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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate Case Nos. 2023-002006, 2024-001063
Circuit Court Case No. 2023-CP-40-01759

John A. Tibbs and Margaret B. Tibbs,... Plaintiffs,

v.

3M Company; 4520 Corp., Inc.; A.O. Smith Corporation; A.W. Hesterton Company; ABB Inc.; Air & Liquid Systems Corporation; AIW-2010 Wind Down Corp.; Amentum Environment & Energy, Inc.; Anchor/Darling Valve Company; Armstrong International, Inc.; Asbestos Corporation Limited ASCO, L.P.; Atlas Asbestos Co.; Atlas Turner, Inc.; AWT Air Company, Inc.; Bahnson, Inc.; Banner Industries International, Inc.; Banner Industries, LLC; Banner Industries of N.E., Inc.; Barretts Minerals Inc.; Beaty Investments, Inc.; Bechtel Corporation; The Bonitz Company; Brand Insulations, Inc.; BW/IP Inc.; Canvas CT, LLC; Cape PLC; Carboline Company; CB&I Laurens, Inc.; Cleaver-Brooks, Inc.; Consolidated Electrical Distributors, Inc.; Copes-Vulcan, Inc.; Covil Corporation; Crane Instrumentation & Sampling, Inc.; Crosby Valve, LLC; Daniel International Corporation; Davis Mechanical Contractors, Inc.; Dezurik, Inc.; Duke Energy Carolinas, LLC; Duke Energy Corporation; Eaton Corporation; Ellington Insulation Company, Inc.; Emerson Electric Co.; Fisher Controls International LLC; Flame Refractories, Inc.; Lowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services; Orporation Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Gardner Denver Nash, LLC; General Boiler Casing Company, Inc.; General Cable Corporation; General Cable Industries, Inc.; General Electric Company; Gould Electronics Inc.; Goulds Pumps, Incorporated; Goulds Pumps LLC; Great Barrier Insulation Co.; Grinnell LLC; Hajoca Corporation; Howden North America Inc.; HPC Industrial Services, LLC; IMO Industries Inc.; ITT LLC; Joy Global Underground Mining LLC; K-Mac Services Incorporated; Metropolitan Life Insurance Company; Mine Safety Appliances Company, LLC; MP Supply,

Inc.; The Nash Engineering Company; Occidental Chemical Corporation; Paramount Global; Patterson Pump Company; PECW Holding Company; Pfizer Inc.; Piedmont Insulation, Inc.; Plastics Engineering Company; Presnell Insulation Co., Inc.; Redco Corporation; Riley Power Inc.; Rockwell Automation, Inc.; RSCC Wire & Cable LLC; Schneider Electric USA, Inc.; Sequoia Ventures Inc.; Spirax Sarco, Incl; SPX Corporation; Stafford Insulation Company; Standard Insulation Company of N.C., Inc.; Starr Davis Company, Inc.; Starr Davis Company of S.C., Inc.; Sterling Fluid Systems (USA) LLC; TE Wire & Cable, LLC; Thermo Electric Company, Inc.; Union Carbide Corporation; Valves and Controls US, Inc.; Velan Valve Corp.; Viking Pump, Inc; Vistra Intermediate Company LLC; The William Powell Company; Wind Up, Ltd.; Yuba Heat Transfer LLC; and Zurn Industries, LLC, ... Defendants,

of which

Asbestos Corporation Limited is the.. Appellant,

and

Cape PLC, individually and as successor in interest to Cape Asbestos Company Limited, by and through its duly appointed Receiver Peter D. Protopapas,.. Third-Party Plaintiff/ Respondent,

v.

Anglo American PLC, individually and as successor in interest to Anglo American Corporation of South Africa Ltd.; DeBeers PLC; DeBeers Centenary AG; DeBeers Consolidated Mines Ltd.; DeBeers S.A.; DeBeers UK Ltd.; DeBeers Jewelers US, Inc.; Angle American US Holdings Inc.; Element Six US Corp.; Element Six Technologies US Corp.; Element Six Technologies (OR) Corp.; First Mode Holdings, Inc.; Platinum Guild International (USA) Jewelry Inc.; Forevermark US Inc.; Anglo American Crop Nutrients (USA), LLC; Charter Consolidated Ltd.; ESAB Corporation; Central Mining & Investment Corporation Ltd.; Cape Holdco Ltd.; The Law Debenture Corporation PLC; Cape Industrial Services Group Ltd.; Mohed Altrad; Altrad UK Ltd.; Cape UK Holdings Newco Ltd.; Altrad Services Ltd., f/k/a Cape Industrial Services Ltd.; Altrad Investment Authority SAS; Sparrows Offshore Group Ltd.; Hawk Bidco US Inc.; Arranco US, LLC; Sparrows Offshore, LLC; The Sparrows Group, LLC, ... Third-Party Defendants,

of which

Mohed Altrad and Altrad Investment Authority SAS are the........... Appellants.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

This appeal is entirely proper as a matter of South Carolina law, and the Receiver's strained attempt to recharacterize the trial judge's order in order to make it unappealable must fail. What is happening below defies all norms of western jurisprudence, and the Altrad Defendants have every right under South Carolina to demand immediate appellate review of a contempt ruling.[1]

To be clear as to what's going on: The Receiver purports to be a receiver over a Jersey company that has no assets in South Carolina, no judgments against it in South Carolina, no active claims against it in South Carolina, and that was never served with a shred of paper about any lawsuit in South Carolina. When all of this was pointed out to the circuit court, the circuit court did not unwind the obvious errors, but instead compounded them by expanding the purported receivership to also cover a U.K. company that also has no assets in South Carolina, no judgments against it in South Carolina, no active claims against it in South Carolina, and that was not given any notice about the proceedings that drug it into this morass.

There is no "receivership estate." There are no South Carolina assets in play. There are no "insurance related entities," as the Receiver falsely claims on Page 4 of his motion to dismiss and as the circuit court wrongly believes there to be. The Receiver in this case is a fictional creation with no foundation in South Carolina law. This is nothing but an attempt to seize private assets from foreign people and companies under the guise of a "receivership" that has been unlawful from its outset. It is unconscionable and finds no basis in law.

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[1] The receivership appointment and related proceedings are so improper that their validity is now being scrutinized by a British court at the request of the entities that are purportedly in receivership. (Ex. A, Receiver's Notice of Filing (Aug. 30, 2024).)

The Altrad Defendants have no contact with South Carolina and are not subject to personal jurisdiction here, and they have remained steadfast in that threshold defense, as they have every right to do. And why shouldn't they? The Altrad Defendants purchased Cape PLC—the Jersey entity wrongly in receivership—at a public sale in 2017. That was the Altrad Defendants' first connection with this company, yet the Receiver pretends that they should be responsible for the alleged behavior of others dating back to 1891—over a century and a quarter before the Altrad Defendants had any involvement whatsoever with Cape PLC. (Third-Party Compl. ¶ 45.) Not only do the Altrad Defendants have no contact with South Carolina, they have no contact with the alleged activities upon which the Receiver is basing his illusory claims.

This situation demands the attention of this Court and must no longer be permitted. The creation of a receivership and the inclusion of the Altrad Defendants in this case is a gross violation of their due process rights. The Altrad Defendants have rightly followed South Carolina procedure for appealing the latest contempt rulings to this Court. The motion must be denied, and this appeal must be allowed to proceed.

PROCEDURAL HISTORY

The Receiver's appointment order happened in a case other than this one, and was cabined only to that case. Nevertheless, the Receiver filed a putative "Third-Party Complaint" in this case and sought to impute Cape PLC's liability to the Tibbs Family to dozens and dozens of "third-party defendants." The "third-party defendants" have since learned that the Tibbs Family's attorneys have an agreement with the Receiver where they will not pursue claims against Cape PLC (on behalf of the Tibbs Family or anyone else) in exchange for the statute of limitations being tolled, and the Tibbs Family's attorneys have represented to the circuit court in both writing and orally in open court that Cape PLC is no longer an active defendant in this case.

When the Altrad Defendants and others sought to dissolve this unlawful receivership, the circuit court expanded the receivership by appointing the Receiver to a new company, Cape Intermediate Holdings Ltd., under a "misnomer" theory—a ruling that is directly contrary to controlling law. *See Porter v. Brown*, 149 S.C. 151, 157–59, 146 S.E. 810, 812–13 (1929) (rejecting an argument that a receivership could remain valid if it was initially created over the incorrect entity by simply substituting a different entity). The Altrad Defendants and others appealed that ruling because "an interlocutory order or decree in a court of common pleas . . . granting, continuing, modifying, or refusing the appointment of a receiver" is immediately appealable as a matter of statutory law. S.C. Code Ann. § 14-3-330(4). This Court dismissed that appeal, and a petition for a writ of certiorari is forthcoming.

While the order "granting," "continuing," and "modifying" the receivership appointment has been on appeal, the Altrad Defendants and others sought to enjoin the circuit court (and the Receiver, operating as an arm of the circuit court) from proceeding due to the absence of jurisdiction pursuant to Rule 205, SCACR, which divests jurisdiction from the circuit court over matters affected by the appeal and renders anything a circuit court does in violation of that rule void. The circuit court acknowledged the requested injunction but refused to enter it. The Altrad Defendants and others then appealed that ruling because "an interlocutory order or decree in a court of common pleas . . . refusing an injunction" is immediately appealable as a matter of statutory law. S.C. Code Ann. § 14-3-330(4). This Court dismissed that appeal, and a petition for a writ of certiorari is pending before the Supreme Court on that issue as well.

Meanwhile, despite the pendency of these appeals, the Receiver has attempted to overwhelm the "third-party defendants" with discovery. One group of "third-party defendants"—the DeBeers Defendants—has engaged in the discovery process and has now been the subject of

no fewer than five motions to compel from the Receiver. By contrast, the Altrad Defendants and several others have objected on grounds that, in addition to the absence of personal jurisdiction, there is no jurisdiction to proceed with anything below, including discovery, because Rule 205 specifically says so, among myriad other reasons.

On March 12, 2024, the circuit court entered an order directing the Altrad Defendants and others "to provide responsive, substantive, and complete answers to the Receiver's Discovery Requests within 14 days."

In *Davis v. Parkview Apartments*, 409 S.C. 266, 280, 762 S.E.2d 535, 543 (2014), the Supreme Court instructed: "However, to challenge the specific rulings of the discovery orders, the normal course is to refuse to comply, suffer contempt, and appeal from the contempt finding." Accordingly, the Altrad Defendants and others continued to maintain their objections, prompting the Receiver to seek punitive sanctions by way of "adverse inferences" and "preadmission" of 2538 exhibits that were never even presented to the Altrad Defendants as part of the Receiver's discovery requests.[2]

The circuit court granted the Receiver's motions, "preadmitted" all 2538 exhibits without any inquiry at all as to what they actually were, and imposed a series of "adverse inferences"

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[2] Because they were not presented to the Altrad Defendants through any discovery request, it is impossible to know what, exactly, is in the Receiver's sea of "preadmitted" exhibits. But his list does include a video—Exhibit 2524—posted on YouTube by a content creator with the username "Cradle of Anal." This YouTube user appears to be located in Sweden, and his or her other online postings including videos titled "Angela Lansbury's Fitness and Positive Moves" and "Have You Heard of Puerto Rico," as well as playlists titled "Pimp" and "Loop Beats." *See* YouTube.com, *at* https://www.youtube.com/@cradleofanal/playlists. In addition to the obvious hearsay problem, no matter what the substance of this user's videos purports to be, there is no way the Receiver can authenticate the video's content without deposing "Cradle of Anal" and inquiring as to whether he or she altered the posted videos in any way.

against the Altrad Defendants that struck their first defense ("General Denial").[3] As instructed by *Davis*, the Altrad Defendants promptly appealed those rulings.

ARGUMENT

The orders on appeal are immediately appealable for three independent reasons. First, an order that "strikes out an answer or any part thereof or any pleading in any action" is immediately appealable. S.C. Code Ann. § 14-3-330(2)(c). Second, the law is settled that "a finding of contempt is immediately appealable." *Ex parte Cannon*, 385 S.C. 643, 660, 685 S.E.2d 814, 823 (Ct. App. 2009). Third, the circuit court continues its refusal to grant injunctive relief despite the unavoidable applicability of Rule 205 and its "exclusive jurisdiction" provision. S.C. Code Ann. § 14-3-330(4) (authorizing appeals of an "an interlocutory order or decree in a court of common pleas . . . refusing an injunction"). The Receiver's motion fails accordingly.

I. The circuit court's rulings strike the Altrad Defendants' defense of a general denial.

In addition to the absence of personal jurisdiction, the Altrad Defendants' chief defense to the "third-party complaint" is a general denial. (*See* Altrad Defs.' Ans. at 48 ("Any allegation not specifically admitted above is denied.").) The only paragraphs of the "third-party complaint" that even allege "facts" involving the Altrad Defendants are Paragraphs 116 through 119, and the Altrad Defendants have denied all such allegations. (*Id.* ¶¶ 116–19.)

As part of its contempt order, the circuit court issued "adverse inferences" against the Altrad Defendants that deem all of the Receiver's allegations (and dozens of "facts" that were never even alleged) to be true. (Order Granting Motion for Sanctions and Motion for Adverse

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[3] Stunningly, the circuit court even memorialized its failure to examine these unauthenticated materials prior to their "preadmission." (Order Preadmitting Exhibits at 6 n.4 (May 23, 2024) (conceding that "the Court has not studied all of the pre-admitted and now authenticated trial exhibits").)

Inferences at 27–31.) Critically for purposes of this motion, these "inferences" do not go away if the Altrad Defendants ultimately decide to participate in discovery. Instead, the circuit court has deemed these inferences to be "rebuttable inferences that are subject to evidentiary challenge by these parties in these proceedings should these recalcitrant Third-Party Defendants elect to participate in these proceedings, as they are required to do by our rules and the orders of this Court." (*Id.* at 16.)[4]

By making these inferences "rebuttable," the circuit court has stricken the Altrad Defendants' defense of a general denial. In South Carolina, as everywhere else, the party pleading a fact has the burden of proving it. *See O'Neal v. Carolina Farm Supply, Inc.*, 279 S.C. 490, 493, 309 S.E.2d 776, 779 (Ct. App. 1983) (acknowledging that "the burden of presenting evidence of a fact was on the party pleading it"). But in making these adverse inferences merely "rebuttable," the circuit court has shifted the burden of "disproof" to the Altrad Defendants. Rather than forcing the Receiver to prove his allegations against the Altrad Defendants in the face of their denial of the same, the circuit court has eliminated the Altrad Defendants' "general denial" defense and is now forcing the Altrad Defendants to prove that they did not do the things alleged.

That burden-shifting only happens for affirmative defenses, not for general denials. As this Court explains:

> In other words, it [an affirmative defense] assumes all elements of the plaintiff's case have been established. Because the plaintiff is taken to have proved a good cause of action, the burden of proof shifts to the defendant to show he is not liable. On the other hand, where the defendant pleads special

[4] The Altrad Defendants strongly object to the mischaracterization of them as "recalcitrant defendants." Each and every procedural step they have taken in this litigation has been fully supported by statute, case law, rule, or—most importantly—the United States Constitution. They are not "recalcitrant"; they are steadfastly protecting themselves from an abusive process in a court that has no jurisdiction over them and from a Receiver who has no lawful basis for operating. Protecting one's rights and going through the steps required to preserve one's issues for appellate review does not render a litigant "recalcitrant"; it is what the law requires.

> matter that denies an element of the plaintiff's cause of action, the defense is not affirmative and the burden of proof remains on the plaintiff to establish his case.

Id. at 494, 309 S.E.2d at 779. Accordingly, by shifting the burden of "disproof" to the Altrad Defendants, the circuit court necessarily eliminated the Altrad Defendants' defense that denied the Receiver's allegations and forced the Receiver to prove his allegations. The Receiver even acknowledged this burden-shifting in his motion: "Moreover, as explained above, the circuit court specifically explained that the adverse inferences are simply rebuttable presumptions that Appellants can refute through evidentiary challenge." (Receiver's Mot. to Dismiss at 13.)

The circuit court's sanction of striking the Altrad Defendants' defense that denies the Receiver's allegations is wrong as a matter of law, as the circuit court has no jurisdiction to issue such a sanction in the first place. And it is immediately appealable under the appellate statute, which allows for immediate appeals of "an order affecting a substantial right made in an action when such order strikes out an answer ***or any part thereof*** or any pleading in any action." South Carolina Code § 14-3-330(2)(c) (emphasis added). This appeal is entirely proper, and the Receiver's motion to dismiss should be denied.

II. The sanctions orders follow the *Davis* procedure for appealing discovery rulings.

This appeal is also proper because the Altrad Defendants followed the Supreme Court's prescription from *Davis* to seek review of improper discovery rulings. In *Davis*, the Supreme Court held that a litigant waives its ability to challenge an adverse discovery ruling if it complies with that ruling in any way. *See* 409 S.C. at 280–81, 762 S.E.2d at 543 (explaining that by partially complying with "the circuit court's formulation of discovery," the appellant had bound himself to those prior discovery rulings as "law of the case"). Rather than any form of compliance, "to

challenge the specific rulings of the discovery orders, the normal course is to refuse to comply, suffer contempt, and appeal from the contempt finding." *Id.* at 280, 762 S.E.2d at 543.

That is precisely the procedure the Altrad Defendants have followed here. The circuit court's prior order about discovery—through which the circuit court wrongly refused to enjoin both itself and the Receiver due to the pendency of an appeal regarding the unlawfulness of his very appointment—instructed the Altrad Defendants "to provide responsive, substantive, and complete answers to the Receiver's Discovery Requests within 14 days." (Order at 13 (Mar. 12, 2024).) They did not, and instead held fast to their myriad objections, including the complete lack of personal jurisdiction of a South Carolina State Court over them, an individual French citizen with zero connection to South Carolina and a French company with zero connection to South Carolina.

The orders now on appeal are the result of the Altrad Defendants' reliance on their prior objections. If they participate in discovery in any way, *Davis* deems those objections waived. That is not a risk the Altrad Defendants could reasonably take under these extreme circumstances, so they followed the *Davis* process for seeking review of the prior decision. The Altrad Defendants do not suffer contempt lightly, but it is the only path the Supreme Court has charted for seeking review of discovery rulings.

The Receiver seeks dismissal because the orders on appeal don't use the exact word "contempt," but this is a superficial and meaningless argument. As this Court knows, the substance of an order, not its "nomenclature," controls the appealability analysis. *See Spalt v. S.C. DMV*, 423 S.C. 576, 584, 816 S.E.2d 579, 583 (2018) (explaining that "[t]he label given to the order is not determinative of its immediate appealability" and holding that the substance of the order" is what controls); *Cape Romain Contrs., Inc. v. Wando E., LLC*, 405 S.C. 115, 121 n.4, 747 S.E.2d 461,

464 n.4 (2013) (explaining that whether an order is immediately appealable is a function of "substance rather than nomenclature"); *Thornton v. SCE&G Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) ("[A]n appellate court should look to the effect of an interlocutory order to determine its appealability . . . .").

The Supreme Court describes "contempt" as the natural result of "the willful disobedience of a court order," and it further explains that "the record must clearly and specifically reflect the contemptuous conduct." *Ex parte Cannon*, 385 S.C. at 660–61, 685 S.E.2d at 824 (quoting *Widman v. Widman*, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct. App. 2001)). And the purpose of contempt is "to coerce the defendant to do the thing required by the order for the benefit of the complainant." *Poston v. Poston*, 331 S.C. 106, 111, 502 S.E.2d 86, 88 (1998).

Here, the circuit court determined that it was "preadmitting" 2538 exhibits that had never been the subject of discovery "as a sanction for the persistent and baseless refusal of the Altrad Third-Party Defendants and the Charter Third-Party Defendants to participate in the discovery process." (Order Preadmitting Exhibit at 6 (May 23, 2024).) It determined that it was going to effectively decide this case on its "merits" through a series of "adverse inferences" because most of the "third-party defendants" "continue to refuse any effort at compliance with the Court's orders and the discovery rules of this State." (Order Issuing Adverse Inferences at 15 (May 23, 2024).) It continued: "The Court finds that this continued discovery misconduct on the part of these Third-Party Defendants amounts to bad faith, willful disobedience, and gross indifference to the rights of the Receiver and this Court's management of its docket." (*Id.*) And it explained that the goal of these sanctions is to prompt these litigants into participating in discovery—activity that, of course, would result in a waiver of the Altrad Defendants' objections under *Davis.* (*Id.* at 16.)

In other words, the circuit court used the exact terminology and framework of "contempt" to describe why it issued the orders it did. This is precisely what *Davis* requires to bring appellate scrutiny to the circuit court's rulings. This appeal is entirely proper, and the Receiver's motion to dismiss should be denied for this second independent reason. *See Ex parte Cannon*, 385 S.C. at 660, 685 S.E.2d at 823 ("Additionally, the finding of contempt is immediately appealable.").

III. The circuit court's sustained refusal to grant the Altrad Defendants' injunction request is immediately appealable.

To enforce Rule 205's grant of exclusive jurisdiction to this Court, the Altrad Defendants and others moved for an injunction of all litigation activity by the Receiver due to the absence of jurisdiction below. That motion was filed on February 16, 2024. It was renewed on April 9, 2024.

To date, the circuit court has refused to even take up these motions. While it has resolved motion after motion that the Receiver has filed, these motions to enforce Rule 205 have been ignored for more than half a year.

The law doesn't allow the sustained refusal to issue a requested injunction—that is required as a matter of law, not as a matter of the circuit court's equitable discretion—to remain idly with the circuit court. The General Assembly has specifically given immediate appellate rights over "an interlocutory order or decree in a court of common pleas . . . refusing an injunction." S.C. Code Ann. § 14-3-330(4).

Critically, the Legislature does not force a litigant in the Altrad Defendants' position to wait until their injunction request is outright "denied"; instead, it chose the word "refusing" to indicate that even a passive failure to enter a requested injunction is appealable, just like it does under the federal appellate statute. *See* 28 U.S.C. § 1292(a)(1) (creating appellate jurisdiction for interlocutory orders "granting, continuing, modifying, ***refusing*** or dissolving injunctions") (emphasis added); *In re Fort Worth Chamber of Com.*, 100 F.4th 528, 533 (5th Cir. 2024) ("[I]f a

district court does not timely rule on a preliminary-injunction motion, it can effectively deny the motion. We have accordingly recognized that simply sitting on a preliminary-injunction motion for too long can effectively deny it." (citing 16 Wright & Miller, Federal Practice & Procedure § 3924.1 (3d Ed.))); *Gray Line Motor Tours, Inc. v. City of New Orleans*, 498 F.2d 293, 296 (5th Cir. 1974) ("If, for example, an action has the effect of denying the requested relief without actually making a formal ruling, then the refusal of the district court to issue a specific order will be treated as equivalent to the denial of a preliminary injunction and will be appealable.").

Accordingly, the Receiver's argument on this point—that the requests for injunctive relief "continue to remain pending" after more than half a year on the docket (Receiver's Mot. to Dismiss at 14)—confirms precisely why they are immediately appealable, as the circuit court's refusal to grant relief required by Appellate Court Rule 205 is immediately reviewable under Section 14-3-330(4). Nor is it even unusual for courts to review the denial of an injunction request on an interlocutory basis. *See, e.g.*, *Hazel v. Blitz USA, Inc.*, 433 S.C. 120, 124, 857 S.E.2d 4, 6 (2021) (reviewing on immediate appeal the propriety of the denial of an injunction required as a matter of law); *Williams v. Nw. Sec. Life Ins. Co.*, 307 S.C. 462, 464–65, 415 S.E.2d 809, 810 (1992) (deciding otherwise-unappealable denials of Rule 12(b) motions were immediately appealable because, as here, they denied injunctions that the defendants sought as a matter of law, rather than as discretionary injunctions under the traditional multi-part "equitable" test). The Receiver's motion to dismiss fails for this third independent reason.

CONCLUSION

The Altrad Defendants have rightly appealed the circuit court's latest rulings, and their appeal follows the uncontroverted and direct authority of South Carolina law. The Court should deny the motion to dismiss, allow this appeal to proceed to merits briefing, and put an end to the

Receiver's unlawful efforts to obtain money judgments from foreign defendants with no connection to or demonstrable assets in the State of South Carolina, especially when the invalidity of the receivership itself is being tested by a legal system with jurisdiction over the entities allegedly in receivership.

Finally, by filing this memorandum, the Altrad Defendants do not waive, but continue to specifically preserve their objection to personal jurisdiction. They likewise adopt and incorporate as if fully set forth herein the arguments by their co-Appellants in opposition to the Receiver's motion to dismiss the same appeal by the Charter Defendants and the Sparrows Defendants.

Respectfully submitted,

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September 5, 2024

Exhibit A to
Opposition to Motion to Dismiss
Contempt Appeal

Filing Regarding the Cape Entities Seeking
Review of Receivership Appointment

ELECTRONICALLY FILED - 2024 Aug 30 2:24 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

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. 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, Vs. ANGLO AMERICAN, PLC, et al., Third-Party Defendants.	In Re: Asbestos Personal Injury Litigation Coordinated Docket Civil Action No.: 2023-CP-40-01759 **NOTICE OF FILING OF ATTEMPT TO ENJOIN THE RECEIVER IN THE HIGH COURT OF JUSTICE OF ENGLAND AND WALES**

PLEASE TAKE NOTE that Certain Third-Party Defendants for Cape PLC and Cape Intermediate Holdings Limited have, in the above captioned matter, sent the attached “Pre Action Letter regarding Declaratory and Injunctive Relief Contemplated Before the English Court” to the Receiver (See Exhibit A, Correspondence from Winston & Strawn).

Respectfully submitted,

RIKARD & PROTOPAPAS, LLC

s/ John K. Chandler
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This 30th day of August, 2024

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30 August 2024

FAO: Peter D. Protopapas
Rikard & Protopapas, LLC,
2110 N Beltline Blvd,
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BY EMAIL ONLY: pdp@rplegalgroup.com

Dear Mr Protopapas

Re: Pre-Action Letter Regarding Declaratory and Injunctive Relief Contemplated Before the English court

Introduction

We are instructed by Cape Intermediate Holdings Limited ("**CIHL**") (a company incorporated in England and Wales) and Cape Plc ("**Cape plc**") (a company incorporated under the laws of Jersey) (together, "**the Claimants**").

We are writing to request that:

1. you agree to consent by 12 pm on Friday 6 September to the terms of the draft court order we propose to seek from the English Court, which is provided at Annex A ("**the Draft Order**").

2. alternatively, should you be unwilling to agree to the terms of the Draft Order, you agree to accept service of our clients' claim form and related documents on counsel you have engaged in London (Morgan, Lewis & Bockius UK LLP), or out of the jurisdiction at 2110 N Beltline Bvld, Columbia, South Carolina 29204, United States of America.

Should you decline to consent to the Draft Order, our clients intend to commence proceedings against you in the English Court pursuant to Part 8 of the CPR for an order substantially in the form set out in the Draft Order ("**the Part 8 Claim**"). Should you decline to provide your agreement to accept service, our clients will make an application for permission to serve the Claim out of the jurisdiction.

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Factual background to the Part 8 Claim

CIHL is a holding company registered in England and Wales and is the successor to "Cape Asbestos Company Ltd" (which was incorporated in 1893).

Cape plc is a company incorporated in Jersey in 2011. It is the ultimate parent company of the Cape group of companies ("**the Cape Group**"). In 2017 Cape plc was acquired by Altrad UK Ltd (which is part of the Altrad group of companies – "**the Altrad Group**" – a world leader in industrial services with a turnover of £5 billion per year).

The Part 8 Claim arises in the context of (and relates to) certain legal proceedings in the US commenced against "Cape plc" and CIHL.

These proceedings ("**the USA Proceedings**") involve two separate actions in the Court of Common Pleas, State of South Carolina, County of Richland ("**the South Carolina Court**") against various defendants for the alleged exposure of the respective plaintiffs to asbestos. The two separate actions are: (1) the "**Park Claim**" (which was initiated in June 2021 by Ms Park, and subsequently taken over by her son) and (2) the "**Tibbs Claim**" (which was brought in April 2023 by Mr and Mrs Tibbs).

In the Park Claim, the Summons and Complaint names "Cape plc" as a defendant – and an Amended Summons and Complaint has added CIHL as a defendant. In the Tibbs Claim, "Cape plc" is a named defendant (but CIHL is not a named defendant).

The Part 8 Claim relates to certain of your actions in the Park Claim and the Tibbs Claim – which actions you purport to pursue in the name of and on behalf of the Claimants. Specifically, we refer to the following:

1. <u>The Receivership Order</u>.

   (a) This is the receivership order of Toal J dated 16 March 2023 ("**the Receivership Order**") that was granted pursuant to the Park Plaintiffs' motion dated 6 March 2023 ("**the Receivership Motion**"). (see enclosure)

   (b) The Receivership Order[1] appears to provide you with very broad powers in your capacity as receiver, including "***the power and authority [to] fully administer all assets of Cape[2]***, *accept service on behalf of Cape, engage counsel on behalf of Cape and* ***take any and all steps necessary to protect the interests of Cape whatever they may be***" (emphasis added).

   (c) The Receivership Motion was based on rule 15-65-10(4) of the South Carolina Code which provides that a receivership order can be made in relation to a company where it (1) is dissolved (2) is insolvent or in imminent danger of insolvency or (3)

[1] While it is only <u>Cape plc</u> that is named in the Receivership Order, you have subsequently confirmed that <u>CIHL</u> was the only company over which the Receivership Order was intended to be made, and the Claim has been issued in the name of <u>both</u> the Claimants (i.e. CIHL and Cape plc) as 'belt and braces' and in order to provide maximum security/protection to those companies' respective positions.

[2] "Cape" is defined in the Receivership Order as "*Cape PLC as the successor in interest to Cape Industries Ltd. (f/k/a Cape AsbestosCompany Ltd.) ("Cape Asbestos") and its subsidiaries and global affiliates*".

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has forfeited its corporate rights. Neither Cape plc or CIHL have been dissolved, nor are they insolvent, nor are they in imminent danger of insolvency.

(d) Despite the Tibbs Plaintiffs never having issued a motion seeking to appoint you as a receiver of Cape plc or CIHL in the Tibbs Claim, you have purported to act as such.

(1) The 3P Complaint.

(a) These are the third-party proceedings issued by you on 30 June 2023 in the name of and on behalf of Cape plc against a variety of defendants ("**the 3P Complaint**").

(b) The 3P Complaint was stated to be brought by "*Cape plc, individually and as successor in interest to Cape Asbestos Company Limited, by and through its duly appointed Receiver Peter D. Protopapas*" against various third party defendants ("**the Third-Party Defendants**") including, but not limited to, "Cape Holdco Ltd", "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 Limited", "Hawk Bidco US Inc", "Arranco US, LLC", "Sparrows Offshore, LLC" and "The Sparrows Group LLC".

(c) The Third-Party Defendants include, *inter alia*, both the direct subsidiaries and the immediate parent companies of the Claimants.

(d) The 3P Complaint is based on many highly contentious and wide-ranging allegations against Cape itself – and also purports to constitute admissions by Cape which are against the best interests of Cape.

(e) The claims sought in the 3P Complaint are based on unjust enrichment and/or constructive trust and/or alter-ego and veil-piercing liability and/or accounting. The claims are for an indeterminate amount.

(f) There is no express authority given to a receiver under rule 15-65-10(4) of the South Carolina Code to pursue third-party derivative claims and the Receivership Order did not expressly authorise you to initiate any third-party derivative proceedings.

(g) Despite this, you have taken the various steps in the name of Cape plc in pursuit of the 3P Complaint. Amongst other things, this has included: (i) seeking and obtaining the 3P Complaint Default Judgement against certain Third-Party Defendants including the Claimants' direct parent and subsidiaries (which include companies in the Altrad Group, and upon which the Cape Group rely for funding/financing and business cross-opportunities); (ii) making motions for disclosure, adverse inferences and sanctions for adverse inferences against certain Third-Party Defendants.

In terms of the Park Claim and the Tibbs Claim, the position is that at no stage have CIHL or Cape plc submitted to the jurisdiction of the South Carolina Court in the Park Claim or the Tibbs Claim. In this regard, CIHL and Cape plc refer to and rely upon the decision of the English Court of Appeal in Adams v Cape Industries Plc [1990] 1 Ch 433 ("**Adams v Cape**"). Nor has there been any judgment made in the Park Claim or the Tibbs Claim against CIHL or Cape plc in the State of South Carolina.

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Our clients' reasons for requesting relief from the English court should you fail to agree to the terms of the Draft Order

As a matter of English private international law (which is the law governing the incorporation of CIHL) the Receivership Order has not been made by a court of competent authority, it cannot be recognised or enforced as such in England and Wales, and it provides no legitimate basis upon which you can act as the receiver of CIHL. You therefore have no authority or mandate to act on behalf of CIHL, and the directors of CIHL require you to cease and desist from purporting to do so. The same applies in respect of Jersey law and Cape plc.

In this regard:

1. CIHL is a holding company incorporated in England, which is where its management and control is based. It does not carry on any business activities in the US, or the State of South Carolina (and never has) and its management and control is not, and never has been, in the US or the State of South Carolina. It also has no, and never has had any, assets in the US or the State of South Carolina.

2. Cape plc is a holding company incorporated in Jersey, its management and control is not in the US or the State of South Carolina, it does not carry on business in the US, or the State of South Carolina and it has no, and never has had any, assets in the US or the State of South Carolina.

3. Accordingly, neither CIHL nor Cape plc have any connection with the State of South Carolina.

4. In terms of the Park Claim and the Tibbs Claim, the position is that at no stage have CIHL or Cape plc submitted to the jurisdiction of the South Carolina Court in the Park Claim or the Tibbs Claim.

5. In these circumstances, as a matter of English private international law the Receivership Order made by the South Carolina Court is not capable of recognition or enforcement by the English Court. It does not satisfy the "*sufficient connection*" threshold test for the recognition of the appointment of a foreign receiver as a matter of English private international law (in relation to which see the decision Goulding J in Re Schemmer [1975] Ch 273). As to this:

   (a) Pursuant to this test, the English Court is required to determine whether a foreign court was jurisdictionally capable to make the appointment according to the relevant principles of English private international law.

   (b) The "*sufficient connection*" test involves looking at the place of incorporation, where a company's management and control is based, whether a company is carrying on business within the jurisdiction of the foreign court and whether a company has submitted to the jurisdiction of the foreign court.

   (c) In the light of the above facts, none of those criteria are satisfied in this case.

6. In this regard, it should be noted that the only relevant American subsidiary of CIHL was North American Asbestos Corporation, which was dissolved in 1978 and has been the subject of controversy in historic American asbestos litigation. However, in Adams v Cape the English Court of Appeal specifically found that CIHL was not present in the US jurisdiction via NAAC

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for the purposes of applying the common law test on the recognition of foreign judgments and that it had not otherwise submitted to the jurisdiction of the US Courts. That is the established legal position.

7. Given that, the English Court cannot recognise a final (let alone an interlocutory) US judgment against CIHL as having been made by a jurisdictionally competent foreign court it therefore follows that the English Court cannot recognise a receivership order against CIHL made on the same basis. The same applies in respect of Cape plc.

8. In this regard, the question of capacity and the constitution of the Claimants, namely, whether the acts of its directors, or others who purport to be the companies' agents, are the acts of CIHL is exclusively a question of English law, in the case of CIHL, and Jersey law in the case of Cape Plc. The law of the place of incorporation determines who are the corporation's officials authorised to act on its behalf. The appointments of the directors of CIHL are therefore governed by the law of England in the case of CIHL, and Jersey in the case of Cape plc.

9. Further, as a matter of English law, the appointment of the directors of CIHL and their competence to act on its behalf is legally unaffected by the Receivership Order made by the South Carolina Court. The same applies under Jersey law in respect of Cape plc. In this regard, any questions in relation to the governance of a company incorporated in England and Wales are plainly and properly a matter for the supervision and determination of the English Court.

10. The *de jure* directors of the Claimants (whose authority arises pursuant to the Claimants' articles of association, as well as the English Companies Act 2006 and the Jersey Companies Law 1991) remain in lawful control of the Claimants. Accordingly, the directors of both of the Claimants are entitled to seek the relief sought from the Court to be able to manage respectively CIHL and Cape plc in accordance with their best interests.

11. Accordingly, and for these reasons, and given that as a matter of English law the South Carolina Court was not jurisdictionally competent to make the Receivership Order, you have had no legitimate basis for acting and you have been acting without the Claimants' authority and/or any mandate from the Claimants.

12. The directors of CIHL and Cape plc are entitled to the relief sought against you to prevent the actual and potential harm caused by your actions. They rely *inter alia* on the following:

    a. The negative impact on directors/management. There are currently two conflicting centres of authority, which is highly prejudicial to the directors of the Claimants and the proper management of those companies (and the broader group of which they form part).

    b. The negative impact on operations/business. Customers and/or suppliers of the Cape Group (who will carry out regular credit checks and adverse media checks through their online reporting databases) will be concerned as to the extent to which authority is apparently vested in yourself as receiver and this could adversely impact their willingness to do business with the companies within the Cape Group (which are the operational subsidiaries of CIHL and Cape plc).

    c. The issues associated with your purported authority to deal with all the assets of the Claimants on a worldwide basis. In this regard, the Claimants own substantial assets

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worldwide (for example, the shares that they own in the subsidiary trading companies of the Cape Group – which has a turnover of approximately £1 billion per year).

d. The negative impact on the reputation of the Claimants and the broader Cape Group. The Cape Group has a valuable brand, both in the UK and abroad, which it has sought to protect and secure.

e. The negative impact on the Scheme of Arrangement in respect of CIHL (and 12 other subsidiary companies in the Cape Group) which was sanctioned in 2006 and continues to be supervised by the English High Court.

f. The negative impact on the funding/financing arrangements of the Altrad Group (which have an indirect effect on the funding/financing of the Claimants and the broader Cape Group).

13. In addition, the issuing and pursuit of the 3P Complaint is abusive, vexatious and unconscionable. The 3P Complaint makes multiple – and highly contentious – allegations directed against the Claimants. It also purports to constitute admissions that have not been authorised by the directors of the Companies.

14. The 3P Complaint is self-evidently contrary to the Companies' best interests and the Companies are entitled to injunctions from the English Court requiring you to cease and desist pursuing such claims in their respective names.

In these circumstances, the directors of CIHL and Cape plc are entitled to the assistance of the English court as the duly appointed directors of CIHL and Cape plc in order to enable them to administer, manage and run the companies efficaciously in accordance with their legal duties and in the best interests of the companies; and to prevent and contain the manifest prejudice to both them and the wider Cape group of companies by your conduct, which is directly contrary to the interests of CIHL and Cape plc and is abusive, vexatious and unconscionable.

There is a real and present dispute as to who is in control and authorised to act on behalf of the Claimants, and it is appropriate for the Court to make the declarations sought. In addition, it is appropriate to grant the injunctive relief sought where (1) you have no legitimate authority to act on behalf of the Claimants (and, in that regard, you have harmed the rights of the Claimants) and (2) your conduct is abusive, vexatious and unconscionable.

Accordingly, CIHL and Cape plc seek your consent to the Draft Order and, if not provided, the assistance of the English Court to obtain clarification that you have no legal authority to act on behalf of our clients, that authority remains vested in the directors, and restraining you from taking any further steps in the name of Cape as set out in the Draft Order.

Requirement for you to provide consent on an urgent basis

As you will be aware, various of the Third-Party Defendants in the 3P Complaint, applied to transfer the 3P Complaint from the South Carolina Court to a Federal Court. By an order of 13 August 2024, the Federal Court remanded the case back to the South Carolina Court.

In these circumstances and given the imminent trial of the 3P Complaint on 9 December 2024 – which is not being brought with the authority of the Claimants and is plainly contrary to their interests – it is paramount that the Claim is addressed urgently.

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In consideration for our clients refraining from taking action against you in the English Court, you are required to agree to the terms of the Draft Order by no later than 12pm on 6 September 2024.

Should you fail to do so, we will without further notice apply to the English Court for the relief in the form of the Draft Order.

For the avoidance of doubt, nothing in this letter should be considered as a waiver of any of our clients' rights which are, to the fullest extent, reserved.

Part 8 of the Civil Procedure Rules

In accordance with paragraph 13.3 of the Business and Property Courts of England & Wales Chancery Guide 2022, we hereby notify you that the use of Part 8 of the England & Wales Civil Procedure Rules is being contemplated to issue the intended claim against you.

We consider that Part 8 is the more appropriate route than Part 7 in the circumstances of the current dispute, for the following reasons:

1. The contemplated claim does not relate to any substantial dispute of fact. The contemplated claim is merely requesting the court's decision on a question by way of declaratory and injunctive relief.

2. A quick resolution of the contemplated claim is required given the imminent trial date of the 3P Complaint on 9 December 2024.

In accordance with paragraph 13.3 of the Chancery Guide, we have attached the Draft Order at Annex A (which we ask you to consent to).

Given that the relief sought in the Claim arises out of the application of well-established principles of English private international law to the USA Proceedings, we do not contemplate that there will a substantial factual dispute (or that disclosure will be necessary).

Agreement to Service Out of the Jurisdiction

As you are aware, on 13 July 2023 you used David Waldron of Morgan, Lewis & Bockius UK LLP to attempt to serve documents from the USA Proceedings on Altrad Services Ltd.

In accordance with the provisions of the English Civil Procedure Rules, and to the extent that you do not agree to provide the undertakings requested above, we request your agreement to accept service of the claim form and associated documents:

1. by way of service on Morgan, Lewis & Bockius UK LLP, Condor House, 5-10 St. Paul's Churchyard, London EC4M 8AL; or, in the alternative,

2. outside the jurisdiction of England and Wales at your address at 2110 N Beltline Bvld, Columbia, South Carolina 29204, United States of America

Please confirm your consent to accept service of the claim form by either (1) or (2) by 6 September 2024, so as to facilitate the efficient and timely progress of the contemplated proceedings. Should you

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fail to provide your agreement to accept service, our clients will make an application for permission to serve out of the jurisdiction.

Pre-Action Protocol

This letter is being sent to you in accordance with the Practice Direction on Pre-Action Conduct and Protocols (the "**Pre-Action PD**") contained in the Civil Procedure Rules (CPR) (albeit that, as envisaged in paragraph 13 of the Pre-Action PD, the urgency of the matter means that it is not possible to give you the full time suggested for your response to this letter). We refer you to paragraphs 13 to 16 of the Pre-Action PD concerning the court's powers to impose sanctions for failing to comply with its provisions.

We enclose the key documents which we intend to rely on to substantiate our clients' claims. Ignoring this letter will lead our clients to commence proceedings against you and may increase your liability for costs.

We look forward to your response.

Yours faithfully,

Winston & Strawn London LLP

Winston & Strawn London LLP

Enc. Receivership Order

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Annex A – Draft Order

Claim No. [#]

IN THE HIGH COURT OF JUSTICE **BUSINESS AND PROPERTY COURTS**

OF ENGLAND AND WALES

BUSINESS LIST (CHD)

Before [Mr]/[Mrs] Justice []

B E T W E E N:

(1) CAPE INTERMEDIATE HOLDINGS LIMITED

(2) CAPE PLC (a company incorporated under the laws of Jersey)

Claimants

- and -

PETER D. PROTOPAPAS

Defendant

[DRAFT] ORDER

UPON THE CLAIM of Cape Intermediate Holdings Limited ("**CIHL**") and Cape plc ("**the Claimants**") issued by Part 8 Claim Form on [] September 2024

AND UPON HEARING Leading Counsel for the Claimants [and Leading Counsel for the Defendant]

AND UPON READING the evidence, being the first witness statement of Ran Oren dated [] September 2024 ("**Oren 1**")

IT IS DECLARED THAT

1. The receivership order of the Court of Common Pleas for the Fifth Judicial Circuit of the State of South Carolina, County of Richland ("**the South Carolina Court**") dated 16 March 2023 appointing Mr Peter Protopapas ("**Mr Protopapas**") as a receiver over the Claimants ("**the Receivership Order**") is not recognised and has no legal effect in England and Wales and worldwide.

2. Mr Protopapas has and had no power or authority to act as a receiver in relation to the Claimants in England and Wales or worldwide and has no power or authority in respect of

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the Claimants in England and Wales or worldwide to carry out the acts referred to in paragraph 5-8 below.

3. The rights and duties of the directors of the Claimants remain unaffected by the appointment of Mr Protopapas as receiver of the Claimants pursuant to the Receivership Order.

4. Mr Protopapas has and had no power or authority to act as the receiver of the Claimants in the South Carolina Court in respect of the Park claim and the Tibbs Claim (as defined in Oren 1) and has and had no power or authority to issue third party claims in the Tibbs Claim against any of the third party defendants in those proceedings, including (i) Mohed Altrad (ii) Altrad Investment Authority SAS (iii) Altrad UK Ltd (iv) Cape UK Holdings Newco Ltd (v) Cape Industrial Services Group Ltd (vi) Cape Holdco Ltd (vii) Altrad Services Ltd (viii) Hawk Bidco (US) Inc (ix) ArranCo US LL (x) Sparrows Offshore LLC.

AND IT IS ORDERED THAT:

5. Mr Protopapas be injuncted in England and Wales and worldwide from acting or purporting to act as a receiver of the Claimants pursuant to the Receivership Order.

6. Mr Protopapas be injuncted in England and Wales and worldwide from appropriating, interfering with or usurping (in any way whatsoever) the lawful exercise of the rights and duties of the directors of the Claimants.

7. Mr Protopapas be injuncted from acting or purporting to act as a receiver of the Claimants in the Park Claim and the Tibbs Claim (as defined in Oren 1).

8. Mr Protopapas be injuncted from litigating as “Cape plc” or CIHL in any legal proceedings in the State of South Carolina, USA or elsewhere.

RECEIVED
Sep 05 2024
SC Court of Appeals

PROOF OF SERVICE

I, the undersigned of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellants Altrad Investment Authority SAS and Mohed Altrad, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specific below by emailing them at the addresses below:

Pleading(s): Altrad Defendants' Memorandum in Opposition to Motion to Dismiss

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Counsel for Asbestos Corporation Limited

By: /s/ M. Todd Carroll

September 5, 2024