PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1339

PETER D. PROTOPAPAS, as the Receiver for Payne & Keller Company on behalf of Payne and Keller Company,

Plaintiff - Appellee,

v.

TRAVELERS CASUALTY AND SURETY COMPANY, f/k/a Aetna Casualty & Surety Company,

Defendant - Appellant,

and

ZURICH AMERICAN INSURANCE COMPANY, CONTINENTAL INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; MEDMARC CASUALTY INSURANCE COMPANY; BERKSHIRE HATHAWAY SPECIALTY INSURANCE COMPANY, f/k/a Stonewall Insurance Company; LEXINGTON INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON AND VARIOUS LONDON MARKET COMPANIES; SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION; FIRST STATE INSURANCE COMPANY; BIRMINGHAM FIRE INSURANCE COMPANY,

Defendants.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Donald C. Coggins, Jr., District Judge. (3:21-cv-04086-DCC)

Argued: January 25, 2024 Decided: February 26, 2024

Before DIAZ, Chief Judge, and NIEMEYER and WYNN, Circuit Judges.

Dismissed by published opinion. Judge Niemeyer wrote the opinion, in which Chief Judge Diaz joined. Judge Wynn wrote an opinion concurring in the judgment.

ARGUED: Harry Lee, STEPTOE LLP, Washington, D.C., for Appellant. David B. Salmons, MORGAN LEWIS & BOCKIUS LLP, Washington, D.C., for Appellee. **ON BRIEF:** Kevin A. Hall, M. Todd Carroll, Columbia, South Carolina, M. Elizabeth O'Neill, WOMBLE BOND DICKINSON (US) LLP, Charlotte, North Carolina, for Appellant. John B. White, Jr., Marghretta Hagood Shisko, JOHN B. WHITE, JR., P.A. LAW FIRM, Spartanburg, South Carolina; Jonathan McLean Robinson, Shanon N. Peake, SMITH ROBINSON HOLLER DUBOSE & MORGAN, LLC, Sumter, South Carolina; Bryan M. Killian, Amanda L. Salz, MORGAN, LEWIS & BOCKIUS LLP, Washington, D.C.; Brian Montgomery Barnwell, RIKARD & PROTOPAPAS, LLC, Columbia, South Carolina, for Appellee.

NIEMEYER, Circuit Judge:

Travelers Casualty and Surety Company, which had removed this case from state court to federal court, challenges the district court's order remanding it back to state court pursuant to 28 U.S.C. § 1447(c).

A South Carolina court-appointed receiver brought this action against Travelers and other insurers on behalf of a defunct company within a state receivership, alleging breaches of insurance policies issued to the company, and Travelers removed the action to federal court under 28 U.S.C. § 1441(a), based on diversity jurisdiction under 28 U.S.C. § 1332. The district court, however, granted the receiver's motion to remand, holding (1) that even though Travelers invoked diversity jurisdiction under §1332, the court nonetheless lacked subject-matter jurisdiction under the doctrine articulated in *Barton v. Barbour*, 104 U.S. 126 (1881), because the case involved the property of a state receivership that was in the exclusive jurisdiction of the state court, and (2) that the removal lacked unanimous consent of the defendants because a forum selection clause in insurance policies issued to the defunct company by some of the defendants rendered their consent invalid and thus they could not join in or consent to removal, as required by 28 U.S.C. § 1446(b)(2)(A).

Because the district court's conclusions in support of remand were at least *colorably* supported, we dismiss this appeal under § 1447(d), which provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal." *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 234 (2007) (holding that a removal order is not reviewable if the district court "relied upon a ground that is colorably characterized" as a lack of subject-matter jurisdiction); *see also Harvey v.*

UTE Indian Tribe of the Uintah & Ouray Rsrv., 797 F.3d 800, 805 (10th Cir. 2015) (holding that the court "will not review the district court's remand order if it can be colorably characterized as grounded" in a procedural defect).

I

The Court of Common Pleas in Richland County, South Carolina, invoking its equity powers granted by South Carolina Code § 15-65-10(4), created a receivership over the South Carolina assets of Payne & Keller Company, a Texas corporation, as well as related entities, after Payne & Keller had become defunct. Before the receivership, Payne & Keller had been engaged in manufacturing and construction and was facing personal injury claims by or on behalf of individuals exposed to asbestos in its products. The state court appointed Peter D. Protopapas as the receiver of Payne & Keller and directed him to collect all of Payne & Keller's assets and protect them, subject to order of the court. Among other things, the court directed Protopapas "to administer any insurance assets of Payne & Keller as well as any claims related to the actions or failure to act of Payne & Keller's insurance carriers" and "to investigate the existence of all insurance coverages potentially available to the company in receivership." Under South Carolina law, Protopapas as a receiver was "an executive officer of the court, to administer the assets of the estate under the direction of the court." *In re Fifty-Four First Mortg. Bonds*, 15 S.C. 304, 314 (1881) (quoting *Gadsden v. Whaley*, 14 S.C. 210, 215 (1880)). He thus held possession of Payne & Keller's assets as an "arm of the court." *In re Am. Slicing Mach. Co.*, 118 S.E. 303, 304 (S.C. 1923).

Acting under the authority and control of the South Carolina court, Protopapas, as receiver, commenced an action on behalf of Payne & Keller in state court against several insurance companies, including Travelers, for coverage of the personal injury claims pending against Payne & Keller. Travelers removed the receiver's action to federal court under 28 U.S.C. § 1441(a), asserting diversity jurisdiction under 28 U.S.C. § 1332. In doing so, it obtained consents to removal from all other defendant insurance companies, except one, which the district court later found to be fraudulently joined to defeat removal jurisdiction. Therefore, it appeared that the defendants had unanimously consented to removal, as required by 28 U.S.C. § 1446(b)(2)(A).

Protopapas filed a motion in the district court to remand the case to state court arguing (1) that a forum selection clause in some of the defendants' insurance policies issued to Payne & Keller prevented those companies from consenting to removal, thus defeating the unanimous consent required, and (2) that the federal court did not have subject-matter jurisdiction over the state receivership under the *Barton* doctrine.

The magistrate judge, to whom the case was initially referred, recommended granting Protopapas's motion and remanding on the basis that not all of the defendants had consented to the removal. As to the argument under the *Barton* doctrine, she expressed skepticism over whether the doctrine was indeed a matter of subject-matter jurisdiction, suggesting that it was instead a prudential limit based on abstention principles.

The district court affirmed the magistrate judge's recommendation to remand, but it did not affirm all of the magistrate judge's reasoning. First, the district court concluded that the *Barton* doctrine did indeed preclude removal to federal court because the doctrine

"act[ed] as a limitation on *federal jurisdiction* when a state court ha[d] previously exercised its authority by appointing a receiver to handle the administration of property." (Emphasis added). The court explained that "to allow this matter to continue in federal court would directly interfere with the exclusive jurisdiction of the receivership court over this dispute." In addition to relying on the *Barton* decision itself, the court also relied on *Porter v. Sabin*, explaining that "it is in the appointing court's discretion 'to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere' and that the appointing court 'may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit.'" (Quoting 149 U.S. 473, 479 (1893)).

Second, the district court agreed with the magistrate judge that the forum selection clause in some of the insurance companies' policies issued to Payne & Keller precluded them from validly consenting to removal such that the removal was not procedurally compliant with § 1446(b)(2)(A). The court noted that language very similar to that in the clauses before it "ha[d] been widely litigated across this Circuit, with courts consistently finding the clause acts as a waiver of an insurer's right to remove a case from the forum selected by the plaintiff," citing four decisions from courts in the Fourth Circuit, as well as three from outside the Circuit.

From the district court's remand order dated February 24, 2023, Travelers filed this appeal, challenging the correctness of both of the district court's rulings. Protopapas filed a motion to dismiss the appeal for lack of appellate jurisdiction under 28 U.S.C. § 1447(d), which provides that remand orders are "not reviewable on appeal."

II

Because Protopapas's motion to dismiss this appeal is based on his claim that we lack appellate jurisdiction, we address that motion first.

Protopapas contends, for the first of his two arguments, that his claims against the insurers are assets within the exclusive jurisdiction of the state-receivership court held by the receiver as an arm of that court, citing *Barton v. Barbour* and *Porter v. Sabin*. He notes that the basis for the *Barton* doctrine is that "federal courts have no jurisdiction over property managed by a court-appointed receiver because the property is subject to the exclusive jurisdiction of the receivership court for whom the receiver acts," citing *Davis v. Gray*, 83 U.S. (16 Wall.) 203, 217–19 (1872); *Wiswall v. Sampson*, 55 U.S. (14 How.) 52, 65–66 (1852). And he adds that we have previously recognized that the doctrine is jurisdictional. *See Conway v. Smith Dev., Inc.*, 64 F.4th 540, 545 (4th Cir. 2023) (noting that "*Barton* concerns *subject-matter jurisdiction*" (emphasis added)); *McDaniel v. Blust*, 668 F.3d 153, 156 (4th Cir. 2012) (noting that the "Supreme Court established in *Barton* that before another court may obtain *subject-matter jurisdiction* over a suit filed against a receiver for acts committed in his official capacity, the plaintiff must obtain leave of the court that appointed the receiver" (emphasis added)).

Travelers contends that Protopapas's understanding of *Barton* is too expansive, arguing that the doctrine applies only to actions filed *against a state-appointed receiver*. It notes that *Barton* itself set forth that limitation, recognizing the "general rule that before suit is brought *against a receiver*[,] leave of the court by which he was appointed must be

obtained." *Barton*, 104 U.S. at 128 (emphasis added). In the case before us, of course, the receiver commenced the action.

Section 1447(d) places "broad restrictions," *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995), on the jurisdiction of courts of appeals to review remand orders. In enacting this limitation, Congress prioritized finality and efficiency at the expense of absolute accuracy, implying a certain level of fungibility of federal and state courts. Specifically, the statute provides broadly that, with some exceptions not applicable here, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). But the Supreme Court has held that the provision is not to be read without limitation. Rather, it explained, the provision "must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." *Things Remembered,* 516 U.S. at 127 (citing *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345–46 (1976)). Thus, § 1447(d) bars appellate court review of remand orders when they are based on "(1) a district court's lack of subject matter jurisdiction or (2) a defect in removal 'other than lack of subject matter jurisdiction' that was raised by the motion of a party within 30 days after the notice of removal was filed." *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 196 (4th Cir. 2008).

When a statute *bars* appellate review of remand orders — thus defining appellate jurisdiction — it arguably prohibits the appellate court from reviewing even whether the district court was correct in the substance of the order. Thus, we have noted that the § 1447(d) bar stands even when the appellate court believes that the district court's order

may have been "erroneous." *Ellenburg*, 519 F.3d at 196 (cleaned up). And Justice Kennedy has observed similarly, noting that courts adhere to this limited review even if it might be "troubling" to allow an erroneous decision to remain untouched; § 1447(d) "leave[s] us no other choice." *Powerex*, 551 U.S. at 239 (Kennedy, J., concurring). Indeed, as the Supreme Court has noted, it might be enough for the appellate court to deny review simply when the district court "*purport[s]* to remand" for a lack of subject-matter jurisdiction by labeling that such is the ground. *Id.* at 232–33 (emphasis added). But because the lack of subject-matter jurisdiction still has to be a basis for a district court's remand order and the appellate court has to be able to so verify when declining to review it, the appellate court should take a peek at the district court's ruling to confirm that fact. In doing so, however, it "should be limited to confirming that [the district court's] characterization was *colorable*," *id.* at 234 (emphasis added), i.e., that a lack of subject-matter jurisdiction was a "*plausible* explanation of what legal ground the District Court actually relied upon for its remand," *id.* at 233. The *Powerex* Court explained, "Lengthy appellate disputes about whether an arguable jurisdictional ground invoked by the district court was properly such would frustrate the purpose of § 1447(d) . . . ." *Id.* at 234. Thus, it held that "when . . . the District Court relied upon a ground that is *colorably* characterized as subject-matter jurisdiction, appellate review is barred by § 1447(d)." *Id.* (emphasis added).

With that standard in hand, we take a brief peek at the district court's reasoning to satisfy ourselves that a lack of subject-matter jurisdiction was a colorable or plausible explanation of the legal ground on which the court actually relied for remand.

To start, the district court *purported* to rely on a lack of subject-matter jurisdiction in remanding this case, announcing that that was the ground on which it was relying. That alone might satisfy § 1447(d) because without jurisdiction, we have no power to review more. Indeed, some of the Justices in *Powerex* would bar review simply on the district court's announcement — i.e., that it "*purported* to remand for lack of subject-matter jurisdiction." *Powerex*, 551 U.S. at 233 (emphasis added). But the actual holding of *Powerex* demands a greater level of review, presumably on the basis that a court can address what is necessary for it to determine its own jurisdiction. The *Powerex* Court thus held that we must determine whether the district court's explanation was "colorable" or "plausible," but we should not review the substance of the explanation to determine whether it was, in fact or in law, correct.

In taking that peek in this case, we note that the district court's explanation for relying on a lack of subject-matter jurisdiction to justify remand was as follows:

> Here, the receivership court has appointed a receiver who is attempting to preserve and collect assets of the defunct corporation as part of his fiduciary duty. This Court finds that *Barton*, and its subsequent application in *Porter*, act as a *limitation on federal jurisdiction* when a state court has previously exercised its authority by appointing a receiver to handle the administration of property; to allow this matter to continue in federal court would directly interfere with *the exclusive jurisdiction of the receivership court* over this dispute.

(Emphasis added).

On its face, this seems like a plausible characterization of subject-matter jurisdiction. Mindful that a lengthy discussion over the merits of the district court's finding is neither appropriate nor necessary, *see Powerex*, 551 U.S. at 234, we do, however, take a

quick look at *Barton* to confirm that the district court's characterization of and reliance on it as involving subject-matter jurisdiction was indeed colorable.

In *Barton*, Frances Barton was injured while riding as a passenger on a train owned by a railroad that had been placed in a state receivership. Barton sued the state-appointed receiver in federal court, seeking $5,000 in damages for the railroad's negligence. The receiver challenged the federal court's jurisdiction, arguing that he was subject exclusively to the state-receivership court and that he could not be sued without leave of the receivership court. *Barton*, 104 U.S. at 127–31. The lower federal court agreed, and the Supreme Court affirmed. It stated that the suit "brought without leave to recover judgment against a receiver for a money demand, [was] virtually a suit the purpose of which [was], and effect of which [would] be, to take the property of the trust from his hands and apply it to the payment of the plaintiff's claim." *Id.* at 129. This was because, as the Court explained, the suit was against the defendant "in his capacity as receiver, and the execution [of a judgment] would run against the property in his hands as such." *Id.* at 128. The Court noted that it was "immaterial whether the suit [was] brought against [the receiver] to recover specific property or to obtain judgment for money demand. In either case leave should be first obtained [from the receivership court]." *Id.* at 129. The Court accordingly held, "Upon these facts[,] we are of opinion that [the federal court] had no jurisdiction to entertain a suit." *Id.* at 131 (citing *Peale v. Phipps*, 55 U.S. (14 How.) 368, 374 (1852) (holding in similar circumstances to those before us, "[w]e see no ground upon which *the jurisdiction* of the court can be sustained" (emphasis added))).

The similarities between *Barton* and the instant case convince us that its holding is at least arguably applicable here, despite Travelers' protestations to the contrary. For instance, Travelers argues that notwithstanding *Barton*, this is simply a common law breach of contract case for which neither Travelers nor Barton would need permission from the receivership court. But the Supreme Court in *Barton* rejected such an argument; the Court specifically dismissed Barton's argument that she was injured in tort and therefore could bring suit for injuries "without leave of the court by which [the receiver] was appointed." 104 U.S. at 130–31.

Travelers also argues that *Barton* is applicable only to suits brought *against* the receiver, but *Barton* also rejects that notion. *Barton* found a lack of jurisdiction because the claims and property were the subject of the state receivership and could not be adjusted in federal court without the receivership court's approval. As the *Barton* Court explained, the plaintiff's judgment "would be against the defendant in his capacity as receiver, and the execution would run against the property in his hands as such." 104 U.S. at 128. And *Porter v. Sabin*, a later case applying *Barton*, confirmed that the doctrine applies to *both suits by and against* the receiver because, when a state court appoints a receiver, "the court assumes the administration of the estate" and "[t]he possession of the receiver is the possession of the court." 149 U.S. at 479; *cf. Marshall v. Marshall*, 547 U.S. 293, 311–12 (2006) (recognizing the "general principle that, when one court is exercising *in rem* jurisdiction of a *res*, a second court will not assume *in rem* jurisdiction over the same *res*" and articulating that the "probate exception" to federal jurisdiction "precludes federal

courts from endeavoring to dispose of property that is in the custody of a state probate court").

Thus, when applying the *Barton* doctrine, the district court plausibly concluded that a federal court lacks jurisdiction over a state receivership or a state-court appointed receiver with respect to assets of the receivership because the state court has exclusive jurisdiction over the assets of the receivership. Exercising federal jurisdiction over a suit by or against a state-appointed receiver, who functions as an "arm" or "executive" of the state-receivership court, would infringe on the state court's control over the receivership assets — its exclusive jurisdiction. Thus, as a matter of comity, as well as custom, the *Barton* doctrine rests on this exclusivity of the state receivership over the assets before it as a matter of jurisdiction, and indeed we have confirmed as much. *See, e.g.*, *Conway*, 64 F.4th at 545 (noting that "*Barton* concerns subject-matter jurisdiction"); *McDaniel*, 668 F.3d at 156 (noting that "[t]he Supreme Court established in *Barton* that before another court may obtain subject-matter jurisdiction over a suit filed against a receiver for acts committed in his official capacity, the plaintiff must obtain leave of the court that appointed the receiver").

In these circumstances, our quick look confirms that the district court's characterization of its remand as relying on a lack of subject-matter jurisdiction was colorably supported, thus barring our review by reason of § 1447(d).

III

For the avoidance of doubt, we also address Protopapas's second argument that the district court's conclusion in its remand order that a procedural defect precluded removal was also colorably supported and thus also bars our review. Specifically, Protopapas contends that, while all defendants signed documents consenting to removal, the forum selection clause in the insurance policy issued to Payne & Keller by at least one defendant prevented that defendant from validly consenting to removal, thus denying Travelers the ability to satisfy the requirement that removal be unanimous. *See* 28 U.S.C. § 1446(b)(2)(A). The forum selection clause at issue provides:

> It is agreed that in the event of the failure of the company hereon to pay any amount claimed to be due hereunder, the company hereon, at the request of the insured, *will submit to the jurisdiction of any court of competent jurisdiction* within the United States of America and will comply with all requirements necessary to give such court jurisdiction *and all matters arising hereunder shall be determined in accordance with the law and practice of such court*.

(Emphasis added).

The district court concluded that this clause barred at least one insurer from consenting to removal to federal court. As it explained, it was remanding the case to state court because, "[g]iven the waiver [contained in the forum selection clause], and thus the inability to obtain valid consent from all defendants, *Defendants have not adequately demonstrated they meet the requirement under* § 1446(b)(2)(A) that all properly joined and served Defendants must join in or consent to the removal of the action." (Emphasis added).

Because the district court purported to rely on a procedural defect, our review, again, is limited to whether that characterization is colorable. *See Powerex*, 551 U.S. at 234; *see also Harvey*, 797 F.3d at 805.

Travelers contends that it is not because we routinely review on appeal forum selection clauses. *See, e.g.*, *Bartels v. Saber Healthcare Grp., LLC*, 880 F.3d 668, 673 (4th Cir. 2018); *FindWhere Holdings, Inc. v. Sys. Env't Optimization, LLC*, 626 F.3d 752, 755 (4th Cir. 2010). But in both *Bartels* and *FindWhere Holdings*, the district court's decision was based on a contractual application of where the forum selection clause at issue required the suit to be brought and *not* whether those clauses had any bearing on a defendant's ability to comply with the requirements for removal to federal court. *See Bartels*, 880 F.3d at 672–73 (noting that the district court concluded that the contract required bringing the suit in state court because "the forum-selection clause required the action to proceed in Franklin County" and there was no "federal courthouse in Franklin County"); *FindWhere Holdings*, 626 F.3d at 754 (noting the district court remanded because it interpreted the language of the forum selection clause that suits must be brought "exclusively in, or be transferred to, the courts of the State of Virginia" to mean state courts in Virginia).

Instead, the issue before us is more like that addressed in *Overlook Gardens Properties, LLC v. ORIX USA, L.P.*, 927 F.3d 1194 (11th Cir. 2019). There, the plaintiff's loan agreement included a forum selection clause, which, the district court held, precluded removal because the lender "could not validly consent to the removal of this action, so the unanimity requirement [was] not met." *Id.* at 1197 (cleaned up). On appeal from the district court's remand order, the Eleventh Circuit held that it lacked jurisdiction under

§ 1447(d) to review the order. It distinguished its review of an order enforcing a forum selection clause from an order remanding for a lack of unanimous consent because of the effect of the forum selection clause and concluded that only the latter reflected a defect in removal. "While a remand based on interpretation and enforcement of a valid forum selection clause is neither a defect in removal process nor a jurisdictional flaw, a lack of unanimous consent to removal is a defect in the removal process." *Id.* at 1198 (cleaned up). Because the district court's remand order here was similarly based on the effect that a forum selection clause had on the defendants' ability to comply with a procedural requirement for removal, we find *Overlook Gardens* more relevant to the issue here than the cases cited by Travelers.

In short, the district court concluded that because at least one insurer agreed to litigate coverage wherever the claimant chose and the claimant chose a state court in South Carolina, the insurer was barred thereafter from consenting to a federal forum. Under the applicable standard for review of that issue, we conclude that the district court's characterization of a procedural defect in these circumstances was at least colorable, inasmuch as unanimous consent to removal was required by § 1446(b)(2)(A). Thus, any further analysis and review would not be appropriate.

* * *

For the reasons given, we conclude that we lack jurisdiction to review the district court's remand order under § 1447(d) and accordingly dismiss this appeal.

DISMISSED

WYNN, Circuit Judge, concurring in the judgment:

I concur in holding that, because the district court based its remand order on the *Barton* doctrine and colorably described the *Barton* doctrine as a mandatory limit on its subject matter jurisdiction, the appeal must be dismissed. But today, my good colleagues in the majority choose to go well beyond what is needed to resolve this appeal. By addressing unnecessary issues, they contravene a clear directive from our Supreme Court not to do so.

We lack jurisdiction to review a remand order if the district court's basis for remand "is colorably characterized" as a lack of subject-matter jurisdiction or a procedural defect in removal, and the bar for whether the district court's description of its basis for remand is "colorable" is exceedingly low. *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 234 (2007). Thus, quite clearly, the Supreme Court has directed that our analysis of whether a district court's basis for remand is colorable should be extremely brief. In other words, we may not delve into whether the district court's application of the basis for remand was "erroneous." *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 196 (4th Cir. 2008) (quoting *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976), *abrogated on other grounds by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996)). And we should not endeavor to resolve any open questions beyond what is necessary to determine whether a remand order is colorably based on a lack of subject matter jurisdiction or a procedural defect in removal.

Our precedent offers a simple resolution to this case. In *McDaniel v. Blust*, we stated that "[t]he Supreme Court established in *Barton* that before another court may obtain

subject-matter jurisdiction over a suit filed against a receiver for acts committed in his official capacity, the plaintiff *must* obtain leave of the court that appointed the receiver." *McDaniel v. Blust*, 668 F.3d 153, 156 (4th Cir. 2012) (emphasis added). We were not asked to decide in *McDaniel* whether the *Barton* doctrine is based on abstention or imposes a mandatory limit on subject-matter jurisdiction. But our reference to the steps a party "must" take before we can exercise subject matter jurisdiction provides, at a minimum, a colorable basis on which the district court could conclude that the *Barton* doctrine imposed a mandatory limitation on its subject matter jurisdiction. Because State Farm cites no case explicitly contradicting that description, and we are not permitted to examine whether the district court's conclusion was erroneous, our analysis can start and end with *McDaniel*.

Unfortunately, the majority opinion chooses to say more than is needed to resolve this appeal in the manner which the Supreme Court has directed.

First, the majority opinion issues an unnecessary, and I would say advisory, proclamation that the *Barton* doctrine applies to cases brought both against *and* by a receiver. Majority Op. at 12. Classically, the *Barton* doctrine applies in "a suit filed *against* a receiver[.]" *McDaniel*, 668 F.3d at 156 (emphasis added). While the main justification for the *Barton* doctrine—protecting the estate's property—could support extending the doctrine to suits brought *by* a receiver, no case has held that the doctrine extends that far. True, in *Porter v. Sabin*, the Supreme Court stated that the *Barton* doctrine applies to "claims of or against" a receiver. *Porter v. Sabin*, 149 U.S. 473, 479 (1893). But that statement was dicta, and, throughout the rest of the opinion, the Supreme Court referred only to claims against a receiver. More importantly, as the magistrate judge recognized,

the complete dearth of decisions applying the *Barton* doctrine to cases brought by a receiver weighs against extending the doctrine.* *See Protopapas v. Zurich Am. Ins. Co.*, No. CV 3:21-4086-DCC, 2022 WL 17668402, at *5 (D.S.C. Oct. 20, 2022) ("[N]o precedential authority has actually applied the *Barton* doctrine to foreclose claims brought by a receiver in pursuit of his official duties to affirmatively collect potential assets for an insolvent corporation."). And the majority opinion's conclusion that the *Barton* doctrine applies to cases brought by a receiver goes to whether the district court erred in its application of the *Barton* doctrine, *not* to whether it colorably described the *Barton* doctrine as imposing a mandatory limitation on subject matter jurisdiction. Because the issue is unresolved and unnecessary to our conclusion, it should not be reached.

Second, in Part III of its opinion, the majority unnecessarily, and again in my opinion, advisorily, addresses an alternative basis for the district court's remand order. *Either* a lack of subject matter jurisdiction or a procedural defect in removal can justify remand. 28 U.S.C. § 1447(c). Here, the district court ordered remand based on both a lack of subject matter jurisdiction and a procedural defect in removal. *See Protopapas v. Zurich Am. Ins. Co.*, No. 3:21-CV-04086-DCC, 2023 WL 2206640, at *3 (D.S.C. Feb. 24, 2023). The majority addresses both bases for the district court's decision. To be sure, we may sometimes issue alternative holdings. *See Gestamp S.C., LLC v. NLRB*, 769 F.3d 254, 262 n.4 (4th Cir. 2014). But it makes no sense to do so when the first holding in a decision is

* In opposing the majority opinion's decision to address this issue, I express no opinion about the ultimate question of whether the *Barton* doctrine applies only to suits brought against a receiver or if it also extends to suits brought by a receiver.

that we lack jurisdiction. Because we have already decided that we lack jurisdiction based on the district court's application of the *Barton* doctrine, the portion of the majority opinion addressing the alleged procedural defect has no importance for its resolution of the case. To comply with the well-established principle against issuing "advisory opinions," *Flast v. Cohen*, 392 U.S. 83, 96 (1968), we should decline to express a viewpoint where none is needed.

In appeals like this one, Congress has sought to keep our review to a minimum. I suggest that future panels carefully heed that directive. Because the majority opinion in this case does not, I concur only in the judgment.

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.

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

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

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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 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.

ORDER SCHEDULING TRIAL DATE

This third-party action was previously scheduled for trial on April 15, 2024. On April 10, 2024 during a pre-trial status conference, the Court granted a continuance due to the lack of participation in the discovery process by the Third-Party Defendants.

The matter is now scheduled for a bench trial on the week of December 9, 2024 at the Richland County Judicial Center, Courtroom 3B, beginning at 9:30 AM. Additionally, a pre-trial conference is scheduled for December 5th at the Richland County Judicial Center, Courtroom 3B, beginning at 9:30 AM.

AND IT SO ORDERED.

[ELECTRONIC SIGNATURE ON FOLLOWING PAGE]

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

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
JOHN A. TIBBS and MARGARET B. TIBBS,	)	
	)	Civil Action No. 2023-CP-40-01759
Plaintiffs,	)	
	)	
v.	)	
	)	
3M COMPANY, *et al.*,	)	
	)	
Defendants.	)	
	)	
**********	)	THIRD-PARTY DEFENDANTS CHARTER CONSOLIDATED LTD., ESAB CORPORATION, AND CENTRAL MINING & INVESTMENT CORP. LTD.'S OBJECTIONS TO RECEIVER'S SECOND SET OF REQUESTS FOR PRODUCTION TO THIRD-PARTY DEFENDANTS CHARTER CONSOLIDATED LTD, ESAB CORPORATION, AND CENTRAL MINING & INVESTMENT CORP. LTD.
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 PLCS, *et al*.,	)	
	)	
Third-Party Defendants.	)	
	)	

Third-Party Defendants Charter Consolidated Ltd. ("Charter"), ESAB Corporation ("ESAB"), and Central Mining & Investment Corp. Ltd. ("Central Mining," and collectively with Charter and ESAB, "Charter Third-Party Defendants") hereby respond and object to the Receiver's Second Set of Requests for Production ("Second Set of Requests for Production"). By so responding and objecting, Charter Third-Party Defendants do not waive, but instead specifically preserve, all objections previously made regarding these proceedings through Charter Third-Party Defendants' written motions, oral arguments, and responsive pleadings, including *inter alia* that the Court lacks personal jurisdiction over Charter Third-Party Defendants, that the Court lacks

subject matter jurisdiction, that the Receiver was unlawfully appointed, that the Receiver lacks standing, and that the Receiver's claims fail under Rule 12(b) and 14, SCRCP.

RESERVATION OF RIGHTS

Charter Third-Party Defendants do not waive, but instead specifically preserve, their right to supplement these objections and serve further objections to any definition, instruction, or portion of the Second Set of Requests for Production at a later date, including but not limited to objections based on the attorney-client, attorney work-product, joint-defense, and common-interest privileges; any other privilege that may be implicated in any way; irrelevance; overbreadth; undue burden and disproportionality; being cumulative and duplicative; scope; vagueness; prematurity; seeking discovery not in the possession, custody, or control of Charter Third-Party Defendants; seeking discovery in the possession of other defendants, third-party defendants, and/or non-parties; seeking discovery obtainable with equal or greater facility from other sources; seeking discovery that may be derived or ascertained from documents already within the Receiver's knowledge, possession or control; seeking discovery of information that does not exist or no longer exists; seeking discovery regarding alleged events that occurred decades before Charter Third-Party Defendants came into existence and/or decades before Charter Third-Party Defendants had any alleged connection with Cape PLC; seeking discovery that cannot be disclosed or produced under the laws of foreign jurisdictions; seeking discovery on issues which are not ripe for adjudication; seeking discovery on matters of opinion, legal contentions, or questions of law; and being oppressive and harassing.

Charter Third-Party Defendants object to these discovery requests on the grounds that the circuit court lacks jurisdiction to proceed with this matter at the present time, as all issues regarding

the purported Receiver's appointment and his purported authority to engage in litigation are presently pending before the South Carolina Court of Appeals.

To the extent the Charter Third-Party Defendants' appeals are remitted and an appellate court no longer has exclusive jurisdiction over matters affected by those appeals, Charter Third-Party Defendants will supplement their objections to the Receiver's Second Set of Requests for Production and provide responses, subject to the objections asserted.

REQUESTS FOR PRODUCTION

In addition to the objections outlined above, Charter Third-Party Defendants specifically object to each of the Requests in the Receiver's Second Set of Requests for Production as set forth below.

REQUEST FOR PRODUCTION NO. 93:

Produce all Documents related to common properties used by employees of Charter and De Beers Consolidated Mines Ltd. and/or Anglo American Corporation of South Africa Ltd., including 40 Holborn Viaduct and Morley House/26–30 Holborn Viaduct. For purposes of this request, "all Documents" includes, but is not limited to, Documents related to the ownership of the property; lease materials related to the property; inter-company agreements regarding the property, including use of the property; Documents related to the payment of council taxes; and Documents related to the sale of the property.

RESPONSE: Charter Third-Party Defendants object to this discovery request on the grounds that the circuit court lacks jurisdiction to proceed with this matter at the present time, as all issues regarding the purported Receiver's appointment and his purported authority to engage in litigation are presently pending before the South Carolina Court of Appeals. *See* Rule 205, SCACR (providing that "[u]pon the service of the notice of appeal, the appellate court ***shall have exclusive jurisdiction*** over the appeal" (emphasis added)); *Stokes-Craven Holding Corp. v. McKenzie*, 416 S.C. 517, 534, 787 S.E.2d 485, 494 (2016) (explaining that "Rule 205 divests the lower court or administrative tribunal of jurisdiction over '***matters affected by the appeal***'" (emphasis supplied

by the Supreme Court) (quoting *Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App. 2012))); *Morris v. Morris*, 295 S.C. 37, 40, 367 S.E.2d 24, 26 (1988) ("This Court has exclusive jurisdiction over an appeal upon the service of a Notice of Intent to Appeal."); *Tillman*, 398 S.C. at 255 & n.3, 728 S.E.2d at 51 & n.3 (reiterating that "[u]nder Rule 205, the lower court is deprived of the power to proceed with matters that are affected by the appeal," and explaining that this rule "deprives the lower court of the power to address a particular issue, or 'matter,' during the pendency of the appeal"); *Binkley v. Burry*, 352 S.C. 286, 294, 573 S.E.2d 838, 843 (Ct. App. 2002) ("Once an appeal is filed, the appellate court has exclusive jurisdiction over the matter."); Jean H. Toal, *et al.*, *Appellate Practice in South Carolina* 121 (3d ed. 2016) (confirming that "[t]he appellate court obtains exclusive jurisdiction over the appeal upon service of the notice of appeal"); *see also Tillman*, 398 S.C. at 255, 728 S.E.2d at 51 ("Thus, the existence or nonexistence of a stay under Rule 241 does not control the family court's power to proceed with the action and address matters not affected by the appeal. Rather, the lower court's power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a 'matter affected by the appeal' under Rules 205 and 241(a).").

Charter Third-Party Defendants previously notified the circuit court and all parties, including the Receiver, of the pendency of the appeal by filing a Notice of Appeal. An appellate ruling in Charter Third-Party Defendants' favor would result in the dissolution of the receivership. A dissolution of the receivership, in turn, would preclude the purported Receiver from pursuing ***all*** the claims in this third-party action against ***all*** remaining Third-Party Defendants—including the Charter Third-Party Defendants —thereby stripping the purported Receiver of any alleged authority to seek or engage in any discovery, let alone the overbroad, disproportionate, and unduly burdensome, as well as in some cases harassing, discovery that the purported Receiver seeks here.

There are presently several other appeals that are pending that were noticed by Charter Third-Party Defendants that affect all aspects of the third-party case. In addition, Defendant Asbestos Corporation Limited ("ACL") filed a notice of appeal on September 13, 2023 as to two orders "Order Holding Atlas Asbestos Company, Ltd. in Contempt" (September 8, 2023) and "Order on Plaintiffs' Motion to Appoint a Receiver" (September 8, 2023). This appeal is still pending and affects all aspects of the Tibbs case. All third-party claims against the Third-Party Defendants, and all discovery sought from the Charter Third-Party Defendants—including the Second Set of Requests for Production—accordingly are "affected by the appeal[s]" under Rule 205, SCACR, and the circuit court lacks jurisdiction over them.

Additionally, the Receiver has no authority to act as there exists no order of appointment that contains the *mandatory* "clause fixing the value of the property for which the bond may be given, as prescribed in Section 15-65-60." S.C. Code Ann. § 15-65-60. Without this mandatory clause, any receivership appointment order is void ab initio. *Truesdell v. Johnson*, 144 S.C. 188, 142 S.E. 343 (1928).

Further, this matter is moot as Plaintiff has dismissed Cape. See Tolling Agreement between Receiver and Plaintiff's counsel; See also E-mail from Plaintiff's counsel to court dated April 8, 2024 notifying court that Cape is no longer a defendant.

REQUEST FOR PRODUCTION NO. 94:

Produce all Documents related to intercompany agreements among or between Charter, DeBeers, and/or Anglo American Corporation of South Africa Ltd. at any time during the life of those corporate Entities. For purposes of this request, the term "intercompany agreements" includes, but is not limited to, transactions, contracts, or group agreements among or between the Entities for the procurement of services, shared services agreements, financial arrangements, facilities agreements including the sharing of office space, risk allocation, allocation of functions, allocation of assets, revenue/profit sharing arrangements, loan facilities, cash pooling arrangements, sales agency agreements, and back office service agreements including agreements to pool resources for finance, tax, legal, or HR services.

RESPONSE: Please see Response to Request No. 93 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 95:

Produce all Documents related to intercompany agreements between Charter and Cape during the life of those corporate Entities. For purposes of this request, the term "intercompany agreements" includes, but is not limited to, transactions, contracts, or group agreements among or between the Entities for the procurement of services, shared services agreements, financial arrangements, facilities agreements including the sharing of office space, risk allocation, allocation of functions, allocation of assets, revenue/profit sharing arrangements, loan facilities, cash pooling arrangements, sales agency agreements, and back office service agreements including agreements to pool resources for finance, tax, legal, or HR services.

RESPONSE: Please see Response to Request No. 93 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 96:

Produce all Documents related to intercompany agreements between Cape and NAAC during the life of those Entities. For purposes of this request, the term "intercompany agreements" includes, but is not limited to, transactions, contracts, or group agreements among or between the Entities for the procurement of services, shared services agreements, financial arrangements, facilities agreements including the sharing of office space, risk allocation, allocation of functions, allocation of assets, revenue/profit sharing arrangements, loan facilities, cash pooling arrangements, sales agency agreements, and back office service agreements including agreements to pool resources for finance, tax, legal, or HR services.

RESPONSE: Please see Response to Request No. 93 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 97:

Produce all Documents, including but not limited to, meeting minutes, internal memoranda, correspondence, and notes, reflecting or related to internal discussions between or among representatives of Charter, Cape, NAAC, Anglo American Corporation of South Africa Ltd., and any other related Entity regarding the September 10, 1973 appellate decision of the U.S. Court of Appeals for the Fifth Circuit in *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076.

RESPONSE: Please see Response to Request No. 93 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 98:

Produce all Documents related to or reflecting Minorco's sale of its investments in Charter Consolidated Ltd. in or around 1993 and any reason(s) for that sale, including to further Minorco's own strategic objectives and because the development of Charter would "be facilitated if there is no single dominant shareholder."

RESPONSE: Please see Response to Request No. 93 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 99:

Produce all Documents related to the organization of Charter PLC in or around 1993.

RESPONSE: Please see Response to Request No. 93 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 100:

Produce all Documents related to the decision to buy back Minorco's 36 percent stake (or other equity holding) in Charter Consolidated in 1993, including without limitation any reason(s) for that decision.

RESPONSE: Please see Response to Request No. 93 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 101:

Produce all Documents related to business plans and merger or acquisition prospects of Charter Consolidated PLC and/or Charter PLC in or around 1993, including any such Documents created while Minorco was still a Charter shareholder, with respect to ESAB, or otherwise to "assemble a group of industrial businesses."

RESPONSE: Please see Response to Request No. 93 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 102:

Produce all Documents related to Charter PLC's acquisition and subsequent control of ESAB, including its Florence, South Carolina operations, in or around 1994 for approximately £286 million.

RESPONSE: Please see Response to Request No. 93 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 103:

Produce all Documents that support Your statement in Your 2023 10-K Report that the Former Parent's subsidiaries were not "producers or direct suppliers of asbestos." "Former Parent" has the same meaning as used in Your 2023 10-K Report.

RESPONSE: Please see Response to Request No. 93 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 104:

Produce all Documents that support Your statement in Your 2023 10-K Report that "products manufactured or used with components that are alleged to have contained asbestos" are the subject of the asbestos liabilities.

RESPONSE: Please see Response to Request No. 93 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 105:

Produce all Documents that support Your statement in Your 2023 10-K Report that the Nicholson methodology is an appropriate methodology for estimating Your future asbestos liabilities.

RESPONSE: Please see Response to Request No. 93 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 106:

Produce all Documents demonstrating Cape's future asbestos liability according to the Nicholson methodology.

RESPONSE: Please see Response to Request No. 93 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 107:

Produce all Documents You used to compile the full set of the "Former Parent's other legacy industrial businesses" for which ESAB holds asbestos-related contingencies and insurance coverages, as set forth in Your 2023 10-K Report.

RESPONSE: Please see Response to Request No. 93 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 108:

Produce all Documents, including Documents demonstrating the separate insurance coverage held by Cape, that support the following statement in Your 2023 10-K Report: "Each subsidiary has separate insurance coverage acquired prior to Company ownership."

RESPONSE: Please see Response to Request No. 93 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 109:

Produce all Documents demonstrating the assets and liabilities undertaken by You in the Separation between You and Enovis Corporation in April 2022 that necessitated a $1.2 billion payment to Enovis as consideration for the contribution of certain assets and liabilities, according to Your July 1, 2022 Form 10-Q. "Separation" has the same meaning as used in Your July 1, 2022 Form 10-Q.

RESPONSE: Please see Response to Request No. 93 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 110:

Produce all Documents that form the basis of Your calculation of $34,396,000 in current asbestos liabilities and $243,178,000 in noncurrent asbestos liabilities as of July 1, 2022, according to Your July 1, 2022 Form 10-Q.

RESPONSE: Please see Response to Request No. 93 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 111:

Produce all Documents demonstrating what portion of the $34,396,000 in current asbestos liabilities and $243,178,000 in noncurrent asbestos liabilities as of July 1, 2022, was attributed to asbestos liabilities associated with Cape.

RESPONSE: Please see Response to Request No. 93 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 112:

Produce all Documents that explain how You assumed $34,396,000 in current asbestos liabilities and $243,178,000 in noncurrent asbestos liabilities as of July 1, 2022, when those same values were $0 each as of December 31, 2021, according to Your July 1, 2022 Form 10-Q.

RESPONSE: Please see Response to Request No. 93 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 113:

Produce all Documents related to the transactions in which Entities that held asbestos-related contingencies became Your subsidiaries during the six months ended July 1, 2022 in connection with the Separation between You and Enovis Corporation, according to Your July 1, 2022 Form 10-Q.

RESPONSE: Please see Response to Request No. 93 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 114:

Produce all Documents that form the basis for Your statement in Your July 1, 2022 Form 10-Q that "Cash used in operating activities related to discontinued operations for the six months ended July 1, 2022 was $13.7 million, which was mainly asbestos related."

RESPONSE: Please see Response to Request No. 93 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 115:

Produce all Documents demonstrating what portion of the $13.7 million in cash used in operating activities related to discontinued operations for the six months ended July 1, 2022, was attributed to costs associated with Cape.

RESPONSE: Please see Response to Request No. 93 and Reservation of Rights.

Dated: August 23, 2024

GORDON REES SCULLY MANSUKHANI, LLP

BY: /s/ A. Victor Rawl, Jr .

A. Victor Rawl, Jr. (SC 09261)
Email: vrawl@grsm.com
40 Calhoun Street, Suite 350
Charleston, SC 29407
Telephone: 843-714-2501

Counsel for Third-Party Defendants Charter Consolidated Ltd., ESAB Corporation, and Central Mining & Investment Corp. Ltd.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
JOHN A. TIBBS and MARGARET B. TIBBS,	)	
	)	Civil Action No. 2023-CP-40-01759
Plaintiffs,	)	
	)	
v.	)	
	)	
3M COMPANY, *et al.*,	)	
	)	
Defendants.	)	
	)	
**********	)	THIRD-PARTY DEFENDANTS CHARTER CONSOLIDATED LTD., ESAB CORPORATION, AND CENTRAL MINING & INVESTMENT CORP. LTD.'S OBJECTIONS TO RECEIVER'S THIRD SET OF REQUESTS FOR PRODUCTION TO THIRD-PARTY DEFENDANTS CHARTER CONSOLIDATED LTD, ESAB CORPORATION, AND CENTRAL MINING & INVESTMENT CORP. LTD.
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 PLCS, *et al*.,	)	
	)	
Third-Party Defendants.	)	
	)	

Third-Party Defendants Charter Consolidated Ltd. ("Charter"), ESAB Corporation ("ESAB"), and Central Mining & Investment Corp. Ltd. ("Central Mining," and collectively with Charter and ESAB, "Charter Third-Party Defendants") hereby respond and object to the Receiver's Third Set of Requests for Production ("Third Set of Requests for Production"). By so responding and objecting, Charter Third-Party Defendants do not waive, but instead specifically preserve, all objections previously made regarding these proceedings through Charter Third-Party Defendants' written motions, oral arguments, and responsive pleadings, including *inter alia* that the Court lacks personal jurisdiction over Charter Third-Party Defendants, that the Court lacks subject matter

jurisdiction, that the Receiver was unlawfully appointed, that the Receiver lacks standing, and that the Receiver's claims fail under Rule 12(b) and 14, SCRCP.

RESERVATION OF RIGHTS

Charter Third-Party Defendants do not waive, but instead specifically preserve, their right to supplement these objections and serve further objections to any definition, instruction, or portion of the Second Set of Requests for Production at a later date, including but not limited to objections based on the attorney-client, attorney work-product, joint-defense, and common-interest privileges; any other privilege that may be implicated in any way; irrelevance; overbreadth; undue burden and disproportionality; being cumulative and duplicative; scope; vagueness; prematurity; seeking discovery not in the possession, custody, or control of Charter Third-Party Defendants; seeking discovery in the possession of other defendants, third-party defendants, and/or non-parties; seeking discovery obtainable with equal or greater facility from other sources; seeking discovery that may be derived or ascertained from documents already within the Receiver's knowledge, possession or control; seeking discovery of information that does not exist or no longer exists; seeking discovery regarding alleged events that occurred decades before Charter Third-Party Defendants came into existence and/or decades before Charter Third-Party Defendants had any alleged connection with Cape PLC; seeking discovery that cannot be disclosed or produced under the laws of foreign jurisdictions; seeking discovery on issues which are not ripe for adjudication; seeking discovery on matters of opinion, legal contentions, or questions of law; and being oppressive and harassing.

Charter Third-Party Defendants object to these discovery requests on the grounds that the circuit court lacks jurisdiction to proceed with this matter at the present time, as all issues regarding

the purported Receiver's appointment and his purported authority to engage in litigation are presently pending before the South Carolina Court of Appeals.

To the extent the Charter Third-Party Defendants' appeals are remitted and an appellate court no longer has exclusive jurisdiction over matters affected by those appeals, Charter Third-Party Defendants will supplement their objections to the Receiver's Third Set of Requests for Production and provide responses, subject to the objections asserted.

REQUESTS FOR PRODUCTION

In addition to the objections outlined above, Charter Third-Party Defendants specifically object to each of the Requests in the Receiver's Third Set of Requests for Production as set forth below.

REQUEST FOR PRODUCTION NO. 116:

Produce all Documents related to the 1965 share exchange between the British South Africa Co., Central Mining and Investment Corp. Ltd., and Consolidated Mines Selection Co. that led to Charter becoming a public company, as set forth in the opinion of the federal district court for the Eastern District of Pennsylvania's decision in *Craig v. Johns-Manville Corp*., Civ. A. No. 82-0321, 1987 WL 10191 (April 23, 1987).

RESPONSE: Charter Third-Party Defendants object to this discovery request on the grounds that the circuit court lacks jurisdiction to proceed with this matter at the present time, as all issues regarding the purported Receiver's appointment and his purported authority to engage in litigation are presently pending before the South Carolina Court of Appeals. *See* Rule 205, SCACR (providing that "[u]pon the service of the notice of appeal, the appellate court ***shall have exclusive jurisdiction*** over the appeal" (emphasis added)); *Stokes-Craven Holding Corp. v. McKenzie*, 416 S.C. 517, 534, 787 S.E.2d 485, 494 (2016) (explaining that "Rule 205 divests the lower court or administrative tribunal of jurisdiction over '***matters affected by the appeal***'" (emphasis supplied by the Supreme Court) (quoting *Tillman v. Oakes*, 398 S.C. 245, 255, 728 S.E.2d 45, 51 (Ct. App.

2012))); *Morris v. Morris*, 295 S.C. 37, 40, 367 S.E.2d 24, 26 (1988) ("This Court has exclusive jurisdiction over an appeal upon the service of a Notice of Intent to Appeal."); *Tillman*, 398 S.C. at 255 & n.3, 728 S.E.2d at 51 & n.3 (reiterating that "[u]nder Rule 205, the lower court is deprived of the power to proceed with matters that are affected by the appeal," and explaining that this rule "deprives the lower court of the power to address a particular issue, or 'matter,' during the pendency of the appeal"); *Binkley v. Burry*, 352 S.C. 286, 294, 573 S.E.2d 838, 843 (Ct. App. 2002) ("Once an appeal is filed, the appellate court has exclusive jurisdiction over the matter."); Jean H. Toal, *et al.*, *Appellate Practice in South Carolina* 121 (3d ed. 2016) (confirming that "[t]he appellate court obtains exclusive jurisdiction over the appeal upon service of the notice of appeal"); *see also Tillman*, 398 S.C. at 255, 728 S.E.2d at 51 ("Thus, the existence or nonexistence of a stay under Rule 241 does not control the family court's power to proceed with the action and address matters not affected by the appeal. Rather, the lower court's power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a 'matter affected by the appeal' under Rules 205 and 241(a).").

Charter Third-Party Defendants previously notified the circuit court and all parties, including the Receiver, of the pendency of this appeal by filing a Notice of Appeal. An appellate ruling in Charter Third-Party Defendants' favor would result in the dissolution of the receivership. A dissolution of the receivership, in turn, would preclude the purported Receiver from pursuing ***all*** the claims in this third-party action against ***all*** remaining Third-Party Defendants—including the Charter Third-Party Defendants —thereby stripping the purported Receiver of any alleged authority to seek or engage in any discovery, let alone the overbroad, disproportionate, and unduly burdensome, as well as in some cases harassing, discovery that the purported Receiver seeks here.

There are presently several other appeals that are pending that were noticed by Charter Third-Party Defendants that affect all aspects of the third-party case. In addition, Defendant Asbestos Corporation Limited ("ACL") filed a notice of appeal on September 13, 2023 as to two orders "Order Holding Atlas Asbestos Company, Ltd. in Contempt" (September 8, 2023) and "Order on Plaintiffs' Motion to Appoint a Receiver" (September 8, 2023). This appeal is still pending and affects all aspects of the Tibbs case. All third-party claims against the Third-Party Defendants, and all discovery sought from the Charter Third-Party Defendants—including the Third Set of Requests for Production—accordingly are "affected by the appeal[s]" under Rule 205, SCACR, and the circuit court lacks jurisdiction over them.

Additionally, the Receiver has no authority to act as there exists no order of appointment that contains the *mandatory* "clause fixing the value of the property for which the bond may be given, as prescribed in Section 15-65-60." S.C. Code Ann. § 15-65-60. Without this mandatory clause, any receivership appointment order is void ab initio. *Truesdell v. Johnson*, 144 S.C. 188, 142 S.E. 343 (1928).

Further, this matter is moot as Plaintiff has dismissed Cape. See Tolling Agreement between Receiver and Plaintiff's counsel; See also E-mail from Plaintiff's counsel to court dated April 8, 2024 notifying court that Cape is no longer a defendant.

REQUEST FOR PRODUCTION NO. 117:

Produce all Documents related to the May 1969 tender offer for 50 percent of the outstanding shares in Cape that left Charter holding all of Cape's preferred stock and 62.5 percent of the common stock, as set forth in the opinion of the federal district court for the Eastern District of Pennsylvania's decision in *Craig v. Johns-Manville Corp*., Civ. A. No. 82-0321, 1987 WL 10191 (April 23, 1987).

RESPONSE: Please see Response to Request No. 116 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 118:

Produce all Documents related to NAAC's 1978 dissolution, including as set forth in the opinion of the federal district court for the Eastern District of Pennsylvania's decision in *Craig v. JohnsManville Corp*., Civ. A. No. 82-0321, 1987 WL 10191 (April 23, 1987).

RESPONSE: Please see Response to Request No. 116 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 119:

Produce all Documents related to Cape's sale of the South African mining operations to Transvaal Consolidated Land and Exploration Co. Ltd ("TCL") in June 1979 in which Cape agreed to indemnify TCL for any asbestos-related claims within a certain time period on condition that "no action taken by TCL could prejudice the outcome of the claim. No indemnity is given in respect of awards made by courts in the U.S.A. or U.K. in respect of health claims," including as set forth in the opinion of the federal district court for the Eastern District of Pennsylvania's decision in *Craig v. Johns-Manville Corp*., Civ. A. No. 82-0321, 1987 WL 10191 (Apr. 23, 1987).

RESPONSE: Please see Response to Request No. 116 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 120:

Produce all Documents related to the series of Communications (including letters) between Cape and its American representatives after Cape was named in asbestos personal injury suits between 1973 and 1975, including a June 20, 1975 letter from Dr. Richard Gaze to NAAC's president Gerry Morgan, that Cape "may wish to do something to change the identity of NAAC in order to avoid exposing the company unnecessarily;" and a June 25, 1975 letter from Cape in-house counsel Anthony Penna to its American counsel raising the issue of changing NAAC's identity "in an attempt to limit its and Cape's exposure to future U.S. litigation," including as set forth in the opinion of the federal district court for the Eastern District of Pennsylvania's decision in *Craig v. Johns-Manville Corp*., Civ. A. No. 82-0321, 1987 WL 10191 (Apr. 23, 1987).

RESPONSE: Please see Response to Request No. 116 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 121:

Produce all Documents related to a November 1, 1977 meeting of the Cape board of directors at which all three Charter nominee directors were present in which the settlement of Texas asbestos injury suits were discussed, as well as during which the Cape managing director presented the proposed reorganization of Cape's asbestos selling arrangements, including as set forth in the opinion of the federal district court for the Eastern District of Pennsylvania's decision in *Craig v. Johns-Manville Corp*., Civ. A. No. 82-0321, 1987 WL 10191 (Apr. 23, 1987).

RESPONSE: Please see Response to Request No. 116 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 122:

Produce all Documents related to a 1977 decision by the Cape board of directors in which the board agreed promptly to implement a "re-organisation of the Group's asbestos selling arrangements, particularly in the U.S.A., which in future would be more closely controlled form South Africa. As part of this re-organisation it is proposed that North American Asbestos Corporation should be wound up," including as set forth in the opinion of the federal district court for the Eastern District of Pennsylvania's decision in *Parker v. Bell Asbestos Mines, Ltd.*, 607 F. Supp. 1397 (1985).

RESPONSE: Please see Response to Request No. 116 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 123:

Produce all Documents related to the 1969 tender offer in which Charter acquired 63 percent of Cape's common stock, including a Document in which Charter advised Cape's shareholders that Charter's business "is allied to the building and light engineering activities of Cape and it is in the opinion of Charter desirable to make use of the wide experience of Cape's management to expand and develop this side of the Charter group's activities. However, Charter's present holding of 25.3 percent in Cape is clearly not sufficient if that company is to be the main channel for the expansion of Charter's industrial activities; it was, therefore, considered necessary to acquire a considerably larger holding which would give Charter control of Cape," including as set forth in the opinion of the federal district court for the Eastern District of Pennsylvania's decision in *Parker v. Bell Asbestos Mines, Ltd.*, 607 F. Supp. 1397 (1985).

RESPONSE: Please see Response to Request No. 116 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 124:

Produce all Documents related to Charter's relationship with the Pandrol Group, including organizational charts, internal notes, and memoranda regarding the placement of Charter executives on Pandrol's Board of Directors, including as set forth in the opinion of the Pennsylvania Superior Court in *Barber v. Pittsburgh Corning Corp.*, 317 Pa. Super. 285, 464 A.2d 323 (1983).

RESPONSE: Please see Response to Request No. 116 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 125:

Produce all Documents related to the leadership roles of Sidney Spiro in Charter and Oppenheimer-related Entities, including his roles at Anglo American Corporation, Charter Consolidated Ltd., De Beers Consolidated Mines Limited, and Minerals and Resources Corporation Limited, including all Documents related to board appointments, board meeting minutes in which his leadership roles were discussed, board compensation, and executive compensation.

RESPONSE: Please see Response to Request No. 116 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 126:

Produce all Documents related to the leadership roles of Murray Hofmeyr in Charter and Oppenheimer-related Entities, including his roles at Anglo American Corporation, Charter Consolidated Ltd., De Beers Consolidated Mines Limited, and Minerals and Resources Corporation Limited, including all Documents related to board appointments, board meeting minutes in which his leadership roles were discussed, board compensation, and executive compensation.

RESPONSE: Please see Response to Request No. 116 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 127:

Produce all Documents related to the leadership roles of Gordon Waddell in Charter and Oppenheimer-related Entities, including his roles at Anglo American Corporation, Charter Consolidated Ltd., De Beers Consolidated Mines Limited, and Minerals and Resources Corporation Limited, including all Documents related to board appointments, board meeting minutes in which his leadership roles were discussed, board compensation, and executive compensation.

RESPONSE: Please see Response to Request No. 116 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 128:

Produce all Documents related to the September 1979 request by Charter for financial information for the NAAC Liquidating Trust, including all Documents, memoranda, and meeting minutes related to information received from the NAAC Liquidating Trust regarding the details on "the general claims situation" and "very approximately as to the total expected trust income and expenditure for 1979."

RESPONSE: Please see Response to Request No. 116 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 129:

Produce all Documents related to the formation of Continental Products Corporation (CPC) following NAAC's dissolution, including Documents related to Charles G. Morgan's appointment as president and role as sole shareholder of CPC, and Documents related to the use of Cape's payment of "termination compensation" to Morgan as the start-up funds for CPC, including as set forth in the opinion of the U.S. Court of Appeals for the Third Circuit in *Craig v. Lake Asbestos of Quebec Ltd.*, 843 F.2d 145 (1988).

RESPONSE: Please see Response to Request No. 116 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 130:

Produce all Documents related to internal Charter discussions regarding the "future executive structure of Cape," including as set forth in the opinion of the U.S. Court of Appeals for the Third Circuit in *Craig v. Lake Asbestos of Quebec Ltd.*, 843 F.2d 145 (1988).

RESPONSE: Please see Response to Request No. 116 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 131:

Produce all Documents related to Communications in which Charter expressed displeasure to the Cape Board after the Cape Board made an acquisition without Charter, and/or in which Cape agreed that it would consider "Charter's policy towards the size of its shareholding in Cape" when making future acquisition decisions, including as set forth in the opinion of the U.S. Court of Appeals for the Third Circuit in *Craig v. Lake Asbestos of Quebec Ltd.*, 843 F.2d 145 (1988).

RESPONSE: Please see Response to Request No. 116 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 132:

Produce all Documents related to the regular financial reporting made by Ronald H. Dent to Charter, including as set forth in the opinion of the U.S. Court of Appeals for the Third Circuit in *Craig v. Lake Asbestos of Quebec Ltd.*, 843 F.2d 145 (1988).

RESPONSE: Please see Response to Request No. 116 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 133:

Produce all Documents, including Communications, internal memoranda, and notes, related to Ronald H. Dent remaining as Chairman of Cape beyond the age of 60, including as set forth in the opinion of the U.S. Court of Appeals for the Third Circuit in *Craig v. Lake Asbestos of Quebec Ltd.*, 843 F.2d 145 (1988).

RESPONSE: Please see Response to Request No. 116 and Reservation of Rights.

REQUEST FOR PRODUCTION NO. 134:

Produce all Documents related to statements made by Charter revealing its plan to "maintain . . . close scrutiny of new capital expenditure projects," including as set forth in the opinion of the U.S. Court of Appeals for the Third Circuit in *Craig v. Lake Asbestos of Quebec Ltd.*, 843 F.2d 145 (1988).

RESPONSE: Please see Response to Request No. 116 and Reservation of Rights.

Dated: August 23, 2024

GORDON REES SCULLY MANSUKHANI, LLP

BY: ___/s/ A. Victor Rawl, Jr._____

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CAPE PLC, individually and as successor in interest to CAPE ASBESTOS COMPANY LIMITED, by and through its duly appointed Receiver, Peter D. Protopapas, Plaintiff, vs. ANGLO AMERICAN PLC, individually and a successor in interest to ANGLO AMERICAN CORPORATION OF SOUTH AFRICA LTD., et al., Defendants.	C/A No. 3:24-3771-MGL **ORDER GRANTING MOTION TO REMAND**

I. FACTUAL AND PROCEDURAL HISTORY

On June 30, 2023, Plaintiff Cape plc, by and through its Receiver, Peter D. Protopapas (the "Receiver"), filed a third-party complaint in the Richland County, South Carolina, Court of Common Pleas, against numerous third-party defendants. The Receiver alleges the third-party defendants, including their predecessors in interest, agents, co-conspirators, and/or amalgamated corporate parents, transacted business throughout the United States, including South Carolina, for the sale and use of asbestos or asbestos-containing products that resulted in thousands of injuries and deaths from mesothelioma and other asbestos-related diseases. The Receiver alleges a complex scheme whereby

Cape plc and the third-party defendants cooperated in marketing and distributing asbestos to South Carolina-based clients, including Raybestos Manhattan, Inc. and Westinghouse Electric Corp., and to other entities conducting business in South Carolina. According to the Receiver, Cape plc and the third-party defendants, fully aware of the hazards of exposure to asbestos, structured their relationships and coordinated their activities to avoid the potential for substantial financial liability. The Receiver asserts causes of action for unjust enrichment (First Cause of Action), constructive trust (Second Cause of Action), alter ego and veil-piercing liability (Third Cause of Action), and accounting (Fourth Cause of Action), *See generally* Third-Party Compl., ECF No. 1-2.

On June 28, 2024, Defendant Anglo American plc ("Anglo American") filed a notice of removal pursuant to 28 U.S.C. §§ 1332, 1441, and 1446. Anglo American asserts it learned on June 18, 2024 that the state court personal injury complaint from which the third-party complaint is purported to be derived, *Tibbs v. 3M Company*, C/A No. 2023-CP-40-01759, had been dismissed weeks before the Receiver filed the third-party complaint. Anglo American submits the Receiver's lawsuit is, and always has been, a first-party action removable on the basis of diversity jurisdiction.

This matter is before the Court on the Receiver's motion to remand, which motion was filed on July 2, 2024. ECF No. 7. Anglo American filed a response in opposition to the motion to remand on July 16, 2024. ECF No. 45. Also on July 16, 2024, responses in opposition to the motion were filed by Defendants Charter Consolidated Ltd., ESAB Corporation, and Central Mining & Investment Corporation Ltd. (the "Charter Defendants"); Mohed Altrad and Altrad Investment Authority, SAS (the "Altrad Defendants"); and ArranCo US, LLC; Hawk Bidco (US) Inc.; and Sparrows Offshore, LLC (the "Sparrows Defendants") (collectively with Anglo American the "Responding Defendants"). ECF Nos. 46, 47, 48. The Receiver filed a reply to the Responding

Defendants' responses on July 23, 2024. ECF No. 67. Having carefully considered the motion, the notice of removal, the responses, the reply, the record, and the applicable law, it is the judgment of the Court the Receiver's motion to remand will be granted.

II. STANDARD OF REVIEW

The burden of establishing federal jurisdiction is placed upon the party seeking removal. *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994). When considering a motion to remand, the Court accepts as true all relevant allegations contained in the complaint and construes all factual ambiguities in favor of the plaintiff. *Woods v. Marshak*, Civil Action No. 3:23-4472-MGL, 2024 WL 3541217, at *2 (D.S.C. July 25, 2024) (citing *Willy v. Coastal Corp.*, 855 F.2d 1160, 1163–64 (5th Cir. 1988)). "'Jurisdictional rules direct judicial traffic. They function to steer litigation to the proper forum with a minimum of preliminary fuss.'" *Id.* (quoting *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 425 (4th Cir. 1999)). The Court is "'obliged to construe removal jurisdiction strictly because of the significant federalism concerns implicated.'" *Id.* (quoting *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004)). Federal courts consider the facts disclosed on the record as a whole. *Capitol Cake Co. v. Lloyd's Underwriters*, 453 F. Supp. 1156, 1160 (D. Md. 1978)(citing 14 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure § 3734, at 738 (1976)(collecting cases)).

III. DISCUSSION

A. ***Barton*** **Doctrine**

The Receiver first argues that this Court lacks subject matter jurisdiction because the Receiver's third-party claims fall within the exclusive jurisdiction of the Receivership Court under the doctrine articulated in *Barton v. Barbour*, 104 U.S. 126 (1881). This Court agrees.

In *Barton*, the plaintiff was injured when a railroad sleeping car in which she was a passenger derailed. She brought a claim for her injuries against the receiver of the railroad company in the Supreme Court of the District of Columbia. The receiver asserted the District of Columbia court lacked jurisdiction because, having been appointed receiver "of all the property, rights, and franchises of said railroad company" by virtue of a decree made by the circuit court for the City of Alexandria, Virginia, the property of the railroad company could not be subject to any claim absent leave of the Alexandria circuit court. 104 U.S. at 127. The Court found that leave of the appointing court is necessary to prevent a claimant from taking property from the receivership "without regard to the rights of other creditors or the orders of the court which is administering the trust property." *Id.* at 129. The Court observed:

> The property is a fund in court to abide the result of the litigation, and to be applied to the payment of the judgment creditor who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And in order to effect this, the court must administer it independently of any rights acquired by third persons pending the litigation. Otherwise the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless.

Id. (quoting *Wiswall v. Sampson*, 55 U.S. 52 (1852)).

Later, in *Porter v. Sabin*, 149 U.S. 473 (1893), two officers of Northwestern Manufacturing & Car Company ("Northwestern") allegedly engaged in fraudulent misappropriation of property of the company. A receiver was appointed who took control of Northwestern's property and tangible assets. The receiver petitioned the appointing court for authority to bring an action against the officers, but the petition was denied. Consequently, stockholders of the company sought to maintain the claim and to make the receiver a defendant. The district court dismissed for lack of jurisdiction.

On appeal, the Supreme Court upheld the lower court's ruling, explaining:

> When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate. The possession of the receiver is the possession of the court; and the court itself holds and administers the estate through the receiver, as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it.
>
> It is for that court, in its discretion, to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against the receiver without the permission of the court which appointed him.
>
> The reasons are yet stronger for not allowing a suit against a receiver appointed by a state court to be maintained, or the administration by that court of the estate in the receiver's hands to be interfered with, by a court of the United States, deriving its authority from another government, though exercising jurisdiction over the same territory. The whole property of the corporation within the jurisdiction of the court which appointed the receiver, including all its rights of action, except so far as already lawfully disposed of under orders of that court, remains in its custody, to be administered and distributed by it. Until the administration of the estate has been completed, and the receivership terminated, no court of the one government can, by collateral suit, assume to deal with rights of property or of action constituting part of the estate within the exclusive jurisdiction and control of the courts of the other.

Id. at 479-80.

Here, the state court appointed the Receiver pursuant to S.C. Code Ann. § 15-65-10. "A receiver represents the Court appointing him; he is an officer of the Court and is the agency through which the Court acts. As he has no power other than that given him by the Order of appointment, his authority is derived solely from the Court. He is subject only to the Court's direction." *Kirven v. Lawrence*, 137 S.E.2d 764, 768 (S.C. 1964)(citing cases). These precedents make clear this Court lacks subject matter jurisdiction over this matter absent approval by the state court.

The Court of Appeals for the Fourth Circuit recently considered *Barton* and *Porter* in a case related to this action, *Protopapas v. Travelers Casualty & Surety Co.*, 94 F.4th 351 (4th Cir. 2024). In *Travelers*, Peter D. Protopapas, as receiver for Payne & Keller Company, brought an action in state court against various insurance companies, alleging the insurers failed to defend or indemnify Payne & Keller Company with respect to asbestos law suits in South Carolina. The receiver sought declaratory relief and asserted causes of action for breach of contract, accounting, and failure to procure insurance. Travelers Casualty & Surety Company ("Travelers") filed a notice of removal on the grounds of diversity jurisdiction. *See Protopapas v. American Int'l Grp.*, C/A No. 3:21-4086-DCC. The receiver filed a motion to remand. The district court granted the motion, relying, in part, on *Barton* and *Porter*. The district court concluded that "*Barton*, and its subsequent application in *Porter*, act as a limitation on federal jurisdiction when a state court has previously exercised its authority by appointing a receiver to handle the administration of property; to allow this matter to continue in federal court would directly interfere with the exclusive jurisdiction of the receivership court over this dispute." Op. and Order, ECF No. 180 at 5-6 (C/A No. 3:21-4086-DCC). Travelers appealed.

The Fourth Circuit dismissed the appeal under 28 U.S.C. § 1447(d).[1] In doing so, the Fourth Circuit was required to ascertain whether the district court "relied upon a ground that is *colorably*

[1]"An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise." This section, read in conjunction with 28 U.S.C. § 1447(c), "bars appellate court review of remand orders when they are based on (1) a district court's lack of subject matter jurisdiction or (2) a defect in removal other than lack of subject matter jurisdiction that was raised by the motion of a party within 30 days after the notice of removal was filed." *Travelers*, 94 F.4th at 356 (internal quotations omitted)(quoting *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 196 (4th Cir. 2008)).

characterized as subject-matter jurisdiction[.]" *Travelers*, 94 F.4th at 356 (emphasis in original) (quoting *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 234 (2007)). The Fourth Circuit proceeded to "take a brief peek at the district court's reasoning to satisfy [itself] that a lack of subject-matter jurisdiction was a colorable or plausible explanation of the legal ground on which the court actually relied for remand." *Id.* The Fourth Circuit concluded:

> Thus, when applying the *Barton* doctrine, the district court plausibly concluded that a federal court lacks jurisdiction over a state receivership or a state-court appointed receiver with respect to assets of the receivership because the state court has exclusive jurisdiction over the assets of the receivership. Exercising federal jurisdiction over a suit by or against a state-appointed receiver, who functions as an "arm" or "executive" of the state-receivership court, would infringe on the state court's control over the receivership assets — its exclusive jurisdiction. Thus, as a matter of comity, as well as custom, the *Barton* doctrine rests on this exclusivity of the state receivership over the assets before it as a matter of jurisdiction[.]

Id. at 358 (citing cases).

The Removing Defendants contend the *Barton* doctrine does not apply because (1) since the Removing Defendants do not have assets in South Carolina, removal does not interfere with the state court's control over in-state assets; (2) the Receiver is acting *ultra vires* because he cannot assert control over assets outside of South Carolina; (3) the Receiver's lawsuit violates the Commerce Clause of the United States Constitution; (4) and the Receiver's lawsuit violates South Carolina's receivership statute. Anglo American's Opp'n to Pl.'s Mot. to Remand, ECF No. 45 at 19-28.[2]

[2]The Court will generally reference Anglo American's response in opposition to the Receiver's motion to remand. The Charter Defendants join in the briefs filed by the other Responding Defendants. ECF No. 46. The Altrad Defendants reiterate Anglo American's assertions neither *Home Depot* nor *Barton* deprives the Court of subject matter jurisdiction. ECF No. 47. The Sparrows Defendants claim the Receivership violates the United States and South Carolina Constitutions. They also argue the Receivership violates the South Carolina statutory receivership framework and precedent by purporting to exert control over foreign third parties and foreign assets and expanding into matters unrelated to the initial appointment by the state court. The Sparrows Defendants also contend the *Barton* doctrine and the *Home Depot* opinion are inapplicable. ECF

These and other questions interpreting the statutory authority of the Receiver must be raised in state court and, if necessary, appealed through the state system. It is not for this Court to sit in judgment of the Receiver's actions taken as a representative of the court that appointed him. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

The Receiver's motion to remand is granted on this ground.

B. *Home Depot* Ruling

The Receiver also contends the holding in *Home Depot U.S.A., Inc. v. Jackson*, 587 U.S. 435 (2019), compels remand. This Court agrees.

In *Home Depot*, a third-party counterclaim defendant attempted to remove the counterclaim filed against it. The Court reviewed the limited jurisdiction granted to the federal courts by Congress, and noted Congress enacted provisions permitting parties to remove cases originally filed in state court to federal court, 28 U.S.C. § 1441(a), under federal question jurisdiction, 28 U.S.C. § 1331, or diversity jurisdiction, 28 U.S.C. § 1332(a); or pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1453(b). *Home Depot*, 587 U.S. at 438. The Supreme Court framed the issue as "whether the term 'defendant' in either § 1441(a) or § 1453(b) encompasses a party brought into a lawsuit to defend against a counterclaim filed by the original defendant or whether the provisions limit removal authority to the original defendant." *Id.* at 439. The Court reiterated its prior rulings that "a district court, when determining whether it has original jurisdiction over a civil action, should evaluate whether that action could have been brought originally in federal court." *Id.*

No. 48. The Court appreciates the efforts and arguments of all parties, and intends this order to resolve each response.

at 441 (citing cases). The Court continued:

> This requires a district court to evaluate whether the plaintiff could have filed its operative complaint in federal court, either because it raises claims arising under federal law or because it falls within the court's diversity jurisdiction. Section 1441(a) thus does not permit removal based on counterclaims at all, as a counterclaim is irrelevant to whether the district court had "original jurisdiction" over the civil action. And because the "civil action . . . of which the district cour[t]" must have "original jurisdiction" is the action as defined by the plaintiff's complaint, "the defendant" to that action is the defendant to that complaint, not a party named in a counterclaim. It is this statutory context . . . that underlies our interpretation of the phrase "the defendant or the defendants."

Id. at 441-42 (internal citations omitted).

The *Home Depot* opinion is consistent with Supreme Court precedent. In *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), the question was whether a state court plaintiff subject to a counterclaim could remove the action to federal court on the grounds of diversity jurisdiction. The Court held amendments to the general removal statute indicated Congressional intent to limit the right to removal solely to defendants.[3] *Id.* at 107; *see Home Depot*, 587 U.S. at 443 (examining *Shamrock Oil* and finding no textual reason to distinguish between a counterclaim defendant who was also the original plaintiff and a counterclaim defendant who was not originally part of the lawsuit). Even though the case is not precisely on point, courts subsequently applying *Shamrock Oil* consistently refuse to grant removal power under § 1441(a) to third-party defendants. *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 332-33 (4th Cir. 2008)(collecting cases).

As alluded to previously, Responding Defendants contend removal is appropriate because the *Tibbs* plaintiffs' personal injury claims against Cape plc had been dismissed prior to the Receiver's filing of the third-party complaint in state court, making the third-party defendants

[2]Between 1875 and 1887, the general removal statute authorized "either party" to remove the action to federal court.

"indisputably original defendants." ECF No. 45 at 8. The Responding Defendants argue the Receiver cannot defeat their statutory right of removal "by filing a first party lawsuit disguised as a third party lawsuit and based upon 'first party' claims that were dismissed weeks before the sham 'third party' lawsuit was filed." *Id.* at 15.

In his reply, the Receiver submits there has been no filing of an actual dismissal of Cape plc from the *Tibbs* case because the *Tibbs* plaintiffs never dismissed Cape plc from their personal injury complaint. The Receiver states an answer on behalf of Cape plc was filed in the *Tibbs* case on June 29, 2023 because Cape plc remains a defendant in that action. The Receiver further states the tolling agreement is not a dismissal, but simply extends the statutory limitations period.[4]

A transcript of a state court hearing reflects, in part, a pretrial hearing status report in *Tibbs*. ECF No. 45-7. The following exchange took place regarding Cape plc's participation in the case.

> MR. CARROLL: Your Honor, may I – may I inquire . . . . This morning, Ms. – Ms. McVey mentioned that there are only two defendants left in Tibbs: Atlas and ACL. My understanding of – of third party practices is the cases are supposed to be tethered together. But – but I don't – . . . . I'm just wondering what happened to Cape.
>
> MS. McVEY: Cape is still in, the tolling agreement.
>
> THE COURT : Cape is still very much in it.
>
> MR. CARROLL: The tolling agreement. Okay. So they are?

ECF No. 45-7 at 156-57.

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[3]A copy of the tolling agreement memorializing the purported dismissal of the *Tibbs* plaintiffs' claims against Cape plc is filed under seal. The tolling agreement provides that the Receiver and certain counsel consent to the dismissal of specific claims filed by counsel's clients against Cape plc without prejudice in exchange for Cape plc's assent to tolling the applicable limitations period. The purpose of the agreement is to allow the parties evaluate the dismissed claims outside of litigation. The agreement provides for refiling of the dismissed claims in the event settlement is not effectuated.

The Court finds, based on the state court judge's understanding, Cape plc was not dismissed from the *Tibbs* action prior to the Receiver's filing of the third-party complaint. Accordingly, *Home Depot* bars removal.

Assuming for purposes of discussion the *Tibbs* plaintiffs' person injury claims against Cape plc had been dismissed as alleged, there exists some authority for Responding Defendants' position. In *Columbian Chemicals Co. v. AIG Specialty Ins. Co.*, Civil Action No. 5:14-CV-166, 2015 WL 12755709 (N.D.W. Va. Mar. 27, 2015), Columbian Chemicals Company ("Columbian") was the defendant in a class action filed in state court. The case was resolved. The same day the class action settlement was approved, Columbian moved the state court for leave to file a third-party complaint against one of its insurers, AIG Specialty Insurance Company ("AIG"), seeking a declaration AIG was obligated to indemnify Columbian for the class action settlement. AIG removed the third-party complaint on grounds of diversity jurisdiction. Columbian moved to remand.

In addressing the motion to remand, the West Virginia district court observed some district courts hold removal is not precluded when a third-party complaint is filed after the original plaintiff's claims are dismissed. As an example, the West Virginia district court referenced *Rivera v. Fast Eddie's Inc.*, 829 F. Supp. 2d 1088 (D.N.M. 2011). In *Rivera*, Melba Rivera ("Rivera") brought a personal injury action in state court against Fast Eddie's Inc. ("Fast Eddie's"). Fast Eddie's maintained insurance policies with Philadelphia Insurance Co. ("Philadelphia") and Valley Forge Insurance Co. ("Valley Forge"). Philadelphia provided legal counsel and settled the case. As part of the settlement agreement, Fast Eddie's assigned Rivera its legal rights against Valley Forge. Rivera then filed a third-party complaint against Valley Forge, asserting Fast Eddie's claims for breach of contract and bad faith. Valley Forge removed the case to federal court. Rivera moved to

remand.

The New Mexico district court determined that Valley Forge, despite being denominated a third-party defendant, could remove the third-party complaint. The *Rivera* court reasoned:

> Here, the original controversy is no longer in litigation; all claims between the original Plaintiff and Defendants have been resolved in a court-approved settlement. Rivera is pursuing its current claim by virtue of an assignment that was a part of her settlement with Fast Eddie's. Therefore, this is not a case where Plaintiff's choice of forum could be defeated by the actions of a party against which she did not bring suit. Rivera, the original Plaintiff, is indeed bringing suit against Valley Forge, though she is doing so in the shoes of Fast Eddie's, the original Defendant. Therefore, for all practical intents and purposes, this suit is identical to an ordinary claim by a plaintiff (Rivera) against a defendant (Valley Forge). It would be anomalous on the one hand to accord an ordinary defendant a right of removal, while on the other hand denying Valley Forge that right simply because of the peculiar stylings of state-law procedure. "The removal statute which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104 [] (1941). Therefore, the Court will treat Valley Forge as a defendant for purposes of § 1441(a), and accord it a right of removal.

Rivera, 829 F. Supp. 2d at 1091-92.

The West Virginia district court found this reasoning to be persuasive in the *Columbian Chemicals* matter because the underlying class action claims had been or were anticipated to be dismissed when the third-party complaint was filed. The West Virginia district court also opined that "Columbian's waiting until the eleventh hour to file its complaint against AIG indicates procedural gamesmanship, which is highly disfavored." *Columbian Chemicals*, 2015 WL 12755709, at *3. According to the West Virginia district court:

> Holding that AIG should be treated as a defendant for purposes of removal is consistent with the competing policies underlying removal to federal court. On one hand, courts are obligated to respect the plaintiff's choice of forum, and on the other, allow defendants to be free from state court bias. Here, the [class action] plaintiffs' claims have been settled and dismissed; therefore, "this is not a case where plaintiff's choice of forum could be defeated" by a third-party defendant. Here, the plaintiff,

> Columbian, sought a state forum for its declaratory judgment action against AIG. Having met its burden demonstrating diversity jurisdiction, AIG, as defendant, wishes to exercise its right to remove this case to federal court, which this Court will honor.

Id. (internal citations omitted).

Nevertheless, the exception for third-party defendants carved out in *Rivera* and *Columbian Chemicals* provides no solace for Responding Defendants. As related above, this Court lacks subject matter jurisdiction over litigation brought by or against the Receiver. "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). The plain language of § 1447(c) provides no discretion but to remand an action removed from state court over which the federal court lacks subject matter jurisdiction. *See Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991) (citing *Maine Ass'n of Interdependent Neighborhoods v. Commissioner*, 876 F.2d 1051, 1054 (1st Cir. 1989)). On these alternate grounds, the Receiver's motion to remand is granted.

IV. CONCLUSION

For the reasons stated, the Receiver's motion to remand, ECF No. 7, is **GRANTED**. This matter is REMANDED to the Court of Common Pleas for the County of Richland, State of South Carolina.

IT IS SO ORDERED.

Signed this 13th day of August 2024, in Columbia, South Carolina.

s/ Mary Geiger Lewis
MARY GEIGER LEWIS
UNITED STATES DISTRICT JUDGE