

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

JOHN A. TIBBS and MARGARET B. TIBBS,
Plaintiffs,

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

v.
3M COMPANY *et al.*,

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

Defendants.

CAPE PLC, individually and as successor in
interest to CAPE ASBESTOS COMPANY
LIMITED, by and through its duly appointed
Receiver Peter D. Protopapas,

**ORDER GRANTING THE RECEIVER'S
MOTIONS TO COMPEL DISCOVERY
RESPONSES OF THIRD-PARTY
DEFENDANTS AND 30(B)(6)
DEPOSITIONS OF ARRANCO US, LLC
AND CENTRAL MINING &
INVESTMENT CORPORATION LTD.**

Third-Party Plaintiff,

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.;

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SC Court of Appeals

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; THE SPARROWS GROUP, LLC,

Third-Party Defendants.

This matter came before the Court on the following six Motions to Compel filed on January 12, 2024 by Third-Party Plaintiff Cape PLC, individually and as successor in interest to Cape Asbestos Company Limited, n/k/a Cape Intermediate Holdings Ltd. (“Cape”), by and through its duly appointed Receiver Peter D. Protopapas (the “Receiver”):

1. Motion to Compel Discovery Responses of Anglo American PLC, De Beers PLC, De Beers UK Ltd., De Beers Centenary AG, and De Beers Consolidated Mines Proprietary Ltd. (together, “Oppenheimer Third-Party Defendants”);
2. Motion to Compel Discovery Responses of Mohed Altrad and Altrad Investment Authority S.A.S. (together, “Altrad Owners Third-Party Defendants”);
3. Motion to Compel Discovery Responses of Arranco US LLC, Hawk Bidco (US) Inc., and Sparrows Offshore, LLC (together, “Altrad Sparrows Third-Party Defendants”);
4. Motion to Compel Discovery Responses of Central Mining & Investment Corporation Ltd., Charter Consolidated Ltd., and ESAB Corporation (together, “Charter Third-Party Defendants”);
5. Motion to Compel 30(b)(6) Deposition of Central Mining & Investment Corporation Ltd. (“Central Mining”); and
6. Motion to Compel 30(b)(6) Deposition of Arranco US, LLC (“Arranco”)

(together, the “Motions to Compel”). On February 16, 2024, the Third-Party Defendants filed materials opposing the Motions to Compel.¹ Accordingly, the Motions to Compel have been fully briefed and are ready for decision.

Discussion

The Third-Party Defendants argue the Court cannot entertain or grant the relief sought by the Motions to Compel for multiple reasons: (1) the South Carolina Court of Appeals possesses exclusive jurisdiction over this entire action following the Third-Party Defendants’ December 18, 2023 appeals of one of the Court’s orders, which they claim prevents both the Court and the Receiver from taking any additional action, including engaging in discovery or ruling on discovery motions, during the pendency of those appeals; (2) discovery cannot proceed during the “pendency” of Third-Party Defendants’ motions for protective order and/or to stay discovery (collectively, the “Protective Order Motions”), motions which were filed prior to any appeals in this case and prior to the Court’s October 25, 2023 hearing, during which the Court effectively granted the primary relief sought by those motions; and (3) the Court now cannot rule on those “pending” Protective Order Motions because it cannot act while the appeals are pending.

As outlined below, the Court finds that the procedural history of this case and recent orders issued by the Court of Appeals in similar circumstances undermine the arguments presented by Third-Party Defendants, and the Court will grant the Motions to Compel.

¹ The Court notes that although Third-Party Defendants included in these February 16 filings what they have termed to be “cross-motions” for “injunctive relief,” the Court advised the parties by email on February 21, 2024, that those requests for injunctive relief will remain under the Court’s advisement to be addressed at another time.

A. Procedural History.

1. *The Receiver's Third-Party Complaint (June 2023).*

On June 30, 2023, the Receiver filed a Third-Party Complaint against numerous third-party defendants alleged to have facilitated, caused, or directed Cape's U.S.-based asbestos sales and liability-avoidance scheme, or otherwise acted as successors in interest to or beneficiaries of entities involved in that scheme, and are therefore responsible for the bodily injury underlying the claims against Cape, including specifically those claims asserted by South Carolinians. In doing so, the Receiver categorized the Third-Party Defendants into three groups: the Altrad Third-Party Defendants (Third-Party Compl. ¶ 119); the Oppenheimer Third-Party Defendants (*id.* ¶ 122); and the Charter Third-Party Defendants (*id.* ¶ 124).² Following appearances by the Altrad Third-Party Defendants, the Receiver sub-divided that category into two groups: the Altrad Owners Third-Party Defendants (Mohed Altrad and Altrad Investment Authority) and the Altrad Sparrows Third-Party Defendants (Arranco US LLC, Hawk Bidco (US) Inc., and Sparrows Offshore, LLC).

2. *The Receiver's Discovery Requests and Deposition Notices (July-September 2023).*

Beginning July 20, 2023, the Receiver served First Sets of Interrogatories and Requests for Production on each of the Third-Party Defendants ("Discovery Requests").³ In addition, the

² Since filing this third-party action, the Receiver has voluntarily dismissed without prejudice 12 Third-Party Defendants; default judgments have been entered against 7 others, including based on intentional failures to respond; and the remaining 13 Third-Party Defendants have been found subject to the proper exercise of personal jurisdiction by this Court.

³ The materials before the Court indicate the Receiver served his Discovery Requests on the following dates:

- As to the Oppenheimer Third-Party Defendants, Receiver served his First Set of Interrogatories and Requests for Production on: (1) Anglo American PLC, De Beers PLC, and De Beers UK Ltd. on August 15, 2023; (2) De Beers Consolidated Mines Proprietary Ltd. on September 26, 2023; and (3) De Beers Centenary AG on December 19, 2023.

Receiver noticed depositions of various Third-Party Defendants pursuant to Rule 30(b)(6), SCRCF, including serving Arranco on August 30, 2023 and Central Mining on September 6, 2023, with both depositions scheduled for October 2023.

The Receiver has indicated that following those notices and in light of the Court's late-October 2023 hearing on the Receiver's motions for default judgment, as well as on the Third-Party Defendants' Protective Order Motions, motions to dissolve the Receivership, and motions to dismiss, the Receiver voluntarily postponed those depositions to allow the Court to resolve the pending motions.

3. Third-Party Defendants' Protective Order Motions (Filed Prior to the October 25, 2023 Hearing and Included on the Agenda for Oral Argument).

Third-Party Defendants filed various iterations of the Protective Order Motions—in stand-alone motions and combined with or embedded within other motions—all of which were included on the Court's agenda for oral argument at the October 25, 2023 hearing. In September and October 2023, the Oppenheimer Third-Party Defendants (five of the six⁴) filed the only stand-alone Protective Order Motions:

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- As to the Charter Third-Party Defendants, Receiver served his First Set of Interrogatories and Requests for Production on ESAB Corporation on July 20, 2023, and on Central Mining and Charter Consolidated Ltd. on September 6, 2023.
 - As to the Altrad Sparrows Third-Party Defendants, Receiver served his First Set of Interrogatories and Requests for Production on July 20, 2023.
 - As to the Altrad Owners Third-Party Defendants, Receiver served his First Set of Interrogatories and Requests for Production on September 6, 2023.

⁴ The Oppenheimer Defendants explain that De Beers Centenary AG did not file a motion for protective order because the Receiver's Discovery Requests were not served on De Beers Centenary AG until December 19, 2023.

- On September 15, 2023, three of the Oppenheimer Defendants (Anglo American PLC, De Beers PLC, and De Beers UK Ltd.) filed a Motion for Stay of Discovery and Protective Order.
- On October 13, 2023, De Beers Consolidated Mines Proprietary Ltd. filed a Motion for Stay of Discovery and Protective Order.

These motions sought “a stay of discovery pending resolution of the motions to dissolve the receivership filed by other Third-Party Defendants and any appeals stemming therefrom.” In footnote 2 of those motions, the Oppenheimer Third-Party Defendants argued as follows:

The Court of Appeals’ one-paragraph order in a separate case confirms the appealability of a denial of a motion to dissolve a receivership **and that a stay during such an appeal is not automatic.** See *Childers v. Davis Mechanical Contractors, Inc., et al.*, No. 2023-000727, at *3 (S.C. Ct. App. Sept. 8, 2023). Here, De Beers plc is asking the Court to exercise its discretion to stay discovery while it considers the validity of the purported Receiver’s authority to pursue such discovery and whether this Court has personal jurisdiction over the target of such discovery.

(emphasis added).

The remaining Third-Party Defendants filed their Protective Order Motions as requests combined with or embedded within other motions:

The Charter Defendants: (1) filed on September 1, 2023, motions to dismiss that informally requested an order staying discovery pending resolution of that motion to dismiss; and (2) filed on October 6, 2023, combined motions to dissolve the Receivership and for protective order, the latter of which sought an order the Charter Defendants have “no obligation to respond to the Discovery Requests or to the 30(b)(6) Notice” until the motions to dissolve are “fully resolved.”

The Altrad Owners: (1) filed on September 1, 2023, combined motions to dismiss and to stay discovery; and (2) filed on September 20, 2023, combined motions to dissolve the Receivership and for protective order for discovery and depositions.

The Altrad Sparrows: (1) filed on August 21, 2023 combined motions to dismiss and to stay discovery; and (2) filed on September 5, 2023, combined motions to dissolve the Receivership and for protective order for discovery and depositions.

4. Order Granting, in part, Protective Order Motions (October 25, 2023).

On October 25, 2023, the Court held a hearing on the pending motions to dissolve the receivership, motions to dismiss, and Protective Order Motions. At the hearing, the Court ruled on the Protective Order Motions by granting a discovery stay “until we deal with the motions to dismiss and motions for entry of default.” (10/25/23 Hrg. Tr. pp. 174:21–175:23 (emphasis added)). The Court later said it would file “a short order to that effect” if the “parties feel in the interim that I need to do something by way of a protective order” but made it clear “I say from the bench now as an order of the Court that I am pausing discovery –further discovery in this matter until we resolve the issue of who ought to be in this matter, if anybody.” (*Id.* at p. 178:9–21).

Following that ruling from the bench giving Third-Party Defendants the primary relief sought in their Protective Order Motions, and following the Court’s invitation to enter a written order “to that effect” upon request of any party, no party requested a written order as to the Protective Order Motions.

5. The Dissolution Order and the Default Order (December 6, 2023).

Thereafter, after receiving proposed orders from both the Receiver and Third-Party Defendants, the Court entered two written orders on December 6, 2023. The Court denied all of the Third-Party Defendants’ motions to dissolve the Receivership and to dismiss for lack of personal jurisdiction (the “Dissolution Order”), and the Court granted seven motions for entry of default and entered default as to Altrad Services Ltd, Altrad UK Ltd, Cape Holdco Ltd, Cape

Industrial Services Group Ltd, Cape UK Holdings Newco Ltd, The Sparrows Group LLC, and Sparrows Offshore Group Ltd (the “Default Order”).

6. *The Receiver’s Communication Confirming What Motions Remained Pending (December 8, 2023).*

On December 8, 2023, following entry of the Court’s Dissolution Order and the Default Order, the Receiver communicated with the Court and all Third-Party Defendants to confirm (1) the Court had ruled on all Protective Order Motions; (2) discovery could proceed; and (3) the only motions remaining for disposition by the Court were additional motions to dismiss on grounds other than personal jurisdiction:

From: John T. Lay
To: JToal@sccourts.org; Diaz, Eva
Cc: Carroll, Todd; Vic Rawl; James Elliott; marv.rose.alexander@lw.com; Steve Pugh; O’Neill, Elizabeth; john.pierce@lw.com; Cameron Berthelsen; caitlin.dahl@lw.com; michele.johnson@lw.com; Ben Carlton; Hall, Kevin; Brian Barnwell; Gray Culbreath; Lindsay Joyner; Jon Robinson; Shannon Peake; murrell@smithrobinsonlaw.com; Troy Brown; Dana Becker; Brady Edwards; Robert Jacques; Lindsay Valek; Brian Barnwell; Paul A. Scudato; Lori Seaborn; Charity McQueen; 6982_67 John A. Tibbs and Margaret B. Tibbs v. Schneider Electric USA, Inc. et al Email: 6982_67
Subject: Cape PLC v. Anglo American PLCC, et al. (2023-CP-40-01759) – Outstanding Motions for Ruling By the Court [IMAN-IMANMAIN.FID1077725]
Date: Friday, December 8, 2023 11:22:43 AM

Chief Justice Toal and Ms. Diaz,

Given the Court’s December 6, 2023 Order denying the Third-Party Defendants’ motions to dismiss for lack of personal jurisdiction and motions to dissolve the Receivership, and given the Court’s ruling during the October 25, 2023 hearing on all motions for protective order/to stay discovery, which stayed discovery only while the Court considered its ruling on the above-referenced motions (10/25/23 Hrg. Tr. Pp.174:21-175:23), it is the Receiver’s understanding: (1) discovery can now proceed; and (2) the only motions remaining for disposition by the Court are those six motions to dismiss filed by certain Third-Party Defendants pursuant to Rule 12(b)(6) (ESAB Corporation; Charter Consolidated, Ltd.; Central Mining & Investment Corp., Ltd.; Mohed Altrad and Altrad Investment Authority SAS; Arranco US, LLC, Hawk Bidco US, LLC, and Sparrows Offshore, LLC; and De Beers Jewellers, Ltd.).

As those six remaining motions have been fully briefed by both sides, counsel for the Receiver requests the Court rule on these remaining motions as briefed and without additional oral argument.

Should the Court need additional information from us, please do not hesitate to let me know.

Thank you in advance for your consideration,

John T.

None of the Third-Party Defendants responded to the Receiver’s December 8 communication or otherwise indicated to the Court that Third-Party Defendants believed their Protective Order Motions remained pending.

7. *The Court's Order Denying the Remaining Motions to Dismiss (December 15, 2023).*

Having received no response from Third-Party Defendants disputing the Receiver's December 8 characterization of what motions remained for decision by the Court, the Court denied, by Form 4 Order entered on December 15, 2023, all other motions to dismiss (the "Order on Remaining Motions to Dismiss"). On that same day, the Receiver served Amended Notices of Deposition pursuant to Rule 30(b)(6), SCRCP on Arranco and Central Mining for depositions to begin on January 10 and 12, 2024, respectively.

8. *Third-Party Defendants' Notices of Appeal (December 18, 2023).*

Beginning December 18, 2023, Third-Party Defendants filed notices of appeal with respect to the Court's Dissolution Order and filed the next day in this Court notices of filing notices of appeal. Third-Party Defendants raised to this Court no other objections or concerns at that time about engaging in discovery during the pendency of those appeals.

9. *Additional Motions to Dismiss Filed by Oppenheimer Defendants (December 21, 2023).*

The Oppenheimer Defendants, who previously acknowledged in their Protective Order Motions "that a stay during such an appeal [of a denial of a motion to dissolve a receivership] is not automatic," invoked the Court's jurisdiction on December 21, 2023—just three days after filing their notices of appeal—by filing additional motions to dismiss echoing the grounds of the motions to dismiss that were denied by the Court one week earlier in the "Order on Remaining Motions to Dismiss."⁵

10. *Communications Between Third-Party Defendants and the Receiver Regarding Discovery Requests and Scheduled Depositions (January 2024).*

⁵ On February 2, 2024, the Court heard oral argument on the Oppenheimer's December 21, 2023 motions to dismiss, and on February 23, 2024, the Court entered an order denying these motions.

On January 5, 2024, the extended deadline set by the Receiver for Third-Party Defendants to respond to the outstanding discovery requests, each set of Third-Party Defendants served Objections to the Discovery Requests refusing to provide substantive responses and indicating their intention not to participate in any discovery in this case during the pendency of their appeals of the Dissolution Order.

By letter dated January 8, 2024, pursuant to Rule 11, SCRCP (“Rule 11 Letter”), counsel for the Receiver attempted to consult with all counsel for the Third-Party Defendants regarding the deficient responses they served late on January 5 (a Friday), as well as their anticipated failure to participate in the two depositions noticed the next week, and the Receiver advised the Third-Party Defendants he intended to proceed with the depositions of Arranco on January 10 and Central Mining on January 12.

The Receiver has indicated that the only direct responses to the Rule 11 Letter he received came from Arranco (stating on January 9, in response to the Receiver’s circulation of a “zoom” link for the deposition set to begin the following day, that it refused to designate or produce any witness); Central Mining (stating on January 10 that it would not produce any deposition witness); and the Oppenheimer Third-Party Defendants (contending on January 12 that the appeal precluded progress in this matter).

B. Current Status and Recent Court of Appeals Orders.

As the procedural history makes clear, there is no active stay of discovery in this proceeding, nor do Third-Party Defendants have any pending Protective Order Motions that require resolution by the Court. At the October 25, 2023 hearing, the Court verbally granted all Third-Party Defendants’ Protective Order Motions for a limited duration and with a self-executing

termination upon the Court's resolution of the remaining pending motions.⁶ The Court invited the parties to request a written order memorializing that bench ruling if a written order was desired, but no party accepted that invitation.

To the extent any Third-Party Defendant claims that it believed the Protective Order Motions remained pending following the October 25 hearing, that claim was waived when Third-Party Defendants failed (1) to correct the Receiver's December 8 communication to the Court confirming the Protective Order Motions were ruled on at the October 25 hearing; or (2) otherwise advise the Court it believed some, all, or even part of the Protective Order Motions were still pending. Instead, Third-Party Defendants said nothing, allowing the Court to enter its December 15 Order intended to dispose of all remaining motions filed before, and on the agenda for, the October 25, 2023 hearing. Third-Party Defendants cannot use their appeals as a shield to defend this lack of response, as those appeals were not filed until December 18.

Nor have Third-Party Defendants sought a separate stay from either this Court or the Court of Appeals. Although the Oppenheimer Defendants recognized in their Protective Order Motions that the appeal of a receivership dissolution order did not automatically stay the case below, they never requested a stay from this Court following their December 18 notices of appeal. Instead, the Oppenheimer Defendants filed new motions to dismiss after noticing the appeal, requesting that the Court act on their behalf. For the Oppenheimer Defendants to now suggest that this Court's

⁶ Third-Party Defendants apparently take the position their Protective Order Motions remained pending because some of them requested a continued stay of all discovery throughout any hypothetical appeal of any order the Court might issue should such an appeal be filed at some point in the future. There were no appeals pending at the time the Court ruled on the Protective Order Motions, and any ruling addressing this hypothetical ground would have been inappropriately advisory. No additional Protective Order Motions have been filed by Third-Party Defendants following their appeals, nor have they filed any other motions following their appeals requesting such a stay.

ability to act was automatically stayed upon the filing of their Notice of Appeal is entirely inconsistent with their prior arguments and actions.

The Court of Appeals has already addressed—and rejected—Third-Party Defendants’ argument that discovery in this case is automatically stayed following the appeal of an order denying a motion to dissolve a receivership; indeed, the Court of Appeals expressly found that the appeal of a dissolution order does **not** stay the Receiver’s ability to carry out his duties in the case below. *See Order, Childers v. Davis Mech. Contractors, Inc. et al.*, No. 2023-000727 (S.C. Ct. App. Sept. 8, 2023) (ruling that the “receivership shall proceed” and the “order is not stayed during pendency of this appeal,” such that “the receivership action and the receiver’s ability to carry out his duties are not stayed”); *see also Order, Childers v. Davis Mech. Contractors, Inc. et al.*, No. 2023-000727 (S.C. Ct. App. Nov. 23, 2023).

Once the Court resolved all pending motions to dismiss and the default-judgment motions, which it did by December 15, 2024, there was no further need for a stay: Discovery was to continue. In multiple communications to the Third-Party Defendants, the Receiver communicated that understanding as well as his proper expectation the Third-Party Defendants would provide “fulsome responses to [discovery] requests . . . on or before January 5, 2024, with depositions to start soon after.” No Third-Party Defendant contested that understanding or otherwise indicated they believed Protective Order Motions were outstanding; indeed, no Third-Party Defendant responded at all.

Although the Third-Party Defendants could have addressed (in a timely manner) any concerns about engaging in discovery immediately following the filing of their December 18 notices of appeal, no such objections were raised. Rather, the Third-Party Defendants waited until January 5—*i.e.*, the day that proper discovery responses were due, and less than a week before the

re-noticed depositions were set to begin—to assert they were taking the position they had no obligation to participate in the case during the pendency of their appeals. Simply put, there is no sound legal basis for the Third-Party Defendants’ assertion that discovery in this proceeding has been stayed, and the Court **GRANTS** each of the Receiver’s Motions to Compel.

* * * * *

For the reasons set forth herein, the Court **GRANTS** the Receiver’s Motions to Compel and **ORDERS** Third-Party Defendants (i) to provide responsive, substantive, and complete answers to the Receiver’s Discovery Requests within 14 days of entry of this Order and (ii) to begin producing documents in response to the Receivers’ Requests for Production the same day. The Court also **ORDERS** Arranco and Central Mining to designate witnesses for the Rule 30(b)(6) depositions noticed by Receiver within 7 days of entry of this Order and produce those witnesses within 21 days of entry of this Order.

IT IS SO ORDERED

SIGNED this _____ day of _____, 2024

HON. JEAN H. TOAL, CHIEF JUSTICE (Ret.)

[JUDGE’S E-SIGNATURE FOLLOWS]



Richland Common Pleas

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

Case Number: 2023CP4001759

Type: Order/Compel

So Ordered

Jean H. Toal

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