair defense doesn't even
14 apply. They aren't arguing that somebody else's
15 asbestosis caused the disease. That's not what
16 they argue here.

17 So, Your Honor, if you did charge empty
18 chair, I represent they did not make a record
19 that anyone could identify what empty chair
20 would be or how it would be argued.

21 But-for causation, just real briefly. Both
22 Jolley and Glenn have said but-for causation
23 does not apply in those toxic tort cases, that
24 it's a substantial factor. The Jolley opinion
25 was affirmed, of course, by the Court of

1 Appeals, and the Supreme Court denied cert as to
2 all the legal issues, but-for causation, all
3 the -- each and every exposure, all of that
4 stuff.

5 The Supreme Court in Jolley has only
6 granted cert on the allocation of settlements
7 issue. It is settled law. Supreme Court has
8 said substantial factor is the law of the land
9 in these types of cases, so but-for should not
10 have been charged.

11 Briefly, sophisticated intermediary
12 defense. Your Honor, I would argue this is
13 exactly like Glenn. Here's why. You know, I'm
14 lucky enough, I guess, to get to try the Jolley
15 case and the Glenn case and this case. What
16 Fisher wanted to say is, yes, we supplied these
17 asbestos gaskets, and we knew they had to be
18 replaced. But they were incorporated into these
19 products and they're placed in these things, and
20 we don't really know how they're going to be
21 used.

22 Okay. Here, Whittaker Clark & Daniels was
23 selling their talc to cosmetic companies, who
24 are going to make a product out of it. The talc
25 doesn't change when its incorporated into the

1 cosmetics. The asbestos doesn't get removed or
2 added in. The talc comes in. You can't remove
3 asbestos from talc. It goes into the finished
4 product.

5 But importantly, just like in Glenn,
6 Whittaker Clark & Daniels says their product
7 doesn't have asbestos. Whittaker Clark &
8 Daniels says it doesn't need a warning. There
9 is no information in what Glenn says and every
10 other sophisticated user says is you have to
11 show that you reasonably relied on the
12 intermediary to warn.

13 If the manufacturer says it doesn't need a
14 warning, how can they expect the purchaser of
15 that talc to warn? They can't. It is just like
16 Glenn, it's just how it played out.

17 And Your Honor, you were correct not to
18 charge sophisticated -- they call it something
19 new, sophisticated purchaser. I've never heard
20 that before, but that's what they call it.

21 Your Honor, I'm going to go just for a
22 second through Dr. Longo. It is well briefed in
23 our papers, so I won't belabor it.

24 THE COURT: I've gone through that a good
25 many times.

1 MS. MCVEY: Okay.

2 THE COURT: But certain things occurred
3 during the course of the examination of Longo
4 that kind of underscore what the rulings had
5 been.

6 MS. MCVEY: Right.

7 THE COURT: I mean, for example, that
8 below-the-waist stuff, which they say is another
9 one of the things that Longo is to be criticized
10 for, they saw in cross-examination.

11 MS. MCVEY: You remember the video and the
12 powder going everywhere?

13 THE COURT: Yes. That was Thackston's
14 cross-examination.

15 MS. MCVEY: That's right.

16 THE COURT: What impact does that have on
17 the argument they're now making about the bogus
18 nature of his testing methodology?

19 MS. MCVEY: Your Honor, I think that waives
20 the argument that they're making. They showed
21 it to him, and they showed it -- I think it
22 backfired, but that's a choice they made. But
23 they showed it to say look how silly it is, you
24 can't put that much powder on yourself while
25 you're getting ready. That's really why he

1 showed it to them.

2 But Longo discussed it, he showed how it
3 works, he went through his testing, and all of
4 his testing documents had been provided to them.
5 He had a two-day deposition. He went through
6 all of it. Did they a cross-examination of him
7 that was pretty impeccable. And he answered
8 their questions.

9 Your Honor, as to whether it should have
10 been admitted, and I will argue to you that the
11 JNOV motion is not the proper vehicle to raise a
12 disagreement about the admissibility of
13 Dr. Longo's testimony, but it was properly
14 admitted. He is well qualified. He is
15 imminently capable. He has tested more of this
16 talc than anybody else. His methodology is
17 reliable. You looked at all of that and ruled
18 that it was true.

19 They particularly do not like his
20 chrysotile testing separation, and we talk about
21 that on page 43 of our brief. Your Honor, this
22 was a method that was developed by the Colorado
23 School of Mines for Johnson & Johnson in 1973.
24 And he explained how it worked to separate talc
25 and chrysotile despite their similar densities.

1 They provided you no additional basis to
2 revisit this evidentiary ruling.

3 So, Your Honor, unless you have more
4 questions about Longo, I think it is well --
5 it's been briefed to death, both before trial,
6 during trial, and after trial.

7 And, Your Honor, you have also heard
8 Dr. Longo testify multiple times in multiple
9 trials, so you're very familiar with his
10 opinions.

11 Briefly, if the Court would like me to go
12 through this, I want to go through the summary
13 charts.

14 THE COURT: Yes, corporate records and the
15 summary charts.

16 MS. MCVEY: Yes. I told you at the
17 beginning of my argument in talking about the
18 cumulative error --

19 THE COURT: One thing that I will ask on
20 the front end on the corporate records.

21 MS. MCVEY: Yes, ma'am.

22 THE COURT: You know, generally, you have
23 these pretrials, and I have reviewed all of
24 these things and admissibility and so forth was
25 determined at that time, subject to what happens

1 at trial. MIL is not in the discussion, of
2 course.

3 But normally, in these trials, the parties
4 will then pick out the things that each side is
5 going to use out of these agreed-upon records.
6 The first thing I hear about it then at trial is
7 that they have objected to every corporate
8 record. How many records was that?

9 MS. MCVEY: 71.

10 THE COURT: So you had -- and that was a
11 list you had provided of what you were going to
12 use out of the several hundreds of -- I mean,
13 there were hundreds of corporate records that I
14 had to review.

15 MS. MCVEY: That's right. So yes, and
16 these were Whittaker Clark & Daniels' specific
17 records that we wanted to use for them. And you
18 remember, we did the same thing for Mary Kay.

19 THE COURT: Right.

20 MS. MCVEY: And so Whittaker Clark &
21 Daniels just refused to engage with us at all.

22 THE COURT: Mary Kay, you all came to
23 equipoise about Mary Kay and Color Techniques.

24 MS. MCVEY: That's right.

25 THE COURT: I knew what was going to come

1 in then. And then Whittaker Clark & Daniels
2 simply said we object to the whole thing.

3 MS. MCVEY: Well, first, they just wouldn't
4 object.

5 THE COURT: First, they wouldn't reply at
6 all.

7 MS. MCVEY: Right.

8 THE COURT: You were sending things
9 overnight and so forth, and I was getting copies
10 of them and they weren't replying.

11 MS. MCVEY: Right. And, Your Honor, you
12 recall, as trial counsel for everybody, when
13 we're in these trials, what I try to do the
14 night before we start is say here are the
15 witnesses we're calling, here are the exhibits
16 we're going to use. We want to move these in so
17 we that can address them, if we need to, first
18 thing in the morning.

19 That is, of course -- I gave them even more
20 time than we normally do.

21 THE COURT: And I take those and make my
22 trial notebook up from that that has the ones
23 that we're going to be talking about.

24 MS. MCVEY: That's right. The idea, of
25 course, particularly in this case when we lost

1 two days of trial was to move things along. And
2 so when they refused to do anything with these
3 documents, I said, "Judge, they're admissible on
4 their face, but they need to tell me what
5 objections they have."

6 The next thing I know, I get, I don't know,
7 20 pages worth of objections where every single
8 one of their documents, and they're Whittaker
9 Clark & Daniels documents, every single one of
10 them were objected to, then I --

11 THE COURT: And that was all 71?

12 MS. MCVEY: Yes. And we did this in the
13 briefing. Then they say we object to these 13,
14 and then it was we object to these 16, and later
15 it was objected to these 11.

16 Even when I read their briefing, I cannot
17 tell what they're objecting to to this day.

18 Your Honor, when you look at those records,
19 they were admissible on their face under various
20 evidentiary rules, which we go through in our
21 briefing. But, too, at some point they waive
22 their objections. They can't refuse to act and
23 hold us up when we have to prove our case.

24 So, Your Honor, those objections were
25 untimely.

1 Let me just briefly for the record say that
2 they were properly-admitted business records.
3 We attached a chart identifying each exhibit and
4 a column setting the basis for the authenticity
5 of each document. These were documents that
6 Whittaker Clark & Daniels had.

7 They never asked to see the underlying
8 documents, and then when they did, we
9 immediately got them anything they wanted,
10 including the authenticating affidavits.
11 Authenticity was established before they were
12 admitted in this case.

13 They object to, like, the Pfizer documents
14 coming in and others. Pfizer was a party to
15 this case. These were Pfizer documents that
16 were produced by Pfizer and contain
17 Bates-stamps, Pfizer logos, letterhead. They're
18 ancient documents under a thousand different
19 reasons, but we also had authenticating
20 documents for both Cypress and Noxell.

21 All of these were properly admitted into
22 evidence. And so not only do they waive their
23 objections, but even if that's not true, Your
24 Honor, these were rightfully admitted.

25 Let me touch briefly on the summaries for a

1 second. The summaries are a little bit of an
2 issue for Whittaker Clark & Daniels. Rule 1006
3 allows summaries to be used. And the way the
4 rule reads is it says summaries can be used as
5 long as the underlying documents are available.
6 Right?

7 And so we gave them these summaries, again,
8 ahead of time. And in these summaries, we had
9 where the information came from, and they could
10 look at it. To the extent they wanted the
11 underlying documents, we got those to them.

12 And so there were a couple of summaries.
13 Let me just go through a couple of those, and
14 stop me if you don't want to hear it because
15 it's in our briefing.

16 We did a summary of the Whittaker Clark &
17 Daniels sales records. The underlying documents
18 supporting the charts were identified. They
19 were made available.

20 These were, of course, summaries of
21 Whittaker Clark & Daniels sales to various
22 companies, which were all compiled directly from
23 Whittaker Clark & Daniels' own sales records,
24 which were separately admitted into evidence.

25 The sales records give the quantity of each

1 sale, each Whittaker Clark & Daniels product
2 number. The sales summaries simply add and
3 multiply those numbers until it can be expressed
4 as the total number of pounds of talc Whittaker
5 Clark & Daniels talc sold over the entire course
6 of a year.

7 The sales records were admitted into
8 evidence because the corporate rep,
9 Mr. St. George, admitted to it. They share the
10 same distinct format and features of other
11 Whittaker Clark & Daniels sales records. Those
12 summary --

13 THE COURT: That's the biggest thing that
14 we talked about in pretrial, is Dennis
15 St. George was their corporate rep and he
16 actually came to the trial.

17 MS. MCVEY: Yes.

18 THE COURT: And he had already verified
19 these documents.

20 MS. MCVEY: That's right, in prior
21 depositions. That's right.

22 And, Your Honor, these were tailored to the
23 issues in this case. Whittaker Clark & Daniels
24 supplied a ton of people with talc, products
25 that Sarah Plant used. And that's why, because

1 as you will see when we get to the next phase of
2 this motion, is that it's not an actual product
3 that matters. Sarah Plant identified those, but
4 it's where this talc is sourced from.

5 THE COURT: Right, and that leads to the
6 next thing, which is the contention that you
7 have muddied the waters by combining them with
8 other corporations through ownership. This is
9 the Canadian mines that -- from which a lot of
10 their talc was sourced, right?

11 MS. MCVEY: Well, they sourced non-talc
12 from a bunch of different places, which we can
13 go through. I think that's the next phase of
14 this motion, so I don't want to get too ahead of
15 myself. I'll talk about their knowledge.

16 They owned talc mines. Whittaker Clark &
17 Daniels owned talc mines. Under any asbestos
18 case, any products case on planet earth, that
19 goes to notice and knowledge. We don't have to
20 show control; they owned it.

21 This summary compilation of the Whittaker
22 Clark & Daniels sales records address three
23 relevant products. Just briefly, it was Trial
24 Exhibit 46, which summarized the sale of talc to
25 entities that made and sold Gold Bond talc

1 products from 1990 to 1999. Directly relevant.

2 And that summary chart comes from three
3 exhibits that were separately admitted into
4 evidence. That's Trial Exhibit 1295, Trial
5 Exhibit 1380 and Trial Exhibit 4155. The next
6 summary was Trial Exhibit 62, and that
7 affected -- I'm sorry, Trial Exhibit 62 and
8 Trial Exhibit 47, that affected time periods
9 from 1992 to '94 and '95 to 2004. And that
10 reflected sales of Whittaker Clark & Daniels,
11 sales of talc to Procter & Gamble, who was the
12 entity who manufactured CoverGirl, to which
13 there was extensive testimony.

14 The summary chart 62 and 47 are derived
15 from Trial Exhibit 947, which are the sales
16 records to Procter & Gamble that Whittaker Clark
17 & Daniels produced. Extremely relevant.

18 The next summary was Trial Exhibit 61, and
19 that summarized Whittaker Clark & Daniels sales
20 from Coty from '89 to 2004. That comes from the
21 Trial Exhibit 1030, the sales records that
22 Whittaker Clark & Daniels provided to us.

23 Judge, these were all -- they had the
24 underlying documents. Nobody is arguing the
25 charts were untrue or they misrepresented

1 something. They were relevant, and they were
2 properly admitted.

3 Judge, I can do this for each of the
4 summaries they argue about.

5 THE COURT: You know, we went through all
6 of them at one time.

7 MS. MCVEY: Okay. Yes, ma'am.

8 THE COURT: And they're all related to the
9 predicate was products she had used --

10 MS. MCVEY: Right.

11 THE COURT: -- and tied to it records that
12 showed Whittaker Clark & Daniels supplied those
13 product manufacturers at certain points in time
14 when she used those products.

15 MS. MCVEY: That's right. And that -- even
16 if it wasn't the CoverGirl brand she used, the
17 CoverGirl talc came from this particular mine,
18 and we'll go through that in another one, and so
19 these records also show testing of asbestos from
20 this particular mine.

21 And that's what the experts said mattered,
22 where did the talc come from? Did it come from
23 this mine? We tested that, it shows asbestos.
24 So everything was related. That goes for the
25 Longo summaries, the Dr. Bailey summaries, the

1 CoverGirl summaries, and the Pfizer summaries.

2 Your Honor, that was -- all the underlying
3 data was available, they had it, they just
4 didn't like the summaries, but it was properly
5 admitted under Rule 1006.

6 The only other thing, and I'm not sure if
7 they even argued this, was that we didn't prove
8 our design defect case because we failed to show
9 a reasonable alternative design.

10 Your Honor, Mr. St. George, the Whittaker
11 Clark & Daniels documents, Dr. Haber, all
12 testified that talc was a reasonable alternative
13 design -- I'm sorry, that cornstarch was a
14 reasonable alternative design for talc.

15 THE COURT: Cornstarch, yeah.

16 MS. MCVEY: That is in the record.

17 Finally, as to manufacturing defect,
18 Whittaker Clark & Daniels says that asbestos
19 shouldn't be in their product, and asbestos was
20 in their product. And if that happened, that is
21 clearly a manufacturing defect.

22 And finally, of course, a supplier of a
23 product has a duty to warn about any dangerous
24 condition.

25 And, Your Honor, I think that addresses all

1 the issues they raised in their JNOV.

2 THE COURT: Okay.

3 MS. MCVEY: Thank you, Your Honor.

4 THE COURT: Okay. We are getting a little
5 ahead of ourselves. The first motion is a
6 motion for new trial absolute. And, Ms. McVey,
7 your arguments apply to new trial absolute but
8 some of them also apply to JNOV, right?

9 MS. MCVEY: Yes, ma'am. And I don't know
10 how you guys want to do it. There's some
11 interlapping ones. I think what they just did
12 is the JNOV motion. I'm sorry, the new trial
13 motion. They still have the JNOV arguments.

14 THE COURT: Right. But we got the new
15 trial absolute, which is basically the
16 cumulative error, the exclusion of Attanoos, the
17 Feingold limitations, the improper instructions
18 on absent parties, the allowance of Longo, the
19 corporate records, the records summaries, and
20 the acts and admissions of these other
21 corporations, and that has all been covered in
22 the motion for new trial absolute, along with
23 this overarching concept of, quote/unquote,
24 cumulative error --

25 MS. MCVEY: Yes, ma'am.

1 THE COURT: -- and whether or not it's
2 going to be applied for the first time in the
3 United States of America to reversing my rulings
4 in two other affirmed cases. So those are the
5 issues on the motion for new trial absolute.

6 I deny the motions for new trial absolute.
7 And I'm going to give some directions about
8 preparation of orders, but basically, the
9 combination of my colloquy at this hearing and
10 the Plaintiffs' briefings on these matters
11 should form the foundation for the Plaintiffs'
12 preparation of a proposed order, which would
13 then be submitted to the defendant, and there
14 will be some timelines on this momentarily.

15 And I would then commit the on-the-record
16 ruling I have just made to a written order that
17 can be used as the foundation for an appeal.

18 MS. MCVEY: Thank you, Your Honor.

19 THE COURT: All right.

20 We next come to be the motion, the judgment
21 non obstante veredicto is kind of a first cousin
22 to what we've been talking about, so I turn back
23 to you, Ms. Flynn.

24 MS. FLYNN: Yes, Your Honor.

25 THE COURT: All right.

1 MS. FLYNN: This will be much more brief.

2 THE COURT: Sure.

3 MS. FLYNN: We have covered some issues
4 that were similar between the two motions.

5 THE COURT: You have at least passively
6 referred to that. I understand that. That's
7 fine.

8 MS. FLYNN: Your Honor, Stephanie Flynn on
9 behalf of Whittaker Clark & Daniels. Our first
10 ground for JNOV was that the evidence was
11 insufficient to conclude that Sarah Plant
12 actually used products containing talc that was
13 specifically supplied by Whittaker Clark &
14 Daniels as opposed to some other supplier, some
15 other source.

16 And that the Court heard a lot of this and
17 we've talked about these factual issues a lot,
18 so I won't belabor them. But as the Court
19 knows, Whittaker Clark & Daniels was a supplier
20 of raw mineral talc and other minerals and
21 pigments up until 2004. There were a lot of
22 other suppliers, there were a lot of other
23 companies that provided talc for various uses
24 and so forth.

25 Of course, there are a lot of uses for

1 talc. Talc can used for manufacturing tires,
2 can be used for manufacturing of drugs and pills
3 and used for cosmetics, as was the issue in this
4 case.

5 But Whittaker wouldn't know necessarily --
6 it might know that, okay, if I'm selling to a
7 cosmetics company, there's a fair assumption
8 that it's going to be used to manufacture some
9 form of cosmetics, but it wouldn't know
10 specifically did that go into a lipstick or
11 something that was engild or hard, did it go
12 into a dry powder form, a blush.

13 THE COURT: Ms. Flynn, let me ask you this:
14 Specifically, the products that they point to as
15 products that it was shown she used and that
16 they contend it would show Whittaker Clark &
17 Daniels supplied the talc for are Gold Bond body
18 and foot powder, CoverGirl, Avon, Coty?

19 MS. FLYNN: That's correct, Your Honor.

20 THE COURT: And, you know, your own records
21 and formula records show periods of time for
22 which Whittaker Clark & Daniels supplied those
23 particular manufacturers of cosmetic products
24 during the time she said she used those
25 products.

1 So I don't understand the evidence is
2 insufficient to conclude that she used any
3 products with talc contributed to WCD, because
4 WCD was shown by its own records that it
5 supplied these various cosmetic manufacturers.

6 MS. FLYNN: And our position is, there are
7 records of sales during relevant periods of
8 time. The problem is, you have to link those to
9 specific products, and I think that's where the
10 missing link comes in. These cases are like
11 puzzles, and we sort of piece them together over
12 time by getting records from --

13 THE COURT: Your records do more than that
14 for a lot of these things. That is when we get
15 into the squabble about these business records
16 because they get a little more specific than
17 just, Hey, I sent something to Coty, they talk
18 about formulas, and formulas ends up being the
19 foundation for the use in a particular kind of
20 product.

21 So it's not correct to say that there's no
22 information in the record that ties those things
23 together, is it?

24 MS. FLYNN: I don't think so. I think that
25 we're looking for that straight connection, and

1 that's -- I'll take Avon. Let me just do Avon
2 for instance.

3 There was a card from Avon that showed
4 their formula for specific type of powder. The
5 specifications in that card reflected use of
6 talc osmanthus 200 type of powders at issue, and
7 that was provided by two other suppliers that
8 were listed on that card. WCD was also listed
9 but for a slightly different enumerated talc
10 code.

11 So our position on that is it is just as
12 likely, if not more likely, that the talc from
13 the other suppliers was the use and was the
14 primary use, whereas WCD could have been an
15 alternative. We think that that leaves the
16 potential that she could have just as easily
17 gotten talc from --

18 THE COURT: You have a record in there that
19 on its face ties the two together, and you
20 have -- you contend, A, there's no asbestos in
21 it, and, B, we're not offering you any records
22 to show anything about what you're talking
23 about, Hey, we supplied a slightly different
24 code that she never used.

25 The big gap in that thing is the only

1 evidence they're seeing is this evidence of
2 supply and specific products that she talks
3 about using.

4 So how do you make this no evidence
5 argument, is what I'm trying to figure out.

6 MS. FLYNN: We understand, Your Honor. We
7 just think that the evidence isn't strong enough
8 to show that she -- without at least some
9 speculation that she actually got a WCD-supplied
10 talc in a product as opposed to somebody else's
11 supplier.

12 THE COURT: Well, I understand the
13 argument.

14 MS. FLYNN: And I won't belabor. I won't
15 go through these individually.

16 We also argued as a basis for our JNOV that
17 the evidence was insufficient for a reasonable
18 jury to include that the talc supplied by
19 Whittaker Clark & Daniels actually contained
20 asbestos.

21 I think the Court heard us say many times,
22 Plaintiffs talked about talc throughout the
23 trial as if it was synonymous with asbestos, but
24 it is not. Talc is not asbestos. And unlike
25 traditional asbestos-containing products --

1 THE COURT: You know, all the witnesses
2 that testified about talc and asbestos made it
3 clear that talc is talc. Where asbestos comes
4 in is that talc is a naturally-occurring
5 mineral, so is asbestos. And in many mines
6 asbestos and talc occur together.

7 And they offer a good deal of evidence
8 about the various mines that Whittaker Clark &
9 Daniels mine and show that in those mines
10 asbestos was occurring naturally. And further,
11 showed testing information that the end products
12 of the talc, they called it talc. They didn't
13 call it talc and asbestos.

14 But that's what they shipped, and the
15 contention is, is talc and asbestos. Testing
16 records show that, some of them Whittaker Clark
17 & Daniels records. And then it showed that
18 those -- that that so-called talc from those
19 mines went into certain cosmetic products.

20 Now, Whittaker Clark & Daniels offers
21 nothing in response to that other than our talc
22 does not include asbestos and talc is not
23 asbestos. There's a big link you're missing
24 there in terms of the information Plaintiffs
25 supplied, is there not?

1 MS. FLYNN: We believe that --

2 THE COURT: Because on JNOV, I'm not
3 looking at the weight of evidence; I'm looking
4 at whether there's any evidence.

5 MS. FLYNN: I understand, Your Honor. I
6 understand. Our position on that, our corporate
7 representative testified, and I know they
8 disagree with his testimony, but that it was a
9 policy of WCD not to sell asbestos that is
10 tested positive for -- I mean, talc that's
11 tested positive for asbestos.

12 THE COURT: He also admitted that they knew
13 some talc did test positive.

14 MS. FLYNN: And that talc wouldn't be sold,
15 and that's the testimony.

16 THE COURT: That's what he said.

17 MS. FLYNN: Correct.

18 THE COURT: It wouldn't be sold.

19 MS. FLYNN: Right. So there are --
20 honestly, there are -- because there's a testing
21 program that has gone on since the early 1970s.

22 THE COURT: Right.

23 MS. FLYNN: So you're going to have
24 positive tests of asbestos and talc, but that's
25 the product that's not being sold. So what

1 Plaintiffs need to do is establish that WCD was
2 selling, you know, talc that contained asbestos,
3 despite the policy.

4 And they criticize Whittaker for not having
5 a written policy about that, but that doesn't
6 mean that a verbal policy wasn't just as
7 sufficient or didn't work and wasn't their
8 policy. It was, it just didn't happen to be in
9 writing.

10 We do think that the source mines,
11 obviously, they will tell you the type of
12 asbestos fibers that you can find in talc, but
13 that doesn't mean that every talc batch that
14 comes from that particular mine is going to have
15 those fibers in it. Because the goal is that
16 they don't. We're not going in there and just
17 mining free will. We're trying to get, you
18 know, as clean and pure a talc as possible, and
19 that's why the testing occurs.

20 THE COURT: Okay. I understand the
21 argument.

22 MS. FLYNN: Our arguments in sections. 3,
23 5, and 6 of our JNOV were very similar. They're
24 all kind of evidence of -- lack of evidence of
25 actual exposure from inhalation and a sufficient

1 dose or quantity and for a specific duration of
2 time.

3 So our position on that was that they
4 failed to show that Ms. Plant actually would have
5 breathed the powder from the cosmetics use. The
6 questions were not asked. The jury just had to
7 assume that that was the case. I don't think it's a
8 leap, but in other words, they would have to show it
9 was inhaled in a sufficient quantity to be able to
10 cause disease.

11 We would contend that there's been no
12 effort to establish the cumulative dose that Sarah
13 received from Whittaker-supplied talc specifically
14 and a comparison of that cumulative dose with
15 anything to show that it was at a level that was
16 above background sufficient to cause disease.

17 Just saying that you use a product, which
18 was the bulk of the testimony at trial, doesn't
19 necessarily translate to amount, frequency, or
20 duration of inhalation. We think that needed to have
21 been shown that she inhaled enough or could have
22 inhaled enough that could be at a level sufficient
23 above background to meet that level to cause disease.

24 The best evidence of that would have been
25 the finding of asbestos bodies. No asbestos bodies

1 were found in the tissue. We think that's strong
2 evidence that it was not caused by asbestos in talc
3 or that the talc wasn't -- that she could have come
4 in contact was actually contaminated by asbestos. It
5 would have been a fingerprint had it been there, and
6 it was not.

7 So I won't belabor those points any longer,
8 but these -- that's the sum total of our 3, 5, and 6?
9 For the JNOV.

10 I believe one of the other grounds we
11 argued was that the evidence was insufficient for a
12 reasonable jury to conclude that the product
13 Ms. Plant used was in essentially the same condition
14 as when it left Whittaker's hands.

15 Our position on that is we didn't make
16 products. Obviously, Whittaker did not make
17 products. It supplied raw materials for use. And
18 Sarah Plant never used raw material talc supplied
19 directly from Whittaker. The time she got it, it had
20 always been formulated into a product by some other
21 manufacturer without our knowledge of how the product
22 was -- or the raw material was specifically going to
23 be used.

24 So things were added to it, changed, and so
25 forth, and therefore, we believe that Sarah Plant

1 didn't come into contact with a product that was in
2 essentially the same condition when it left
3 Whittaker's hands.

4 And that's a well settled tenant of
5 products liability law that the product be shown and
6 be essentially in the same condition as it would have
7 left the hands of the defendant.

8 And I believe Ms. McVey has commented on
9 this already, I'll just say something about it
10 briefly. It's the last couple of grounds.

11 The jury had insufficient evidence of any
12 defect, whether design, manufacturing, or warnings.
13 As this Court knows, Whittaker is a supplier. At
14 times Whittaker never saw the talc that it was
15 supplying. It might be direct shipped perhaps from
16 the mining and milling company directly to the
17 ultimate manufacturer of whatever cosmetic product it
18 was going into.

19 And there were times even when it did
20 receive bags of talc into its warehouse, those same
21 bags were then just shipped out directly to the end
22 manufacturer without Whittaker touching it or doing
23 essentially anything to it.

24 So Whittaker never manufactured or designed
25 any product; it simply obtained the talc from the

1 millers and miners and sold that talc. We don't
2 think that that qualifies as manufacturing, certainly
3 doesn't qualify as designing anything.

4 Whittaker had no role in what the end users
5 and manufacturers, rather, did with that talc in
6 terms of how they manufactured it, what products they
7 put into it, how much of the talc they put into the
8 product, et cetera.

9 Further, Plaintiffs had the burden of
10 showing a warning would have made a difference in the
11 Plaintiffs' conduct. We've talked a little bit about
12 warnings, so I won't rehash that aspect of it. Other
13 than to say Whittaker didn't have to ability to
14 communicate directly with Ms. Plant. It had no
15 control over what the manufacturers did to the talc
16 and what warnings that they might have put on the
17 talc-based products themselves.

18 So those products were labeled and sold
19 without input from Whittaker. And for those reasons,
20 we don't believe there's evidence upon which a jury
21 could have found that Whittaker had the ability to
22 warn.

23 And then there's no evidence that Sarah
24 Plant --

25 THE COURT: What they were being asked to

1 warn about is something that you all say never
2 happened, which is, is asbestos in this
3 material, use it with care or do not use it, so
4 that it would be consumed by a consumer and so
5 forth. They represented just the opposite.
6 They said our talc does not contain asbestos.

7 MS. FLYNN: Once the talc was tested and
8 determined to be nondetect for asbestos, then
9 yes, that is absolutely the case.

10 THE COURT: Right. And whatever they did,
11 what was shown by Plaintiff was enough to let
12 the jury have this as an issue is the battle of
13 facts. They showed a line of evidence that they
14 contend allow the jury to conclude that
15 Whittaker Clark & Daniels knew that talc was
16 contaminated with asbestos and it did not warn.

17 MS. FLYNN: I understand their position.
18 The manufacturers were also in the same business
19 with the same industries, were also testing.
20 It's a whole testing product all the way from
21 the mining and milling companies all the way
22 through --

23 THE COURT: Does that mean they don't have
24 any -- I don't understand how that absolves the
25 supplier of the tainted material, if that's what

1 it is, with the duty to warn. I don't see how
2 they're absolved of that if somebody else also
3 knows or is doing something about it. I mean,
4 is that what the argument is?

5 MS. FLYNN: Whittaker didn't have any
6 control over what was put on the ultimate
7 product that Ms. Plant would have purchased. I
8 mean, that's the manufacturer.

9 THE COURT: They did. What they were going
10 to do is take the talc that was given them and
11 incorporate it into their product. They had
12 some control over whether it contained asbestos,
13 did they not?

14 MS. FLYNN: Whittaker tested the talc, so
15 it didn't -- it was found not to contain
16 asbestos, but the manufacturer is the
17 ultimate -- Whittaker didn't know what products
18 it was going into, and neither would the
19 manufacturers tell us which products.

20 THE COURT: I understand that line of
21 argument. There is evidence otherwise, of
22 course.

23 MS. FLYNN: The only other point I wanted
24 to raise with that is there's no evidence in the
25 case that Sarah Plant would have done anything

1 differently had she seen a warning on a blush or
2 on a face powder. We don't have any information
3 or evidence in the case that she would have
4 changed her behavior or that a warning would
5 have made any difference to her in the products
6 she used.

7 As you know, there's no legal duty to give
8 a warning, also, for a rare risk or a danger.
9 Mesothelioma is absolutely a rare disease. That
10 was stressed over and over again in the trial.
11 It was also stressed in the trial that Ms. Plant
12 for the plaintiffs was an eggshell plaintiff.
13 So you kind of have a dual thing going, a very
14 rare disease and a very susceptible plaintiff.

15 There's case law out there that provides
16 that there's no legal duty --

17 THE COURT: That doesn't lower your
18 standard of duty, though. You take the
19 plaintiff as you find them. If the plaintiff is
20 an eggshell plaintiff, that is, has some other
21 kind of susceptibility, that doesn't somehow
22 lower your obligation, does it?

23 MS. FLYNN: We would have a legal duty to
24 warn of reasonable risk; however, Ms. Plant was
25 an exceptional, unusual circumstance.

1 THE COURT: Yeah, but a warning would have
2 been the same for anybody. Hey, this has got
3 asbestos in it, use it at your peril or words to
4 that effect.

5 MS. FLYNN: I understand your position,
6 Your Honor. Our position was we can't warn
7 everyone. She was a -- even if talc contained
8 asbestos and even if there was a product that
9 made it through this process that contained
10 asbestos, it would not harm normal people at a
11 level that it might have harmed somebody like
12 Sarah Plant.

13 If that's the case -- and I don't think
14 we -- I don't think we would acknowledge that
15 that happened, that Whittaker sold talc for the
16 manufacturer of products that contained
17 asbestos, but if it did, then she's an unusual
18 circumstance. And that's really the point.

19 THE COURT: All right.

20 MS. FLYNN: And, Your Honor, the only other
21 point I would make, obviously, we've just raised
22 loss of consortium. That would fail if the
23 Court find that Sarah Plant's claims failed.

24 THE COURT: Right. Understand.

25 MS. FLYNN: I believe those are all the

1 arguments I have on that.

2 MS. MCVEY: Your Honor, Theile McVey for
3 the Plant family. I'm going to be super brief,
4 unless you want me to go through the weeds.

5 THE COURT: I think you have already
6 covered much of what's been said, but if you
7 want to do a short summary, that's fine.

8 MS. MCVEY: I'm going to go for three
9 minutes, and then I'm going to sit down, unless
10 there are any questions.

11 THE COURT: All right.

12 MS. MCVEY: Your Honor, there is sufficient
13 evidence in this record to show that Sarah Plant
14 was exposed to talc supplied by Whittaker Clark
15 & Daniels, that the talc contained asbestos and
16 that Whittaker Clark & Daniels' exposures were a
17 substantial factor in the development of her
18 mesothelioma.

19 The exposures of Whittaker Clark & Daniels
20 primarily came from four brands, that's Gold
21 Bond, CoverGirl, Avon, and Coty body powders.
22 The fact testimony showing the extensive
23 exposure to Sarah Plant came from her mom,
24 Patrice Johnson. We talked about childhood
25 exposures and Sarah Plant herself.

1 Your Honor, I'm not going to go through,
2 but it is in our briefing that Gold Bond --
3 Whittaker Clark & Daniels was an exclusive
4 supplier to Gold Bond when Sarah Plant was using
5 it. And that's testimony from her mom and from
6 Sarah herself, that Sarah Plant used CoverGirl
7 for over 15 years, of which Whittaker Clark &
8 Daniels supplied. CoverGirl was her go-to
9 makeup.

10 There are trial exhibits in our briefing
11 that shows that the supply to CoverGirl, the
12 supply to Coty, the supply to Avon, the supply
13 to Gold Bond. I will not go through that, but
14 the jury had that evidence in their possession.

15 Your Honor, there is extensive testing,
16 hundreds and hundreds and hundreds of tests that
17 show that talc -- where Whittaker Clark &
18 Daniels got their talc, that those mines were
19 containing asbestos, and you heard that
20 testimony from Mark Bailey. You heard it from
21 Dr. Haber, and you heard it from Dr. Madigan,
22 who was a statistician who talked about how if
23 you find talc in these mines, that there's an
24 extremely high chance that you were going to
25 have talc in the products that Whittaker Clark &

1 Daniels supplied.

2 South Carolina doesn't require that we show
3 that they were the sole supplier of talc. South
4 Carolina law says that we have to show it is
5 more likely true than not. But we did show that
6 they were the sole supplier of talc to Gold
7 Bond, and Dr. Haber said that exposure alone was
8 a substantial factor in the development of her
9 disease.

10 We go way beyond that, but just for the
11 purposes of this record, we meet that standard.
12 The talc, the Italian, Brazilian, Chinese,
13 Montana, all the talcs that -- Whittaker Clark &
14 Daniels got their talc, mines, have shown to be
15 containing asbestos. That was all Dr. Longo's
16 testing and Dr. Mark Bailey's testing.

17 I'm going to sit down, unless you have
18 other conversation for me, but it is clear there
19 is sufficient evidence in this record that
20 Whittaker Clark & Daniels supplied talc to the
21 products that Sarah Plant used, that it was
22 caused -- that it was contaminated with
23 asbestos, and Dr. Haber says that it was a
24 substantial factor in the development of her
25 disease. That's more than enough to defeat a

1 motion for JNOV.

2 If there is anything else you want me to
3 address, I'm happy to, but I think that solves
4 the problem.

5 THE COURT: Very good.

6 MS. MCVEY: Thank you, Your Honor.

7 THE COURT: All right. I nervously ask, is
8 there anything in reply?

9 MS. FLYNN: Nothing further, Your Honor.

10 THE COURT: All right. The motion for JNOV
11 is denied. The JNOV contentions are almost
12 exclusively evidentiary based, and I made very
13 specific rulings on all of these issues, but the
14 overall conclusion was in those matters, I am
15 concerned not with the weight of the evidence
16 but with the presence of evidence and found that
17 under proper charges for a jury to consider
18 whether there is sufficient evidence to
19 determine that the Plaintiff has proved its case
20 with regard to exposure to asbestos and then its
21 causation as it relates to her mesothelioma.

22 I find that the case was properly submitted
23 to the jury. The evidence was properly
24 submitted to the jury. The jury was properly
25 charged. Therefore, the JNOV motion is denied.

1 I will be asking Plaintiff to prepare a
2 proposed order in accordance with the briefing
3 that it has submitted and the arguments that
4 have been made and the rulings I have verbally
5 made with regard to these matters.

6 Now, we've got the motion for setoff. And
7 my question is: How is the best way to handle
8 this at this point?

9 MS. MCVEY: Your Honor, of course it is
10 their motion, but we have publicly filed the
11 aggregate amount of the settlements.

12 THE COURT: Yes, I'm aware.

13 MS. MCVEY: So that can be made. And of
14 course, we submitted to you in-camera. I
15 actually brought a highlighted copy with me, if
16 it helps you, to show the releases that have
17 been executed. Of the 19, there are 14 that
18 have been executed. Five, we're still waiting
19 to get, but each and every one of them release,
20 of course, Parker's loss of consortium, Sarah
21 Plant's personal injury, and future wrongful
22 death causes of action.

23 THE COURT: Your allocation has been what?

24 MS. MCVEY: A third to Sarah Plant's
25 damages, a third to Parker Plant's damages, and

1 a third to the wrongful death, the future
2 wrongful death.

3 THE COURT: So it is absolutely equal
4 distribution, unlike some we see sometime that
5 is even-stein so that the individual
6 contributions are not as impactful as the
7 overall percentages, which are the same for
8 each.

9 MS. MCVEY: That's right, Your Honor. So
10 it's publically filed, but we had -- there are
11 total settlements of \$8,650,000.

12 THE COURT: 8,250-?

13 MS. MCVEY: -650.

14 THE COURT: -650.

15 MS. MCVEY: And, Your Honor, that was from
16 19 different settlements.

17 The jury's verdict was \$871,356 for past
18 medical expenses; \$3,268,336 for future medical
19 expenses; \$20 million for Sarah's other damages,
20 past and future; and \$5 million for Parker's
21 loss of consortium.

22 The total award then for Sarah Plant was
23 \$24,139-- I'm sorry, \$24,139,692. The total
24 award for Parker was \$5 million.

25 And Your Honor, if you look at page 4 of

1 our brief, we kind of put together a chart which
2 I know everybody has, and it shows that
3 Whittaker Clark & Daniels gets a setoff.

4 THE COURT: Just a second.

5 MS. MCVEY: I'm sorry.

6 THE COURT: Okay. I got it.

7 MS. MCVEY: So it's page 4 of our brief in
8 response to their motion for setoff. And we
9 agree that Whittaker Clark & Daniels is entitled
10 to a setoff of \$2,883,333 for the loss of
11 consortium verdict and \$2,833,333 for Sarah's
12 personal injury claim.

13 And therefore, under that math, Whittaker
14 Clark & Daniels is responsible for a judgment
15 for Sarah Plant's personal injury of
16 \$21,256,359; for Parker's loss of consortium of
17 \$2,116,667; for a total judgment against
18 Whittaker Clark & Daniels of \$23,373,026.

19 And, Your Honor, I'll just note for the
20 record that Whittaker Clark & Daniels have not
21 moved to remit this verdict at all, so --

22 THE COURT: Yeah, that's one thing I was
23 going to put on the record. There's been no
24 motion for nisi of the verdict.

25 All right. So we've got on the record what

1 Plaintiffs' calculations are.

2 Who's going to argue the setoff?

3 MR. CULBREATH: I'm going to argue, Your
4 Honor.

5 THE COURT: All right, Mr. Culbreath.

6 MR. CULBREATH: I'm going to hand to the
7 Plaintiffs' counsel.

8 If I may approach.

9 We got their brief on the 13th. We've
10 since filed a brief with the Court --

11 THE COURT: Right.

12 MR. CULBREATH: -- that deals with the
13 issue of the future wrongful death allocation.
14 Obviously, what we're going for -- this is Gray
15 Culbreath of Gallivan White & Boyd on behalf of
16 Whittaker Clark & Daniels.

17 What we're asking, Your Honor, is for that
18 remaining third to be reallocated such that the
19 entire verdict is set off and credited to
20 Whittaker Clark & Daniels.

21 Obviously, when we filed our initial
22 motion, we didn't have the benefit of the fact
23 that they were allocating the future wrongful
24 death.

25 THE COURT: Now that you've got that, that

1 will change your --

2 MR. CULBREATH: It changes it in two
3 respects, Your Honor. One, we're focused really
4 on that allocation of 2,883,333, the future
5 wrongful death. Your Honor now has the
6 settlement agreements. We still have concerns
7 about the timing of the settlement agreements.

8 For example, you know, were they entered
9 into before verdict, after verdict? Do they
10 specifically mention future wrongful death? Are
11 they part of a bundle of 10, 12 cases settled?

12 THE COURT: Yeah. Well, my understanding
13 is that each of these is a separate,
14 freestanding or standalone settlement with a
15 specific defendant for a specific amount of
16 money to be allocated in the way she's
17 described. That's what I understand from the
18 case to be -- we'll get back to Ms. McVey and
19 let her describe that for us.

20 MR. CULBREATH: We don't know because we've
21 never seen them, obviously, because at least the
22 causes of action alleged against my client did
23 not include any wrongful death claim. There's
24 no Court approval or oversight of those
25 settlements before today.

1 THE COURT: Well, I mean, what she's done
2 is she's not giving you any -- she shows a zero
3 award for wrongful death. Explain to me exactly
4 what you're saying.

5 MR. CULBREATH: Sure. First of all, Your
6 Honor, that was not a cause of action in this
7 case. There was no wrongful death cause of
8 action pled. We know that the question of
9 whether there is a future wrongful death claim
10 is up in the air. That's one of the issues that
11 was accepted by the Supreme Court in Jolley.

12 THE COURT: In Jolley, that's correct.

13 MR. CULBREATH: Wrongful death, as you
14 know, is a creature of statute. It's a
15 derogation of common law, and so, say, for
16 future wrongful death to exist, it would have to
17 exist by virtue of the General Assembly, not in
18 the common law. You know, it can't exist
19 without a death.

20 Future wrongful death presupposes, you
21 know, that that's going to occur and it is going
22 to occur because of the things that are alleged
23 in this case. But if, God forbid, the Plaintiff
24 was hit by a truck tomorrow, that case wouldn't
25 have -- there would be no future wrongful death.

1 It would be against the trucking company.

2 Because case law is pretty clear from the
3 Stokes case, it has to -- the cause of action
4 exists at the time of death and it is dependent
5 on another claim as well. Wrongful death claim
6 is a mere vehicle to assert another substantive
7 claim, products liability, negligence. It's not
8 a standalone claim that you can bring.

9 And we don't know any -- obviously, the
10 allocation, and it begs the question, you know,
11 does it implicate parties not to this case,
12 because as I thought about, does future wrongful
13 death claim require Court approval? Because if
14 it's part of that scheme, then there are
15 beneficiaries in the wrongful death statute, not
16 the parties to this litigation.

17 Of course, the right to set off or not is
18 also dependent on whether or not there's a
19 release of a separate and distinct cause of
20 action. We asked to see the agreements here.
21 We didn't know.

22 And the Plaintiffs, by their own terms in
23 the brief on page 4, just above the table they
24 recite, the Plaintiffs' have chosen to allocate
25 the settlement proceeds, and so that implies, as

1 I read it, that this was a unilateral decision
2 of the Plaintiffs on how to allocate those
3 dollars, as opposed to something that was done
4 as a collaborative effort as a settlement with,
5 in this case, I guess, there are 14 releases
6 that exist among 19 defendants.

7 The Glenn case, we revisit Glenn, the
8 decision a few weeks ago, so the Court obviously
9 should review before a final determination is
10 made. Was there a release of that claim,
11 specific claim? And if it is silent as to the
12 future wrongful death, that suggests then that
13 the Plaintiff has chosen themselves.

14 You know, Your Honor's put on the record in
15 discussion that your review indicates that it's
16 not a bundling in which there were, say, 12
17 cases settled for a lump sum and the Plaintiffs
18 assigned a dollar of that lump sum. Obviously,
19 we don't have releases, so we don't know if that
20 exists or not. And what the dates, terms of the
21 allocations were, if there was some agreement
22 prior to verdict.

23 So we don't believe this cause of action
24 exists, and if it doesn't exist, then you can't
25 settle it, and so there would be a reallocation

1 of the \$2.8 million to the verdict and the
2 entire amount of the verdict set off in favor of
3 Whittaker Clark & Daniels.

4 So that's our position, Your Honor.

5 THE COURT: Okay. Ms. McVey.

6 MS. MCVEY: Your Honor, just briefly in
7 response. One, I want to be very clear that we
8 negotiate every single case individually, and
9 when we settle a case for a plaintiff like Sarah
10 Plant, she executes an individual release.

11 There's not some lump sum and we are doing --

12 THE COURT: That's correct. I have in my
13 hand releases, specific individual settlement
14 agreements and a compromised settlement and
15 indemnity agreements with regard to each of
16 these matters.

17 MS. MCVEY: That's right. And, Your Honor,
18 in your copy, I did not highlight, but if it's
19 helpful to you, I have highlighted the language
20 that releases -- in each of these releases --

21 THE COURT: Sure, that would be helpful.

22 MS. MCVEY: -- it releases the future
23 wrongful death claims.

24 THE COURT: And I've done some of this
25 highlighting already in red pencil, but anyway,

1 I understand that.

2 MS. MCVEY: So in each case, Sarah Plant's
3 personal injury claims, Parker Plant's loss of
4 consortium claims, and future wrongful death
5 claims are released. The defendants insist on
6 that.

7 Some of the defendants did insist on that
8 because, unlike a lot of cases, mesothelioma is
9 a terminal cancer. There is going to be a
10 wrongful death claim. Right? They know that's
11 coming. So if Sarah were to die before the
12 verdict is reached, then we would amend the
13 complaint and have wrongful death causes of
14 action. They want that settled as well.

15 THE COURT: They're buying peace.

16 MS. MCVEY: That's right.

17 THE COURT: Future peace, as well as what's
18 before them right now.

19 MS. MCVEY: That's right.

20 And importantly, there is no allocation,
21 I'll represent to the Court and then you know it
22 because you've seen it, there is not an
23 allocation of one-third, one-third, one-third
24 contained in the releases to the Court.

25 THE COURT: Right. They pay an amount to

1 settle the case, and they settle all these
2 things in it. They do not allocate it. It's
3 kind of like the verdict the jury renders. The
4 verdict the jury renders does not allocate
5 either.

6 MS. MCVEY: Right.

7 THE COURT: It is a verdict.

8 MS. MCVEY: Your Honor, what Riley teaches
9 us is that Plaintiffs in settling defendants,
10 the Plaintiffs can allocate settlements to its
11 benefit. That's what it says. What we believe
12 we've done here is a very fair allocation, a
13 third, a third, a third. It certainly gives
14 Whittaker Clark & Daniels the setoff it's
15 entitled to and also preserves the Plaintiffs'
16 ability to allocate, so we believe it's
17 appropriate.

18 The second thing I want to say is, the
19 Glenn case, which is a very long opinion, like
20 they are, these trials are complicated, is
21 sending it back to you for one issue, and that
22 is they want you to review the underlying
23 settlement agreements.

24 Because, as you know, in the Court
25 approval, because it was a wrongful death case,

1 we allocated 90 percent to wrongful death,
2 10 percent to survival. And what the Court of
3 Appeals says is, if you also release loss of
4 consortium, the judge needs to look at that.

5 THE COURT: Yes.

6 MS. MCVEY: There needs to be some
7 consideration for that. So we believe we're
8 under an obligation to give consideration to
9 these three causes of action, so that's why
10 we're doing it this way.

11 The Court of Appeals approved exactly what
12 we did like this in Jolley, and the Supreme
13 Court has that one issue. We'll see what they
14 do. Even if they tell us no, you have to go do
15 something else, that's an easy issue to fix when
16 it comes back down.

17 THE COURT: But if I do what you're asking
18 me to do now, what I've done is to do exactly
19 what was done in Jolley, which is the most
20 comparable case to this one.

21 MS. MCVEY: That's right.

22 THE COURT: And the Supreme Court can take
23 that up, or they may be content when the Supreme
24 Court -- if the Supreme Court approves the
25 Jolley allocation as made, fine. If they send

1 it back, fine, but at least there would be
2 some -- I would have gone on and discharged my
3 duties, not just hold this thing until some
4 future advice from them.

5 MS. MCVEY: That's right, Your Honor, so we
6 would ask you today to enter a judgment.

7 THE COURT: What they want is to win
8 totally and just knock out wrongful death.

9 MS. MCVEY: That's right.

10 THE COURT: But the settling parties
11 released wrongful death. You have some value
12 for the wrongful death claim.

13 MS. MCVEY: And the settling defendants got
14 a value for it, absolutely. Yes.

15 THE COURT: Right.

16 MS. MCVEY: So, Your Honor, we would ask
17 today that you enter a total judgment against
18 Whittaker Clark & Daniels for \$23,373,026.

19 THE COURT: Right. And but to just enter a
20 judgment without making the allocations that we
21 just talked about?

22 MS. MCVEY: No, Your Honor, I think you
23 need to make the allocation but the total
24 judgment --

25 THE COURT: The total judgment?

1 MS. MCVEY: Yes.

2 THE COURT: Yes, I would have to do that
3 because what they're wanting is less than that
4 by way of total judgment because they want to
5 carve out the wrongful death and leave that to
6 be borne by whoever has already settled so they
7 don't have any responsibility for it.

8 MS. MCVEY: That's right, Your Honor.

9 THE COURT: When the other parties didn't
10 allocate either, they just got released?

11 MS. MCVEY: That's right.

12 THE COURT: But you're not asking for a
13 release from them, you're asking to confirm the
14 judgment that was entered against them?

15 MS. MCVEY: Right. If they were to pay it,
16 we're happy to take a check, then obviously, you
17 know, they would satisfy the judgment. But a
18 judgment has to be entered, I believe.

19 THE COURT: Right. Okay.

20 All right. Mr. Culbreath, in reply.

21 MR. CULBREATH: Briefly, Your Honor.

22 In terms of this allocation of future
23 wrongful death, we have an allocation of
24 personal injury. Personal injury converts to
25 wrongful death upon death, and so they really

1 are two separate claims. The jury wouldn't
2 render a verdict for personal injury and
3 wrongful death for Sarah Plant, so they
4 shouldn't be able to allocate that. They have a
5 personal injury line, that money should be
6 allocated to the personal injury line, not this
7 future wrongful death claim, and the whole
8 verdict goes to setoff.

9 THE COURT: Yeah. Well, I think those are
10 all good arguments. I am going to stick with
11 the same methodology I used in Jolley. I
12 realize that the Supreme Court has got the
13 ability to look at that, and that's pending
14 before the Court at this time.

15 So we'll give some -- but I'm not going to
16 vary from the way I've done it in other cases,
17 which is the way other judges have tried these
18 types of torts have done. But they didn't have
19 quite the dilemma that I have on these cases,
20 which is the Smith versus Tiffany wrinkle in it
21 that's brought about by the Contributions Among
22 Other Joint Tortfeasors Act.

23 So, Gray, you may very well be right
24 because of the Contributions Act in terms of
25 what you argue. I'm not so sure just as kind of

1 a general matter on these settlements. But be
2 that as it may, it is certainly good arguments
3 on both sides of this issue, and I will tee it
4 up by granting the Plaintiffs' settlement as
5 elucidated.

6 So again, draw an order that reflects the
7 settlement as you have proposed it and the
8 allocation as you have proposed it and addresses
9 the contention that wrongful death and future
10 wrongful death should not be considered in any
11 manner.

12 And let's now talk about some deadlines for
13 when we can get these orders and what kind of
14 strings defendant would be on to reply and so
15 forth.

16 Do you have a proposal?

17 MS. MCVEY: Your Honor, I think we could
18 get you orders by Monday.

19 THE COURT: All right.

20 MS. MCVEY: And then maybe they could have
21 a week to respond or whatever they need.

22 THE COURT: Hang on.

23 That said, I will be in the midst of the
24 asbestos block starting next week.

25 So will you, Ms. McVey.

1 MS. MCVEY: I will be there, too. I think
2 I can get it done this weekend. And they would
3 need some time to reply, so I think it would get
4 to you after the trial.

5 THE COURT: We have the block that begins
6 the 24th and continues into the next week, the
7 1st. I mean, let's be realistic. You all are
8 all going to be involved in that asbestos block,
9 if it goes.

10 MS. MCVEY: I can get my order done,
11 orders, proposed orders to them by Monday.

12 THE COURT: Gray, how much time do you all
13 need? Curtis? Anybody? Ms. Flynn?

14 MS. MCVEY: Correct me if I'm wrong, but I
15 think you all are out of the next block.

16 MR. CULBREATH: Yes.

17 MS. MCVEY: Okay.

18 THE COURT: So if she gets it in by the
19 24th, all right, would you be able to react to
20 the orders by the next Monday, May 1st?

21 MR. CULBREATH: Yes, Your Honor, I believe
22 so.

23 THE COURT: Okay. And then let her have
24 until the next Monday, the 8th, to react back,
25 and that will get us out of the trial block, and

1 the idea would be I will try to formalize
2 between the two of you May 8 or 9.

3 MS. MCVEY: That will be fine, Your Honor.

4 THE COURT: Is that reasonable?

5 MS. MCVEY: Of course.

6 MR. CULBREATH: Yes, Your Honor.

7 THE COURT: Now, what else?

8 MS. MCVEY: That's it as it relates to the
9 Plant post-trial motions.

10 THE COURT: Now, we still have Payne.

11 MS. MCVEY: We still have the receivership,
12 Whittaker Clark & Daniels motion to reconsider,
13 Your Honor.

14 THE COURT: That's right.

15 I don't want to hear huge arguments on
16 Whittaker Clark & Daniels' receivership, but I
17 will tell you on the front end that I am very
18 concerned about the legitimacy of this
19 receivership, so I am very open to hearing some
20 arguments about this.

21 So who's the moving party? Whittaker Clark
22 & Daniels. That will be you, Mr. Ott?

23 MR. OTT: No, Your Honor. That's above my
24 pay grade.

25 THE COURT: You have the big guns coming?

1 MR. OTT: Huge guns, Your Honor.

2 MS. MCVEY: Your Honor, just for the
3 record, Mr. Branham is going to argue for the
4 Payne case.

5 THE COURT: That's fine.

6 MS. MCVEY: He's been admitted pro hac in
7 Payne. I will take -- there's one other issue
8 in Plant that I will take after he argues Payne.

9 THE COURT: Now, it is 12:30.

10 Amber, how are you doing?

11 THE COURT REPORTER: I'm hanging in there.

12 THE COURT: Okay. I'm going to keep
13 plowing because I have to be able to get my
14 target. Is that all right?

15 MS. MCVEY: Yes, ma'am.

16 THE COURT: All right. Let's see how far
17 we can get.

18 MS. FLYNN: Your Honor, this is Kevin
19 McCarrell with Fox Rothschild, our firm, so he's
20 going to argue this motion.

21 MR. MCCARRELL: Thank you, Your Honor. May
22 it please the Court.

23 My name is Kevin McCarrell. I'm here on
24 behalf of Whittaker Clark & Daniels here on our
25 motion to --

1 THE COURT: Spell your last name.

2 MR. MCCARRELL: Sure, Your Honor.

3 McCarrell, M-c-C-A-R-R-E-L-L.

4 THE COURT: All right, Mr. McCarrell.

5 MR. MCCARRELL: Thank you, Your Honor.

6 THE COURT: One thing I would appreciate
7 right on the front end, I find this argument to
8 be pejorative, critical, and I don't think
9 that's the way these matters ought to be argued.

10 We have a receivership statute. I've used
11 the receivership statute in South Carolina to
12 try to make some sense of the corporations who
13 are -- who have a lot of potential liability in
14 these asbestos cases and either haven't
15 responded at all or have financial situations
16 that are vicarious enough that I am concerned
17 about incurred obligations, like in this case
18 with this big verdict, so that I try to, on the
19 front end, appoint someone to manage the group
20 who can delve into its principal asset which is
21 generally its insurance to cover these matters.

22 And that has had a salutary result, about
23 18 or 19 of these receiverships, maybe more,
24 Mr. Protopapas can tell us. I have appointed
25 Peter Protopapas as receiver on many of them and

1 a couple of other folks. But what they resulted
2 in is having good people who represent to the
3 company they're trying to defend the company and
4 protect the company in creating an asset pool
5 sufficient to respond in some kind of sensible
6 way to potential settlements of claims against
7 these corporations that are in financial straits
8 or not operational.

9 So that is the reason. I just want that on
10 the record.

11 Whittaker Clark & Daniels presents to the
12 Court as a company that hasn't been in active
13 business since 2004. The Court had a very
14 difficult time with Whittaker Clark & Daniels in
15 the pretrial motion phase of this asbestos trial
16 because Whittaker Clark & Daniels would not
17 respond at all to questions about its financial
18 status, its assets, its assets in this state or
19 elsewhere, its responsibilities to various
20 things. It was a very difficult time for the
21 Court.

22 And now, I come to the information -- now
23 that this big verdict has been rendered, I come
24 to the information that this company which is
25 only functioning through what I guess must be

1 insurance companies or its assets or both who
2 are defending it against these suits all around
3 the country for these kind of cases.

4 And I'm trying to be careful to be sure
5 that those assets are maintained in such a way
6 that these responsibilities can be fairly
7 discharged. That's why these receiverships are
8 created locally.

9 It is not -- but in the filings that
10 Whittaker Clark & Daniels have made, the
11 criticisms have been very pejorative and
12 critical of South Carolina and of the Court for
13 the use of this receivership ability, talking
14 about in the next outrageous thing they did and
15 this, that, and the other.

16 That doesn't move the ball down the field
17 any in my view. It took a long time to finally
18 discover that Whittaker Clark & Daniels did
19 have, if it's \$95 million or \$1 billion, but it
20 had some rather substantial group of assets,
21 against which it had some very substantial
22 verdicts that had been rendered.

23 But also, we were able to find out from
24 when Whittaker Clark & Daniels finally answered
25 some of the discovery that it is tied to some

1 very large corporate interests, including
2 Berkshire Hathaway itself.

3 And all those things influenced the Court's
4 action in trying to protect assets that can be
5 made available for the responsibilities that
6 Whittaker Clark & Daniels has incurred as a
7 result of this trial.

8 So I want you to understand that on the
9 front end, Mr. McCarrell. And hopefully,
10 persuade your clients, that you are not the
11 author of these papers yourself, to be a bit
12 more respectful about what was attempted to be
13 accomplished.

14 That being said, I will be scrutinizing
15 this receivership by law to see whether it
16 properly applies in this setting, and I will
17 give you a very respectful hearing about that,
18 more than I think your client gave this Court
19 when you filed these papers.

20 And with that, you may proceed.

21 MR. MCCARRELL: Thank you, Your Honor. And
22 I do think Your Honor hit on one of the points I
23 was intending to make, which is Mr. Protopapas
24 has been appointed a receiver in many cases
25 already, but I do believe there's an important

1 distinction that in those cases it was a defunct
2 corporation, and Whittaker Clark & Daniels has
3 officers and directors. It is a corporation in
4 good standing in New Jersey.

5 So we do believe that's an important
6 difference in this case.

7 Your Honor, there's three issues that we
8 want to focus on here. One, we believe that the
9 order, receivership order exceeds the
10 jurisdictional limits of the Court.

11 Two, we believe that it exceeds statutory
12 authority provided to the Court.

13 And three, we believe that the Plaintiffs
14 have failed to show insolvency or imminent
15 danger of insolvency.

16 Your Honor, with respect to the first
17 issue, Whittaker Clark & Daniels is not a South
18 Carolina corporation. It has no presence or
19 assets in South Carolina or any -- it doesn't
20 maintain a principal place of business in South
21 Carolina.

22 So, Your Honor, we do believe that the
23 order is overly broad. While we acknowledge,
24 for example, that there may be specific
25 jurisdiction for Your Honor to have heard this

1 case and et cetera under the long-arm statute,
2 we don't believe that then translates into
3 general jurisdiction under South Carolina Code
4 36-2-802, for example.

5 Your Honor, we did cite a lot of case law
6 throughout other states and even the United
7 States Supreme Court precedent for the
8 proposition that a Court only has jurisdiction
9 for a receivership over assets that are in that
10 state.

11 I know Your Honor has reviewed the
12 briefing. The Acken v. Coughlin case is a
13 particularly good example of that, in which a
14 New York trial court was overturned for
15 appointing a receiver over a West Virginia
16 corporation.

17 The order in that case was very similar to
18 the one here, Your Honor, which is very broad.
19 It allows the receiver to change the locks on
20 any real property, regardless of where it's
21 located. It allows them to hire real estate
22 brokers to sell property, presumably in other
23 states of where they're located, open mail,
24 collect accounts receivable, endorse and cash
25 checks, or even move property, presumably across

1 state lines, this order would allow the receiver
2 to do.

3 And, Your Honor, we would submit that that
4 is simply entirely too broad and exceeds the
5 jurisdictional scope of this Court's authority.

6 Your Honor, to the second point, again, the
7 receivership statute itself on its face, I think
8 the state legislature recognized the
9 jurisdictional limits in enacting the statute
10 proposed with respect to foreign corporations, a
11 receiver could only be appointed with respect to
12 assets found in this state.

13 And again, Your Honor, we submit that there
14 are no assets of Whittaker Clark & Daniels in
15 South Carolina.

16 In the spirit of keeping it brief, Your
17 Honor, I move to the third point, which is that
18 the Plaintiffs have failed to show insolvency or
19 imminent danger of insolvency.

20 To be honest, Your Honor, I wasn't able to
21 follow all the math in the Plaintiff's briefing,
22 but even taking the lowest amounts of assets
23 that we're talking about here, which would be
24 86 million, and the number used in your order as
25 far as what we're concerned about as far as

1 verdicts of 48 million, there's still a very
2 large gap, and that is not insolvent. Assets
3 exceed liabilities.

4 And, Your Honor, importantly verdicts are
5 not final judgments, and certainly not pending
6 cases or upcoming trials are not final
7 judgments. And so, Your Honor, there's just not
8 been a sufficient showing here of insolvency or
9 even immanent danger of insolvency.

10 Your Honor, the bottom line is a
11 receivership is a drastic remedy. Our case law
12 has been clear on that. And in this case,
13 there's simply no reason to appoint a receiver
14 and no jurisdictional authority to appoint a
15 receiver.

16 THE COURT: Out of curiosity, let me probe
17 the asset picture at the present time just a
18 little bit.

19 Nine years ago, in 2013, your corporate
20 representative, Dennis St. George, says that you
21 all had only \$15 million in the bank.

22 How did that amount of assets increase so
23 dramatically when you quit doing business in
24 2004? How did that valuation increase so
25 dramatically to 95 million was quoted to me,

1 105 million was quoted to me at one time. When
2 it's 15 in 2013, nine years ago, what happened?

3 MR. MCCARRELL: Your Honor, unfortunately,
4 I don't know the answer to that information.
5 I've seen the same --

6 THE COURT: You represent them and you
7 represent them in this very matter that one part
8 is the assets. So tell me more about what we
9 can do to find that out, if you don't know.

10 MR. MCCARRELL: Your Honor, I can certainly
11 go back to my client and ask them. If Your
12 Honor wants to, you know, have any testimony on
13 that point, we can try to do that. I just don't
14 know the answer to that.

15 THE COURT: Well, explain to me what the
16 relationship is between Resolute Corporation and
17 Whittaker Clark & Daniels. Is Resolute the
18 insurer, or what is Resolute to you all?

19 MR. MCCARRELL: They're not an insurer,
20 Your Honor. They're not an insurer.

21 THE COURT: What are they?

22 MR. MCCARRELL: My understanding is, you
23 know, some sort of claims manager, but that's
24 not a title that I've been told. I don't know
25 what their official title would be with respect

1 to Whittaker Clark & Daniels.

2 THE COURT: So you say they're just a
3 commercial entity hired to manage all these
4 claims?

5 MR. MCCARRELL: Your Honor, I --

6 THE COURT: Let me run at it another way,
7 Mr. McCarrell.

8 Somebody pays Mr. Thackston to defend
9 Whittaker Clark & Daniels. Somebody pays you to
10 come down here and argue this matter. And
11 Ms. Flynn and everyone else, Mr. Culbreath, Mr.
12 Ott, and everyone else that's involved in
13 representing Whittaker Clark & Daniels. So who
14 pays you all?

15 MR. MCCARRELL: Your Honor, respectfully, I
16 am not the billing attorney. I was brought in
17 to argue the jurisdictional issues.

18 THE COURT: Well, that's not good enough,
19 sir. You don't work for free. You or your law
20 firm is being paid to represent Whittaker Clark
21 & Daniels.

22 MR. MCCARRELL: Yes, ma'am, we are.

23 THE COURT: Well, who is your client?

24 MR. MCCARRELL: Our client is Whittaker
25 Clark & Daniels, Your Honor.

1 THE COURT: Who pays you?

2 MR. MCCARRELL: Your Honor, I do not know.
3 I don't do the bills. I don't see what check
4 comes in. That's not in my job description,
5 Your Honor. I was brought in to argue this
6 discrete issue on the receivership.

7 MS. FLYNN: Your Honor, I don't want to tag
8 team it, but he was on the jurisdictional side.
9 I can respond to some of the factual questions,
10 but I don't want to intrude too deeply. But
11 if --

12 THE COURT: Well, the jurisdictional factor
13 is much impacted in my mind by the very issue
14 I'm asking about, which is where and what are
15 the assets that are being used to come in here
16 to South Carolina and defend this lawsuit. That
17 is one of the ways in which we will finally be
18 able to figure out where some insurance was to
19 some of these responsible corporations in South
20 Carolina courts.

21 In previous litigation, we traced it
22 through how these things are being defended.
23 They aren't being defended for nothing. And I
24 feel like the Court is being trifled, to be
25 honest with you. It's the same situation we got

1 into with the normal, you know, interrogatories
2 and discovery requests and requests to produce
3 that defendants ask for all the time, and
4 Whittaker Clark & Daniels, stuff that he was in,
5 would give us practically no information.

6 Now they've hired Mr. McCarrell to come
7 down here and argue about jurisdiction, but he
8 knows nothing about their financial situation
9 and the very thing he's arguing is that they are
10 an alive corporation with no assets in South
11 Carolina and no responsibility therefore under
12 our receivership law. I don't understand that.

13 MS. FLYNN: Your Honor, if I may.

14 THE COURT: Yes, ma'am.

15 MS. FLYNN: On some of the questions you
16 have asked, Whittaker Clark & Daniels pays us.
17 It is not covered by insurance.

18 THE COURT: And what -- let me go back then
19 to Whittaker Clark & Daniels. What do you know
20 about the financial condition of Whittaker Clark
21 & Daniels? Those questions were asked to them
22 while you represented them during the pretrial
23 discovery of this case. So you're going to have
24 to know something about it because you were
25 asked in detail about it.

1 MS. FLYNN: Your Honor, the testimony of
2 Dennis St. George that it was 15 million was
3 related specifically to the sale of Whittaker
4 Clark & Daniels assets at the time it was sold
5 in 2004.

6 That was not a complete picture of the
7 company. It didn't represent all assets. It
8 represented a piece of it, and he wasn't
9 asked --

10 THE COURT: Dennis St. George is the
11 ongoing corporate representative of Whittaker
12 Clark & Daniels as it now exists. So having him
13 say, well, they have this -- this is their asset
14 picture in 2013 does not comply with this total
15 responsibility as a corporate representative
16 because he was presented here in this witness
17 stand as the current corporate representative
18 for Whittaker Clark & Daniels.

19 MS. FLYNN: I don't believe that other
20 questions were asked. It was not delved further
21 into with him what else made up -- that was the
22 problem. It was taken out of context. It is a
23 single response.

24 THE COURT: How did we get the
25 95 million-dollar figure and the

1 105 million-dollar figure and the
2 86 million-dollar figure? Who supplied those?

3 MS. FLYNN: Whittaker Clark & Daniels
4 supplied those through an account, not through
5 Mr. St. George.

6 THE COURT: Well, there has to be some
7 entity that has those kind of assets, and all we
8 know about it is they were sold for \$15 million
9 in 2013. But something else is happening that
10 relates to where their assets are, and that's
11 what I want to know about.

12 MS. FLYNN: And, Your Honor, they have been
13 consolidated with other companies underneath an
14 umbrella of --

15 THE COURT: We saw that in that pre -- when
16 we finally got that piece of information, and we
17 saw Resolute's position in the thing they're not
18 just a claims manager, they're in an ownership
19 posture and control posture in relation to
20 Whittaker Clark & Daniels and so is Berkshire
21 Hathaway.

22 MS. FLYNN: And I don't know if they own
23 shares in them. They are up the chain, but they
24 don't have an ownership role. They are claims
25 manager in terms of their dealings with

1 Whittaker Clark & Daniels and in consideration
2 with the consolidated assets of these other
3 companies.

4 THE COURT: Where are the assets that were
5 represented to be assets of Whittaker Clark &
6 Daniels that are said to be somewhere between,
7 in this litigation recently, \$86 million and
8 \$105 million?

9 MS. FLYNN: That would be in a bank account
10 or in a stock.

11 THE COURT: Their stock?

12 MS. FLYNN: Stock they own.

13 THE COURT: You mean securities?

14 MS. FLYNN: Securities.

15 THE COURT: And who's controlling that?

16 MS. FLYNN: Whittaker Clark & Daniels has
17 officers and directors.

18 THE COURT: Whittaker Clark & Daniels is
19 practically -- I mean, the only person we have
20 ever seen is Dennis St. George, and they say
21 there's a kind of a board, kind of a loose
22 configure to figure out who exactly is in
23 control. Who is in control?

24 MS. FLYNN: Raj Mehta.

25 THE COURT: Yeah, that's the -- I'm very

1 well aware of that name.

2 All right. Mr. McCarrell, do you have
3 anything else to add?

4 MR. MCCARRELL: No, Your Honor. Nothing
5 further.

6 THE COURT: All right. Well, Mr. Branham.

7 MR. BRANHAM: Your Honor, Trey Branham for
8 the Payne family.

9 I want to talk about this first issue of
10 insolvency or imminent danger because those are
11 the two things that the receivership statute in
12 South Carolina talks about. Are they insolvent,
13 or are they in imminent danger of insolvency?
14 Those are the two questions to be asked.

15 Now, I've been asking a long time about
16 what are their assets and where are they. And
17 all that we get back in the brief is Plaintiffs
18 haven't shown we're insolvent.

19 Well, Judge, they gave you a number, and to
20 be clear, that number is for a group of
21 companies, at least three of which are not
22 subject to personal jurisdiction in this Court.
23 They gave you a consolidated number for four
24 companies, not the number for Whittaker Clark.

25 Now, what I will tell you is, Your Honor,

1 I've seen the number for Whittaker Clark. They
2 produced it in a California case.

3 THE COURT: That is confidential and not
4 something that I can see.

5 MR. BRANHAM: But you could order that to
6 be produced here. But what they were very clear
7 in their brief is they expect me to abide by
8 that protective order, and I will. I'm not in
9 the business of violating protective orders.
10 But they could show you, Judge.

11 They just stood up and they said we have
12 not shown that they are insolvent or in the
13 imminent danger of, and I will get to that
14 because we have, but if their finances don't
15 show imminent danger of insolvency, why haven't
16 they brought them here? It's like they're
17 standing here saying guess how much money is in
18 my pocket when all they have to do is just turn
19 out their pockets and we can see.

20 This isn't really hard. They're just
21 making it that way.

22 THE COURT: Well, no, they're saying some
23 other things that are also very pertinent,
24 Mr. Branham, which is they are not incorporated
25 in South Carolina, they have no assets in South

1 Carolina.

2 Now, they were subject to the jurisdiction
3 of this Court, and they have had verdict
4 rendered against them in this jurisdiction. But
5 how does that translate into -- and let's say
6 they are insolvent or in imminent danger of
7 insolvency. Let's say on the basis of what I
8 have right now determine that, how could I put
9 them into a South Carolina receivership?

10 MR. BRANHAM: Sure, Judge. And I will come
11 back to insolvency after I tell you about that
12 because I want to answer that question. Okay?

13 This Court has been handling receiverships
14 now for a long period of time. In those
15 instances, the assets that have been available
16 are insurance assets. Either insurance policies
17 or proceeds from those insurance policies.
18 That's what this Court has been administering.
19 And it's not true that the only corporations
20 over which receiverships have been granted are
21 from the state of South Carolina.

22 Just recently this Court entered an order
23 in the Childers case denying the dismissal
24 motion by Travelers to dismiss the Payne &
25 Keller receivership. Payne & Keller is a Texas

1 corporation. And in that order determining that
2 under the statutes of South Carolina in the
3 Supreme Court's order in Sangamo --

4 THE COURT: Sangamo. I'm very familiar
5 with that case.

6 MR. BRANHAM: Sangamo. In this Court's
7 order in Sangamo and then reaffirmed in the
8 Childers order entered by this Court on
9 March 31st, that insurance assets are subject to
10 the law of South Carolina if those assets are
11 designed to protect the lives, liberty, or
12 property that are in interest in South Carolina.
13 And deny Travelers motion to dismiss.

14 Now, what we have shown you, Judge, because
15 we've had to go out and piece this together
16 because early on when I asked Ms. Flynn if I
17 could talk to her, Whittaker Clark & Daniels'
18 lawyer, about the financial information produced
19 in the California case, she told me no.

20 THE COURT: Well, I don't blame her for
21 that, and I'm not going to have her fussed at
22 one bit about that. Those protective orders are
23 what they are. She is just as bound by them as
24 you are.

25 MR. BRANHAM: So that's true, Judge, but

1 Whittaker Clark & Daniels, it is their financial
2 information, they could waive that or extend it.
3 That's -- it's in their control to do that, and
4 they chose not to.

5 So we've been forced to go out and piece
6 this together. And here's what we know, and I
7 want to be really clear about this, Your Honor.
8 Every fact, every single fact that is presented
9 in our motion, both our initial motion for the
10 appointment and our response comes either from
11 them or public record. I have created it.

12 What we know is this: In 2013, Dennis
13 St. George says we have this much money. Now,
14 we can argue about that, but the only thing that
15 happened between 2004 when they sold all of
16 their assets to Brenntag. In 2013, that we know
17 about, was nothing because their own lawyers say
18 the only thing the company exists to do is
19 defend and indemnify asbestos litigation. That
20 is the sole purpose of the company.

21 I looked up the definition of defunct right
22 before I stood up here, and it is no longer
23 functional. Sounds pretty close. And so
24 whatever they had in 2004 carried forward to
25 2013, because they're not doing anything else,

1 they don't make anything, they don't employ
2 anybody, they don't have any employees, they
3 don't sell anything. As far as I can tell, they
4 don't own any real property.

5 So that \$15 million, probably a pretty fair
6 number based on the circumstantial evidence.
7 But then what we see, which I cited in our
8 response brief, is insurance litigation. And I
9 gave the Court several dismissals that were
10 entered in that litigation that Whittaker Clark
11 & Daniels brought indicating not for how much
12 but that there were settlement agreements.

13 Now, again, how much, that's in control of
14 Whittaker Clark & Daniels. They could tell us.
15 And then they showed in their discovery
16 responses which are in my response brief,
17 there's three pages listing insurance companies.
18 Some umbrella, some primary. I just heard them
19 stand up here and say they don't have any
20 insurance.

21 Now, that discovery response is in either
22 the Plant or the Payne case, I forget which one,
23 but it's not like that's 15 years old. That's
24 just last year. They identify all these
25 insurance companies, and they just stood up here

1 and told this Court there is no insurance. What
2 happened? Where did it go?

3 I just showed this Court in our response
4 that they were sued six days after the verdict
5 in the Plant case by North River Insurance in a
6 declaratory judgment action in which North River
7 Insurance indicates that North River Insurance
8 issued a 25 million-dollar per occurrence
9 insurance policy to Whittaker Clark & Daniels.

10 Now, North River Insurance says we don't
11 owe any money on that because of this, that, and
12 the other, but there's a policy sitting out
13 there and we were just told there was no
14 insurance. That is a case that was filed six
15 days after this, and they just told us this
16 there is no insurance.

17 They have 887 pending today mesothelioma
18 claims. Your Honor knows what those cases are
19 worth. The idea that even if they have
20 \$80 million in cash, which I submit to you is
21 really questionable because four companies
22 having \$87 million is not the same as one having
23 \$87 million.

24 But even if they have that, they have 887
25 pending claims, not including the judgment that

1 this Court just entered, and they suggest that
2 we haven't demonstrated insolvency.

3 But, Judge, I think it goes further than
4 that because what other claims, and as Your
5 Honor talked about in the Childers older,
6 because what Travelers was seeking to do was to
7 dismiss the third-party claims brought under
8 those insurance policies and other claims of
9 action asserted on behalf of Payne & Keller.

10 And you denied that because you determined
11 that those policies were issued nationwide,
12 which apparently is what those policies were,
13 for the benefit of those including people in
14 South Carolina.

15 Again, you cited the case that you authored
16 when you sat on the Supreme Court for exactly
17 that proposition. But if the entire purpose of
18 the company since 2004, which is their
19 lawyers -- their lawyers say this. Again, I'm
20 not creating facts here. Their lawyers say the
21 entire purpose of the company since 2004 has
22 been to indemnify and pay claims.

23 Would those be insurance assets also
24 intended to protect the lives and property of
25 those in South Carolina? I submit to you they

1 would be. Because that's all the company does.
2 They haven't identified a single thing that is
3 outside the state of South Carolina.

4 THE COURT: Well, here's what they argue.
5 They argue that it's not enough that you have a
6 client that was able to recover in South
7 Carolina courts. Your client is not a South
8 Carolina resident. Your client's a resident of
9 what, Tennessee?

10 MR. BRANHAM: Tennessee.

11 THE COURT: Now, she was able to bring her
12 claim here because it was tied to some other
13 claims with companies that had a presence here
14 but also contributed to her situation. The one
15 company that was most identifiable was Rite Aid,
16 was the fact that Rite Aid was dismissed would
17 not impair the Court's jurisdiction, as we know.

18 But in terms of a specific language of the
19 receivership, is it enough connection with South
20 Carolina to have a judgment from a South
21 Carolina court in the amount of the Plant
22 judgment, if you're talking about Plant.

23 With Payne, now it's a little bit different
24 situation. Payne had a connection with South
25 Carolina, and that's the one we're really

1 arguing right now, so she has more of a South
2 Carolina connection. She doesn't have a
3 judgment yet, but she has a valid -- or her
4 estate has a valid pending claim here.

5 What Whittaker Clark & Daniels is arguing
6 is really a target in a lot of ways towards the
7 gun that's pointed right at them right now which
8 is this big judgment that's been rendered in
9 Sarah Plant's case.

10 MR. BRANHAM: What I think I would say to
11 that, Your Honor, is that Sarah Plant's
12 exposure, if that's the question, is tied to
13 South Carolina. She was exposed here.

14 THE COURT: No question --

15 MR. BRANHAM: And if --

16 THE COURT: -- family vacations and other
17 things.

18 MR. BRANHAM: And so if the question is --

19 THE COURT: There are all kinds of reasons
20 why jurisdiction is here for prior exposure,
21 true.

22 MR. BRANHAM: One of the things that
23 Sangamo teaches us is that the statute governing
24 this issue is intended to make those companies
25 and insurance assets available under South

1 Carolina law, of which receivership law is a
2 part, subject to South Carolina when you are
3 threatening lives, interests, or property in
4 this state, and that is exactly what this jury
5 found.

6 The fact that she lives in Tennessee is of
7 no moment, because she was exposed here. And I
8 would suggest to you, Judge, that the reason why
9 that is is because we have an interest in that.
10 And I think that's what Sangamo says, is that if
11 you're going to come in here and you're going to
12 do something, and you can't --

13 THE COURT: I get it. Don't wound up in a
14 jury argument for me.

15 MR. BRANHAM: I'm sorry, Judge.

16 Unless you have more questions about that,
17 and I am happy to answer any of them, I want to
18 touch on just a few more things about
19 insolvency, if you need it. If you don't, I am
20 happy to move on.

21 They're in control of that. I think I have
22 shown you they are certainly in imminent danger
23 of insolvency.

24 THE COURT: I don't think you need to cover
25 that further.

1 MR. BRANHAM: I will not then, Your Honor.

2 The last couple of things that I do want to
3 suggest to you, Judge, is this. The first is
4 that they complain about not having an
5 opportunity in the first place to respond, that
6 they were only given four days to respond. And
7 the statute makes clear that this Court has the
8 authority to enter this order after four days,
9 and even on shorter period of time if it deems
10 it necessary.

11 THE COURT: I'm not troubled with that.
12 They briefed it, but that wouldn't be the thrust
13 of it.

14 MR. BRANHAM: Okay. The last thing I want
15 to say is, I am concerned enough about their
16 insolvency to just note this for the record.
17 You have entered a receivership. I don't know
18 what you're going to do here. But assuming that
19 you maintain the receivership, the property of
20 Whittaker Clark & Daniels, as any custody
21 alleges, it's in the property of the Court.
22 Once that receivership order, it's in the
23 property of the Court.

24 And so to the extent there is a
25 consideration of a bankruptcy filing, which I

1 have some concerns about, I just want it in the
2 record for any bankruptcy judge that's looking
3 at this issue that at the present time a
4 receivership is in place.

5 And as the Court well knows, once that
6 receivership order is in place, they no longer
7 hold the property, the receiver holds the
8 property. The receiver is proper party to the
9 bankruptcy. They don't have the authority to
10 enter a bankruptcy. They don't control it.

11 Now, if Your Honor vacates it and all that
12 kind of thing, that changes things. But as we
13 stand here right this second, they do not have
14 the authority to enter into a voluntary
15 bankruptcy.

16 THE COURT: I'm well aware, that was the
17 main factor in my signing the order so quickly
18 is that I wanted to be sure that something other
19 than kind of a morphous organization I wasn't
20 quite sure about in terms of asset picture,
21 control or anything else would not simply
22 declare bankruptcy and that entity would still
23 be controlling things. I wanted a receiver that
24 I knew would take it seriously, to look at the
25 asset picture and see what was going on.

1 And that is what we've set up under the
2 South Carolina receivership, this receivership
3 as we have for many, many others. I get that.

4 MR. BRANHAM: Judge, two last points
5 because one is that Ms. McVey, I think, has some
6 specific discussion about the Plant case here.
7 I also note that Mr. Protopapas is in the
8 room --

9 THE COURT: Yes.

10 MR. BRANHAM: -- and I don't know whether
11 or not --

12 THE COURT: Let me go on and hear from
13 Ms. McVey.

14 MR. BRANHAM: Thank you, Your Honor.

15 MS. MCVEY: Your Honor, I'll be very, very
16 brief. Mr. Branham just argued the receivership
17 is proper under Section 4 of the receivership
18 statute. But, Judge, in the Plant case, there
19 are two additional grounds to maintain this
20 receivership, and that is that you have just
21 denied the post-trial motions. You have entered
22 a judgment on behalf of the Plant family.

23 And the South Carolina receivership statute
24 provides special provisions for judgment
25 creditors, like Sarah and Parker Plant. And the

1 receiver can be and should be appointed in court
2 after a judgment to carry the judgment into
3 effect. That's Section 2 of the receivership
4 statute.

5 The statute also says you can appoint a
6 receiver for Whittaker Clark & Daniels after a
7 judgment in order to preserve the company
8 property during the appeal. That's Section 3.

9 So, Your Honor, at least to the Plants, we
10 believe that Section 2 and 3 of the receivership
11 statute applies, as well as Section 4, because
12 it is clear that they are insolvent or fear of
13 insolvency is coming.

14 And I know Mr. Protopapas is here, if you
15 want to hear from him as well.

16 THE COURT: All right. Mr. Protopapas.

17 The main thing I want to know from you, Mr.
18 Protopapas is this: You're now the receiver,
19 and I have not done anything further. I'm
20 simply hearing these motions about whether to
21 reconsider and whether to vacate.

22 Is it of any moment that the verdict has
23 been rendered, I have from the bench agreed to a
24 judgment -- to issue a judgment against
25 Whittaker Clark & Daniels in a certain amount,

1 but I have not signed an order to that effect?

2 Is that going to make any difference if
3 something else happens from a legal point of
4 view initiated by Whittaker Clark & Daniels, or
5 would you contend the receiver is now in control
6 of all of that?

7 MR. PROTOPAPAS: Your Honor, I contend the
8 receiver is in control of all of it; however, an
9 additional sustaining ground would be a signed
10 order with the actual verdict entered into the
11 record. I think the judgment creditor status of
12 the Plant family gives them additional
13 protections in the laws of the State of South
14 Carolina, and they're entitled absent two
15 things.

16 One is a bond, which I have written
17 separately to Whittaker Clark & Daniels, and
18 asked them to post in the Plant case. I have
19 not received a response. I have asked and
20 invited Mr. Mehta to appear today to explain the
21 solvency. He is not here.

22 I have asked for cooperation so I can get a
23 transparency, which is desperately needed for
24 claimants in South Carolina. Transparency in
25 the financial condition of Whittaker Clark &

1 Daniels, and I have not gotten it.

2 I have held further action simply so this
3 day could come and the Court could consider
4 post-trial motions as such. However, if the
5 Court is inclined to continue with the
6 receivership, action will begin tomorrow
7 morning. And I think rightfully so to get
8 transparency into the financial situation,
9 answers for this court, which we have done in
10 Covil and other cases.

11 Simply transparency, putting a light on it,
12 would satisfy a claimant who has \$28 million, a
13 judgment creditor, who risks never being able to
14 collect that judgment during the four and a half
15 years of appeals, while 900 other mesothelioma
16 cases get settled, resolved, or tried.

17 She has rights. That family has rights.
18 They're judgment creditors, as do the Payne
19 family who are coming up for trial in August.

20 And respectfully, the insurance program is
21 identified in interrogatories. Being litigated
22 on a drop-down issue, of all things, in New
23 Jersey. There are assets.

24 THE COURT: I'm very familiar with that.

25 MR. PROTOPAPAS: And drop-down issues of a

1 company that sits on top of a defunct mission
2 policy, which is echoing other issues this Court
3 has entertained. I think we identify the
4 insurance policy, ensure they're on notice of
5 the Plant and Payne cases, ensure they are not
6 eroded or misfeasance so the Plants and Paynes
7 will have an opportunity to recover, if they are
8 entitled to do so, after appeal or trial. And
9 we bring clarity and transparency into the
10 financial condition of this entity.

11 THE COURT: What I'm worried about is this:
12 I have set a briefing schedule for -- I have
13 issued a from-the-bench order granting the
14 judgment, but I have set up a schedule for
15 submission of a written order.

16 One other thing that could be done, and I'm
17 going to give Whittaker Clark & Daniels plenty
18 of room to respond to this, would be to today
19 issue a written judgment and say to be amended
20 by further details with respect to setoff, et
21 cetera, and denial of post-trial motions.

22 I don't know that that would make much
23 difference. I think it could still be argued it
24 is not a judgment in finality until all of those
25 other things are done, and that's the only

1 reason I hesitate to do that.

2 MR. PROTOPAPAS: I agree, Your Honor. I
3 heard the two-week calendar, and I understand
4 that.

5 THE COURT: You know, you take the position
6 that as the receiver, you're in charge now?

7 MR. PROTOPAPAS: After today's -- after the
8 motion to reconsider is denied, I'm ready to
9 move forward in a fashion as the Court directs.
10 I've held simply to allow clarity, hoping a bond
11 would be posted.

12 THE COURT: Yeah.

13 MR. PROTOPAPAS: Hoping clear financial
14 information would be given. And if they are
15 solvent and they came to this Court and said
16 here's the bank account, here's the bond, don't
17 worry about the Plant family, I would be up here
18 saying, Your Honor, they have answered your
19 questions for the purposes of the here and now
20 to resolve the receivership. I haven't seen
21 that transparency.

22 THE COURT: Yeah. Okay.

23 MR. PROTOPAPAS: Thank you, Your Honor.

24 THE COURT: All right. Now, Mr. McCarrell,
25 I come back to you and Ms. Flynn.

1 MR. MCCARRELL: Yes, Your Honor.

2 THE COURT: And I think you can see what
3 I'm worried about now. I don't think it's
4 something I want to do to try to accelerate this
5 process. I want to do the normal, deliberate
6 thing I do, which is to have these orders
7 submitted to me, and you all have a chance to
8 review them, go back and enter the judgment like
9 I normally would.

10 On the merits, I am satisfied now that
11 there are sufficient connections with South
12 Carolina of the Whittaker Clark & Daniels assets
13 to Ms. Plant and Ms. Payne, or the family of
14 Ms. Payne, to justify the receivership. But I
15 am reluctant to just accelerate all this and
16 start issuing some orders today. That's why I
17 was so quick about issuing a receivership order,
18 I think it was evident, as I was concerned about
19 the instability financially given all these
20 other matters that have been discussed here.

21 But I don't want to put you as lawyers in a
22 negative situation. I want to give you the time
23 you normally have to react to these things and
24 look at the proposed orders.

25 So what I'm going to do is this: I'm going

1 to deny the motion to reconsider and to dissolve
2 the receivership. And I do that on the record
3 now.

4 I will direct that the Plaintiffs submit an
5 order to that effect and get it to me by Monday.
6 And if you all -- I would have you all by
7 Thursday of next week send me any amendments you
8 wish to make to it, and then I will issue that
9 order.

10 The rest of the briefing schedule will be
11 as I've already recited. I'm not going to vary
12 it from that. If there gets to be some
13 litigation about how in charge the receiver is,
14 that will just have to be as it is. I think
15 I've done what I could to protect the potential
16 of these assets.

17 I say that without any negative observation
18 about your very capable representation of this
19 client. And of course, Ms. Flynn, who enjoys my
20 highest confidence and admiration.

21 But I want to make this thing move in some
22 kind of reasonable way with a reasonable
23 framework that everyone on all sides of this
24 understands what's going on.

25 So I'm going to stay with the more measured

1 schedule than I usually use for finalizing this
2 these orders because they have to be in some
3 kind of shape for Appellate Courts to review,
4 and I want to protect everybody's rights to have
5 them in shape where you can make the contentions
6 you want to make about the rectitude of what's
7 said in these orders.

8 That's what I'm going to do, but I give you
9 one more chance to say anything else you would
10 like to say in connection with the matter,
11 Mr. McCarrell.

12 MR. MCCARRELL: Well, Your Honor, I think
13 you have issued your ruling. I don't want to go
14 back and argue. If you want to give me an
15 opportunity, I'll go back and respond to some of
16 the --

17 THE COURT: Sure. Sure. Sure.

18 MR. MCCARRELL: Your Honor, Mr. Branham
19 argued, for example, that we essentially tried
20 to shift the burden, that we have the burden to
21 show insolvency, and that's simply not the case,
22 Your Honor.

23 THE COURT: I agree with you. I think they
24 have the burden to make out the imminence.

25 MR. MCCARRELL: Yes, Your Honor.

1 THE COURT: That's what they attempted to
2 do with the information they've argued, but you
3 are correct about that, it is up to them to
4 demonstrate the imminence.

5 MR. MCCARRELL: Thank you, Your Honor.

6 And, Your Honor, normal collection law
7 process is you get a final non-appealable
8 judgment, and then you domesticate it in the
9 state where the corporation is located, and then
10 you try to attach the assets that are in that
11 state.

12 And, Your Honor, they simply haven't shown
13 that there's any reason to exceed the
14 jurisdictional limits of the Court.

15 THE COURT: What jurisdictional limits?
16 You're talking about whether I have jurisdiction
17 at all, you're not talking about some dollar
18 limit?

19 MR. MCCARRELL: Correct, Your Honor.
20 Correct, Your Honor.

21 THE COURT: I understand.

22 MR. MCCARRELL: I also want to correct the
23 record, I don't believe I ever stood up and said
24 there was no insurance. I don't think I spoke
25 about that at all, as I recall.

1 But the three pages of listing insurance
2 policies that Mr. Branham spoke about, those
3 don't talk about what coverage there is or what
4 exclusions might apply or what coverage has been
5 exhausted. So, you know, that's just a list of
6 the policies that exist.

7 So I'm not sure what he was driving at
8 discussing that I told the Court that there was
9 no insurance.

10 Your Honor, the other issue is, with regard
11 to, you know, instituting a receiver here in
12 South Carolina. That creates the possibility
13 that in every other state where there may be
14 cases pending or ultimately resulting a judgment
15 in those other trials, Oregon, for example, that
16 they could try to institute a receiver in
17 Oregon, and then you have two competing
18 receivers, both of which have an order saying
19 that, well, they can go and attach any real
20 property in any state wherever it is located,
21 they can open all the mail.

22 I mean, you could have ultimately -- I
23 don't know about how many states Whittaker Clark
24 & Daniels has cases in, but in a hypothetical
25 case, you have 50 different receivers in 50

1 different states all with the same order saying
2 they're the receiver.

3 And, Your Honor, that is why the process of
4 having the receiver appointed in principal's
5 home state was created. You can have ancillary
6 receiverships, and we had those arguments in the
7 brief.

8 But the primary receivership has to be in
9 the state of the corporation's domicile. And
10 that's simply not the case here, Your Honor.

11 As far as Sangamo, I may have messed that
12 up, that is a -- I'm very aware Your Honor
13 authored the opinion, but that is a choice of
14 law case. That does not extend to create an in
15 rem jurisdiction over insurance policies that
16 cover residents of a state. It is a completely
17 separate issue that it simply doesn't address.
18 It is not in the context of receiverships or
19 applicable to this case.

20 And then I think the final issue I want to
21 address, Your Honor, is with respect to
22 Ms. McVey's argument, whichever provision of the
23 South Carolina statutes relied upon, that
24 doesn't really change the jurisdictional
25 analysis, but regardless, I think there's a

1 procedural issue.

2 They filed a motion relying on Subsection 4
3 of the receivership statute, and now she's
4 coming in saying, Oh, now we want to look at
5 Sections 1 and 3 or 3 and 4, whatever the other
6 subsections were, and you can't simply change
7 horses midstream.

8 The motion to appoint a receiver that they
9 filed specifically relied on Subsection 4,
10 which, by the way, specifically says with
11 respect to foreign incorporations, you can only
12 appoint a receiver for assets within the state.
13 So I don't believe that argument holds water.

14 THE COURT: And of course, their argument
15 is, Sangamo, I know you think it was just a
16 choice of law case, is assets that are
17 responsible for the satisfaction of a financial
18 obligation incurred in this state, as a result
19 of contacts with this state, gives the receiver
20 the ability to be appointed. Because the asset
21 is regarded, that is the insurance or whatever
22 other bond or other kind of financial asset is
23 available to satisfy a South Carolina
24 obligation, gives the receiver that authority.
25 That's the argument they make.

1 MR. MCCARRELL: I understand that, Your
2 Honor.

3 THE COURT: And I don't see anything in the
4 statute that exactly says only in the
5 domesticated -- only in the state of your
6 incorporation, and that's what gives me a little
7 pause.

8 MR. MCCARRELL: That's more in the case
9 law, Your Honor.

10 THE COURT: Yeah, I understand.

11 MR. MCCARRELL: But the statute does say
12 you can appoint a receiver over domestic -- or
13 over corporations and in like cases, over
14 foreign corporations with respect to assets
15 within the state.

16 THE COURT: Right. And their argument is
17 when you incur a South Carolina obligation of
18 this type, the insurance assets you have are
19 regarded as assets existing in the state.

20 MR. MCCARRELL: I understand that. And,
21 Your Honor, even if Your Honor is inclined to
22 rule that insurance assets are assets within the
23 state --

24 THE COURT: Yeah.

25 MR. MCCARRELL: -- I believe the

1 receivership order could be modified to apply
2 specifically to insurance assets.

3 THE COURT: It might could be.

4 MR. MCCARRELL: I'm sorry?

5 THE COURT: I said it might could be.

6 MR. MCCARRELL: And I think, you know, that
7 would be a much --

8 THE COURT: I think the broader includes
9 the narrower, but it might could be.

10 MR. MCCARRELL: I understand, Your Honor.
11 The broader would -- as I indicated earlier,
12 includes real estate, no matter where it's
13 located, and the ability to open mail and all of
14 those sorts of things that doesn't seem to drive
15 the concern of Your Honor, which is the
16 insurance assets.

17 THE COURT: Right. Right. Point well
18 taken. Thank you very much, Mr. McCarrell.

19 MR. MCCARRELL: Thank you, Your Honor.

20 THE COURT: All right. Ms. McVey,
21 Mr. Branham, do you have sufficient specificity
22 to --

23 MS. MCVEY: I think so, Your Honor. I just
24 want to note for the record that the
25 receivership statute allows me to move under

1 Sections 2 and 3 in open court to apply a
2 receiver for the judgment creditors.

3 THE COURT: And you will be regarded as
4 having done so. That's fine. I am not nearly
5 as concerned about that as the asset existence
6 itself.

7 MS. MCVEY: And, your Honor, I think that's
8 why Mr. Protopapas going forward as receiver can
9 bring transparency to what's located within the
10 state, what's happening --

11 THE COURT: Right.

12 MS. MCVEY: -- who the insurance policies
13 are. That's why a receiver is needed. And
14 certainly at some point if it needs to be
15 revisited, it can be, but right now we have no
16 transparency. We just have a moving target.

17 THE COURT: I understand. All right.
18 Anything else?

19 MS. MCVEY: No, Your Honor.

20 THE COURT: Okay.

21 - - -

22 (The hearing concluded at 1:29 p.m.)

23 - - -
24
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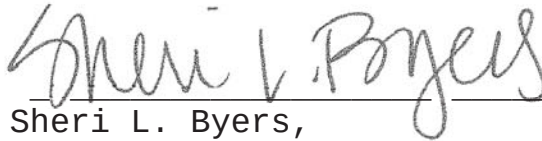
CERTIFICATE OF REPORTER

I, Sheri L. Byers, Registered Professional Reporter and Notary Public of the State of South Carolina at Large, do hereby certify:

That the foregoing proceedings were taken before me on the date and at the time mentioned on page 1 and the proceedings were recorded stenographically by me and were thereafter transcribed under my direction; that the foregoing transcript as typed is a true, accurate and complete record of the proceedings to the best of my ability.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 18th day of April, 2023, at Lexington, Lexington County, South Carolina.



Sheri L. Byers,
Registered Professional Reporter,
Notary Public
State of South Carolina at Large
My Commission expires:
October 30, 2023

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

Case No. 2021-CP-40-03484

v.

Davis Mechanical Contractors, Inc., et al.,

Defendants.

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

Third-Party Plaintiffs,

v.

Zurich American Insurance Company, et al.,

Third-Party Defendants.

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

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

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

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

BACKGROUND

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

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

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

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

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

ANALYSIS

A. Standing

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

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

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

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

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

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

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

B. Personal Jurisdiction

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

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

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

C. Rule 14

Rule 14(a), SCRCP, allows a defendant to bring third-party claims against “a person not a party to the action who is or may be liable to him for all or part of the plaintiff’s claim against him.” Here, the Receiver has asserted claims against Travelers, which he alleges issued insurance policies to Payne & Keller that may provide coverage for, and therefore trigger indemnity obligations in relation to, the claims brought by the plaintiff in this action. Accordingly, the third-party claims are appropriate under Rule 14 and Travelers’ arguments for dismissal on this basis are rejected.

D. Rule 12(b)(8)

Finally, Travelers argues that the Receiver's third-party claims should be dismissed under Rule 12(b)(8), SCRCP, because they are duplicative of claims brought against it in *Protopapas as Receiver for Payne & Keller Co. v. Am. Int'l Grp. et al.*, No. 3:21-cv-04086-JMC (D.S.C.). However, as the courts of this state have long observed, "The general rule is that an action may be pleaded in abatement of a second suit only when between the same parties and *in the same jurisdiction* and with the same object." *Poston v. Home Ins. Co. of N.Y.*, 191 S.C. 314, 317–18, 4 S.E.2d 261, 262 (1939) (emphasis added). Because no separate action is pending between the Receiver and Travelers for the same claims in South Carolina state court, Rule 12(b)(8) does not provide a basis for dismissing the Receiver's third-party claims here. *See Hill v. Hill*, 51 S.C. 134, 137, 28 S.E. 309, 310 (1897) ("[I]t is a well established doctrine that the pendency of another suit in a foreign jurisdiction cannot be pleaded in the domestic forum."); *see, e.g., Hauge v. Curran*, No. 2011-UP-264, 2011 S.C. App. Unpub. LEXIS 300, at *4 (Ct. App. June 7, 2011) (reversing the trial court's dismissal under Rule 12(b)(8) because the two similar actions were in different jurisdictions).

CONCLUSION

Based on the foregoing, as well as the arguments presented by the Receiver in his filings and at the January 27 hearing, **IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT** Travelers' Motion to Dismiss Third-Party Claims and Dissolve the Payne & Keller Receivership is hereby **DENIED**.⁴ Travelers' November 16, 2022 Motion for Protective Order and to Dissolve Receivership, which relies solely on the standing arguments rejected above, is also **DENIED**.

⁴ The Joining Defendants' motion is also denied.

IT IS SO ORDERED.

[JUDGE'S E-SIGNATURE PAGE FOLLOWS]



Richland Common Pleas

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

So Ordered

Jean H. Toal

Electronically signed on 2023-03-30 14:34:37 page 10 of 10

ELECTRONICALLY FILED - 2023 Mar 31 10:53 AM - RICHLAND - COMMON PLEAS - CASE#2021CP4003484
ELECTRONICALLY FILED - 2023 May 17 6:15 PM - RICHLAND - COMMON PLEAS - CASE#2022CP4003834

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
Melvin G. Welch and Donna B. Welch,	)	C/A NO. 2022-CP-40-03834
	)	
Plaintiffs,	)	
	)	
vs.	)	<u>Atlas Turner Inc.'s Motion to</u>
	)	<u>Reconsider and Vacate the Contempt</u>
3M Company, et al.,	)	<u>Order of May 11, 2023</u>
	)	
Defendants.	)	
	)	
	)	

Pursuant to SCRCP 52(b), Atlas Turner, Inc. ("Atlas")¹ moves the Court to reconsider and vacate its order finding Atlas in contempt of the Court on May 11, 2023. As set forth more fully below, Atlas seeks reconsideration on two grounds: (1) as presented in prior filings, which are fully adopted and incorporated herein², the Court lacks specific personal jurisdiction over Atlas

¹ Although Atlas Asbestos Co. and Atlas Turner, Inc. are named in the Third Amended Complaint as separate defendants, they are not two separate companies. Atlas Asbestos Co. changed its name to Atlas Turner, Inc. Therefore, Atlas Asbestos Co. and Atlas Turner Inc. are two different names for the same company. The proper name of the sole defendant is Atlas Turner, Inc.

² See:

- Atlas' Motions to Dismiss for Lack of Personal Jurisdiction with a Memorandum in Support and an affidavit from Richard Dufour dated September 7, 2022 ("9/7 Dufour Aff.") filed with each iteration of Plaintiffs' complaint;
- Atlas' Amended Memorandum in Support of the Motion to Dismiss with exhibits, including a second affidavit from Richard Dufour dated December 28, 2022 ("12/28 Dufour Aff."), filed December 30, 2022;
- Atlas' Motion for Protective Order and Memorandum in Support filed January 3, 2023.
- Atlas' Motion for Summary Judgment (which included the Motion to Dismiss) and a Memorandum in Support with affidavits and other exhibits filed March 20, 2023;

pursuant to S.C. Code Ann. § 36-2-803 and the Due Process Clause of the United State Constitution as recently explicated by the United States Supreme Court; and (2) Atlas was not willfully disobedient, and did not voluntarily or intentionally fail to comply with this Court's order.

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). 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. *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.

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- Atlas' Motions for Protective Orders/Memos in Support with exhibits, regarding newly served Notices of 30(b)(6) depositions filed April 3, 2023, and April 6, 2023;
 - Atlas' Motion to Quash Trial Subpoena, filed April 14, 2023;
 - Atlas' Replies to Plaintiffs' Responses in Opposition to Atlas' Motions to Dismiss and Motions for Protective Order, filed April 18, 2023;
 - Section II of Atlas' Response and Objection to Appointment of a Receiver, filed May 15, 2023.

ARGUMENT

I. The Order Holding Atlas Turner, Inc. in Contempt Violates The Due Process Clause of the United States Constitution Because the Court Lacks Personal Jurisdiction Over Atlas.

“[T]he Fourteenth Amendment’s Due Process Clause ... limits the power of a state court to render a valid personal judgment against a nonresident defendant.” *Bristol-Meyers Squibb Co. v. Superior Court of California*, 582 U.S. 255, 261-62 (2017). “In order for a state court to exercise specific jurisdiction” under a state long-arm statute like S.C. Code Ann. §36-2-803, which purports to extend the state court’s jurisdiction to the full extent allowed by the Due Process Clause, *see S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 260, 423 S.E.2d 129, 130-31 (1992), “‘the suit’ must ‘aris[e] out of or relate[e] to the defendant’s contacts with the forum’.” *Bristol-Myers Squibb*, 582 U.S. at 262 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014); emphasis added).

A. A “Stream of Commerce” Theory is No Longer a Valid Basis for Asserting Specific Personal Jurisdiction Over a Non-Resident Defendant.

At the April 19 hearing on Atlas’ motions to dismiss, for summary judgment, and for a protective order, and at the status conference in which the Court orally held that Atlas was in contempt of the Court, the Court specifically referenced a “stream of commerce” theory of personal jurisdiction to support its denial of the motions, i.e., that Plaintiffs’ could satisfy their burden of proving due process simply by alleging in the complaint that Atlas placed its products into the stream of commerce and expected it to make its way to South Carolina. (See 5/4/2023 Hrg. Trans., p. 19, attached as Exhibit 1 (the transcript for the 4/19 hearing had not yet been received).) Since the South Carolina Supreme Court’s 2008 decision in *State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 666 S.E.2d 218 (2008) articulating a “stream of commerce” type of approach, *Id.* at 90, 666 S.E.2d at 222-23 (which involved a taxation matter, not a products liability suit), the United States Supreme Court has addressed the question of specific jurisdiction over a non-

resident product manufacturer in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011); *Bristol-Myers*; and *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1025 (2021). In those decisions, the Supreme Court emphasized that, for specific jurisdiction, due process can only be satisfied if the suit is connected to the forum by the actions of the defendant, not by the actions of third parties. Here, there is a lack of allegations or evidence that could meet this standard.

To meet the power prong of the due process test for specific personal jurisdiction, the suit must arise out of or relate to the **defendant's** contacts with the forum. See *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491–94, 611 S.E.2d 505, 509–10 (2005); *Ford*, 141 S. Ct. at 1025; *Bristol-Myers*, 137 S. Ct. at 1780; *J. McIntyre*, 564 U.S. at 881. Specifically, the court must “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*, 310 S.C. at 260, 423 S.E.2d at 131 (emphasis added); see also *Ford*, 141 S. Ct. at 1025. Specific personal jurisdiction cannot exist if the cause of action is unrelated to the **defendant's** contacts with the forum. *Id.*

Since *Sumatra* was decided in 2008—in addition to *J. McIntyre*, *Bristol-Myers*, and *Ford*—the United States Supreme Court has spoken several times on issues of personal jurisdiction. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); *Walden v. Fiore*, 571 U.S. 277 (2014); *Daimler AG v. Bauman*, 571 U.S. 117 (2014). Taken together, these cases reinforce two principles: (1) a non-resident defendant cannot be subject to personal jurisdiction in a state based on the unilateral actions of third parties, and (2) the exercise of specific jurisdiction requires a plaintiff to establish that his claims are sufficiently related to minimum contacts formed by the defendant with the forum state to satisfy due process.

Further, the United States Supreme Court rejected “nationwide” stream of commerce jurisdiction in *J. McIntyre*, decided three years after *Sumatra*. Indeed, the argument advanced by Plaintiffs and utilized by the Court in denying Atlas’ motions to dismiss, summary judgment, and for

a protective order—that, irrespective of how a product arrived in the state, specific jurisdiction exists in every state when a manufacturer allegedly targets the United States as a whole—is precisely the argument that the New Jersey Supreme Court accepted in *Nicastro v. McIntyre Machinery America, Ltd.*, 987 A.2d 575, 592 (N.J. 2010), which the United States Supreme Court later reversed. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011). Notably, in reaching its conclusion, the New Jersey Supreme had cited to this Court’s opinion in *Sumatra* in support. 987 A.2d at 588, n.1.

Allowing the exercise of personal jurisdiction based on allegations that a defendant placed a product into the stream of commerce with knowledge or awareness or expectation it might make its way to South Carolina is inconsistent with the United States Supreme Court’s decisions. “[T]he mere unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984). The “defendant’s conduct [] must form the necessary connection with the forum State that is the basis for its jurisdiction over him.” *Walden v. Fiore*, 571 U.S. 277, 285 (2014); see also *Cockrell*, 363 S.C. at 491–92, 611 S.E.2d at 508 (“[W]e conclude that South Carolina also does not have personal jurisdiction over the respondents in this case. The bats did not arrive in South Carolina through the respondents’ efforts.”); *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 334, 594 S.E.2d 878, 885 (Ct. App. 2004) (“The fruits of [defendant’s] labor . . . arrived in South Carolina not through his efforts, but through the efforts of others, and therefore cannot serve as the basis for jurisdiction.”).

B. Neither the Allegations of the Complaint Nor the Evidence Submitted by the Parties in Supporting or Opposing Atlas’ Motions Establish a Prima Facie Case of Specific Personal Jurisdiction.

“The question of personal jurisdiction over a nonresident defendant is one that must be resolved upon the facts of each particular case.” *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). At the pretrial stage, the burden is on the plaintiff to prove personal jurisdiction

over a nonresident by a prima facie showing of jurisdiction either in the complaint or in affidavits. *Id.* at 491, 611 S.E.2d at 508. “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.” *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007).

1. Plaintiff’s Exposure Allegations

Plaintiffs allege that Mr. Welch suffered from mesothelioma caused by exposure to asbestos-containing insulation while working for Daniel Construction installing instruments at the Chemstrand/Monsanto plant in Greenwood, South Carolina. It is undisputed that Mr. Welch worked at this facility for less than a year, and that his employment at this plant began, at the earliest, in 1965, and ended early in the second quarter of 1967. *See* excerpts from trial deposition of Mr. Welch taken October 14, 2022, attached as Exhibit 2 at pages 13-14; *see* Social Security print out, attached as Exhibit 3, at pages 1-2. He did not know the brand name or manufacturer of pipe insulation used at the Monsanto/Chemstrand plant. *See* excerpts from discovery deposition of Mr. Welch taken on October 11, 2022, attached as Exhibit 4 at p. 87; *see* excerpts from discovery deposition taken on October 7, 2022, attached as Exhibit 5 at p. 18. Not only did Plaintiff not identify Atlas products at the plant, nothing in the documents submitted by Plaintiffs, discussed *infra*, pp. 8-9, and no witness/coworker or other testimony identify Atlas product at the plant at the relevant time period.

2. Plaintiff’s Jurisdictional Allegations in the Operative Complaint.

The Third Amended Complaint contains four paragraphs that touch upon the issue of personal jurisdiction over defendants. (Third Amend. Compl. ¶¶ 2, 6, 9, and 27.) In the first three of these paragraphs, the allegations are conclusory and either apply to all Defendants named in the

case or to a subset, “Product Defendants,” not specifically to Atlas. Paragraph 27 actually names Atlas, but the allegation is again conclusory. It contains no facts concerning what business Atlas did in South Carolina, how Atlas carried out business allegedly done in South Carolina, or when any such business was supposedly done in South Carolina.

Settled precedent in this state requires the complaint to allege specific facts, not just conclusory allegations, to establish the contacts necessary to invoke specific jurisdiction. See *Power Prods. & Servs. Co., Inc. v. Kozma*, 379 S.C. 423, 433, 434, 436, 665 S.E.2d 660, 665–67 (Ct. App. 2008). In *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 723 S.E.2d 835, 838 (Ct. App. 2012), the complaint alleged that the court had personal jurisdiction based on the same kind of allegations as found in Plaintiffs’ Third Amended Complaint:

[E]ach [defendant] has caused tortious injury within this State as set forth herein, and each regularly does or solicits business, or engages in a persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered in this State as contemplated under the statute.

Id. at 148, 723 S.E.2d at 835. The South Carolina Court of Appeals held that, even with a liberal construction of the long-arm statute and the complaint, the plaintiff had “failed to allege any facts that show that [the defendants] (1) have regular transactions of business or solicitation, (2) engage in a persistent course of conduct, (3) derive substantial revenue, or (4) consume goods or services rendered in South Carolina.” *Id.* at 151, 723 S.E.2d at 839 (emphasis added). Here, as in *Sullivan*, merely alleging general legal conclusions does not establish a prima facie case of personal jurisdiction. *Id.*

3. Atlas’ Evidence

In support of its motion to dismiss, motion for summary judgment and motion for a protective order, Atlas submitted two affidavits from Mr. Richard Dufour, one dated September 7, 2022, attached as Exhibit 6, and one dated December 28, 2022, attached as Exhibit 7. Pertinent, actual facts from the affidavits pertaining to Atlas and South Carolina are as follows:

- Atlas manufactured asbestos containing products, but all sales of said products were made F.O.B. Montreal, Quebec, Canada and all payments were made to it in Quebec, Canada. Exhibit 6 at ¶3.
- Atlas Turner never has been a corporation organized under the laws of South Carolina, and Atlas Turner has no subsidiary company that did business in South Carolina. Atlas Turner has never been, registered with South Carolina, nor has Atlas Turner ever applied for authority to do business in South Carolina. Exhibit 6 at ¶4.
- Atlas Turner has never appointed nor authorized any agent to accept process for it in South Carolina. Atlas Turner has never maintained an office in South Carolina. Atlas Turner had no bank accounts in South Carolina and it never owned any real property in South Carolina. Atlas Turner has never transacted business South Carolina. Exhibit 6 at ¶4.
- Atlas Turner paid no taxes or fees in South Carolina and did not maintain any employees, officers or agents in South Carolina. Exhibit 6 at ¶6.

Most importantly, however, Atlas has no records of sales to any company in South Carolina prior to 1968, much less any sales to the plant where Plaintiff worked or to the contractor for work installing asbestos products at the Monsanto plant while Plaintiff worked there. See 12/28 Dufour Aff, attached as Exhibit 7 at ¶12. Further, Atlas Turner never manufactured or sold any asbestos-containing brake material, clutch material, or gasket material, the only other type of exposure identified by Plaintiffs. *Id.*, Exhibit 7 at ¶13. Thus, Plaintiffs' causes of action did not arise out of or relate to **Atlas'** "contacts" with South Carolina because Atlas had no contacts with the forum or the sole place where Mr. Welch claims possible exposure to the type of products Atlas manufactured.

4. Plaintiffs' Alleged "Evidence" of Atlas Products at the Monsanto Plant

In Plaintiffs' Opposition, filed April 12, 2023, to Atlas' Motion for Summary Judgment and Motion to Dismiss, Plaintiffs included Exhibits 13-22 in an attempt to establish some contact by Atlas with Plaintiff and South Carolina during the relevant time period (before 1968) at the

Monsanto plant. Assuming for sake of argument that Plaintiff could establish the admissibility of such documentation at trial,³ Atlas demonstrated in its document by document analysis of each piece of evidence submitted by Plaintiffs, which is incorporated into this memorandum by reference, that Plaintiffs' exhibits actually confirm Atlas' statements regarding sales of its products: there are no records of sales to any company in South Carolina prior to 1968; and there are no records or any documents that show any Atlas products present at the Chemstrand/Monsanto plant during the relevant time at issue in this case, which is either 1965-66 or 1966 until early second quarter 1967. See Reply to Plaintiffs' Opposition (filed April 18, 2023), pages 11-16, attached as Exhibit 8.

While some of Plaintiffs exhibits show that Atlas— at various points in time — sold products to entities in South Carolina, simply showing Atlas sold products to the state is not sufficient to establish the Court has specific personal jurisdiction. South Carolina case law is clear: to establish specific personal jurisdiction over Atlas, Plaintiffs must show both sufficient minimum contacts with the forum and that Plaintiffs' claims arise out of those contacts. *S. Plastics*, 310 S.C. at 260, 423 S.E.2d at 131. See also *Bristol-Meyers*, 137 S.Ct. at 1780; *World-Wide Volkswagen Corp.*, 444 U.S. at 296-297; *Hanson v. Denckla*, 257 U.S. 235, 251, 253 (1958). The documents Plaintiffs provide fail to establish that any Atlas product was at the Monsanto plant before, or during, the time Mr. Welch worked there. Consequently, Plaintiffs have failed to show that Mr. Welch was exposed to asbestos from an Atlas product. Because there is no evidence that Mr. Welch was exposed to an Atlas product, his claims cannot be said to arise out of Atlas' contacts with this

³ Atlas does not concede the authenticity (SCRE 901), relevance (SCRE 401, 402, & 403), requirement of personal knowledge (SCRE 602), hearsay (SCRE 801, 802), and other evidentiary objections that may be asserted against admission of these documents at trial of the case.

State. The Order Holding Atlas Turner, Inc. in Contempt should be vacated because the Court lacks personal jurisdiction over Atlas.

II. Defendant Atlas Was Not Willfully Disobedient, and Did Not Voluntarily or Intentionally Fail to Comply With This Court's Order

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

Atlas Turner 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 9:

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 § 5 (emphasis added).

Quebec courts have made clear that other Quebec “concerns” like Atlas are subject to criminal and/or civil penalties if they produce, in United States litigation, information or documents from their files in Quebec. In *Asbestos Corporation Limited v. Eagle Picher Industries*,

Inc. (Court of Appeal, Montreal, February 24, 1984), a copy of which is attached as Exhibit 10, the court ruled that if a witness was required to consult business records or archives of the employer, a Quebec “business concern,” in order to provide his testimony, such testimony would fall under the prohibition set out in Section 2 of the QBCRA. *See* Exhibit 10 at p. 11. Further, Judge Beauregard stated that “the filing ... of the documents ... joined to an examination of an agent of [Asbestos Corporation Limited] (“ACL”) whose testimony on these documents will be taken down by a stenographer who will translate his notes for the purposes of the foreign tribunal is equivalent, ... to the transmission out of Quebec of a ‘résumé or summary’ of the files of [ACL].” *Id.* at p. 11. Also, Judge Tyndale’s opinion, which follows the opinion of Judge Beauregard, states the QBCRA “[o]bviously ... forbids production of the documents Moreover, inspection by an attorney acting for Respondent would be useless unless he took notes, and this would lead to the export of a résumé or digest. *Id.* at pp. 1-2.

In *Pelnar v. Ins. Co. of N. America* (Court of Appeal, Montreal, June 25, 1985) a copy of which is attached as Exhibit 11, the court held that the prohibition set out in Section 2 of the QBCRA is not only aimed towards business concerns, their officers or employees, but equally towards any persons who may have, or have had, in their possession documents or résumés thereof. *See* Exhibit 11 at pp. 5-6. In addition, in *Renault v. Bell Asbestos Mines, Ltd.* (Court of Appeal, Montreal, August 13, 1980), a copy of which is attached as Exhibit 12, the court ruled that the word “document” related to much more than just accounting documents and that the QBCRA must be interpreted liberally and broadly. *See* Exhibit 12 at pp. 4-5.

Atlas 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).

However, with due respect to the judges in each case, those cases failed to accurately assess the operation of the QBCRA upon Quebec entities like Atlas and the potential exposure they faced for compliance. For instance, in *Asbestos Corporation Limited v. Eagle Picher Industries, Inc.* (Court of Appeal, Montreal February 24, 1984), the Quebec Court of Appeal decided that if a witness is required to consult records or archives, such testimony would fall under the prohibition of the Section 2 of the QBCRA. See Exhibit 10, pp. 9-11; also Judge Tyndale's opinion at pp.1-2. Further, in *Lac D'Amiante Du Quebec Limited*, attached as Exhibit 13, the Court held that the application of the QBCRA did not require a preliminary request from the Attorney General. See Exhibit 13, at p. 289. Therefore, the South Carolina federal courts' interpretations in *Lyons* and *Central Wesleyan* understate the liability of a company in Atlas' position under the QBCRA and the dilemma it faces when called upon to produce documents and a witness in a Rule 30(b)(6) situation like the one that has prompted this Court's contempt order. Such decisions only show that Atlas is stuck between the proverbial "rock and a hard place" or beholden to two masters – stuck between facing mandatory contempt of court in its domicile or suffering contempt and displeasing this Court if it does not produce discovery to Plaintiffs' satisfaction.

Atlas takes its discovery obligations seriously but also asks this Court to recognize and consider that Atlas cannot please both masters at the same time. Application of fairness to the situation should enable Plaintiffs to obtain as much discovery as possible while not subjecting Atlas to criminal and/or civil penalties in its domicile. Several of this Court's sister courts have reached this precise result.

For example, in *Jennis v. Turner and Newall Ltd.*, No. 83-61-L (D. N.H. Dec. 5, 1984), a copy of which is attached as Exhibit 14, plaintiff served interrogatories to ACL to investigate how much raw asbestos ACL sold to her employer. Exhibit 14, at p. 1. 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 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 15, ACL sought a protective order from the plaintiff's discovery due to threat of sanctions under the QBCRA. Exhibit 15, 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 16, 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 16, 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 Atlas faces criminal and/or penalties if it violates the QBCRA or contempt and severe sanctions (Plaintiffs have requested that Atlas' answer be struck and it be placed effectively in default) 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).⁴ In *Aerospatiale*, the Supreme Court dealt with a French "Blocking 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

⁴ Atlas Turner 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. This is the approach taken by other United States courts cited *supra*, pp. 12-14.

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 Atlas. As for the second factor – the degree of specificity – many of Plaintiffs’ requests are overly broad.⁵ For example, Topic 65 asks: beginning in the year that Defendant first manufactured, marketed, produced...sold...any asbestos-containing products and continuing through the present day, the identity [sic] each person who has held the position of corporate medical director, corporate safety director, and corporate industrial hygienist, however characterized. For each person identified, the person’s current or last known address and whether the person is currently alive or dead, if known. Also Topic 69 is “All information relating to the Defendant’s knowledge of asbestos.” As for the third factor – the origination of the information – this factor weighs heavily in favor of Atlas since the information sought did not originate in the United States. As for the fourth factor – the availability of alternative means for securing the information – this factor weighs in favor of Atlas.

B. Atlas Lacks Individuals with Personal Knowledge and for the Most Part Does Not Maintain or Possess the Records That Would be Necessary to Educate a Witness to be Able to Testify to Matters Contained in the 30(b)(6) Notices.

As noted in Mr. Dufour’s affidavit dated December 28, 2022, Atlas Turner ceased all operations in 1986, 37 years or approximately a generation ago. It has no current employees; it has no former employees competent to testify to the topics listed in the 30(b)(6) Notices, and for the most part does not even maintain or possess records that would be necessary to educate a witness to be able to testify to matters contained in the 30(b)(6) Notice. To the extent that relevant

⁵ See Plaintiffs’ First Amended Notice of 30(b)(6) Deposition of Atlas Turner, Inc. and Subpoena Duces Tecum, attached as Exhibit 17.

records do exist, their production would be prohibited by the QBCRA as interpreted by the courts in Canada and the Province of Quebec, as set forth above. *See* Exhibit 7 at ¶¶ 10, 11, 14, 15.

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).

Due to Atlas' unique circumstances, this Court should find that Atlas was not willfully disobedient and did not voluntarily or intentionally fail to comply with this Court's order. The Court's contempt order should be vacated.

CONCLUSION

For the foregoing reasons, the Court should vacate its Order Holding Atlas Turner Inc. in Contempt.

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May 22, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
Melvin G. Welch and Donna B. Welch,	)	C/A NO. 2022-CP-40-03834
	)	
Plaintiffs,	)	
	)	
vs.	)	<u>Atlas Turner Inc.'s Response and</u>
	)	<u>Objection to Plaintiffs' Motion to Strike</u>
3M Company, et al.,	)	<u>Its Answer</u>
	)	
Defendants.	)	
	)	
	)	

Atlas Turner, Inc. ("Atlas")¹ responds and objects to Plaintiffs' May 11, 2023 Motion to Strike its answer to the Third Amended Complaint as a punishment for this Court's finding Atlas in contempt of Court. Atlas objects on two grounds: (1) as argued in Atlas' Motion for Reconsideration filed May 22, 2023, which is incorporated in full into this response and objection, the Court lacks personal jurisdiction over Atlas pursuant to S.C. Code Ann. § 36-2-803 and the Due Process Clause of the United State Constitution as recently explicated by the United States Supreme Court;² and (2) striking Atlas's answer is unduly harsh and goes beyond that which is necessary. The Court should, therefore, deny Plaintiffs' request.

¹ Although Atlas Asbestos Co. and Atlas Turner, Inc. are named in the Third Amended Complaint as separate defendants, they are not two separate companies. Atlas Asbestos Co. changed its name to Atlas Turner, Inc. Therefore, Atlas Asbestos Co. and Atlas Turner Inc. are two different names for the same company. The proper name of the sole defendant is Atlas Turner, Inc.

² See also the following filings of Atlas asserting in whole or in pertinent part the defense of lack of personal jurisdiction at each appropriate stage of the case, each of which are incorporated by reference into this response and objection:

- Atlas' Motions to Dismiss for Lack of Personal Jurisdiction with a Memorandum in Support and an affidavit from Richard Dufour dated September 7, 2022 ("9/7 Dufour Aff.") filed with each iteration of Plaintiffs' complaint;

As discussed in Section II of Atlas' motion to reconsider this Court's order finding it in contempt, which Atlas incorporates by reference as if set forth fully herein, Atlas's refusal to participate in discovery as ordered by the Court is not a willful act exhibiting bad faith or gross indifference to Plaintiffs' rights. Atlas's noncompliance stems from its repeatedly asserted position that this Court lacks personal jurisdiction over it, the fact that compliance with the Court's order would subject it to penalties in Canada, and the fact that Atlas has no records of sales to any company in South Carolina prior to 1968 (*see* 12/28 Dufour Affidavit ¶ 12; Mr. Welch's only alleged exposure to Atlas' insulation products occurred before 1968).

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion to Strike Atlas' Answer.

-
- Atlas' Amended Memorandum in Support of the Motion to Dismiss with exhibits, including a second affidavit from Richard Dufour dated December 28, 2022 ("12/28 Dufour Aff."), filed December 30, 2022;
 - Atlas' Motion for Protective Order and Memorandum in Support filed January 3, 2023.
 - Atlas' Motion for Summary Judgment (which included the Motion to Dismiss) and a Memorandum in Support with affidavits and other exhibits filed March 20, 2023;
 - Atlas' Motions for Protective Orders/Memos in Support with exhibits, regarding newly served Notices of 30(b)(6) depositions filed April 3, 2023, and April 6, 2023;
 - Atlas' Motion to Quash Trial Subpoena, filed April 14, 2023;
 - Atlas' Replies to Plaintiffs' Responses in Opposition to Atlas' Motions to Dismiss and Motions for Protective Order, filed April 18, 2023;
 - Section II of Atlas' Response and Objection to Appointment of a Receiver, filed May 15, 2023.

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May 23, 2023

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

CIVIL ACTION NO. 2022-CP-40-03834

Melvin G. Welch and Donna B. Welch,

Plaintiffs,

vs.

3M Company, et al.,

Defendants.

**Atlas Turner Inc.'s Supplemental Response and
Objection to the Plaintiffs' Motion to Appoint a
Receiver**

Atlas Turner, Inc. ("Atlas")¹, by and through its undersigned counsel, submits this Supplemental Response and Objection to the Plaintiffs' Motion to Appoint a Receiver.² Plaintiffs have not identified any assets of Atlas located in the State of South Carolina. Atlas is a Canadian company, and South Carolina's receivership statute does not authorize a South Carolina court to create a receivership over a foreign company that does not have any assets located in South Carolina. To the contrary, principles of comity prohibit extraterritorial reach beyond the State's borders to property of a foreign company located outside of South Carolina. Therefore, Plaintiffs' Motion to Appoint a Receiver should be denied.

¹ Although Atlas Asbestos Co. and Atlas Turner, Inc. are named in the Third Amended Complaint as separate defendants, they are not two separate companies. Atlas Asbestos Co. changed its name to Atlas Turner, Inc. Therefore, Atlas Asbestos Co. and Atlas Turner, Inc. are two different names for the same company. The proper name of the sole defendant is Atlas Turner, Inc.

² Atlas previously submitted its Response and Objection to the Plaintiff's Motion to Appoint a Receiver on May 15, 2023. As the Court knows, prior counsel for Atlas faced a conflict that arose during the briefing of this motion. As a result, counsel submitted a substitution of counsel. This supplemental memorandum specifically addresses items not addressed fully in the prior memorandums. This filing is intended to supplement, rather than replace the prior filings. Atlas incorporates by reference its May 15, 2023 Response and Objection to Plaintiffs' Motion to Appoint a Receiver and the filings incorporated therein.

I. A receiver has no extraterritorial authority, and therefore no receivership can exist as to Atlas unless it has property located within the State of South Carolina.³

The limited territorial authority of a receiver is well established. As the United States Supreme Court recognized in *Booth v. Clark*, 58 U.S. 322 (1854), a receiver is an officer of the court, and his jurisdictional role is confined to the territory of the court. *Id.* at 332 (“Indeed, 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 him to sue for such property, we understand the decisions of that State as confining his action to the State of New York.”).

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.

Plaintiffs bear the burden of proving a receivership is proper, including showing the existence of property located within this State. They have not done so. Plaintiffs rely on alleged insurance policies, claiming that any such policies would be property located in South Carolina. This reliance is misplaced because the South Carolina Supreme Court has already held that policies of liability insurance are not property subject to in rem jurisdiction. Moreover, there is no evidence that any policies insured lives, interests or property in South Carolina. Atlas was a Canadian company that sold products from Canada that were shipped F.O.B. Montreal. Therefore, Plaintiffs have not presented any evidence of property located within the State.

³ To be clear, Atlas denies that the Court has personal jurisdiction over it. Therefore, no receiver can be appointed over it by this Court in any scenario.

Moreover, intangible assets such as insurance policies are deemed to be located in the place of the company's home office. Therefore, any potential liability insurance policies would not support a finding of property within the State, which is necessary for the appointment of a receiver.

I. The South Carolina Supreme Court has already ruled that liability insurance policies are not property subject to attachment in the State.

In the 1960s and 1970s, plaintiffs seeking more favorable venues or venues with longer statutes of limitation attempted to create personal jurisdiction over defendants by attaching liability insurance policies as a form of in rem jurisdiction. At the time, the New York courts approved of this approach. *See Seider v. Roth*, 269 N.Y.S.2d 99, 216 N.E.2d 312 (1966). However, the approach was largely rejected by other jurisdictions. As the Supreme Court of South Carolina recognized: “Apparently no state has followed the New York Court in this respect and it appears . . . that the decision in *Seider* has been much criticized by legal writers on both constitutional and practical grounds.” *Howard v. Allen*, 254 S.C. 455, 176 S.E.2d 127 (1970).

In *Howard*, a plaintiff attempted to convince a South Carolina court to adopt the New York approach. The plaintiff was injured by an aircraft propeller at the Greenville Municipal Airport. In an effort to create personal jurisdiction over the Ohio-based defendant, the plaintiff issued a summons, complaint, and a warrant of attachment directing the Spartanburg Sheriff to attach and seize “the applicable limits of liability and the duty to defend contained in Policy No. NM-6-625, issued by American Motorists Insurance Company . . .” *Id.* at 457, 176 S.E.2d at 128. When the Circuit Court quashed the attachment and dismissed the case, the plaintiff appealed, arguing that the “duty to defend and the limit of liability contained in a policy of liability insurance constitute a ‘debt’ owed to the policyholder which is subject to attachment, thereby conferring jurisdiction upon the Courts of this State.” *Id.*

Unsurprisingly, the South Carolina Supreme Court rejected this attempt at creating in rem jurisdiction, holding: “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.” *Howard*, 254 S.C. at 459, 176 S.E.2d at 128. The reason for this is simple. “[T]he insurer owes the insured nothing until the liability of the insured and the amount thereof has been determined.” *Id.* In fact, the Supreme Court noted 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.***” *Id.* at 461, 176 S.E.2d at 129 (emphasis added).

Plaintiffs’ efforts to argue to the contrary highlight the very problem with their argument. Plaintiffs claim that a liability insurance policy is located essentially everywhere. Hypothetically, this means that fifty different states could appoint fifty different receivers over the same insurance policies. This approach would be completely unworkable. Fortunately, this is not the law. The rule set forth in *Howard* is plain: liability insurance policies are not a debt – i.e., property – located within the State or subject to attachment in the State of South Carolina.

II. South Carolina’s insurance choice of law statute does not apply because Plaintiffs have not identified any policies insuring lives, interests or property within this State.

South Carolina’s insurance choice of law statute provides: “All contracts of insurance on property, lives, or interests in this State are considered to be made in the State . . .” S.C. Code § 38-61-10. Atlas is, and always has been, a Canadian company. Therefore, any alleged insurance policy issued to Atlas insured an interest or property in Canada. There is no evidence that Atlas owned property in South Carolina.

The choice of law statute cannot be read without an understanding of its history and purpose. The statute has its roots in the historical sale of mail order insurance policies. *Johnston*

v. *Commercial Travelers Mut. Acc. Ass'n of Am.*, 242 S.C. 387, 393, 131 S.E.2d 91, 94 (1963). Under traditional choice of law rules, mail order insurance often required the insured to litigate coverage issues in the insurer's home state, even if the policy insured a life located in South Carolina. This created hardships for local insureds who applied for coverage for life or property that was principally located in South Carolina. *Id.* ("The hardship of requiring an assured or his beneficiary to hire a lawyer to prosecute small claims in a state far from the residence of the policy holder soon became evident."). As a result, "a number of states . . . enacted statutes similar" to South Carolina's insurance choice of law statute. *Id.*

Viewed in the context of its purpose, South Carolina's choice of law statute is designed to allow persons purchasing insurance that is intended to insure lives, interests or property located in the State to expect that South Carolina law will apply to those insurance policies. In the mail order context, both the applicant and the insurer know – based on the application – that the focus of the insurance policy will be in South Carolina.

The facts of *Johnston* highlight the purpose of the statute. In that case, the plaintiff purchased an accident insurance policy in 1949. Under traditional insurance choice of law rules, the contract was governed by New York law. However, the policy insured the plaintiff, who from the time of application until the date of his injury six years later, was a resident of St. George, South Carolina. *Id.* at 390, 131 S.E.2d at 92-93. The only reason New York law would have otherwise applied was that the plaintiff applied for the policy via mail to the insurer's home office in New York. *Id.* The insurance company mailed the policy to the plaintiff's South Carolina address, and the plaintiff mailed premiums from South Carolina. *Id.* Based on these facts, the Supreme Court found the South Carolina choice of law statute applied. Although the parties may have technically entered the contract in New York, "South Carolina has sufficient connection with

the formation of such contract that our public policy demands that it conform with the requirements of our Insurance Code.” *Id.* at 393, 131 S.E.2d at 94.

The evidence in this case stands in stark contrast to the facts in *Johnston*. Here, the undisputed evidence is that Atlas was, and has always been, a Canadian company operating in Canada. Although Plaintiffs allege Atlas sold products that were shipped to contractors in North Carolina or South Carolina, there is no allegation that those products were shipped by Atlas from South Carolina, that they were made in South Carolina, or that Atlas had any property located in South Carolina. Whereas the insurance policy in *Johnston* insured a specific life in South Carolina, the application was mailed from South Carolina, the policy was mailed to South Carolina, and premium payments were made from South Carolina, there are no similar facts or allegations as to Atlas. Thus, there is no evidence or even allegation that policies of insurance insuring Atlas insured lives, interests, or property in this State.

Moreover, the purpose of the insurance choice of law statute does not apply here. The purpose of the statute is to ensure that South Carolina policyholders can litigate insurance disputes for policies purchased to insure South Carolina lives, interests or property in South Carolina. See *Johnston*, 242 S.C. at 94, 131 S.E.2d at 393-94. Here, any policy would have been issued to a Canadian company. The company did not have any property in South Carolina. In sum, the policies did not insure lives, interest or property in South Carolina.

Plaintiffs’ reliance on *Sangamo Weston, Inc. v. National Surety Corporation*, 307 S.C. 143, 414 S.E.2d 127 (1992), is misplaced. First and foremost, *Sangamo Weston* – like the choice of law statute itself – addresses choice of law questions. It does not hold that insurance policies for non-resident defendants are property within the State of South Carolina. Moreover, the insurance policy at issue in that case dealt with a company that manufactured products *in South Carolina*, and the

suit arose out of those South Carolina manufacturing operations. *Id.* at 146, 414 S.E.2d at 129. Specifically, Sangamo Weston operated a manufacturing facility in Pickens County, South Carolina, and the coverage litigation involved CERCLA environmental hazards from that South Carolina facility. Thus, the policy at issue in *Sangamo* insured property and interests – the manufacturing facility – in South Carolina. There is no allegation before the Court that any policies allegedly issued to Atlas insured facilities in South Carolina.

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 simply not enough. 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 subject automobile collision took place in South Carolina. The contract was negotiated in New York for a rental car rented from a location in New York. The fact that the claimant drove the vehicle to South Carolina where the accident occurred was insufficient to trigger South Carolina's choice of law statute.⁴ *Id.* at 552, 436 S.E.2d at 184.

⁴ Numerous courts applying South Carolina law have reached the same conclusion. *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).

Plaintiffs bear the burden of showing that this Court has authority to appoint a receiver. Under the receivership statute, a receivership is limited to property within the State. Plaintiffs have not identified any property of Atlas located within the State. Rather, Atlas has confirmed that it does not own any property in this State. It has never owned real property in South Carolina, it never owned or operated any manufacturing facilities in the State, it never held any bank accounts in the State, and it has never maintained an office in this State. (Ex. 1, Aff. of Richard Dufour, Sept. 7, 2022); (Ex. 7, Aff. of Richard Dufour, Dec. 28, 2022).⁵ Thus, there is no basis in the record for this Court to appoint a receiver over a Canadian company.

III. Intangible assets are located at the domicile of either the debtor or the creditor – either way, not in South Carolina.

An insurance asset is either located at the domicile of the creditor – Atlas – or the debtor – the insurance company. As the Supreme Court of the United States has held:

The locality of things which may be said to be intangible is somewhat confusing, but, if it be kept up, the right of the creditor and the obligation of the debtor cannot have the same, unless debtor and creditor live in the same place. But we do not think it is necessary to resort to the idea at all, or to give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a nonresident to the defeat of his creditors. To do it, you must go to the domicile of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He, and only he, has something in his hands. That something is the res, and gives character to the action, as one in the nature of a proceeding in rem.

Chicago, R.I. & P. Ry. Co. v. Sturm, 174 U.S. 710, 715-16, 19 S. Ct. 797, 799-800 (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, 152 N.E.

⁵ Exhibit numbers reference the exhibits to Atlas’ Response and Objection to Plaintiffs’ Motion to Appoint a Receiver.

916, 918 (1926). Regardless of which rule applies, the insurance policies are not located in South Carolina.

CONCLUSION

For the above-stated reasons, as well as those stated in the incorporated filings, Plaintiffs' Motion to Appoint a Receiver should be denied. Atlas does not have any property located in South Carolina. Without property located in this State, the Court's appointment of a receiver over a Canadian company is improper.

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

CIVIL ACTION NO. 2022-CP-40-03834

Melvin G. Welch and Donna B. Welch,

Plaintiffs,

vs.

3M Company, et al.,

Defendants.

**Atlas Turner Inc.'s Motion to Reconsider the
June 20, 2023 Order Striking Atlas Turner's
Answer**

Pursuant to Rules 52(b) and 59(e), SCRPC, Atlas Turner, Inc. (“Atlas”)¹ moves the Court to reconsider and vacate its June 20, 2023 Order Striking Atlas Turner’s Answer. As set forth more fully below, Atlas seeks reconsideration in order to preserve previously asserted arguments, on the ground that the Court’s Order does not address the personal jurisdiction arguments raised by Atlas and it does not consider Atlas’s argument that striking of Atlas’ Answer is unduly harsh and goes beyond that which is necessary.

“[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue

¹ Although Atlas Asbestos Co. and Atlas Turner, Inc. are named in the Third Amended Complaint as separate defendants, they are not two separate companies. Atlas Asbestos Co. changed its name to Atlas Turner, Inc. Therefore, Atlas Asbestos Co. and Atlas Turner, Inc. are two different names for the same company. The proper name of the sole defendant is Atlas Turner, Inc.

or argument has been raised, but not ruled on, in order to preserve it for appellate review.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original).

Atlas has repeatedly asserted its position that the Court lacks personal jurisdiction over it. Atlas incorporates its prior arguments², including but not limited to: (1) Neither the allegations of the Complaint nor the evidence submitted by the parties makes a prima facie showing of personal jurisdiction over Atlas; (2) evidence that Atlas sold products after Plaintiff Melvin Welch’s alleged exposure does not satisfy the requirements of specific jurisdiction; (3) the stream of commerce theory is not a proper basis for a finding of specific jurisdiction. The Court’s Order does not address these arguments.

The Court’s Order does not address the factors necessary when determining whether striking Atlas’ Answer is an appropriate and necessary sanction. Specifically, the Court finds

² Atlas expressly adopts and incorporates its prior filings, including:

- Atlas’ Response and Objection to Plaintiffs’ Motion to Strike its Answer, filed May 23, 2023;
- Atlas’ May 22, 2023 Motion to Reconsider and Vacate the Contempt Order of May 11, 2023;
- Atlas’ Motion to Dismiss for Lack of Personal Jurisdiction with a Memorandum in Support and affidavit from Richard Dufour dated September 7, 2022 filed with each iteration of plaintiffs’ complaint;
- Atlas’ Amended Memorandum in Support of the Motion to Dismiss with exhibits, including a second affidavit from Richard Dufour dated December 28, 2022, filed December 30, 2022;
- Atlas’ Motion for Protective Order and memorandum in Support filed January 3, 2023;
- Atlas’ Motion for Summary Judgment (which included the Motion to Dismiss) and a Memorandum in Support with affidavits and other exhibits filed March 20, 2023
- Atlas’ Motions for Protective Orders/Memos in Support with exhibits, regarding newly served Notices of 30(b)(6) depositions filed April 3, 2023 and April 6, 2023;
- Atlas’ Motion to Quash Trial Subpoena, filed April 14, 2023;
- Atlas’ Replies to Plaintiffs’ Responses in Opposition to Atlas’ Motions to Dismiss and Motions for Protective Order, filed April 18, 2023;
- Section II of Atlas’ Response and Objection to Appointment of a Receiver, filed May 15, 2023.

Atlas's conduct "intentional and willful," but it does not address Atlas' stated basis for not responding to discovery, including: (1) the fact that Atlas does not have sales records of sales to any company in South Carolina prior to 1968, which is after Mr. Welch's alleged exposure; (2) the fact that Atlas lacks individuals with personal knowledge and for the most part does not maintain or possess the records that would be necessary to educate a witness to be able to testify to matters contained in the 30(b)(6) notices; and (3) Atlas' potential exposure to criminal penalties under Quebec law if it produces business records in this litigation or presents a witness to testify regarding its business. Likewise, the Court's Order does not apply the comity analysis using the factors set forth in *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 107 S. Ct. 2542 (1987) and Restatement (Third) of Foreign Relations Law of the United States, § 442 (1987).

The Court's Order finds Atlas has failed to produce a witness, but Atlas has no former employees competent to testify to the topics listed on the 30(b)(6) Notices of Deposition in this case and, for the most part, Atlas does not even maintain or possess the records that would be necessary to educate a witness to be able to testify to those matters.³ Likewise, the Order finds Atlas has refused to produce documents, but Atlas has no records of sales to any company in South Carolina prior to 1968.⁴ Finally, to the extent any relevant documents do exist, their production is prohibited by the Quebec Business Concerns Records Act as interpreted by the courts in Canada and the Province of Quebec.⁵ The Order also does not address the efficacy of less severe sanctions.

³ Dec. 28, 2022 Aff. of Richard Dufour, ¶ 14, attached as Exhibit 7 to Atlas' May 23, 2023 Motion to Reconsider and Vacate the Contempt Order.

⁴ Dec. 28, 2022 Aff. of Richard Dufour, ¶ 12, attached as Exhibit 7 to Atlas' May 23, 2023 Motion to Reconsider and Vacate the Contempt Order.

⁵ Dec. 28, 2022 Aff. of Richard Dufour, ¶ 15, attached as Exhibit 7 to Atlas' May 23, 2023 Motion to Reconsider and Vacate the Contempt Order. *See also* cases attached as exhibits 9-16 to Atlas' May 23, 2023 Motion to Reconsider and Vacate the Contempt Order.

Based on the above and the arguments raised in Atlas' incorporated filings, a sanction of striking Atlas' Answer is unduly harsh and is not supported by the record.

CONCLUSION

For the above-stated reasons, as well as those stated in the incorporated filings, Atlas respectfully moves for reconsideration of the Court's Order striking its Answer and for entry of an Order denying Plaintiffs' Motion to Strike Atlas' Answer.

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

CIVIL ACTION NO. 2022-CP-40-03834

Melvin G. Welch and Donna B. Welch,

Plaintiffs,

vs.

3M Company, et al.,

Defendants.

**Atlas Turner Inc.'s Motion to Reconsider the
June 21, 2023 Order on Plaintiffs' Motion to
Appoint a Receiver**

Pursuant to Rules 52(b) and 59(e), SCRPC, Atlas Turner, Inc. (“Atlas”)¹ moves the Court to reconsider and vacate its June 2, 2023 Order granting Plaintiff’s Motion to Appoint a Receiver. As set forth more fully below, Atlas seeks reconsideration in order to preserve the previously-asserted arguments, on the grounds that the Court’s Order does not address the personal jurisdiction arguments raised by Atlas, it does not address certain of Atlas’s arguments that there is no factual or legal basis to appoint a receiver over Atlas, and the Order makes certain errors of law.

“[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue

¹ Although Atlas Asbestos Co. and Atlas Turner, Inc. are named in the Third Amended Complaint as separate defendants, they are not two separate companies. Atlas Asbestos Co. changed its name to Atlas Turner, Inc. Therefore, Atlas Asbestos Co. and Atlas Turner, Inc. are two different names for the same company. The proper name of the sole defendant is Atlas Turner, Inc.

or argument has been raised, but not ruled on, in order to preserve it for appellate review.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original).

A. Atlas reasserts its objections to personal jurisdiction.

Atlas has previously asserted its position that the Court lacks personal jurisdiction over it. Atlas incorporates its prior arguments², including but not limited to: (1) Neither the allegations of the Complaint nor the evidence submitted by the parties makes a prima facie showing of personal jurisdiction over Atlas; (2) evidence that Atlas sold products after Plaintiff Melvin Welch’s alleged exposure does not satisfy the requirements of specific jurisdiction; (3) the stream of commerce theory is not a proper basis for a finding of specific jurisdiction. The Court’s Order does not address

² Atlas expressly adopts and incorporates its prior filings, including:

- Atlas’ Response and Objection to Plaintiffs’ Motion to Appoint a Receiver, filed May 15, 2023;
- Atlas’ Supplemental Response and Objection to the Plaintiffs’ Motion to Appoint a Receiver, filed June 14, 2023;
- Atlas’ Response and Objection to Plaintiffs’ Motion to Strike its Answer, filed May 23, 2023;
- Atlas’ May 22, 2023 Motion to Reconsider and Vacate the Contempt Order of May 11, 2023;
- Atlas’ Motion to Dismiss for Lack of Personal Jurisdiction with a Memorandum in Support and affidavit from Richard Dufour dated September 7, 2022 filed with each iteration of plaintiffs’ complaint;
- Atlas’ Amended Memorandum in Support of the Motion to Dismiss with exhibits, including a second affidavit from Richard Dufour dated December 28, 2022, filed December 30, 2022;
- Atlas’ Motion for Protective Order and memorandum in Support filed January 3, 2023;
- Atlas’ Motion for Summary Judgment (which included the Motion to Dismiss) and a Memorandum in Support with affidavits and other exhibits filed March 20, 2023
- Atlas’ Motions for Protective Orders/Memos in Support with exhibits, regarding newly served Notices of 30(b)(6) depositions filed April 3, 2023 and April 6, 2023;
- Atlas’ Motion to Quash Trial Subpoena, filed April 14, 2023;
- Atlas’ Replies to Plaintiffs’ Responses in Opposition to Atlas’ Motions to Dismiss and Motions for Protective Order, filed April 18, 2023;
- Section II of Atlas’ Response and Objection to Appointment of a Receiver, filed May 15, 2023.

these arguments, and the appointment of a receiver over Atlas violates the Due Process Clause of the United States Constitution.

B. The Court's Order does not address a number of Atlas' arguments regarding the impropriety of appointing a South Carolina receiver over a Canadian corporation that has no assets in South Carolina.

The Court's Order does not address Atlas' arguments that:

- 1) There is no factual or legal basis under S.C. Code § 15-65-10(4) or (5) to appoint a receiver;³
- 2) Plaintiffs have not met their burden of presenting evidence of property located in South Carolina to support the appointment of a receiver;⁴
- 3) A receiver has no extraterritorial authority and the appointment of a Receiver over a foreign corporation with no property located in the State goes beyond the Court's jurisdiction and violates principles of comity;⁵
- 4) A liability insurance policy is not property subject to in rem jurisdiction in South Carolina pursuant to *Howard v. Allen*;⁶
- 5) Plaintiffs have not shown that any insurance policy allegedly issued to Atlas insured lives, interests or property in South Carolina;⁷
- 6) The mere fact that an alleged policy may provide liability coverage for injuries that occur in South Carolina does not mean that the policy insures lives, interests or property in South Carolina;⁸
- 7) Intangible assets are located at the domicile of either the debtor or the creditor – either way, not in South Carolina;⁹

Atlas submits that these issues – which are fully briefed in Atlas' May 15, 2023 Response and Objection to Plaintiffs' Motion to Appoint a Receiver and its June 14, 2023 Supplemental Response

³ Atlas' May 15, 2023 Response and Objection to Plaintiffs' Motion to Appoint a Receiver ("May 15 Response"), pp. 3-7.

⁴ *Id.* at p. 6; Atlas' June 14, 2023 Supplemental Response and Objection to the Plaintiffs' Motion to Appoint a Receiver ("June 14 Supplement"), pp. 3-9.

⁵ May 15 Response, p. 4-5; June 14 Supplement, pp. 2-3.

⁶ June 14 Supplement, pp. 3-4.

⁷ June 14 Supplement, pp. 4-8.

⁸ June 14 Supplement, p. 7.

⁹ June 14 Supplement, pp. 8-9.

and Objection to the Plaintiffs' Motion to Appoint a Receiver – preclude the appointment of a receiver under South Carolina law and under the United States Constitution's Due Process Clause.

C. The Order's reasoning that entry of a default judgment is a purely ministerial task is an error of law.

In footnote 2 of the Court's Order, the Court states that “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.” (Order, p. 2). Respectfully, the Court's statement conflates the entry of a default with the entry of a default judgment. The case cited – *Stark Truss Co., Inc. v. Superior Const. Corp.*, 360 S.C. 503 (Ct. App. 2004) – states that the entry of a default is a ministerial task. *Id.* at 509 (noting that the clerk enters the default as a purely ministerial task). Unlike entry of default, the entry of default judgment – especially in a case of unliquidated damages – is not at all ministerial. Despite the striking of the Answer, Atlas is still entitled to have the case tried before a finder of fact, to cross-examine witnesses, to object to evidence, to seek offsets for amounts paid by other alleged tortfeasors, etc. Whereas a clerk of court is authorized – and required – to enter default upon a showing that a defendant is in default, the Rules do not permit a clerk to enter default judgment. *See* Rule 55, SCRCF. Instead, Rule 55(b)(2) requires notice to Atlas and a hearing before default judgment may be entered. Furthermore, the Court may choose to set aside a default for good cause shown. *See* Rule 55(c), SCRCF.

To the extent the Order purports to find that striking of the Answer has the same effect as an entry of a judgment against Atlas, this holding is incorrect. Moreover, Footnote 3 of the Order states that the striking of Atlas' Answer was “unopposed.” To be clear, Atlas opposed the motion, and it continues to oppose the striking of its Answer.

D. The Receivership Order is unclear and contains inconsistent language.

The Receivership Order states that the Receiver is appointed over Atlas' alleged "Insurance Assets" as that term is defined in footnote 4 of the Order. However, in the "Powers of the Receiver" section of the Order, the Court states that the Receiver may "accept service on behalf of Atlas, engage counsel on behalf of Atlas and take any and all steps necessary to protect the interests of Atlas whatever they may be." (June 21, 2023 Order, p. 6). Respectfully, this language appears to come from other receivership orders in which the Court has appointed Peter Protopapas as a general receiver over a company. This portion of the Order appears to contradict the limited receivership over only alleged insurance assets. Likewise, the Order states that the receiver may have access to "files of counsel." (June 21, 2023 Order, p. 4, n.4). However, in the context of a limited receivership, providing counsel's files to the receiver implicates significant ethical concerns regarding the potential waiver of attorney-client privilege. Therefore, even if not fully vacated, Atlas respectfully submits the Order should be modified to clarify the limited scope of the receivership.

CONCLUSION

For the above-stated reasons, as well as those stated in the incorporated filings, Atlas respectfully moves for reconsideration of the Court's Order granting Plaintiffs' Motion to Appoint a Receiver and for entry of an Order denying the Plaintiffs' Motion to Appoint a Receiver.

s/ Wesley B. Sawyer
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Counsel for Defendant Atlas Turner, Inc.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
DONNA B. WELCH, individually and as	)	CASE NO. 2022-CP-40-03834
Personal Representative of the Estate of	)	
MELVIN G. WELCH, deceased,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	ATLAS TURNER, INC.'S MOTION
	)	TO DISMISS PLAINTIFF'S FOURTH
	)	AMENDED COMPLAINT
ADVANCE AUTO PARTS, INC., et al.	)	
	)	
Defendants.	)	
	)	

Defendant Atlas Turner, Inc., sued incorrectly as Atlas Turner, Inc., as successor to Atlas Asbestos Co. (hereinafter "Atlas Turner"),¹ on behalf of itself and Defendant Atlas Asbestos Co., in an abundance of caution and to preserve the record, respectfully submits this Motion to Dismiss Plaintiffs' Fourth Amended Complaint (hereinafter "Complaint") pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure and on the ground that this Court lacks personal jurisdiction over it.

Atlas Turner understands the court's prior rulings on its earlier motions and its position regarding personal jurisdiction and striking Atlas Turner's answer to Plaintiff's Third Amended Complaint. This motion does not seek to disregard any prior ruling, nor does it seek to cause any delay. With the utmost respect and in an abundance of caution to preserve the record, Atlas Turner files this Motion to avoid any claim that it has waived its objections to personal jurisdiction. Atlas

¹ Although Atlas Asbestos Co. and Atlas Turner, Inc. are named in the Third Amended Complaint as separate defendants, they are not two separate companies. Atlas Asbestos Co. changed its name to Atlas Turner, Inc. Therefore, Atlas Asbestos Co. and Atlas Turner, Inc. are two different names for the same company. The proper name of the sole defendant is Atlas Turner, Inc.

repeats and incorporates by reference the arguments, exhibits, and authorities presented in the following filings:

- A. Atlas Turner's Motions to Dismiss for Lack of Personal Jurisdiction with Memorandum in Support and affidavit from Richard Dufour dated September 7, 2022 ("9/7 Dufour Aff.") filed with each iteration of Plaintiffs' Complaint:
- B. Atlas' Amended Memorandum in Support of the Motion to Dismiss with exhibits, including a second affidavit from Richard Dufour dated December 28, 2022 ("12/28 Dufour Aff."), filed December 30, 2022.

CLEMENT RIVERS, LLP

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Attorneys for Atlas Turner, Inc.

Charleston, South Carolina

Dated: July 3, 2023

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	FOR THE FIFTH JUDICIAL CIRCUIT
Melvin G. Welch and Donna B. Welch,	In Re: Coordinated Asbestos Docket
Plaintiffs,	Civil Action No: 2022-CP-40-03834
v.	
3M Company, <i>et al.</i> ,	MOTION TO CLARIFY RECEIVERSHIP
Defendants.	ORDER TO ASSUME CONTROL OVER
	THE DEFENSE OF ATLAS TURNER'S
	UNITED STATES ASBESTOS
	LITIGATION

Pursuant to Rule 7(b) of the South Carolina Rules of Civil Procedure and the Court's plenary powers, Peter D. Protopapas, as Receiver for the Insurance Assets of Atlas Turner Inc. f/k/a Atlas Asbestos Company, Ltd., and its affiliates, ("Atlas"), respectfully moves this Court for an Order clarifying the Receivership Orders allowing the Receiver to assume control of the defense of asbestos claims made against Atlas Turner, Inc. in the United States. In support of this Motion, the Receiver would show as follows:¹

1. On June 21, 2023, Peter D. Protopapas was appointed as Receiver of the insurance assets of Atlas. (Ex. A, Appointment Order.)
2. The Appointment Order directs the "Receiver to investigate the existence of all insurance or indemnification coverage or claims relating thereto which are potentially available to Atlas. (*Id.* at p.7.) The Appointment Order also authorizes the Receiver to "engage counsel on behalf of Atlas and take any and all steps necessary to protect the interest of Atlas whatever they may be." (*Id.* at p.6.)

¹ Pursuant to Rule 11, SCRPC, the undersigned counsel certifies that consultation with Atlas would serve no useful purpose as it continually defies and fails to recognize this Court's appointment of a Receiver over its insurance assets.

3. Atlas Turner, Inc. is a viable Canadian corporation continually sued in South Carolina and other United States asbestos litigation and fails to participate and now maneuvers in a way to excuse its carriers from responding to the losses, including those incurred in South Carolina, which the insurers wrote coverage to address.

4. According to the Receiver's investigation to date (with which Atlas and its counsel have refused to cooperate) Atlas Turner, Inc., and its affiliates, appear to have millions of dollars' worth of insurance assets that are potentially available and responsive to the asbestos Plaintiffs' underlying asbestos claims against Atlas. (Ex. B, List Outlining Atlas' Insurance Assets.)

5. As part of its duties and pursuant to the Order of Appointment, the Receiver has tendered claims to various insurance carriers for a defense of Atlas in the underlying asbestos suits.

6. On July 21, 2023, Atlas Turner, Inc. received two letters from Resolute Management, Inc., (one on behalf of CNA-affiliated entities and one on behalf of Certain Underwriters at Lloyd's, and various, London Market Insurers), stating it has been advised by Atlas "that Atlas has continued to control its defense of the Asbestos Lawsuits even after entry of the Receivership Order" and will continue to control its own defenses because "Peter Protopapas is not objecting to Atlas's control of its own defense." Further, Atlas is not tendering the Asbestos Lawsuits for defense or indemnity. (Ex. C and D, Letter from Resolute Management to Atlas.)

7. On July 24, 2023, the Receiver received two letters from Resolute Management, Inc., (one on behalf of CNA-affiliated entities and one on behalf of Certain Underwriters at Lloyd's, and various, London Market Insurers), stating each has been "advised by Atlas that Atlas is controlling and defending its own interests, and [that the Receiver is] not objecting to Atlas's control of its own defense. Further, "Atlas is not tendering the Asbestos Lawsuits [to CNA or Lloyds] for defense and indemnity," and therefore, "given that Atlas is not tendering the Asbestos Lawsuits,

there is no defense or indemnity being requested.” (Ex. E and F, Letters from Resolute Management to Peter Protopapas.)

8. Atlas continues to thwart and oppose the activities of the Receiver. Its latest efforts to contravene the Receiver’s tenders of South Carolina asbestos cases to apparently responsive insurers for defense and indemnity is contrary to the Court’s stated goals for this receivership and directly hinders the Receiver from fulfilling his duties pursuant to his Appointment Order.

9. Accordingly, pursuant to the Order of Appointment instructing the Receiver to take all steps necessary to protect the interests of Atlas, the Receiver seeks a Clarifying Order from this Court authorizing him to assume control of the defense of the asbestos litigation pending against Atlas in the United States.

10. This Motion is further supported by the applicable law and any memorandum in support that may be submitted prior to the hearing on this matter.

Respectfully submitted,

s/ John K. Chandler

Brian M. Barnwell (SC Bar No. 78249)

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Counsel for the Receiver

This 25th day of July, 2023.

EXHIBIT A

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

MELVIN G. WELCH and)
DONNA B. WELCH) C/A NO. 2022-CP-40-03834
)
)
Plaintiffs,)
)
v.)
)
3M COMPANY)
f/k/a MINNESOTA MINING AND)
MANUFACTURING COMPANY, et al.)
)
Defendants.)
)
_____)

ORDER ON PLAINTIFFS' MOTION TO APPOINT A RECEIVER

This order follows the Court's order finding Atlas Turner Inc. f/k/a Atlas Asbestos Company ("Atlas") in contempt of court and this Court's entry of an order striking Atlas' pleadings. Before the Court is Plaintiffs' Motion to Appoint a Receiver over Atlas Turner, Inc. f/k/a Atlas Asbestos Company, Ltd ("Atlas").

BACKGROUND

For the reasons set for below, the Court grants Plaintiffs motion to appoint a receiver over the Insurance Assets¹ of Atlas. Peter Protopapas is appointed as receiver over those Insurance Assets and the Court expects anyone or any entity having information or materials which are

¹ This term is defined below.

reasonably calculated to lead to the discovery of admissible evidence to cooperate with this Court's Receiver in locating and marshalling those assets.

PROCEEDURAL BACKGROUND

On May 11, 2023, this Court found Atlas to be in contempt of Court. The Court based its contempt order on Atlas' flat refusal to comply with this Court's orders to produce documents, a witness or otherwise participate in discovery. As part of this Court's order on contempt, the Court ordered Plaintiffs to brief the issue of the sanction requested.

On May 11, 2023, Plaintiffs filed their brief requesting that this Court strike Atlas' pleadings. Atlas' response was filed on May 15, 2023 and Plaintiffs' reply was filed on May 18, 2023. After considering the briefing of the parties, this Court determined that striking Atlas' answer was the appropriate sanction for contempt of this Court's orders.

Now, having struck Atlas' answer, Atlas 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 unopposed striking of Atlas' answer. Atlas further argues that there is no evidence of its insolvency, yet it refuses to comply with this Court's orders to discovery that and many other issues. The Court does not believe it is appropriate for Atlas to use this refusal as a sword. Regardless, other elements of the receivership statute are satisfied and thus, this argument is unavailing.

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, Atlas’ has been struck, and thus only a ministerial action being left for Atlas to be in judgment, a receiver to take possession of and, to the extent necessary, litigate Atlas’ insurance assets 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 Atlas’ personal jurisdiction claims, exposed by decades of opinions dismissing those very assertions and Atlas 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 Atlas’s insurance carriers.” 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 Atlas. Even assuming Atlas’ interpretation of §15-65-10 is correct, to the extent they exist, Atlas’ Insurance Assets⁴ 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.

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.

⁴ 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.

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 Atlas]” *Id.*⁵ Thus the appointment of a receiver over those assets is appropriate.

B. Due Process has not and will not be violated

Atlas continues to ignore the jurisprudence of this state which directly addresses its due process argument. Atlas ignores, again, the teachings of the South Carolina Supreme Court in *Sangamo*.

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. Atlas sold its poison 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,

⁵ As more fully set forth above, the funds at issue appear to be the proceeds from settlements involving insurance contracts designed to protect lives, interests and property within the state and thus would also be governed by substantive South Carolina law.

whatever insuring assets of Atlas 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 Atlas. 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 Atlas Turner, Inc. and any subsidiaries, accept service on behalf of Atlas, engage counsel on behalf of Atlas and take any and all steps necessary to protect the interests of Atlas whatever they may be. This order includes the right and obligation to administer any insurance or indemnification assets of Atlas as well as any claims related to the actions or failure to act of Atlas insurance carriers or other entities, including, but not limited to the officers, directors and/or shareholders of Atlas against which the Atlas 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 Atlas; redirect the delivery of any such mail addressed to the Atlas or any business of the Atlas, so that such mail may come directly to the receiver; 2) endorse and cash all checks and negotiable instruments payable to Atlas 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 Atlas; 4) hire any person necessary to accomplish any right or power under this Order; and 5) take all action necessary to gain access to all storage facilities, safety-deposit boxes, real property, and leased premises wherein any property

of Atlas may be situated, and to review and obtain copies of all documents related to insurance assets of Atlas.

The Court expects the Receiver to investigate the existence of all insurance or indemnifications coverages or claims relating thereto which are potentially available to Atlas. 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 Atlas or any entity for whom Atlas 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 Atlas to marshal all of the available insurance assets, including claims related thereto and any other property subject to this receivership of Atlas and its subsidiaries, successors, and assigns, is appropriate. Peter Protopapas is hereby appointed the receiver over Atlas consistent with this order.

IT IS SO ORDERED.

[JUDGE'S SIGNATURE PAGE FOLLOWS]



Richland Common Pleas

Case Caption: Melvin G Welch , plaintiff, et al vs 3M Company , defendant, et al
Case Number: 2022CP4003834
Type: Order/Appointment of Receiver

So Ordered

Jean H. Toal

Electronically signed on 2023-06-20 14:50:19 page 8 of 8

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EXHIBIT B

EXHIBIT 14

We have no record of sales made prior to 1968 and no detail (apart from the year and the amount of sales made in 1968 and 1969 and some in 1970 also.

Sales of products to companies listed on Exhibit A

Name

Johns-Manville Sales Corp.	1968	No record	7,469.40
	1969	No record	3,360.00
	1972	Asbestos cement sheets	861.77
Covil Insulation Co.	1968	No record	11,958.68
	1970	Asbestos insulation (Newtherm)	57,836.91
	1971	" (Newtherm)	98,828.59
	1972	" (Newtherm)	33,449.87
Delaware Insulation Co.	1973	Non-asbestos insulation (Newtherm)	3,144.15
Fuller-Austin Co.	1972	Asbestos insulation (Newtherm)	352.25
Porter-Hayden Co.	1970	No record	150.31
	1971	Asbestos insulation (Newtherm) & asbestos cement cylinders	1,374.59
	1972	Asbestos cement cylinders	3,189.76
	1973	" "	3,228.00
	1974	Non-asbestos insulation (Newtherm), asbestos cement cylinders & asbestos cement sheets	10,031.46
	1975	Asbestos cement insulated board	1,528.11
	1976	Asbestos cement cylinders, asbestos cement sheets & asbestos cement insulated board	9,059.51
	1971	Asbestos insulation (Atlasite)	8,760.60
	1972	" " "	140,729.42
	1967	No record	4,388.75
Armstrong Contracting & Supply Co.	1968	No record	26,519.59
	1969	No record	66,140.44
	1970	Asbestos insulation (Newtherm)	112,121.17
	1971	Asbestos fibre(Limpet)	
		Asbestos insulation (Newtherm)	105,100.18
		Asbestos fibre(Limpet)	

EXHIBIT C

Armstrong Contracting & Supply Co. (cont'd)	1972	Asbestos Insulation (Newtherm)	109,492.21
	1973	Asbestos fibre(Limpet) Non-asbestos insulation (Newtherm)	126,729.10
	1974	Asbestos cement patio pots & non-asbestos insulation (Newtherm)	120,207.99
	1975	Asbestos cement sheets, Asbestos cement patio pots & Non-asbestos insulation (Newtherm)	9,352.85
	1976	Asbestos cement patio pots & non-asbestos insulation (Newtherm)	57,206.95
Philip Carey Corp.	1969	No record	107.63
Daniel Construction Co.	1970	No record	2,749.00
	1975	Asbestos cement sheets & stainless steel hardware	212,611.71
	1976	Asbestos cement sheets & stainless steel hardware	159,542.59
Guy M. Beatty & Co.	1967	No record	7,062.01
	1970	Asbestos insulation (Newtherm)	2,091.69
	1971	" " "	16,903.54
	1972	" " "	33,960.27
	1973	Non-asbestos insulation (Newtherm)	1,413.23
Industrial Insulation Co. Inc.	1969	No record	560.79
	1970	Asbestos insulation (Newtherm)	1,369.63
	1971	" " "	904.80
	1972	" " "	2,379.24

<u>Name</u>	<u>Amount</u>	<u>Dates</u>
Canadian General Insurance Company	\$500,000	7 - 1/10/64
The Royal Insurance Company, Ltd.	\$1,000,000	3/31/69 - 6/30/69
Canadian General Insurance Company	\$1,000,000	6/30/69 - 3/31/72
Federal Insurance Company	\$1,000,000	3/31/72 - 7/31/75
Lloyd's Underwriters	\$500,000 (2 layers \$2,000,000 excess - primary)	3/13/62 - 4/23/62
Lloyd's Underwriters	\$1,000,000 (2 layers \$4,000,000 excess - primary)	4/23/62 - 6/19/65
Lloyd's Underwriters	\$1,000,000 (2 layers \$4,000,000 excess - primary)	6/19/65 - 3/31/68
Lloyd's Underwriters	\$1,000,000 (2 layers \$4,000,000 excess - primary)	3/31/68 - 3/31/71
Federal Insurance Company	\$5,000,000 (excess - primary)	3/31/71 - 7/31/75
The Royal Insurance Company, Ltd.	\$1,000,000	1/10/64 - 4/1/69

EXHIBIT D

Schedule

The following are other defendants to whom Atlas has sold asbestos materials. We have no records prior to 1968.

<u>Name</u>	<u>Date</u>	<u>Amount</u>	<u>Shipped to</u>
Johns Manville Products Corp.	1971	100.05	Georgia
	1972	977.41	"
	1973	6,884.52	Texas-80%; Ga & N
	1974	709.16	Georgia
Standard Asbestos Manufacturing Co.	1967	256.94	No record
	1968	54.80	" "
	1969	202.45	" "
	1973	230.40	Missouri
Armstrong Cork Company	1967	45.32	No record
Owens-Corning Fiberglass Corp.	1969	536.96	No record
	1970	2,027.17	" "
	1971	17,187.49	Aruba (stopover N
	1972	4,856.13	Iran & S.C.
	1973	2,217.49	South Carolina
Certain-teed Products Corp.	1969	37.00	No record
	1971	4,724.72	Pennsylvania
Keene Corp.	1970	9,683.94	No record 60%; N.Y. 39% & Alabama 1%
Fibreboard Corp.	1971	10,058.90	California

Exhibit E

EXHIBIT C

Keith Rahman

Account Manager
Direct Claims Division
Phone: 312-345-2093
Fax: 312-750-1706
Email: krahman@resolutemgmt.com

Resolute Management Inc.

141 West Jackson Boulevard
Chicago Board of Trade Annex
Suite 1800A
Chicago, IL 60604

July 21, 2023

VIA UNITED PARCEL SERVICE

Atlas Turner Inc.
854 Boul Ouellet
Thetford Mines
G6G 7A5 Quebec
Canada

Re: Asbestos Lawsuits
Atlas Turner Inc. f/k/a Atlas Asbestos Company ("Atlas")

Dear Atlas,

Resolute Management Inc. is the administrator on behalf of certain CNA-affiliated underwriting entities ("CNA") for certain asbestos claims that may impact CNA policies incepting prior to January 1, 2010. CNA understands that Atlas has been named as a defendant in various asbestos lawsuits in the Court of Common Pleas, Fifth Judicial Circuit South Carolina ("Asbestos Lawsuits"),¹ including the *Welch* lawsuit.

CNA is also aware of the order entered by Justice Jean Toal entered on June 20, 2023 ("Receivership Order") in the *Welch* lawsuit stating that it appointed Peter Protopapas as the receiver solely over Atlas' insurance assets, which is defined as proceeds of insurance, claims related to any breaches of duty relating to those policies, information related to those insurance policies and any other assets related to such insurance.² CNA has been advised by Atlas that Atlas has continued to control its defense of the Asbestos Lawsuits even after entry of the Receivership Order, which Atlas believes is its right even if the Receivership Order is allowed to stand, and that Peter Protopapas is not objecting to Atlas's control of its own defense.

¹ The lawsuits filed against Atlas are: (1) *Lenora Childers, Individually and as Personal Representative of the Estate of Lewis C. Childers v. 3M Company* (Case No. 2021-CP-40-03484); (2) *Ricky Dean Flynn, as the Executor of the Estate of Jerry Kay Flynn, Deceased v. 3M Company* (Case No. 2023-CP-40-00633); (3) *Sandra M. Gonce, Individually and as Executrix of the Estate of Dwight Gonce, Deceased v. Air & Liquid Systems Corporation* (Case No. 2023-CP-40-02933); (4) *Joe Eldra Goodwin, Individually, and as the Personal Representative of the Estate of Dorothy Jean Fox Goodwin v. Air & Liquid Systems Corporation* (Case No. 2020-CP-40-04613); (5) *Heather Donaghy, as Personal Representative of the Estate of Shirley Smiley Potter, deceased v. 4520 Corp., Inc.* (Case No. 2023-CP-40-03108); (6) *John A. Tibbs and Margaret B. Tibbs v. 3M Company* (2023-CP-40-01759); and (7) *Melvin G. Welch and Donna B. Welch v. 3M Company* (Case No. 2022-CP-40-03834).

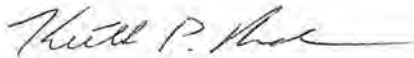
² CNA is aware that Atlas has appealed the Receivership Order and believes it is void.

Atlas Turner, Inc.
July 21, 2023
Page 2 of 2

CNA has further been advised by Atlas that Atlas is defending its own interests in the Asbestos Lawsuits, and that Atlas is not tendering the Asbestos Lawsuits to CNA for defense or indemnity. Please advise if any of the above is incorrect.

If you have any questions concerning this correspondence, please feel free to contact me at krahman@resolutemgmt.com or 1-312-345-2093.

Best,



Keith P. Rahman

EXHIBIT D

Keith Rahman

Account Manager
Direct Claims Division
Phone: 312-345-2093
Fax: 312-750-1706
Email: krahman@resolutemgmt.com

Resolute Management Inc.

141 West Jackson Boulevard
Chicago Board of Trade Annex
Suite 1800A
Chicago, IL 60604

July 21, 2023

VIA UNITED PARCEL SERVICE

Atlas Turner Inc.
854 Boul Ouellet
Thetford Mines
G6G 7A5 Quebec
Canada

Re: Asbestos Lawsuits
Atlas Turner Inc. f/k/a Atlas Asbestos Company ("Atlas")

Dear Atlas,

Resolute Management Inc. is a third party-administrator for certain claims on behalf of Certain Underwriters at Lloyd's, London ("Lloyd's Underwriters"). Lloyd's Underwriters understand that Atlas has been named as a defendant in various asbestos lawsuits in the Court of Common Pleas, Fifth Judicial Circuit South Carolina ("Asbestos Lawsuits"),¹ including the *Welch* lawsuit.

Lloyd's Underwriters are also aware of the order entered by Justice Jean Toal entered on June 20, 2023 ("Receivership Order") in the *Welch* lawsuit stating that it appointed Peter Protopapas as the receiver solely over Atlas' insurance assets, which is defined as proceeds of insurance, claims related to any breaches of duty relating to those policies, information related to those insurance policies and any other assets related to such insurance.² Lloyd's Underwriters have been advised by Atlas that Atlas has continued to control its defense of the Asbestos Lawsuits even after entry of the Receivership Order, which Atlas believes is its right even if the Receivership Order is allowed to stand, and that Peter Protopapas is not objecting to Atlas's control of its own defense.

Lloyd's Underwriters have further been advised by Atlas that Atlas is defending its own interests in the Asbestos Lawsuits, and that Atlas is not tendering the Asbestos Lawsuits to Lloyd's Underwriters for defense or indemnity. Please advise if any of the above is incorrect.

¹ The lawsuits filed against Atlas are: (1) *Lenora Childers, Individually and as Personal Representative of the Estate of Lewis C. Childers v. 3M Company* (Case No. 2021-CP-40-03484); (2) *Ricky Dean Flynn, as the Executor of the Estate of Jerry Kay Flynn, Deceased v. 3M Company* (Case No. 2023-CP-40-00633); (3) *Sandra M. Gonce, Individually and as Executrix of the Estate of Dwight Gonce, Deceased v. Air & Liquid Systems Corporation* (Case No. 2023-CP-40-02933); (4) *Joe Eldra Goodwin, Individually, and as the Personal Representative of the Estate of Dorothy Jean Fox Goodwin v. Air & Liquid Systems Corporation* (Case No. 2020-CP-40-04613); (5) *Heather Donaghy, as Personal Representative of the Estate of Shirley Smiley Potter, deceased v. 4520 Corp., Inc.* (Case No. 2023-CP-40-03108); (6) *John A. Tibbs and Margaret B. Tibbs v. 3M Company* (2023-CP-40-01759); and (7) *Melvin G. Welch and Donna B. Welch v. 3M Company* (Case No. 2022-CP-40-03834).

² Lloyd's Underwriters are aware that Atlas has appealed the Receivership Order and believes it is void.

Atlas Turner, Inc.
July 21, 2023
Page 2 of 2

If you have any questions concerning this correspondence, please feel free to contact me at krahman@resolutemgmt.com or 1-312-345-2093.

Best,

A handwritten signature in black ink, appearing to read "Keith P. Rahman", with a long horizontal flourish extending to the right.

Keith P. Rahman

EXHIBIT E

Keith Rahman

Account Manager
Direct Claims Division
Phone: 312-345-2093
Fax: 312-750-1706
Email: krahman@resolutemgmt.com

Resolute Management Inc.

141 West Jackson Boulevard
Chicago Board of Trade Annex
Suite 1800A
Chicago, IL 60604

July 24, 2023

VIA EMAIL (pdp@rplegalgroup.com)

Peter Protopapas
Rikard & Protopapas, LLC
2110 N. Beltline Blvd.
Columbia, SC 29204

Re: Atlas Turner Inc. f/k/a Atlas Asbestos Company ("Atlas")

Dear Mr. Protopapas,

Resolute Management Inc. is the administrator on behalf of certain CNA-affiliated underwriting entities ("CNA") for certain asbestos claims that may impact CNA policies incepting prior to January 1, 2010. CNA received the email from Lindsay Valek, paralegal at Rikard & Protopapas, LLC, dated June 21, 2023 and responds to same herein.

As to the asbestos lawsuits filed against Atlas and listed in the June 21 communication ("Asbestos Lawsuits"),¹ CNA has been advised by Atlas that Atlas is controlling and defending its own interests in the Asbestos Lawsuits, and that you are not objecting to Atlas's control of its own defense. Atlas is not tendering the Asbestos Lawsuits to CNA for defense and indemnity. See enclosed communication to Atlas dated July 21, 2023. Given that Atlas is not tendering the Asbestos Lawsuits, there is no defense or indemnity being requested from CNA.

If you have any questions concerning this correspondence, please feel free to contact me at krahman@resolutemgmt.com or 312-345-2093.

Best,



Keith P. Rahman

¹ The lawsuits filed against Atlas are: (1) *Lenora Childers, Individually and as Personal Representative of the Estate of Lewis C. Childers v. 3M Company* (Case No. 2021-CP-40-03484); (2) *Ricky Dean Flynn, as the Executor of the Estate of Jerry Kay Flynn, Deceased v. 3M Company* (Case No. 2023-CP-40-00633); (3) *Sandra M. Gonce, Individually and as Executrix of the Estate of Dwight Gonce, Deceased v. Air & Liquid Systems Corporation* (Case No. 2023-CP-40-02933); (4) *Joe Eldra Goodwin, Individually, and as the Personal Representative of the Estate of Dorothy Jean Fox Goodwin v. Air & Liquid Systems Corporation* (Case No. 2020-CP-40-04613); (5) *Heather Donaghy, as Personal Representative of the Estate of Shirley Smiley Potter, deceased v. 4520 Corp., Inc.* (Case No. 2023-CP-40-03108); (6) *John A. Tibbs and Margaret B. Tibbs v. 3M Company* (2023-CP-40-01759); and (7) *Melvin G. Welch and Donna B. Welch v. 3M Company* (Case No. 2022-CP-40-03834).

EXHIBIT F

Keith Rahman

Account Manager
Direct Claims Division
Phone: 312-345-2093
Fax: 312-750-1706
Email: krahman@resolutemgmt.com

Resolute Management Inc.

141 West Jackson Boulevard
Chicago Board of Trade Annex
Suite 1800A
Chicago, IL 60604

July 24, 2023

VIA EMAIL (pdp@rplegalgroup.com)

Peter Protopapas
Rikard & Protopapas, LLC
2110 N. Beltline Blvd.
Columbia, SC 29204

Re: Atlas Turner Inc. f/k/a Atlas Asbestos Company ("Atlas")

Dear Mr. Protopapas,

Resolute Management Inc. is a third party-administrator for certain claims on behalf of Certain Underwriters at Lloyd's, London ("Lloyd's Underwriters"). Lloyd's Underwriters received the email from Lindsay Valek, paralegal at Rikard & Protopapas, LLC, dated June 21, 2023 and responds to same herein.

As to the asbestos lawsuits filed against Atlas and listed in the June 21 communication ("Asbestos Lawsuits"),¹ Lloyd's Underwriters have been advised by Atlas that Atlas is controlling and defending its own interests in the Asbestos Lawsuits, and that you are not objecting to Atlas's control of its own defense. Atlas is not tendering the Asbestos Lawsuits to Lloyd's Underwriters for defense and indemnity. See enclosed communication to Atlas dated July 21, 2023. Given that Atlas is not tendering the Asbestos Lawsuits, there is no defense or indemnity being requested from Lloyd's Underwriters.

If you have any questions concerning this correspondence, please feel free to contact me at krahman@resolutemgmt.com or 312-345-2093.

Best,



Keith P. Rahman

¹ The lawsuits filed against Atlas are: (1) *Lenora Childers, Individually and as Personal Representative of the Estate of Lewis C. Childers v. 3M Company* (Case No. 2021-CP-40-03484); (2) *Ricky Dean Flynn, as the Executor of the Estate of Jerry Kay Flynn, Deceased v. 3M Company* (Case No. 2023-CP-40-00633); (3) *Sandra M. Gonce, Individually and as Executrix of the Estate of Dwight Gonce, Deceased v. Air & Liquid Systems Corporation* (Case No. 2023-CP-40-02933); (4) *Joe Eldra Goodwin, Individually, and as the Personal Representative of the Estate of Dorothy Jean Fox Goodwin v. Air & Liquid Systems Corporation* (Case No. 2020-CP-40-04613); (5) *Heather Donaghy, as Personal Representative of the Estate of Shirley Smiley Potter, deceased v. 4520 Corp., Inc.* (Case No. 2023-CP-40-03108); (6) *John A. Tibbs and Margaret B. Tibbs v. 3M Company* (2023-CP-40-01759); and (7) *Melvin G. Welch and Donna B. Welch v. 3M Company* (Case No. 2022-CP-40-03834).

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO. 2022-CP-40-03834
DONNA B. WELCH, individually and	)	
as Personal Representative of the Estate of	)	
MELVIN G. WELCH, deceased,	)	
	)	ATLAS'S MEMO IN OPPOSITION
Plaintiff,	)	TO PLAINTIFF'S MOTION TO LIFT STAY
	)	
vs.	)	
	)	
ADVANCE AUTO PARTS, INC., et al.	)	
	)	
Defendants.	)	
	)	

Defendant Atlas Turner, Inc., incorrectly identified in this action as Atlas Turner, Inc., as successor to Atlas Asbestos Co., for itself and on behalf of Defendant Atlas Asbestos Co. (all of whom are hereinafter collectively referred to in the singular as "Atlas"),¹ submits this memo in opposition to Plaintiff's motion, filed August 14, 2023, to lift the automatic stay in this matter as to the appointment of a receiver (the "Subject Motion").² Most respectfully, the Subject Motion should be denied, as explained below.

BACKGROUND

By notice of appeal served and filed July 6, 2023, Atlas appealed this Court's orders (1) holding Atlas in contempt, filed May 11, 2023; (2) denying Atlas's motion to reconsider and vacate

¹ Atlas Asbestos Co. and Atlas Turner, Inc. are incorrectly identified in this action as separate Defendants. Atlas Asbestos Co. and Atlas Turner, Inc. are not different entities, but rather different names for the same entity, which was formerly named Atlas Asbestos Co. but is now named Atlas Turner, Inc.

² The Subject Motion bears the former caption for this matter, which identifies two Plaintiffs, Melvin G. Welch and Donna B. Welch; however, with the filing of the Fourth Amended Complaint on June 16, 2023, the operative caption is now as shown above, identifying a single Plaintiff, Donna B. Welch, individually and as Personal Representative of the Estate of Melvin G. Welch, deceased. Accordingly, Atlas refers to the Subject Motion as the motion of the single Plaintiff identified in the operative case caption.

the order holding it in contempt, filed June 16, 2023; (3) striking Atlas's answer, filed June 20, 2023; (4) appointing a receiver for Atlas, filed June 21, 2023; (5) denying Atlas's motion to reconsider the order striking its answer, filed June 28, 2023; and (6) denying Atlas's motion to reconsider the order appointing a receiver, filed June 28, 2023.

The Subject Motion asks the Court to lift the automatic stay triggered by Atlas's appeal as to the appointment of a receiver. In other words, the Subject Motion asks that the receiver be allowed to go ahead and exercise the following incredibly broad powers conferred by the order appointing him even though the propriety of that order (and others relating to it) is rightly in question pursuant to Atlas's valid exercise of its right to appeal:

POWERS OF THE RECEIVER

As set forth above, the powers afforded to the receiver here are all related to the insurance assets of Atlas. 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 Atlas Turner, Inc. and any subsidiaries, accept service on behalf of Atlas, engage counsel on behalf of Atlas and take any and all steps necessary to protect the interests of Atlas whatever they may be. This order includes the right and obligation to administer any insurance or indemnification assets of Atlas as well as any claims related to the actions or failure to act of Atlas insurance carriers or other entities, including, but not limited to the officers, directors and/or shareholders of Atlas against which the Atlas 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 Atlas; redirect the delivery of any such mail addressed to the Atlas or any business of the Atlas, so that such mail may come directly to the receiver; 2) endorse and cash all checks and negotiable instruments payable to Atlas 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 Atlas; 4) hire any person necessary to accomplish any right or power under this Order; and 5) take all action necessary to gain access to all storage facilities, safety-deposit boxes, real property, and leased premises wherein any property of Atlas may be situated, and to review and obtain copies of all documents related to insurance assets of Atlas.

The Court expects the Receiver to investigate the existence of all insurance or indemnifications coverages or claims relating thereto which are potentially available to Atlas. 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 Atlas or any entity for whom Atlas 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.

(Order on Plaintiffs' Motion to Appoint a Receiver, filed June 21, 2023, pp. 6–7.)³

To be clear, Plaintiff concedes that Atlas's appeal has triggered the automatic stay as to the appointment of a receiver and, therefore, the receiver is prohibited from taking action unless and until the stay is lifted. (See Subject Motion p. 1 (moving pursuant to Rule 241, SCACR, "to lift the automatic stay in this matter"); *id.* at p. 3 (referring to "the automatic stay imposed by Atlas' filing of its Notice of Appeal"); *id.* at p. 5 ("Given that the appointed receiver is, during the pendency of this appeal, prohibited from acting . . ."); *id.* at p. 5 (requesting "that this Court lift

³ (See also *id.* at p. 4 n.4 (defining "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").)

the automatic stay imposed by Atlas' filing of its notice of appeal").) This is important because, were there a dispute about whether the automatic stay applies, i.e., if Plaintiff were to deny that the automatic stay applies, such a dispute could not be resolved in this Court and would have to be resolved in the Court of Appeals. *See Kearney v. Allen*, 287 S.C. 324, 327–28, 338 S.E.2d 335, 337–38 (1985) (interpreting former Supreme Court Rule 41 and holding that, when no procedure is specified, authority to resolve disputes over whether the automatic stay applies is vested in the Supreme Court, not the circuit court); *State v. Cooper*, 342 S.C. 389, 398, 536 S.E.2d 870, 875–76 (2000) (modifying *Kearney* to hold that the Court of Appeals has the power and authority to rule upon issues arising under the South Carolina Appellate Court Rules, including those arising under Rule 241). This is especially true in this case as the receivership was authorized by this Court as a sanction related to and resulting from the striking of Atlas' pleadings. As such, to lift any stay would require this Court to do so on multiple orders, as the receivership flows from each of them to some degree.

Having conceded that Atlas's appeal triggered the automatic stay, Plaintiff contends, "lifting the automatic stay as to the appointment of a receiver over Atlas' insurance assets is necessary to 'prevent a contested issue from becoming moot.'" (Subject Motion p. 5 (quoting Rule 241(c)(2).) According to Plaintiff, this necessity is born of the "potential" that exists, "[d]ue to the believed liquidity of Atlas' insurance assets,"⁴ that Atlas might "divest itself of the very assets intended to be protected by the appointment of a receiver." (Subject Motion p. 3; *see also id.* at p. 5 ("While the parties await a resolution from the appellate court on Atlas' presented issues, the potential exists for Atlas to divest itself of the very assets, its insurance, intended to be protected

⁴ Nowhere in the Subject Motion does Plaintiff explain what is meant by the "liquidity of Atlas's insurance assets" or the basis of Plaintiff's "belie[f]" as to the same.

and preserved by the appointment of a receiver.”).) No evidence of any of these speculative theories has been offered into evidence by the Plaintiff.

ARGUMENT

I. The Subject Motion should be denied, because it is speculative and not properly supported and, in any event, lifting the automatic stay is not necessary to prevent a contested issue from becoming moot. Indeed, to the contrary, lifting the automatic stay will ensure a contested issue is mooted.

Rule 241(a) establishes the following “general rule”:

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. 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.

As explained above, Plaintiff concedes that this general rule applies here to prohibit the receiver from acting unless and until the automatic stay triggered by Atlas’s appeal is lifted. So, first off, Atlas would note that the very fact that a stay is the rule, rather than the exception, necessarily reflects a policy preference in favor of a stay absent a compelling reason to the contrary.

In determining whether there is a compelling reason to deviate from the general rule, Rule 241(c)(2) instructs that the Court “should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” Here, Plaintiff does not argue that lifting the automatic stay is necessary to preserve jurisdiction of Atlas’s appeal, only that it is necessary to prevent a contested issue from becoming moot. Most respectfully, Plaintiff’s argument is speculative and not properly supported, and in any event, it is unavailing.

Judicial determinations may not rest on speculation. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) (“[V]erdicts may not be

permitted to rest upon surmise, conjecture, or speculation.”). Here, Plaintiff asks the Court to upset the general rule in favor of stay, arguing that such relief is “necessary” based on an alleged “potential” that Atlas might “divest itself of the very assets, its insurance, intended to be protected and preserved by the appointment of a receiver.” (Subject Motion p. 5.) As explained above, Plaintiff claims this potential exists “[d]ue to the believed liquidity of Atlas’ insurance assets,” but explains neither what this means nor why Plaintiff believes it. (Subject Motion p. 3.)

The only exhibits Plaintiff attaches to the Subject Motion are two letters from Resolute Management Inc. dated July 21 and 24, 2023, respectively. Without explanation, Plaintiff simply declares that these letters show Atlas “meddling” and attempting “to thwart the receiver in his duties,”⁵ but review of the letters themselves shows no such thing. (See Subject Motion at Exhibits A and B.) In fact, the letter of July 21, 2023, expressly reflects “Lloyd’s Underwriters have been advised by Atlas that Atlas has continued to control its defense of the Asbestos Lawsuits even after entry of the Receivership Order, which Atlas believes is its right even if the Receivership Order is allowed to stand, and that [the receiver] is not objecting to Atlas’s control of its own defense.”. Nothing in Exhibits A or B show, much less establish an evidentiary basis that Atlas is meddling with insurance (as there is none), thwarting the receiver (as there are no “Insurance Assets” to marshal), or trying to utilize (non-existent) insurance liquidity to its advantage.

Moreover, both of the letters are dated after the date on which Atlas served and filed the pending appeal, July 6, 2023, and thus after the automatic stay (which, again, Plaintiff concedes was triggered by the appeal) had commenced. So not only do the letters not show Atlas “meddling” and attempting “to thwart the receiver in his duties,” at the time of the letters, the automatic stay was already in place and—as Plaintiff well knows—the receiver was in fact prohibited from acting.

⁵ (Subject Motion p. 5.)

Indeed, to the extent that the receiver attempted to act (and/or that Plaintiff encouraged or otherwise caused the receiver to attempt to act) despite the prohibition imposed by the automatic stay, it would not be Atlas who “violate[d] . . . applicable rules and precedent” (as Plaintiff accuses), but rather the receiver and/or Plaintiff.

A stay is not necessary to prevent a contested issue from becoming moot. Rather, the opposite is true. As Plaintiff concedes, Atlas has lawfully exercised its right to appeal, and in consequence, the law has imposed an automatic stay that prohibits the receiver from taking action. Thus, as it stands, the status quo, and, in turn, Atlas’s right to a meaningful appeal of the propriety of the order appointing the receiver (and related orders), is preserved. Lifting the automatic stay would simply turn the receiver loose to irrevocably exercise the vast array of powers conferred in the order appointing him before Atlas’s (undeniably proper) appellate challenge to that order is ever decided. Essentially, it would allow the receiver to go ahead do all of the things that Atlas’s appeal challenges as improper before Atlas’s appeal can be heard.⁶ In other words, it would not prevent a contested issue from becoming moot, but rather guarantee it does. And the only thing that Plaintiff offers to the contrary is the unexplained and speculative notion that there is a “possibility” that Atlas might divest itself of its insurance—with how and why it might possibly do so simply left to the imagination.⁷ Even assuming, *arguendo*, such a “possibility” exists, such a mere possibility cannot reasonably be found to outweigh the certainty that lifting the automatic

⁶ If this were a sufficient reason to lift a stay, the entire concept of and reasons for automatic stays would be swallowed by the exception to the general rule.

⁷ Once the receiver acts, the toothpaste cannot be put back in the tube. Atlas is a viable Canadian corporation which owns or possesses no property in South Carolina. It has no judgment against it and likewise had none when it was purportedly placed in a South Carolina based receivership. These facts all strongly support keeping the automatic stay in place pending appeal.

stay will deny Atlas its right to a meaningful appeal of the order appointing the receiver (and related orders).

CONCLUSION

For the foregoing reasons, together with any other or further reasons presented via oral argument, or via such additional written submissions as the Court may permit or require, Atlas asks the Court to deny the Subject Motion.

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Stephen L. Brown
Stephen L. Brown (SC Bar No. 66468)
sbrown@ycrlaw.com
James D. Gandy, III (SC Bar No. 11925)
tgandy@ycrlaw.com
Stephen A. Griffith (SC Bar No. 103744)
sgriffith@ycrlaw.com
25 Calhoun Street, Suite 400
Charleston, SC 29401
P.O. Box 993 (29402)
(843) 720-5488
Attorneys for Atlas Turner, Inc.

Charleston, South Carolina

August 17, 2023

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	FOR THE FIFTH JUDICIAL CIRCUIT
MELVIN B. WELCH AND DONNA B. WELCH,	In The Coordinated Asbestos Docket
	Civil Action No. 2020-CP-40-03834
Plaintiffs,	NOTICE OF ATLAS TURNER, INC.'S
Vs.	MISLEADING REPRESENTATIONS AND
3M Company, et al.,	FILING OF EVIDENCE OF POTENTIAL
Defendants	INSURANCE LIQUIDATION

On August 17, 2023, Defendant Atlas Turner, Inc. (“Atlas”) filed a “Memo in Opposition to Plaintiff’s Motion to Lift Stay” which contains misleading representations. Specifically, Atlas asserts that there is no evidence presented of any potential liquidity of Insurance Assets of Atlas:

According to Plaintiff, this necessity [request to lift stay] is born of the potential that exists, due to the believed liquidity of Atlas’ insurance assets, that Atlas might divest itself of the very assets intended to be protected by the appointment of a receiver. . .No evidence of any of these speculative theories has been offered into evidence by the Plaintiff.

Atlas Memo at 4-5 (internal quotations omitted). Indeed, Atlas argues throughout its Memo that any potential liquidation of Insurance Assets is purely speculative and unsupported by any evidence. *See, e.g.*, Atlas Memo at 6.

Atlas’s representation that liquidation of Insurance Assets is speculative and unsupported is misleading, as the Receiver is aware of documents that evidence potential past liquidations of Insurance Assets of Atlas:

- First, Atlas was party to an agreement that purports to release insurance policies issued by its insurance with Royal Insurance Company. *See Exhibit A* (Memorandum of Agreement between Bell Asbestos Mines,

LTD, Royal Insurance Company of Canada, and Atlas, dated December 18, 1986).

- Second, Atlas may also have released rights in connection with policies issued by Maryland Casualty Company. See Exhibit B (agreement between Asbestos Corporation Limited (“ACL”) and the Maryland Casualty Company dated July 18, 1989, at p. 13) (requiring Atlas to waive its rights to in favor ACL and Maryland Casualty).

As a result of Atlas’s participation in prior potential liquidations of Insurance Assets, it is simply misleading for Atlas to represent that the possibility of further liquidation of Insurance Assets is mere “speculation.” Moreover, Atlas did not disclose to the Court these prior potential liquidations of its Insurance Assets when it represented to the Court that “Plaintiff did not present evidence of liquidation.” Atlas’s Memo, therefore, contains misleading representations to the Court.

Furthermore, Atlas also misleadingly states that the Receiver’s tendering of asbestos lawsuits to Atlas’s insurers through Resolute Management, Inc. for defense and was violative of an automatic stay: “Indeed, to the extent that the Receiver attempted to act (and/or that Plaintiff encouraged or otherwise caused the Receiver to attempt to act) despite prohibition imposed by the automatic stay, it would not be Atlas who violated applicable rules and precedent (as Plaintiff accuses), but rather the receiver and/or Plaintiff.” Memo at 7 (internal quotations omitted). Atlas, without evidence, speculated that the undersigned Receiver acted improperly by tendering lawsuits *after* Atlas filed its notice of appeal on July 7, 2023. In fact, the Receiver tendered lawsuits to Resolute on June 21, 2023. See Exhibit C.

Respectfully submitted,

s/ Peter D. Protopapas, Esquire
Peter D. Protopapas
SC BAR 68304
Rikard & Protopapas, LLC
2110 N. Beltline Blvd
Columbia, SC 29204
803.978.6111
pdp@rplegalgroup.com

Dated: August 18, 2023

MEMORANDUM OF AGREEMENT

B E T W E E N

BELL ASBESTOS MINES, LTD., a corporation having its head office and principal place of business in the Province of Quebec at Thetford Mines, herein acting and represented by Mtre Alain Dulude, its Legal Counsel

hereunto duly authorized by virtue of the By-laws of the corporation and by virtue of a Resolution of its Board of Directors adopted at a meeting held on the tenth day of December, 1986, a certified copy whereof is annexed to these presents after having been signed for identification.

PARTY OF THE FIRST PART
(hereinafter referred to as «Bell»)

A N D

ROYAL INSURANCE COMPANY OF CANADA, herein acting and represented by Jean-Guy Houde, its Claims Manager (Quebec), duly authorized for all purposes hereof as he hereby declares.

PARTY OF THE SECOND PART
(hereinafter referred to as «Royal»)

A N D

ATLAS TURNER INC., a corporation having its head office and principal place of business at 5600 Hochelaga Street, in the City of Montreal, herein acting and represented by Mtre Alain Dulude, its Legal Counsel

hereunto duly authorized by virtue of the By-laws of the corporation and by virtue of a Resolution of its Board of Directors adopted at a meeting held on the sixteenth day of December, 1986, a certified copy whereof is annexed to these presents after having been signed for identification.

PARTY OF THE THIRD PART
(hereinafter referred to as «Atlas Turner»).

WHEREAS ROYAL issued insurance policies which were in force during the period January 10, 1964 to June 30, 1969 (hereinafter referred to as the «policies»), it being understood that the word «policies» is defined to include and mean, also, endorsements, renewals, extensions, insuring agreements and additional insuring agreements as well as any other policy, binder or document of any nature at

.../2

any time issued; and

WHEREAS the policies were subscribed to and issued in the Province of Quebec and, in consequence, are governed by the laws of Quebec; and

WHEREAS these policies designated the following named insureds:

« BELL ASBESTOS MINES LIMITED and/or
ATLAS ASBESTOS COMPANY LIMITED and/or
ATLAS ASBESTOS COMPANY, DIVISION OF
BELL ASBESTOS MINES LIMITED »;

and

WHEREAS the charter of one of the above named insureds, namely, ATLAS ASBESTOS COMPANY, LIMITED (the correct name) was surrendered on January 19, 1968 but, in fact, it had ceased to do any business as of the 30th day of September, 1963, having sold all of its assets to BELL, including the right to use the words «atlas asbestos company division»; and

WHEREAS ATLAS TURNER INC. was incorporated under the Canada Business Corporations Act on December 21, 1976 under the name ATLAS ASBESTOS COMPANY LTD., which name was changed to ATLAS TURNER INC. on March 1, 1979; and

WHEREAS as and from the mid-1970's, BELL and ATLAS TURNER became the target of over Seven Thousand (7,000) lawsuits in the United States by litigants who claim to have sustained personal injuries as a result of exposure to asbestos fibers and asbestos products and/or who claim to have sustained property damages relating to the existence in various immoveables of these products; and

WHEREAS BELL and/or ATLAS TURNER have asserted that they were entitled to coverage under the policies and, over the years, have forwarded to ROYAL copies of proceedings in the lawsuits above-mentioned; and

WHEREAS ROYAL has denied from the outset that there was any coverage under the policies with respect to these lawsuits, a position which it has maintained steadfastly to this date; and

.../3



WHEREAS BELL and ATLAS TURNER have threatened to institute legal proceedings against ROYAL with a view to having the dispute resolved in a court of law; and

WHEREAS ROYAL, inter alia, has threatened to invoke non-disclosure of material facts at the time of issuance of the policies as a ground for demanding the nullity thereof; and

WHEREAS the parties hereto acknowledge that protracted litigation with respect to their dispute would be time-consuming and costly; and

WHEREAS the parties hereto have decided to prevent litigation by concluding a contract of transaction, the whole in accordance with Articles 1918 et seq. of the Civil Code of Lower Canada,

NOW THEREFORE THIS MEMORANDUM OF AGREEMENT WITNESSETH:

1. The Preamble hereof forms an integral part of the Agreement;
2. BELL acknowledges to have received at the execution hereof from ROYAL a sum of TWO MILLION FIVE HUNDRED THOUSAND DOLLARS (\$2,500,000.00) in CANADIAN CURRENCY in full and final satisfaction of any and all claims, demands and rights of action of any nature whatsoever which it may have or pretend to have in connection with the policies, either in its own right or as the result of operations conducted by ATLAS ASBESTOS COMPANY as a DIVISION OF BELL, it being further acknowledged by BELL that payment of the said sum has been made by way of two (2) cheques, one payable to its order in the amount of FIVE HUNDRED THOUSAND DOLLARS (\$500,000.00) and the other payable to MONTREAL TRUST COMPANY in the amount of TWO MILLION DOLLARS (\$2,000,000.00), the whole as set forth in Paragraph 11 hereof;
3. BELL further acknowledges that the present payment has been made by ROYAL without any admission of liability and solely with a view to avoiding protracted litigation;
4. ATLAS TURNER now acknowledges that it has no claim whatsoever to assert with respect to the policies and that the payment hereby made to BELL, coupled with the latter's undertakings hereinafter stipulated to pay claimants, constitute sufficient cause and consideration for it to intervene in the present Agreement;



.../4

5. In consideration of the present payment, BELL and ATLAS TURNER forever release and discharge ROYAL from any and all liability, past, present or future, with respect to claims of any nature whatsoever which could conceivably fall under the coverage afforded by the policies, acknowledging hereby that ROYAL has satisfied and fulfilled all of its alleged obligations and duties for the entire limits during the period of coverage;

6. In further consideration of the present payment, BELL and ATLAS TURNER undertake to indemnify, forever save harmless and assume at their own expense the defence of ROYAL from and against any and all claims, demands or rights of action which may be asserted, made or instituted against ROYAL under the policies, before any Court or Tribunal having jurisdiction, and by any person or corporation, whether named in the policies or not;

7. In further consideration of the present payment, BELL and ATLAS TURNER expressly represent and guarantee that no other person or corporation, including parent, affiliated or subsidiary companies, excess or umbrella insurers, successors and assigns, is entitled to any alleged proceeds, benefits or indemnities in virtue of the policies, and that the undertaking to guarantee and indemnify ROYAL, as provided in Paragraph 6 hereof, shall apply mutatis mutandis to this paragraph as well;

8. BELL and ATLAS TURNER acknowledge that their renunciation in advance to any further claims under the policies holds true for facts which may be unknown at the present time, that this Agreement will prevent them from asking for the nullity or cancellation of the present settlement for any cause whatsoever, including error of fact or of law, and that they have transacted with ROYAL generally upon all matters between them;

9. BELL and ATLAS TURNER hereby undertake to cease and desist, as and from the date hereof, from sending any further claims, writs or other proceedings to ROYAL and acknowledge that the latter would not have entered into this Agreement without this express undertaking on their part;

10. BELL and ATLAS TURNER expressly represent and guarantee that, as of this date, they will not submit, voluntarily, copies of the policies to any third party and especially to anyone who would be likely to make use of them in a court of law, it being agreed with ROYAL that no such third party would have any right, title or interest in the policies;

.../5

[Handwritten signatures and initials]

11. It is understood and acknowledged that out of the present payment of TWO MILLION FIVE HUNDRED THOUSAND DOLLARS (\$2,500,000.00), the sum of FIVE HUNDRED THOUSAND DOLLARS (\$500,000.00) shall be applied in partial reimbursement of a much larger amount already paid in satisfaction of various judgments and/or through out-of-court settlements as indemnities to numerous claimants; and that the balance of TWO MILLION DOLLARS (\$2,000,000.00) shall be deposited in a trust account with MONTREAL TRUST COMPANY (the Trustee), which amount shall be used exclusively for the payment of indemnities to claimants alleging damages related to the use of asbestos, either in satisfaction of judgments or through out-of-court settlements; and with the undertaking as well that ROYAL shall receive from the Trustee, at its Montreal branch office, on or before the fifteenth (15th) day of February of each year (beginning in 1988) an annual statement establishing:

- i) the amounts paid;
- ii) the names of the beneficiaries; and
- iii) the balance outstanding in the said trust account,

such statement to be duly certified by the Trustee's authorized representative, this undertaking to remain in force until the trust account has been entirely extinguished; failing which BELL and ATLAS TURNER shall pay to ROYAL a penalty of ONE HUNDRED DOLLARS (\$100.00) per day until such time as their obligations hereunder are fulfilled.

Interest received from time to time by the Trustee may be used either to pay claimants or to defray the costs of defence in connection with the litigation in the United States.

If any monies remain in the trust account when all the litigation in the United States has been settled, such monies shall be paid by the Trustee to BELL;

12. The present Agreement has been drawn up in English pursuant to the express wish of the parties;

La présente convention a été rédigée en anglais

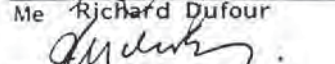
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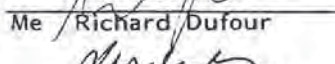


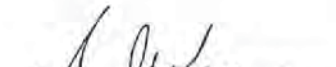
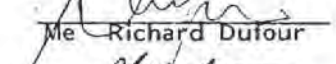
suivant la volonté expresse des parties.

IN WITNESS WHEREOF the parties have executed
five (5) counterparts of this Memorandum of Agreement at Montreal,
this eighteenth day of December, 1986.

WITNESSES:


Me Richard Dufour

Mtre J. Arclen Blakely


Me Richard Dufour

Mtre J. Arclen Blakely


Me Richard Dufour

Mtre J. Arclen Blakely

BELL ASBESTOS MINES, LTD.

By:


Mtre Alain Dulude

ROYAL INSURANCE COMPANY OF CANADA

By:


Jean-Guy Houde -
Claims Manager (Quebec)

ATLAS TURNER INC.

By:


Mtre Alain Dulude

EXTRAIT DU PROCÈS-VERBAL DE LA RÉUNION DU
CONSEIL D'ADMINISTRATION DE LES MINES D'AMIAN-
TE BELL LTÉE, TENUE À THETFORD-MINES, QUÉBEC,
LE 10 DÉCEMBRE 1986

Sur proposition dûment faite et appuyée, il est unanimement résolu:

1. D'ACCEPTER de transiger avec La Royale du Canada Compagnie d'Assurance (ci-après-appelée «La Royale»), relativement au différend entre celle-ci et Les Mines D'Amiante Bell Ltée et Atlas Turner Inc. en regard du litige de l'amiante aux Etats-Unis et des polices d'assurance émises par La Royale;
2. D'AUTORISER le conseiller juridique de la compagnie, Me Alain Dulude, de signer une convention intitulée «Memorandum of Agreement», dont copie fut soumise à l'assemblée, approuvée par celle-ci et annexée au présent procès-verbal, moyennant un paiement global de Deux Millions Cinq Cent Mille (\$2,500,000.00) dont Deux Millions (\$2,000,000.00) sera versé au Montréal Trust et Cinq Cent Mille (\$500,000.00) aux Mines D'Amiante Bell Ltée.
3. DE CONSENTIR à tous les termes et conditions dudit «Memorandum of Agreement» lequel contient, entre autre, une quittance complète et finale de toute réclamation que la compagnie a ou pourrait avoir contre La Royale et qui constitue de même une transaction au sens des articles 1918 et ss. du Code civil du Bas-Canada.

THETFORD-MINES (Québec)
le 18 décembre 1986.


Me Claire Brunelle
Secrétaire



Sur proposition dûment faite et appuyée, il est unanimement résolu:

1. D'ACCEPTER de transiger avec La Royale du Canada Compagnie d'Assurance (ci-après appelée «La Royale»), relativement au différend entre celle-ci et Les Mines D'Amiante Bell Ltée et Atlas Turner Inc. en regard du litige de l'amiante aux Etats-Unis et des polices d'assurance émises par La Royale;
2. D'AUTORISER le conseiller juridique de la société, Me Alain Dulude, de signer une convention intitulée «Memorandum of Agreement», dont copie fut soumise à l'assemblée, approuvée par celle-ci et annexée au présent procès-verbal.
3. DE CONSENTIR à tous les termes et conditions dudit «Memorandum of Agreement» lequel contient, entre autre, une quittance complète et finale de toute réclamation que la Société a ou pourrait avoir contre La Royale et qui constitue de même une transaction au sens des articles 1918 et ss. du Code civil du Bas-Canada.

MONTREAL (Québec)

le 18 décembre 1986.

Claire Brunelle

Me Claire Brunelle
Secrétaire-adjointe

Alain Dulude

AGREEMENT OF TRANSACTION, SETTLEMENT AND RELEASE

Between

Asbestos Corporation Limited

and

The Maryland Casualty Company

bearing formal date of
July 18, 1989

MCC000001

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AGREEMENT OF TRANSACTION, SETTLEMENT AND RELEASE

This Agreement of Transaction Settlement and Release ("Agreement") is entered into by and between Asbestos Corporation Limited ("ACL") and The Maryland Casualty Company ("Maryland").

Recitals

A. Maryland issued the following comprehensive liability policies (hereinafter "the Policies") to ACL.

<u>Policy No.</u>	<u>Effective Period</u>
56-107294	January 1, 1967- January 1, 1970
56-108541	January 1, 1970 - May 21, 1970
56-108801	May 21, 1970 - October 1, 1971

B. Numerous demands, claims and lawsuits have been or will be asserted or filed against ACL in various jurisdictions by persons contending that exposure to asbestos or asbestos-containing products mined, processed, manufactured, distributed or sold by ACL, or the incorporation or use of such products in public or private buildings, caused such persons (being sometimes referred to herein as the Claimants as defined further in Paragraph 5 hereof) to suffer damages as a result of (i) asbestos-related bodily injury, sickness or disease (including death resulting therefrom) contracted at various times, or (ii) injury to or destruction of property, including the loss of use thereof. The demands, claims and lawsuits described in this recital are hereafter referred to as "Asbestos Claims."

C. ACL contends that Maryland is obligated under the Policies to defend and indemnify ACL with respect to the Asbestos Claims. Maryland denies that any of the Policies it issued to ACL provides defense, indemnity or other coverage for certain of the Asbestos Claims, and disputes the extent of its obligations with respect to those Asbestos Claims for which some defense, indemnity or other coverage may be available under the Policies.

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D. Effective May 3, 1982, ACL, Maryland and various other insurance carriers entered into an agreement whereby the parties allocated responsibility, on a claim-by-claim basis, for the defense and indemnity of certain Asbestos Claims. The allocation agreement was amended in October 1983, March 1985 and August 1986, and these agreements are collectively referred to herein as the "Allocation Agreement". The Allocation Agreement was terminated effective April 17, 1989.

E. ACL and Maryland both desire to transact their outstanding dispute within the meaning of Article 1918 et seq. of the Civil Code of Lower Canada, and to compromise their differences concerning the scope of Maryland's obligations, if any, with respect to the Asbestos Claims or any other claims or losses of any nature whatsoever, arising or allegedly arising under the Policies or any other policies of liability insurance, whether known or unknown, issued to ACL at any time.

NOW THEREFORE, in consideration of the promises and mutual covenants herein, it is agreed as follows:

1. **Indemnity Trust Account.** Within fifteen days after the full execution of this Agreement, and in consideration of ACL's releases, discharges and undertakings herein, Maryland, on ACL's behalf, shall pay \$4,900,000 (subject to adjustment as provided in Paragraph 21 of this Agreement and according to Exhibit 1) into a trust account (the "Indemnity Trust Account") established for this purpose by ACL under the terms of a trust agreement (the "Indemnity Trust Agreement") to be governed by the laws of Ontario and at a financial institution in Ontario (the Trustee) selected by ACL with the consent of Maryland (such consent not to be unreasonably withheld). ACL, or its authorized representatives, shall be entitled to instruct the Trustee to draw upon the Balance of the Indemnity Trust Account (or the income thereon only, as the case may be,) for the following purposes and no others:

- (a) to pay on behalf of ACL all sums ACL becomes legally obligated to pay to third parties as a result of settlements it reaches, or final judgments rendered, in respect of Asbestos Claims that ACL has determined arise from bodily injury or property damage that would have been the responsibility of Maryland under the liability coverage it provided to ACL, and subject to obtaining a final release from any Claimant in favor of ACL;
- (b) to pay (or to reimburse ACL), from the income that has accrued upon the principal in the Indemnity Trust Account, the reasonable and necessary trustee fees and trust account administration fees charged by the Trustee selected to hold the Indemnity Trust Account, and the reasonable expenses necessary to carry out the provisions of the

MCC000003

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Indemnity Trust Agreement, provided however, if at any time such accrued income is insufficient to pay such fees and expenses as they become due, such fees and expenses shall be paid from the "Defense Trust Account" described in Paragraph 2 of this Agreement;

- (c) to reimburse ACL for any payments that ACL may be obligated to make under Paragraph 5(a) of this Agreement;
- (d) to make any payments called for under Paragraph 7 of this Agreement; and
- (e) to reimburse the issuer of the Letter of Credit called for under Paragraph 6 of this Agreement any sums owing to it under the security arrangements made in accordance with said paragraph.

Subject to subparagraph (a) of this paragraph, ACL shall at all times enjoy full discretion to make such settlements of Asbestos Claims as it, in the exercise of good faith, deems fit.

The Indemnity Trust Agreement shall be in the form attached to this Agreement as Exhibit 2, or in such other form as may be satisfactory to the Trustee, ACL and Maryland.

It is the intention of both parties to this Agreement that the Trustee, upon acceptance to act as Trustee and upon the execution of the Indemnity Trust Agreement with ACL, shall own the funds in the Indemnity Trust Account for the benefit of the Claimants and for the other specific purposes recited herein. ACL shall have the right to direct the Trustee in the investment of these funds; provided however, ACL shall only direct the Trustee and the Trustee shall only be authorized to acquire, hold or invest in (i) cash, (ii) short-term fixed income securities issued by the Trustee or a bank set out in Schedule A of the Bank Act (Canada) and, with Maryland's written approval, Schedule B of such Act, or (iii) investments set forth in the Civil Code of Lower Canada Article 981o(a), (b), (e)(1), or (f). It shall be the sole responsibility of ACL to ensure that the investment of these funds provides at all times an appropriate degree of liquidity of the account funds taking into consideration the number, severity and status of pending Asbestos Claims.

2. Defense Trust Account. Within fifteen days after the full execution of this Agreement, and in consideration of ACL's releases, discharges and undertakings herein, Maryland, on ACL's behalf, shall pay \$5,050,000 into a trust account (the "Defense Trust Account") established for this purpose by ACL under the terms of a trust agreement (the "Defense Trust Agreement") to be governed by

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the laws of Ontario and with the same Trustee selected to maintain the Indemnity Trust Account. ACL, or its authorized representatives, shall be entitled to instruct the Trustee to draw upon the principal and income of such Defense Trust Account for the following purposes and no others:

- (a) to pay the reasonable and necessary counsel fees incurred by ACL in defending Asbestos Claims, and other expenses (such as court costs, depositions, witness fees, experts' fees, appeal bonds) that are directly attributable to the defense of Asbestos Claims that ACL has determined arise from bodily injury or property damage that would have been the responsibility of Maryland under the liability coverage it provided to ACL, provided however, funds in the Defense Trust Account may not be used to pay any fees or costs incurred by or on behalf of ACL in connection with its efforts to investigate or litigate insurance coverage issues or negotiate this Agreement or any agreement with any of ACL's other insurance carriers;
- (b) to pay (or to reimburse ACL) the reasonable and necessary trustee fees and trust account administration fees charged by the Trustee selected to hold the Defense Trust Account, the reasonable expenses necessary to carry out the provisions of the Defense Trust Agreement, and the fees and expenses set forth in the proviso to Paragraph 1(b) of this Agreement;
- (c) to pay the reasonable and necessary Letter of Credit fees charged by the financial institution which issues the Letter of Credit called for under Paragraph 6 of this Agreement;
- (d) to reimburse ACL for any payments that ACL may be obligated to make under Paragraph 5(b) of this Agreement;
- (e) make any payments called for under Paragraph 7 of this Agreement;
- (f) to pay, in an amount not to exceed in any one year 5% of the income generated in that year by the principal remaining in both the Defense Trust Account and Indemnity Trust Account, a reasonable share (such share to take into account other insurance coverage or insurance proceeds available to ACL) of the expenses incurred by ACL in monitoring, managing or administering the defense of Asbestos Claims;
- (g) to pay into the Indemnity Trust Account, upon reduction of the Balance in the Indemnity Trust Account to \$500,000 by virtue of disbursements made in accordance with Paragraph 1 of this Agreement, such amounts as may, when added to said Balance of \$500,000, be required to discharge ACL's obligations under fully executed settlement agreements reached, or final judgments issued, as

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a result of Asbestos Claims; provided however, the total of all sums transferred pursuant to this subparagraph shall in no event exceed \$1,345,000; and

- (h) to reimburse the issuer of the Letter of Credit called for under Paragraph 6 of this Agreement any sums owing to it under the security arrangements made in accordance with said Paragraph 6.

Subject to subparagraph (a) of this paragraph, ACL shall at all times enjoy full discretion to defend Asbestos Claims as it, in the exercise of good faith, deems fit.

The Defense Trust Agreement shall be in the form attached to this Agreement as Exhibit 3, or in such other form as may be satisfactory to the Trustee, ACL and Maryland.

It is the intention of both parties to this Agreement that the Trustee, upon acceptance to act as Trustee and upon the execution of the Defense Trust Agreement with ACL, shall own the funds in the Defense Trust Account for the purposes of the present Agreement. ACL shall have the right to direct the Trustee in the investment of these funds; provided however, ACL shall only direct the Trustee and the Trustee shall only be authorized to acquire, hold or invest in (i) cash, (ii) short-term fixed income deposits issued by the Trustee or a bank set out in Schedule A of the Bank Act (Canada) and, with Maryland's written approval hereto, Schedule B of such Act, or (iii) investments set forth in the Civil Code of Lower Canada Article 981o(a), (b), (e)(1) or (f). It shall be the sole responsibility of ACL to ensure that the investment of these funds provides at all times an appropriate degree of liquidity of the account funds taking into consideration the number, severity and status of pending Asbestos Claims.

3. Releases.

(a) ACL, in consideration of Maryland's undertakings as outlined in the preceding paragraphs and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, does hereby for itself, its past, present and future officers, directors, principals, affiliates, subsidiaries, servants, agents, mandataries, representatives, successors, assigns and/or any person making a claim through or derived from ACL (all such persons hereinafter collectively and individually referred to as "ACL"), release, acquit and forever discharge Maryland and its past, present and future officers, directors, principals, affiliates, subsidiaries, servants, agents, mandataries, representatives, successors, and assigns from any and all actual or potential liability, and from any and all past, pending, future, fixed, contingent, known or unknown claims, rights, demands, or causes of action,

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- (1) arising under or related to the defense, indemnity or other coverage provided by the Policies (or any other policies of liability insurance, whether known or unknown, issued to ACL at any time) for or in connection with "bodily injury" or "property damage" as those terms are defined in the Policies, including without limitation, all defense, indemnity or other coverage with respect to Asbestos Claims or any other claims or losses of any nature whatsoever, such that all such matters and disputes between the parties are finally and conclusively transacted;
- (2) arising under, resulting from, or related to the Allocation Agreement; or
- (3) arising from or in any way related to Maryland's monetary obligations to ACL as of the date of this Agreement, such monetary obligations currently estimated by ACL to be approximately \$150,000.

(b) ACL acknowledges that the payments made by Maryland on ACL's behalf under the preceding paragraphs of this Agreement represent, and shall be conclusively deemed for all purposes to be, a full and final payment and complete exhaustion of the currently remaining, separately stated aggregate limits of liability under Policy Nos. 56-107294 and 56-108541 for "bodily injury" and "property damage" (as those terms are defined in the Policies), and a full and final payment and complete exhaustion of the currently remaining aggregate combined single limits of liability under Policy No. 56-108801. ACL further acknowledges that the agreements of Maryland herein contained constitute the fulfillment of Maryland's entire obligations under the Policies (or any other policies of liability insurance, whether known or unknown, issued to ACL at any time). Accordingly, ACL hereby surrenders, renounces, relinquishes, waives and bargains away all past, present or future rights, whether known or unknown, to any further defense, indemnity or other coverage under the Policies (or any other policies of liability insurance, whether known or unknown, issued to ACL at any time) for or related to any liability imposed (or which is sought to be imposed) on ACL, or any loss, of any nature whatsoever.

(c) ACL's obligations under the Policies (or any other policies of liability insurance, whether known or unknown, issued to ACL at any time) shall automatically terminate when the total of the Balances in the Indemnity Trust Account and the Defense Trust Account has been reduced to zero by disbursements made in accordance with this Agreement.

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4. Obligations under the Allocation Agreement. In consideration of Maryland's undertakings and promises herein, and effective upon the date of full execution of this Agreement, ACL shall assume and fully discharge all of Maryland's obligations under the Allocation Agreement, including such obligations with respect to those matters already "allocated" (as that term is used in the Allocation Agreement) to Maryland in which final payment has not been made; provided however, Maryland shall be responsible for "defence costs" (as that term is defined in the Allocation Agreement) incurred prior to April 17, 1989 in the defense of Asbestos Claims with respect to cases allocated to Maryland under the Allocation Agreement.

5. Indemnification. ACL recognizes that persons asserting, or seeking indemnification or contribution with respect to, Asbestos Claims ("Claimants"), or other insurance carriers, may assert claims or initiate proceedings (hereinafter "Third-Party Actions") against Maryland for the purpose of causing Maryland directly or indirectly to satisfy Asbestos Claims or claims for indemnification or contribution with respect to such Asbestos Claims. Such Third-Party Actions include, but are not limited to, efforts to recover sums under the Policies (or any other policies of liability insurance, whether known or unknown, issued to ACL at any time) (i) under the provisions of the civil law of the Province of Quebec; (ii) by seeking to garnish or attach the proceeds of the Policies (or such other policies); (iii) by asserting the rights of third-party beneficiaries under the Policies (or such other policies); (iv) by instituting a declaratory judgment action concerning the obligations of Maryland under the Policies (or such other policies); (v) by instituting an action for contribution; or (vi) under any state's or other jurisdiction's direct action or reach-and-apply statutes. ACL acknowledges that, in the event a Third-Party Action is asserted or instituted against Maryland, ACL shall

- (a) indemnify Maryland for all sums Maryland becomes legally obligated to pay to Claimants or other insurance carriers as a result of settlements or judgments reached in such Third-Party Action;
- (b) indemnify Maryland for all reasonable and necessary counsel fees incurred by Maryland in defending such Third-Party Action, and other expenses (such as court costs, depositions, witness fees, experts' fees, appeal bonds) that are directly attributable to the defense of such Third-Party Action;
- (c) where the Third-Party Action is asserted or instituted by a Claimant who has not obtained a judgment against ACL, cooperate with Maryland in the defense of such Third-Party Action; and
- (d) in its own name and at its own expense actively and in good faith oppose, and join with Maryland in opposing, any effort by any party to invalidate, set aside, or have declared unenforceable or ineffective

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any aspect of this Agreement, the Indemnity Trust Agreement, or the Defense Trust Agreement.

ACL's obligations under subparagraph (a) of this Paragraph, and toward Maryland under Paragraph 4 of this Agreement, shall at no time exceed the Balance then remaining in the Indemnity Trust Account, and shall terminate when such Balance has been reduced to zero by disbursements made in accordance with Paragraph 1 of this Agreement. ACL's obligations under subparagraph (b) of this Paragraph shall at no time exceed fifty percent (50%) of the Balance then remaining in the Defense Trust Account, and shall terminate when such Balance has been reduced to zero by disbursements made in accordance with Paragraph 2 of this Agreement. So long as the Balance remaining in the Defense Trust Account exceeds \$150,000, Maryland shall execute no settlements of Third-Party Actions without ACL's prior consent, such consent not to be unreasonably withheld. After such Balance has been reduced to \$150,000, Maryland shall not be required to secure the consent of ACL to settle any Third-Party Action, but Maryland shall in good faith inform and consult with ACL concerning any such settlement. Maryland shall at all times, without regard to the Balance in the Defense Trust Account, enjoy full discretion to defend such Third-Party Actions as it, in the exercise of good faith, sees fit.

6. Letter of Credit.

(a) To secure ACL's performance of its obligations under subparagraphs (a) and (b) of the preceding Paragraph, ACL shall, within fifteen days after the full execution of this Agreement, but in no event later than the establishment of the Indemnity Trust Account or Defense Trust Account, cause a financial institution in Ontario (the "Issuer") selected by ACL with the consent of Maryland (such consent not to be unreasonably withheld) to issue an irrevocable, clean, standby Letter of Credit (the "LOC") naming Maryland as beneficiary, and effective upon the date of its issuance. ACL shall, as part of its application for such LOC, provide the Issuer with a copy of this Agreement. The LOC shall be for an initial term of one year, shall be renewable and shall obligate the Issuer to honor Maryland's drafts at sight upon certification by Maryland that ACL has failed to perform its obligations under this Agreement and that as a result thereof Maryland is entitled to payment of the amount of such drafts. Maryland may present such drafts where:

(i) Maryland has become legally obligated to pay sums described in Paragraph 5(a) of this Agreement, and/or it has incurred reasonable and necessary counsel fees or other expenses described in Paragraph 5(b) of this Agreement; and

(ii) despite Maryland's written demand upon ACL for indemnification no less than forty-five (45) days before the date of such sight draft, ACL has failed and/or refused to comply fully with its indemnification

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obligations under Paragraph 5 of this Agreement with respect to such sums, fees and other expenses.

Maryland may also present its draft upon the LOC where (i) ACL has failed or refused to provide the notice of renewal of the LOC required in subparagraph (b) of this paragraph within the time prescribed; or (ii) ACL has advised Maryland that it does not intend to renew the LOC in accordance with subparagraph (b) of this paragraph; (iii) ACL has failed to effectuate the transfer of Balances to a substitute Trustee in accordance with, and within the time prescribed by, paragraph 7(c) of this Agreement; or (iv) the Trustee has given notice of its intention to apply or has applied to the appropriate judicial authority for disposition of the Balances.

(b) ACL agrees to secure one-year or longer renewals of the LOC from time to time, and to comply with all conditions imposed by (and all requests of) the Issuer, such that Maryland shall be and remains at all times the named beneficiary of a fully effective, unexpired LOC conforming to the provisions of this Paragraph 6 until the Balance in the Indemnity Trust Account has been reduced to \$200,000 by disbursements made in accordance with Paragraph 1 of this Agreement, or the date on which the Indemnity Trust Account Agreement has been terminated in accordance with Paragraph 7(a) of this Agreement, whichever date occurs first. ACL further agrees to provide written notice to Maryland of each renewal of the LOC (such notice to be subscribed to by the Issuer) at least twenty (20) days prior to the expiration of the LOC to be thus renewed.

(c) The initial amount of the LOC shall be \$7,350,000. The amount of the LOC shall thereafter be reduced as often as ACL requires, but the amount of the LOC shall, as a result of each such reduction, equal or exceed 75% of the total of the remaining Balances of the Indemnity Trust Account and Defense Trust Account. After the total of the said Balances falls below \$2,100,000, the amount of the LOC shall, as a result of each such reduction, thereafter equal or exceed 50% of the total of said Balances. To effectuate such reductions to the amount of the LOC, ACL shall provide the Issuer with a notice of reduction countersigned by Maryland. Maryland shall countersign each notice of reduction that complies with this subparagraph within 10 days after ACL has submitted such notice of reduction to Maryland for countersignature. Each notice of reduction submitted by ACL to Maryland for countersignature shall be accompanied by a current statement by the Trustee of the Balances in the Indemnity Trust Account and Defense Trust Account.

To secure the obligations of ACL to the Issuer arising under or in connection with the LOC, but for no other purpose whatsoever, the Trustee may pledge, mortgage or otherwise encumber up to 100% of the Balances remaining

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in both the Indemnity Trust Account and the Defense Trust Account. The LOC shall be in the form attached to this Agreement as Exhibit 4, or in such other form as may be satisfactory to the Issuer, ACL and Maryland.

7. Termination of Trust Account Agreements.

(a) (i) As used in this Paragraph, the phrase "full and complete liquidation or discharge of all Asbestos Claims against ACL" shall mean the expiration of a continuous twenty-four month period in which no Asbestos Claims are pending or asserted against ACL, and no Third-Party Actions (as that term is defined in Paragraph 5 of this Agreement) are pending or asserted against Maryland.

(ii) Upon the full and complete liquidation or discharge of all Asbestos Claims against ACL, the Trustee shall remit to ACL the then remaining Balance in the Indemnity Trust Account, and terminate the said Indemnity Trust Agreement.

(iii) Upon the full and complete liquidation or discharge of all Asbestos Claims against ACL, or at any other time by written agreement of Maryland and ACL, the Trustee shall remit to Maryland the then remaining Balance in the Defense Trust Account, and terminate the Defense Trust Agreement.

(iv) In the event of the bankruptcy, insolvency, dissolution or liquidation of ACL, the Indemnity Trust Agreement and the Defense Trust Agreement shall continue in force except that Maryland shall assume the obligations of ACL to instruct the Trustee in accordance with Paragraphs 1 and 2 of this Agreement.

(b) With the consent of Maryland, such consent not to be unreasonably withheld, ACL may also terminate the Indemnity Trust Agreement or Defense Trust Agreement for the purpose of transferring and entrusting the funds in those accounts to a substitute Trustee, under a trust agreement containing terms and conditions satisfactory to Maryland. Without limiting the generality of the foregoing, Maryland shall have reasonable grounds to withhold its consent where Maryland or the Issuer believes that such a termination of the trust account(s) or substitution of Trustee might impair any security posted in connection with the issuance of the LOC.

(c) In the event the Trustee notifies ACL of its intention to exercise its right under the Indemnity Trust Agreement or Defense Trust Agreement to resign its function as Trustee under either or both such agreements, ACL shall (i) so notify Maryland in writing within fifteen days of receiving the Trustee's notice of its intention to resign, and (ii) transfer and entrust the Balances in the

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account(s) to a substitute Trustee, under a trust agreement (or trust agreements, as the case may be) containing terms and conditions satisfactory to Maryland. The substitute Trustee shall be a financial institution in Ontario selected by ACL with the consent of Maryland (such consent not to be unreasonably withheld), and the trust agreement(s) shall be governed by the laws of Ontario. ACL shall take whatever steps are necessary to ensure that the foregoing transfer of funds to a substitute Trustee shall be fully accomplished and effective no less than thirty days before the original Trustee's resignation takes effect.

8. Rendering of Trust Accounts. Within thirty days after the end of each calendar year quarter, and beginning with the first full calendar quarter following execution of this Agreement, ACL shall provide to Maryland a statement of the Balance in the Indemnity Trust Account and the Defense Trust Account, disbursements from and earnings upon those accounts, the application of such disbursements (specifying the particular settlements or judgments discharged, and defense costs paid), copies of any certifications provided by ACL to the Trustee in accordance with the trust agreements, and any other information or documents (e.g. copies of complaints) reasonably requested by Maryland. ACL shall further provide to Maryland copies of the releases obtained from the Claimants, copies of all statements of account issued by the Trustee to ACL with respect to the Indemnity Trust Account and the Defense Trust Account, and copies of the monthly statement of securities held in the Indemnity Trust Account and Defense Trust Account assigned to the Bank including their market value.

9. Third-Party Actions. ACL agrees that it will cease and forego all efforts to locate or develop any evidence or other information that may directly or indirectly assist any Claimant in developing, asserting or litigating any Third-Party Action against Maryland, and ACL further agrees that it shall refrain from assisting others in locating or developing any such evidence or information.

10. Assignments and Subrogation. ACL covenants and agrees that it will not effect or attempt to effect any assignment of rights under any of the Policies (or any other policies of liability insurance, whether known or unknown, issued to ACL at any time), or any assignment of rights to institute or conduct coverage litigation against Maryland, to any person. ACL further represents and warrants that it has not effected or attempted to effect any such assignments. ACL recognizes that, to the extent of the sums deposited by Maryland into the Indemnity Trust Account pursuant to Paragraph 1 of this Agreement, Maryland desires to have contractually assigned to it all of ACL's rights of recovery against other persons with respect to the Asbestos Claims, and ACL agrees to effect such contractual assignment, provided however, Maryland agrees to effectuate and provide, with respect to Asbestos Claims, a waiver of its rights of subrogation against each of the following companies and its liability insurance carrier(s) upon receipt by

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Maryland of a satisfactory waiver of subrogation in favor of ACL and Maryland and executed by each of the following companies and its liability insurance carrier(s):

Bell Asbestos Mines,
Atlas Turner Inc.,
Atlas Asbestos Company, Ltd.,
Les Mines SNA Inc.,
Société Nationale de l'Amiante

Maryland shall bear all fees and costs incurred in prosecuting any subrogation action not waived in accordance with the preceding sentence. ACL shall do nothing whatsoever to prejudice Maryland's rights of recovery against other persons with respect to Asbestos Claims.

11. Mutual Release With Other Carriers of ACL. Maryland agrees to effectuate and provide, with respect to Asbestos Claims, a release of all claims, demands and causes of action against each of the other insurers of ACL upon receipt by Maryland of a coextensive and equal release of it executed by such other insurer.

12. Dismissal of Declaratory Judgment Proceedings. Within five days after the full execution of this Agreement, ACL will file a Declaration of Settlement out of Court in relation to the proceedings in the Motion for Declaratory Judgment filed by ACL on June 29, 1987 and bearing Superior Court No. 500-05-006502-874, such Declaration to be duly signed by all the parties to said proceedings.

13. Notices, Approvals, Other Communications. Any notices, approvals, consents or other communications required or permitted under this Agreement shall be sent to the individuals and addresses designated below, or to the designees of the individuals indicated below:

To ACL: Mr. Alain Dulude
Asbestos Corporation Limited
840, Quellet Boulevard West
Thetford Mines, Quebec,
G6G 7A5

with a copy to:

Mr. Richard Dufour
Dufour, Fradette
3400 du Souvenir Boulevard, Suite 300
Laval, Quebec, H7V 3Z2

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To Maryland: Mr. Rein Keskula
The Maryland Casualty Co.
3910 Keswick Road
Baltimore, Maryland 21211

with a copy to:

Mr. J. Vincent O'Donnell, Q.C.
Lavery, O'Brien
1 Place Ville Marie
40th Floor
Montreal, Quebec,
H3B 4M4

14. Governing Law and Acknowledgments. This Agreement and all questions relating to its validity, interpretation, performance and enforcement shall be governed by and construed in accordance with the laws of Quebec, notwithstanding any conflict-of-laws doctrines to the contrary.

The Indemnity Trust Agreement and the Defense Trust Agreement shall be drafted according to and shall be governed by the laws of the Province of Ontario, notwithstanding any conflict-of-laws doctrines to the contrary.

The undersigned representatives of Maryland and ACL acknowledge that they have read this Agreement; that each has had the advice and assistance of outside counsel and has not been influenced to any extent whatsoever by any representations or statements made by Maryland, ACL or agents of these parties other than those contained in this Agreement; and that each party voluntarily executes this Agreement. Ambiguities determined to exist in this Agreement are not to be construed against any party.

15. Indulgences, Etc. Neither the failure nor any delay on the part of Maryland or ACL to exercise any right, remedy, power or privilege ("Right") under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any Right preclude any other or further exercise of the same or of any other Right. No waiver shall be effective unless it is in writing and is signed by the party asserted to have granted such waiver.

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16. Assignments Under Agreement. Neither party to this Agreement may assign its rights or obligations under this Agreement without the prior written consent of the other party.

17. Compromise and Incorporation. This Agreement represents a compromise and transaction of disputed claims and is the product of arms-length negotiations. No promises, inducements or considerations have been offered and accepted, or given, except as herein set forth. The entire agreement of the parties relating to the subject matter of this Agreement is contained herein, and this Agreement supersedes any prior oral or written agreement concerning the subject matter hereof, including but not limited to the Allocation Agreement.

18. No Admissions. ACL acknowledges that Maryland denies and disputes coverage under the Policies (and any other policies of liability insurance, whether known or unknown, issued to ACL at any time) for the Asbestos Claims, and that Maryland's payments under this Agreement are made in compromise and transaction of disputed coverage demands only. This Agreement is not, and cannot be construed as, or asserted by any party to be, an admission by Maryland that any coverage exists under the Policies (or any other policies of liability insurance, whether known or unknown, issued to ACL at any time) for any of the Asbestos Claims, or any other claims that have been or may be asserted against ACL, nor does this Agreement constitute an acceptance by ACL or Maryland of any interpretation of the Policies (or any other policies of liability insurance, whether known or unknown issued at any time). ACL and Maryland agree that none of the terms of this Agreement shall constitute a recognition or admission of one or the other of the parties hereto as to the interpretation of coverage under the Policies (or any other policies of liability insurance, whether known or unknown, issued to ACL at any time). The Agreement shall, however, be admissible in evidence in any action to show that Maryland has no further obligations concerning coverage or payment of proceeds under the Policies (or any other policies of liability insurance, whether known or unknown, issued to ACL at any time).

19. Confidentiality. The parties to this Agreement shall maintain in strict confidence the terms and conditions of this Agreement, the Indemnity Trust Agreement, the Defense Trust Agreement and any documents related thereto, except as further provided in this paragraph. Such terms and conditions may be disclosed:

- (a) in any action by either party hereto to enforce the terms and conditions of this Agreement;
- (b) to the reinsurers, reinsurance intermediaries, or auditors of Maryland or its parent company;

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- (c) by Maryland in response to any Third-Party Action, or any other claim, demand or cause of action of whatsoever kind and nature asserted against Maryland for defense, indemnity or other coverage under the Policies (or any other policies of liability insurance, whether known or unknown, issued to ACL at any time);
- (d) by ACL to any insurer that issued a policy of liability insurance to ACL, or to ACL's auditors, to ACL's parent, or to any one of its five (5) affiliated companies as identified in Paragraph 10 of this Agreement; provided however, ACL may disclose the terms and conditions of this Agreement to such parties only after receiving from each such party to whom it wishes to make such disclosure a written commitment by that party to maintain the confidentiality of the terms and conditions of this Agreement;
- (e) under valid order of any court of competent jurisdiction, such order not to be sought by either party to this Agreement, provided however, the party to be made subject to such an order shall provide immediate written notice to the other party hereto of any effort by any person to obtain such an order, to enable such other party hereto to oppose, if desired, the issuance of such an order; and
- (f) by mutual written agreement of the parties.

20. Interpretation. As used in this Agreement:

- (a) the symbol "\$" and the term "dollars" shall be interpreted to mean Canadian dollars; and
- (b) the term "person" shall be interpreted to include corporations, partnerships, joint ventures, associations, government departments or agencies, and any other entities, as well as individuals.
- (c) the term "Balance" or "Balances" in relation to the Indemnity Trust Account or the Defense Trust Account shall be the value of the assets in which the funds from the said accounts are invested with all interest or dividend income accrued thereon and any capital appreciation or depreciation with respect to such assets.

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21. The amount Maryland is required to deposit into the Indemnity Trust Account shall be \$4,900,000, less the total of all payments made on behalf of ACL by Maryland to third parties between March 31, 1989 and the date of this Agreement, as a result of settlements reached and final judgments rendered in respect of Asbestos Claims ("Transition Indemnity Payments").

The Transition Indemnity Payments are set forth in Exhibit 1 hereto.

22. Amendments. This agreement may not be amended or modified except in writing and when duly signed by an authorized representative on behalf of both parties hereto.

23. Representative Capacity. Each person signing this Agreement in a representative capacity hereby expressly warrants that he has express authority to bind his principal and signs this Agreement in such representative capacity on behalf of his principal.

24. Execution in Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original as against any party whose signature appears thereon, and all of which shall together constitute one and the same instrument. This Agreement shall be deemed fully executed and shall become binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of the parties reflected herein as signatories.

25. Paragraph Headings. Paragraph headings in this Agreement are provided only for the convenience of the parties; they form no part of this Agreement and shall not be used as an aid in interpretation of the contracting intent of the parties hereto.

26. Further Assurances. Each of the parties hereto shall make, do or execute or cause to be made, done or executed all such acts, documents, deeds or things as may be necessary or reasonably required to carry out the intent and purpose of this Agreement and the transactions contemplated thereby.

27. Language. The parties hereto have required that the present Agreement and all documents relating thereto be drawn up in the English language only. Les parties aux présentes ont exigé que la présente convention ainsi que tous les documents s'y rattachant soient rédigés en langue anglaise seulement.

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DATED this 18th day of July, 1989.

SOCIÉTÉ ASBESTOS LIMITÉE
ASBESTOS CORPORATION LIMITED

Per/By: 

Title: _____

COMPAGNIE MARYLAND CASUALTY
THE MARYLAND CASUALTY COMPANY

Per/By: 

Title: _____

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Peter Protopapas

From: Lindsay Valek
Sent: Wednesday, June 21, 2023 2:18 PM
To: Stefanie Haines; lossreport@cnaasap.com
Cc: Peter Protopapas; Danny Nieto
Subject: Tender to Continental / CNA / Resolute of Matters on behalf of ATLAS TURNER, INC. (Potter, Gonce, Goodwin, Flynn, Childers, Tibbs & Welch)
Attachments: Welch - FILS Original S&C (w path rpt) 07.25.22.pdf; Welch - FILS Motion to Expedite 07.26.22.pdf; GONCE - Summons & Complaint (wPath) - FILED - 06.06.23.pdf; Childers - 2nd Amd S&C (wpath rpt) - FILED 05.09.23.pdf; Potter - FILS 1st Amd S&C (w path rpt) - 06.20.23.pdf; Flynn - FILS MTE and Exhibits.pdf; Flynn - 1st Amd S&C - FILED 05.17.23.pdf; Goodwin - FILS S&C (w path rpt) - 05.23.23.pdf; 2023.04.05 Tibbs - FILS Summons & Complaint (w path & linking rpts) - 04.05.23.pdf; 2023.06.21 Order to Appoint a Receiver.pdf

Please be advised that the Receiver for ATLAS TURNER, INC. (order of appointment is attached) is tendering the following matters against Atlas alleging asbestos bodily injury:

Ricky Dean Flynn as the Executor of the Estate of Jerry Kay Flynn, vs. 3M Company, et al. Note: Motion to Expedite (attached).
 Case Number 2023-CP-40-00633
 Pending in Richland County, SC

Joe Eldra Goodwin, Ind. And as PR for the Estate of Dorothy Jean Fox Goodwin vs. Air & Liquid Systems Corporation, et al.,
 Case Number 2020-CP-40-04613
 Pending in Richland County, SC

John A. Tibbs and Margaret B. Tibbs vs. 3M Company, et al.
 Case Number 2023-CP-40-01759
 Pending in Richland County, SC

Melvin G. Welch and Donna B. Welch vs. 3M Company, et al. Note: Motion to Expedite (attached).
 Case Number 2022-CP-40-03834
 Pending in Richland County, SC

Sandra M. Gonch, Ind and as Exectrix of the Estate of Dwight GOnce, deceased vs. Air & Liquid Systems Corporation, et al.
 Case Number 2023-CP-40-02933
 Pending in Richland County, SC

Lenora Childers, Ind and as PR for the Estate of Lewis C. Childers vs. 3M Company, et al.
 Case Number 2021-CP-40-3484
 Pending in Richland County, SC

Heather Donaghy as PR for the Estate of Shirley Smiley Potter, deceased vs. 4520 Corp, et al.
 Case Number 2023-CP-40-03108

Pending in Richland County, SC

The Receiver for Atlas respectfully provides notice and tender and requests that the insurers provide a full defense and complete indemnification under all applicable insurance policies to Atlas for amounts incurred or which may be incurred in relation to the defense and resolution of this asbestos suit. To the extent that a defense will not be provided, please advise so that the Receiver can take the actions necessary to protect Atlas. To the extent the information has not been provided to the Receiver already, we request copies of each, and every policy issued to, or otherwise protective of, Atlas.

We request that you confirm in writing your receipt of this notice and tender and your acknowledgment of your insuring obligations with respect to the above-referenced suit.

As always, thank you for your attention to this matter and please don't hesitate to reach out if you have any questions or concerns.

Lindsay H. Valek
Paralegal



Phone: 803.978.6111
Mobile: 803.360.7391
Fax: 803.978.6112
lindsay@rplegalgroup.com
rplegalgroup.com

2110 N. Beltline Blvd.
Columbia, SC 29204



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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
MELVIN G. WELCH and	)	
DONNA B. WELCH,	)	
	)	
	)	
Plaintiffs,	)	CASE NO. 2022-CP-40-03834
	)	
v.	)	REPORT OF THE RECEIVER OF
	)	THE INSURANCE ASSETS OF
	)	ATLAS TURNER AND RESPONSE TO
	)	CERTAIN INSURER THIRD-PARTY
3M COMPANY, <i>et al.</i> ,	)	DEFENDANTS' MOTION TO STAY
	)	THE THIRD-PARTY ACTION
Defendants.	)	

Peter D. Protopapas, as Receiver for the Insurance Assets of Atlas Turner Inc., f/k/a Atlas Asbestos Company (“Atlas”), submits this Report and Response (i) to provide an interim report to the Court on the Receiver’s investigation into Atlas’s potential Insurance Assets to respond to asbestos personal injury liabilities in this Court, and (ii) to seek guidance from the Court with regard to future activity in light of recent filings by Third-Party Defendants The Continental Insurance Company (“Continental”) and Certain Underwriters at Lloyd’s, London and Certain London Market Companies (“Certain London Market Insurers”) seeking to “enforce an automatic stay.”

Report on Investigation to Date

The Receiver’s investigation to date into Atlas’s potential Insurance Assets has already uncovered evidence that Atlas had (and likely still has) insurance responsive to U.S. asbestos claims—but that Atlas has elected to adopt a strategic “posture” of minimal engagement, with its insurers (acting either in concert with Atlas or independently) withdrawing their defense of Atlas, resulting in the entry of default judgments against Atlas in asbestos litigation across the country.

A. *Prior Atlas litigation reveals the adoption of a strategy change in 1985 to avoid U.S. jurisdiction.*

In his research, the Receiver located a multi-plaintiff case in Ohio, in which Atlas appears to have purposefully withdrawn its defense and allowed a trial court to enter default judgments against it on 22 asbestos personal injury claims, with the expectation (or belief) that the underlying plaintiffs would be unable to collect on the default judgments entered against it. *See Antoine v. Atlas*, 66 F.3d 105 (6th Cir. 1995).

As recounted in the pleadings and related documents the Receiver has reviewed, in December 1990,¹ plaintiffs, represented by Ness Motley, sued Atlas and a series of insurers who they believed were responsible for the Atlas liabilities—including Royal Insurance (Arrowood), Certain London Market Insurers, Canadian General (Aviva), Federal and Chubb—to collect on the previously entered default judgments. That action, filed in the federal district court for the Southern District of Ohio, was captioned *Antoine v. Atlas Turner*, No. 1:90-cv-02231.

The *Antoine* case revealed a purposeful plan on the part of Atlas, which previously had actively participated in the U.S. asbestos personal injury litigation, to abruptly withdraw, in 1985, its defense in the *Antoine* case and its defense of U.S. asbestos litigation as a whole. In a September 24, 1985 letter to Atlas’s long-time Ohio counsel, James Conroy, Alain Dulude of Atlas Turner explained:

Over the last two years, the posture of Bell Asbestos Mines, Limited and Atlas Turner Inc in the U.S. asbestos litigation has changed considerably. For economic and other considerations, with which you are already acquainted, **Bell and Atlas have taken a minimal defense posture and have proceeded to default judgments in several cases.** After reviewing the overall situation, and in

¹ The Receiver believes that Plaintiffs may have elected to initiate the action to recover funds in 1990 because by that time, the Societe National de L’Amiante, the Canadian state-owned entity that had acquired Atlas, had sold Atlas and ceased to exist. *See Vasura v. AC&S*, 84 F. Supp. 2d 531, 534 (S.D.N.Y. 2000) (“[w]ithout question Atlas Turner was not a foreign state in 1999 when this lawsuit was filed, having been sold a decade earlier [in 1989] by Societe Nationale de L’Amiante.”).

contemplation of additional decisions regarding the position of Bell and Atlas in the U.S. asbestos litigation, I must advise you at this time that all matters involving Bell Asbestos Mines Limited and/or Atlas Turner Inc are to be transferred immediately to Thomas P. Meaney, Jr., Esq.

Exh. A. Despite the change in counsel, Mr. Conroy received a Notice of Application for Default Judgment as to Atlas in the 22 asbestos personal injury cases. See Exh. B, Deposition of J. Conroy, at 16-17. Conroy “immediately contacted Mr. Meaney on the telephone,” as requested in Dulude’s letter, and messengered the documents to Mr. Meaney’s office. *Id.* at 17. Even though Mr. Meaney received the telephone call and documents, Atlas allowed the default to proceed. The court entered default judgments on December 17, 1985. See Exh. C, Order on Motion to Set Aside Default Judgments, N.D. Ohio, No. 1:90-cv-02231, at 4.

The “minimal defense posture” Atlas adopted in 1985 appears predicated on its status, at that time, as a subsidiary of a company owned by the Province of Quebec, which it argued made it immune to litigation in the United States. As the federal district court noted in his order denying Atlas’s motion to set aside the default judgments, Atlas was “a subsidiary of Societe National de L’Amiante, a Crown Corporation established pursuant to a Parliamentary Act of the Province of Quebec,” and therefore was “‘an agency or instrumentality of a foreign state’ and a ‘foreign state’ within the meaning of 28 U.S.C. 1603(b).” *Id.* at 3. Therefore, “Atlas does not dispute that it received copies of the default judgments; it simply argues that the default judgments were not properly served upon it in accordance with the [Foreign Sovereign Immunities Act].” *Id.* at 4.

Discovery in the *Antoine* case also revealed that during this period of the Atlas strategy change, at least one of Atlas’s insurers, Chubb, withdrew its defense of Atlas in the asbestos cases. Although it certainly is curious, the Receiver has not yet been able to ascertain what prompted Chubb’s decision--at the same time Atlas adopted its “minimal defense posture”—to suddenly withdraw its defense of Atlas. In his deposition, Atlas’s former Ohio counsel, James Conroy,

testified only, I “was advised in late March of 1985 that I was no longer to—that if I was to continue representing these companies, it would be direct representation as far as payment of fees and that Chubb no longer had an obligation to defend.” Exh. B at 306. Conroy noted Chubb’s decision to withdraw its defense in his initial letter to Thomas Meaney on October 29, 1985: “Further to our conversation of October 28, 1985, enclosed you will find a list of those Atlas and/or Bell cases which our records indicate were active as of the date of declination of coverage by Chubb Insurance.” Exh. D, letter from J. Conroy to T. Meaney, Oct. 29, 1985.

B. *Atlas applies its avoidance strategy across the U.S.*

Atlas repeated its practice of attempting to avoid claims, by allowing defaults, in multiple other actions across the U.S. *See, e.g., Straub v. A.P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994) (considering Atlas’s defaults in three separate California asbestos personal injury cases).

In subsequent asbestos cases across the U.S., Atlas took further actions to advance its avoidance strategy, invoking jurisdictional defenses and refusing to provide meaningful discovery. *See, e.g., In re Connecticut Asb. Litig.*, 677 F. Supp. 70 (D. Conn. 1986) (denying Atlas Turner’s motion to dismiss for lack of personal jurisdiction); *Dapkunas v. AC&S, Inc.*, No. 85-2184, 1986 WL 561 (E.D. Pa. Dec. 29, 1986) (same).

Perhaps most notably, after a \$4 million judgment against it in an asbestos personal injury case, Atlas sought to avoid payment with a motion to dismiss on jurisdictional grounds. The trial court granted the motion, but on appeal, the Second Circuit reversed the ruling, holding that Atlas had waived its jurisdictional defense. *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58 (2d Cir. 1999). Still seeking to avoid payment, Atlas sought to set aside the verdict. *See Hamilton v. Atlas Turner, Inc.*, 96 F. Supp. 2d 352 (S.D.N.Y. 2000). The court denied the motion, and granted plaintiff’s motion to compel discovery related to Atlas’s assets in the United States that could be used to pay

the judgment in the case. The trial court's order on the motion to compel made clear Atlas's intent to avoid inquiries into its assets: "The sources and location of any assets of Atlas Turner in the United States are proper avenues of inquiry and are not shielded by the attorney-client privilege. The scheduled depositions will proceed at the convenience of counsel." *Id.* at 357.

C. *Atlas's activities here show a similar effort to avoid U.S. asbestos claims and thwart the Receiver's efforts to investigate and marshal its Insurance Assets.*

After the Receiver initiated this third-party action against Atlas's insurers, individuals purporting to act on Atlas's behalf advised Atlas's insurers that Atlas was not tendering the asbestos claims pending before this Court and that no defense or indemnity should be provided by Atlas's insurers. Specifically, on July 24, 2023, the Receiver received two letters from Resolute Management, Inc. (one on behalf of Continental and one on behalf Certain London Market Insurers), stating each has been "advised by Atlas that Atlas is controlling and defending its own interests, and [that the Receiver is] not objecting to Atlas's control of its own defense. Further, the letters asserted that "Atlas is not tendering the Asbestos Lawsuits [to Continental or Certain London Market Insurers] for defense and indemnity," and therefore, "given that Atlas is not tendering the Asbestos Lawsuits, there is no defense or indemnity being requested." Exhs. E and F, July 24, 2023 Letters from Resolute Management to Peter Protopapas. These arranged declinations of coverages appear to be designed to thwart the Receiver's investigation and marshaling of Atlas's Insurance Assets to respond to the asbestos claims before this Court.

Interlocutory Appeal and Associated Issues

Both Continental and Certain London Market Insurers recently filed motions asserting that an automatic stay applies to this third-party action, prohibiting the Receiver from pursuing claims against Atlas's insurers, because Atlas has filed a notice of appeal as to various orders of this Court. If they are correct, the Receiver cannot, at present, fulfill his court-assigned duties and is concerned

that individuals purporting to act on Atlas's behalf may take further actions that jeopardize Atlas's Insurance Assets. However, even if a stay does apply, the Receiver submits there are actions the Court could take to preserve Atlas's Insurance Assets during the pendency of the appeal:

a. **Order Lifting Stay Under Rule 241(c)(2).** First, the Court may enter an order under Rule 241(c)(2) of the South Carolina Appellate Court Rules, lifting any automatic stay to "prevent a contested issue from becoming moot." Such action appears warranted here considering the ongoing efforts of individuals purporting to act on Atlas's behalf to avoid the authority of this Court, to avoid the asbestos claims pending before this Court, and the risk that such individuals might seek to fraudulently transfer, impair or otherwise prejudice Insurance Assets that otherwise would be available to respond to asbestos claims in this court.

b. **Allow Insurance Asset Discovery to Continue.** Second, even if the Court concludes that the stay applies and should not be lifted as to the substantive proceedings in this third-party action, pending the Atlas appeal, the Court might lift the stay, in part, to permit the Receiver to continue his ongoing investigation into Atlas's Insurance Assets while Atlas's appeal is pending. Specifically, the Court could allow fact discovery to proceed in the third-party action, while holding in abeyance substantive rulings regarding the insurers' obligations to provide coverage for specific asbestos liabilities, pending resolution of the appeal. Again, such limited relief appears warranted under Rule 241(c)(2).

c. **Enter a Preservation Order.** Finally, as a corollary to, or as alternative to, lifting the stay in whole or in part to "prevent a contested issue from becoming moot," the Court could (and arguably should) enter a "preservation order" instructing Atlas, its insurers, and all agents and counsel for Atlas and its insurers to preserve all information regarding Atlas's Insurance

Assets, and not to transfer, impair or otherwise prejudice any Insurance Assets during the pendency of this matter unless and until the Court orders otherwise.

Continental and Certain London Market Insurers' Pending Motions to Dismiss

Although they assert that this third-party action is automatically stayed, Continental and Certain London Market Insurers included in their August 15, 2023 filings alternative motions to dismiss, motions for a more definite statement, and the like. Of course, if the Court should determine that a stay applies, as these Third-Party Defendants contend, these alternative motions are filed in contravention of such stay and are not properly before the Court. If, on the other hand, the Court concludes that a stay does not apply or should be lifted to allow these motions to be presented and heard, the Receiver will respond, at the appropriate time, to the substance of the alternative motions raised in the filings of Continental and Certain London Market Insurers.

Dated: August 18, 2023

Respectfully submitted,

/s/ Duke K. McCall III

Duke K. McCall III

SC Bar No. 66466

Morgan, Lewis & Bockius LLP

1111 Pennsylvania Avenue, NW Washington,

DC 20004-2541

duke.mccall@morganlewis.com

***Attorney for the Receiver of Atlas Turner, Inc.
f/k/a Atlas Asbestos Company, Ltd.***

EXHIBIT A



September 24, 1985

James P. Conroy, Esq.
Porter, Wright, Morris & Arthur
925 Euclid Avenue
Suite 1500, Huntington Building
Cleveland, Ohio
44115 U.S.A.

771-2700

Dear Mr. Conroy:

Over the last two years, the posture of Bell Asbestos Mines, Limited and Atlas Turner Inc in the U.S. asbestos litigation has changed considerably. For economic and other considerations, with which you are already acquainted, Bell and Atlas have taken a minimal defense posture and have proceeded to default judgments in several cases. After reviewing the overall situation, and in contemplation of additional decisions regarding the position of Bell and Atlas in the U.S. asbestos litigation, I must advise you at this time that all matters involving Bell Asbestos Mines Limited and/or Atlas Turner Inc are to be transferred immediately to Thomas P. Meaney, Jr., Esq. of Burke, Haber & Berick, 300 National City Bank Building, Cleveland, Ohio 44114 U.S.A. You will be contacted shortly by a representative of the Burke, Haber & Berick office to effectuate an orderly and efficient transfer of the files.

Please understand that this transfer is not the result of any dissatisfaction with your representation of Bell and/or Atlas but is instead an action which is required for the efficient and expeditious handling of the matters involving Bell and Atlas.

Thank you for your cooperation in the past and your anticipated cooperation in this transfer.

Very truly yours,

ATLAS TURNER INC

Alain Dulude

9.26.85

DULUDE

AD/bm

cc: Thomas P. Meaney, Jr., Esq.



ELECTRONICALLY FILED - 2023 Aug 18 4:55 PM - RICHLAND - COMMON PLEAS - CASE#2022CP4003834

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

EDWARD ANTOINE, et al.,)
)
) Plaintiffs,)
)
vs.) Case No. 1:90CV2231
)
ATLAS TURNER, INC., et al.,)
)
) Defendants.)

THE DEPOSITION OF JAMES P. CONROY
WEDNESDAY, MAY 22, 1996

The deposition of JAMES P. CONROY, called by the Plaintiffs for examination pursuant to the Federal Rules of Civil Procedure, taken before me, the undersigned, Darlene Lowe, Court Reporter and Notary Public within and for the State of Ohio, taken at the offices of Steven M. Weiss, Esq., 1250 Illuminating Building, 55 Public Square, Cleveland, Ohio, commencing at 10:01 a.m., the day and date above set forth.

WANOUS REPORTING SERVICE
55 PUBLIC SQUARE
1225 ILLUMINATING BUILDING
CLEVELAND, OHIO 44113
(216) 861-9270

107

1 APPEARANCES:

2
3
4 On behalf of the Plaintiffs:

5 Steven M. Weiss, Attorney at Law
6 1250 Illuminating Building
7 55 Public Square
8 Cleveland, Ohio 44113

9 and

10 James L. Epperson, Attorney
11 Middleton, Mixson, Orr & Adams
12 622 Drayton Street
13 Savannah, Georgia 31412

14 On behalf of the Defendants:

15 Terrance P. Gravens, Attorney at Law
16 1240 Standard Building
17 Cleveland, Ohio 44113

18 (Plaintiffs' Exhibits 1 and 2 were marked.)
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I N D E X

WITNESS:

EXAMINATION

JAMES P. CONROY

BY MR. EPPERSON

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- - - - -

E X H I B I T S

PLAINTIFFS' :

MARKED

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PROCEEDINGS

MR. EPPERSON: This is the deposition of James Conroy taken pursuant to a subpoena issued by me. That subpoena had been marked as Plaintiff's Exhibit 1.

I'd like to have that attached to the record.

JAMES P. CONROY

of lawful age, called by the Plaintiffs for examination, pursuant to the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows:

EXAMINATION OF JAMES P. CONROY

BY MR. EPPERSON:

Q Mr. Conroy, if you would review that document, does that appear --

A Yes, that appears to be the subpoena -- a copy of the subpoena with which I was served.

Q Okay. I'll steal it back from you for a second.

A Yes.

MR. EPPERSON: We have a few stipulations we want to put on. The first, we stipulated to the qualifications of the court reporter and other formalities of taking down

1 transcribing of the deposition and filing the
2 original when and if that becomes necessary.

3 We further stipulate that all objections
4 are reserved for later determination by the
5 Court with the exception of those as to form of
6 the question and responsiveness to the answer.

7 Mr. Conroy is going to reserve his right
8 to read and sign the deposition after it's
9 transcribed.

10 Q Is that correct, Mr. Conroy?

11 A That is correct.

12 MR. GRAVENS: Just for the
13 record, it is so stipulated as indicated. And
14 just for the record, I don't anticipate in this
15 deposition that it will be -- that isn't an
16 issue, but obviously the attorney-client
17 privilege is a potential issue, and I'm just
18 going to try to follow the mandate of the Sixth
19 Circuit in the opinion Case No. 94-3355 Antoine
20 et al. versus Atlas Turner et al.

21 MR. EPPERSON: As a matter of
22 fact, I have a copy of that case that we'll mark
23 as Plaintiff's Exhibit 3.

24 - - - - -

25 (Plaintiffs' Exhibit 3 was marked.)

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MR. GRAVENS: That's fine.
For the record, in that regard just to preserve
it, I will object because of our position on the
privilege. But because the Sixth Circuit has
spoken, I'll only raise the privilege where it's
pertinent, if at all, in this deposition.

MR. EPPERSON: The last
stipulation we have is that when I refer to
Edward Antoine, I'm also referring to the Donald
Beamer case, which is Case No. C-81-754; Evelyn
Simonin, Case No. C-81-755; Edward Antoine, Case
No. C-82-344; and Vaughn Schlegel, C-84-8056 and
all the plaintiffs associated with those cases,
as well as this current case which we have
before us, which is Case No. 1:90-CV-2231.

MR. GRAVENS: And again, that
is so stipulated. The only thing I'm not sure
of is the case caption that we're currently
working under is a little -- procedurally, I
filed the motion for relief in the underlying
cases. As I sit here, I guess I'm not sure of
the status of the more recent case of 1990,
which was the supplemental petition. But for
the record, I think we all know what we're

1 talking about.

2 MR. EPPERSON: Okay. Anybody
3 else need to make any statements?

4 (No response.)

5 Q Mr. Conroy, could you please state your full
6 name?

7 A James P. Conroy, C-o-n-r-o-y.

8 Q And you're currently living and working here in
9 Cleveland, Ohio?

10 A Yes, that's correct.

11 Q Okay. And you're an attorney?

12 A Yes, sir.

13 Q And you're currently in good standing with the
14 state of Ohio?

15 A Yes, I am.

16 Q And in 1985, you were also in good standing with
17 the state of Ohio?

18 A Yes.

19 Q Who are you working with now, as far as what
20 firm?

21 A I'm a partner in the firm of Walter &
22 Haverfield.

23 Q Let me ask you this: When did you first become
24 an attorney?

25 A I was -- in 1974. November, December 1974.

1 Q And since December 1974, have you always
2 remained an attorney in good standing?
3 A Yes, sir.
4 Q And let me go forward up to 1985. Who were you
5 associated with at that time, the law firm?
6 A Porter, Wright, Morris & Arthur.
7 Q And were you a partner with that firm at that
8 time?
9 A I was either a contracted partner or had just
10 been named equity partner.
11 Q As a partner with Porter, Wright, Morris &
12 Arthur, did you have an occasion to -- or did
13 you have a policy that you had to bill your time
14 to your clients?
15 A Certainly.
16 Q And you understand what I mean by bill your
17 time, keep a running log of your time?
18 A Yes, sir. I would keep a running long of
19 chargeable hours and on a monthly basis would
20 have them prepared and submitted for payment.
21 Q Okay. When you would have those -- that time
22 prepared and submitted for payment, did you have
23 an occasion to write out what type of work you
24 were doing on any particular hour?
25 A Yes, it was always my practice to, and has been

1 to, write a narrative for each charge.

2 Q Okay. And that narrative would describe -- to
3 the best of your recollection, would describe
4 every aspect of what you did for that client at
5 that particular time?

6 A Perhaps not every aspect, but it would give the
7 essence.

8 Q Okay. I need to have this marked as Plaintiff's
9 Exhibit 4.

10 - - - - -

11 (Plaintiffs' Exhibit 4 was marked.)

12 - - - - -

13 Q I'm going to show you what has been marked as
14 Plaintiffs' Exhibit 4.

15 A Yes, sir.

16 Q Do you recognize Plaintiffs' Exhibit 4?

17 A Yes, I recognize it.

18 Q Can you tell us what Plaintiffs' Exhibit 4 is --
19 first, how do you recognize Plaintiffs' Exhibit
20 4?

21 A Plaintiffs' Exhibit 4 is a letter which was
22 prepared by me in the normal course of my
23 representation -- actually, it was prepared
24 after the termination of my representation, but
25 prepared in the normal course of my business as

1 counsel at Porter, Wright, Morris.

2 Q When you said it was prepared after your
3 representation ended, when did your
4 representation end for Atlas Turner?

5 A That is correct, my representation ended
6 effective with the notice which was filed with
7 the Court of my withdrawal -- our firm's
8 withdrawal as counsel.

9 Q Would that be June 5, 1985?

10 A That is my recollection. It is time stamped
11 June 5.

12 MR. GRAVENS: Before we go too
13 far, I don't have what the witness --

14 MR. EPPERSON: I'm going --

15 MR. GRAVENS: I assume there's
16 more to the packet than the one letter.

17 MR. EPPERSON: Yes.

18 Q Let me get on to that now. As far as outside
19 that letter, did you have any enclosures that
20 were attached to that letter?

21 A Yes, sir, I did have enclosures which were
22 attached.

23 Q If you could, please review that entire packet.

24 MR. WEISS: Entire packet,
25 meaning Plaintiffs' Exhibit 4?

1 MR. EPPERSON: Plaintiffs'

2 Exhibit 4.

3 A Certainly.

4 (Witness reviewing document.)

5 I have reviewed it.

6 Q Is that all the enclosures that were supposed to
7 be attached to that letter which you've
8 identified as Plaintiffs' Exhibit 4?

9 A Yes, I believe those are all of the enclosures.

10 Q This is the same packet that you were -- that
11 was originally placed under seal by the Court in
12 this action?

13 A Yes, sir.

14 MR. EPPERSON: And if I could
15 with counsel's stipulation, just refer to this
16 as the Conroy documents from now on.

17 MR. GRAVENS: That's
18 acceptable.

19 Q Back in 1985, do you recall whether your firm
20 had what we refer to today as a fax machine?

21 A I do not recall in -- to be honest with you if
22 we did or did not. I think that was right at
23 the outset of the technology.

24 Q If you can refer to Plaintiffs' Exhibit 4 to
25 refresh your recollection up in the right-hand

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corner.

MR. WEISS: Page 1 of
Exhibit 4?

MR. EPPERSON: Page 1 of
Exhibit 4.

Q Upper right-hand corner and under the caption of
your firm's name.

A I see. Yes, I see we did have a telecopier.

Q That is what we refer to today as a fax machine?

A Yes, it is.

Q Do you recall whether this letter and enclosures
were faxed to anyone?

A No, I do not recall and it would have been -- it
was the office's practice to so indicate on
correspondence if, in fact, it was faxed.

Q How would they indicate on the document whether
it was faxed?

A In the upper left-hand corner above the address
of the individual to whom the letter was sent
would have appeared in capital letters VIA
FACSIMILE.

Q Now, in this letter which is in the Conroy
document letter which you referred to -- or
which I referred to as Plaintiffs' Exhibit 4,
you refer to a conversation that you had with, I

1 believe it would be, Thomas Meaney?

2 A Yes.

3 Q Who is Thomas Meaney?

4 A Thomas Meaney is an attorney whom I have known
5 for an extended period of time, prior to this
6 case, and knew him to be a litigation partner
7 with the firm of Burke, Haber & Berick.

8 Q How did you happen to come upon a conversation
9 on October 28th, 1985?

10 A On October 28th, 1985, I received from the
11 Court -- pardon me, I was served with a Notice
12 of Application for Judgment in the Beamer,
13 Simonin, Antoine and Schlegel cases. And
14 subsequent to my receipt, I contacted Mr. Meaney
15 as it was -- I had been advised by Atlas Turner
16 and Bell Mines that Mr. Meaney was their counsel
17 of record in these cases.

18 MR. GRAVENS: Objection, move
19 to strike.

20 A Well, perhaps -- let me clarify. I was advised
21 that Mr. Meaney would be taking over the
22 handling of all of the Atlas and Bell cases and
23 that, in fact, I was to transfer my files to
24 Mr. Meaney.

25 Q Who were you advised by?

1 A I believe I was advised by a gentleman by the
2 name of Alain Dulude.
3 Q And when were you advised?
4 A Mr. Dulude advised me by letter in September of
5 1985.
6 Q Okay. And let me ask you: With Alain Dulude,
7 did you have occasion to talk to him on October
8 28th, 1985?
9 A I did not speak to Mr. Dulude, to the best of my
10 recollection. I -- no, I do not have a
11 recollection of speaking with him that day.
12 Q Do you recall whether anyone else with your firm
13 talked to Mr. Dulude on that day?
14 A I do not recall.
15 Q Okay. Now, in Plaintiffs' Exhibit 4 which we're
16 referring to now --
17 A Yes, sir.
18 Q -- you copied this letter to Mr. Dulude?
19 A That is correct.
20 Q And you spelled Alain, A-l-a-i-n, his first
21 name?
22 A That is the correct spelling, A-l-a-i-n.
23 Q D-u-l-u-d-e?
24 A That is my understanding of the correct
25 spelling.

1 Q Who is Mr. Dulude?

2 A Alain Dulude was an individual employed, I
3 believe, or an independent contractor to -- I'm
4 not sure -- to both Bell and Atlas. And as I
5 recall, his job was the coordination of asbestos
6 litigation for Bell Mines and Atlas Turner.

7 Q Can you tell us what you're referring to now as
8 far as what documents you're pulling out?

9 A Nonresponsive documents simply to confirm that
10 he represented both or had -- that he was
11 employed by or in some way represented by both
12 companies.

13 Q If you want to refer to them, I just ask that
14 they be marked as an exhibit.

15 A Then I don't think I need to refer -- I've
16 refreshed my recollection. I don't even need to
17 refer to them.

18 Mr. Dulude was, my understanding, employed
19 by both companies.

20 Q Was Mr. Dulude always your contact with Atlas
21 Turner?

22 A No.

23 Q When did he become your contact with Atlas
24 Turner?

25 A Sometime between May of 1983 and this date, and

1 I do not know when during that period.

2 Q When you say this date, what are you referring
3 to?

4 A The date of this letter. I'm sorry, October
5 28th, 1985 -- October 29th, 1985.

6 Q In your letter to Thomas Meaney, you refer to
7 a -- you refer to the conversation of October
8 28th. What else did you speak with him on?

9 MR. GRAVENS: Objection. For
10 the record, I just wanted to note the objection
11 for the record in light of the Sixth Circuit's
12 decision to reserve it, but that's all I'm going
13 to do is make an objection at this time.

14 Q Let me clarify. I'm not asking about any cases
15 outside this.

16 A Correct.

17 Q All right. I'm limiting my question to the
18 cases that we're referring to here.

19 A Correct.

20 Q Can you tell us what that conversation, other
21 than what you've already stated, would be about?

22 MR. GRAVENS: Same objection.

23 A Yes, I can. On the 28th of October, I received
24 from the law offices of Charles Cloninger a
25 Notice of Application for Default Judgment in

1 the four cases that I've already referenced. I
2 immediately contacted Mr. Meaney on the
3 telephone to advise him that I had received this
4 document, and I advised him that I was going to
5 send them over to him. We discussed other
6 aspects of the general representation of Bell
7 and Atlas, as far as Tom was concerned, but the
8 main thrust of this conversation was certainly
9 this motion for default judgment.

10 Q Okay. And then you subsequently did send these
11 documents over to Mr. Meaney; is that correct?

12 A I subsequently had them messengered over to
13 Mr. Meaney.

14 Q Who would that messenger be? Would it be a
15 service?

16 A It could have been either a service -- we used
17 both. It depended if our in-house staff were
18 available. If they were, they would have taken
19 it. If not, we would have used a service. I
20 believe at that time we used a service by the
21 name of Bonnie Speed. I'm not absolutely sure
22 of that.

23 Q Have you subsequently come in possession of any
24 other documents which relate to the default
25 judgment?

1 A Yes, I have.

2 Q What documents would those be?

3 A The opinion of Judge Lambros granting the
4 default judgment --

5 Q Okay.

6 A -- the order.

7 Q Do you have a copy of that?

8 A I do. I have prepared copies -- this is to
9 be -- this was a packet of documents -- those
10 last two documents accompany the letter of
11 October 29th.

12 Q Okay.

13 MR. EPPERSON: I'll ask that
14 this document be marked as the next Plaintiffs'
15 exhibit in order.

16 - - - - -

17 (Plaintiff's Exhibit 5 was marked.)

18 - - - - -

19 A I also have brought for production under Item 3,
20 "Copies of any and all documents from your files
21 connected with the cases listed above after you
22 filed your notice to withdraw as Atlas Turner's
23 counsel."

24 These documents applied to all cases,
25 including the four which were questioned.

1 Q I'm going to ask that these be marked as the
2 next Plaintiffs' exhibit in order.

3 - - - - -

4 (Plaintiffs' Exhibits 6 and 7 were marked.)

5 - - - - -

6 MR. EPPERSON: We have to do
7 some real quick housekeeping. We have entered
8 two documents -- the Conroy documents have been
9 entered twice. We want to make sure we clarify
10 this for the record, that Plaintiffs' Exhibits 2
11 and 4 are the same Conroy documents and,
12 therefore, we would just refer to them as
13 Plaintiffs' Exhibit 4 from now on.

14 Q Mr. Conroy, now that we're back on the record
15 I've have a chance to review the documents which
16 you have submitted to us with reference to your
17 subpoena.

18 A I have one additional document under the
19 general, broad request for documents, it simply
20 is the file in which my documents were kept
21 simply because it has a phone number of
22 Mr. Meaney's law firm on it.

23 Q Okay. I'm going to refer to Plaintiffs' Exhibit
24 5 now, and this would be your letter of December
25 23, 1985 to Thomas Meaney. Would you review

1 that exhibit?

2 A (Witness complying.)

3 Q You've had a chance to review Plaintiffs'

4 Exhibit 5?

5 A Yes.

6 Q Do you recognize Plaintiffs' Exhibit 5?

7 A I do.

8 Q How do you recognize Plaintiffs' Exhibit 5?

9 A This is the memorandum opinion and order which I

10 received on I would -- I believe December 19th,

11 1985.

12 Q And would Plaintiffs' Exhibit 5 include a letter

13 from you to Thomas Meaney?

14 A Yes, a cover letter.

15 Q Okay. And, basically, would it be fair to say

16 that you're forwarding the default judgment to

17 Mr. Meaney?

18 A Yes, that's exactly what this letter was for.

19 If I might add --

20 Q Sure.

21 A -- in the context -- in the opinion of the

22 Court, the Court indicates that I was served --

23 "On October 25th, 1985, plaintiffs' counsel

24 served Mr. Conroy with a notice..." I actually

25 received the notice on the 28th. I believe

1 service was effective on the 25th by mail.

2 Q Okay. And you forwarded that document to
3 Mr. Meaney, as it was your understanding that he
4 was now the counsel for Atlas Turner; is that
5 correct?

6 MR. GRAVENS: Objection.

7 A That is correct.

8 Q I'm going to show you what's been marked as
9 Plaintiffs' Exhibits 6 and 7 and ask that you
10 review those two Plaintiffs' exhibits.

11 A (Witness reviewing document.)

12 Right I'm familiar with them.

13 Q How are you familiar with those two documents?

14 A These are letters -- identical letters which
15 Mr. Dulude sent to me dated the 24th of
16 September, 1985, received in my office on the --
17 time stamped as received on September 26th,
18 1985.

19 Q Those are the letters which you referred to
20 earlier in your testimony where Mr. Dulude
21 informed you that Mr. Meaney was now going to be
22 representing Atlas Turner?

23 A Atlas Turner and Bell Asbestos Mines Limited,
24 yes, sir.

25 MR. GRAVENS: Objection.

1 Just so the record is clear, in particular
2 I'd like to make a more specific objection as to
3 Exhibit 7 relating to Bell.
4 Q And those are your -- those are the letters that
5 you received; is that correct?
6 A That is correct.
7 Q And Plaintiffs' Exhibits 6 and 7 would be -- 6
8 would be the Atlas Turner letter, and Exhibit 7
9 would be the Bell letter?
10 A Correct, sir.
11 Q Have you had any telephone conversations with
12 Mr. Dulude since your withdrawal as counsel?
13 A I'd -- I would have to look at documents which
14 were not under the purview of the subpoena to
15 confirm. I could speculate.
16 Q Have you had a chance to review any documents in
17 pursuit -- in trying to refresh your
18 recollection for your testimony here today?
19 A Yes, sir.
20 Q Okay. And do you have any of those documents
21 with you?
22 A I have documents. Yes, I do have documents with
23 me.
24 Q Would those documents refresh your recollection
25 as to whether you had a telephone conversation,

1 or any other conversation for that matter, with
2 Mr. Dulude?

3 A Concerning?

4 Q Concerning default judgments, application for
5 default judgments in this case.

6 MR. GRAVENS: Can I ask before
7 he goes too far looking at the documents, I
8 think your question, as I understand it, is
9 related to whether or not he had any
10 conversations with Dulude about the applications
11 for default or the default itself. And I'd like
12 that question answered initially before he looks
13 at the documents because he may not need the
14 documents to refresh his recollection to answer
15 that question.

16 A Would you repeat the question, please?

17 Q Did you have any conversations telephonically,
18 in person, or otherwise with Mr. Dulude about
19 the default judgments themselves or the
20 application for default judgments that you can
21 remember, outside of what we've already referred
22 to?

23 A Concerning these cases? No, I had no phone
24 conversation that I recall.

25 Q How about in person?

1 A I do not recall speaking with Mr. Dulude in
2 person, no, sir.

3 Q Have you ever met Mr. Dulude?

4 A I believe -- yes, I did. It was prior to this
5 period of time which we're speaking, September
6 1985.

7 Q How about, have you had any conversations
8 telephonically or in person with -- outside of
9 what you referred to already in your written
10 communications, have you had any other
11 conversations with anyone representing Atlas
12 Turner about the defaults or the application for
13 default?

14 A No, sir. Other than Mr. Meaney.

15 Q You were hired by Chubb & Son?

16 A Yes.

17 Q Did you forward any of these to Chubb & Son?

18 A I did not forward any of these documents to
19 Chubb & Son. Well, when you said I was hired, I
20 had been hired. I was advised in late March of
21 1985 that I was no longer to -- that if I was to
22 continue representing these companies, it would
23 be direct representation as far as payment of
24 fees and that Chubb no longer had an obligation
25 to defend.

1 Q Do you know if Thomas Meaney ever acknowledged
2 receipt of any of these documents that we
3 referred to as the Conroy documents or the
4 Plaintiffs' Exhibit 5, which is your letter
5 regarding default judgments?

6 A Did he ever acknowledge receipt in any way? No.

7 MR. EPPERSON: Off the record.

8 - - - - -
9 (Recess taken.)

10 - - - - -

11 Q Mr. Conroy --

12 A Yes, sir.

13 Q -- now that we're back on the record, I'm going
14 to ask you just a few more questions. I think
15 we'll be through shortly.

16 When Atlas Turner -- when you were hired
17 to represent Atlas Turner, was that a private
18 corporation at that time, do you recall?

19 MR. GRAVENS: Objection.

20 A When I was hired to represent -- I was never
21 hired. Of course, the firm was hired to
22 represent Atlas Turner, and that would have been
23 effective in late 1983 and at that time do I
24 recall if Atlas was a private --

25 Q Private corporation or was it a government

1 corporation, government entity.

2 MR. GRAVENS: Same objection.

3 A My best recollection is that it had become in
4 some way, shape or form a related -- or involved
5 with the Province of Quebec.

6 Q When do you recall that happening?

7 MR. GRAVENS: Objection.

8 A It would have been -- I would have to speculate.
9 It was sometime before that. I can't say if it
10 was a year, a month, two years. It was sometime
11 before that. It would have been at least -- I
12 would say at least a year, but that again is
13 really speculation.

14 Q A year before you were hired by Chubb & Son to
15 represent Atlas?

16 A A year before I -- Porter, Wright was hired. I
17 had represented Atlas/Bell prior to joining
18 Porter, Wright. I had worked for Atlas/Bell as
19 its counsel.

20 Q When was Porter, Wright hired to represent their
21 interest?

22 A Just immediately after I joined the firm. I
23 joined the firm effective October 3, 1983.

24 Q So you're saying approximately October 3, 1982,
25 that's when they were acquired by Quebec?

1 A No. I'm saying I have knowledge that there was
2 a relationship, and it's been a long time and I
3 don't recall the specifics, between the Province
4 of Quebec and these two entities and it was well
5 before that -- it was several years at least
6 before that time. That's my recollection.

7 Q Do you recall telling -- let me back up here for
8 a second. I don't mean to jump around too much
9 on you.

10 Do you recall telling anyone at Atlas
11 Turner about the application for default,
12 whether it was Dulude or anyone else?

13 A No, I did not. I told them vis-a-vis my carbon
14 copy of my letter to its counsel.

15 MR. GRAVENS: Objection, move
16 to strike.

17 Q You say you sent a carbon copy to Dulude; is
18 that correct?

19 A Yes, sir, that's what the letter indicates.

20 Q Was that carbon copy faxed at any time to
21 Dulude?

22 A No.

23 Q How do you know that?

24 A I -- let me rephrase the answer.

25 Q Fine.

1 A I do not recall that it was faxed. And the fact
2 that my letter indicates that the transmittal
3 was by carbon copy, without any indication of
4 facsimile transmittal, would indicate that it
5 was sent simply ordinary mail.

6 Q Now, is it correct when I say you withdrew your
7 appearance as counsel for Atlas on June 5, 1985?

8 A That is the date on which the Notice of
9 Withdrawal was filed, yes, sir.

10 Q Do you recall whether anyone entered an
11 appearance on behalf of Atlas as of that date or
12 thereafter?

13 MR. GRAVENS: Objection.

14 A I have no -- I never learned whether anyone
15 filed a formal notice of appearance.

16 Q Are you aware of any reason why no one appeared
17 for Atlas at the default hearing?

18 A No, I am not aware.

19 Q Are you aware if there was a calculated effort
20 by Atlas Turner to remit default -- permit
21 default judgments be taken against them in the
22 United States Court?

23 MR. GRAVENS: Objection.

24 Could I hear the question back?

25 Q Are you aware of any calculated effort by Atlas

1 Turner to permit default judgments to be taken
2 against it in the United States Court?

3 MR. GRAVENS: Objection.

4 A A calculated --

5 Q Before you answer, let me show you once again
6 Plaintiffs' Exhibits 6 and 7.

7 A Thank you.

8 Yes, those are the letters. In reviewing
9 the letter of the -- letters of September
10 24th --

11 MR. WEISS: Plaintiffs'
12 Exhibits 6 and 7?

13 THE WITNESS: Exhibits 6 and 7
14 yes, sir.

15 A -- there is a reference to the fact that Atlas
16 and Bell --

17 MR. GRAVENS: Just for the
18 record, I'm going to object because obviously
19 the letter speaks for itself.

20 A -- have taken, as he states, minimal defense
21 posture and have proceeded to default judgments
22 in several cases.

23 Q Did you have any discussions with Atlas Turner
24 or anyone on Atlas Turner's behalf regarding
25 this memo?

1 MR. GRAVENS: I ask what point
2 in time? It's significant for the privilege.
3 Was it before or after June 5th?
4 MR. EPPERSON: This is
5 obviously after June 5th.
6 MR. GRAVENS: If it's related
7 to anything of June 5th, 1985, I'll note an
8 objection for the record, but pursuant to the
9 Sixth Circuit's opinion, you can answer.
10 MR. WEISS: Let's talk about
11 that because the Sixth Circuit never said after
12 June 5th is the date in which the
13 attorney-client privilege ended and, therefore,
14 the privilege ended. That's not what they said.
15 They did say that, but they've also said in
16 addition to that communications regarding
17 appearing for default judgments, somebody
18 regarding -- communications to a client or from
19 a client regarding appearance, a simple matter
20 of appearing somewhere to go or not to go to
21 court is not privileged. And if there is a
22 decision to go or not to go to court, it's a
23 perfunctory thing.
24 MR. GRAVENS: At this point in
25 time, I don't think it's helpful to argue it. I

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mean, I'll make my objection.

MR. WEISS: Okay.

MR. GRAVENS: So we're clear, my understanding of the question, you're asking him after June 5th of 1985 -- we'll probably have to have the question repeated -- well, just for the record, at this point I don't think it's necessary to get into privilege.

MR. WEISS: He asked the question and you amended it to after June of 1985, he meaning Mr. Epperson. I'm not comfortable with that limitation. Why don't we find out if the discussion happened and find out when.

MR. GRAVENS: Could we do it the other way? Could we start after June 5th, 1985? I think it would be easier.

MR. WEISS: If you're equating easier with more restrictive, then you're right it would be easier.

MR. GRAVENS: Then you can follow up by asking him how about June 5th and we can address that issue at that point. As a practical matter, I think I have some sense of what the answer is going to be. I think we're

1 wasting our time.

2 Q I'll ask the broad question first. Did you have
3 any discussion with Atlas Turner as to its
4 position on the default judgments being taken in
5 the United States Court?

6 MR. GRAVENS: Objection.
7 You're asking him a question about what his --
8 if it's before June 5th of 1985, what his client
9 communication was as far as their position, and
10 I will submit that is absolutely privileged and
11 I will assert the privilege and advise
12 Mr. Conroy we're so asserting the privilege.

13 MR. WEISS: Well, the --
14 Q Mr. Conroy, what are you referring to there? If
15 you're referring to anything other than an
16 exhibit, I ask that be marked at this time.

17 A I understand. I -- your question is did I
18 have -- did Atlas --

19 Q Did you have any discussions with Atlas Turner,
20 or any representative thereof, including Thomas
21 Meaney, as to its position on default judgments
22 or its minimal defense of default judgments
23 after -- hold on. Let me back up here.

24 Have you had any discussions with Atlas
25 Turner, its representatives, employees,

1 including Thomas Meaney, about its appearing in
2 court to defend any default judgment?

3 A After June 5th?

4 Q After June 5th.

5 A Yes.

6 Q What kind of discussions did you have?

7 MR. GRAVENS: Objection, go
8 ahead and answer.

9 A I --

10 MR. GRAVENS: Strike the go
11 ahead and answer. Objection as to that -- per
12 the Sixth Circuit's raising the privilege.

13 A I had discussions with Mr. Dulude's office
14 concerning a state court application for
15 judgment which was post June 5th, 1985.

16 Q State court as in the state of Ohio?

17 A (Witness nodding.)

18 Q Is that what you're referring to?

19 A Um-hum.

20 MR. WEISS: Do you mean yes?

21 A Yes. Pardon me.

22 Q When was that discussion?

23 MR. GRAVENS: Just for the
24 record, continuing line of objection as to
25 whatever went on in the state case.

1 A Well --

2 Q All right. I'll --

3 A I'll have to refresh my recollection, and I have
4 to -- I do have -- yes, I have -- I advised
5 Mr. Dulude's -- I had a conversation on July
6 24th, 1985 with Mr. Dulude's office concerning
7 the -- a hearing to be held before Judge Jim
8 McMonagle in Cleveland, which was going to deal
9 with Atlas and Bell, and I made reference to
10 default judgment and we discussed it. And I
11 advised his office; I do not believe at that
12 time I advised Mr. Dulude.

13 Q That's fine.

14 A That's my -- I have to --

15 Q I would ask that document be marked as the next
16 Plaintiffs' exhibit in order.

17 MR. GRAVENS: Just for the
18 record, I'll enter an objection. I think I've
19 got an objection.

20 - - - - -
21 (Plaintiffs' Exhibit 8 was marked.)

22 - - - - -
23 MR. GRAVENS: Regarding
24 Plaintiffs' Exhibit 8, I have objected regarding
25 the production. And regarding the questions, I

1 would assert the privilege, but I am trying to
2 strike a delicate balance here of zealously
3 protecting the privileged interest of my client,
4 but at the same time I have before me the
5 pertinent portion of the Sixth Circuit's
6 opinion, and I'm not totally clear how the Court
7 would consider this, but -- I want to make it
8 clear I'm not waiving the privilege as to this
9 document or the questions regarding this
10 document. But given the Sixth Circuit's
11 opinion, I'm just stating that for the record.

12 Q You do know an attorney in Savannah -- or an
13 attorney at that time by the last name of
14 Cloninger?

15 A Which time are we referring to?

16 Q This is 1985, about the time of your --

17 A I heard of Mr. Cloninger and I had a telephone
18 conversation from either Mr. Cloninger -- I
19 believe it was Mr. Cloninger. At some time
20 during that time period he called me, yes.

21 Q What was that telephone conversation about?

22 A It had something to do with the fact that he was
23 involved now in the cases. He had -- he was
24 taking over from prior counsel -- or working
25 with prior counsel, Steve Laudig, and I believe

1 we talked about a hearing in Cleveland. I'm
2 very hazy on that. The reason I remember is
3 because the name is the name of a baseball
4 player that I recall.

5 Q Do you recall in that conversation telling
6 Mr. Cloninger that no one would be appearing on
7 behalf of Atlas Turner at the default hearings?

8 A I have no recollection of that.

9 MR. GRAVENS: Just for the
10 record, so we're clear, and we can do this
11 outside because I don't want to suggest anything
12 improper, are you talking about the settlement
13 conversations?

14 MR. EPPERSON: Um-hum.

15 MR. GRAVENS: I think we've
16 got -- my concern now is when you talk about a
17 conference, if I recall from the last
18 deposition, we got into an issue, as I
19 understand there were settlement conferences in
20 the cases generally sometime in the summer as
21 opposed to the default hearings that were
22 obviously held later in 1985 and --

23 MR. WEISS: I think what
24 he's asking, Terry, I may be able to short
25 circuit this. I understand your concern and

1 trying to avoid confusion. Essentially what
2 he's asking, were there discussions regarding
3 the appearance or non-appearance of Atlas Turner
4 at default judgments in any of the four cases
5 that brings us here today, with Cloninger,
6 discussions with Cloninger.

7 MR. GRAVENS: Just so we're
8 clear, my sense is there may have been
9 conversations. No one -- I think we went into
10 this at the last deposition, that he did not
11 appear at the settlement conferences that were
12 held in the summer of 1985 for Atlas.

13 MR. WEISS: You mean
14 Mr. Conroy?

15 MR. GRAVENS: Mr. Conroy.

16 MR. WEISS: Well, it's
17 interesting. I don't think it's necessarily
18 contradicting what we're doing, but do you
19 understand what we're asking?

20 A If the telephone conference had taken place
21 subsequent to my withdrawal and prior to the
22 letter of September 24th, the letters, I would
23 have -- I would have told him -- I am sure that
24 I had withdrawn as counsel and that I would not
25 appear because I was no longer counsel, clearly.

1 And if the conversations took place after the
2 26th of September, the date upon which I
3 received and I assume reviewed this letter, I
4 would have --

5 MR. WEISS: This letter
6 meaning --

7 A The letter from Atlas and Bell advising
8 Mr. Meaney's appointment.

9 Q Plaintiffs' 6 and 7?

10 A Plaintiffs' 6 and 7. I would have told
11 Mr. Cloninger that you don't need to call me any
12 more, call Mr. Meaney.

13 Q Do you recall if that conversation took place
14 before the September time frame?

15 A No, I really do not. I just don't.

16 Q Do you have any other documents after your
17 withdrawal relating to default judgments?

18 A I produced the letter dated July 29th, 1985 and
19 I have to -- I was retained I believe on a
20 limited basis to -- it's my recollection I may
21 have something in a file which would clear this
22 up to simply appear at judgment, not on this
23 hearing as counsel to advise. Not that I was
24 counsel of record in this case, but as counsel.
25 Now, I'm concerned about the privilege issue as

1 well.

2 MR. GRAVENS: Again, my
3 objection is as to the other case. I thought
4 the question was related --

5 MR. WEISS: It was not
6 related -- look, Terry, the question is what the
7 question is. You can't object.

8 MR. GRAVENS: For the record,
9 Steve -- read the question back. Don't tell me
10 what to do, Steve. Just please read the
11 question -- do you have any more documents about
12 subsequent, then he starts talking about before.

13 MR. WEISS: Let me say now
14 what he said after June 5th --

15 MR. GRAVENS: No, read the
16 question back.

17 - - - - -
18 (The record was read.)

19 - - - - -
20 A After withdrawal. And yes, I referenced a
21 letter of July 25th.

22 Q Any others outside that?

23 A Not that I have been able to locate.

24 MR. GRAVENS: Just so the
25 record is clear, can we agree that he already

1 produced the September -- the letter to Meaney
2 regarding defaults?

3 MR. WEISS: Anything other.

4 MR. GRAVENS: Just so we're
5 clear.

6 A I also want it clear that there was some -- I
7 cannot say that I was appearing independent --
8 as an independent fact witness. There was a
9 special retention, and it may have applied to
10 this so there may be privilege attached. I
11 don't recall. But I -- the fact is I did appear
12 in open court, and I think that letter
13 reflects -- if I could see it again.

14 Q That's what, Plaintiffs' Exhibit 7?

15 A 8. I'm referring to Plaintiffs' 8.

16 MR. GRAVENS: And again,
17 continuing line of objection as to Exhibit 8.

18 A This letter I -- yes, I've reviewed it and it
19 speaks for itself.

20 Q Okay. Outside of what we've got here that's
21 been marked as plaintiffs' exhibits, what other
22 documents did you bring with you today?

23 A I simply brought other copies of the documents
24 which were produced and other documents which --
25 several other documents which are not related to

1 these cases were pre-June 5th and do not fall
2 within the subpoena; again, documents produced
3 during the period of my appearance as counsel
4 for Atlas/Bell.

5 Q Did you bring any billing records with you?

6 A No, I don't have those, sir. No. Porter,
7 Wright, Morris & Arthur may have those, but I
8 don't.

9 Q Any telephone records?

10 A Again, I don't have those.

11 Q The firm would have those?

12 A The firm, if they exist, would have those.

13 Q And the firm's practice, do you continually keep
14 records and files or do you, say, what I call
15 purge them after a certain amount of time?

16 A No, the firm -- I can't say how long, but they
17 store files off site for extended periods of
18 time.

19 Q Do you know where that site is located?

20 A I could tell you where the files are. Counsel
21 has the files.

22 Q He would have those records there?

23 A He has my file -- no.

24 Q Billing records, telephone records.

25 A I don't think that those files contain our

1 billing records. I believe they just contain
2 the substance of these cases.

3 Q Do you know where the billing records, the
4 telephone records would be located?

5 A You would have to -- I would give you the name
6 of the -- probably in -- if they exist at all,
7 in Columbus.

8 Q Ohio?

9 A Yes, our billing was done out of Columbus.

10 Q Where at in Columbus, Ohio?

11 A Porter, Wright's office.

12 Q That would be 41 South High Street, Columbus?

13 A That's correct.

14 Q Let me ask you this: I believe earlier we
15 talked about the fact that you did not -- that
16 you had conversations -- let me back up.

17 You talked about that you were retained by
18 Chubb & Son, correct, to represent Atlas Turner?

19 A Yes, the firm was.

20 Q All right. Did you have -- did you tell them
21 about the -- did you tell Chubb & Son about the
22 application for default judgment?

23 A No, I did not advise them of that because
24 they -- I was no longer working for them or on
25 behalf of them.

1 Q Other than Thomas Meaney, I believe Alan
2 Dulude --

3 A Alain Dulude.

4 Q -- did you tell anyone else about the
5 application for default judgments or the default
6 judgments themselves?

7 MR. GRAVENS: Objection.

8 A Other than perhaps discussion in the office
9 about them, my office, no.

10 Q Do you know if anyone in your office had any
11 discussions with Alain Dulude or Thomas Meaney
12 or anyone else at Atlas Turner about the
13 application for default judgment or the default
14 judgments themselves?

15 A I don't specifically recall that there were. I
16 know there were discussions between others, a
17 paralegal in particular, but I don't believe it
18 had to do with the default judgments; it simply
19 had to do with transferring the files.

20 Q Who all worked on this case at your office at
21 Porter, Wright?

22 A I would have been the individual working on this
23 primarily and a paralegal at that time by the
24 name of Mary Lou Hunter. Her work on the case
25 was primarily being the transfer -- in

1 anticipation of the transfer of these files
2 after receipt of the two letters of September -
3 Exhibits 6 and 7.

4 Q Okay. Do you have any associates that worked
5 with you on this case?

6 A I would have had associates that worked on these
7 cases, yes.

8 Q And would they ever have occasion to have
9 contact with the client?

10 A Rarely.

11 Q Well, on the rare occasions when they would have
12 had contact with the client, would that have
13 been post June 5th or your withdrawal?

14 A Possibly, but they would have -- it would have
15 been standing -- it would have been discussions
16 about default judgments and things such as that
17 in my memory.

18 Q Why is that?

19 A Because of the nature of the motion and at the
20 time -- no, at the time, there would have been
21 no other associates working on this aspect of
22 what we're discussing today. It was simply
23 myself.

24 MR. EPPERSON: That's all I
25 have.

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MR. GRAVENS: No questions at
this time.

MR. EPPERSON: Thank you,
Mr. Conroy.

(Signature not waived.)

(Deposition concluded at 11:14 a.m.)

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THE STATE OF OHIO,)
COUNTY OF CUYAHOGA.)

SS:

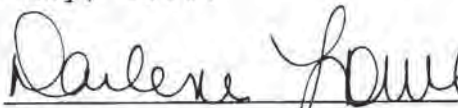
CERTIFICATE

I, Darlene Lowe, a Notary Public within and for the state of Ohio, duly commissioned and qualified, do hereby certify that the within-named witness, JAMES P. CONROY, was first duly sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony then given by him was by me reduced to stenotypy in the presence of said witness afterwards transcribed on a computer/printer, and that foregoing is a true and correct transcript of the testimony so given by him, as aforesaid.

I do further certify that this deposition was taken at the time and place in the foregoing caption specified.

I do further certify that I am not a relative, counsel or attorney of either party, or otherwise interested in the event of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Cleveland, Ohio, on this 24th day of May, 1996.



Darlene Lowe, Notary Public
within and for the state of Ohio
My Commission expires March 17, 1997.

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THE STATE OF _____)
COUNTY OF _____) SS:

Before me, a Notary Public in and for said state
and county, personally appeared the above-named
JAMES P. CONROY, who acknowledged that he
did sign the foregoing transcript and that the same is
a true and correct transcript of the testimony so
given.

IN TESTIMONY WHEREOF, I have hereunto affixed my
name and official seal at _____,
this _____ day of _____, 1996.

JAMES P. CONROY

Notary Public

My Commission expires: _____

EXHIBIT C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

EDWARD ANTOINE, et al.,

Plaintiffs,

v.

ATLAS TURNER, INC., et al.,

Defendants.

Case No. C90-2231

MEMORANDUM OPINION
AND ORDER

THOMAS D. LAMBROS, CHIEF JUDGE

On December 17, 1985, plaintiffs obtained default judgments against Atlas Turner, Inc. in four asbestos cases (C81-754, C81-755, C82-344 and C84-8056) which were filed under this Court's Ohio Asbestos Litigation ("OAL") Plan. They have now filed this action to collect on those default judgments. Atlas Turner filed a motion for relief from judgment pursuant to Federal Rules of Civil Procedure 55(c) and 60(b)(4), and has asserted five bases for vacating the underlying judgments. This motion was referred to Magistrate Judge Charles R. Laurie, who issued a Report and Recommendation that the default judgments be set aside on the ground that plaintiffs had failed to comply with the notice requirements of Fed.R.Civ.P. 55(b) with respect to their applications for default judgment. Magistrate Judge Laurie deferred consideration of the other four arguments in support of Atlas' motion for relief from judgment pending this Court's ruling on his Report and Recommendation.

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By order dated March 31, 1993, this Court found that Atlas Turner had, in fact, been given proper notice by virtue of service of the applications for default upon Atlas' counsel of record, James Conroy, and rejected the recommendation of the Magistrate Judge. However, the Court extended to Atlas Turner the opportunity to file supplemental briefing on all other grounds raised in its motion for relief from judgment. Atlas Turner has done so and the plaintiffs have filed a brief in response thereto.

A judgment may be set aside under Fed.R.Civ.P. 60(b)(4) as void. A judgment "is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." Wright & Miller, Federal Practice and Procedure: Civil § 2862 (1973 & Supp. 1993). In this case, Atlas argues both that this Court lacked personal jurisdiction over it and that the default judgments were entered in a manner inconsistent with due process.

Atlas raises again its argument that the judgments are void to the plaintiffs' failure to comply with the notice requirements of Fed.R.Civ.P. 55(b) and basic due process of law by serving copies of the applications for default upon Atlas' counsel of record, James Conroy. By Order dated March 31, 1993, this Court previously considered and rejected this argument for the reason that James Conroy had not been given permission to withdraw from his representation of Atlas in the underlying actions. Service upon him constituted service of the applications for default upon Atlas. This argument will not be revisited.

Second, Atlas argues that the default judgments are void due to the plaintiffs' alleged failure to comply with the notice requirements of the Foreign Sovereign Immunities Act ("the FSIA"), Title 28 U.S.C. § 1602 et seq., pertaining to service of the default judgments on Atlas. It is undisputed that, because Atlas is a subsidiary of Societe National d L'Amiante, a Crown Corporation established pursuant to a Parliamentary Act of the Province of Quebec, it is "an agency or instrumentality of a foreign state" and a "foreign state" within the meaning of 28 U.S.C. § 1603(b). Atlas argues that service of a default judgment upon it, therefore, must be made in accordance with Title 28 U.S.C. § 1608(e) which provides as follows:

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

Section 1608, subsections (a) and (b), which apply to a foreign state or political subdivision thereof and an agency or instrumentality of a foreign state, respectively, both provide for service, in part:

- (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or
- (2) if no special arrangement exists, . . . in accordance with an applicable international convention on service of judicial documents.

Atlas claims that plaintiffs never served the default judgment upon Atlas in any form, and therefore, the judgments are void.

During his deposition, Atlas' former counsel, James Conroy, admitted that he had, in fact, received copies of the default judgments. The record also reflects that the default judgments dated December 17, 1985 were issued to counsel of record by the Court on the same date. As previously discussed herein and in the Order of March 31, 1993, Mr. Conroy's notice of withdrawal on June 5, 1985 was ineffective. As far as the Court is concerned, Mr. Conroy remained counsel of record, and service upon him constituted service on Atlas. The Court can only assume that counsel of record will transmit information to its clients, and the Court is under no obligation to issue orders to a party directly unless counsel is granted permission to withdraw and no substitute enters an appearance.

More importantly, Atlas does not dispute that it received copies of the default judgments; it simply argues that the default judgments were not properly served upon it in accordance with the FSIA. This arguments fails to recognize the well-established principle that where a defendant has actual notice of the action, strict compliance with service of process provisions is unnecessary. The Sixth Circuit recently addressed this issue with respect to service on foreign entities under the FSIA. In Sherer v. Aeronauticas, S.A., 987 F.2d 1246 (6th Cir. 1993), the Court adopted the "substantial compliance" approach to service of process and agreed that:

the better rule permits the assertion of personal jurisdiction where substantial compliance has effected actual notice. The purpose of the [FSIA's] requirements is to ensure actual notice to foreign states of the fact and substance of pending litigation. Where a party has received such notice, despite technical omissions in the manner of service, the purpose of the Act if not its letter has been satisfied.

(quoting Obenchain Corp. v. Corporation Nationale de Inversiones, 656 F.Supp. 436 (W.D.Pa. 1987), aff'd in part and rev'd in part, 898 F.2d 142 (3d Cir. 1990)).

Aside from Atlas' actual notice of the default judgments, a close reading of the FSIA reveals that the plaintiffs did in fact comply with its service provisions. The FSIA provides that service may be made "in accordance with an applicable international convention on service of judicial documents." Under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, Canada has consented to service of process "by postal channels, directly to persons abroad." Because the default judgments were mailed to counsel for Atlas on December 17, 1985 by the Court, it is clear that Atlas was properly served with the default judgments under the FSIA. Accordingly, Atlas' argument that the default judgments are void on this basis is without merit.

Third, Atlas argues that the default judgments should be set aside under Fed.R.Civ.P. 60(b)(4), because they are void "due to a total failure of due process in the procedures by which they were obtained." Atlas argues the following deficiencies in the manner in which the default judgments were obtained:

- a) that counsel for plaintiffs submitted affidavits as to what the evidence would be rather than affidavits of the plaintiffs themselves in support of the applications for default;
- b) that the plaintiffs hurriedly presented the applications for default to the Court and that the affidavits originally accompanying the applications for default were not notarized;
- c) that the affidavits summarize attached medical reports and do not conclusively state that the plaintiffs' illnesses are related to asbestos exposure;
- d) that the affidavits incorrectly state that Atlas was a supplier of raw asbestos materials to the plants at which plaintiffs worked; and
- e) that the Court conducted a hearing on the applications for default via telephone and entered default in the exact amounts requested by plaintiffs.

Federal Rule of Civil Procedure 55(b)(2) sets forth the procedure for entry of default judgment by the Court. That subsection states in part:

If the party against whom judgment by default is sought has appeared in the action, the party . . . shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry in into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper

.....

Further, under the FSIA, under § 1608(e), a party seeking default judgment must establish his claim or right to relief by evidence "satisfactory to the court."

On October 23, 1985, the plaintiffs requested that the Clerk of Courts enter defaults against Atlas Turner. Those requests were supported by affidavits submitted by plaintiffs' counsel, M. Charles Cloninger, indicating that Atlas directed its former attorney, James Conroy to withdraw, that Atlas would no longer defend these actions and that Atlas had failed to appear for scheduled conferences and had not complied with various requirements of the Ohio Asbestos Litigation Case Management Plan. On October 25, 1985, Mr. Cloninger served Mr. Conroy with a notice of application for judgment advising that the Court would conduct a telephonic conference on the motions for default judgment on October 31, 1985 at 2:00 p.m. Following the telephonic conference, on December 17, 1985, this Court issued an order reopening the actions for the purposes of entering default judgments against Atlas. The Order states in part:

At 2:00 p.m. on October 31, 1985, this matter came on for a telephonic hearing on plaintiffs' motions for default judgments. Noting that Atlas had failed to make an appearance, and finding that plaintiffs had adequately supported their motions for default judgments with sworn materials demonstrating both that they had been exposed to asbestos containing materials manufactured by Atlas Turner and that they had suffered asbestos related diseases as a result of that exposure, this Court orally granted plaintiffs' motions for default judgments in the amounts requested. . .

Although a telephonic hearing was held in this case, neither the federal rules nor the FSIA require a hearing. The evidence submitted in support of the default judgments contained affidavits of counsel summarizing what the evidence would be at trial. The affidavits also attached medical reports and identified expert witnesses who would testify as to medical causation of the asbestos exposure. The plaintiffs also

submitted a summarization of the SPRINT interview of Ralph Wyatt, a longtime employee and former manager of the Grizzly plant who testified that Atlas did, in fact supply raw asbestos fiber to Grizzly from 1946 to 1977. The Court deemed the above evidence sufficient to establish the plaintiffs' right to relief. Further, Atlas does not attack the amounts of the judgments for lack of supporting evidence, but simply states that they are excessively high given Atlas' small role, if any, in contributing to the plaintiffs' asbestos diseases.

Given the above circumstances and the manner in which the default judgments were obtained, this Court cannot conclude that the judgments are void due to a lack of due process. Atlas was given sufficient notice of the impending default judgments and was given adequate opportunity to be heard at the telephonic conference but chose not to do so. Atlas cannot be heard to complain now that the plaintiffs "hurriedly" sought the default judgments. The requests for entry of default and accompanying affidavits were filed on October 23, 1985; the Court orally granted the default judgments on October 31, 1985, but the judgments were not entered until December 17, 1985. The plaintiffs brought this action in 1990 to enforce the judgments, and only then did Atlas move to set them aside.

Next, Atlas argues that the judgments are void because this Court lacked personal jurisdiction over it for two reasons: first, that the summons and complaint were not served upon it in accordance with the FSIA; and second that it does not have the minimum contacts with the State of Ohio to support an assertion of personal

jurisdiction. In its original brief in support of its motion for relief from judgment, Atlas states that "original service in this case was by mail." As articulated above, all that was required in this case was service by postal channels. Atlas does not deny that it had actual notice of this suit, but simply that the plaintiffs did not comply with the requirements of the FSIA. Again, where a defendant has actual notice of the action, strict compliance with service of process provisions is unnecessary. Thus, any lack of personal jurisdiction was not due to insufficient service of process.

The second prong of Atlas argument that the Court lacked personal jurisdiction is that Atlas had no contacts with the State of Ohio to render it amenable to suit in the State of Ohio. However, under the FSIA, the area relevant to a determination of minimum contacts for the assertion of personal jurisdiction is the entire United States, not merely the forum state. Meadows v. Dominican Republic, 817 F.2d 517, stay denied, 108 S.Ct. 343, 484 U.S. 9851, 98 L.Ed.2d 369, cert. denied, 108 S.Ct. 486, 484 U.S. 976, 98 L.Ed.2d 485 (9th Cir. 1987). In this case, while Atlas' direct contact with Ohio may be questionable, its contacts throughout the United States are not. As is evident from the record, Atlas supplied asbestos products throughout the country during the period of time relevant to the causes of action in the cases underlying the default judgments at issue here. Accordingly, this Court properly exercised personal jurisdiction over Atlas and the judgments are not void for a lack thereof.

Based upon all of the foregoing, Atlas' motion for relief from the default judgments pursuant to Rules 55(c) and 60(b)(4) must be denied; the default judgments are valid and enforceable against Atlas.

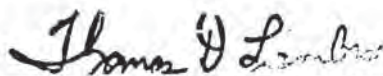
This action was brought pursuant to Ohio Revised Code § 3929.06 against Atlas and other defendants which are insurance carriers allegedly liable for payment on these judgments pursuant to contracts of insurance issued by them to Atlas. Section 3929.06 provides, in part,

Upon the recovery of a final judgment against any firm, person or corporation by any person, including administrators and executors, for loss or damage on account of bodily injury or death, . . . if the defendant in such action was insured against loss or damage at the time when the rights of action arose, the judgment creditor or the successor in interest is entitled to have the insurance money provided for in the contract of insurance between the insurance company and the defendant applied to the satisfaction of the judgment. If the judgment is not satisfied within thirty days after it is rendered, the judgment creditor or the successor in interest, to reach and apply the insurance money to the satisfaction of the judgment, may file a supplemental petition in the action in which said judgment was rendered, in which the insurer is made a new party defendant in said action, and whereon service of summons upon the insurer shall be made and returned as in the commencement of an action at law. Thereafter, the action shall proceed as to the insurer as in an original action.

The plaintiffs have alleged liability of the defendant insurance carriers based upon contracts of insurance provided to Atlas. The insurance carriers, therefore, should have been joined as new party defendants in the original underlying asbestos actions. Instead, this separate action was filed against Atlas and the insurance carriers to enforce the judgments. Pursuant to O.R.C. § 3929.06, if the default judgments are not satisfied

within thirty (30) days, the plaintiffs may join such carriers as new party defendants in the original asbestos actions in which the judgments were obtained. This action is hereby dismissed and terminated.

IT IS SO ORDERED.



Thomas D. Lambros
Chief Judge
United States District Court

AT CLEVELAND, OHIO

DATED: 3/1/94

EXHIBIT D

PORTER, WRIGHT,
MORRIS & ARTHUR
ATTORNEYS AT LAW

925 EUCLID AVENUE, SUITE 1500, CLEVELAND, OHIO 44115

TELEPHONE: (216) 443-9000

TELECOPIER: (216) 443-9011

JAMES P. CONROY

October 29, 1985

Thomas P. Meaney, Jr., Esq.
Burke, Haber & Berick Co., L.P.A.
National City Bank Building
Cleveland, Ohio 44114

Re: Atlas/Bell Cleveland Cases

Dear Tom:

Further to our conversation of October 28, 1985, enclosed you will find a list of those Atlas and/or Bell cases which our records indicate were active as of the date of declination of coverage by Chubb Insurance.

Please note that included in this list are the cases of Beamer, Simonin, Antoine, and Schlegel. One or more of these cases has multiple plaintiffs which include the following individuals:

Swanson Daniels
Delmar Schliesser
Donald Beamer
Roger Theis
Evelyn Simonin
Edward Antoine
Earl Beverly
James Dix
Kenneth Eagleson
George Hardesty
Charles Hofacker
Everett Johnson
Mose McCould
Walter Salisbury
Robert Schooley
Lester Sulfridge
Martha Blankenship
Richard Wallace
Garry Pack
Vaughn Schlegel
Dorris Steele
Doris Mae Verfaille

41 SOUTH HIGH STREET
COLUMBUS, OHIO 43215
TELEPHONE: (614) 227-2000
TELECOPIER: (614) 227-2100

1133 15TH STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE: (202) 822-0840
TELECOPIER: (202) 822-9595
TELEX: (810) 482-1702

1650 ATRIUM ONE,
301 EAST FOURTH STREET
CINCINNATI, OHIO 45202
TELEPHONE: (513) 381-4700
TELECOPIER: (513) 421-0991

2100 FIRST NATIONAL BANK BUILDING
P.O. BOX 1805
DAYTON, OHIO 45401
TELEPHONE: (513) 228-2411
TELECOPIER: (513) 228-0600

ELECTRONICALLY FILED - 2023 Aug 18 4:55 PM - RICHLAND - COMMON PLEAS - CASE#2022CP4003834



Thomas P. Meaney, Jr., Esq.
October 29, 1985
Page Two

Please note further that the enclosed list contains several of these names. I point this distinction out so that you will be aware that although the names appear in the so called "case list", these individuals are actually part of the four cases to which I have made specific reference.

Further, I enclose for your immediate attention a Notice of Application for Judgment which I received on October 28, 1985 from Attorney M. Charles Cloninger. As is apparent from the Notice, Attorney Cloninger is seeking default judgment in favor of the above listed plaintiffs for the amounts as set forth in the Notice. The hearing is scheduled for Thursday, October 31, 1985 at 2:00 p.m.

At this time I am in the process of preparing our final statement for services to be submitted directly to Atlas. I shall be forwarding the same to the client in the very near future. I also look forward to working with you in the orderly transfer of these files and shall do whatever is necessary to accomplish the same.

Please contact me should you have any questions in the interim. Best regards.

Very truly yours,

James P. Conroy

kjm/l236A

Enclosures

cc: *Alan Delude*
~~Alan Delude~~

BY MESSENGER

PORTER, WRIGHT,
MORRIS & ARTHUR

ELECTRONICALLY FILED - 2023 Aug 18 4:55 PM - RICHLAND - COMMON PLEAS - CASE#2022CP4003834

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

Melvin G. Welch and Donna B. Welch,

In Re: Coordinated Asbestos Docket

Plaintiffs,

Civil Action No: 2022-CP-40-03834

v.

NOTICE OF FILING3M Company, *et al.*,

Defendants.

Atlas Turner, Inc. f/k/a Atlas Asbestos
Company, Ltd., By and Through Its Duly
Appointed Receiver Peter D. Protopapas,

Third Party Plaintiff,

v.

Zurich American Insurance Co., individually
and as successor by merger to Maryland
Casualty Company; Federal Insurance
Company; Continental Insurance Company;
Insurance Company of North America; Aetna
Life & Casualty Co., n/k/a Travelers Casualty
& Surety Co.; Certain Underwriters at Lloyd's,
London, and Certain London Market
Companies; Canadian General Insurance
Company, n/k/a Aviva Insurance Co. of
Canada; and Marsh & McLennan Companies,
Inc.;

Third Party Defendants.

PLEASE TAKE NOTICE that Atlas Turner, Inc., f/k/a Atlas Asbestos Company, Ltd., by
and through Its Duly Appointed Receiver, Peter D. Protopapas, hereby provides notice to the Court
of the attached Exhibit A, the suspected insurance program of Atlas.

Respectfully submitted,

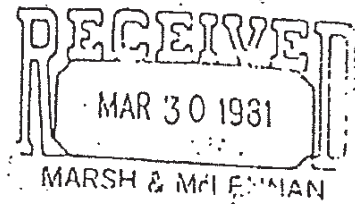
s/ Peter D. Protopapas
Peter D. Protopapas
SC BAR 68304
Rikard & Protopapas, LLC
2110 N. Beltline Blvd
Columbia, SC 29204
803.978.6111
pdp@rplegalgroup.com

This 20th Day of August, 2023

Exhibit «B»

Maryland Casualty Company Policy No. 56C-104668 from January 1 1961 to January 1, 1964	\$200,000/occurrence annual aggregate \$1,000,000
Maryland Casualty Company Policy No. 56-C-106117 from January 1, 1964 to January 1, 1967	\$200,000/occurrence annual aggregate \$1,000,000
Maryland Casualty Company Policy No. 56C-107294 from January 1, 1967 to January 1, 1970	\$1,000,000/occurrence sub-limit \$200,000 person, annual aggregate BI limit \$1,000,000
Maryland Casualty Company Policy No. 56-108541 from January 1, 1970 to May 21, 1970	\$1,000/occurrence sub-limit \$200,000 person, annual aggregate \$1,000,000
Maryland Casualty Company Policy No. 56-108801 from May 21, 1970 to October 1, 1971	\$3,000,000
Continental Insurance Company Policy No. 3147150 from October 1, 1971 to December 6, 1971	\$3,000,000
Federal Insurance Company Policy No. CGL-4400523 from December 6, 1971 to July 31, 1975	\$2,000,000
Aetna Life & Casualty Insurance Co. Policy No. 51-985LG26921SCA from July 31, 1975 to April 1, 1976	\$2,000,000/occurrence \$2,000,000 aggregate
Aetna Life & Casualty Insurance Co. Policy No. 51-985LG26920SCA from April 1, 1976 to July 1, 1976	\$2,000,000/occurrence \$2,000,000 aggregate
Aetna Life & Casualty Insurance Co. Policy No. 51-985LG30513SCA from July 1, 1976 to July 1, 1977	\$2,000,000/occurrence \$2,000,000 aggregate
Aetna Life & Casualty Insurance Co. Policy No. 985LG31719SCA from July 1, 1977 to July 1, 1978	\$2,000,000/occurrence \$2,000,000 aggregate
Insurance Company of North America from July 1, 1978 to July 1, 1981 #CJL-5971	\$ 500,000/occurrence \$4,000,000 annual aggregate
Insurance Company of North America from July 1, 1981 to February 12, 1982 #CJL-5971	\$2,000,000/occurrence \$4,000,000 annual aggregate

EXHIBIT B



A. Primary Coverage-

<u>PRIMARY</u>	<u>LIMITS</u>	<u>APPROXIMATE BODILY INJURY DEDUCTIBLE</u>
Maryland Casualty Co. Policy #56C-106117 1/1/57 to 2/2/67*	Unknown	Unknown
Maryland Casualty Co. Policy #56-107294 1/1/67 to 1/1/70	\$200,000 per person. \$1,000,000 annual aggregate.	None
Maryland Casualty Co. Policy #56-108451 1/1/70 to 5/21/70	\$200,000 per person. \$1,000,000 aggregate.	None
Maryland Casualty Co. Policy #56-108801 5/21/70 to 10/1/71	\$3,000,000	None
Continental Insurance Co. Policy #3147150 10/1/71 to 12/6/71	\$3,000,000	None
Federal Insurance Co. Policy #CGL-4400523 12/6/71 to 7/31/75	\$2,000,000	None
Aetna Life & Casualty Policy #51-985LG26921SCA 7/31/75 to 4/1/76	\$2,000,000 per occurrence \$2,000,000 aggregate.	\$250,000 per occurrence. \$2,000,000 aggregate.

*There is a possibility of earlier coverage which is under investigation.

Aetna Life & Casualty Policy #51-985LG26920SCA 4/1/76 to 7/1/76	\$2,000,000 per occurrence \$2,000,000 aggregate.	\$250,000 per occurrence. \$2,000,000 aggregate.
Aetna Life & Casualty Policy #51-985LG30513SCA 7/1/76 to 7/1/77	\$2,000,000 per occurrence \$2,000,000 aggregate.	\$250,000 per occurrence. \$2,000,000 aggregate.
Aetna Life & Casualty Policy #985LG31719SCA 7/1/77 to 7/1/78*	\$2,000,000 per occurrence \$2,000,000 aggregate.	\$500,000 per occurrence. \$9,100,000 aggregate. <i>Five million.</i>
Insurance Co. of North America Policy #CGL-5971 7/1/78 to 7/1/81	\$2,000,000 per occurrence. \$4,000,000 aggregate. per policy year.	\$500,000 per occurrence \$4,000,000 aggregate per policy year.

*ACL retained 53.67% of losses between \$500,000 and \$1 million and 43.67% of losses between \$1 million and \$2 million.

B. Excess Coverage-

No excess coverage prior to July 1, 1973. From that date forward coverage was provided by numerous carriers at the following aggregate amounts:

07/73 to 10/74	\$ 98,000,000
10/74 to 07/76	198,000,000
07/76 to 07/77	298,000,000
07/77 to 11/77	123,000,000
11/77 to 01/78	148,000,000
01/78 to 07/78	173,000,000
07/78 to 07/79	298,000,000
07/79 to 07/80	298,000,000
07/80 to date	298,000,000

ASBESTOS CORPORATION LIMITEDChronological Schedule of CGL

<u>Insurer</u>	<u>Coverage Occurrence/Aggregate</u>	<u>Policy Number</u>	<u>Term</u>	
			<u>Inception</u>	<u>- Expiration</u>
Maryland	200,000/1,000,000	56C104668	1/1/61	- 1/1/64
Maryland	200,000/1,000,000	56C106117	1/1/64	- 1/1/67
Maryland	200,000/1,000,000	56C107294	1/1/67	- 1/1/70
Maryland	200,000/1,000,000	56C108541	1/1/70	- 1/1/73 (C)
Maryland	3,000,000/3,000,000	56C108801	5/21/70	- 1/1/73 (C)
Continental	3,000,000/3,000,000	3147450	10/1/71	- 10/1/74 (C)
Federal	2,000,000/2,000,000	4400523	12/6/71	- Open (C)
Aetna	2,000,000/2,000,000	51LG26921 SCA	7/31/75	- 4/1/76
Aetna	2,000,000/2,000,000	51LG26920 SCA	4/1/76	- 7/1/76
Aetna	2,000,000/2,000,000	51LG30513 SCA	7/1/76	- 7/1/77
Aetna	2,000,000/2,000,000	51LG31719 SCA	7/1/77	- 7/1/78
INA	2,000,000/4,000,000	CGL 5971	7/1/78	- 7/1/79
INA	2,000,000/4,000,000	CGL 5971	7/1/79	- 7/1/80

- Cancelled before policy expiration

11/18/80

**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. 2022-CP-40-03834

Donna B. Welch, individually and as Personal Representative of the Estate of Melvin
G. Welch, deceased,

Respondent,

v.

Advance Auto Parts, Inc.; American Honda Motor Co., Inc.; Atlas Asbestos Co; Atlas
Turner, Inc. as successor to Atlas Asbestos Co, a foreign company; Bahnson, Inc.;
Covil Corporation; Daniel International Corporation; Davis Mechanical Contractors,
Inc.; Ellington Insulation Company, Inc.; Fluor Constructors International f/k/a Fluor
Corporation; Fluor Constructors International, Inc.; Fluor Daniel Services
Corporation; Fluor Enterprises, Inc.; General Parts, Inc. individually and as
successor-in-interest to Carquest Corporation; Goodrich Corporation f/k/a The B. F.
Goodrich Company; The Goodyear Tire & Rubber Company; Graybar Electric
Company, Inc.; Honeywell International, Inc. individually and as successor-in-
interest to Allied Signal, Inc., as successor to Bendix Corporation; Morse Tec LLC
f/k/a Borgwarner Morse Tec LLC, and successor-by-merger to Borg-Warner
Corporation; Occidental Chemical Corporation as successor to Durez Corporation;
O'reilly Automotive Stores, Inc.; Paramount Global f/k/a Viacomcbs Inc., f/k/a CBS
Corporation, a Delaware corporation f/k/a Viacom, Inc., successor-by-merger to CBS
Corporation, a Pennsylvania corporation, f/k/a Westinghouse Electric Corporation;
Pneumo Abex LLC successor-in-interest to Abex Corporation; Redco Corporation
f/k/a Crane Co.; Reinz Wisconsin Gasket LLC f/k/a and/or successor to Reinz
Wisconsin Gasket Co. and Wisconsin Gasket Manufacturing Co., a wholly owned
subsidiary of Dco LLC; Rust Engineering & Construction, Inc.; Rust International
Inc.; Southern Insulation, Inc.; Spirax Sarco, Inc.; Union Carbide Corporation;
Westrock MWV, LLC individually and as successor-in-interest to Westvaco; ZF
Active Safety US Inc. f/k/a Kelsey-Hayes Company,

Defendants,

Of whom Atlas Turner, Inc., is

Appellant.

NOTICE OF APPEAL

** 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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P.O. Box 993 (29402)
(843) 720-5488
Attorneys for Appellant

Other Counsel of Record:

Theile B. McVey
Jamie D. Rutkoski
KASSEL MCVEY ATTORNEYS AT LAW
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and

Aaron D. Chapman
DEAN OMAR BRANHAM SHIRLEY, LLP
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Dallas, Texas 75202
(214) 722-5990

Attorneys for Respondent

Peter D. Protopapas
John K. Chandler
Brian M. Barnwell
RIKARD & PROTOPAPAS, LLC
2110 N. Beltline Blvd, Columbia, SC 29204
PO Box 5640, Columbia, SC 29250
(803) 978-6111

Receiver for "insurance assets" of Atlas Turner, Inc. per Order being appealed

Defendant Atlas Turner, Inc. hereby appeals the following orders of the Honorable Jean Hoefer Toal, Circuit Court Judge, copies of which are attached hereto:

- **Order Holding Atlas Turner, Inc. in Contempt**, filed May 11, 2023;
- **Form 4 Order, filed June 16, 2023**, denying Atlas Turner Inc.'s May 22, 2023 Motion to Reconsider and Vacate the Court's Contempt Order of May 11, 2023;
- **Order Striking Atlas Turner's Answer**, filed June 20, 2023;
- **Order on Plaintiffs' Motion to Appoint a Receiver**, filed June 21, 2023;
- **Form 4 Order filed June 28, 2023**, denying Atlas Turner Inc.'s Motion to Reconsider the June 20, 2023 Order Striking Atlas Turner's Answer.
- **Form 4 Order filed June 28, 2023**, denying Atlas Turner Inc.'s Motion to Reconsider June 21, 2023 Order on Plaintiff's Motion to Appoint a Receiver; and

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 June 28, 2023.

Respectfully submitted,
CLEMENT RIVERS, LLP

By: s/Stephen L. Brown
 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
 Charleston, South Carolina 29401
 P.O. Box 993 (29402)
 (843) 720-5488
Attorneys for Appellant

Charleston, South Carolina

July 6, 2023

**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. 2022-CP-40-03834

Donna B. Welch, individually and as Personal Representative of the Estate of Melvin
G. Welch, deceased,

Respondent,

v.

Advance Auto Parts, Inc.; American Honda Motor Co., Inc.; Atlas Asbestos Co; Atlas
Turner, Inc. as successor to Atlas Asbestos Co, a foreign company; Bahnson, Inc.;
Covil Corporation; Daniel International Corporation; Davis Mechanical Contractors,
Inc.; Ellington Insulation Company, Inc.; Fluor Constructors International f/k/a Fluor
Corporation; Fluor Constructors International, Inc.; Fluor Daniel Services
Corporation; Fluor Enterprises, Inc.; General Parts, Inc. individually and as
successor-in-interest to Carquest Corporation; Goodrich Corporation f/k/a The B. F.
Goodrich Company; The Goodyear Tire & Rubber Company; Graybar Electric
Company, Inc.; Honeywell International, Inc. individually and as successor-in-
interest to Allied Signal, Inc., as successor to Bendix Corporation; Morse Tec LLC
f/k/a Borgwarner Morse Tec LLC, and successor-by-merger to Borg-Warner
Corporation; Occidental Chemical Corporation as successor to Durez Corporation;
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Corporation, a Delaware corporation f/k/a Viacom, Inc., successor-by-merger to CBS
Corporation, a Pennsylvania corporation, f/k/a Westinghouse Electric Corporation;
Pneumo Abex LLC successor-in-interest to Abex Corporation; Redco Corporation
f/k/a Crane Co.; Reinz Wisconsin Gasket LLC f/k/a and/or successor to Reinz
Wisconsin Gasket Co. and Wisconsin Gasket Manufacturing Co., a wholly owned
subsidiary of Dco LLC; Rust Engineering & Construction, Inc.; Rust International
Inc.; Southern Insulation, Inc.; Spirax Sarco, Inc.; Union Carbide Corporation;
Westrock MWV, LLC individually and as successor-in-interest to Westvaco; ZF
Active Safety US Inc. f/k/a Kelsey-Hayes Company,

Defendants,

Of whom Atlas Turner, Inc., 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)
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(843) 720-5488
Attorneys for Appellants

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 July 6, 2023, via email (see attached) to their following counsel of record:

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Receiver for “insurance assets” of Atlas Turner, Inc. per Order being appealed

I also certify that a copy of this **NOTICE OF APPEAL** is this day, July 6, 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
July 6, 2023

Bell, Pollyana (Polly)

From: Bell, Pollyana (Polly)
Sent: Thursday, July 6, 2023 4:38 PM
To: 'tmcvey@kassellaw.com'; 'jrutkoski@kassellaw.com'; 'achapman@dobslegal.com'; 'pdp@rplegalgroup.com'; 'jchandler@rplegalgroup.com'; 'bb@rplegalgroup.com'
Cc: 'Stephen Brown (sbrown@ycrlaw.com)'; Hines, Russell; Gandy, III, James D. (Tripp); Justman, Aimee
Subject: Welch v. Advance Auto Parts, Inc. et al. Notice of Appeal; 2022-CP-40-03834 (CR 20230593)
Attachments: 3 - 23.06.20 Order.pdf; 4 - 23.06.21 Order.pdf; 5 - 23.06.28 Order.pdf; 6 - 23.06.28 Order.pdf; Notice of Appeal.pdf; 1 - 23.05.11 Order.pdf; 2 - 23.06.16 Order.pdf

Enclosed please find Appellant Atlas Turner, Inc.'s Notice of Appeal and the orders referenced therein for service upon you in the above-referenced matter.

Thank you,

Pollyana Bell
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CLEMENT RIVERS, LLP
25 Calhoun Street • Suite 400 • Charleston, SC 29401
FOR COUNSEL

Dec 28 2023

SC Court of Appeals

Certificate of Counsel

The undersigned counsel for Appellants certifies that, in accordance with Rule 210(c), SCACR, this **Record on Appeal** contains all material proposed to be included by any party that was presented to the lower court and not any other material. The undersigned also certifies that this **Record on Appeal** complies with the Supreme Court of South Carolina's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings issued April 15, 2014.

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Stephen L. Brown

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December 28, 2023