THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas
For the Fifth Judicial Circuit
The Honorable Jean H. Toal,
Acting Circuit Court Judge

Civil Action No. 2023-CP-40-01759

Appellate Case Nos.
2023-002006
2023-002007
2023-002008
2023-002009
2023-002010
2023-002011

John A. Tibbs and Margaret B. Tibbs,

Plaintiffs,

v.

3M Company; 4520 Corp., Inc.; A.O. Smith Corporation; A.W. Hesterton 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.; Lowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services; Orporation 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, Incl; 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; and Zurn Industries, LLC,

Defendants,

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.; DeBeers PLC; DeBeers Centenary AG; DeBeers Consolidated Mines Ltd.; DeBeers S.A.; DeBeers UK Ltd.; DeBeers Jewelers US, Inc.; Angle 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 (USA) Jewelry Inc.; Forevermark US Inc.; Anglo American Crop Nutrients (USA), 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 SAS; Sparrows Offshore Group Ltd.; Hawk Bidco US Inc.; Arranco US, LLC; Sparrows Offshore, LLC; 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, Central Mining & Investment Corporation Ltd., Charter Consolidated Ltd., and ESAB Corporation are the

Appellants.

MOTION TO DISMISS APPEALS OF INTERLOCUTORY DISCOVERY ORDER

Pursuant to Rule 240 of the South Carolina Rules of Appellate Procedure, Peter D. Protopapas, in his capacity as the court-appointed Receiver for Cape PLC, individually and as successor in interest to Cape Asbestos Company Limited, n/k/a Cape Intermediate Holdings Ltd. (the "Receiver") respectfully requests this Court dismiss the March 19, 2024 Notices of Appeal (the "March 2024 Notices") filed by Third-Party Defendants Mohed Altrad and Altrad Investment Authority S.A.S. (together, "Altrad Owners Third-Party Defendants"); Arranco US LLC ("Arranco"), Hawk Bidco (US) Inc., and Sparrows Offshore, LLC (together, "Altrad Sparrows Third-Party Defendants"); and Central Mining & Investment Corporation Ltd. ("Central Mining"), Charter Consolidated Ltd., and ESAB Corporation (together, "Charter Third-Party Defendants") (collectively, the "Third-Party Defendants"). The Receiver also requests that while this Court considers this motion, it hold in abeyance all other briefing and submission deadlines.

The March 2024 Notices seek inappropriate, interlocutory review of an order compelling discovery participation, bearing the title "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. (the "March 12 Discovery Order"). Although the March 12 Discovery Order also compelled five additional third-party defendants[1] to participate

[1] Anglo American PLC, De Beers PLC, De Beers Consolidated Mines Proprietary Ltd., De Beers UK Ltd., and De Beers Centenary AG (collectively, "Oppenheimer Third-Party Defendants").

in discovery, those five chose not to join in the filing of the March 2024 Notices and instead have produced some documents and served written responses to the Discovery Requests.[2]

The March 2024 Notices, which are the *second* set of notices of appeal filed by these Third-Party Defendants in this case in the last four months asking this Court to review interlocutory orders issued by Chief Justice Toal (Ret.), contravene decades-worth of case law governing appealability and seek improper interlocutory review of a discovery order. South Carolina law is clear—and has been clear for many years—that an order granting a motion to compel and directing a party to participate in discovery is an interlocutory order not immediately appealable. *Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008) (holding discovery orders are interlocutory and are not immediately appealable because they do not involve the merits of the action or affect a substantial right); *Ex Parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986) ("An order directing a party to participate in discovery is interlocutory and not directly appealable under S.C. Code Ann. § 14–3–330 (1976)."); *Ex Parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005) ("[A]n order denying or compelling pretrial discovery is not directly appealable since it is an intermediate or interlocutory decision.").

Pursuant to section 14-3-330 of the South Carolina Code, appellate courts have jurisdiction over interlocutory orders only if the interlocutory order involves the merits; affects a substantial right; or grants, continues, modifies, or refuses an injunction or receivership. "An order involves the merits when it finally determine[s] some substantial matter forming the whole or a part of some cause of action or defense," *Tillman v. Tillman*, 420 S.C. 246, 249, 801 S.E.2d 757, 759 (Ct. App. 2017) (internal quotations omitted), and affects a substantial right when it "(a) in effect determines

[2] By noting the Oppenheimer Third-Party Defendants have participated in discovery, the Receiver is not implying that the Oppenheimer Third-Party Defendants' participation is satisfactory or without deficiency.

the action and presents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial, or (c) strikes out an answer or any part thereof or any pleading in any action," S.C. Code Ann. § 14-3-330(2). None of those scenarios exists here.

Indeed, the March 12 Discovery Order is a garden-variety order compelling discovery from parties that repeatedly refused to participate in discovery at all. It arose from steadfast failures (1) by all of the Third-Party Defendants to respond to **any** of the written discovery the Receiver began serving on them **eight months ago** (the "Discovery Requests")[3] and (2) by Central Mining and Arranco to designate or appear for 30(b)(6) depositions noticed to begin in January 2024 following the circuit court's disposal of all potentially-dispositive motions the Third-Party Defendants filed. After repeated outreaches to Third-Party Defendants to address their failure to engage in any discovery at all (which, with the exception of the Oppenheimer Third-Party Defendants, continues to this day), the Receiver filed six Motions to Compel on January 12, 2024:

1. Motion to Compel Discovery Responses of the Oppenheimer Third-Party Defendants;

[3] As to the Third-Party Defendants at issue in this appeal, the materials before the circuit court indicated the Receiver served his Discovery Requests on the following dates:

- 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.

In addition, the Receiver noticed depositions of various Third-Party Defendants pursuant to Rule 30(b)(6), SCRCP, including serving Arranco on August 30, 2023, and Central Mining on September 6, 2023, with both depositions scheduled for October 2023, which the Receiver voluntarily postponed to allow the circuit court to first resolve the pending motions to dismiss and to dissolve the Cape Receivership. The Receiver subsequently issued amended notices for depositions of those two entities, after the circuit court resolved the pending motions.

2. Motion to Compel Discovery Responses of the Altrad Owners Third-Party Defendants;

3. Motion to Compel Discovery Responses of the Altrad Sparrows Third-Party Defendants;

4. Motion to Compel Discovery Responses of the Charter Third-Party Defendants;

5. Motion to Compel 30(b)(6) Deposition of Central Mining; and

6. Motion to Compel 30(b)(6) Deposition of Arranco

(together, the "Motions to Compel").

Third-Party Defendants responded to the Motions to Compel by pointing to two sets of filings, which they erroneously claim excuse them from engaging in any discovery: (1) their first set of interlocutory Notices of Appeal, filed December 18, 2023 (the "December 2023 Notices"), which seek interlocutory review of the circuit court's December 6, 2023 order rejecting their personal jurisdiction arguments for dismissal and their requests to dissolve the Cape Receivership (the "December 6 Interlocutory Order"); and (2) their motions for protective order and/or to stay discovery, filed prior to the circuit court's October 2023 hearing (collectively, the "Protective Order Motions"), **which the circuit court decided during that hearing**—in the Third-Party Defendants' favor no less—by ordering a temporary stay of discovery while the circuit court considered the dismissal and dissolution motions. Although the circuit court's temporary stay of discovery expired by its own terms upon entry of the December 6 Interlocutory Order, Third-Party Defendants now attempt to resurrect their previously-filed-and-decided Protective Order Motions as a shield against discovery participation. And they now claim the filing of their interlocutory December 2023 Notices—twelve days after the December 6 Interlocutory Order—prevents the Receiver from engaging in discovery and prevents the circuit court from ruling on any discovery

motions until this Court (and presumably thereafter the Supreme Court) fully and finally resolves their appeals. Although the Oppenheimer Third-Party Defendants also filed December 2023 Notices, they have moved forward, as previously noted, with discovery rather than join in this second round of appeals.

The March 12 Discovery Order is a discovery order that is not the proper subject of an interlocutory appeal under South Carolina law. It granted the Motions to Compel following a detailed recitation of the case's procedural history, which made clear: "[T]here [was] no active stay of discovery in th[e] proceeding, nor [did] Third-Party Defendants have any pending Protective Order Motions that require[d] resolution" by the circuit court. (March 12 Discovery Order at 10). The March 12 Discovery Order also highlighted the Third-Party Defendants' failure to seek a stay from either the circuit court or this Court and cited recent orders from this Court that had already addressed—and rejected—arguments that discovery was automatically stayed when, as here, a party has appealed an interlocutory order denying a motion to dissolve a receivership:

> [T]he Court of Appeals [has] 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).

(March 12 Discovery Order at 12). Finally, the March 12 Discovery Order reiterated "[d]iscovery was to continue"—a finding consistent with the Receiver's express communication **three months earlier** to both the Court and the Third-Party Defendants that discovery could proceed and no Protective Order Motions remained pending—**a communication to which no Third-Party Defendant responded at all**, much less challenged. *Id.* (quoting a December 8, 2023 email sent

by counsel for the Receiver that he expected "fulsome responses to [discovery] requests . . . on or before January 5, 2024, with depositions to start soon after."). Pursuant to the March 12 Discovery Order, all Third-Party Defendants were to produce documents and provide "responsive, substantive, and complete answers" to the Discovery Requests by March 26, and Arranco and Central Mining were to designate witnesses for the 30(b)(6) depositions by March 19 and produce those witnesses by April 2. *Id.* Yet, only the Oppenheimer Third-Party Defendants, who also filed Protective Order Motions and December 2023 Notices (but not March 2024 Notices), are even attempting to participate in discovery.

Nor can these Third-Party Defendants' efforts to use their December 2023 Notices as a discovery excuse be reconciled with this Court's prior orders authorizing the Receiver to continue with his duties even while this Court is considering the appeal of an order refusing to dissolve the Receivership. After filing the inappropriate interlocutory March 2024 Notices, Appellants proclaim "[d]espite having no jurisdiction to proceed, the circuit court entered an order allowing a court-appointed receiver to conduct virtually boundless discovery while the propriety of the receiver's appointment and the receiver's authority to undertake any activity at all is already pending on appeal." (*See* Altrad Defendants' Initial Brief at iii). But engaging in discovery is exactly what this Court has said the Receiver may do even while the Receivership is being challenged on appeal. *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).

This appeal is ripe for dismissal. It is not an authorized interlocutory appeal but rather another attempt by Third-Party Defendants to delay the case, neglect its legal obligations to participate in discovery, and avoid going to trial on the underlying issues. *See Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 94, 529 S.E.2d 11, 14 (2000) (noting "the avoidance of a trial is not a sufficient reason to justify immediate appellate review").

Indeed, Third-Party Defendants attempt to justify their improper appeal of this interlocutory order by asking this Court to rule on issues **not addressed** by the March 12 Discovery Order.

First, Third-Party Defendants incorrectly couch the circuit court's order as one denying their requests for an injunction, mischaracterizing their March 2024 Notices as an "injunction appeal" **when the March 12 Order made clear it contains no ruling on any request for an injunction**. Indeed, footnote 1 of the March 12 Order expressly stated the Third-Party Defendants' eleventh-hour insertion of requests for "injunctive relief" in their responses to the Motions to Compel were not under submission yet for the Court's consideration:

> Although Third-Party Defendants included in [their] February 16 filings [submitted in opposition to the Receiver's Motions to Compel] 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.

(March 12 Order at 3 n.1). A rose by any other name is still a rose: Third-Party Defendants cannot simply rebrand an order compelling discovery to be the "denial of injunctive relief" in an effort to circumvent South Carolina's threshold for interlocutory appeals, and they certainly cannot do so when the circuit court expressly stated in the March 12 Order that it was not ruling on injunctive requests. Accordingly, for the purpose of this appeal, any effort to rope in undecided "cross-motions" for injunctive relief is unfounded.

Second, Third-Party Defendants ask the Court to make a pronouncement on yet another issue not underlying or part of the circuit court's March 12 Order. Specifically, Third-Party Defendants frame their "statement of issue on appeal" as driven by Rule 205 of the South Carolina Appellate Court Rules, on the purported basis that rule vests "exclusive jurisdiction" with this Court and, in turn, deprives the circuit court of any ability to exercise jurisdiction over the matter and allow discovery to proceed. The March 12 Order made clear, however, the circuit court's decision was based on Third-Party Defendants' complete inaction in seeking relief from discovery (whether in this Court or the circuit court) combined with this Court's previously-referenced orders issued in substantially similar receivership appeals permitting discovery to proceed because "the appeal of a dissolution order does **not** stay the Receiver's ability to carry out his duties in the case below." (*See* March 12 Order at 10–13). In other words, no pronouncement or ruling under Rule 205 was made in the March 12 Order, nor was one required.

Accordingly, pursuant to Rule 240 of the South Carolina Appellate Court Rules, the Receiver respectfully requests that the Court dismiss the March 2024 Notices filed by the Altrad Owners Third-Party Defendants, the Altrad Sparrows Third-Party Defendants, and the Charter Third-Party Defendants on March 19, 2024. The circuit court's March 12 Order that is the subject of these March 2024 Notices is not immediately appealable, and the Court should refuse to expand the narrow construction of immediately-appealable, interlocutory orders in S.C. Code § 14-3-330 and interpretive case law to allow continued evasion of even the most basic discovery.

(Signature page follows)

Respectfully Submitted,

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April 1, 2024

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas
For the Fifth Judicial Circuit

The Honorable Jean H. Toal,
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Case No. 2023-CP-40-01759

Appellate Case Nos.
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John A. Tibbs v. Asbestos Corporation Limited, et al

PROOF OF SERVICE

I, Lindsay A. Joyner., of Gallivan White and Boyd, PA, *Attorney for Respondent Cape PLC, individually and as successor in interest to Cape Asbestos Company Limited, by and through its duly appointed Receiver Peter D. Protopapas,* hereby certify that the **MOTION TO DISMISS APPEALS OF INTERLOCUTORY DISCOVERY ORDER** was served on all other parties to this appeal on April 1, 2024, via email to their following counsel of record:

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April 1, 2024

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Subject:	Tibbs v. Asbestos Corporation Limited, App. Case Nos.: 2023-002006, 2023-002007, 2023-002008, 2023-002009, 2023-002010, 2023-002011 [IMAN-IMANMAIN.FID1086139]
Date:	Monday, April 1, 2024 6:33:47 PM
Attachments:	2024.04.01 Motion to Dismiss(14213386.1).pdf 2024.04.01 POS for MOTION TO DISMISS APPEALS OF INTERLOCUTO(14238084.1).pdf

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All,

Please find served upon you, in compliance with the Supreme Court's Order dated May 6, 2022, Respondent's Motion to Dismiss Appeals of Interlocutory Discovery Order in the above-referenced appellate cases, which we will be filing with the Court of Appeals of South Carolina momentarily, which will include a copy of this email with the POS attached here as well.

Please let me know if you have any questions.

Thanks,
Lindsay

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