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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
THE HONORABLE JEAN TOAL ACTING CIRCUIT COURT JUDGE

Civil Action No. 2023-CP-40-01759

Appellate Case No. 2023-001461

John A. Tibbs and Margaret B. Tibbs, Respondents,
v.
3M Company; 4520 Corp., Inc.; A.O. Smith Corporation; A.W. Chesterton Company; ABB Inc.; Air & Liquid Systems Corporation; Aiw-2010 Wind Down Corp.; Amentum Environment & Energy, Inc.; Anchor/Darling Valve Company; Armstrong International, Inc.; Asbestos Corporation Limited; ASCO, L.P.; Atlas Asbestos Co; Atlas Turner, Inc.; AWT Air Company, Inc.; Bahnson, Inc.; Banner Industries International, Inc.; Banner Industries, LLC; Banner Industries of N.E., Inc.; Barretts Minerals Inc.; Beaty Investments, Inc.; Bechtel Corporation; The Bonitz Company; Brand Insulations, Inc.; BW/IP Inc.; Canvas Ct, LLC; Cape PLC; Carboline Company; CB&I Laurens, Inc.; Cleaver-Brooks, Inc.; Consolidated Electrical Distributors, Inc.; Copes-Vulcan, Inc.; Covil Corporation; Crane Instrumentation & Sampling, Inc.; Crosby Valve, LLC; Daniel International Corporation; Davis Mechanical Contractors, Inc.; Dezurik, Inc.; Duke Energy Carolinas, LLC; Duke Energy Corporation; Eaton Corporation; Ellington Insulation Company, Inc.; Emerson Electric Co.; Fisher Controls International LLC; Flame Refractories, Inc.; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors

International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Gardner Denver Nash, LLC; General Boiler Casing Company, Inc.; General Cable Corporation; General Cable Industries, Inc.; General Electric Company; Gould Electronics Inc.; Goulds Pumps, Incorporated; Goulds Pumps LLC; Great Barrier Insulation Co.; Grinnell LLC; Hajoca Corporation; Howden North America Inc.; HPC Industrial Services, LLC; IMO Industries Inc.; ITT LLC; Joy Global Underground Mining LLC; K-Mac Services Incorporated; Metropolitan Life Insurance Company; Mine Safety Appliances Company, LLC; MP Supply, Inc.; The Nash Engineering Company; Occidental Chemical Corporation; Paramount Global; Patterson Pump Company; PECW Holding Company; Pfizer Inc.; Piedmont Insulation, Inc.; Plastics Engineering Company; Presnell Insulation Co., Inc.; Redco Corporation; Riley Power Inc.; Rockwell Automation, Inc.; RSCC Wire & Cable LLC; Schneider Electric USA, Inc.; Sequoia Ventures Inc.; Spirax Sarco, Inc.; SPX Corporation; Stafford Insulation Company; Standard Insulation Company Of N. C., Inc.; Starr Davis Company, Inc.; Starr Davis Company Of S.C., Inc.; Sterling Fluid Systems (USA) LLC; TE Wire & Cable LLC; Thermo Electric Company, Inc.; Union Carbide Corporation; Valves And Controls Us, Inc.; Velan Valve Corp.; Viking Pump, Inc.; Vistra Intermediate Company LLC; The William Powell Company Wind Up, Ltd.; Yuba Heat Transfer LLC; Zurn Industries, LLC,

Defendants,

Of which Asbestos Corporation Limited is the Appellant,

And

Peter Protopapas, Duly Appointed Receiver for Atlas Corporation Limited, is the

Respondent,

And

Cape PLC, individually and as successor in interest to Cape Asbestos Company Limited, by and through its duly appointed Receiver Peter D. Protopapas,

Third-Party Plaintiff, Respondent,

v.

Anglo American PLC, individually and as successor in interest to Anglo American Corporation of South Africa LTD., De Beers PLC, individually and as successor in interest to De Beers S.A., De Beers Centenary AG, De Beers Consolidated Mines Ltd., n/k/a De Beers Consolidated Mines Proprietary Ltd., De Beers UK Ltd., De Beers Jewellers LTD., De Beers Jewellers US, Inc., Anglo American US Holdings Inc., Element Six US Corp., Element Six Technologies US Corp., Element Six Technologies (OR) Corp., First Mode Holdings, Inc., Platinum Guild International (U.S.A.) Jewelry Inc., Lightbox Jewelry Inc., Forevermark US Inc., Anglo American Crop Nutrients (U.S.A.) LLC, Charter Consolidated Ltd., ESAB Corporation, Central Mining & Investment Corporation Ltd., Cape Holdco Ltd., The Law Debenture Corporation PLC, Cape Industrial Services Group Ltd., Mohed Altrad, Altrad UK Ltd., Cape UK Holdings Newco Ltd., Altrad Services, Ltd., f/k/a Cape Industrial Services Ltd., Altrad Investment Authority S.A.S., Sparrows Offshore Group Ltd., Hawk Bidco US Inc., ArranCo US, LLC, Sparrows Offshore, LLC, and The Sparrows Group, LLC,

Third-Party Defendants,

Of which Mohed Altrad, Altrad Investment Authority S.A.S., ArranCo US, LLC, Hawk Bidco US Inc., Sparrows Offshore, LLC, Anglo American PLC, De Beers, PLC, De Beers Centenary AG, De Beers Consolidated Mines Proprietary Ltd., De Beers UK Ltd.,

ESAB Corporation, Charter Consolidated Ltd., and
Central Mining & Investment Corporation Ltd, **Appellants**,

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STATEMENT OF ISSUES ON APPEAL

1. Consistent with South Carolina law and Constitutional due process, is it permissible for a purported receiver to bring third-party claims on behalf of a foreign corporate defendant that is solvent, was placed into receivership in an unrelated action, and was never served with process concerning appointment of the receiver?

2. Consistent with South Carolina law and Constitutional due process, can the Circuit Court exercise personal jurisdiction over a nonresident corporate defendant where the defendant has no contacts with the State of South Carolina, and where the plaintiff fails to allege a *prima facie* basis for imputing the purported South Carolina contacts of a third-party entity to the defendant?

STATEMENT OF THE CASE

On May 3, 2023, in the action captioned *Tibbs v. 3M Co., et al.*, No. 2023-CP-40-01759, plaintiffs John and Margaret Tibbs filed a Complaint against Cape plc and other defendants asserting claims for negligence, strict liability, vicarious liability based upon respondeat superior, breach of implied warranties, fraudulent misrepresentation, conspiracy, and loss of consortium arising from Mr. Tibbs' alleged exposure to asbestos.

On June 30, 2023, Peter D. Protopapas, in his purported capacity as receiver for Cape plc, filed a Third-Party Complaint against De Beers plc and thirty-two other Third-Party Defendants asserting causes of action for unjust enrichment, "constructive trust," "alter ego and veil-piercing liability," and "accounting."

De Beers plc filed a Motion to Dismiss for Lack of Personal Jurisdiction on August 15, 2023, and a Memorandum in Support of Motion to Dismiss for Lack of Personal Jurisdiction on October 23, 2023.

Third-Party Defendants ArranCo US, LLC, Hawk Bidco (US), Inc., and Sparrows Offshore, LLC, filed Motions to Dissolve the Cape plc "Receivership" on August 21, 2023, and September 5, 2023. Third-Party Defendants Mohed Altrad and Altrad Investment Authority SAS also filed a Motion to Dissolve the Cape plc "Receivership" on September 1, 2023, and September 20, 2023. Third-Party Defendants Charter Consolidated Ltd., Central Mining and Investment Corporation Ltd., and ESAB Corporation filed Motions for Protective Order and to Dissolve Receivership on October 6, 2023.

Mr. Protopapas, in his purported capacity as receiver for Cape plc, filed an Omnibus Opposition to Certain Third-Party Defendants' Motions to Dismiss under Rules 12(b)(1) and 12(b)(6) and an Omnibus Opposition to Motions to Dissolve on October 18, 2023, and filed a Supplement to Omnibus Memorandum in Opposition to Third-Party Defendants' Motion to Dismiss for Lack of Personal Jurisdiction on December 4, 2023.

On October 25, 2023, the Circuit Court held oral argument on the motions to dismiss for lack of personal jurisdiction filed by De Beers plc and other Third-Party Defendants and the motions to dissolve the purported receivership over Cape plc.

On December 6, 2023, the Circuit Court entered an Order Denying Certain Third-Party Defendants' Motions to Dissolve Receivership and Third-Party Defendants' Motions to Dismiss for Lack of Personal Jurisdiction. That Order denied De Beers plc's Motion to Dismiss for Lack of Personal Jurisdiction.

On December 18, 2023, De Beers plc filed a Notice of Joinder of the Motions to Dissolve the Cape plc "Receivership" and a Notice of Appeal of the Circuit Court's Order denying its Motion to Dismiss for Lack of Personal Jurisdiction.

STATEMENT OF FACTS

This appeal concerns the purported receiver's (hereinafter "Receiver") authority to bring third-party claims against De Beers plc and the other Third-Party Defendants on behalf of Cape plc, and the Circuit Court's lack of personal jurisdiction over De Beers plc in this action.

Pursuant to South Carolina Appellate Court Rule ("SCACR") 208(6), De Beers plc adopts by reference and incorporates herein the recitation of facts and legal arguments set forth in the Initial Appellant Briefs filed by the other Third-Party Defendants with respect to the Circuit Court's denial of the Motions to Dissolve Receivership. If those arguments are successful, the case must be dismissed.

The case should be dismissed as against De Beers plc for the additional reason that the Circuit Court cannot exercise personal jurisdiction over De Beers plc in this action consistent with due process under the United States Constitution. In its order denying De Beers plc's motion to dismiss for lack of personal jurisdiction, the Circuit Court makes no determination that De Beers plc has any contacts with the State of South Carolina whatsoever, let alone contacts that gave rise to or relate to the Receiver's claims in this action. Indeed, De Beers plc does not have any such contacts. The entity now known as De Beers plc is a holding company incorporated in Bailiwick of Jersey and formed in 2000. De Beers plc conducts no business in South Carolina—whether related to asbestos or otherwise—and did not even exist at the time of the alleged events underlying the Receiver's claims.

To side-step these inconvenient (and incontrovertible) facts, which are fatal to any finding of jurisdiction over De Beers plc, the Circuit Court concluded that De Beers plc

was nevertheless subject to alter ego or "single business enterprise" jurisdiction based on an attenuated chain of imputed contacts that Cape[1] allegedly has with South Carolina that are not supported by the allegations in the Third-Party Complaint, let alone by actual evidence. The Circuit Court concluded that the Receiver has made the required *prima facie* showing that (i) De Beers plc is the successor in interest to either Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd., and (ii) those entities were either alter egos or part of a single business enterprise with Cape, "including through" Charter Consolidated Ltd. These conclusions are not supported by the evidentiary record in this case, which is limited to the allegations in the Receiver's Third-Party Complaint and De Beers plc's (and the other Third-Party Defendants') affidavits submitted in support of their motions to dismiss.

The Receiver does not allege any facts in the Third-Party Complaint that would show that De Beers plc was an alter ego of or part of a single business enterprise with Cape, either individually or as a successor in interest to either Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd. The suggestion that the Circuit Court could pierce the corporate veil between Cape and De Beers plc is baffling when one considers that there has never been even a remote corporate affiliation between the entity now known De Beers plc, a holding company formed in 2000, and Cape: Anglo American

[1] The order concluded that the entity now known as Cape Intermediate Holdings Ltd. was formerly known as Cape plc from 1989 to 2011 and is the successor in interest to Cape Industries Ltd., formerly known as Cape Asbestos Company Ltd. De Beers plc contests that conclusion for the reasons set forth in the Initial Appellant Briefs filed by the other Third-Party Defendants. Unless otherwise indicated, references to "Cape" herein refer to Cape Industries Ltd., the entity the Circuit Court erroneously concluded was an alter ego of, or part of a single business enterprise with, Anglo American Corporation of South Africa Ltd. and De Beers Consolidated Mines Ltd.

Corporation of South Africa Ltd. (now known as Anglo American South Africa (Pty) Ltd.) had fully divested its indirect ownership interest in Cape by 1993, seven years before the entity now known as De Beers plc was formed.

The fact the Receiver fails to sufficiently allege that De Beers plc is the successor in interest to Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd. alone is sufficient to warrant dismissal of De Beers plc from the action for lack of personal jurisdiction. But the Circuit Court's determination that the Receiver pled facts sufficient to make a *prima facie* case of alter ego status, or the existence of a single business enterprise, as between Anglo American Corporation of South Africa Ltd., De Beers Consolidated Mines Ltd., and Cape—"including through Charter"—also is not supported by the Receiver's allegations, and is another reason why there can be no personal jurisdiction over De Beers plc consistent with Constitutional due process. In this regard, the Third-Party Complaint is replete with vague and conclusory group pleading, theatric references to the "dominance" of the Oppenheimer mining "empire" in "Apartheid-era South Africa," and other smoke and mirrors, but contains few specific facts that could even possibly support the Receiver's theories of alter ego and single business enterprise.

South Carolina law requires more. In particular, it requires the Receiver to *plead with specificity* facts demonstrating that Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd. were the alter ego of, or part of a single business enterprise with, Cape. The Receiver's allegations fall woefully short of this legal standard, asserting instead that: (1) De Beers Consolidated Mines Ltd. and Cape had one person who served as a director for both entities and who died in 1930, decades prior to the commencement of the purported scheme to avoid asbestos liabilities, and (2) that Anglo

American Corporation of South Africa Ltd., De Beers Consolidated Mines Ltd., and Charter occupied space in the same London office building half a century ago.

The Receiver has failed to meet his burden of demonstrating personal jurisdiction over De Beers plc. For that reason, the Circuit Court's order denying De Beers plc's motion to dismiss for lack of personal jurisdiction should be reversed.

I. The Receiver's Third-Party Complaint

On May 3, 2023, plaintiffs in the underlying action filed a lawsuit against Third-Party Plaintiff Cape plc and other defendants (the "First-Party Defendants") seeking to recover damages for injuries that allegedly resulted from the First-Party Defendants' alleged production and distribution of asbestos containing products from the 1940s to late 1980s. *See generally Tibbs v. 3M Co., et al.*, No. 2023-CP-40-01759, First Am. Compl. The plaintiffs asserted claims for negligence, strict liability, vicarious liability based upon respondeat superior, breach of implied warranties, fraudulent misrepresentation, conspiracy, and loss of consortium. *See id.* ¶¶ 145–247.

Around the same time, in an unrelated asbestos personal injury action captioned *Park v. Armstrong Int'l, Inc.*, No. 2021-CP-40-02727, the Circuit Court appointed Peter D. Protopapas to serve as Receiver over "Cape PLC as the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.)." The *Park* action, however, had been fully resolved (with no finding of liability with respect to Cape plc) nine months prior to the Receiver's appointment. It is unclear why the *Park* plaintiff moved to place Cape plc into receivership or why the Circuit Court granted that motion (without a hearing) when the case had ended almost a year beforehand.

In his newly minted, purported capacity as Receiver for Cape plc in the unrelated *Park* action, on June 30, 2023, the Receiver then filed a Third-Party Complaint against De Beers plc and thirty-two other Third-Party Defendants in *this* action. In that complaint, the Receiver alleges that Cape and the Third-Party Defendants were co-conspirators in a "liability-avoidance scheme" that was "designed to avoid responsibility to the . . . people injured by Cape asbestos." Third-Party Compl. ¶ 43(e). Unlike the tort claims at issue in the Tibbs plaintiffs' lawsuit, the Receiver asserts equitable "claims" for unjust enrichment, constructive trust, alter ego and veil-piercing liability, and accounting, *see id.* ¶¶ 125–46, based upon on the Third-Party Defendants' alleged scheme to "obfuscate" corporate relationships to "frustrate creditors and avoid liability" for asbestos-related injuries for "tens of thousands" of individuals across the country, *id.* ¶¶ 43(e), 145.

More specifically, the Receiver alleges that Cape established the North American Asbestos Corporation ("NAAC"), a marketing subsidiary, in 1953, to facilitate the distribution of asbestos from South Africa to the United States (including South Carolina), while also concealing the risks of asbestos. Then, when injured persons began filing asbestos-related products liability lawsuits in the 1970s, the Receiver claims that Cape (in whose shoes the Receiver stands) took various steps to evade liability, including liquidating NAAC in 1978, ceasing to manufacture asbestos products in 1982, restructuring its business, and refusing to appear in U.S. court proceedings. Third-Party Compl. ¶¶ 70–75, 79–88, 91–104; *see also* Third-Party Plaintiff Cape plc's Omnibus Opposition to Third-Party Defendants' Motions to Dismiss for Lack of Personal Jurisdiction ("Opp.") at 7–9.

The Third-Party Complaint does not allege that De Beers plc directed or participated in Cape's alleged misconduct.[2]

II. The Receiver's Jurisdictional Allegations

In the Third-Party Complaint, the Receiver alleges without any supporting facts that various entities (which he collectively defines as the "Oppenheimer Third-Party Defendants"), including De Beers plc, are present in South Carolina "through" ten U.S. entities for whom Anglo American plc "act[s] as ultimate parent company." Third-Party Compl. ¶ 121.[3] The Receiver further alleges that the "[e]xercise of personal jurisdiction over the Oppenheimer Third-Party Defendants . . . is proper . . . because certain of the Oppenheimer Third-Party Defendants dominated and controlled Cape over a period of decades, which resulted in grave injury and injustice to the people of South Carolina injured by Cape's asbestos." Opp. at 27.

The Receiver does not allege any facts in support of his position that De Beers plc is subject to personal jurisdiction in South Carolina. The only allegations in the Third-Party Complaint specific to De Beers plc are (1) that De Beers plc "is a corporation organized under the laws of the Bailiwick of Jersey, with its principal place of business

[2] The Receiver makes various allegations in the Third-Party Complaint regarding connections between Cape plc and "De Beers", but the Receiver defines "De Beers" to mean "De Beers Consolidated Mines Ltd. (collectively with its affiliates and successors in interest, as named as Third-Party Defendants herein." Third-Party Compl. ¶ 45. Thus, allegations in the Third-Party Complaint regarding "De Beers" concern De Beers Consolidated Mines Ltd. and a group of unspecified affiliate companies; they are not specific to De Beers plc.

[3] Those entities are alleged to include "De Beers Jewellers US, Inc., Anglo American US Holdings Inc., Element Six US Corp., Element Six Technologies US Corp., Element Six Technologies (OR) Corp., First Mode Holdings, Inc., Platinum Guild International (U.S.A.) Jewelry Inc., Lightbox Jewelry Inc., Forevermark US Inc., and Anglo American Crop Nutrients (U.S.A.), LLC." Third-Party Compl. ¶ 121.

located in St. Helier, Jersey," Third-Party Compl. ¶ 3; and (2) that De Beers plc "dominat[ed], conspire[ed], facilitat[ed] or otherwise financially benefit[ted]" from Cape's alleged mining and marketing of asbestos. *Id.* ¶ 121. The Receiver's jurisdictional allegations otherwise consist solely of boilerplate statements that allege in conclusory fashion without any factual specificity that, for example, "the Oppenheimer Third-Party Defendants have increased their business activities in the United States." *Id.* ¶ 122.

III. De Beers plc is a Foreign Holding Company Formed in 2000

As set forth in the uncontradicted Affidavit of Konstantinos Mitsos, Head of Corporate Projects for the De Beers Group (the "Mitsos Affidavit" or "Mitsos Aff."), the entity now known as De Beers plc is a holding company, founded in 2000, that is organized under the laws of the Bailiwick of Jersey. *See* Mitsos Aff. ¶ 3. Its principal place of business is located in London, United Kingdom. *Id*. De Beers plc has never been organized under the laws of, nor had its principal place of business in, the State of South Carolina. *Id.* ¶ 4. As a holding company, De Beers plc has not conducted and does not conduct any business in South Carolina. *See id.* ¶ 10.

IV. De Beers plc Has No Connection to South Carolina

De Beers plc has no connection to the State of South Carolina. De Beers plc has never held a Certificate of Authority to do business in South Carolina and does not conduct business in South Carolina. *See id.* ¶¶ 5e, 8. De Beers plc does not have an agent for service of process in South Carolina and does not have any employees in South Carolina. *Id.* ¶ 5b. De Beers plc also does not own or lease any real or personal property, maintain any facilities, keep any offices, or hold any bank accounts in South Carolina. *Id.*

Contrary to the Third-Party Complaint's allegation that "De Beers plc . . . currently [has a] presence, operations, and business in the United States, including in South Carolina" through the operations of ten U.S. entities identified at Paragraph 121 of the Third-Party Complaint, De Beers plc does not have operations or businesses in South Carolina. Mitsos Aff. ¶¶ 5e, 8. Moreover, De Beers plc is not a shareholder in any of the entities identified above by the Third-Party Complaint, *id.* ¶¶ 6–7, and thus cannot have a presence, operations, and business anywhere "through operation" of those entities.

Also contrary to the Third-Party Complaint's allegation that De Beers plc has increased its "business activities in the United States," including by using "courts in the United States to enforce trademarks or other valuable rights," Third-Party Compl. ¶ 122, De Beers plc has never filed a lawsuit in the State of South Carolina and has never consented to the exercise of jurisdiction over it in South Carolina. Mitsos Aff. ¶¶ 5c–d, 9.

V. De Beers plc Has Never Produced or Sold Asbestos and Has No Connection to Companies in the Asbestos Industry

De Beers plc has never mined, milled, produced, manufactured, sold, or distributed asbestos or asbestos-containing products for use in South Carolina. Mitsos Aff. ¶ 5a. De Beers plc also has never had any shareholder interest in Cape plc, the entity for which the Receiver was purportedly appointed in this action. *Id.* ¶ 6. Likewise, Cape plc has never had a shareholder interest in De Beers plc. *Id.* Further, De Beers plc has no relationship to the alleged series of events that underly the Third-Party Complaint's causes of action against De Beers plc, because De Beers plc did not even exist when those events allegedly occurred.

VI. The Circuit Court Denies De Beers plc's Motion to Dismiss and the Third-Party Defendants' Motions to Dissolve

On August 15, 2023, De Beers plc filed a Motion to Dismiss for Lack of Personal Jurisdiction and a supporting memorandum on October 23, 2023. Separately, motions to dissolve the purported Receivership over Cape plc in this action were filed by other Third-Party Defendants (collectively, the "Motions to Dissolve Receivership").

The Receiver filed an omnibus opposition to De Beers plc and other Third-Party Defendants' motions to dismiss for lack of personal jurisdiction, as well as an omnibus opposition to the Motions to Dissolve Receivership, on October 18, 2023. On December 6, 2023, the Circuit Court entered an Order Denying Certain Third-Party Defendants' Motions to Dissolve Receivership and Third-Party Defendants' Motions to Dismiss for Lack of Personal Jurisdiction (the "Order"). With respect to De Beers plc's motion to dismiss for lack of personal jurisdiction, the Court concluded that

> (i) the Receiver has made the required *prima facie* showing that De Beers PLC, whether individually or as a successor in interest to De Beers Consolidated Mines Ltd. and/or Anglo American Corporation of South Africa Ltd., was an alter ego of Cape or part of an amalgamated, single business enterprise, or benefitted from the use of Cape as its agent, with respect to the mining, production, manufacture, and distribution of asbestos fiber (among other valuable minerals, metals, and other materials handled by the Oppenheimer mining empire) from South Africa to the United States, including to South Carolina, and (ii) the exercise of personal jurisdiction over De Beers PLC is proper at this time, including based on the longstanding activities and business of the Anglo/De Beers Group to mine, market, and distribute various minerals, including asbestos and diamonds, to the United States of America, including South Carolina.

Order at 61–63 (footnote omitted). In the same Order, the Court denied the Third-Party Defendants' Motions to Dissolve Receivership, holding that there were "no valid grounds to dissolve the Cape Receivership." *Id.* at 25.

On December 18, 2023, De Beers plc timely filed a Notice of Appeal of the Circuit Court's Order denying its motion to dismiss for lack of personal jurisdiction as well as a Notice of Joinder of the Motions to Dissolve Receivership. Pursuant to SCACR 208(6), De Beers plc adopts by reference and incorporates herein the portions of the Initial Appellant Briefs filed by the other Third-Party Defendants addressing the Circuit Court's denial of the Motions to Dissolve Receivership.

STANDARD OF REVIEW

On appeal of an order denying a motion to dismiss for lack of personal jurisdiction, the Circuit Court's determination is subject to reversal if it is "unsupported by the evidence or influenced by an error of law." *Moosally v. W.W. Norton & Co., Inc.*, 358 S.C. 320, 327, 594 S.E.2d 878, 882 (Ct. App. 2004). "The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case." *Id.* The plaintiff "bears the burden of proving the existence of personal jurisdiction" over a nonresident defendant. *Id.* At the pretrial stage, that burden "is met by a *prima facie* showing of jurisdiction either in the complaint or in affidavits." *Id.* Nevertheless, bare and conclusory allegations are insufficient to make out a *prima facie* case of personal jurisdiction. *See, e.g., Power Prods. & Servs. Co. v. Kozma*, 379 S.C. 423, 433, 665 S.E.2d 660, 665–66 (Ct. App. 2008) (rejecting allegation that defendants "misappropriated the trade secrets of [plaintiff] with a plan toward opening a competitive business prior to their termination" as conclusory, and therefore not entitled to presumption of truth on a motion to dismiss for lack of personal jurisdiction, where plaintiff "failed to allege specific facts" supporting those claims, and defendants' "affidavits actually support[ed] the opposite conclusion").

I. Requirements of Personal Jurisdiction

In determining whether personal jurisdiction exists over a nonresident defendant, the Circuit Court performs a two-step analysis. First, the Circuit Court determines whether the South Carolina long-arm statute provides a basis for asserting jurisdiction over the defendant. *See Young v. FDIC*, 103 F.3d 1180, 1191 (4th Cir. 1997). Second, the Circuit Court determines whether the exercise of personal jurisdiction comports with due process under the Fourteenth Amendment to the U.S. Constitution. *Anita's N.M. Style Mexican Food, Inc. v. Anita's Mexican Foods Corp.*, 201 F.3d 314, 317 (4th Cir. 2000). South Carolina's long-arm statute has been construed to be coextensive with the limits of Constitutional due process. *S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 130 (1992). Accordingly, "the sole question" on a motion to dismiss for lack of personal jurisdiction "becomes whether the exercise of personal jurisdiction in this case would violate the strictures of due process." *Abdulla v. So. Bank*, 439 S.C. 391, 401, 887 S.E.2d 138, 143 (2004) (citation omitted).

In conducting this analysis, "due process requirements must be met as to each defendant and thus the Court is to assess individually each defendant's contacts with South Carolina." *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 492, 611 S.E.2d 505, 508 (2005) (citing *Rush v. Savchuk*, 444 U.S. 320 (1980)). Further, "the focus must center on the contacts generated by the defendant, and not on the unilateral actions of some other entity." *Id.* (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984)). South Carolina courts must faithfully apply the decisions of the United States Supreme Court in determining whether they can exercise personal jurisdiction over a nonresident defendant consistent with Constitutional due process. *See, e.g.*, *State v. Watts*,

320 S.C. 377, 381 n.1, 465 S.E.2d 359, 362 (Ct. App. 1995) ("[A] rule stated in a decision by the United States Supreme Court and based on the United States Constitution is binding on state courts under the Supremacy Clause" (citing *Henry v. City of Rock Hill*, 376 U.S. 776 (1964); S.C. Const. art. V § 9)).

A. General Personal Jurisdiction

Consistent with Constitutional due process, a foreign corporate defendant may be subject to either general or specific jurisdiction, depending upon the extent of the defendant's contacts with the forum state. *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014). The "paradigm" bases for the exercise of general jurisdiction over a corporate defendant are its state of incorporation and the state where it maintains its principal place of business. *Id.* at 137 (citing *Goodyear Dunlop Tires Operations S.A. v. Brown*, 564 U.S. 915, 924 (2011)). Only in an "exceptional" case will a corporate defendant be subject to general jurisdiction anywhere else, namely, where the defendant's contacts with the forum are so continuous and systematic that they are equivalent to physical presence in the state, such that the defendant can fairly be considered "at home" there. *See id.* at 139, 139 n.19; *Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft KG v. Texport, Inc.*, 954 F. Supp. 2d 415, 421 (D.S.C. 2013) (same). Indeed, even in cases where corporate defendants have conducted a substantial amount of activity in the forum, such as by advertising to in-state residents, maintaining offices and employees there, making purchases and generating millions of dollars in revenue there, and holding regular meetings within the state, courts

have found that general jurisdiction is lacking. *See, e.g.*, *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 624 (4th Cir. 1997) (collecting cases).[4]

B. Specific Personal Jurisdiction

Specific jurisdiction requires that the plaintiff's claims "arise out of or relate to" the defendant's forum contacts. *Ford Motor Co. v. Mont. Eighth Jud. Cir. Ct.*, 592 U.S. 351, 359 (2021) (quoting *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 582 U.S. 255, 262 (2017)).

To determine whether a corporate defendant is subject to specific jurisdiction, South Carolina courts conduct a two-prong test. Under the first prong, courts consider (i) whether the defendant has purposefully availed itself of the privilege of conducting business within South Carolina, and (ii) whether the plaintiff's causes of action arise from or relate to the defendant's contacts with the state (which, together with part (i), establishes "minimum contacts"). *See Power Prods.*, 379 S.C. at 432, 665 S.E.2d at 665. If minimum contacts have been established under this first prong, courts turn to the second prong of the test, which inquires whether the exercise of specific jurisdiction over the defendant would be fair and reasonable, that is, comport with "traditional notions of fair play and substantial justice." *See id.*

[4] The Circuit Court did not hold in its Order that De Beers plc—a holding company, not an operating company, organized in Jersey and headquartered in the United Kingdom—is subject to general jurisdiction in South Carolina. *See* Order at 27 n.17 ("Because the Receiver's response to the Personal Jurisdiction Motions focused on establishing specific jurisdiction, the Court likewise focuses its discussion on specific jurisdiction."). There are no facts in the record or otherwise that would support the Circuit Court's exercise of general jurisdiction over De Beers plc.

C. Alter-Ego and "Single Business Enterprise" Theories of Personal Jurisdiction

With respect to both general and specific jurisdiction, courts may impute the forum contacts of one corporate entity to another on the basis that the former entity is acting as the agent of the latter entity, and, therefore, any contacts the agent has with the forum are fairly considered the contacts of the principal. *See, e.g.*, *Wright v. Waste Pro USA Inc.*, 2019 WL 3344040, at *5 (D.S.C. July 25, 2019) (observing that "courts may rely on agency principles to exercise personal jurisdiction over a parent corporation through its subsidiary if the parent company exercises a certain level of control and supervision over its subsidiary").

In the traditional parent-subsidiary context, courts inquire whether the subsidiary is the alter ego of the parent. *Id.* Under the alter ego test, courts consider "(1) common ownership; (2) financial independence; (3) degree of selection of executive personnel and failure to observe corporate formalities; and (4) the degree of control over marketing and operational policies." *Id.*[5]

Outside the parent-subsidiary context, courts have recognized the "single business enterprise" theory (also referred to as the "amalgamation of interests" theory) as a means

[5] As the Circuit Court notes in its Order, South Carolina courts have recognized alter ego status and corporate veil piercing as independent bases for imputing jurisdictional contacts between a parent and subsidiary. Order at 29 n.18. Nonetheless, the two theories rely on largely overlapping (if not identical) considerations. *Id.* (collecting cases). Under the veil piercing test, courts consider "(1) whether the [subsidiary] was grossly undercapitalized; (2) failure to observe corporate formalities; (3) non-payment of dividends; (4) insolvency of the debtor corporation at the time; (5) siphoning of funds of the corporation by the dominant stockholder; (6) non-functioning of other officers or directors; (7) absence of corporate records; and (8) the fact that the corporation was merely a facade for the operations of the dominant stockholder." *Wright*, 2019 WL 3344040, at *8. Consistent with the Circuit Court's Order, De Beers plc refers to alter ego and veil piercing as a single "alter ego" test for purposes of the jurisdictional analysis.

of imputing jurisdictional contacts between two corporate affiliates who do not have a parent-subsidiary relationship. *See, e.g.*, *Duong v. N. Am. Transp. Servs. LLC*, 2019 WL 13109647, at *13 (D.S.C. Sept. 25, 2019) (The single business enterprise theory "operates to pierce the corporate veil of companies that are merely related, as opposed to piercing the corporate veil of a parent company through a subsidiary company. In other words, it allows 'horizontal' veil piercing."). Under this theory, "a court can refuse to recognize multiple businesses as separate and instead consider them as one entity when the business[es] 'have unified their . . . operations and resources to achieve a common business purpose and where adherence to the fiction of separate corporate identities would defeat justice.'" *Id.* (quoting *Pertuis v. Front Roe Rests., Inc.*, 423 S.C. 640, 653, 817 S.E.2d 273, 279 (2018)). The single business enterprise theory '"requires more than a showing that various businesses are intertwined. There must also be 'further evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions.'" *Id.* (quoting *Pertuis*, 423 S.C. at 281). Few courts have applied the single business enterprise theory to impute jurisdictional contacts.

ARGUMENT

I. The Receiver's Allegations Do Not Support Imputing Other Entities' Jurisdictional Contacts to De Beers plc based on Successor Liability

In the Order, the Circuit Court concluded the Receiver has made a *prima facie* showing that De Beers plc is the successor in interest to Anglo American Corporation of South Africa Ltd. and/or De Beers Consolidated Mines Ltd., and therefore may be considered an alter ego of or part of a single business enterprise with Cape. Order at 61–62. Specifically, the Court concluded that De Beers plc "is effectively alleged to be a successor in interest to De Beers Consolidated Mines Ltd. (as formed in 1888) and

responsible for actions as part of various entities in the "De Beers Group, which have been created since the 1970s," because those unspecified entities are alleged to "act as 'successors in interest and beneficiaries of Cape's liability avoidance scheme, co-responsible for Cape's tortious conduct.'" Order at 62 (quoting Third-Party Compl. ¶ 112)). The Circuit Court further concluded (based not upon the allegations of the Third-Party Complaint, but a purported 2021 "manual" for De Beers Consolidated (Pty) Ltd. for which the cited hyperlink is broken, and De Beers plc's 2022 annual financial disclosures) that because De Beers plc is the ultimate parent company for De Beers Consolidated Mines (Pty) Ltd. (formerly De Beers Consolidated Mines Ltd.), and that because Anglo American plc is the ultimate parent company for De Beers plc, then De Beers plc "may bear responsibility as successor in interest to Anglo American Corporation of South Africa Ltd. and/or De Beers Consolidated Mines Ltd."

The Circuit Court's conclusions rest on fundamental errors of law concerning successor liability. Under the law of South Carolina (and most U.S. states), "in the absence of a statute, a successor or purchasing company ordinarily is not liable for the debts of a predecessor or selling company unless" one of four exceptions applies: "(1) there was an agreement to assume such debts, (2) the circumstances surrounding the transaction warrants a finding of a consolidation or merger of the two corporations, (3) the successor company was a mere continuation of the predecessor, or (4) the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims." *Simmons v. Mark Lift Indus., Inc.*, 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005) (citing *Brown v. Am. Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924)); *see also* Order at 52 (setting forth four bases for successor liability under *Brown*).

Here, the Third-Party Complaint does not allege De Beers plc became a successor in interest to Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd. by operation of a statute, and the Circuit Court does not cite a statute as the basis for its conclusion. The Third-Party Complaint also does not allege any facts that would satisfy any of the four bases for successor liability set forth above.

Specifically, the Receiver does not allege that De Beers plc agreed to assume the debts of Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd. (basis 1). The Receiver also does not allege any facts suggesting there was a consolidation of, or merger between, either Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd. and De Beers plc (basis 2), and indeed, because both De Beers Consolidated Mines Ltd. (now known as De Beers Consolidated Mines (Pty) Ltd.) and De Beers plc are named and have appeared as separate defendants in this action, there is no dispute that the two entities are not merged.

The Receiver also does not allege facts establishing that De Beers plc is a "mere continuation" of Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd. (basis 3). To establish that a successor entity is the "mere continuation" of its predecessor, the plaintiff must allege "commonality between officers, directors, and shareholders of the seller and purchaser." *Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 267, 18 S.E.2d 447, 453 (2018); *Simmons,* 366 S.C. at 312 n.1 (declining to extend mere continuity exception to non-liability "to cases in which there is no such commonality of officers, directors and shareholders"). The Receiver does not allege any facts to show that either Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd. has the same officers, directors, or shareholders as

De Beers plc, and the Circuit Court does not identify any purported overlap of officers, directors, or shareholders between those entities as the basis for its decision.

Finally, the Receiver does not allege any facts to show a transaction among Anglo American Corporation South Africa Ltd., De Beers Consolidated Mines Ltd., and/or De Beers plc, that "was entered into fraudulently for the purpose of wrongfully defeating creditors' claims" (basis 4). *See Simmons*, 366 S.C. at 317. The Receiver's sweeping allegations concerning Cape's purported "sales and liability avoidance scheme" of the 1970s do not satisfy this standard. Instead, the Receiver must specifically allege that all (or substantially all) of the assets of Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd. were transferred to De Beers plc so that the predecessor entity was rendered a shell with no assets to satisfy creditors' claims. *See, e.g.*, *Thrower v. Kistler*, 14 F. Supp. 217 (E.D.S.C. 1936) (describing fraudulent transaction, for purposes of successor liability, as a scheme "whereby the new corporation [takes] the valuable assets of the old corporation and seeks to escape its liabilities"). The Third-Party Complaint does not make such an allegation, and the Court did not determine that De Beers plc was the product of a fraudulent transfer of assets from either of the two purported predecessor entities.

In sum, the Receiver fails to allege facts that would make De Beers plc the successor in interest to either Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd. under South Carolina law. The Circuit Court's Order denying De Beers plc's motion to dismiss for lack of personal jurisdiction on the basis that De Beers plc is the successor in interest to one (or both) of those entities therefore rests on an error of law and should be reversed.

II. Even if Successor Liability Were Established, the Receiver's Allegations Do Not Support Imputing Cape's Alleged Forum Contacts to De Beers plc on an Alter Ego or Single Business Enterprise Theory

In its Order, the Circuit Court held that the Receiver has made the required *prima facie* showing that De Beers plc, as one of the "Oppenheimer Third-Party Defendants," is subject to personal jurisdiction because "members of the 'De Beers Group,' Anglo American Corporation of South Africa Ltd., and other parts of the Oppenheimer 'Greater Group' are alleged to have exerted significant control over Cape." Order at 51. In support of this conclusion, the Court stated (i) that Anglo American Corporation of South Africa Ltd. "and/or" De Beers Consolidated Mines Ltd., "including through Charter," were Cape plc's alter ego; and (ii) that Anglo American Corporation of South Africa Ltd. and De Beers Consolidated Mines Ltd. "controlled Cape (through Charter and other members of the Oppenheimer mining empire)" as part of a single business enterprise. Order at 51–54.

The Circuit Court's determination of personal jurisdiction over De Beers plc, therefore, rests on two foundational assumptions: (i) De Beers plc is sufficiently alleged to be the successor in interest to Anglo American Corporation of South Africa Ltd. and/or De Beers Consolidated Mines Ltd.; (ii) Anglo American Corporation of South Africa Ltd. and De Beers Consolidated Mines Ltd. are sufficiently alleged to be either alter egos of Cape or members of a single business enterprise with Cape.

For the reasons set forth in section I, the Receiver has not alleged sufficient facts to support the Circuit Court's determination that the Receiver has made the required *prima facie* showing that De Beers plc is the successor in interest to either Anglo American

Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd.[6] This alone is reason to reverse the Circuit Court's Order finding personal jurisdiction over De Beers plc. However, the Receiver also fails to sufficiently allege alter ego status or the existence of a single business enterprise with respect to Anglo American Corporation of South Africa Ltd. and De Beers Consolidated Mines Ltd., on the one hand, and Cape on the other hand, which represents an additional, independent basis for reversing the Order of the Circuit Court.

Specifically, the Circuit Court held that the Receiver has made the required *prima facie* showing that Anglo American Corporation of South Africa Ltd. "and/or" De Beers Consolidated Mines Ltd. "exerted significant control and operational oversight over Cape" through (i) involvement in Cape's formation; (ii) overlap of officers, directors, and share ownership; (iii) influence or control over major decisions at Cape; (iv) a "common marketing image, or mechanism for influence over business and governmental stakeholders"; (v) a "plan to create corporate complexity and artificial corporate separation and to make strategic divestitures to avoid answering to American creditors"; and (vi) unity of operations "despite formally separate structures." Order at 52–53. In support of those legal determinations, the Circuit Court cited the Receiver's allegations at paragraphs 50–69, 105–109, and 120 of the Third-Party Complaint. *Id.* at 52–54. Based upon those allegations, the Circuit Court held the Receiver has sufficiently alleged that Anglo

[6] Indeed, the Receiver does not allege at all that De Beers plc is the successor in interest De Beers Consolidated Mines Ltd., nor could he, given that he names and identifies De Beers Consolidated Mines Ltd., now known as De Beers Consolidated Mines (Pty) Limited, as a separate, still-existent defendant to the third-party action, and does not allege that De Beers Consolidated Mines Ltd. transferred any of its operating assets or liabilities to De Beers plc upon the latter entity's formation in 2000.

American Corporation of South Africa Ltd. "and/or" De Beers Consolidated Mines Ltd. were alter egos of, or members of a single business enterprise with, Cape. *See id.* The Circuit Court is incorrect.

Two of the six above-listed determinations—involvement in Cape's formation, and a "common marketing image, or mechanism for influence over business and governmental stakeholders"—are not relevant factors under either the alter ego or single business enterprise test, and therefore cannot support the Circuit Court's Order.[7] The remaining four determinations are not supported by the allegations in the Third-Party Complaint and, therefore, cannot justify imputing Cape's alleged South Carolina contacts to Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd. (and by extension, imputing those contacts to De Beers plc). De Beers plc discusses each in turn below.

A. The Receiver Fails to Allege Sufficient Facts to Establish Overlap of Officers, Directors, and Share Ownership

The Circuit Court concluded that the Receiver sufficiently alleged overlap of officers, directors, and share ownership among "the organizations" (which De Beers plc assumes refers to Anglo American Corporation of South Africa Ltd., De Beers Consolidated Mines Ltd., and Cape), "including through Charter." Order at 52 (citing Third-Party Compl. ¶¶ 45, 47, 49, 55–56, 59–61, 67). That determination is not supported

[7] Involvement in Cape's formation is irrelevant because, in assessing alter ego status or the existence of a single business enterprise, courts examine the entities' post-formation conduct, namely, evidence of sharing finances or undercapitalization, disregard for corporate formalities, and control of one entity's operations by the other. *See supra* at 16–17. The Circuit Court does not cite any authority for the relevance of a "common marketing image" (as opposed to, e.g., one entity's exclusive control over another's marketing image), or a "mechanism for influence over business and governmental stakeholders," to the alter ego or single business enterprise analyses.

by the allegations in the Third-Party Complaint. The Receiver's allegations contain numerous references to the influence of the Oppenheimer family, unspecified "Anglo" or "De Beers" "affiliated" entities, the Oppenheimer "business dynasty" and its "amalgamated mining empire," and other atmospherics—but few specific facts, which are necessary to make a legal determination of alter ego status or a single business enterprise. *See, e.g.*, *J.R. v. Walgreens Boots Alliance, Inc.*, 470 F. Supp. 3d 534, 548 (D.S.C. 2020) (all four elements of alter ego test must be alleged with specificity for court to impute jurisdictional contacts from one entity to another). As further set forth below, the few specific facts alleged in the Third-Party Complaint do not establish that Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd. was Cape's alter ego or part of a single business enterprise with Cape, including "through" Charter, as suggested by the Circuit Court.

Overlapping officers and directors. The Receiver alleges only that a single director, Ludwig Breitmeyer, concurrently sat on the boards of De Beers Consolidated Mines Ltd. and Cape (as Cape's chairman), Third-Party Compl. ¶ 50, and that Charter seconded unspecified "key personnel" "for Cape's management" and for a period paid the compensation of Cape's chairman, *id.* ¶ 61. These allegations are insufficient to establish that either Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd. was Cape's alter ego or part of a single business enterprise with Cape, for at least three reasons.

First, overlap of officers and directors is not sufficient to disregard corporate separateness under either the alter ego or single business enterprise test. *See, e.g.*, *Wright*, 2019 WL 3344040, at *5 (reasoning evidence that "all four defendants have the same CEO

and CFO" alone "does not create personal jurisdiction via an alter ego theory"); *Jones ex rel. Jones v. Enterprise Leasing Co.-Southeast*, 383 S.C. 259, 267, 678 S.E.2d 819, 823–24 (Ct. App. 2009) ("[C]ommon officers and/or directors . . . do not, without more, support the conclusion the subsidiary is its parent's alter ego or agent for the transaction of its business." (quoting *Yarborough & Co. v. Schoolfield Furniture Indus., Inc.*, 275 S.C. 151, 153–54, 268 S.E.2d 42, 44 (1980))); *ScanSource, Inc. v. Mitel Networks*, 2011 WL 2550719, at *17 (D.S.C. June 24, 2011) ("[T]he fact that [the parent and subsidiary], like many companies, share executives does not establish that [the parent] controls the selection of the [subsidiary's] executives").

Second, the purported overlap in directors predates the alleged contacts that give rise to the Receiver's claims. Ludwig Breitmeyer died in 1930, *see* Third-Party Compl. ¶ 47–48, 50, but the purported sales and liability-avoidance scheme that forms the basis for the Receiver's claims did not come into existence until 1953 at the earliest, when Cape allegedly established the *NAAC*, *see id.* ¶ 70. Mr. Tibbs' alleged exposure to Cape-manufactured asbestos also did not begin until the 1940s, years after this single example of board overlap between Cape and any Anglo or De Beers entity. The test for specific jurisdiction examines the defendant's contacts at the time the plaintiff's cause of action arose, so Breitmeyer's alleged position on both De Beers Consolidated Mines Ltd. and Cape's boards a century ago and two decades prior to the advent of the alleged liability avoidance cannot support a finding of personal jurisdiction over De Beers plc consistent with Constitutional due process. *See, e.g.*, *Hamburg*, 954 F. Supp. 2d at 420 (defendant's contacts with the forum state "are measured as of the time the claim arose" for purposes of specific jurisdiction (citation omitted)); *see also, e.g., CFTC v. TFS-ICAP, LLC*, 415 F.

Supp. 3d 371, 384 n.7 (S.D.N.Y. 2019) (a defendant's alleged contacts "may so predate the conduct at issue that they do not relate to the suit" for purposes of specific jurisdiction).

Third, the Receiver does not allege that either Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd. played any role in Charter's alleged secondment of unspecified "key personnel for Cape's management" or its alleged payment of Cape's chairman's compensation. Even if these allegations could support the conclusion that Charter and Cape were alter egos or parts of a single business enterprise (they do not),[8] they provide no basis for imputing any of Charter's alleged contacts to Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd., contrary to the Circuit Court's vague and unsubstantiated determination that "Anglo" and "De Beers" entities exercised control over Cape "through" Charter. Order at 52.

Overlapping share ownership. The Receiver's allegations are similarly spartan with respect to the purported overlap in share ownership among Anglo American Corporation of South Africa Ltd., De Beers Consolidated Mines Ltd., Charter, and Cape, and do not support a finding of alter ego status or a single business enterprise with respect to any of those entities. In the Third-Party Complaint, the Receiver alleges that (i) sometime between 1965 and 1980, Charter had a majority shareholder interest in Cape, *see*

[8] The Circuit Court's Order conflicts with the conclusion of every other U.S. court to consider on the merits whether Charter was an alter ego of Cape or any of Cape's subsidiaries. *See Kessinger v. Gen. Mining Union Corp.*, 1986 U.S. Dist. LEXIS 31038, at *17–18 (C.D. Ill. Mar. 26, 1986) (granting motion to dismiss Charter for lack of personal jurisdiction and holding that "the record is still barren of proof that Charter was the alter ego of Cape or any of Cape's subsidiaries at any time"); *Mohn v. Int'l Vermiculite Co.*, 147 Ill. App. 3d 717, 719–20 (1986) (affirming dismissal for lack of personal jurisdiction on similar grounds); *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 152 (3d Cir. 1988) (holding that Charter was not the alter ego of Cape under New Jersey law); *Culbreth v. Amosa, Ltd.*, 898 F.2d 13, 14–15 (3d Cir. 1990) (affirming grant of summary judgment that Charter was not the alter ego of Cape under Pennsylvania law).

Third-Party Compl. ¶¶ 60–61, 109; (ii) sometime between 1965 and 1980, Charter had a minority ownership interest in Anglo American Corporation of South Africa Ltd., *see id.* ¶ 60; and (iii) at different points in time in the 1960s and 1970s members of the Oppenheimer family were majority shareholders of Anglo American Corporation of South Africa Ltd. and Charter, *see id.* ¶ 59 n.12.

Two of the three factual allegations above can be ruled out as irrelevant to the alter ego and single business enterprise tests. Charter's alleged 10 percent stake in Anglo American Corporation of South Africa Ltd. is irrelevant because a minority shareholder interest would not give Charter control over any decisionmaking at Anglo American Corporation of South Africa Ltd., and in any event, the Receiver alleges that Anglo American Corporation of South Africa Ltd. exercised control over Cape "through" Charter, not that Charter controlled Anglo American Corporation of South Africa Ltd.

The allegation regarding the Oppenheimer family's majority shareholder interests in Anglo American Corporation of South Africa Ltd. and Charter also is irrelevant. As a threshold matter, the Receiver does not allege facts indicating concurrent, majority ownership of Anglo American Corporation of South Africa Ltd. and Charter—the Oppenheimers' alleged majority shareholder interests in the two entities were separated by more than a decade. The Receiver also does not allege that the Oppenheimer family used their majority shareholder interests in the two entities to render Charter a mere shell corporation for Anglo American Corporation of South Africa Ltd., as required to show alter ego status. *See, e.g.*, *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 903 (2d Cir. 1981) (observing that for purposes of imputing jurisdictional contacts, the alter ego test "inquire[s] whether the corporation is a real or shell entity"), *cited in* Order at 37. For the

same reasons, the Receiver's allegations fail to show (for purposes of the single business enterprise test) whether the two entities have "unified their . . . operations and resources to achieve a common business purpose." *Duong*, 2019 WL 13109647, at *13. Indeed, if common ownership of two companies, without more, were sufficient to disregard corporate separateness, a prolific corporate investor such as Warren Buffett's Berkshire Hathaway would become the alter ego of the nearly 300 businesses in which it holds direct or indirect shareholder interests, which is not the law. *See United States v. Bestfoods*, 524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries.").[9]

The sole, remaining allegation—that between 1965 and 1980, Cape was a subsidiary of Charter—fails to satisfy the alter ego or single business enterprise tests with respect to Anglo American Corporation of South Africa Ltd. and De Beers Consolidated Mines Ltd. Mere ownership of a subsidiary does not confer liability on the parent entity. *See Bestfoods*, 524 U.S. at 61; *see also, e.g.*, *Carroll v. Smith-Henry, Inc.*, 281 S.C. 104, 106, 313 S.E.2d 649, 651 (Ct. App. 1984) ("Stock ownership alone ordinarily does not render a parent corporation liable for the contracts of its subsidiary . . . ."). And even if Cape's contacts could be imputed to Charter as Charter's subsidiary, there remains a missing link in the chain, as there are no alleged facts in the Third-Party Complaint that

[9] Moreover, the single business enterprise test "requires more than a showing that various businesses are intertwined"—there must also be "further evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." *Duong*, 2019 WL 13109647, at *13. Even assuming the Oppenheimers' majority shareholder interests in Anglo American Corporation of South Africa Ltd. and Charter established the requisite "intertwinement" or "blurring" of the two entities' businesses (they do not), the Circuit Court does not explain how the Receiver pled facts sufficient to make a *prima facie* case that any "bad faith, abuse, fraud, wrongdoing, or injustice" resulted from the entities' common ownership.

would permit the Circuit Court to impute Charter's contacts to Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd.

Accordingly, the Circuit Court's determination that the Receiver pled facts sufficient to establish alter ego status or a single business enterprise based on overlapping directors, officers, and share ownership between Anglo American Corporation South Africa Ltd. or De Beers Consolidated Mines Ltd. and Cape, "including through Charter," is not supported by the factual allegations in the Third-Party Complaint and must be reversed. *See Moosally*, 358 S.C. at 327.

B. The Receiver Fails to Allege Sufficient Facts to Establish Influence or Control over Decisions at Cape

In its Order, the Circuit Court ruled that the Receiver has sufficiently alleged that Anglo American Corporation of South Africa Ltd. and De Beers Consolidated Mines Ltd. had "a capacity to influence or control major business decisions of Cape, including relating to personnel." Order at 52 (citing Third-Party Compl. ¶¶ 50–52, 54, 58 & n.10, 59, 61, 67). As an initial matter, a "capacity" to influence or control the decisions of another entity, does not make the two entities alter egos. In any parent-subsidiary relationship, the parent entity has the (legitimate) capacity to influence the actions of its subsidiary by way of its majority shareholder interest. *See Carroll*, 281 S.C. at 106; *Bestfoods*, 524 U.S. at 61.

The cited allegations in the Third-Party Complaint do not support the conclusion that Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd. exerted an improper degree of control over Cape. Indeed, the only factual allegations of "control" appear at paragraph 61, where the Receiver alleges that Charter "second[ed] and compensate[ed] key personnel for Cape's management" and cites 1984 testimony that Charter had been paying Cape's chairman's compensation. The "secondment" of certain

personnel for Cape's management by Charter is not a basis for holding that Cape and Charter were alter egos, and in any event, these allegations fail to bridge the gap between either Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd. and Charter. Accordingly, the Court's conclusion that those entities exerted "influence or control major business decisions of Cape" is unsupported by the evidentiary record. *See Moosally*, 358 S.C. at 327.

C. The Receiver Fails to Allege Sufficient Facts Implicating Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd. in a "Scheme" to Evade U.S. Creditors

In the Order, the Circuit Court ruled that the Receiver has sufficiently alleged a "plan to create corporate complexity and artificial corporate separation and to make strategic divestitures to avoid answering to American creditors" among Anglo American Corporation of South Africa Ltd., De Beers Consolidated Mines Ltd., and Cape. Order at 53 (citing Third-Party Compl. ¶¶ 53 & n.7, 59, 62, 64–67, 105–109). The Receiver makes only threadbare, conclusory allegations in this regard, and none of them supports the Circuit Court's conclusion that Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd. played any role in a plan to "create corporate complexity and artificial separation" or "make strategic divestitures to avoid answering to American creditors" in furtherance of Cape's purported sales and liability-avoidance scheme.

Almost none of the cited allegations concerns action taken by Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd. (as opposed to other entities' and individuals' decisions to sell shares). *See, e.g.*, Third-Party Compl. ¶¶ 107 ("[B]eginning in the late 1970s, the Oppenheimer family began to substantially sell or otherwise divest their direct financial interests in Charter"), 109 (alleging Charter's

unilateral "divestiture . . . of its strategic holdings in Anglo American [and] De Beers"). In fact, the Receiver does not allege *any* action taken by De Beers Consolidated Mines Ltd., and with respect to Anglo American Corporation of South Africa Ltd., the Receiver's allegations are speculative, conclusory, and do not support imputing jurisdictional contacts under the alter ego or single business enterprise tests.

At Paragraph 64, the Receiver asserts that "[a]lthough the precise 'connection between Cape, Charter, Central Mining and Anglo American is complex,' that complexity reflects an intentional scheme to obfuscate corporate relationships and ownership interests while minimizing the amalgamated business empire's liability risks, including for asbestos." *Id.* ¶ 64. The Receiver does not allege any facts establishing that Anglo American Corporation of South Africa Ltd. played any role in this ill-defined "scheme" to "obfuscate corporate relationships and ownership interests," and the Circuit Court's Order also does not explain why attempting to "minimiz[e] . . . liability risks" is a basis for disregarding corporate separateness. *See, e.g.*, *Craig*, 843 F.2d at 150 ("[E]vasion of tort liability has never, in itself, been sufficient basis to disregard corporate separateness.") (reversing trial court and holding no basis to pierce Cape Industries plc's corporate veil to reach then-parent Charter Consolidated plc).

At Paragraph 65, the Receiver alleges that "Charter was designed to serve as a corporate cushion—a products-liability patsy—for Anglo that could (i) promptly purge itself of substantial cash (through dividends based on new profits, or by otherwise reallocating assets among holding companies through more complex transactions) to Oppenheimer-affiliated entities, and (ii) add a 'formal' degree of separation between Anglo and Cape." Third-Party Compl. ¶ 65. This allegation contains no facts and amounts to

little more than the Receiver's speculation about the relationship between Anglo American Corporation of South Africa Ltd. and Charter. *See, e.g.*, *Power Prods.*, 379 S.C. at 433, 665 S.E.2d at 665 (conclusory statements unsupported by specific alleged facts cannot confer personal jurisdiction).

In short, the Receiver makes no allegations in the Third-Party Complaint to support the Circuit Court's conclusion that Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd. played any role in a scheme to evade American creditors, as might support imputing Cape's alleged forum contacts to those entities under an alter ego or single business enterprise theory of jurisdiction.

D. The Receiver Fails to Sufficiently Allege a "Unity of Operations" Despite "Formally Separate Structures" to Support Imputing Contacts Under Alter Ego or Single Business Enterprise Theories

In the Order, the Circuit Court determined that the Receiver has sufficiently alleged "unity of operations, including a common physical addresses [sic], despite formally separate structures" among Anglo American Corporation of South Africa Ltd., De Beers Consolidated Mines Ltd., and Cape. Order at 53 (citing Third-Party Compl. ¶¶ 54, 57). The only "fact" alleged in these paragraphs of the Third-Party Complaint is that "Charter and Anglo shared common office space at 40 Holborn Viaduct in London." Third-Party Compl. ¶ 57. But sharing office space, even in combination with other factors suggesting a lack of corporate separateness, is not sufficient to establish alter ego status. *See, e.g.*, *Vitol, S.A. v. Primerose Shipping Co. Ltd.*, 708 F.3d 527, 546 (4th Cir. 2013) (evidence that ship operators "shared offices, phone numbers, and other office facilities," painted their fleets similar colors, and failed to adhere to corporate formalities, among other indicia of a "close business relationship," was not sufficient to establish alter ego status); *In re*

AuditHead, LLC, 624 B.R. 134, 147 (Bankr. D.S.C. 2020) (that two entities "shared equipment and office space and used the same independent contractors marketing to similar clients" did not establish that entities operated as a "single economic unit").

The remainder of the cited allegations are just conclusory recitations of the factual predicates for determining alter ego status or the existence of a single business enterprise—disguised as "facts" with purported cites to secondary source material—and provide no factual basis for the Circuit Court to conclude there was any "unity of operations" among Anglo American Corporation of South Africa Ltd., De Beers Consolidated Mines Ltd., and Charter. *See* Third-Party Compl. ¶ 57 (alleging, without any supporting facts, that Anglo and Charter "employed personnel who routinely switched roles between the entities, and each had boards that were dominated by the Oppenheimer family," that there were "overlapping directors among the Oppenheimer companies," and that "there was an '[i]ntegration of the London staffs' of the three merged companies" (citation omitted)).

The Order also does not point to any alleged facts suggesting "bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions" as required to impute contacts on a single business enterprise theory. *Duong*, 2019 WL 13109647, at *13. Indeed, the Circuit Court simply states in vague and conclusory fashion that "there is a more than a suggestion of bad faith, abuse, fraud, wrongdoing, or injustice by the Oppenheimer Third-Party Defendants with respect to their perpetuation of this common business purpose and blurring of the distinction among the numerous members in the Anglo/De Beers Group of companies." Order at 54.

In sum, the factual allegations in the Third-Party Complaint do not support the Circuit Court's determination of a "unity of operations . . . despite formally separate

structures" among Anglo American Corporation of South Africa Ltd., De Beers Consolidated Mines Ltd., and Cape, that would justify imputing Cape's alleged South Carolina contacts to those two entities on an alter ego or single business enterprise theory. While the Third-Party Complaint and the Circuit Court's Order (both of which were drafted entirely by the Receiver) throw a lot of mud against the wall, carefully examining the alleged facts (as the Circuit Court is required to do on a motion to dismiss) demonstrates why none of it sticks.

III. Because There is No Basis to Impute Cape's Alleged Contacts to De Beers plc, the Receiver's Claims Against De Beers plc Must Be Dismissed for Lack of Personal Jurisdiction

For the reasons set forth in sections I and II, the allegations in the Third-Party Complaint do not establish a basis for imputing Cape's alleged South Carolina contacts to De Beers plc. Accordingly, the Court must consider the facts set forth in the Mitsos Affidavit in support of De Beers plc's motion to dismiss for lack of personal jurisdiction to determine whether the Circuit Court may exercise personal jurisdiction over De Beers plc in this case consistent with Constitutional due process. *See, e.g.*, *Springmasters, Inc. v. D&M Mfg.*, 303 S.C. 528, 532, 532 n.1, 402 S.E.2d 192, 194, 194 n.1 (Ct. App. 1991) (considering "the pleadings and evidence, including [the defendant]'s affidavit," to determine "whether there is any evidence to support [the Circuit Court's] findings" on motion to dismiss for lack of personal jurisdiction); *see also, e.g.*, *Walker v. Lowe's Companies, Inc.*, 2007 WL 4322148, at *2 (D.S.C. Dec. 5, 2007) (finding lack of personal jurisdiction over corporate defendant based on affidavit of defendant's corporate representative where the plaintiff's allegations, even assumed to be true, "[did] not contradict [the defendant]'s assertion that it has no contacts with South Carolina").

As established by the Mitsos Affidavit, De Beers plc has no contacts with South Carolina that would support general jurisdiction. General jurisdiction requires that the defendant have a physical presence (or contacts approximating physical presence) in the forum, the paradigm bases for which are state of incorporation and the state where the defendant maintains its principal place of business. *Daimler*, 571 U.S. at 137. Here, De Beers plc is incorporated in Bailiwick of Jersey and maintains its principal place of business in the United Kingdom, not South Carolina. Mitsos Aff. ¶ 3. Moreover, De Beers plc is a holding company, not an operating company, and does not conduct business or maintain operations anywhere, including in South Carolina. *Id*. Accordingly, there also is no basis to find that De Beers plc has such continuous and systematic contacts with South Carolina that it can fairly be considered "at home" there, as required to exercise general jurisdiction in a state outside the defendant's state of incorporation or where it maintains its principal place of business. *See Daimler*, 571 U.S. at 139.

De Beers plc also has no contacts with South Carolina that would support specific jurisdiction. Specific jurisdiction requires that the defendant purposefully avail itself of the privilege of doing business in South Carolina, and that the plaintiff's claims arise from or relate to those purposeful contacts. De Beers plc has never purposefully availed itself of the privilege of doing business in South Carolina by selling, mining, milling, producing, manufacturing, or distributing asbestos-containing products. *See* Mitsos Aff. ¶ 5a. Further, because the entity now known as De Beers plc did not exist until 2000, and because it is not the successor in interest to Anglo American Corporation of South Africa Ltd. or De Beers Consolidated Mines Ltd., there is no basis to find that De Beers plc has any contacts

with South Carolina that gave rise or relate to the claims asserted by the Receiver in the Third-Party Complaint, which concern alleged events that took place prior to 2000.

Because De Beers plc has no contacts with the State of South Carolina, let alone contacts that relate to the Receiver's claims in this action, the Circuit Court cannot exercise personal jurisdiction over De Beers plc consistent with due process, and the Third-Party Complaint should be dismissed on this basis. *See, e.g.*, *Walker*, 2007 WL 4322148, at *2 (granting defendant's motion to dismiss where the plaintiff's allegations, "even if true, [did] not contradict [the defendant]'s assertion" in the affidavit of its corporate representative that it had no contacts with South Carolina, and therefore "the only reasonable inference [was] that [the defendant] has no contacts with South Carolina").

IV. De Beers plc Adopts the Arguments of the Other Third-Party Defendants with Respect to the Order Denying the Third-Party Defendants' Motions to Dissolve Receivership

Pursuant to SCACR 208(6), De Beers plc hereby adopts by reference and incorporates herein the portions of the Initial Appellant Briefs filed by the other Third-Party Defendants addressing the Circuit Court's denial of the Motions to Dissolve Receivership.

CONCLUSION

For the reasons set forth above, De Beers plc respectfully requests that the Court reverse the Circuit Court's December 6, 2023 "Order Denying Certain Third-Party Defendants' Motions to Dissolve Receivership and Third-Party Defendants' Motions to Dismiss for Lack of Personal Jurisdiction" and remand the case with instructions to dismiss the Receiver's Third-Party Complaint as against De Beers plc for lack of personal jurisdiction pursuant to South Carolina Rule of Civil Procedure 12(b)(2).

Respectfully submitted,

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