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,

v.

3M COMPANY *et al.*,

Defendants.

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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,

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

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

In Re:

Asbestos Personal Injury Litigation
Coordinated Docket

ORDER GRANTING THE RECEIVER FOR CAPE PLC'S MOTION TO PRE-ADMIT EXHIBITS

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; THE SPARROWS GROUP, LLC,

Third-Party Defendants.

This matter came before the Court on the Motion to Pre-Admit Exhibits filed 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"), which was filed on April 3, 2024. Having considered the Motion to Pre-Admit Exhibits (the "Motion") and supporting materials, the Court grants the Motion for the reasons set forth below.

PROCEDURAL BACKGROUND

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), which is comprised of two separate subgroups of responding Third Party Defendants, represented by separate law firms: the Altrad Owners Third-Party Defendants, and the Altrad Sparrows Third-Party Defendants;[1]
- The Charter Third-Party Defendants (*id.* ¶ 124);[2] and
- The Oppenheimer Third-Party Defendants (*id.* ¶ 122).[3]

Within a month of filing the Third-Party Complaint, the Receiver began propounding discovery requests, including serving the First Sets of Interrogatories and Requests for Production on the Third-Party Defendants ("Discovery Requests") beginning on July 20, 2023 and serving

[1] The Altrad Third-Party Defendants are Mohed Altrad and Altrad Investment Authority S.A.S. ("Altrad Owners Third-Party Defendants"), along with the U.S. subsidiaries of the Altrad Group that have responded to the Receiver's third-party action, *i.e.*, ArranCo US LLC ("Arranco"), Hawk Bidco (US) Inc., and Sparrows Offshore, LLC ("Altrad Sparrows Third-Party Defendants").

[2] The Charter Third-Party Defendants are Central Mining & Investment Corporation Ltd. ("Central Mining"), Charter Consolidated Ltd., and ESAB Corporation.

[3] The Motion excludes the five Third-Party Defendants that are not categorically refusing to participate in any discovery: Anglo American PLC (individually and as successor in interest to Anglo American Corporation of South Africa Ltd.), De Beers PLC, De Beers Centenary AG, De Beers UK Ltd., and De Beers Consolidated Mines Proprietary Ltd. ("Oppenheimer Third-Party Defendants").

notices of depositions of certain of the Third-Party Defendants pursuant to Rule 30(b)(6), SCRCP, with those depositions scheduled for October 2023. Despite these persistent efforts by the Receiver to advance this matter, throughout the intervening ten months, the Third-Party Defendants have flatly refused to participate in discovery, despite repeated orders of this Court. The stated justification for the Third-Party Defendants' blatant refusal to participate in any discovery has been the filing of a series of appeals, including plainly frivolous appeals of non-appealable discovery orders.

Indeed, most recently, on March 12, 2024, this Court ordered the Third-Party Defendants "(i) to provide responsive, substantive, and complete answers to the Receiver's Discovery Requests with 14 days of entry of this Order and (ii) to begin producing documents in response to the Receiver's Requests for Production the same day." Order at 13. As part of that March 12 Order, this Court required Arranco and Central Mining to produce 30(b)(6) witnesses for deposition within 21 days of the Order. *Id.* The Altrad Third-Party Defendants and the Charter Third-Party Defendants have persisted in their complete refusal to comply with this Order.

In light of the continuing refusal of the Altrad Third-Party Defendants and the Charter Third-Party Defendants to participate in the discovery process, and ahead of an April 15, 2024 bench trial setting, on April 3, 2024, the Receiver filed the Motion, which sought a ruling that all exhibits included on the Receiver's trial exhibit list (submitted as Exhibit A to the Motion) were admitted and deemed authentic.

FINDINGS

It is well established in South Carolina that judges sitting without a jury have wide latitude "to admit all evidence" and then "evaluate the evidence and ascertain the truth." *Brown v. Allstate Ins. Co.*, 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001). As the Supreme Court stated in *Brown*,

when it reversed the majority opinion of the Court of Appeals:

> The majority essentially adopts a new rule for trial judges sitting without a jury. According to the majority, if incompetent evidence is admitted on the ultimate issue of the trial, the trial judge must affirmatively reject this evidence, even if it is clear he is making a judgment based on competent evidence in the record. We reject this rule because it would require trial judges to rule on all admitted evidence in a bench trial. A trial judge's role in a bench trial is to admit all evidence and then evaluate it in a non-jury setting. The majority's rule is, therefore, unnecessarily burdensome and would inhibit the trial judge's ability to evaluate the evidence and ascertain the truth.

Id. "[I]n the context of a bench trial[,] a judge is presumed to disregard prejudicial or inadmissible evidence." *State v. Inman*, 395 S.C. 539, 565–66, 720 S.E.2d 31, 45 (2011). This is because "[a] judge, unlike a juror, is uniquely suited by training, experience[,] and judicial discipline to disregard potentially prejudicial comments and to separate, during the mental process of adjudication, the admissible from the inadmissible, even though he has heard both." *Id.* (quoting *Cole v. Commonwealth*, 428 S.E.2d 303, 305 (Va. Ct. App. 1993)).

Judicial economy is best served by allowing judges the ability to use their training, skill, and experience to make these evidentiary determinations while considering the legal issues in a case. Unlike in a jury trial—where it might be imperative to keep jurors from hearing inadmissible evidence due to the possibility of prejudice—this Court, as fact finder and judge in a bench trial, is the one who makes the ultimate determination on the admissibility of evidence and the legal issues in the case. These determinations can and should occur at the same time. Because this Court determines whether the evidence is admissible and then evaluates it as the fact finder, there is no need to keep inadmissible evidence from the fact finder to prevent prejudice. *See Lucas v. Vanover*, No. 2006-UP-233, 2006 WL 7286027, at *4 (S.C. Ct. App. Apr. 27, 2006) ("[T]he role of the circuit court in this matter was to admit all evidence, admissible or inadmissible, and then

evaluate it as the fact finder. The *Brown v. Allstate* rule does not require the circuit court to make an affirmative statement that it did not rely on the incompetent evidence in rendering its decision . . . only [to] reference the competent evidence . . . in its order."). This Court has the inherent power to manage its docket in the most efficient manner to avoid unnecessary costs or use of the Court's time. *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936). Pre-Admitting evidence will save this Court and the parties the time and burden of lawyers arguing about exhibits during the trial day.

This Court's determination that the Receiver's exhibits are authentic is also appropriate as a sanction for the persistent and baseless refusal of the Altrad Third-Party Defendants and the Charter Third-Party Defendants to participate in the discovery process.[4] There is no active stay of discovery in this case, nor has one been obtained either from this Court or the Court of Appeals.

[4] While the Court has not studied all of the pre-admitted and now authenticated trial exhibits submitted by the Receiver, the Court has observed that a large portion of them, including many cited by the Receiver as support for allegations in the Third-Party Complaint, appear to be ones over which the Court could take judicial notice, since they relate to subjects and facts of general knowledge and the like. *See Matter of Harry C.*, 280 S.C. 308, 310, 313 S.E.2d 287, 288 (1984) ("The Courts will take judicial notice of subjects and facts of general knowledge, and also of facts in the field of any particular science which are capable of demonstration by resort to readily accessible sources of indisputable accuracy, and judges may inform themselves as to such facts by reference to standard works on the subject."); *see also, e.g.*, Edward J. Imwinkelried, *Evidentiary Foundations* 556 (12th ed. 2023) (noting that Federal Rule of Evidence 201(b), like the South Carolina corollary, "uses the expression, 'cannot reasonably be questioned,' rather than referring to 'certainty.' The courts are increasingly applying (b)(2) to information posted on government websites and even private sources such as Google Maps."); 2 McCormick On Evid. § 330 (8th ed. 2022) ("Information obtained from online sources is becoming a frequently used basis for judicial notice. To this point, government and corporate websites and well-recognized mapping services are among the most commonly relied upon sources."); *Owens-Ill. Glass Co. v. Am. Coastal Lines, Inc.*, 222 F. Supp. 923, 927 (S.D.N.Y. 1963) (taking judicial notice of Moody's manual from 1958); *Pettaway v. Miami Air Int'l, Inc.*, 624 F. Supp. 3d 1268, 1279 & n.13 (M.D. Fla. 2022) (taking judicial notice of "historical facts raised by the parties," including regarding international relations involving Guantanamo Bay); *Record Museum v. Lawrence T'ship*, 481 F. Supp. 768, 771 (D.N.J. 1979) (taking judicial notice of "the phenomenon known as the Counterculture of the Seventies"); *Connealy v. Walsh*, 412 F. Supp. 146, 151 (W.D. Mo. 1976) (stating that "the history of the Missouri . . . is judicially noticeable").

When a party fails to meaningfully participate in discovery or to appear for a deposition, South Carolina Rule of Civil Procedure 37(d) permits the Court to "make such orders in regard to the failure as are just." "Whatever sanction is imposed should serve to protect the rights of discovery provided by the rules." *Kershaw County Bd. Of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990). "The court is allowed to make such orders as it deems just under the circumstances and the selection of a sanction is discretionary with the court." *Pioneer Elecs. (USA), Inc. v. Cook*, 294 S.C. 135, 137, 363 S.E.2d 112, 113 (Ct. App. 1987).

Because the Altrad Third-Party Defendants and the Charter Third-Party Defendants have not meaningfully responded to written discovery and have failed to produce witnesses for deposition, the Receiver has been unable to authenticate documents that otherwise would have been authenticated under Rule 901 during the normal course of discovery. Given this discovery misconduct, a determination that all the Receiver's trial exhibits are authentic is appropriate under the circumstances.

* * * * *

For the reasons set forth herein, the Court **GRANTS** the Motion to Pre-Admit Exhibits in its entirety and further finds that each of the exhibits on Exhibit A thereto is authentic.

AND IT IS SO ORDERED.

[JUDGE'S SIGNATURE PAGE FOLLOWS]

Richland Common Pleas

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

Case Number: 2023CP4001759

Type: Order/Other

So Ordered

Jean H. Toal