

RECEIVED

Sep 10 2024

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 No. 2024-001446
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. Chesterton 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.; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; 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, Inc.; 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. Protopoulos,

v.

Third-Party
Plaintiff/
Respondent,

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.; 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 (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,

of which

Third-Party
Defendants,

Mohed Altrad; Altrad Investment Authority SAS; ArranCo US, LLC; Hawk Bidco US Inc.; Sparrows Offshore, LLC; Anglo American PLC; De Beers PLC; De Beers Centenary AG; De Beers Consolidated Mines Proprietary Ltd.; De Beers UK Ltd.; ESAB Corporation; Charter Consolidated Ltd.; and Central Mining & Investment Corporation Ltd. are the

..... Appellants.

**RETURN OF APPELLANTS CHARTER CONSOLIDATED, LTD., ESAB CORPORATION, AND
CENTRAL MINING AND INVESTMENT CORPORATION LTD. TO MOTION TO DISMISS
AND EXPEDITE (MODE OF TRIAL)¹**

BLUESTEIN THOMPSON SULLIVAN, LLC

John S. Nichols (SC 4210)
1614 Taylor Street
Columbia, SC 29201
Telephone: (803) 770-7599
Email: john@bluesteinattorneys.com

GORDON REES SCULLY MANSUKHANI, LLP

A. Victor Rawl, Jr. (SC 09261)
Email: vrawl@grsm.com
677 King Street, Suite 450
Charleston, SC 29403
Telephone: 843-714-2501

*Counsel for Appellants Charter Consolidated Ltd., ESAB Corporation,
and Central Mining and Investment Corporation Ltd.*

¹ By making this filing, the Charter Appellants do not waive, but instead specifically preserve, all defenses asserted and objections previously made regarding these proceedings through its written motions, oral arguments, memoranda and briefs, responsive pleadings, served responses, and appellate filings, including, *inter alia*, that: the Court lacks personal jurisdiction over each of the Charter Appellants; the Court lacks subject matter jurisdiction; the Receiver was improperly appointed; the Cape PLC receivership was improperly continued and modified and an entirely new receivership was granted over the separate entity named Cape Intermediate Holdings Limited (“CIHL”); the Receiver lacks standing; the Receiver’s claims improperly pled, should be severed, and/or fail under Rules 12(b) and 14, SCRCF; and these proceedings and the claims asserted and relief sought against the Charter Appellants violate their fundamental procedural and substantive constitutional rights and protections.

Appellants Charter Consolidated Ltd. (“Charter”), ESAB Corporation (“ESAB”), and Central Mining and Investment Corporation Ltd. (“Central Mining,” and collectively, “Charter Appellants”) hereby respectfully submit this Return to Motion to Dismiss and Expedite (the “Motion”) filed by Peter D. Protopapas, in his purported capacity as the court-appointed receiver for Cape PLC (“Respondent” or “Receiver” or “Mr. Protopapas”).

All arguments, authorities, and prior incorporations and adoptions by reference included in the Charter Appellants’ prior filings, including briefs and related materials filed with this Court, the Supreme Court, and the circuit court, are incorporated by reference herein. Cf. Rule 208(b)(6), SCACR (“In cases involving more than one appellant or respondent, including cases consolidated for appeal, any number of parties may join in a single brief, and any party may adopt by reference all or any part of the brief of another.”). *See also Stanley Smith & Sons, Inc. v. Dumas*, 315 S.C. 30, 33, 431 S.E.2d 595, 596 (Ct.App.1993) (the Court of Appeals took notice of the contents of the appellate record in another, unrelated case).

INTRODUCTION

In another attempt to insulate errors of law occurring in the circuit court in this case, the Receiver has once again filed a Motion to Dismiss and Expedite (“Motion”) rather than respond on the merits to a valid, appealable issue of substantial constitutional importance. Of course, because calling this appeal “improper and frivolous” clearly has no support in the law, the Receiver’s filing attempts to conflate this appeal with prior (valid) appeals that remain pending

before the appellate courts,² appeals of valid issues in other cases that have nothing to do with this one.

Basic indisputable facts compel this Court to hear the merits of this case. *First*, the Charter Appellants filed their Notice of Appeal at the earliest possible moment at which their rights were violated under South Carolina law. *Second*, any issues as to “issue preservation” go to the merits of the appeal, despite the Receiver’s desire to shortchange the appellate process to avoid scrutiny of the improper action occurring in the circuit court. As much as the Receiver seeks to catch the Charter Appellants, and others, in a self-serving “gotcha game” with soundbites from various hearings, the December 9, 2024 bench trial of this case was not scheduled until June 20, 2024—*no earlier*. *Third*, there would be no delay if the Receiver simply consented to a trial by jury which was specifically requested by the Charter Appellants and others; the delay is one of his own creating as a result of insistence on a bench trial before former Chief Justice Toal on styled “equitable,” “derivative” claims that *only recently* have been made known to the Charter Appellants to be derivative to nothing.

Moreover, the “Third-Party” Complaint below is patently improper, and preventing review of this fact appears to be a motivating feature of the Receiver’s serial motions to dismiss without ever engaging on the merits of otherwise valid appeals. Under Rule 14(a) of the South Carolina Rules of Civil Procedure, a defendant is permitted to implead and pursue claims against a third party only if it “is or may be liable to [defendant] for all or part of the plaintiff’s claim”; it “does not allow the defendant to assert a separate and independent claim.” Rule 14(a), SCRCPP; *see also Uptagrafft v. United States*, 315 F.2d 200, 202 (4th Cir. 1963) (“The right to bring in such

² Mot. at 3.

third party exists only when the third party ‘is or may be liable to him for all or part of plaintiff’s claim against him.’”); *Smith v. Tiffany*, 419 S.C. 548, 560, 799 S.E.2d 479, 486 (2017) (“a non-party is subject to impleader [under Rule 14, SCRC] only if there is a basis to assert he is liable to the named defendant(s) for all or a part of the plaintiff’s claim”); *Id.* at 561, 799 S.E.2d at 486 (“Absent any potential liability to either the plaintiff or to nonsettling defendants, interpleader under Rule 14 is not proper.”). Before the “third-party” pleading was filed, the Receiver agreed with counsel for the Tibbs Plaintiffs to indefinitely toll the statute of limitations as to the Tibbs’ claims against Cape PLC. Thus, the case below is entirely improper, and has been from its inception—a fact that has only been recently discovered by Charter Appellants. This fact is important, because as set forth below, not only are the Charter Appellants entitled to a jury trial of any third-party claims, but, as a mandatory condition precedent, there must first be a jury trial between the original *Tibbs* Plaintiffs and Cape PLC.

Thus, the Charter Appellants strenuously object to the Receiver’s characterization of valid and justifiable appeals as “improper and frivolous,” part of a “pursuit of successive improper appeals,” “another attempt in a long line of recent attempts” to “abuse South Carolina rules of procedure to subvert justice and delay circuit court rulings on important matters of South Carolina law,” repeating a “failed strategy,” or filing appeals that are “solely interposed for the purpose of delaying the trial.” While the Receiver states “this type of continued behavior should not be tolerated,” the use of hyperbolic language casting aspersions on parties endeavoring to protect and preserve their constitutional rights and exercising rights afforded to them under South Carolina law—in the face of illusory claims designed to disguise the substantial dollars of legal damages

being sought under the cloak of equitable headers—is decidedly *not* a basis to grant an expedited dismissal of a valid appeal.

PROCEDURAL BACKGROUND

This case involves the improper appointment of a pre-judgment receiver over a large active UK company in one case, whose authority is limited by statute to that single case, but who has now filed “third-party” claims in this case, even though there is no claim pending against the entity in receivership (in either case.)

1. The Receiver’s authority as pre-judgment receiver is limited to *Park*.

The Charter Appellants were not parties to *Park v. Armstrong International, Inc.*, Case No. 2021-CP-40-02727 (“*Park*”) in which the Park Appointment Order over Cape PLC was entered on March 6, 2023 (nine months after the case had been resolved)³ and stated that “the Court hereby appoints Peter Protopapas be and hereby is appointed Receiver **in this case** [the *Park Case*] pursuant to the South Carolina Law with the power and authority ...to protect the interests of Cape whatever they may be.” Neither the Charter Appellants nor Cape PLC was given notice of the *Park* motion to appoint a pre-judgment receiver. It is undisputed that the Park Appointment Order is based on incorrect information (Cape PLC is NOT dissolved; it is an active UK company).⁴ The

³ The circuit court in *Park* ordered trial on June 20, 2022. (Docketing Order at 2 (filed Dec. 1, 2021, in *Park*)). On June 3, 2022, Mr. Park’s counsel reported to the Court that the case was “fully resolved.” (Email from Ms. McVey to 479 recipients (June 3, 2022)). Other than stipulations of dismissal being filed, the case was over, and no damages or liability was ever attributed to Cape PLC.

⁴ Cape PLC has filed an action in the UK seeking a declaration that the Receiver has no authority over it.

Park Appointment Order was entered *ex parte*, with no adverse party to oppose or to test the merits of the appointment.

Even if the Park Appointment Order were proper (which it was not), the Park Appointment Order appointed the Receiver pursuant to S.C. Code Ann. § 15-65-10 (2005) to be the pre-judgment receiver over Cape PLC in *Park only*. Neither Title 15 nor the *Park* Appointment Order allows the Receiver to act in other cases. Enforcement of this long-recognized principle supports a ruling that the Receiver lacks standing to pursue *the Tibbs* third-party complaint.

2. The Receiver’s improper actions as purported receiver for Cape PLC in *Tibbs*.

Nonetheless, the Receiver decided to act outside of *Park*, and filed a third-party complaint in the present case. The *Park* plaintiffs are not parties to this case, have no interest in the Tibbs’ claims, and have no interest in the Receiver’s third-party derivative action against the Charter Appellants. Further, while the *Tibbs* plaintiffs did make a motion for an appointment of a receiver over another defendant, the *Tibbs* plaintiffs have not moved for the appointment of a receiver over Cape PLC (or CIHL). Thus, the Receiver has no authority or standing to act in this case.

In the underlying asbestos case in *Tibbs*, the *Tibbs* plaintiffs alleged tort claims against several defendants – including Cape PLC. There is no evidence that the *Tibbs* plaintiffs served Cape PLC with the complaint. However, the Receiver made an appearance and filed a “general denial” “on behalf of” Cape PLC.⁵ The following day, the Receiver filed a Third-Party Complaint against the Charter Appellants and others.⁶

⁵ Sparrows App. at 269-277.

⁶ Sparrows App. at 278-339.

The Charter Appellants moved to vacate the receivership. The circuit court entered the December 2023 Order finding that the Receiver may act as receiver in the *Tibbs* case, and further finding that: 1) the circuit court in the *Park Case* “appointed a receiver for Cape PLC”;⁷ 2) the Receiver is seeking through his third-party complaint to assert claims on behalf of Cape Intermediate Holdings Ltd. (“CIHL”), not the presently existing Cape PLC;⁸ 3) the Park Appointment Order was flawed because it incorrectly found that Cape PLC was dissolved;⁹ and 4) despite the foregoing, the Receiver may now act as pre-judgment receiver for Cape PLC and CIHL. The primary effect of the December 2023 Order was to grant a new pre-judgment receiver appointment in *Tibbs* over both Cape PLC and a new entity, CIHL. This order is on appeal.

⁷ December 2023 Order page 4.

⁸ The circuit court explained: “Cape PLC (as it was known from 1989 to 2011, and as is now known as Cape Intermediate Holdings Ltd.) is the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.)....” December 2023 Order Page 6. “The second Cape PLC, on the other hand, is a new entity allegedly created in the Bailiwick of Jersey in April 2011.... Other than the common name, there is no evidence the Park Plaintiffs meant to sue the new Bailiwick of Jersey entity as a defendant in their asbestos exposure lawsuit. The new entity was not organized in the United Kingdom; the new entity has existed for less than 20 years; and there is no indication in the record the new entity was the same entity that historically sold asbestos in the United States (nor could there be given its relative infancy).” *See* December 2023 Order Page 17; *see also* December 2023 Order pages 6-9 summarizing third-party complaint allegations of “Cape” that all predate Cape PLC’s 2011 formation.

⁹ The circuit court stated: “Although the order appointing the Receiver [in *Park*] incorrectly described Cape as ‘dissolved,’ even though Cape is still a going concern in the United Kingdom, that does not impact the legality of the Receivership, as dissolution of the entity placed in receivership is not required under subsection (5).” December 2023 Order Page 25, fn 16. *See also* generally December 2023 Order page 23-25 where the circuit court relies entirely on S.C. Code Ann. § 15-65-10(5) and does not reference S.C. Code Ann. § 15-65-10(4).

After additional motion practice, multiple appeals, and other developments, described in relevant part in the timeline below, the circuit court scheduled *a jury trial* for the underlying claims asserted by the *Tibbs* plaintiffs on April 15, 2024. Two days before the pretrial hearing, counsel for *Tibbs* notified the circuit court and all counsel of record that Plaintiff was no longer pursuing claims against Cape PLC. There has been no determination of liability or damages between the *Tibbs* plaintiffs and Cape PLC, and Cape PLC is no longer an active defendant in this case. Nonetheless, the circuit court issued the Bench Trial Order and setting the derivative third-party case for *a bench trial* in December 2024 – prior to any determination of liability or damages as to Cape PLC. The Charter Appellants timely filed and served a Notice of Appeal of the Bench Trial Order.

RELEVANT TIMELINE

The following timeline sets forth particular events relevant to this appeal:

Date	Event
March 17, 2023	Pre-judgment receiver appointed over Cape PLC in <i>Park – Park Appointment Order</i> .
April 5, 2023	<i>Tibbs</i> Complaint filed - naming Cape PLC (active company), but not CIHL. ¹⁰ Complaint never served on Cape PLC.
June 12, 2023	<i>Tolling Agreement Signed – Ending Active Controversy Between Tibbs and Cape PLC/ Receiver. Agreement not</i>

¹⁰ The Amended Complaint alleges: “Defendant, CAPE PLC, ... **is** a private liability company organized and existing under the laws of the United Kingdom of Great Britain and Northern Ireland with its court appointed Receiver maintaining its principal place of business in South Carolina. At all times material hereto, CAPE PLC manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, raw asbestos fibers present at numerous jobsites in South Carolina and North Carolina. Cape PLC is sued as a Product Defendant.” (Sparrows App. at 501.)

	<i>disclosed to third-party defendants until Pre-trial hearing on April 10, 2024.</i>
June 30, 2023	Third-Party Complaint in <i>Tibbs</i> filed by <i>Park</i> Receiver for Cape PLC, but purporting to assert legal claims on behalf of CIHL even through CIHL is not a defendant in <i>Tibbs</i> , and even though Third-Party Complaint on its face admits that Cape PLC is not the successor in interest to Cape Asbestos Corp. See para 113. (Sparrows App. at 325-326.)
August 21, 2023	Dispositive motions filed by third-party defendants, including motions to dissolve receivership, 12(b) motions to dismiss, and motion to strike or sever pursuant to Rule 14 (because not a proper third-party case).
September 20, 2023	Docketing order issued indicating that <i>Tibbs</i> would start trial on April 15, 2024. The docketing order did not indicate the mode of trial. (See Receiver’s App. 68-71)
October 18, 2023	Receiver responds to Rule 14 argument – arguing that claims are derivative, that “third-party action under Rule 14(a) properly seeks third-party relief from parties that may be liable to satisfy all or part of claims against the Receiver”, and that third-party defendants “are wholly necessary to this action.” ¹¹
December 6, 2023	Circuit court issued order denying Charter Appellants’ motions to vacate receivership and granting The Receiver ability to act as receiver for both Cape PLC and CIHL in <i>Tibbs</i> . <i>*this order is on appeal.</i>
December 15, 2023	Circuit court issued order denying 12(b) motions and Rule 14 argument. (App. at 21).
January 2, 2024	Charter Appellants file Answer to Third-Party Complaint preserving all arguments and requesting “ <i>trial by jury of all issues raised in the Third-Party Complaint.</i> ” (See Receiver’s App. 72, 132)
April 3, 2024	Receiver filed motion for sanctions – “Motion to Pre-Admit Exhibits” (App. at 14-20) – because of third-party defendants’

¹¹ Third-Party Plaintiff’s Omnibus Opposition to Certain Third-Party Defendants ‘Motions to Dismiss Under Rules 12(b)(1) and 12(b)(6) and , Alternatively, For More Definite Statement And To Strike Or Sever Under Rules 12E and 14 (“Omnibus Response to Motions to Dismiss”)(App. at 25-59). Receivers arguments that the Third-Party Complaint plead proper third-party claims pursuant to Rule 14 were successful as Charter Defendants Rule 14 motion to Strike or Sever were denied on December 15, 2023. Receiver is judicially estopped from claiming that claims are not derivative.

	lack of participation in discovery based on various pending appeals. The motion stated: “The Receiver hereby Requests that this Court pre-admit its trial exhibits in advance of the trial in this case ... beginning April 15, 2024....” The motion specifically stated that “this case ... involves claims sounding in equity <i>and law</i> ” (emphasis added)(App. at 15).
April 5, 2024	Receiver filed “Pre-Trial Hearing Status Report” prior to the April 10, 2024 Pre-Trial hearing in the Tibbs case – for the April 15, 2024 day certain jury trial in Tibbs (see Docketing Order above). Notwithstanding the April 15, 2024 day certain jury trial between Tibbs and Defendants (which Charter Appellants still believed to include Cape PLC), and notwithstanding Receiver’s the admission in his pre-trial Motion to Pre-Admit Exhibits that his case “ <i>involves claims sounding in equity and law</i> ”, and notwithstanding that every third-party defendant demanded a jury trial, the Receiver suggested that the April 15, 2024 trial would be non-jury (but did not seek the Charter Appellants’ consent to proceed in this fashion). (See Receiver’s App. 259-266)
April 8, 2024	The <i>Tibbs</i> plaintiffs notified the circuit court and all parties, in advance of the April 15, 2024 day certain jury trial, that there remained only 2 defendants left in <i>Tibbs</i> , neither of whom was Cape PLC. (See Sparrow’s App. 64-67)
April 10, 2024	At a pretrial hearing, the <i>Tibbs</i> plaintiffs confirmed that Cape PLC was no longer a defendant because of the “tolling agreement” with the Receiver (presumably mooted third-party claims). The circuit court “continued” any trial related to Cape PLC at the Receiver’s request. (See Sparrow’s App. 183, 222-223)
June 20, 2024	The circuit court issued its “Order Scheduling Trial Date,” which stated: “This third-party action was previously scheduled for [jury] trial on April 15, 2024. ... The matter is <u>now</u> scheduled for a <u>bench trial</u> on the week of December 9, 2024...” <i>*this order is on appeal</i>
June 28, 2024	Other third-party defendants removed this case to federal court based on the Tolling Agreement. (See Sparrow’s App. 256-268)

August 14, 2024	Federal court remanded <i>Tibbs</i> to state court but acknowledged that there was some authority to support removal. ¹² (App. at 1-13)
August 30, 2024	The Charter Appellants and others filed a Notice of Appeal of the Denial of Right to Jury Trial.

ARGUMENT

After dispensing with the gratuitous fog of the Receiver’s rhetoric, he posits essentially three arguments in furthering his request that this appeal should be dismissed; *all* are fundamentally incorrect. First, he argues that the Charter Appellants possess no right to jury trial. *See* Mot. at 4. Second, he somehow tries to argue the subject Order is not appealable. *See* Mot. at 10. Third, and finally, he asserts Appellants “waived” their constitutional rights to jury trial. *See* Mot. at 10.

As set forth more fully herein, the Charter Appellants correctly demanded a trial by jury as warranted by the nature of the claims and relief sought in the “Third-Party” Complaint, but the circuit court nevertheless ordered the case to be set for a bench trial. The Receiver himself described his claims as sounding in law: “*this case ... involves claims sounding in equity and law.*” Motion to Pre-Admit Exhibits. As a matter of black-letter South Carolina law, the circuit court’s order is a quintessential deprivation of a substantial right and entitled mode of trial pursuant

¹² District Court described the tolling agreement as follows: “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 refile of the dismissed claims in the event settlement is not effectuated.” (App. at 10).

to section 14-3-330 of the South Carolina Code and South Carolina jurisprudence interpreting and enforcing that appealability statute. Nor have the Charter Appellants “waived” their constitutional right to a jury trial, as the Receiver suggests. Rather, they invoked this right in their initial responsive pleadings, have never stipulated to forfeit it, and timely challenged their deprivation of this right after the circuit court ordered a bench trial.

While this Return responds in-kind to each of the Receiver’s arguments, the Charter Appellants strenuously object to this unfounded attempt to litigate the merits of this appeal via expedited motion to dismiss. Such attempted circumvention of full merits argument—by actually arguing the merits in a now-perfunctory dismissal motion—warrants denial of the Receiver’s motion on that basis alone.

A. The Charter Appellants Are Entitled to a Jury Trial as a Matter of Right.

The nature of the claims in the Complaint and the “Third-Party” Complaint, combined with the Charter Appellants’ timely request for a jury trial, require dismissal of the Motion and trial by jury.

First, the nature of this purported “third-party” action entitles the Charter Appellants to the jury trial demanded by the *Tibbs* Plaintiffs in the underlying, first-party asbestos tort proceedings by virtue of operation of Rule 14, SCRCPP, and the right to “stand in the shoes” of Cape PLC as part of the defense of claims for which “derivative liability” is necessarily alleged to have been based and capable of being passed through to the Third-Party Defendants. *See* Rule 14, SCRCPP; *see also generally, Lindner v. Meadow Gold Dairies, Inc.*, 515 F. Supp. 2d 1141, 1149 (D. Haw. 2007) (acknowledging the third-party defendant’s right “to stand in [the defendant/third-party plaintiff’s] shoes for the purposes of defending against the [plaintiff’s] claims”); Moore’s Federal

Practice § 14.25 (Matthew Bender 3d ed.) (“[T]he impleader rule recognizes the derivative nature of the third-party defendant’s potential liability and permits it essentially to stand in the defendant’s shoes and assert its defenses.”).

There is no doubt the issues in the *Tibbs* first-party complaint are triable by jury, as is a regular occurrence in the circuit court with asbestos cases and has been demanded by the *Tibbs* Plaintiffs themselves. *See Tibbs* Plfs.’ First Am. Compl. at 97 (“A JURY IS RESPECTFULLY DEMANDED TO TRY THESE ISSUES.”) (See Sparrow’s App. 570); Hearing Tr., at 27:11–13 (July 16, 2024) (“And the Tibbs family itself, . . . [t]hey deserve their day in court”) (See Sparrow’s App. 366).

Second, even if the nature of the claims in the first-party action did not dictate the “main purpose” of the Receiver’s so-called third-party claims, the third-party claims sound in tort as well. Simply because the Receiver has cloaked his claims in purported equitable causes of action does not make it so. *Cf. Ward v. Atlas Const. Co., Inc.*, 276 S.C. 346, 278 S.E.2d 621 (1981) (Court looked to “the nature and substance of the cause of action ... rather than the form of remedy” to determine whether the action was in equity or at law for purposes of survival of the causes of action or abatement at common law). *See, also, Southern Ry., Carolina Div. v. Howell*, 89 S.C. 391, 393, 71 S.E. 972, 972-973 (1911) (“It has been decided by this court too often to require citation of the cases that a plaintiff cannot, by framing his complaint so that his action would, under the old procedure, be one cognizable only by court of equity, select the forum in which the issue shall be tried, and thereby defeat a defendant’s constitutional right of trial by jury.”).

Indeed, the “main purpose rule” – not the Receiver’s semantics – governs whether a matter is at law or in equity. Characterization of an “action as equitable or legal depends on the [plaintiff’s]

‘main purpose’ in bringing the action.” *Verenes v. Alvanos*, 387 S.C. 11, 16, 690 S.E.2d 771, 773 (2010) (citation omitted). “[T]he ‘main purpose’ rule evolved from a determination that where a plaintiff has prayed for money damages in addition to equitable relief, characterization of the action as equitable or legal depends on the plaintiff’s ‘main purpose’ in bringing the action.” *Id.* at n. 3, citing *Floyd v. Floyd*, 306 S.C. 376, 380, 412 S.E.2d 397, 399 (1991).

The main purpose of the action should generally be ascertained from the body of the complaint; however, if necessary, resort may also be had to the prayer for relief and any other factual circumstances which throw light upon the main purpose of the action. *Verenes v. Alvanos*, at 16, 690 S.E.2d at 773. The nature of the issues raised by the pleadings and character of relief sought under them determine the character of an action as legal or equitable. *Id.*

In this case, the Receiver’s “Third Party” Complaint seeks damages for tort liability. The body of the Complaint commences with the assertion:

This lawsuit seeks to finally hold accountable three groups of Third-Party Defendants (including their predecessors in interest) who are responsible for the sale and use of asbestos or asbestos-containing products throughout the United States, including in South Carolina, and which caused or materially contributed to thousands of deaths from mesothelioma or other asbestos related disease, and *billions of dollars of past, present, and calculable future damages.*

(Complaint, Introductory Statement, p. 10). The Complaint further alleges that “each of the Third-Party Defendants” “committ[ed] a litany of tortious acts in whole or in part in the State” and “caus[ed] injuries and deaths in the State by acts or omissions outside the State....” Complaint, p. 16, ¶ 37(iii), (iv). The Complaint adds the following averments:

Although this complaint arises out of events commencing many decades ago and continuing for decades, those events led to and resulted in asbestos-related disease that continues to be diagnosed in and suffered by residents of South Carolina to this day. As described in detail below, Third-Party Defendants (including their

predecessors in interest) *are directly responsible for injuries caused by these events, especially by the sale and use of asbestos or asbestos-containing products throughout the United States, including in South Carolina.*

(Third-Party Complaint, p. 17, ¶ 39) (See Sparrow’s App. 289)(emphasis added).

Furthermore, although the prayer for relief is couched in terms of “a full accounting” in equity, Third-Party Plaintiffs seek a money judgment against the Charter Appellants regarding “the extent to which [the Charter Appellants have] financially benefitted from the liability-avoidance scheme” and “such other and further relief as the Court may deem just and proper, including pre-judgment and post-judgment interest as provided by South Carolina law.” (Third-Party Complaint, p. 65, ¶¶ B, C) (See Sparrow’s App. 337).

Moreover, the Receiver admits that his claims include claims at law. Specifically in his Motion to Pre-Admit Exhibits (as a sanction against third-party defendants) filed on April 3, 2024 (12 days prior to the day certain jury trial set for April 15, 2024), the Receiver argued: “The Receiver hereby Requests that this Court preadmit its trial exhibits in advance of the [jury] trial in this case ... beginning April 15, 2024.... *this case ... involves claims sounding in equity and law.*” (Motion to Pre-Admit Exhibits (App. at 21)). Additionally, in his filings in opposition to Charter Appellants motions to dismiss, in addition to the tort claims alleged by Receiver, he also suggests there may be contract claims (also claims sounding in law.) The Receiver argued that “the Third-Party Complaint pleads [a contractual or fiduciary relationship] between and among Cape and Third-Party Defendants.”¹³ (App. at 55).

¹³ Receiver’s contention that contractual rights may form part of his claim likewise support the contention that the claims are of a legal and not equitable nature – and may even foreclose equitable claims. *See Rodarte v. Univ. of S.C.*, 419 S.C. 592, 604, 799 S.E.2d 912, 918 (2017) (“Quasi-contractual remedies ... are inapplicable when the parties are bound by an express contract.”)

The Receiver in other filings make it clear that money damages are being sought. The Receiver states that his claims are “to redress the scourge of *asbestos-related disease caused by Third-Party Defendants*.” (App. at 33) “Indeed, the Receiver went to great efforts to show ...that the damages alleged against Third-Party Plaintiff in the Asbestos Suits resulted from the actions of Third-Party Defendants ...” (internal quotations omitted). (App. at 52)

Thus, there can be no question that the “Third-Party” Complaint seeks tort damages for personal injuries grounded in tort and sounding in strict products liability. Damages for tort injury are inherently at law, not in equity. *See, e.g., Est. of Parrott v. Sandpiper Independent and Assisted Living*, ___ S.C. ___, 904 S.E.2d 455, 461 (Ct. App. 2024) (in explaining its scope of appellate review, Court of Appeals stated the matter was at law, citing *First Union Nat’l. Bank of S.C. v. Soden*, 333 S.C. 554, 574, 511 S.E.2d 372, 382 (Ct. App. 1998) (“[T]he character of an action as legal or equitable depends on the relief sought.”) and *Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 560, 619 S.E.2d 5, 9 (Ct. App. 2005) (“An action in tort for damages is an action at law.”)); *Ritter and Assoc. v. Buchanan Volkswagen*, 405 S.C. 643, 748 S.E.2d 801 (Ct. App. 2013) (an action in tort for money damages is an action at law); *Culler v. Blue Ridge Elec. Co-Op.*, 309 S.C. 243, 246, 422 S.E.2d 91, 93 (1992) (“an action in tort is generally an action at law, unless equitable relief is sought”; Court held action seeking money damages was an action at law). Because the action is at law, not in equity, the Charter Appellants are entitled to a jury trial. *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997) (the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions).

The Complaint also seeks an award of pre-judgment and post-judgment interest. Such relief would be proper only if the relief sought and obtained is money damages. *See* S.C. Code Ann. §

34-31-20 (A) (2005) (permitting pre-judgment interest “in all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due”); § 34-31-20(B) (permitting post-judgment interest on “a money decree or judgment”). These remedies are available when a party is entitled to, or obtains, a judgment for a money award.

Accordingly, the “main purpose” of the Receiver’s Third-Party Complaint against the Charter Appellants is to obtain a money judgment under tort or contract theories. These are matters at law, not in equity. The Charter Appellants are therefore entitled to the jury trial they timely demanded.

The Receiver somehow tries to fault the Charter Appellants by stating: “Even in their late-filed Notices of Appeal, Appellants did not identify any specific factual issues or causes of action in this case that are triable by a jury,” and then citing jurisprudence related to issue preservation, a completely separate issue. Of course, a Notice of Appeal under the South Carolina Appellate Court Rules need not identify the specific issues being appealed—that is what briefing is for. *Compare* Rule 203(e), SCACR (setting forth form and content requirements for a notice of appeal and *not including* identification of appellate issues) *with* Rule 208, SCACR (noting that initial briefs should include statements of issues and argument).

Accordingly, the Court should deny the Motion to Dismiss and permit the parties to proceed to briefing the issue on the merits.

B. The Order Setting the Matter for a Bench Trial is Immediately Appealable

The Order is immediately appealable because it affects a substantial right: the Charter Appellants’ right to a jury trial. Pursuant to S.C. Code Ann. § 14-3-330(2) (2017), the appellate courts have held on numerous occasions that when a trial court’s order deprives a party of a mode

of trial to which it is entitled as a matter of right, such order is immediately appealable because it affects a substantial right. *Flagstar Corp. V. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000), citing *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997); *C & S Real Estate Services, Inc., v. Massengale*, 290 S.C. 299, 350 S.E.2d 191 (1986); *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985); *First Union National Bank of South Carolina v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct. App.1998); *Preferred Sav. Bank, Inc. v. Elkholy*, 303 S.C. 95, 399 S.E.2d 19 (Ct. App.1990). These cases not only permit, but indeed require, immediate appeal in the event of denial of a mode of trial to which one is entitled as a matter of right; failure to immediately appeal such an order forever bars appellate review. *Flagstar Corp., citing Creed v. Stokes*.

Here, the Charter Appellants are entitled to the jury trial they timely demanded, and the Scheduling Order deprives them of that right. The Order is not only immediately appealable; the Charter Appellants had to appeal to preserve their right to a jury trial.

C. The Charter Appellants Have Not Waived Their Constitutional Right to a Jury Trial.

Respondent's waiver argument is fully unsupported by law or fact. As with the United States Constitution, the South Carolina Constitution "preserve[s] inviolate" the fundamental right to a jury trial. S.C. Const. art. I, § 14; *see also* U.S. Const. amend. VII ("[T]he right of trial by jury shall be preserved . . ."); *Lane v. Gilbert Constr. Co.*, 383 S.C. 590, 600, 681 S.E.2d 879, 884 (2009) ("The right to trial by jury is a fundamental right."). The South Carolina Rules of Civil Procedure reiterate this constitutional mandate, both in Rule 38(a) concerning the right to trial by jury and in Rule 42(b) governing bifurcation. *See, e.g.*, Rule 38(a), SCRCP ("The right of trial by jury as declared by the Constitution . . . shall be preserved to the parties inviolate."); Rule 42(b), SCRCP ("The court, in furtherance of convenience or to avoid prejudice, or when separate trials

will be conducive to expedition and economy, may order a separate trial of any claim . . . or third-party claim[] or of any separate issue . . . always preserving inviolate the right of trial by jury as declared by the Constitution . . .”).

Where, as here, a party demands a trial by jury in its responsive pleading, the demand cannot be waived absent stipulation of the parties or court order. *Compare* Rule 38(b), SCRCP (“Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue.”) *with* Rule 38(d), SCRCP (“The failure of a party to serve a demand as required by this rule . . . constitutes a waiver by him of trial by jury. A demand for trial by jury as made herein provided may not be withdrawn without the consent of the parties”) *and* Rule 39(a), SCRCP (“The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation . . . consent to trial by the court sitting without a jury or (2) the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues does not exist.”).

Here, each of the Charter Appellants included in their Answers an unequivocal demand for a “trial by jury of all issues raised in the Third-Party Complaint.” (App. 132.) Nothing since then has altered that demand (much less waived it entirely) by any mechanism recognized by law; the Charter Appellants have never stipulated to withdraw their demand for a jury trial, and the circuit court had not ordered a bench trial prior to the order in this appeal. In short, the Charter Appellants have preserved their demand for a jury trial throughout this litigation, including by appealing when the circuit court issued an order depriving the Charter Defendants of their right to a jury trial.

Indeed, the key word in former Chief Justice Toal’s treatise, *Appellate Practice in South Carolina*, is “Orders.” Jean H. Toal, et al., *Appellate Practice in South Carolina* 156 (3d ed. 2016); see also *id.* at 145 (“Orders denying a party’s right to a mode of trial must be appealed immediately, and a party runs the risk of waiving the right to appeal if that party fails to so immediately appeal.” (emphasis added)); *id.* at 157 (reiterating that “these orders must be appealed immediately” (emphasis added)). See also *S.C. Cmty. Bank v. Salon Proz, LLC*, 420 S.C. 89, 93–94, 800 S.E.2d 488, 490–91 (Ct. App. 2017) (recognizing immediate right to appeal order of reference for determination of issues by master-in-equity in action involving both equitable and legal claims, and reiterating that “[t]he failure to immediately appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue” (emphasis added) (quoting *First Union Nat’l Bank of S.C. v. Soden*, 333 S.C. 554, 565, 511 S.E.2d 372, 377 (Ct. App. 1998))); *Frampton v. S.C. Dep’t of Transp.*, 406 S.C. 377, 386, 752 S.E.2d 269, 274 (Ct. App. 2013) (holding that “the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue” (emphasis added) (quoting *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997))); *Bateman v. Rouse*, 358 S.C. 667, 675, 596 S.E.2d 386, 390 (Ct. App. 2004) (explaining that appellant “was required to wait for a written order prior to appealing”; citing Rule 203(b)(1), SCACR, for that proposition that the deadline to appeal is based on “receipt of written notice of entry of the order or judgment”; and noting that “the purpose of requiring an immediate appeal of the denial of the right to a jury trial is to preserve a party’s constitutional rights that would otherwise be lost” (emphasis added)).

All of the foregoing citations have one thing in common—they are appeals of orders. Nothing the Receiver cites or references anywhere in his Motion, prior to the June 20,

2024 *Order*, is an appealable *order* pertinent to Appellants’ jury trial demands and the circuit court’s deprivation thereof. The Receiver regularly contests valid appeals—as touted in the Motion—as “frivolous and improper.” The Receiver cannot now seriously contend the Charter Appellants could have taken an appeal of the Receiver choosing “not to demand a trial by jury in his Complaint,” a circuit court statement that a case is tentatively going to be “tried in a non-jury setting,” or other random statements by counsel that are not orders of the court that substantively determine the third-party case is set for a bench trial, untethered to the first-party tort action to which it purportedly derived by virtue of the Receiver’s secretive Tolling Agreement—a false and illusory premise disguised and maintained from inception. On that basis alone, the list of acts considered “waivers” is unavailing, as the definitive treatise on appellate procedure notes appeal must be taken from the *order* that constitutes the deprivation, which the Appellants have so taken. As Chief Justice Toal also wrote for the Supreme Court:

An order is not final until it is entered by the clerk of court; and until the order or judgment is entered by the clerk of the court, the judge retains control of the case. *Bowman v. Richland Mem’l Hosp.*, 335 S.C. 88, 91, 515 S.E.2d 259, 260 (Ct. App. 1999) (citations omitted). However, “the moment . . . [the order] is filed by the clerk of court, it becomes the judgment of the court and fixes the rights of the parties.” *Archer v. Long*, 46 S.C. 292, 295, 24 S.E. 83, 84 (1896). Stated otherwise, the effective date of an order is not when it is signed by the judge, but when it is entered by the clerk of court. *Bowman*, 335 S.C. at 93, 515 S.E.2d at 261.

Upchurch v. Upchurch, 367 S.C. 16, 22–23, 624 S.E.2d 643, 646 (2006), *disapproved on other grounds of by Miles v. Miles*, 393 S.C. 111, 711 S.E.2d 880 (2011).

In this instance, the circuit court rejected the Charter Appellants’ demand for a jury trial when it issued a scheduling order setting the case for a bench trial. The Charter Appellants then appealed. Nothing more was required of them – including, as Respondent suggests, asking the

circuit court to reconsider the order setting this matter for a bench trial before taking this appeal. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 649, 642 (2011) (“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.”). *See also Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 332, 730 S.E.2d 282, 287 (2012) (Toal, CJ, dissenting) (cautioning that “an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice.”); *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 648 n. 3, 817 S.E.2d 273, 277 n. 3 (2018) (noting the *Lewis* majority expressed concern about the “over-zealous application” of “long-standing error preservation rules” and discouraging a “hypertechnical application” of those rules resulting in appellate arguments being procedurally barred). Nor were the Charter Appellants required to contest the circuit court’s decision to set the case for a bench trial in the scheduling order before appealing from it, as “any objection [before an order was issued] would have been futile.” *State v. Pace*, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994).

Tellingly, each of Respondent’s remaining citations to the record is nothing more than an instance of attorney argument or a nonbinding statement responding to another party’s characterization of this case as a bench trial. (*See, e.g., Receiver’s App.* 432 (opposing motion to pre-admit exhibits assuming a bench trial).) In fact, the only “order” Respondent cites granted the Receiver’s Motion to Pre-Admit Exhibits and, in doing so, referenced “judges sitting without a jury” in reaching its conclusion. (*See Receiver’s App.* 642.) It did not set the case for a bench trial. And, oral statements are not conclusive and not appealable. *See Ford v. State Ethics Comm’n*,

344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) (“Until written and entered, the trial judge retains discretion to change h[er] mind and amend his oral ruling accordingly.”); *Case v. Case*, 243 S.C. 447, 451, 134 S.E.2d 394, 396 (1964) (“Even if as contended by defendant the trial Judge granted an oral divorce to plaintiff such pronouncement is not a final ruling on the merits nor is it binding on the parties until it has been reduced to writing, signed by the Judge and delivered for recordation. The Decree must be in writing and until such time the Judge may modify, amend or rescind such an oral Order.”).

Thus, the fact “[n]o Appellants objected to or otherwise disputed the Receiver’s contention in his April 4, 2024 pre-trial hearing status report that the trial would be a non-jury trial,” Mot. at 11, is not controlling. The right to appeal does not arise from the Receiver’s understanding of how a case will be tried—that is an issue for the circuit court. Likewise, the fact memoranda—*filed before the full import of the secretive Tolling Agreement became known and the impact thereof on the Appellants’ jury trial rights became understood*—noted a bench trial of equitable claims may be in the future is merely a momentary understanding of how the case *may be* litigated, without having the benefit of the pertinent facts and circumstances intentionally withheld by the Receiver.

Similarly, the contention that a party did not submit a scheduling order to a court divested of jurisdiction as a result of valid appeals cannot constitute waiver where any action in the circuit court is void, *ab initio*, as a matter of law. See Rule 205, SCACR; *Tillman v. Oakes*, 398 S.C. 245, 254–56, 728 S.E.2d 45, 50–51 (Ct. App. 2012); see also *Arnal v. Fraser*, 371 S.C. 512, 517–23, 641 S.E.2d 419, 421–24 (2007) (conducting matter-by-matter analysis of lower court rulings; voiding *ab initio*, “for lack of jurisdiction,” those rulings that were affected by the matter on appeal;

and noting that, per Rule 205, “the lower court may not act or issue orders that affect an issue on appeal”).

Moreover—and possibly more importantly—all of the Receiver’s citations to actions allegedly constituting waiver relate to the trial of the “third-party” case. Nowhere does the Receiver address the fact that Appellants are entitled to the benefit of a jury trial in the “first-party” action and that the “third-party” action can be tried only after the jury trial between the *Tibbs* Plaintiffs and Cape PLC occurs and liability found against Cape PLC. At no point were either of these issues discussed by the Receiver, likely because the Dismissal Agreement renders each an impossibility and the Receiver’s “third-party” action a non-viable illusion.

Accordingly, the Court should reject Respondent’s argument that the Charter Appellants waived their right to contest the order setting this matter for a bench trial and thus depriving them of the right to a trial by jury.

D. Issue Preservation Has No Bearing on Appealability

The Motion also impermissibly conflates issue preservation with appealability. While there is no doubt the mode of trial issue is properly before this Court, the Receiver has filed a merits brief on waiver under the guise of a motion to dismiss rather than allowing the proper appellate process to play out. The Supreme Court—addressing merits briefs, not conclusory motions to dismiss—has stated repeatedly “that issue preservation rules should not be applied in a technical manner as if this is some sort of game of ‘gotcha’ elevating form over substance to trap trial lawyers so as to prevent the appeal of a legitimate issue.” *State v. Morales*, 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023). That statement was made after full briefing. Here, the Receiver

attempts to shortchange that process and have this Court dismiss a case on an unfounded “gotcha” basis without full briefing and on a reduced briefing schedule. And, citations to case law regarding evidentiary objections in trial are unavailing when the actual issue was presented via jury demand—which is both self-explanatory and self-executing, *S.C. Cmty. Bank*, 420 S.C. at 95, 800 S.E.2d at 491—and rejected via the circuit court’s entry of the Order setting the case for bench trial.¹⁴ Dismissal of this case on the basis of arguments regarding issue preservation would be highly improper and thus, this Court should reject those arguments.

CONCLUSION

For the reasons set forth herein, the Charter Appellants respectfully request this Court deny Respondent’s Motion and resume the briefing timeline to determine the merits of the appeal of the May 23 Orders.¹⁵

¹⁴ The Receiver faults the parties below for not objecting to the Order. On June 10, 2024, one of the Receiver’s many attorneys, G. Murrell Smith, Jr., sent a letter to the circuit court asking the case be scheduled for trial on December 9, 2024 due to his “unavailability” in his role as Speaker of the House. Due to the *unequivocal* published South Carolina law regarding Rule 205, SCACR, all parties below presumed the letter would serve no purpose. In apparent disagreement, and without any notice to the parties—10 days thereafter—the circuit court ignored the valid jury demands and decided this case would be tried via bench trial. There was no justification given for the reasons. *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997) (“A failure to exercise discretion amounts to an abuse of that discretion.”).

¹⁵ Per Rule 208(b)(6), SCACR, the Charter Appellants incorporate herein, to the extent applicable, all additional arguments raised and authorities cited by similarly situated Appellants Mohed Altrad, Altrad Investment Authority S.A.S., ArranCo US, LLC, Hawk Bido (US) Inc., and Sparrows Offshore, LLC.

Dated: September 10, 2024

BLUESTEIN THOMPSON SULLIVAN, LLC

BY: /s/ John S. Nichols

John S. Nichols
SC Bar No. 4210
Bluestein Thompson Sullivan, LLC
1614 Taylor Street
Columbia, SC 29201
Telephone: (803) 770-7599
Email: john@bluesteinattorneys.com

GORDON REES SCULLY MANSUKHANI, LLP

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

A. Victor Rawl, Jr. (SC 09261)
Email: vrawl@grsm.com
677 King Street, Suite 450
Charleston, SC 29403
Telephone: 843-714-2501

*Counsel for Appellants Charter
Consolidated Ltd, ESAB Corporation, and
Central Mining & Investment Corporation
Ltd.*

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 No. 2024-001446
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. Chesterton 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.; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; 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, Inc.; 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. Protopoulos,

v.

Third-Party
Plaintiff/
Respondent,

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.; 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 (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,

of which

Third-Party
Defendants,

Mohed Altrad; Altrad Investment Authority SAS; ArranCo US, LLC; Hawk Bidco US Inc.; Sparrows Offshore, LLC; Anglo American PLC; De Beers PLC; De Beers Centenary AG; De Beers Consolidated Mines Proprietary Ltd.; De Beers UK Ltd.; ESAB Corporation; Charter Consolidated Ltd.; and Central Mining & Investment Corporation Ltd. are the

..... Appellants.

APPENDIX TO
RETURN OF APPELLANTS CHARTER CONSOLIDATED, LTD., ESAB CORPORATION, AND
CENTRAL MINING AND INVESTMENT CORPORATION LTD. TO MOTION TO DISMISS
AND EXPEDITE (MODE OF TRIAL)

BLUESTEIN THOMPSON SULLIVAN, LLC

John S. Nichols (SC 4210)
1614 Taylor Street
Columbia, SC 29201
Telephone: (803) 770-7599
Email: john@bluesteinattorneys.com

GORDON REES SCULLY MANSUKHANI, LLP

A. Victor Rawl, Jr. (SC 09261)
Email: vrawl@grsm.com
677 King Street, Suite 450
Charleston, SC 29403
Telephone: 843-714-2501

*Counsel for Appellants Charter Consolidated Ltd., ESAB Corporation,
and Central Mining and Investment Corporation Ltd.*

INDEX

ORDER GRANTING MOTION TO REMAND.....	1
THE RECEIVER FOR CAPE PLC’S MOTION TO PREADMIT EXHIBITS.....	14
ORDER DENYING MOTIONS TO DISMISS	21
THIRD-PARTY PLAINTIFF’S OMNIBUS OPPOSITION TO CERTAIN THIRD-PARTY DEFENDANTS’ MOTIONS TO DISMISS UNDER RULES 12(B)(1) AND 12(B)(6) AND, ALTERNATIVELY, FOR MORE DEFINITE STATEMENT AND TO STRIKE OR SEVER UNDER RULES 12(E) AND 14	25



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

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

²The 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

²Between 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.

³A 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

13



A TRUE COPY
 ATTEST: ROBIN L. BLUME, CLERK

BY: 
 DEPUTY CLERK

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
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,

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

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

In Re:

Asbestos Personal Injury Litigation
Coordinated Docket

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.

**THE RECEIVER FOR CAPE PLC'S
MOTION TO PREADMIT EXHIBITS**

Third-Party Plaintiff Peter D. Protopapas, as duly appointed receiver for Cape PLC, individually and as successor in interest to Cape Asbestos Company Ltd., n/k/a Cape Intermediate Holdings Ltd. (the “Receiver” or “Receivership”), by and through undersigned counsel, hereby requests that this Court preadmit its trial exhibits in advance of the trial in this case.

BACKGROUND

This case is set for a bench trial in the trial block beginning April 15, 2024, and involves claims sounding in equity and law. The Receiver filed this third-party action on June 30, 2023. In the intervening nine months, the third-party defendants have refused to participate in discovery, despite the Receiver’s repeated requests and orders of this Court. Most recently, on March 12, 2024, this Court entered an order requiring third-party defendants “(i) to provide responsive, substantive, and complete answers to the Receiver’s Discovery Requests with 14 days of entry of this Order and (ii) to begin producing documents in response to the Receiver’s Requests for Production the same day.” Order at 13. The order also required Arranco and Central Mining to produce 30(b)(6) witnesses for deposition within 21 days of the Order. *Id.* None of the defendants have meaningfully complied with this Order.

Because the third-party defendants have refused to participate in discovery,¹ the Receiver is unable to rely on information adduced in discovery to authenticate its exhibits. Given their complete refusal to participate in discovery despite the Receiver's requests and this Court's orders, the Receiver respectfully requests that the Court find that Rule 901's authentication requirements have been met as to all the Receiver's exhibits as a discovery sanction for the third-party defendants' conduct. The Receiver submits its list of exhibits attached hereto as Exhibit A, and requests that they be pre-admitted into evidence for use at trial.

LAW & ARGUMENT

- 1. Because this case is set for a bench trial, this Court has the latitude to admit all the Receiver's exhibits and make evidentiary determinations based on the Court's own evaluation of their content.**

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

The majority essentially adopts a new rule for trial judges sitting without a jury. According to the majority, if incompetent evidence is admitted on the ultimate issue of the trial, the trial judge must affirmatively reject this evidence, even if it is clear he is making a judgment based on competent evidence in the record. We reject this rule because it would require trial judges to rule on all admitted evidence in a bench trial. A trial judge's role in a bench trial is to

¹ Like the other third-party defendants, Anglo American PLC, De Beers PLC, De Beers Centenary AG, De Beers UK Ltd., and De Beers Consolidated Mines Proprietary Ltd. refused to provide **any** discovery for many months. Although they have recently communicated willingness to participate in discovery, their discovery provided to date has been wholly deficient, or otherwise subject to numerous improper objections and limitations, including (i) producing on or about March 26, 2024, a limited, non-sensitive set of publicly available materials created after 1986, and (ii) refusing to admit to the genuineness of documents referenced in the Receiver's Third-Party Complaint, including copies of their own annual reports and other corporate filings.

admit all evidence and then evaluate it in a non-jury setting. The majority's rule is, therefore, unnecessarily burdensome and would inhibit the trial judge's ability to evaluate the evidence and ascertain the truth.

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

Judicial economy is best served by allowing judges the ability to use their training, skill, and experience to make these evidentiary determinations while considering the legal issues in a case. As discussed above, unlike in a jury trial—where it might be imperative to keep jurors from hearing inadmissible evidence due to the possibility of prejudice—the Court, as fact finder and judge in a bench trial, is the one who makes the ultimate determination on the admissibility of evidence and the legal issues in the case. These determinations can and should occur at the same time. Here, there is no need to keep inadmissible evidence from the fact finder to prevent prejudice because the Court determines whether the evidence is admissible and then evaluates it as the fact finder. See *Lucas v. Vanover*, No. 2006-UP-233, 2006 WL 7286027, at *4 (S.C. Ct. App. Apr. 27, 2006) (“[T]he role of the circuit court in this matter was to admit all evidence, admissible or inadmissible, and then evaluate it as the fact finder. The *Brown v. Allstate* rule does not require the circuit court to make an affirmative statement that it did not rely on the incompetent evidence in rendering its decision . . . only [to] reference the competent evidence . . . in its order.”).

This Court has the inherent power to manage its docket in the most efficient manner to avoid unnecessary costs or use of the Court's time. *Landis v. North Am. Co.*, 299 U.S. 248, 254

(1936). Pre-Admitting evidence will save this Court and the parties the time and burden of lawyers arguing about exhibits during the trial day. Therefore, pursuant to the South Carolina Rules of Evidence, the Receiver seeks to admit the exhibits set forth on the attached Exhibit A for the trial of this matter.

2. The Court should find all the Receiver's Exhibits authentic as a sanction for the Third-Party defendants' discovery conduct.

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

Because the third-party defendants have not meaningfully responded to written discovery and have failed to produce witnesses for deposition, the Receiver has been unable to authenticate documents that otherwise would have been authenticated under Rule 901 during the normal course of discovery. Given the third-party defendants' discovery conduct, a finding that all the Receiver's Trial Exhibits are authentic is an appropriate sanction under the circumstances.

CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that this Court pre-admit all its Exhibits and find that each of the exhibits is authentic.

In accordance with Rule 11, SCRCPP, the undersigned counsel certifies that consultation on this matter would serve no useful purpose given the third-party defendants' positions on discovery participation.

GALLIVAN, WHITE & BOYD, P.A.By: /s/ John T. Lay, Jr.

John T. Lay, Jr., SC Bar No. 64526

Gray T. Culbreath, SC Bar No. 11907

Lindsay A. Joyner, SC Bar No. 77437

Laura W. Jordan, SC Bar No. 100374

Eleanor L. Jones, SC Bar No. 104678

1201 Main Street, Suite 1200

PO Box 7368 (29202)

Columbia, SC 29201

jlay@gwblawfirm.comgculbreath@gwblawfirm.comljoyner@gwblawfirm.comljordan@gwblawfirm.comejones@gwblawfirm.com

(803) 779-1833

Jonathan M. Robinson

Shanon N. Peake

SMITH | ROBINSON, LLC

2530 Devine Street, Third Floor

Columbia, SC 29205

jon@smithrobinsonlaw.comshanonp@smithrobinsonlaw.com

(803) 254-5445

G. Murrell Smith, Jr.

SMITH | ROBINSON, LLC

PO Box 580

Sumter, SC 29151-0580

murrell@smithrobinsonlaw.com

(803) 778-2471

Troy S. Brown (*pro hac vice forthcoming*)Dana E. Becker (*pro hac vice forthcoming*)

MORGAN, LEWIS & BOCKIUS LLP

1701 Market Street

Philadelphia, PA 19103

troy.brown@morganlewis.comdana.becker@morganlewis.com

(215) 963-5000

Brady Edwards (*pro hac vice forthcoming*)

Robert W. Jacques (*pro hac vice forthcoming*)

MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue NW
Washington, DC 20004
brady.edwards@morganlewis.com
robert.jacques@morganlewis.com
(202) 739-3000

Paul A. Scrudato (*pro hac vice forthcoming*)

MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, NY 10178
paul.scrudato@morganlewis.com
(212) 309-6000

Attorneys for Third-Party Plaintiff

April 3, 2024
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2023 CP-40-01759

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

ANGLO AMERICA PLC, individually and as

successor in interest to ANGLO AMERICAN
CORPORATION OF SOUTH AFRICA LTD., *et*
al.,

THIRD- PARTY DEFENDANT(S)

Submitted by: The Honorable Jean H. Toal

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCPP; ☐ Rule 41(a), SCRCPP (Vol. Nonsuit); ☐ Rule 43(k), SCRCPP (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCPP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: **Motions to Dismiss pursuant to SCRCPP, Rule 12(b)(1) and Rule 12(b)(6) filed by ESAB Corporation; Charter Consolidated, Ltd.; Central Mining & Investment Corp., Ltd.; Mohed Altrad and Altrad Investment Authority SAS; Arranco US, LLC, Hawk Bidco US, LLC, and Sparrows Offshore, LLC are DENIED. The Court finds this Court has proper subject matter jurisdiction and the Third-Party Plaintiff's Complaint pleads a valid claim for relief based on the allegations set forth. The Court refers to its Order Denying Third-Party Defendants' Motions to Dissolve Receivership and Third-Party Defendants' Motions to Dismiss for Lack of Personal Jurisdiction entered on December 6, 2023.**

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$

		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



Richland Common Pleas

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

Case Number: 2023CP4001759

Type: Order/Form 4

So Ordered

Jean H. Toal

Electronically signed on 2023-12-15 16:25:11 page 4 of 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

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,

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

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

In Re:

Asbestos Personal Injury Litigation
Coordinated Docket

**THIRD-PARTY PLAINTIFF'S
OMNIBUS OPPOSITION TO CERTAIN
THIRD-PARTY DEFENDANTS'
MOTIONS TO DISMISS UNDER
RULES 12(B)(1) AND 12(B)(6) AND,
ALTERNATIVELY, FOR MORE
DEFINITE STATEMENT AND TO
STRIKE OR SEVER UNDER
RULES 12(E) AND 14**

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.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
FACTUAL AND PROCEDURAL BACKGROUND.....	2
I. This Court Appointed the Receiver to Address Cape’s Decades-Long Conduct	2
II. The Receiver Has Asserted Third-Party Causes of Action.....	4
A. The Charter Third-Party Defendants are responsible for the implementation of Cape’s liability-avoidance scheme	5
B. Altrad is responsible for continuing Cape’s liability-avoidance scheme.....	7
C. Altrad and the Charter Third-Party Defendants filed the motions at issue.....	10
ARGUMENT	10
I. The Court Has Subject-Matter Jurisdiction Over This Third-Party Action.....	10
A. South Carolina law requires this Court to have subject-matter jurisdiction	10
B. The relevant Cape entity was properly served and put into receivership	11
C. The Receiver was lawfully appointed and has authority to bring this action.....	11
D. No advisory opinion is sought in this action.....	12
II. The Receiver Has Adequately Pleaded Each Cause of Action.....	13
A. The legal threshold to survive a challenge under Rule 12(b)(6) is low.....	14
B. The unjust-enrichment claim is properly pleaded.....	15

TABLE OF CONTENTS
(continued)

	Page
C. The constructive-trust claim is properly pleaded.....	17
D. The alter ego and veil-piercing claim is properly pleaded.....	19
E. The accounting claim is properly pleaded	21
III. The Litany of Other Arguments Likewise Lack Merit	23
A. The South Carolina “Door Closing Statute” does not bar the Receiver from asserting the claims in the Third-Party Complaint	23
B. There is no basis for striking the claims or for a trial severance	24
C. The Third-Party Complaint provides fair notice of the claims	24
CONCLUSION.....	25

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Allison v. W.L. Gore & Assocs.</i> , 394 S.C. 185, 714 S.E.2d 547 (2011)	11
<i>Baddourah v. McMaster</i> , 433 S.C. 89, 856 S.E.2d 561 (2021)	10–11
<i>Baker v. Equitable Leasing Corp.</i> , 275 S.C. 359, 271 S.E.2d 596 (1980)	20
<i>Barber v. Pittsburgh Corning Corp.</i> , 464 A.2d 323 (Pa. Super. Ct. 1983)	6
<i>Beach v. Hudson</i> , 398 S.C. 424, 380 S.E.2d 869 (Ct. App. 1989)	24
<i>BNP Paribas Mortg. Corp. v. Bank of Am., N.A.</i> , 949 F. Supp. 2d 486 (S.D.N.Y. 2013)	12
<i>Booth v. Grissom</i> , 265 S.C. 190, 217 S.E.2d 223 (1975)	13
<i>Brown v. Leverette</i> , 291 S.C. 364, 353 S.E.2d 697 (1987)	15
<i>Builder Mart of Am., Inc. v. First Union Corp.</i> , 349 S.C. 500, 563 S.E.2d 352 (Ct. App. 2002)	21
<i>Cameron v. Owens-Corning Fiberglas Corp.</i> , 296 Ill. App. 3d 978 (1998)	5
<i>Carolina First Corp. v. Whittle</i> , 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000)	25
<i>Cobalt Multifamily Investors I, LLC v. Arden</i> , 46 F. Supp. 3d 357 (S.D.N.Y. 2014)	19
<i>Consignment Sales, LLC v. Tucker Oil Co.</i> , 391 S.C. 266, 705 S.E.2d 73 (Ct. App. 2010)	22
<i>Craig v. Johns-Manville Corp.</i> , 1987 WL 10191 (E.D. Pa. Apr. 23, 1987), rev'd, 843 F.2d 145, 150 (3d Cir. 1988)	5–6

<i>Culbreth v. Amosa (Pty.) Ltd.</i> , 898 F.2d 13 (3d Cir. 1990).....	6
<i>David v. McLeod Regional Med. Ctr.</i> , 367 S.C. 242, 626 S.E.2d 1 (2006)	25
<i>Drury Dev. Corp. v. Found. Ins. Co.</i> , 380 S.C. 97, 668 S.E.2d 798 (2008)	20
<i>Farmer v. Monsanto Corp.</i> , 353 S.C. 553, 579 S.E.2d 325 (2003)	23
<i>First Gen. Servs. of Charleston, Inc. v. Miller</i> , 314 S.C. 439, 445 S.E.2d 446 (1994)	24
<i>FOC Lawshe Ltd. P’ship v. Int’l Paper Co.</i> , 352 S.C. 408, 574 S.E.2d 228 (Ct. App. 2002).....	15
<i>Gaskins v. S. Farm Bur. Cas. Ins. Co.</i> , 343 S.C. 666, 541 S.E.2d 269 (Ct. App. 2000).....	25
<i>H&W Elec. Corp. v. Atlantic Workforce Inc.</i> , 2022 WL 18495840 (D.S.C. Sept. 28, 2022).....	19–20
<i>HHHunt Corp. v. Town of Lexington</i> , 389 S.C. 623, 699 S.E.2d 699 (Ct. App. 2010).....	14–15
<i>InterGen N.V. v. Grina</i> , 344 F.3d 134 (1st Cir. 2003).....	12
<i>McDill v. Nationwide Mut. Ins. Co.</i> , 368 S.C. 29, 627 S.E.2d 749 (Ct. App. 2006).....	13–14
<i>Mohn v. Int’l Vermiculite Co.</i> , 498 N.E.2d 375 (Ill. App. Ct. 1986)	6
<i>Overcash v. S.C. Elec. & Gas Co.</i> , 364 S.C. 569, 614 S.E.2d 619 (2005)	14
<i>Oskin v. Johnson</i> , 400 S.C. 390, 735 S.E.2d 459 (2012)	19
<i>Paradis v. Charleston Cnty. Sch. Dist.</i> , 424 S.C. 603, 819 S.E.2d 147 (Ct. App. 2018), rev’d, 433 S.C. 562, 861 S.E.2d 774 (2021).....	25
<i>Paravati v. Bell Asbestos Mines, Ltd.</i> , 1986 WL 492 (E.D. Pa. Dec. 3, 1986).....	6

<i>Parker v. Bell Asbestos Mines, Ltd.</i> , 607 F. Supp. 1397 (E.D. Pa. 1985)	6
<i>Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club</i> , 310 S.C. 132, 425 S.E.2d 764 (Ct. App. 1992).....	21
<i>Pertuis v. Front Roe Restaurants, Inc.</i> , 423 S.C. 640, 817 S.E.2d 273 (2018)	20–21
<i>In re RCS Eng'rd Prods. Co., Inc.</i> , 102 F.3d 223 (6th Cir. 1996)	12
<i>Regions Bank v. Wingard Props., Inc.</i> , 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011).....	15
<i>Richland Cnty. Sch. Dist. 2 v. Lucas</i> , 434 S.C. 299, 862 S.E.2d 920 (2021)	13
<i>Rogers v. Salisbury Brick Corp.</i> , 299 S.C. 141, 382 S.E.2d 915 (1989)	21–23
<i>Russell v. Columbia</i> , 305 S.C. 86, 406 S.E.2d 338 (1991)	15
<i>SSI Med. Servs., Inc. v. Cox</i> , 301 S.C. 493, 392 S.E.2d 789 (1990)	17
<i>Sturkie v. Sifly</i> , 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984).....	20
<i>T.L. Smith Co. v. Orr</i> , 224 F. 71 (8th Cir. 1915)	13
<i>Tex. & Pac. Ry. Co. v. Pottorff</i> , 291 U.S. 245 (1934).....	19
<i>Tourism Expenditure Review Comm. v. City of Myrtle Beach</i> , 403 S.C. 76, 742 S.E.2d 371 (2013)	13
<i>Toussaint v. Ham</i> , 292 S.C. 415, 357 S.E.2d 8 (1987)	15
<i>Watts v. Metro Sec. Agency</i> , 346 S.C. 235, 550 S.E.2d 869 (Ct. App. 2001).....	25
<i>Wolfe v. Wolfe</i> , 215 S.C. 530, 56 S.E.2d 343 (1949)	18

Statutes and Rules

S.C. Code	
§ 15-5-150	23–24
§ 15-65-10	2–3, 12

S.C. Rules of Civil Procedure	
Rule 8	25
Rule 9	21
Rule 12	1, 10, 13–14, 21, 23–25
Rule 14	1, 10, 24

Other Authorities

Appointment Order, <i>Park et al. v. Armstrong Int’l, Inc. et al.</i> , No. 2021-CP-4002727 (Mar. 17, 2023)	3–4, 11–12, 23
Michele Hughes, 1A C.J.S. Accounting § 6 (2023)	22–23
Order of the S.C. Supreme Court 2019-05-28-02 (May 28, 2019)	11
6C Charles A. Wright & Arthur R. Miller, <i>Fed. Practice & Proc.</i> § 1460	24

Third-Party Plaintiff Peter D. Protopapas, as duly appointed receiver for Cape PLC (the “Receiver” or “Receivership”), by and through undersigned counsel, hereby submits this omnibus response in opposition to certain motions to dismiss filed pursuant to Rules 12(b)(1) and 12(b)(6), and Rules 12(e) and 14 in the alternative, by certain Third-Party Defendants, including (i) Mohed Altrad and the Altrad Investment Authority S.A.S. (“AIA”) (together, “Altrad”) and (ii) Central Mining and Investment Corporation Ltd. (“Central Mining”), Charter Consolidated Ltd. (“Charter”), and ESAB Corporation (together, the “Charter Third-Party Defendants”). Because the Receiver has stated viable claims for relief, and because this case is properly pending before this Court, these motions should be denied.

INTRODUCTION

This case involves an ongoing scheme perpetuated by or inuring to the benefit of Third-Party Defendants that is many decades old, and that continues to deprive South Carolina citizens of critical assets and financial resources to redress the scourge of asbestos-related disease caused by Third-Party Defendants. In conjunction with myriad other motions, certain Third-Party Defendants—namely, Altrad and the Charter Third-Party Defendants—have moved to dismiss this third-party action for lack of subject matter-jurisdiction and on the basis that the Third-Party Complaint fails to state a claim.

Specifically, on September 1, 2023, multiple motions to dismiss were filed pursuant to Rules 12(b)(1) and 12(b)(6), with relief requested in the alternative under Rules 12(e) and 14, by Central Mining, Charter, and ESAB Corporation (as part of motions primarily asserting personal-jurisdiction challenges under Rule 12(b)(2), with these arguments asserted in the alternative) and Mohed Altrad and the Altrad Investment Authority S.A.S. (as a standalone motion, which also

asks in the alternative for a more definite statement and to strike or sever). As explained below, the arguments raised in those motions lack merit, and therefore, the motions should be denied.¹

FACTUAL AND PROCEDURAL BACKGROUND²

I. This Court Appointed the Receiver to Address Cape’s Decades-Long Conduct.

On June 4, 2021, Isabella Park initiated an asbestos personal-injury lawsuit (“Park Lawsuit”) against certain defendants, including Cape PLC, individually and as successor in interest to Cape Asbestos Company Ltd. *See* Compl., *Park v. Armstrong Int’l, Inc. et al.*, No. 2021-CP-4002727 (June 4, 2021), at 1, 7. Ms. Park sought relief after being “diagnosed with mesothelioma caused by exposure to asbestos dust and fibers,” which were unintentionally “brought home” for years “as a result of her husband’s work with and around asbestos-containing products.” *Id.* ¶ 4.

On June 9, 2021, less than five months from her diagnosis, and only five days after filing her lawsuit, Ms. Park passed away. Her son Keith then amended the complaint, individually and as personal representative to Ms. Park’s estate (the “Park Plaintiffs”), to assert a wrongful-death action on November 17, 2021. *See* First Amended Compl., *Park et al. v. Armstrong Int’l, Inc. et al.*, No. 2021-CP-4002727 (Nov. 17, 2021). In so doing, the amended complaint added Cape Intermediate Holdings Limited (f/k/a Cape Intermediate Holdings PLC) as a defendant, apart from

¹ For the Court’s convenience, the Receiver submits a single omnibus brief in response to these motions to dismiss in an effort to streamline the number of filings before the Court. Moreover, because the Charter Third-Party Defendants purport to incorporate by reference, adopt, and rely upon the arguments raised by Altrad (*e.g.*, Central Mining Mot., at 7 n. 27), this omnibus response addresses primarily the arguments posed in Altrad’s motion, while addressing as appropriate any unique points asserted by the Charter-Third Party Defendants.

² For a more detailed background on the asbestos suits underlying the Third-Party Complaint and the Court’s appointment of a receivership for Cape PLC under S.C. Code §§ 15-65-10(4) and (5), the Receiver refers the Court to, and incorporates by reference, the “Factual and Procedural Background” section in the omnibus opposition to Third-Party Defendants’ motions to dissolve.

Cape PLC, with both defendants (together, “Cape”) identified as successors in interest to Cape Asbestos Company Ltd. *Id.* at 9; *see also id.* ¶¶ 26–27 (describing Cape’s business).

In December 2021, the Park Plaintiffs served the complaint and summons on both Cape PLC and Cape Intermediate Holdings Ltd.—identifying both “individually and as successors to Cape Asbestos Company Limited.” Ex. A to Notice of Filing of Omitted [sic] Exhibit, *Park et al. v. Armstrong Int’l, Inc. et al.*, No. 2021-CP-4002727 (Aug. 28, 2023), at 1–6, 12–13. Consistent with decades of litigation-avoidance practice, Cape never responded to that proceeding.

On March 6, 2023, the Park Plaintiffs filed a motion for “this Court to appoint a receiver over Cape PLC and its subsidiaries, affiliates, successors, and assigns.” Motion to Appoint Receiver, *Park et al. v. Armstrong Int’l, Inc. et al.*, No. 2021-CP-4002727 (Mar. 6, 2023), at 1. Consistent with Cape’s failure to respond to the Park Lawsuit, the Appointment Motion described Cape’s litigation-avoidance strategy—starting nearly 50 years earlier in the late 1970s and continuing—by which Cape “decided to simply accept default judgments in asbestos lawsuits [that] could not be enforced.” *Id.* at 1–2.

On March 17, 2023, pursuant to S.C. Code §§ 15-65-10(4) and (5), the Court appointed a receiver for Cape PLC, as successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.). *See Order, Park et al. v. Armstrong Int’l, Inc. et al.*, No. 2021-CP-4002727 (Mar. 17, 2023) (“Appointment Order”), at 1. Pursuant to the Appointment Order, and “pursuant to the South Carolina Law,” the Receiver has “power and authority fully administer all assets of Cape, 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”—in proper satisfaction of claims against Cape—“whatever they may be.” *Id.* The Appointment Order also authorized “rights, authority and powers

with respect to” Cape’s property, including to “obtain from any . . . third party, any financial records belonging to or pertaining to” Cape. *Id.* at 2.

II. The Receiver Has Asserted Third-Party Causes of Action.

Pursuant to the Appointment Order, the Receiver investigated Cape’s historical and current ownership and control and, from that diligence, identified three groups of entities (and one individual) responsible for the injuries caused in the United States over many decades by Cape or its litigation-avoidance scheme, *i.e.*, the “Oppenheimer,” “Charter,” and “Altrad” Third-Party Defendants. Accordingly, on June 30, 2023, the Receiver filed a Third-Party Complaint against them in an asbestos action filed against Cape PLC in April 2023 (*i.e.*, after the Appointment Order was entered). *See John and Margaret Tibbs v. 3M Company et al.*, No. 2023-CP-4001759.

In the Third-Party Complaint, the Receiver summarized the roles of these Third-Party Defendants over Cape’s history, for which the Receiver has asserted claims for unjust enrichment, constructive trust, alter ego and veil-piercing liability, and accounting. Although the allegations against each Third-Party Defendant are varied, the crux of the Third-Party Complaint (like the Appointment Order) is based on their roles in (i) creating, funding, or otherwise supporting Cape’s highly successful asbestos business for decades, despite knowing health hazards associated with Cape asbestos, and/or (ii) implementing and benefiting from Cape’s scheme to avoid liability in the United States for the devastating harm caused by that asbestos business, once Cape began to be sued.

While the Oppenheimer and Charter Third-Party Defendants bear historical responsibility for Cape’s conduct, *see, e.g.*, Third-Party Compl. ¶¶ 45–111, the Altrad Third-Party Defendants have adopted—and are currently responsible for—the continuation of Cape’s liability-avoidance scheme, by which Cape failed to respond to the Park Lawsuit, *see id.* ¶¶ 91, 112–119.

A. The Charter Third-Party Defendants are responsible for the implementation of Cape’s liability-avoidance scheme.

As alleged in the Third-Party Complaint, the Charter Third-Party Defendants—particularly, Central Mining and Charter, as now controlled by ESAB Corporation—were interwoven with Cape’s business at critical times in Cape’s history. Although that history is more fully summarized in the Third-Party Complaint, the key points are that (i) Central Mining, including its directors and officers associated with Wernher, Beit & Co., L. Breitmeyer & Co., and the so-called “Corner Hours Group,” operated and supported Cape at the company’s infancy, including when evidence of asbestos disease first became known, *see* Third-Party Compl. ¶¶ 45–53, 83, and (ii) near the height of U.S. demand for asbestos, Central Mining (after being acquired by the Oppenheimer business empire) was merged with two other companies to form Charter (also an instrumentality of the Oppenheimer empire), which dominated Cape’s management and operations during the 1970s, including when Cape first implemented its litigation-avoidance scheme, *id.* ¶¶ 54–55. Indeed, Cape’s continued operation was central to why the Oppenheimer created Charter in the first place, *i.e.*, to run Cape’s highly profitable asbestos business as Charter’s “principal industrial subsidiary,” while Charter also acted as a holding company for other Oppenheimer business interests and a “products-liability patsy” for asbestos-related health hazards that were well known to management but hidden from the public. *See id.* ¶¶ 56–69, 77–105.

For these reasons, asbestos plaintiffs have previously sought—with some success—to hold Charter and Central Mining liable for Cape’s unethical business practices. *See, e.g., Cameron v. Owens-Corning Fiberglas Corp.*, 296 Ill. App. 3d 978, 989 (1998) (“Plaintiffs have alleged a conspiracy with sufficient specificity to provide the circuit court with jurisdiction over Charter.”); *Craig v. Johns-Manville Corp.*, 1987 WL 10191, at *18 (E.D. Pa. Apr. 23, 1987) (predicting that “on the present record, the New Jersey Supreme Court would not hesitate to pierce the ‘diaphanous

veil’ between Charter and Cape”), *rev’d*, 843 F.2d 145, 150 (3d Cir. 1988) (on appeal, contradicting the trial judge’s assessment and myopically interpreting Cape’s history to find that “evasion of tort liability has never, in itself, been sufficient basis to disregard corporate separateness” under N.J. law); *Paravati v. Bell Asbestos Mines, Ltd.*, 1986 WL 492, at *1 (E.D. Pa. Dec. 3, 1986) (denying Charter’s motion for partial summary judgment because “the case in its current posture has disputed issues of material fact”); *Parker v. Bell Asbestos Mines, Ltd.*, 607 F. Supp. 1397, 1404 (E.D. Pa. 1985) (“[I]f the plaintiff . . . can prove that Charter controls Cape, and that Cape has deliberately avoided liability to American plaintiffs, it will be fair to ask Charter to stay and defend Cape’s position.”); *Barber v. Pittsburgh Corning Corp.*, 464 A.2d 323, 328–29 (Pa. Super. Ct. 1983) (finding that “the record shows clearly the extent to which [Cape] comprises an operating arm of Charter”).³

Subsequently, the Oppenheimer empire *appears* to have fully divested its interests in Charter and Central Mining (though only discovery can confirm if and when those interests were fully divested), which remain well-capitalized, but have been part of various corporate reorganizations and transactions in recent years, with ESAB Corporation currently acting as their parent company and successor in interest. *See* Third-Party Compl. ¶¶ 112, 123–24.

³ As selectively cited in the motions, dismissals of Charter in prior lawsuits are wholly non-precedential here and distinguishable from the facts alleged in this third-party action, which is still at an early stage in the proceeding. *See Culbreth v. Amosa (Pty.) Ltd.*, 898 F.2d 13, 14–15 (3d Cir. 1990) (affirming summary-judgment dismissal of alter ego claim under Pennsylvania law on an apparently bare record showing only that Charter became Cape’s majority owner in 1969); *Mohn v. Int’l Vermiculite Co.*, 498 N.E.2d 375, 376–77 (Ill. App. Ct. 1986) (declining to reverse ruling that “Charter was [not] estopped from relitigating its relationship with Cape”).

B. Altrad is responsible for continuing Cape’s liability-avoidance scheme.

In contrast to Charter and Central Mining, Altrad is a relative newcomer to the Cape liability-avoidance scheme. *See* Third-Party Compl. ¶¶ 91, 112–119.⁴ The Altrad Group was founded by Mohed Altrad in the 1980s and has since grown substantially with several corporate acquisitions, all now directly or indirectly under the control of the Altrad Investment Authority S.A.S. (“AIA”), for which Mr. Altrad owns 77.45% of the shares. *See* Altrad 2022 Annual Report, at 71 (Feb. 9, 2023), https://newsmanager.altrad.com/files/altrad-group/news/2023/02/09_annual-report-2022/annual-report_2022_en_double_br-min.pdf. In 2017, Altrad acquired Cape—reportedly for £332 million⁵—through a corporate intermediary, Altrad UK Ltd., which (i) was incorporated in June 2017 for the specific purpose of acquiring Cape, (ii) acts as a “wholly owned subsidiary of AIA [that has been] financed by AIA through a current account,” and (iii) also “proceeded to refinance Cape’s debt” as part of the acquisition. Ex. 1, Altrad 2017 Annual Report (June 6, 2018), at 42. After the acquisition, certain Cape entities were rebranded with the Altrad

⁴ The Receiver submits that the Third-Party’s complaint allegations properly pleads allegations regarding Altrad’s current control of Cape and role in Cape’s litigation-avoidance scheme, including with respect to the Park Lawsuit. The following background of Altrad’s acquisition of Cape are consistent with and supplements those allegations, which will be further supported by discovery in this litigation.

⁵ Although a substantial sum, the Altrad Group has also spent **many** millions of dollars on relatively frivolous expenditures in the corporate name (*i.e.*, Mr. Altrad’s name), including signing in 2021 a **\$120 million** sponsorship deal with the New Zealand national rugby team known as the “All Blacks,” described as one of the “richest in the game’s history,” apart from sponsoring the French national team and club teams as well. *Rugby: French Billionaire Mohed Altrad Reveals Hidden Detail in Massive All Blacks Sponsorship Deal*, New Zealand Herald (Aug. 30, 2021), <https://www.nzherald.co.nz/sport/rugby-french-billionaire-mohed-altrad-reveals-hidden-detail-in-massive-all-blacks-sponsorship-deal/TN4ZPRCLR7JMQD5T2P5DZAONLM/>; *see also* Greg Hadley, *How New Zealand Rugby’s Haka Dance Is South Carolina Basketball’s New Inspiration*, The State (Nov. 13, 2018), <https://www.thestate.com/sports/college/university-of-south-carolina/usc-mens-basketball/article221631490.html> (reflecting the global reach of the All Blacks rugby team sponsored by Altrad, including in South Carolina).

name, as now Cape is Altrad. *See* Third-Party Compl. ¶ 116 (referencing Altrad Services Ltd., f/k/a Cape Industrial Services Ltd.).

Since the 2017 acquisition, moreover, Altrad has repeatedly touted the importance of Cape to the Group. As Mr. Altrad explained at the time, Cape was:

fully aligned with [Altrad’s] growth strategy, to become the world leader in the provision of industrial services, scaffolding solutions and light construction equipment in the civil and industrial sectors. Altrad and Cape have strong complementary in geographic and product mix enabling the creation of a multi-disciplinary industrial services leader in key markets around the world. We believe the proposed acquisition can bring together our respective strengths to create a powerful global platform with a strong competitive edge to meet customers’ requirements.

Charlie Schouten, *Altrad in £332m Cape Takeover Bid as Nexus Plans IPO*, Construction News (July 7, 2017), <https://www.constructionnews.co.uk/sections/news/altrad-in-332m-cape-takeover-bid-as-nexus-plans-ipo-07-07-2017/>.

Altrad has continued to describe the Cape acquisition as “transformative” and providing to Altrad “the platform to become the global industrial services leader that it is today.” Ex. 2, Altrad News Release, *Q3 Trading Update: Benefiting from Cost Synergies and Growth Opportunities* (Aug. 1, 2018). Specifically, the integration of Cape was valuable to the Altrad Group by (i) “represent[ing] a successful stride towards [Altrad’s] strategy of building an international leader in industrial services”; (ii) “leveraging . . . cost synergies”; (iii) “benefitting from cross-selling opportunities” with other Altrad entities; and (iv) “giving the Group exposure to both mature and emerging markets,” with the “core benefit of the Cape acquisition [being] the diversification of the Group’s sectors and markets,” while also “reinforc[ing] market leading positions in key

geographies and widen[ing] the range of services that the company provides to its global blue-chip client base.” *Id.*

Even this year—after service of the Park Lawsuit was flouted—Cape was touted by Altrad as a “major acquisition[.]” that was part of the Group’s “proven track record for acquisition, integration and transformation,” which “provide[s] a template for the smooth integration of . . . [other] acquisitions” into the Altrad Group. Ex. 3, Altrad 2022 Annual Report (Feb. 9, 2023), at 32. As Altrad has publicized, the Group has “already realiz[ed] the benefit of synergies, new opportunities and a growing order book resulting from the [Cape] acquisition[.]” *Id.*⁶

Consistent with these public statements, the Third-Party Complaint named several entities (and Mr. Altrad) as “successors in interest to Cape and its numerous subsidiary and affiliated entities, or beneficiaries from Cape’s liability-avoidance scheme, or both, and [were] collectively referred to as the ‘Altrad Third-Party Defendants.’” Third-Party Compl. ¶ 119.⁷ Since those Third-Party Defendants were served, moreover, two subgroups have emerged in this litigation: (i) five

⁶ See also, e.g., Company News, *Generation Hire & Sale Welcomes Cape to the Altrad Group of Families* (Sept. 14, 2017), <https://www.altradgeneration.com/en-gb/news/generation-welcomes-cape-altrad-group-families/> (noting that Cape had been a customer of certain Altrad companies “for both scaffolding and training services,” and “[t]he inclusion [of Cape] within the group means we can build on that relationship to better serve the oil, gas and energy industries”); Company News, *Altrad Combines Cape PLC, NSG and Hertel to Create UK’s Largest Industrial Service Provider* (Sept. 10, 2018), <https://www.altrad.com/en/newsreader/altrad-combines-cape-plc-nsg-and-hertel-to-create-uks-largest-industrial-service-provider.html> (noting use of Cape to “offer something truly unique to our customers” that was “future-proofing [the] business”); Ex. 4, Altrad 2019 Annual Report (Dec. 30, 2019), at 76 (stating that “the acquisition[.] of . . . Cape in 2017 increased the size of the Group and represent[ed] a leap forward in terms of quality and quantity”); Ex. 5, Altrad 2018 Annual Report (Jan. 8, 2019), at 28 (“The acquisition[.] of . . . Cape (2017) ha[s] profoundly transformed the Group and the markets it serves . . .”).

⁷ The Receiver originally named The Law Debenture Corporation PLC (“Law Debenture”) as an Altrad Third-Party Defendant, based on public information suggesting that it was a “Person with Significant Control” of Cape as of 2016. See Third-Party Compl. ¶ 113. After receiving additional information from Law Debenture’s counsel regarding the nature of its “control,” which was based on representing the interests of certain persons in the United Kingdom also injured by Cape asbestos, the Receiver dismissed Law Debenture on August 21, 2023, without prejudice.

Altrad Third Party Defendants, including Mr. Altrad and AIA who are responsible for the motions to dismiss at issue, and (ii) seven Altrad Third-Party Defendants—including Altrad UK. Ltd.—which appear to be acting in unison with Cape’s liability avoidance scheme and have failed to respond to the Third-Party Complaint, despite being served pursuant to Article 10 of the Hague Convention. Of the seven defaulting Altrad Third-Party Defendants, five of them—including Altrad UK Ltd.—share the same registered office address as Cape PLC, n/k/a Cape Intermediate Holdings Ltd., in Warrington, England at 6-7 Lyncastle Way Barleycastle Lane, Appleton Thorn Trading Estate. And one of those defaulting entities—Altrad UK Ltd.—has been acknowledged by counsel for Mr. Altrad and AIA to also be represented by them as well. *See* Ex. 6.

C. Altrad and the Charter Third-Party Defendants filed the motions at issue.

Appearing to advocate on behalf of Cape, Altrad, as well as the Charter Third-Party Defendants, have filed multiple motions to dismiss this third-party action pursuant to Rules 12(b)(1) and 12(b)(6) and, in the alternative, for relief under Rules 12(e) and 14 (while also filing a litany of motions on other grounds not addressed in this omnibus opposition).⁸ As explained below, those motions lack merit and should be denied.

ARGUMENT

I. The Court Has Subject-Matter Jurisdiction Over This Third-Party Action.

A. South Carolina law requires this Court to have subject-matter jurisdiction.

Under Rule 12(b)(1), SCRCPP, a party assert a defense based on a Court’s “lack of jurisdiction over the subject matter.” “A court’s subject matter jurisdiction is determined by whether it has the authority to hear the type of case in question.” *Baddourah v. McMaster*, 433 S.C. 89, 96, 856 S.E.2d 561, 565 (2021) (quoting *Allison v. W.L. Gore & Assocs.*, 394 S.C. 185,

⁸ Notably, none of the Oppenheimer Third-Party Defendants has moved, like Altrad and the Charter Third-Party Defendants, for dismissal under Rules 12(b)(1) or 12(b)(6), SCRCPP.

188, 714 S.E.2d 547, 549 (2011)). In turn, South Carolina Supreme Court Order 2019-05-28-02 states explicitly, “IT IS ORDERED that the Honorable Jean Hoefer Toal, retired Chief Justice of the Supreme Court, is hereby appointed to serve as the Chief Judge for Administrative Purposes over all asbestosis and asbestos litigation filed within the state court system.”

B. The relevant Cape entity was properly served and put into receivership.

Repeating a prominent argument of Altrad in its motions to dissolve the Receivership, Altrad challenges this Court’s subject-matter jurisdiction based on the fact that an entity named “Cape PLC”—a holding company recently organized in 2011 for tax reasons in the Bailiwick of Jersey—was not served in the Park Lawsuit. Thus, according to Altrad, this Receivership and the third-party claims cannot proceed.

As explained in the omnibus opposition to those motions to dissolve, this argument is a red herring.⁹ Until Altrad raised this point (*i.e.*, in support of its motions for premature dismissal of this third-party action), one continuously running corporation had consistently been put at issue and into receivership—*i.e.*, Cape PLC (from 1989–2011), n/k/a Cape Intermediate Holdings Ltd. (from 2013 to present), originally known as Cape Asbestos Company Ltd. at its founding in 1893, when organized under English law.

Accordingly, this argument that the Court lacks subject-matter jurisdiction has no merit.

C. The Receiver was lawfully appointed and has authority to bring this action.

Altrad also repeats arguments, as briefed separately in its multiple motions to dissolve the Receivership, that the Court’s Appointment Order in the Park Lawsuit was unlawful, and thus the Receiver has no authority to bring this third-party action. Likewise, the Charter-Third Party

⁹ Arguments in that separately filed omnibus opposition to motions to dissolve are incorporated by reference herein.

Defendants argue that the Receiver, in asserting this action, is exceeding his authority under the Appointment Order and South Carolina law.

As explained more fully in the omnibus opposition in response to those motions to dissolve, this argument is without merit and does not warrant dismissal of the claims. The Receiver is authorized to bring this third-party action pursuant to his appointment under S.C. Code § 15-65-10, including pursuant to subsection (5), which does not require any prior determination of liability or damages judgment, as Altrad incorrectly asserts. There is simply no basis under South Carolina law—and Altrad cites none—that this claim is an impermissible “self-piercing” in which the Receiver is “suing itself.”¹⁰ Rather, the Receiver has pleaded multiple viable claims regarding the roles of the Third-Party Defendants in the asbestos liability-avoidance scheme that precipitated this Receivership in the first place, and which the Receiver is entitled to investigate further.

D. No advisory opinion is sought in this action.

There is also no merit to Altrad’s and the Charter Third-Party Defendants’ assertion that the Court should dismiss the Third-Party Complaint because it seeks an impermissible advisory opinion. Although there has not been a ruling that Cape is liable to the Tibbs Plaintiffs, and thus that Third-Party Defendants are also liable for that amount, the Third-Party Defendants ignore that,

¹⁰ The out-of-jurisdiction authorities cited by Altrad in support of this argument (i) do not, in fact, support dismissal here, (ii) are distinguishable in multiple ways, and/or (iii) are non-binding. *See, e.g., InterGen N.V. v. Grina*, 344 F.3d 134, 149 (1st Cir. 2003) (stating that the alter ego doctrine under federal common law can be “invoked only where equity requires the action to assist a third party,” and is particularly applicable when the corporate form, as here, “is used to defeat an overriding public policy”); *In re RCS Eng’rd Prods. Co., Inc.*, 102 F.3d 223, 226 (6th Cir. 1996) (“[C]ourts apply the alter ego theory and disregard a company’s separate corporate identity for the benefit of third parties, *e.g.*, creditors of the corporation, who would suffer an unjust loss or injury unless the shareholders or the parent corporation were held liable for the subsidiary’s debts.”); *BNP Paribas Mortg. Corp. v. Bank of Am., N.A.*, 949 F. Supp. 2d 486, 501 (S.D.N.Y. 2013) (rejecting argument in non-receivership context that a bank had to sue itself pursuant to a contractual term, which was deemed by the court to be a commercially unreasonable expectation).

due to Cape’s avoidance scheme, (i) Cape does not even contest its liability, and (ii) there are no assets available to the Receiver to pay for that liability or defense, or to even assess the ultimate merits of the claim (apart from its facial plausibility). Indeed, while positing that the Receiver “has hired counsel to defend Cape PLC and presumably the lawyer is fulfilling its [purported] obligation to defend the company to the fullest and avoid imposition of any liability,” Altrad glosses over the fact that—due to the Cape avoidance scheme—the Receiver is unable to pay for any such defense, and its primary task is to marshal assets for the creditors harmed by Cape. *Cf. T.L. Smith Co. v. Orr*, 224 F. 71, 73 (8th Cir. 1915) (a receiver “is appointed on the petition of a creditor for the benefit of the creditors, and is in fact their representative far more than he is the representative of the debtor”). Rather than seek “mere guidance,” the Receiver seeks discovery and a determination—based on the facts that have been alleged and will be presented further with evidence—that Third-Party Defendants have benefited from the Cape liability-avoidance scheme, while injured individuals remain uncompensated. This presents a real and substantial controversy for the Court’s resolution.

Accordingly, dismissal on this basis also lacks merit.¹¹

II. The Receiver Has Adequately Pleaded Each Cause of Action.

Altrad (and secondarily, the Charter Third-Party Defendants) argues that the Receiver has failed to properly plead any claim, and thus moves for dismissal under Rule 12(b)(6) for “failure

¹¹ The authorities cited by Third-Party Defendants as supporting their argument that this action asks for an impermissible advisory opinion—in reality—offer no such support. *See, e.g., Richland Cnty. Sch. Dist. 2 v. Lucas*, 434 S.C. 299, 307, 862 S.E.2d 920, 924 (2021) (declining to give “advisory guidance as to [the school district]’s options and obligations regarding virtual education”); *Tourism Expenditure Review Comm. v. City of Myrtle Beach*, 403 S.C. 76, 82, 742 S.E.2d 371, 374 (2013) (dismissing declaratory action with respect to governmental expenditures because the law provided “[n]o case or controversy exists outside [a defined] statutory process”); *Booth v. Grissom*, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975) (finding appeal did not present a justiciable issue given the tax levy at issue had ended and new legislation enacted); *McDill v. Nationwide Mut. Ins. Co.*, 368 S.C. 29, 31–32, 627 S.E.2d 749, 750 (Ct. App. 2006) (finding no

to state facts sufficient to constitute a cause of action.” Those arguments, however, are based on a wholly misleading premise that AIA and Mr. Altrad have nothing to do with Cape and its pattern of liability avoidance. Indeed, as detailed above, Altrad has repeatedly touted the benefits it has received by acquiring and integrating Cape into the Altrad Group, such that now ***Cape is Altrad and Altrad profits from Cape***. And because Cape is Altrad’s wholly owned subsidiary—indirectly through Altrad UK Ltd., which has refused to appear—Altrad is ***currently responsible*** for the perpetuation of the liability-avoidance scheme, including Cape’s failure to respond to the Park Lawsuit that precipitated this Receivership in the first place. Thus, there is no basis to the assertion that there are “no allegations” of why or how Mr. Altrad and AIA should be liable for Cape.

With that self-serving, factual premise corrected, which also cannot be credited for the purpose of deciding the pending motions (because it conflicts with what the Third-Party Complaint alleges), the Receiver has properly pleaded each of the four causes of action against the Altrad Third-Party Defendants, as well as against the Charter Third-Party Defendants.

A. The legal threshold to survive a challenge under Rule 12(b)(6) is low.

“[A] judgment on the pleadings is considered to be a drastic procedure by our courts. . . . Therefore, pleadings in a case should be construed liberally . . . so that substantial justice is done between the parties.” *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). Although Rule 12(b)(6) provides that a complaint may be dismissed for “failure to state facts sufficient to constitute a cause of action,” in evaluating such a motion, a court “must presume all well pled facts to be true” and “should not dismiss the complaint merely because the court doubts the plaintiff will prevail in the action.” *HHHunt Corp. v. Town of Lexington*, 389 S.C. 623,

need to determine liability of insurer where relevant party in underlying action had already been found to have no liability, thereby mooting the need to address insurance).

633, 699 S.E.2d 699, 704 (Ct. App. 2010). The motion cannot be granted “if facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case.” *Brown v. Leverette*, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987) (emphasis added). “All properly pleaded factual allegations are deemed admitted for the purposes of considering a motion for judgment on the pleadings.” *FOC Lawshe Ltd. P’ship v. Int’l Paper Co.*, 352 S.C. 408, 413, 574 S.E.2d 228, 230 (Ct. App. 2002) (citing *Russell v. Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991)). Thus, the question to be considered is “whether in the light most favorable to plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.” *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987).

B. The unjust-enrichment claim is properly pleaded.

Based on the benefits that inured to Altrad and the Charter Third-Party Defendants from Cape, the Receiver has adequately pleaded an unjust-enrichment claim, with which the Receivership is entitled to restitution for “(1) a benefit conferred by [Cape PLC] upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value.” *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 257, 715 S.E.2d 348, 356 (Ct. App. 2011) (citation omitted). Under this equitable doctrine, the plaintiff is permitted recovery of the amount that “the defendant has been unjustly enriched at the expense of the plaintiff.” *Id.*

The Third-Party Complaint alleges in detail how the Third-Party Defendants, including their predecessors in interest, “received a non-gratuitous benefit from Cape as a result of the liability-avoidance scheme”—which Charter Third-Party Defendants planned, and which Altrad continues to support—and by adopting business practices that left Cape’s American entity (NAAC) woefully undercapitalized, to the benefit of Cape’s shareholders and to the detriment of

people sickened by Cape’s asbestos. *See* Third-Party Compl. ¶ 127. From this, an unjust-enrichment claim is properly pleaded.

First, the Charter Third-Party Defendants, while they still controlled Cape, (i) received higher profits, with cash received as dividends or value through other transactions, *see* Third-Party Compl. ¶¶ 60–65, 79, 95, and (ii) avoided liability, as Cape was the focus of asbestos-related litigation, *id.* ¶¶ 80, 91, 94, 97, 102, 105–06. In turn, from Cape’s continued operation as a solvent company in the United Kingdom—because its liabilities have been evaded—Altrad found an ostensibly perfect bedfellow for its expansive corporate ambitions. *Id.* ¶¶ 116–19. (*See also supra* Factual and Procedural Background § II.B.)

Second, the Third-Party Defendants have realized substantial benefit from that benefit conferred—to wit, substantial tangible assets, including cash paid as dividends and otherwise—making Third-Party Defendants more valuable. For example, as Charter’s principal industrial subsidiary, Cape was critical to Charter’s profitability and, indeed, why Charter was even created in 1965 and allowed to continue as a “products-liability patsy” for the broader Oppenheimer business empire. *See* Third-Party Compl. ¶¶ 55–69 (describing the relative roles of Cape and Charter as part of the Oppenheimer empire), ¶¶ 82–88 (describing the known risks of asbestos), ¶ 95 (noting how Cape’s American subsidiary continued to earn record profits at the time the decision was made to liquidate). In turn, although Altrad baldly claims that “none of the Altrad Defendants have been enriched in any way from Cape PLC,” that assertion is starkly contradicted by Altrad’s numerous public statements regarding Cape, including that Cape has been “transformative” to the Group and provided “the platform [for Altrad] to become the global industrial services leader that it is today.” Ex. 2, Altrad News Release, *Q3 Trading Update*:

Benefiting from Cost Synergies and Growth Opportunities (Aug. 1, 2018) (emphases added); *see also* Third-Party Compl. ¶ 128 (alleging Altrad “realized substantial monetary value”).

Third, the inequity from the Third-Party Defendants’ retention of any benefit received is legally repugnant, on its face, in light of Cape (i) marketing asbestos, increasing its demand, and supplying asbestos throughout the United States, including in South Carolina, *id.* ¶¶ 45–47, 51–53, 69–72, 86–87, (ii) despite knowing of the significant health hazards associated with asbestos, given Cape’s incipient role in the trade, *id.* ¶¶ 81–88, and (iii) while systematically ignoring the ocean of unaddressed harms in the United States resulting from Cape’s business, *id.* ¶¶ 105, 114. On its face, “[i]t would be inequitable for these Third-Party Defendants to retain any such benefit without paying the Receiver for its value,” and the “proper and appropriate remedy under the circumstances here is for the Court . . . to require that each of the . . . Third-Party Defendants to return funds that have been wrongfully diverted from meeting obligations and responsibilities in the United States, in an amount to be proven at trial.” *Id.* ¶¶ 129–30.

Accordingly, the Receiver has properly pleaded an equitable unjust-enrichment cause of action against the Third-Party Defendants.

C. The constructive-trust claim is properly pleaded.

The Receiver has also adequately pleaded a constructive-trust cause of action. Under South Carolina law, a “constructive trust arises whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it,” such “as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty.” *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 500, 392 S.E.2d 789, 793–94 (1990). “It is not essential for the application of this doctrine that an actual trust or fiduciary relation should exist between the original wrongdoer and the beneficial owner,” because “[w]henver one person ha[s]

wrongfully taken the property of another, and converted it into a new form or transferred it, the trust arises and follows the property or its proceeds.” *Wolfe v. Wolfe*, 215 S.C. 530, 535, 56 S.E.2d 343, 346 (1949).

The basis for a constructive trust has similar grounds, and is largely derived from, the separate cause of action for unjust enrichment, by which the Charter Third-Party Defendants received and Altrad continues to earn substantial monetary benefit from Cape’s asbestos schemes. Specifically, as alleged, Third-Party Defendants have been unjustly enriched and inequitably retained benefits due to acts of fraud, breaches of duty, or other circumstances for which they are responsible. *E.g.*, Third-Party Compl. ¶ 132. The Third-Party Defendants “have taken possession of property—cash and other assets—which they should not have taken through the wrongful acts alleged” with respect to Cape’s liability avoidance scheme and asbestos business. *See id.* ¶ 133. Moreover, the “funds that they or their predecessors in interest have wrongfully diverted should have remained available to bodily-injury claimants in the United States, including in South Carolina, providing additional resources to meet Cape’s obligations to the tens of thousands of individuals harmed.” *Id.* ¶ 134. And in light of “false or misleading statements made by each of the . . . Third-Party Defendants, or their predecessors in interest, to hide the true nature of Cape’s unethical business practices and the known harms associated with its asbestos products, the funds would and should have been accessible to third-party claimants.” *Id.* ¶ 135. Thus, the “proper and appropriate remedy under the circumstances here is for the . . . Third-Party Defendants to return funds”—which on information in belief, have been invested in or inured to the benefit of the Third-Party Defendants’ U.S.-based entities—“that have been wrongfully diverted from meeting Cape’s obligations and responsibilities in the United States, in an amount to be proven at trial.” *Id.* ¶ 136.

Finally, there is no basis to any argument that this claim requires a fiduciary or special relationship with Cape and that such relationship does not exist here from the purportedly “arms-length commercial” relationships between the parties. These formally distinct entities have been bedfellows and alter egos in an ongoing scheme to evade responsibilities to people made sick by Cape asbestos. *See, e.g.*, ¶¶ 91, 116–19 (summarizing the acquisition of Cape by Altrad, a company dominated by one shareholder, and the continuation of liability avoidance). And where, as here, a third party receives assets fraudulently or illegally from a company now in receivership—thereby reducing what is available to claimants—the Receiver’s duty is “to take steps to set aside [those] transactions,” even if the company otherwise (*i.e.*, not in receivership) would “not [be] in a position to do so.” *Tex. & Pac. Ry. Co. v. Pottorff*, 291 U.S. 245, 261 (1934); *cf. also, e.g., Cobalt Multifamily Investors I, LLC v. Arden*, 46 F. Supp. 3d 357, 364 (S.D.N.Y. 2014) (stating that in “most states, the receiver of an insolvent corporation may sue to set aside fraudulent conveyances made by the corporation,” regardless of an otherwise available unclean-hands defense).

Accordingly, the Receiver has properly pleaded the constructive-trust cause of action against the Third-Party Defendants.

D. The alter ego and veil-piercing claim is properly pleaded.

The Receiver also properly pleaded an alter ego¹² and veil-piercing¹³ cause of action against Altrad and the Charter Third-Party Defendants. Indeed, the Receiver went to great efforts

¹² South Carolina recognizes the imposition of liability under an “alter ego” theory based on a factual assessment of several factors, including: (i) common ownership; (ii) financial dependence; (iii) the degree of selection of executive personnel and failure to observe corporate formalities; and (iv) the degree of control over marketing and operational policies. *H&W Elec. Corp. v. Atlantic Workforce Inc.*, 2022 WL 18495840, at *3 (D.S.C. Sept. 28, 2022); *see also Oskin v. Johnson*, 400 S.C. 390, 400, 735 S.E.2d 459, 465 (2012) (“requir[ing] a showing of (1) total domination and control of one entity by another and (2) inequitable consequences caused thereby”).

¹³ South Carolina recognizes attaching “veil-piercing” liability to a shareholder through a two-part test involving, *first*, an eight-factor analysis of the shareholder's relationship to the corporation

to show the various overlaps of operations, control, and organization that connect Cape with the Third-Party Defendants, which justify treating them as the same and recognizing that the “damages alleged against Third-Party Plaintiff in the Asbestos Suits resulted from the actions of Third-Party Defendants or their predecessors in interest, which dominated, controlled, facilitated, or benefited from Cape’s successful asbestos business and liability-avoidance scheme.” Third-Party Compl. ¶ 141. Thus, “the proper and appropriate remedy under the circumstances here is for the Court to declare that the Third-Party Defendants are alter egos of [Cape] and thereby liable” to the Receiver for asbestos-related suits naming Cape as a defendant. *Id.*

Although “a legitimate purpose for forming a corporation is to limit individual liability for the corporation’s obligations,” *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 655, 817 S.E.2d 273, 280 (2018), Cape was not—and still is not—operated in a legitimate manner where such a corporate divide should be recognized. Indeed, although Altrad cites certain decisions purportedly cautioning the use of an alter ego or veil-piercing theory, those decisions in fact support the application of those doctrines to the Third-Party Defendants here.¹⁴ Critically, this case

and, *second*, proof of an element of injustice or fundamental unfairness if the acts of the corporation are not regarded as the acts of the equity owners. *H&W Elec. Corp.*, 2022 WL 18495840, at *3. For the first step, the eight factors are: (i) whether the corporation was grossly undercapitalized; (ii) failure to observe corporate formalities; (iii) non-payment of dividends; (iv) insolvency of the debtor corporation at the time; (v) siphoning of funds of the corporation by the dominant stockholder; (vi) non-functioning of other officers, directors, or stockholders; (vii) absence of corporate records; and (viii) the fact that the corporation was merely a façade for the operations of the dominant stockholder. *Id.* And for the second step, to prove fundamental unfairness, the plaintiff must establish that: (i) the defendant was aware of the plaintiff’s claim against the corporation, and (ii) thereafter, the defendant acted in a self-serving manner with regard to the property of the corporation and in disregard of the plaintiff’s claim in the property. *Id.*

¹⁴ See, e.g., *Sturkie v. Sifly*, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct. App. 1984) (recognizing that veil piercing is appropriate “when the notion of legal entity is used to protect fraud, justify wrong, or defeat public policy”); *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008) (same, and also emphasizing that “each case must be decided on its own particular facts”); *Baker v. Equitable Leasing Corp.*, 275 S.C. 359, 367, 271 S.E.2d 596, 600 (1980) (“recogniz[ing] that the corporate fiction may be disregarded in the appropriate case”).

is **not** one based on allegations of liability related to “mere fact of [majority] ownership” of a subsidiary. *Builder Mart of Am., Inc. v. First Union Corp.*, 349 S.C. 500, 508, 563 S.E.2d 352, 356 (Ct. App. 2002). Rather, the control of Cape by its current and historical owners, in order to profit from a company selling a product that they uniquely knew to be dangerous, while making every effort to escape liability in the United States, constitutes a misuse of control “resulting in injustices or inequitable consequences” that this action seeks to remedy. *Peoples Fed. Sav. & Loan Ass’n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 148–49, 425 S.E.2d 764, 774 (Ct. App. 1992).

In addition, there are more than sufficient allegations for this Court to conclude that the groups of Third-Party Defendants, at least at one time, “actually operate[d] as a single business enterprise, and thus should be treated as a single entity.” *Pertuis*, 423 S.C. at 650, 817 S.E.2d at 278. Treating them as separate, and allowing Cape’s liability to continue unaddressed—as certain Third-Party Defendants suggest that this Court do—“would defeat justice,” in light of the “evidence of bad faith, abuse, fraud, wrongdoing, or injustice” that has been alleged. *Id.*, 423 S.C. at 653, 655, 817 S.E.2d at 279, 281.¹⁵

Accordingly, this cause of action should move forward as well.¹⁶

E. The accounting claim is properly pleaded.

The Receiver’s claim for accounting also meets the minimal pleading standards under South Carolina law. Accounting is a flexible equitable remedy, appropriate in varied contexts, including (i) “to prevent unjust enrichment by disclosing and requiring the relinquishment of

¹⁵ Even assuming “heightened pleading requirements” under Rule 9, SCRCPP, apply to this claim—as Altrad asserts without any authority in support (*see also infra* n.17)—“circumstances constituting fraud” have been sufficiently pleaded in light of the unethical business practices and avoidance schemes alleged to implicate the Third-Party Defendants.

¹⁶ The Receiver’s positions on veil-piercing and alter ego liability in the separately filed omnibus opposition to motions to dismiss filed under Rule 12(b)(2) are incorporated by reference herein.

profits received as the result of a breach of a confidential or fiduciary duty,” (ii) “in actions involving long and complicated accounts where it would not be practicable for a jury to comprehend the issues and correctly make adjustment,” and (iii) “when there is a need for discovery.” *Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 144, 382 S.E.2d 915, 917 (1989). Indeed, accounting is particularly appropriate where, as here, there is a need for discovery regarding information within the “exclusive control” of a defendant. *Consignment Sales, LLC v. Tucker Oil Co.*, 391 S.C. 266, 273, 705 S.E.2d 73, 77 (Ct. App. 2010).

As alleged throughout the Third-Party Complaint, “this lawsuit involves an international, decades long scheme designed to profit from the sale of harmful asbestos fiber into the United States, including for use in South Carolina.” Third-Party Compl. ¶ 144. That scheme, moreover, “was intentionally designed to obfuscate the relationships between numerous, large corporations, and its direct purpose was to frustrate creditors and avoid liability, while retaining untold millions of dollars siphoned to foreign entities and individuals.” *Id.* ¶ 145. “Given this long, complex history, a full accounting of each of the Third-Party Defendants, including for any records related to the allegations herein, is appropriate for the purpose of discovery.” *Id.* ¶ 146.

Ignoring the broad-based nature and purpose of this cause of action, Altrad asserts that accounting is available in limited contexts and not appropriate here. Altrad is wrong. For one, Altrad misreads the law in asserting that accounting is appropriate as a claim only against persons that a fiduciary or confidential relationship with Cape. Although certain decisions state that “[a]n accounting *implies* the defendant” may have a contractual or fiduciary relationship with the plaintiff, the appropriate context for accounting is not so limited, and is often used in conjunction with other equitable claims (like have been asserted by the Receiver in this third-party action). *Consignment Sales, LLC*, 391 S.C. at 272, 705 S.E.2d at 77 (citing Michele Hughes, 1A C.J.S.

Accounting § 6 (2023)); *see also Rogers*, 299 S.C. at 144, 382 S.E.2d at 917 (noting that although accounting is designed to prevent unjust enrichment “received as the result of a breach of a confidential or fiduciary duty,” the claim “may also be invoked” in other contexts as a part of “[e]quitable jurisdiction”). Indeed, the Appointment Order makes clear that the Receiver has “rights, authority and powers with respect to” Cape’s property, including to “obtain from any . . . third party, any financial records belonging to or pertaining to” Cape—*i.e.*, a right enforceable as an accounting cause of action. Appointment Order, at 2

Moreover, even if such a contractual or fiduciary relationship is required between the parties to maintain a claim for accounting, the Third-Party Complaint pleads such a relationship between and among Cape and Third-Party Defendants, including Altrad, given their roles in perpetuating and benefiting from the Cape-liability avoidance scheme. An accounting is a proper remedy for obtaining discovery of those relationships further and assessing any amounts due.

Accordingly, the accounting cause of action should also be allowed to proceed.

III. The Litany of Other Arguments Likewise Lack Merit.

In their motions to dismiss, Altrad and the Charter Third-Party Defendants make several arguments in the alternative, apart from their challenges under Rules 12(b)(1) and 12(b)(6). In turn, each of those arguments is also invalid.

A. The South Carolina “Door Closing Statute” does not bar the Receiver from asserting the claims in the Third-Party Complaint.

There is no merit to the Charter Third-Party Defendants’ conclusory assertion that the so-called “South Carolina Door Closing Statute” bars claims against them. That statute, codified at S.C. Code § 15-5-150, “does not involve subject matter jurisdiction but rather determines the capacity of a party to sue.” *Farmer v. Monsanto Corp.*, 353 S.C. 553, 557, 579 S.E.2d 325, 327 (2003). Moreover, by its express terms, the statute authorizes the Receiver to bring this third-party

action, because (i) the Receiver is a “resident of this State,” and (ii) the “cause of action” has “arisen” in this State or has a “subject . . . situated within this State,” given the alleged harm caused to South Carolinians from exposure to Cape asbestos in this State.

Accordingly, the South Carolina Door Closing Statute does not require dismissal, but instead supports the Receiver’s capacity to assert the claims in the Third-Amended Complaint.

B. There is no basis for striking the claims or for a trial severance.

The Court should likewise deny the alternative requests for the Court to strike the third-party claims and/or to grant a severed, separate trial for Altrad and the Charter Third-Party Defendants. This third-party action under Rule 14(a) properly seeks third-party relief from parties that may be liable to satisfy all or part of claims against the Receiver, to the extent the claims result from Cape asbestos. Rather than the involvement of Altrad or the Charter Third-Party Defendants “complicat[ing] the litigation unduly,” or serving to “prejudice the other parties in any substantial way,” *Beach v. Hudson*, 398 S.C. 424, 426, 380 S.E.2d 869, 871 (Ct. App. 1989) (quoting 6C Charles A. Wright & Arthur R. Miller, *Fed. Practice & Proc.* § 1460), these parties are wholly necessary to this action, given their current or historical control of Cape and the continued liability-avoidance scheme. *See, e.g., First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 443, 445 S.E.2d 446, 448 (1994) (permitting third-party claim to proceed).

Accordingly, there is no basis for the relief requested under Rule 14.

C. The Third-Party Complaint provides fair notice of the claims.

There is also no basis for requiring the Receiver to issue a more definite statement of the claims. Pursuant to Rule 12(e), that argument would have merit only if the pleading was “so vague or ambiguous” that a party could not “reasonably be required to frame a responsive pleading.” Here, however, there are extensive and well-supported allegations of the Third-Party Defendants’ roles in, and benefits from, Cape’s asbestos business and litigation-avoidance scheme—even

though **no** discovery has been provided by the Third-Party Defendants to date. What has been alleged in the Receiver's initial pleading provides more than "fair notice" of the nature of the claims and the "ultimate facts" for which relief is sought. *Watts v. Metro Sec. Agency*, 346 S.C. 235, 240, 550 S.E.2d 869, 871 (Ct. App. 2001); *see also Carolina First Corp. v. Whittle*, 343 S.C. 176, 188, 539 S.E.2d 402, 409 (Ct. App. 2000) (referencing the "liberal pleading requirements of Rule 8, SCRCP," which do not "require[] particularized allegations").¹⁷

Accordingly, no further statement in support of the Receiver's claims is needed currently.¹⁸

CONCLUSION

For the foregoing reasons, the Court should deny Altrad's and the Charter Third-Party Defendants' motions to dismiss under Rules 12(b)(1) and 12(b)(6).

¹⁷ Decisions cited by the Charter Third-Party Defendants as suggesting a heightened pleading requirement in South Carolina do not in fact support that point. *See Paradis v. Charleston Cnty. Sch. Dist.*, 424 S.C. 603, 613, 819 S.E.2d 147, 153 (Ct. App. 2018), *rev'd*, 433 S.C. 562, 564, 861 S.E.2d 774, 775 (2021) (overruling precedent requiring pleading of special damages for a civil-conspiracy claim); *David v. McLeod Regional Med. Ctr.*, 367 S.C. 242, 249, 626 S.E.2d 1, 4 (2006) (noting at summary-judgment stage that more than "generic allegations and conjecture" are needed to support a medical malpractice claim); *see also Gaskins v. S. Farm Bur. Cas. Ins. Co.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000) (reversing dismissal of several claims, including based on the principle that "[t]o ensure substantial justice to the parties, the pleadings must be liberally construed").

¹⁸ Although claims are properly pleaded against each Third-Party Defendant, the Receiver would be willing to amend the Third-Party Complaint, and asks for leave to do so to add further factual and legal support for the Receiver's claims, in the alternative to dismissal of any cause of action against any Third-Party Defendant.

Dated: October 18, 2023
Columbia, South Carolina

GALLIVAN, WHITE & BOYD, P.A.

By: /s/ John T. Lay, Jr.
John T. Lay, Jr., SC Bar No. 64526
Gray T. Culbreath, SC Bar No. 11907
Lindsay A. Joyner, SC Bar No. 77437
Laura W. Jordan, SC Bar No. 100374
Eleanor L. Jones, SC Bar No. 104678
1201 Main Street, Suite 1200
PO Box 7368 (29202)
Columbia, SC 29201
jlay@gwblawfirm.com
gculbreath@gwblawfirm.com
ljoyner@gwblawfirm.com
ljordan@gwblawfirm.com
ejones@gwblawfirm.com
(803) 779-1833

Jonathan M. Robinson
Shanon N. Peake
SMITH | ROBINSON, LLC
2530 Devine Street, Third Floor
Columbia, SC 29205
jon@smithrobinsonlaw.com
shanonp@smithrobinsonlaw.com
(803) 254-5445

G. Murrell Smith, Jr.
SMITH | ROBINSON, LLC
PO Box 580
Sumter, SC 29151-0580
murrell@smithrobinsonlaw.com
(803) 778-2471

Troy S. Brown
Dana E. Becker
Vanessa M. Brown (*pro hac vice forthcoming*)
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
troy.brown@morganlewis.com
dana.becker@morganlewis.com
vanessa.brown@morganlewis.com
(215) 963-5000

Brady Edwards (*pro hac vice forthcoming*)

Robert W. Jacques
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue NW
Washington, DC 20004
brady.edwards@morganlewis.com
robert.jacques@morganlewis.com
(202) 739-3000

Paul A. Scrudato
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, NY 10178
paul.scrudato@morganlewis.com
(212) 309-6000

Attorneys for Third-Party Plaintiff

RECEIVED

Sep 10 2024

SC Court of Appeals

PROOF OF SERVICE

I, the undersigned of the law offices of Gordon Rees Scully Mansukhani, LLP, attorneys for Appellants Counsel for Appellants Charter Consolidated Ltd, ESAB Corporation, and Central Mining & Investment Corporation Ltd., 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): RETURN OF APPELLANTS CHARTER CONSOLIDATED, LTD., ESAB CORPORATION, AND CENTRAL MINING AND INVESTMENT CORPORATION LTD. TO MOTION TO DISMISS AND EXPEDITE (MODE OF TRIAL)

Parties Served:

John T. Lay, Jr. (jlay@gwblawfirm.com)
Gray T. Culbreath (gculbreath@gwblawfirm.com)
Lindsay A. Joyner (ljoyner@gwblawfirm.com)
Eleanor L. Jones (ejones@gwblawfirm.com)
Jonathan M. Robinson (jon@smithrobinsonlaw.com)
Shanon N. Peake (shanonp@smithrobinsonlaw.com)
G. Murrell Smith, Jr. (murrell@smithrobinsonlaw.com)
Troy S. Brown (troy.brown@morganlawis.com)
Dana E. Becker (dana.becker@morganlewis.com)
Brady Edwards (brady.edwards@morganlewis.com)
Robert W. Jacques (robert.jacques@morganlewis.com)
Paul A. Scrudato (paul.scrudato@morganlewis.com)

Counsel for the Receiver for Cape PLC

Theile B. McVey (tmcvey@kassellaw.com)
John D. Kassel (jkassel@kassellaw.com)
Jamie D. Rutkoski (jrutkoski@kassellaw.com)
Charles William Branham, III (tbranham@dobslegal.com)
Kevin W. Paul (kpaul@dobslegal.com)
David Christopher Humen (dhumen@dobslegal.com)

Counsel for Plaintiffs

James H. Elliott, Jr. (jelliott@richardsonplowden.com)
Cameron D. Berthelsen (cberthelsen@richardsonplowden.com)

Counsel for Co-Appellants AA/DB Non-US Third-Party Defendant

Steven J. Pugh (spugh@richardsonplowden.com)
Benjamin P. Carlton (bcarlton@richardsonplowden.com)
Carmen V. Ganjehsani (cganjehsani@richardsonplowden.com)
Ashwin R. Sanzgiri (asanzgiri@richardsonplowden.com)

Counsel for Co-Appellants ArranCo US, LLC; Hawk Bidco (US) Inc.; and Sparrows Offshore, LLC

M. Todd Carroll (todd.carroll@wbd-us.com)
Kevin A. Hall (kevin.hall@wbd-us.com)
M. Elizabeth O'Neill (elizabeth.oneill@wbd-us.com)

Counsel for Co-Appellants Altrad Investment Authority SAS and Mohed Altrad

Stephen L. Brown (sbrown@ycrlaw.com)
James D. Gandy, III (tgandy@ycrlaw.com)
Stephen A. Griffith (sgriffith@ycrlaw.com)

Counsel for Asbestos Corporation Limited

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

September 10, 2024

