THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Civil Action No. 2023-CP-40-01759

Appellate Case Nos.
2024-001063
2024-001064
2024-001065

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.; Lowserve 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, Incl; SPX Corporation; Stafford Insulation Company; Standard Insulation Company of N.C., Inc.; Starr Davis Company, Inc.; Starr Davis Company of S.C., Inc.; Sterling Fluid Systems (USA) LLC; TE Wire & Cable, LLC; Thermo Electric Company, Inc.; Union Carbide Corporation; Valves and Controls US, Inc.; Velan Valve Corp.; Viking Pump, Inc; Vistra Intermediate Company LLC; The William Powell Company; Wind Up, Ltd.; Yuba Heat Transfer LLC; and Zurn Industries, LLC,

Defendants,

and

Cape PLC, individually and as successor in interest to Cape Asbestos Company Limited, by and through its duly appointed Receiver Peter D. Protopapas,

Third-Party Plaintiff / Respondent

v.

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

Third-Party Defendants,

of which

Mohed Altrad, Altrad Investment Authority S.A.S, Arranco US LLC, Hawk Bidco (US) Inc., Sparrows Offshore, LLC, Central Mining & Investment Corporation Ltd., Charter Consolidated Ltd., and ESAB Corporation are the

Appellants.

REPLY TO APPELLANTS' RETURNS TO MOTION TO DISMISS APPEALS OF INTERLOCUTORY ORDERS

Respondent Cape PLC, individually and as successor in interest to Cape Asbestos Company Limited, ("Cape")[1] by and through its duly appointed Receiver Peter D. Protopapas ("the Receiver") respectfully submits this reply in support of the Receiver's Motion to Dismiss the June 21, 2024 and June 24, 2024 Notices of Appeal (the "June 2024 Appeals") filed by Mohed Altrad and Altrad Investment Authority S.A.S. (together, "Altrad Owners Third-Party Defendants"); Arranco US LLC, Hawk Bidco (US) Inc., and Sparrows Offshore, LLC (together, "Altrad Sparrows Third-Party Defendants"); and Central Mining & Investment Corporation Ltd., Charter

[1] The Third-Party Defendants' assertion that Cape is no longer an active defendant in the *Tibbs* case is incorrect. The Tibbs Plaintiffs never dismissed Cape from their asbestos personal injury case. Instead, on June 29, 2023, two weeks after the tolling agreement between the Receiver and the Dean Omar law firm, the Receiver filed an answer in *Tibbs* because the complaint against Cape had not been dismissed and the claims were—and still are—live against Cape. And although the Third-Party Defendants reference a tolling agreement, tolling agreements are not dismissals, but instead simply "extend the statutory limitations period on the plaintiff's claim." *See* Black's Law Dict. 1625 (9th ed. 2004). Further, the transcript of the pretrial hearing status report in *Tibbs* reflects the circuit court's understanding that there was not a dismissal of Cape. The following exchange took place regarding Cape'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?

A copy of the pertinent transcript excerpt is attached hereto as **Exhibit 1.**

Consolidated Ltd., and ESAB Corporation (together, "Charter Third-Party Defendants") (collectively, "Third-Party Defendants" or "Appellants").[2]

It is important to highlight the continued use of serial appeals by the Third-Party Defendants to illustrate their steadfast improper attempts to avoid the impending December 9, 2024 trial date in the circuit court. Appellants have appealed nearly every single order issued in this case, *John A. Tibbs v. Asbestos Corporation Limited, et al.*, 2023-CP-40-01759. All of the interlocutory appeals that this Court has considered have been dismissed. Some of the appeals were delayed as they have been held in abeyance due to an improper removal of the *Tibbs* action to which Appellants consented, despite the Fourth Circuit Court of Appeals' recent decision explaining why these receivership cases may not be removed. The federal court swiftly rejected the improper removal and remanded the case after briefing on August 13, 2024. *See* Remand Order in *Tibbs v. 3M Co.*, No. 3:24-cv-3771-MGL, ECF No. 75 (D.S.C. Aug. 13, 2024). This Court has now also dismissed the Third-Party Defendants' appeals of the circuit court's order denying their motion to dissolve the receivership and dismiss for lack of jurisdiction and denied rehearing on the matter.[3] In turn, the Third-Party Defendants have now launched the latest round of frivolous appeals by filing three new Notices of Appeal on August 30, 2024, from the circuit court's scheduling order setting the trial in this case for December 9, 2024. The Receiver has moved to

[2] The level of coordination amongst the Third-Party Defendants cannot be overstated. Indeed, although the three sets of Appellants are each represented by different counsel, the Notices of Appeal filed by the Altrad Sparrows Third-Party Defendants and the Charter Third-Party Defendants are nearly identical.

[3] On September 3, 2024, the Charter Third-Party Defendants filed a Petition for Writ of Certiorari in the South Carolina Supreme Court seeking review of this Court's decision dismissing these appeals, and the Altrad Sparrows Third-Party Defendants and Altrad Owners Third-Party Defendants have done the same on September 10, 2024. In addition, the Third-Party Defendants filed their Petitions for Writ of Certiorari in the South Carolina Supreme Court seeking review of this Court's decision dismissing their appeal of the circuit court's March 12, 2024 Order compelling their discovery responses.

dismiss these latest appeals because (1) none of the Receiver's claims are triable by a jury, (2) the scheduling order is not appealable, and (3) the Third-Party Defendants waived their ability to argue their entitlement to a jury trial because they never contested that this case would be tried in a bench trial, despite myriad opportunities to do so.[4] The volume of the Third-Party Defendants' appeals of interlocutory orders—all of which are not immediately appealable under South Carolina law—has frustrated the circuit court and the court-appointed Receiver's ability to fulfill his duties. Appellants' attempts to appeal every ruling of the circuit court is unheard of and contrary to the administration of justice in this state. *See Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 94, 529 S.E.2d 11, 13 (2000) (noting South Carolina disfavors piecemeal appeals as they can delay the progress of a case for years).

It is abundantly clear that Appellants' purpose in consenting to the improper removal and their pursuit of successive improper appeals (including the latest round of appeals) is to delay and avoid trial and to stop this case from moving forward. The Third-Party Defendants' June 2024 Appeals are no different—they are simply another attempt in a long line of efforts by Appellants to abuse South Carolina rules of procedure and to subvert justice and delay circuit court rulings on important matters of South Carolina law.[5]

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[4] These purported mode of trial appeals are substantially similar to those employed by another defendant to an unrelated receivership action, *Covil v. Penn National*, which successfully delayed a trial originally scheduled for December 12, 2022, for nearly a year. The Court of Appeals dismissed Penn National's appeal, and, on November 7, 2023, the South Carolina Supreme Court denied the Petition for Certiorari in *Covil Corp. v. Penn National Mutual Casualty Insurance Co.*, 2023-001079. That case was finally tried on November 27–28, 2023, and now is on appeal again.

[5] The law firm of Winston & Strawn, LLP ("Winston") has recently threatened to sue the Receiver personally and related to his official acts as the court-appointed receiver for Cape in the High Court of London and Wales. While Winston purports to represent certain Cape entities, the Altrad Owners Third-Party Defendants are the persons that control Winston's Cape clients. *See* **Exhibit 2** (2022 Annual Report of Cape Intermediate Holdings Ltd. at 22, identifying Cape's "ultimate parent undertaking and controlling party [as] Altrad Investment Authority SAS"; 2023 Annual Report of Altrad UK Ltd. at 1, 18, reporting that Altrad Investment Authority SAS is "controlled by Dr M

ARGUMENT

The Third-Party Defendants argue that their sustained pattern of using interlocutory appeals is simply them availing themselves of valid legal arguments supported by the law to protect against violations of their substantial rights. Appellants' ceaseless interlocutory appeals, however, are far from "valid." The Third-Party Defendants cannot escape the fact that the underlying basis of their objections is not supported by South Carolina law and has been rejected by South Carolina courts. Nonetheless, Appellants continue their attempts to improperly manufacture an appealable issue to stop this case from proceeding to final judgment.[6]

Despite this Court's clear ruling that the circuit court's order refusing to dismiss the third-party complaint and refusing to dissolve the receivership is not immediately appealable, the Third-Party Defendants spend a portion of their Returns rehashing their arguments brought up in their prior improper interlocutory appeals, claiming that the receivership is unlawful and that South Carolina courts do not have personal jurisdiction over them.[7] The Third-Party Defendants continue

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Altrad," and that the "principal activity of" Altrad UK Ltd.—whose parent is Altrad Investment Authority SAS—is the management of its investment in Cape Plc, its subsidiaries and associated undertakings"). This newest stunt ignores the decisions of the United States Supreme Court, the United States Court of Appeals for the Fourth Circuit, and the United States District Court for the District of South Carolina with respect to the exclusive jurisdiction of the circuit court, *i.e.*, the receivership court, over the Receiver. *See Barton v. Barbour*, 104 U.S. 126 (1881); *Porter v. Sabin*, 149 U.S. 473 (1893); *Protopapas v. Travelers Casualty & Surety Co.*, 94 F.4th 351 (4th Cir. 2024); the South Carolina federal district court order of August 13, 2024, in this action, 3:24-3771-MGL, ECF No. 75. It is designed both to intimidate the Receiver personally as an individual and to try to avoid the December 9, 2024 trial.

[6] The Third-Party Defendants also purport that the Receiver falsely claims that there are insurance-related entities involved in this action. The Third-Party Defendants' representation is incorrect. The Receiver concedes there are no insurance-related entities in this matter currently, including because all Third-Party Defendants have refused to disclose any of their insurers. The Receiver's reference to insurance-related entities on page 4 of his Motion is simply a reference to the insurance-related entities in other receiverships (of which this Court is aware) whose playbook of improper interlocutory appeals the Third-Party Defendants have adopted and followed here.

[7] The Altrad Owners Third-Party Defendants aver to this Court that the "Receiver purports to be a receiver over a Jersey company that has no assets in South Carolina, no judgments against it in

to argue that Rule 205, SCACR, poses a jurisdictional bar preventing this action from continuing in the circuit court because by simply appealing their denied motions to dissolve the receivership, they can deprive the circuit court of jurisdiction for an indeterminate time period. The Third-Party Defendants' arguments are untenable because the Supreme Court and Court of Appeals have made clear that the denial of motions to dismiss and dissolve a receivership are not immediately appealable. Yet Appellants continue using the pendency of their improper interlocutory appeals as an excuse to refuse to participate in discovery despite: (1) this Court's rulings in the *Childers* case that receivership actions and the receivership court may proceed during the pendency of an appeal from a receivership case despite Rule 205 arguments raised by the appellants (September 8, 2023 Order and November 21, 2023 Order in Appellate Case No. 2023-000727); (2) the Supreme Court's order in *Childers* dismissing an appeal of a similar order denying a motion to dismiss and dissolve a receivership as interlocutory and not immediately appealable (March 27, 2024 Order in Appellate Case No. 2023-000727); and (3) South Carolina caselaw confirming that Rule 205 does not stop proceedings in the circuit court when a party appeals an interlocutory order that is not immediately appealable. (*See* pp. 31–37 of the Receiver's Return to the Petition for Writ of Certiorari filed by Appellants in Appellate Case No. 2024-000916.) This Court has also rejected identical Rule 205 arguments in other unrelated interlocutory receivership appeals. *See* Order, *Welch v. Advance Auto Parts*, Appellate Case No. 2024-000337 (filed April 12, 2024) ("Appellant

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South Carolina, no active claims against it in South Carolina, and that was never served with a shred of paper about any lawsuit in South Carolina," and that they "have no contact with South Carolina and are not subject to personal jurisdiction here . . . ." (Return at 3, 4.) However, one needs to look no further than the Altrad Owners Third-Party Defendants' own website to find these assertions are simply not true. *See* South Carolina contact information at rmdksouthcarolinarentaladmins@altrad.com and "Other branches in USA" at 301 Webb Road Williamston, South Carolina, at www.rmdkwikform.com/us/contact-us/; *see also* "Our History" at https://www.altrad.com/en/our-history.html.

Continental Insurance Company filed a motion to enforce this court's exclusive jurisdiction over this matter . . . . The motion is denied."); Order, *Mitchell v. 3M Company*, Appellate Case No. 2024-000341 (filed April 12, 2024) ("Appellant Continental Insurance Company filed a motion to enforce this court's exclusive jurisdiction over this matter . . . . The motion is denied."). Thus, the legal basis for the Third-Party Defendants' refusal to participate in discovery and attempts to delay trial through their flood of improper interlocutory appeals is unsound and has been continuously rejected by South Carolina courts.

The same applies to the June 2024 Appeals that attempt to appeal the circuit court's interlocutory Order granting the Receiver's Motion to Pre-Admit Exhibits[8] and Order granting the Receiver's Motion for Sanctions and Motion for Adverse Inference (the "May 23, 2024 Orders"). The May 23, 2024 Orders address discovery sanctions and are not immediately appealable, and the Court should dismiss the June 2024 Appeals.

[8] The Third-Party Defendants' argument that the Receiver's "sea" of pre-admitted exhibits was not presented through any discovery request is incorrect. On the contrary, in response to a wave of motions filed by the Third-Party Defendants, the Receiver in October 2023 filed scores of exhibits referenced in the third-party complaint; and when served in March 2024 with requests to authenticate those documents under Rule 36, SCRCP, and S.C. Code § 19-1-60, the Third-Party Defendants refused. In footnote 2 of the Altrad Owners Third-Party Defendants, moreover, they refer to pre-admitted Exhibit 2524, which is a video posted by a YouTube user with an unfortunate username. What the Altrad Owners Third-Party Defendants conveniently omit is (1) any mention of the substance of that video, which consists of a highly relevant PBS *Frontline* episode from the mid-1990s, and (2) that there can be no reasonable doubt about the authenticity of that video, which is available from another account on YouTube (https://www.youtube.com/watch?v=uPd_0m7rjkI) and also available for inspection as part of an official, PBS-issued VHS copy in the Receiver's possession. *See also* PBS Frontline, *Season 1994: Episode 9, The Diamond Empire,* https://www.pbs.org/wgbh/frontline/documentary/the-diamond-empire/ ("FRONTLINE . . . chronicles how one family, the Oppenheimers of South Africa, gained control of the supply, marketing, and pricing of the world's diamonds," among other minerals).

I. The May 23, 2024 Orders do not "determine the action" and do not strike portions of Appellants' Answers.

The Third-Party Defendants argue that the May 23, 2024 Orders are immediately appealable because by making the adverse inferences rebuttable, the circuit court has stricken their defense of general denial in their Answers because it shifted the burden of "disproof" of the Receiver's claims against them. Even if true, this shifting of the burden is not tantamount to striking of a portion of an answer, and the Third-Party Defendants do not provide any support for their proposition to the contrary. The May 23, 2024 Order granting adverse inferences specifically stated that the circuit court was ***not*** striking the parties' pleadings. (*See* p. 16.)

The Third-Party Defendants also argue that the May 23, 2024 Orders effectively foreclose them from contesting the case on the merits because there is nothing they could ever do to rebut the adverse inferences, boldly claiming that there is no likelihood that the judge who entered the adverse inferences will not draw them as the factfinder at the bench trial of this case. Contrary to Appellants' claims, the circuit court did not enter irrefutable negative inferences and instead left Appellants entirely free to mount any defense or contest on the merits they want should they choose to do so. Appellants' insinuation that the circuit court judge, Chief Justice Toal (Retired), will not be impartial in her consideration of the evidence is unsupported. 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). South Carolina law is also clear that when the adverse inference "presumption is drawn, it cannot be treated as independent evidence of a fact otherwise unproved, but can only be considered in determining the credibility or probative force of the evidence presented." *Baker v. Port City Steel Erectors, Inc.*, 261 S.C. 469, 476, 200 S.E.2d 681, 683 (1973). The storied career, training, skill, and experience of the circuit court judge here is unparalleled and

make her fully equipped and capable of making impartial evidentiary determinations while considering the issues in this case, which includes determinations of whether a presumption should be drawn or has been rebutted. Thus, the May 23, 2024 Orders are interlocutory and not immediately appealable.

II. The May 23, 2024 Orders do not constitute the circuit court's refusal to issue requested injunctive relief.

The Third-Party Defendants argue that the May 23, 2024 Orders are immediately appealable because they constitute the circuit court's sustained refusal to issue a requested injunction. This argument is unavailing.

The Third-Party Defendants' so-called requests for injunctive relief were eleventh-hour requests tacked on to their February 16, 2024 memoranda opposing the Receiver's January 12, 2024 Motions to Compel. A defendant should not be allowed to unilaterally convert a discovery order on a motion to compel into an immediately appealable issue by slipping a so-called "cross-motion for injunction" into their briefing opposing the underlying motion to compel.[9] Otherwise, any litigant could manufacture an immediately-appealable issue out of ***any garden-variety discovery order at any point*** by simply opposing the underlying motion with a "gotcha" request to enjoin the moving party from taking any action. Indeed, five days after these "injunctive" requests materialized, the circuit court informed the Third-Party Defendants by email on February 21 that the circuit court would allow the parties to submit proposed orders on the fully briefed motions to compel, but that these "recent motions for injunctive relief" would "remain under the Court's advisement to be addressed at a later time." (*See* **Exhibit 3**) Consistently with the circuit court's indication to all counsel, the March 12, 2024 Order expressly stated that the Third-Party

[9] Notably, there is no active order by any court staying discovery in the proceeding before the circuit court. The Third-Party Defendants have failed to seek a stay of discovery from either the circuit court or this Court.

Defendants' belated insertion of requests for "injunctive relief" in their responses to the Motions to Compel were not yet under submission for the Court's consideration:

> Although Third-Party Defendants included in [their] February 16 filings [submitted in opposition to the Receiver's Motions to Compel] what they have termed to be 'cross-motions' for 'injunctive relief,' the Court advised the parties by email on February 21, 2024, that those requests for injunctive relief will remain under the Court's advisement to be addressed at another time.

(*See* **Exhibit 4**, March 12, 2024 Order at 3 n.1.) The circuit court clearly stated that it will address these "injunctive" relief requests at a later time. Thus, the Third-Party Defendants cannot simply rebrand the circuit court's pronouncement as a "refusal" to rule on their so-called requests for "injunctive relief," and they do not provide any controlling South Carolina authority to the contrary.

Appellants' reference to a couple of cherry-picked non-South Carolina cases is insufficient to provide support for their proposition that the circuit court "simply sitting" on their "injunction" requests for too long can be construed as effectively denying them. Moreover, the cases Appellants cite are distinguishable. In *In re Fort Worth Chamber of Com.*, 100 F.4th 528 (5th Cir. 2024), the Fifth Circuit found that under the fact-specific circumstances and the "***unique expedited nature***" of the case, the district court's inaction on the motion for a preliminary injunction amounted to effective denial. *Id*. at 533 (emphasis added). The Fifth Circuit admonished, however, that "whether a district court fails to act promptly ***depends entirely on context***." *Id*. at 534 (emphasis added). Importantly, the Fifth Circuit recognized that "plaintiffs cannot simply say they need an expedited ruling and then appeal by claiming effective denial when they don't get it on their preferred timeline," and the Fifth Circuit emphasized that "[d]istrict courts have wide discretion in managing their docket, and they do not necessarily deny a motion by failing to rule on a parties' requested timeline." *Id*. at 535. The facts and procedural issues in *Gray Line Motor Tours, Inc. v.*

City of New Orleans, 498 F.2d 293 (5th Cir. 1974) are completely unrelated to the circumstances here. In *Gray Line Motor Tours*, the Fifth Circuit found that the district court's order staying considerations of that portion of the airport ground carrier's suit against the city airport authority and others relating to legality of the 15 percent gross revenue charge imposed on ground carriers, until a state court had had an opportunity to determine its legality under state law, had the effect of denying a preliminary injunction, and the Fifth Circuit had jurisdiction under the interlocutory appeals statute to review the stay order. *Id*. at 297–98. Similarly, *Helton v. Clements*, 787 F.2d 1016 (5th Cir. 1986) involved a completely unrelated issue, with the Fifth Circuit holding that the district court's order that refused to rule on a motion to dismiss (based on the defense of governmental immunity) until trial was an immediately appealable "final decision" within the meaning of 28 U.S.C. § 1291.

As for the *D.C. v. Trump*, 959 F.3d 126 (4th Cir. 2020) case that the Altrad Sparrows Third-Party Defendants and the Charter Third-Party Defendants cite in their Returns, this decision actually supports the Receiver's position. The Fourth Circuit, on rehearing en banc, stated that typically a "district court's ***actual*** refusal to rule on [whether the President lacks absolute] immunity is treated as a denial of immunity and is immediately appealable." *Id*. at 130 (emphasis added). The Fourth Circuit held, however, that the district court clearly intended to rule on the President's immunity claim and did not unreasonably delay in doing so, explaining as follows:

> Here, the district court ***neither expressly nor implicitly refused to rule*** on immunity. It ***did not make any rulings*** with respect to the President in his individual capacity. To the contrary, the district court ***stated in writing that it intended to rule*** on the President's individual capacity motion. Despite the President's suggestion, the district court's deferral did not result in a delay "beyond reasonable limits."
>
> Not even seven months had elapsed after the close of briefing on this question at the time the President noted this appeal. During these seven months, the district court, recognizing that the President in his individual capacity had moved to dismiss, again expressly stated in writing that it would address that motion. In these same seven months, in addition to managing all of the other cases on its docket, the

> district court managed the many aspects of this complex litigation against the President: the court held a second hearing on the President's motion to dismiss in his official capacity, issued a second, thorough written opinion explaining its ruling, and also issued a lengthy written opinion explaining its denial of the President's motion to certify an interlocutory appeal of the court's rulings. We cannot conclude that the court's failure to also rule on the motion at issue here during this same seven-month period evinces an unreasonable delay or a desire to needlessly prolong this litigation.
>
> It is axiomatic that a district court has wide discretion to prioritize matters among its docket. . . . [T]his ***seven-month delay provides scant justification for intrusion into the district court's docket***, particularly given the court's express statements that it would rule on the President's motion to dismiss and its diligence in attending to other important matters in the case. This was not an unreasonable or inexplicable delay tantamount to a denial of immunity.

Id. at 131–32 (emphasis added). Just as in the *D.C. v. Trump* case, the circuit court here neither expressly nor implicitly refused to rule on the Third-Party Defendants' requests for "injunctive relief." Instead, the circuit court did not make any rulings on these requests, clearly stated in writing that it intended to address them at a later time, not even seven months had elapsed after the Third-Party Defendants tacked on their eleventh-hour "injunctive" requests in their responses to the Motions to Compel, and the circuit court diligently attended to other important matters and fully briefed motions in the case, in addition to managing all of the other cases on its docket, during this time period. As a result, the May 23, 2024 Orders do not constitute the circuit court's refusal to issue a requested injunction and instead are interlocutory and not immediately appealable.

III. The May 23, 2024 Orders do not constitute contempt findings.

The Third-Party Defendants argue that the May 23, 2024 Orders are immediately appealable because they are tantamount to contempt findings. Not so.

Contrary to Appellants' arguments, the May 23, 2024 Orders do not hold them in contempt and do not contain any contempt findings. These Orders merely impose *discovery sanctions* in the form of pre-admitting exhibits, drawing certain adverse inferences, and awarding reasonable attorney's fees and costs. In South Carolina, orders addressing discovery sanctions are not

immediately appealable. *See, e.g.*, *Fam. Servs. Inc. v. Inman*, No. 2020-001132, 2023 WL 5096715, at *7 (S.C. Ct. App. Aug. 9, 2023); *see also Richardson v. Halcyon Real Est. Servs., LLP*, 439 S.C. 419, 424–25, 887 S.E.2d 153, 156 (Ct. App. 2023) ("We conclude the award of attorney's fees and costs as a . . . discovery sanction . . . is therefore not immediately appealable."). Otherwise, any litigant could manufacture an immediately-appealable issue out of non-contempt discovery sanctions, such as when a trial court permits a negative inference from a party's spoliation of evidence, or when a trial court deems matters contained in requests for admissions admitted for trial if a party fails to respond or insufficiently responds to such requests.

Here, there has been no rule to show cause and no proceeding for contempt for violation of a court order. All that has happened is an award of sanctions that has been entered by the circuit court. There has been no "refusal to comply" and no finding of contempt as contemplated by *Davis v. Parkview Apartments*, 409 S.C. 266, 280, 762 S.E.2d 535, 543 (2014). In fact, while the circuit court concluded that an award of reasonable attorneys' fees and costs in favor of the Receiver was proper, the circuit court ordered the Receiver to submit his Report on Attorneys' Fees and Costs along with evidence for the circuit court's *in camera* review. The Receiver submitted this Report to the circuit court on June 24, 2024, and it is still under the circuit court's review as it has not yet approved the Receiver's fee petition in the amount requested. Thus, it has not yet been possible for the Third-Party Defendants to "refuse to comply" with anything, such as by failing to pay the fees, and there has been no order finding them in contempt for such refusal. Moreover, the May 23, 2024 Order granting adverse inferences contemplates *exactly* that kind of *future* finding of contempt as the circuit court states that the sanctions that are the subject of the May 23, 2024 Orders are "an intermediate form of relief, which stops short of more severe sanctions" and recognizes that such harsher sanctions may "eventually . . . also be warranted" if the Third-Party

Defendants "continue to refuse to engage in discovery and comply with the Court's orders." (*See* p. 16.)

In *Richardson v. Halcyon Real Est. Servs., LLP*, 439 S.C. 419, 887 S.E.2d 153 (Ct. App. 2023), the court explained that a sanctions order that does not constitute a final judgment is not immediately appealable. *Id*. at 426, 887 S.E.2d at 157. "A final judgment is an order that . . . reserv[es] no further questions or directions for future determination." *Id*. Here, the May 23, 2024 Order granting adverse inferences specifically held that they are "***rebuttable inferences*** [that] are ***subject to evidentiary challenge*** by" Appellants. (*See* p. 16 (emphasis added).) Thus, the circuit court's discovery sanctions orders are *not* final judgments that eliminate further questions or directions for future determination. There is nothing "final" in their nature, as they do not foreclose the Third-Party Defendants from contesting the case on the merits and leave them entirely free to mount any defense or evidentiary challenge they want. The discovery sanctions imposed by the circuit court are similar to the discovery sanction order in *Johnson ex rel. D'Andre G. v. Chaudhry*, No. 2013-UP-176, 2013 WL 8508086 (S.C. Ct. App. May 1, 2013) allowing the plaintiff "to present only one expert witness at trial on issues of liability," which this Court held was not immediately appealable. *Id*. at *1. That is, like the plaintiff in *Chaudhry*, the Third-Party Defendants may not be able to present evidence at trial in the *manner* that they prefer in light of the circuit court's discovery sanctions orders, but they are not at all foreclosed from presenting evidence on the merits, and this does not transform these orders into immediately appealable orders. Thus, the May 23, 2024 Orders are interlocutory and not immediately appealable.

CONCLUSION

In light of the foregoing, the circuit court's May 23, 2024 Orders that are the subject of the June 2024 Appeals are not immediately appealable. The June 2024 Appeals are yet another chapter

in the Appellants' familiar playbook attempting to manufacture an immediately appealable issue where none exists in order to delay the case and prevent it from going to trial on the underlying issues, and the Court should dismiss them.

Respectfully Submitted,

GALLIVAN, WHITE & BOYD, P.A.

By: /s/ Lindsay A. Joyner
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(212) 309-6000
Attorneys for Third-Party Plaintiff

September 12, 2024

EXHIBIT 1

HEARING

In Re: Flynn v. Atlas Turner (2023-CP-40-000633)
Goodwin v. 3M (2020-CP-40-004613)
Mitchell v. Atlas Turner (2022-CP-40-02979)
Tibbs v. Atlas Turner (2023-CP-40-01759)
Donaghy/Potter v. Atlas Turner (2023-CP-40-03108)
Link v. Atlas Turner (2022-CP-40-05543)

In Re: Childers
Civil Action No. 2021-CP-40-03484

Receiver vs. AIG, et al,
Civil Action No. 2021-CP-40-05768

Receiver vs. Baker Patterson, et al.,
Civil Action No. 2023-CP-40-05203

In Re: State of Covil v. Pennsylvania National
(2023)-CP-40-000633)

Covil v. Penn National (2020-CP-4002098)

BEFORE THE HONORABLE
CHIEF JUSTICE (RET.) JEAN TOAL

DATE TAKEN: Wednesday, April 10, 2024

TIME START: 9:27 a.m.

TIME END: 12:27 p.m.

LOCATION: Richland County Judicial Center
1701 Main Street
Columbia, South Carolina

REPORTED BY: Cindy A. Hayden, RMR-CRR
EveryWord, Inc.

APPEARANCES:

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(Appearances continued on next page.)

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~ And ~

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(Appearances continued on next page.)

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~ And ~

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APPEARANCES CONTINUED:

ATTORNEYS FOR AIG PROPERTY & CASUALTY, BERKSHIRE HATHAWAY SPECIALTY, LEXINGTON INSURANCE COMPANY, CONTINENTAL INSURANCE COMPANY, NATIONAL UNION INSURANCE COMPANY, UNNAMED UNDERWRITERS AT LLOYD'S AND UNNAMED LONDON MARKET COMPANIES:

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BY: WESLEY B. SAWYER, ESQUIRE
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803.782.4100
wsawyer@murphygrantland.com

Your Honor. I just -- I don't want my client --

THE COURT: I think your position is very well stated.

MR. CARROLL: Very good. Thank you, Your Honor.

THE COURT: All right.

MR. CARROLL: Your Honor, may I -- may I inquire -- this is unrelated to the 205 issue. 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 --

THE COURT: I'm not going to answer that right now. I'm not in that right now. I --

MR. CARROLL: 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.

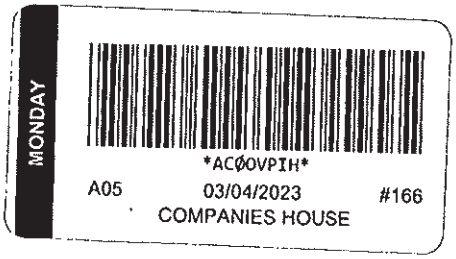
EXHIBIT 2

Company's Registered Number: 00040203

CAPE INTERMEDIATE HOLDINGS LIMITED

ANNUAL REPORT AND FINANCIAL STATEMENTS

FOR THE YEAR ENDED 31 AUGUST 2022



16. The Scheme of Arrangement (continued)

(k) In the case of certain Scheme creditors (Recourse Scheme Creditors), who are those Scheme creditors whose claims are in whole or in part the subject of a contract of insurance (Recourse Scheme Claims) their rights to enforce their Recourse Scheme Claims against a relevant Scheme Company will revive in certain circumstances. These circumstances are where the relevant Scheme Company is insolvent or where there has been a specified reduction in the Payment Percentage and if the Scheme creditor was able to bring about the insolvency of the relevant Scheme Company he would be able to recover greater compensation from the FSCS ("Financial Services Compensation Scheme") or, in certain circumstances, from a solvent insurer than is available from CCS at that time under the Scheme. There will be a specified reduction if either (i) the Payment Percentage has been reduced below 100 per cent but above 50 per cent and the Scheme creditor has not been paid in full after 12 months or (ii) the Payment Percentage is reduced to 50 per cent or below

(l) Each Scheme Company will agree to hold on trust for any Scheme creditor concerned the proceeds of any policy of insurance (or any compensation received from the FSCS) referable to that Scheme claim;

(m) The restriction described in sub paragraph (a) above will not apply to proceedings to enforce the right to conferred under sub-paragraph (l) above;

(n) There are provisions contained in two reimbursement agreements which preserve certain rights of proof by CCS and Cape plc respectively in any insolvency of Cape plc or any of the other Scheme companies; and

(o) In support of the above, on 6 May 2011 CIH, Cape plc and CCS entered into a new Guarantee and Funding Agreement whereby Cape plc agreed to make certain additional funding available to CIH in connection with CIH's commitments under the Funding Agreement, as well as to guarantee all present and future payment obligations of Cape plc and CCS under the Funding Agreement. In addition, a Scheme Share in Cape plc (referred to in paragraph (j) above) was issued to the Scheme Shareholder which has similar rights to the Scheme Shares in CIH and CCS and which will afford the Scheme Shareholder substantially the same rights to those provided by the Scheme Shares in CIH and CCS.

17. Ultimate parent undertaking

The immediate parent undertaking is Cape Holdco Limited, a company registered in England and Wales.

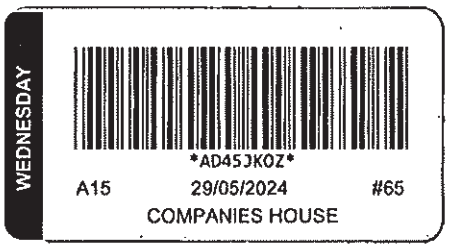
The ultimate parent undertaking and controlling party is Altrad Investment Authority SAS. Copies of the financial statements of Altrad Investment Authority SAS can be obtained from the Company Secretary, 16 avenue de la Gardie – 34510 Florensac - France.

Registered number: 10799083

ALTRAD UK LIMITED

ANNUAL REPORT

FOR THE YEAR ENDED 31 AUGUST 2023



ALTRAD UK LIMITED

STRATEGIC REPORT
FOR THE YEAR ENDED 31 AUGUST 2023

Introduction

The principal activity of the company is a holding company.

Business review

The principal activity of the company is the management of its investment in Cape Plc, RMDK Bidco Limited, Valmec Limited, Hawk Newco Limited, Altrad Babcock Limited and their subsidiaries and associated undertakings. The principal activity of these entities is the provision of critical industrial services focused on the energy and natural resources sectors.

The principal operating income associated with the company is income from shares in group undertakings.

Principal risks and uncertainties

Principal risks and uncertainties are considered to be the continued economic conditions impacting on the performance of the company's investments.

The key risk to the company is the performance of its indirect subsidiaries and associated undertakings. A strong performance of these entities is required to meet the financial obligations within the group and provide a level of return on the company's investment, to support its recoverability. The directors are satisfied with the performance of these entities during the year.

Financial key performance indicators

The board monitors the performance of the company, based on the profitability of its indirect subsidiaries and associated undertakings, on a regular basis. The underlying group continues to be profitable, reflected in the level of dividends received of £30,000,000 (2022: £30,000,000).

Directors' statement of compliance with duty to promote the success of the company

The directors have acted in a way they consider, in good faith, promotes the success of the company for the benefit of its members as a whole, and in doing so has given regard (amongst other matters) to:

Business relationships
The company is a holding company for investments in a number of subsidiaries. The company maintains good relationships with its parent Altrad Investment Authority S.A.S and its subsidiaries. Their business values are aligned.

Shareholders
The management team are committed and openly engaged with the group's shareholders through regular board meetings and effective dialogue. The shareholders are actively engaged in understanding our strategy, culture, people and the performance of our shared objectives for the short, mid and longer terms.

This report was approved by the board and signed on its behalf.

DocuSigned by:
John Walsh
4800D506478E459...
J A M Walsh
Director

Date: 28 May 2024

13. Post balance sheet events

Since the year end, the company has exchanged contracts to acquire a 100% shareholding in a related business. Completion of the deal is subject to approval by the Competition and Markets Authority.

14. Controlling party

The company's immediate and ultimate parent undertaking is Altrad Investment Authority SAS, a company incorporated in France. Altrad Investment Authority SAS, which is controlled by Dr M Altrad. The smallest and largest group for which group financial statements are prepared is Altrad Investment Authority SAS. Copies of the financial statements can be obtained from the company secretary at 16, Avenue de la Gardie, 34510, Florensac, France.

EXHIBIT 3

From: Diaz, Eva <ediaz@sccourts.org>
Sent: Wednesday, February 21, 2024 4:07 PM
To: John T. Lay <jlay@gwblawfirm.com>; Steve Pugh <SPugh@RichardsonPlowden.com>; Carroll, Todd <Todd.Carroll@wbd-us.com>; Vic Rawl <vrawl@grsm.com>; Toal, Jean <JToal@sccourts.org>
Cc: James Elliott <JElliott@RichardsonPlowden.com>; O'Neill, Elizabeth <Elizabeth.ONeill@wbd-us.com>; john.pierce@lw.com; Cameron Berthelsen <CBerthelsen@RichardsonPlowden.com>; Ben Carlton <BCarlton@RichardsonPlowden.com>; Hall, Kevin <Kevin.Hall@wbd-us.com>; Brian Barnwell <BB@rplegalgroup.com>; Gray Culbreath <gculbreath@gwblawfirm.com>; Jon Robinson <jon@smithrobinsonlaw.com>; Shannon Peake <shanonp@smithrobinsonlaw.com>; murrell@smithrobinsonlaw.com; Troy Brown <troy.brown@morganlewis.com>; Dana Becker <dana.becker@morganlewis.com>; Brady Edwards <brady.edwards@morganlewis.com>; Robert Jacques <Robert.jacques@morganlewis.com>; Lindsay Valek <Lindsay@rplegalgroup.com>; Paul A. Scrudato <paul.scrudato@morganlewis.com>; Charity McQueen <CMcQueen@RichardsonPlowden.com>; Laura Jordan <ljordan@gwblawfirm.com>; Lori Seaborn <lseaborn@gwblawfirm.com>; Helen Elliott <HElliott@RichardsonPlowden.com>; Lindsay Joyner <ljoyner@gwblawfirm.com>; 6982_67 John A_ Tibbs and Margaret B_ Tibbs v_ Schneider Electric USA_ Inc_ et al Email _6982_67_ <{F1077725}.IMANMAIN@031be.imanage.work>
Subject: RE: Cape PLC v. Anglo American PLCC, et al. (2023-CP-40-01759) – Pending Motions to Compel and Pending Motions for Protective Order

Good afternoon, all.

First, Chief Justice Toal has reviewed the proposed orders requested during the Feb. 2, 2024 hearing. The Court will be filing final orders soon.

Second, Chief Justice Toal has approved the request as proposed on behalf of the Receiver, that is, to address the issue of whether motions for protective orders remain pending in proposed orders on the motions to compel. The Court will allow the parties to provide proposed orders on the six motions to compel by Feb. 27, 2024.

Last, at this time, the Court will not request any briefing on the recent motions for injunctive relief filed by the third-party defendants and will remain under the Court's advisement to be addressed at another time.

Let me know if you have any questions.

Best,

Eva Diaz
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From: John T. Lay <jlay@gwblawfirm.com>
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Cc: Diaz, Eva <ediaz@sccourts.org>; James Elliott <JElliott@RichardsonPlowden.com>; O'Neill, Elizabeth

EXHIBIT 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

JOHN A. TIBBS and MARGARET B. TIBBS,
Plaintiffs,
v.
3M COMPANY *et al.*,

Defendants.

****

CAPE PLC, individually and as successor in interest to CAPE ASBESTOS COMPANY LIMITED, by and through its duly appointed Receiver Peter D. Protopapas,

Third-Party Plaintiff,

v.

ANGLO AMERICAN PLC, individually and as successor in interest to ANGLO AMERICAN CORPORATION OF SOUTH AFRICA LTD.; DE BEERS PLC, individually and as successor in interest to DE BEERS S.A.; DE BEERS CENTENARY AG; DE BEERS CONSOLIDATED MINES LTD., n/k/a DE BEERS CONSOLIDATED MINES PROPRIETARY LTD.; DE BEERS UK LTD.; DE BEERS JEWELLERS LTD.; DE BEERS JEWELLERS US, INC.; ANGLO AMERICAN US HOLDINGS INC.; ELEMENT SIX US CORP.; ELEMENT SIX TECHNOLOGIES US CORP.; ELEMENT SIX TECHNOLOGIES (OR) CORP.; FIRST MODE HOLDINGS, INC.; PLATINUM GUILD INTERNATIONAL (U.S.A.) JEWELRY INC.; LIGHTBOX JEWELRY INC.; FOREVERMARK US INC.; ANGLO AMERICAN CROP NUTRIENTS (U.S.A.), LLC; CHARTER CONSOLIDATED LTD.; ESAB CORPORATION; CENTRAL MINING & INVESTMENT CORPORATION LTD.; CAPE HOLDCO LTD.; THE LAW DEBENTURE CORPORATION PLC; CAPE INDUSTRIAL SERVICES GROUP LTD.;

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

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

ORDER GRANTING THE RECEIVER'S MOTIONS TO COMPEL DISCOVERY RESPONSES OF THIRD-PARTY DEFENDANTS AND 30(B)(6) DEPOSITIONS OF ARRANCO US, LLC AND CENTRAL MINING & INVESTMENT CORPORATION LTD.

MOHED ALTRAD; ALTRAD UK LTD.; CAPE UK HOLDINGS NEWCO LTD.; ALTRAD SERVICES LTD., f/k/a CAPE INDUSTRIAL SERVICES LTD.; ALTRAD INVESTMENT AUTHORITY S.A.S.; SPARROWS OFFSHORE GROUP LTD.; HAWK BIDCO US INC.; ARRANCO US, LLC; SPARROWS OFFSHORE, LLC; THE SPARROWS GROUP, LLC,

Third-Party Defendants.

This matter came before the Court on the following six Motions to Compel filed on January 12, 2024 by Third-Party Plaintiff Cape PLC, individually and as successor in interest to Cape Asbestos Company Limited, n/k/a Cape Intermediate Holdings Ltd. ("Cape"), by and through its duly appointed Receiver Peter D. Protopapas (the "Receiver"):

1. Motion to Compel Discovery Responses of Anglo American PLC, De Beers PLC, De Beers UK Ltd., De Beers Centenary AG, and De Beers Consolidated Mines Proprietary Ltd. (together, "Oppenheimer Third-Party Defendants");

2. Motion to Compel Discovery Responses of Mohed Altrad and Altrad Investment Authority S.A.S. (together, "Altrad Owners Third-Party Defendants");

3. Motion to Compel Discovery Responses of Arranco US LLC, Hawk Bidco (US) Inc., and Sparrows Offshore, LLC (together, "Altrad Sparrows Third-Party Defendants");

4. Motion to Compel Discovery Responses of Central Mining & Investment Corporation Ltd., Charter Consolidated Ltd., and ESAB Corporation (together, "Charter Third-Party Defendants");

5. Motion to Compel 30(b)(6) Deposition of Central Mining & Investment Corporation Ltd. ("Central Mining"); and

6. Motion to Compel 30(b)(6) Deposition of Arranco US, LLC ("Arranco")

(together, the "Motions to Compel"). On February 16, 2024, the Third-Party Defendants filed materials opposing the Motions to Compel.[1] Accordingly, the Motions to Compel have been fully briefed and are ready for decision.

Discussion

The Third-Party Defendants argue the Court cannot entertain or grant the relief sought by the Motions to Compel for multiple reasons: (1) the South Carolina Court of Appeals possesses exclusive jurisdiction over this entire action following the Third-Party Defendants' December 18, 2023 appeals of one of the Court's orders, which they claim prevents both the Court and the Receiver from taking any additional action, including engaging in discovery or ruling on discovery motions, during the pendency of those appeals; (2) discovery cannot proceed during the "pendency" of Third-Party Defendants' motions for protective order and/or to stay discovery (collectively, the "Protective Order Motions"), motions which were filed prior to any appeals in this case and prior to the Court's October 25, 2023 hearing, during which the Court effectively granted the primary relief sought by those motions; and (3) the Court now cannot rule on those "pending" Protective Order Motions because it cannot act while the appeals are pending.

As outlined below, the Court finds that the procedural history of this case and recent orders issued by the Court of Appeals in similar circumstances undermine the arguments presented by Third-Party Defendants, and the Court will grant the Motions to Compel.

[1] The Court notes that although Third-Party Defendants included in these February 16 filings what they have termed to be "cross-motions" for "injunctive relief," the Court advised the parties by email on February 21, 2024, that those requests for injunctive relief will remain under the Court's advisement to be addressed at another time.

A. Procedural History.

1. The Receiver's Third-Party Complaint (June 2023).

On June 30, 2023, the Receiver filed a Third-Party Complaint against numerous third-party defendants alleged to have facilitated, caused, or directed Cape's U.S.-based asbestos sales and liability-avoidance scheme, or otherwise acted as successors in interest to or beneficiaries of entities involved in that scheme, and are therefore responsible for the bodily injury underlying the claims against Cape, including specifically those claims asserted by South Carolinians. In doing so, the Receiver categorized the Third-Party Defendants into three groups: the Altrad Third-Party Defendants (Third-Party Compl. ¶ 119); the Oppenheimer Third-Party Defendants (*id.* ¶ 122); and the Charter Third-Party Defendants (*id.* ¶ 124).[2] Following appearances by the Altrad Third-Party Defendants, the Receiver sub-divided that category into two groups: the Altrad Owners Third-Party Defendants (Mohed Altrad and Altrad Investment Authority) and the Altrad Sparrows Third-Party Defendants (Arranco US LLC, Hawk Bidco (US) Inc., and Sparrows Offshore, LLC).

2. The Receiver's Discovery Requests and Deposition Notices (July-September 2023).

Beginning July 20, 2023, the Receiver served First Sets of Interrogatories and Requests for Production on each of the Third-Party Defendants ("Discovery Requests").[3] In addition, the

[2] Since filing this third-party action, the Receiver has voluntarily dismissed without prejudice 12 Third-Party Defendants; default judgments have been entered against 7 others, including based on intentional failures to respond; and the remaining 13 Third-Party Defendants have been found subject to the proper exercise of personal jurisdiction by this Court.

[3] The materials before the Court indicate the Receiver served his Discovery Requests on the following dates:

- As to the Oppenheimer Third-Party Defendants, Receiver served his First Set of Interrogatories and Requests for Production on: (1) Anglo American PLC, De Beers PLC, and De Beers UK Ltd. on August 15, 2023; (2) De Beers Consolidated Mines Proprietary Ltd. on September 26, 2023; and (3) De Beers Centenary AG on December 19, 2023.

Receiver noticed depositions of various Third-Party Defendants pursuant to Rule 30(b)(6), SCRCP, including serving Arranco on August 30, 2023 and Central Mining on September 6, 2023, with both depositions scheduled for October 2023.

The Receiver has indicated that following those notices and in light of the Court's late-October 2023 hearing on the Receiver's motions for default judgment, as well as on the Third-Party Defendants' Protective Order Motions, motions to dissolve the Receivership, and motions to dismiss, the Receiver voluntarily postponed those depositions to allow the Court to resolve the pending motions.

3. Third-Party Defendants' Protective Order Motions (Filed Prior to the October 25, 2023 Hearing and Included on the Agenda for Oral Argument).

Third-Party Defendants filed various iterations of the Protective Order Motions—in stand-alone motions and combined with or embedded within other motions—all of which were included on the Court's agenda for oral argument at the October 25, 2023 hearing. In September and October 2023, the Oppenheimer Third-Party Defendants (five of the six[4]) filed the only stand-alone Protective Order Motions:

- As to the Charter Third-Party Defendants, Receiver served his First Set of Interrogatories and Requests for Production on ESAB Corporation on July 20, 2023, and on Central Mining and Charter Consolidated Ltd. on September 6, 2023.
- As to the Altrad Sparrows Third-Party Defendants, Receiver served his First Set of Interrogatories and Requests for Production on July 20, 2023.
- As to the Altrad Owners Third-Party Defendants, Receiver served his First Set of Interrogatories and Requests for Production on September 6, 2023.

[4] The Oppenheimer Defendants explain that De Beers Centenary AG did not file a motion for protective order because the Receiver's Discovery Requests were not served on De Beers Centenary AG until December 19, 2023.

- On September 15, 2023, three of the Oppenheimer Defendants (Anglo American PLC, De Beers PLC, and De Beers UK Ltd.) filed a Motion for Stay of Discovery and Protective Order.

- On October 13, 2023, De Beers Consolidated Mines Proprietary Ltd. filed a Motion for Stay of Discovery and Protective Order.

These motions sought "a stay of discovery pending resolution of the motions to dissolve the receivership filed by other Third-Party Defendants and any appeals stemming therefrom." In footnote 2 of those motions, the Oppenheimer Third-Party Defendants argued as follows:

> The Court of Appeals' one-paragraph order in a separate case confirms the appealability of a denial of a motion to dissolve a receivership **and that a stay during such an appeal is not automatic**. *See Childers v. Davis Mechanical Contractors, Inc., et al.*, No. 2023-000727, at *3 (S.C. Ct. App. Sept. 8, 2023). Here, De Beers plc is asking the Court to exercise its discretion to stay discovery while it considers the validity of the purported Receiver's authority to pursue such discovery and whether this Court has personal jurisdiction over the target of such discovery.

(emphasis added).

The remaining Third-Party Defendants filed their Protective Order Motions as requests combined with or embedded within other motions:

The Charter Defendants: (1) filed on September 1, 2023, motions to dismiss that informally requested an order staying discovery pending resolution of that motion to dismiss; and (2) filed on October 6, 2023, combined motions to dissolve the Receivership and for protective order, the latter of which sought an order the Charter Defendants have "no obligation to respond to the Discovery Requests or to the 30(b)(6) Notice" until the motions to dissolve are "fully resolved."

The Altrad Owners: (1) filed on September 1, 2023, combined motions to dismiss and to stay discovery; and (2) filed on September 20, 2023, combined motions to dissolve the Receivership and for protective order for discovery and depositions.

The Altrad Sparrows: (1) filed on August 21, 2023 combined motions to dismiss and to stay discovery; and (2) filed on September 5, 2023, combined motions to dissolve the Receivership and for protective order for discovery and depositions.

4. Order Granting, in part, Protective Order Motions (October 25, 2023).

On October 25, 2023, the Court held a hearing on the pending motions to dissolve the receivership, motions to dismiss, and Protective Order Motions. At the hearing, the Court ruled on the Protective Order Motions by granting a discovery stay "**until** we deal with the motions to dismiss and motions for entry of default." (10/25/23 Hrg. Tr. pp. 174:21–175:23 (emphasis added)). The Court later said it would file "a short order to that effect" if the "parties feel in the interim that I need to do something by way of a protective order" but made it clear "I say from the bench now as an order of the Court that I am pausing discovery –further discovery in this matter until we resolve the issue of who ought to be in this matter, if anybody." (*Id.* at p. 178:9–21).

Following that ruling from the bench giving Third-Party Defendants the primary relief sought in their Protective Order Motions, and following the Court's invitation to enter a written order "to that effect" upon request of any party, no party requested a written order as to the Protective Order Motions.

5. The Dissolution Order and the Default Order (December 6, 2023).

Thereafter, after receiving proposed orders from both the Receiver and Third-Party Defendants, the Court entered two written orders on December 6, 2023. The Court denied all of the Third-Party Defendants' motions to dissolve the Receivership and to dismiss for lack of personal jurisdiction (the "Dissolution Order"), and the Court granted seven motions for entry of default and entered default as to Altrad Services Ltd, Altrad UK Ltd, Cape Holdco Ltd, Cape

Industrial Services Group Ltd, Cape UK Holdings Newco Ltd, The Sparrows Group LLC, and Sparrows Offshore Group Ltd (the "Default Order").

6. The Receiver's Communication Confirming What Motions Remained Pending (December 8, 2023).

On December 8, 2023, following entry of the Court's Dissolution Order and the Default Order, the Receiver communicated with the Court and all Third-Party Defendants to confirm (1) the Court had ruled on all Protective Order Motions; (2) discovery could proceed; and (3) the only motions remaining for disposition by the Court were additional motions to dismiss on grounds other than personal jurisdiction:

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Cc: Carroll, Todd; Vic Rawl; James Elliott; mary.rose.alexander@lw.com; Steve Pugh; O"Neill, Elizabeth; john.pierce@lw.com; Cameron Berthelsen; caitlin.dahl@lw.com; michele.johnson@lw.com; Ben Carlton; Hall, Kevin; Brian Barnwell; Gray Culbreath; Lindsay Joyner; Jon Robinson; Shannon Peake; murrell@smithrobinsonlaw.com; Troy Brown; Dana Becker; Brady Edwards; Robert Jacques; Lindsay Valek; Brian Barnwell; Paul A. Scrudato; Lori Seaborn; Charity McQueen; 6982_67 John A Tibbs and Margaret B Tibbs v Schneider Electric USA Inc et al Email 6982_67
Subject: Cape PLC v. Anglo American PLCC, et al. (2023-CP-40-01759) – Outstanding Motions for Ruling By the Court [IMAN-IMANMAIN.FID1077725]
Date: Friday, December 8, 2023 11:22:43 AM

Chief Justice Toal and Ms. Diaz,
Given the Court's December 6, 2023 Order denying the Third-Party Defendants' motions to dismiss for lack of personal jurisdiction and motions to dissolve the Receivership, and given the Court's ruling during the October 25, 2023 hearing on all motions for protective order/to stay discovery, which stayed discovery only while the Court considered its ruling on the above-referenced motions (10/25/23 Hrg. Tr. Pp.174:21-175:23), it is the Receiver's understanding: (1) discovery can now proceed; and (2) the only motions remaining for disposition by the Court are those six motions to dismiss filed by certain Third-Party Defendants pursuant to Rule 12(b)(6) (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; and De Beers Jewellers, Ltd.).

As those six remaining motions have been fully briefed by both sides, counsel for the Receiver requests the Court rule on these remaining motions as briefed and without additional oral argument.

Should the Court need additional information from us, please do not hesitate to let me know.
Thank you in advance for your consideration,

John T.

None of the Third-Party Defendants responded to the Receiver's December 8 communication or otherwise indicated to the Court that Third-Party Defendants believed their Protective Order Motions remained pending.

7. The Court's Order Denying the Remaining Motions to Dismiss (December 15, 2023).

Having received no response from Third-Party Defendants disputing the Receiver's December 8 characterization of what motions remained for decision by the Court, the Court denied, by Form 4 Order entered on December 15, 2023, all other motions to dismiss (the "Order on Remaining Motions to Dismiss"). On that same day, the Receiver served Amended Notices of Deposition pursuant to Rule 30(b)(6), SCRCP on Arranco and Central Mining for depositions to begin on January 10 and 12, 2024, respectively.

8. Third-Party Defendants' Notices of Appeal (December 18, 2023).

Beginning December 18, 2023, Third-Party Defendants filed notices of appeal with respect to the Court's Dissolution Order and filed the next day in this Court notices of filing notices of appeal. Third-Party Defendants raised to this Court no other objections or concerns at that time about engaging in discovery during the pendency of those appeals.

9. Additional Motions to Dismiss Filed by Oppenheimer Defendants (December 21, 2023).

The Oppenheimer Defendants, who previously acknowledged in their Protective Order Motions "that a stay during such an appeal [of a denial of a motion to dissolve a receivership] is not automatic," invoked the Court's jurisdiction on December 21, 2023—just three days after filing their notices of appeal—by filing additional motions to dismiss echoing the grounds of the motions to dismiss that were denied by the Court one week earlier in the "Order on Remaining Motions to Dismiss."[5]

10. *Communications Between Third-Party Defendants and the Receiver Regarding Discovery Requests and Scheduled Depositions (January 2024).*

[5] On February 2, 2024, the Court heard oral argument on the Oppenheimer's December 21, 2023 motions to dismiss, and on February 23, 2024, the Court entered an order denying these motions.

On January 5, 2024, the extended deadline set by the Receiver for Third-Party Defendants to respond to the outstanding discovery requests, each set of Third-Party Defendants served Objections to the Discovery Requests refusing to provide substantive responses and indicating their intention not to participate in **any** discovery in this case during the pendency of their appeals of the Dissolution Order.

By letter dated January 8, 2024, pursuant to Rule 11, SCRCP ("Rule 11 Letter"), counsel for the Receiver attempted to consult with all counsel for the Third-Party Defendants regarding the deficient responses they served late on January 5 (a Friday), as well as their anticipated failure to participate in the two depositions noticed the next week, and the Receiver advised the Third-Party Defendants he intended to procced with the depositions of Arranco on January 10 and Central Mining on January 12.

The Receiver has indicated that the only direct responses to the Rule 11 Letter he received came from Arranco (stating on January 9, in response to the Receiver's circulation of a "zoom" link for the deposition set to begin the following day, that it refused to designate or produce any witness); Central Mining (stating on January 10 that it would not produce any deposition witness); and the Oppenheimer Third-Party Defendants (contending on January 12 that the appeal precluded progress in this matter).

B. Current Status and Recent Court of Appeals Orders.

As the procedural history makes clear, there is no active stay of discovery in this proceeding, nor do Third-Party Defendants have any pending Protective Order Motions that require resolution by the Court. At the October 25, 2023 hearing, the Court verbally granted all Third-Party Defendants' Protective Order Motions for a limited duration and with a self-executing

termination upon the Court's resolution of the remaining pending motions.[6] The Court invited the parties to request a written order memorializing that bench ruling if a written order was desired, but no party accepted that invitation.

To the extent any Third-Party Defendant claims that it believed the Protective Order Motions remained pending following the October 25 hearing, that claim was waived when Third-Party Defendants failed (1) to correct the Receiver's December 8 communication to the Court confirming the Protective Order Motions were ruled on at the October 25 hearing; or (2) otherwise advise the Court it believed some, all, or even part of the Protective Order Motions were still pending. Instead, Third-Party Defendants said nothing, allowing the Court to enter its December 15 Order intended to dispose of all remaining motions filed before, and on the agenda for, the October 25, 2023 hearing. Third-Party Defendants cannot use their appeals as a shield to defend this lack of response, as those appeals were not filed until December 18.

Nor have Third-Party Defendants sought a separate stay from either this Court or the Court of Appeals. Although the Oppenheimer Defendants recognized in their Protective Order Motions that the appeal of a receivership dissolution order did not automatically stay the case below, they never requested a stay from this Court following their December 18 notices of appeal. Instead, the Oppenheimer Defendants filed new motions to dismiss after noticing the appeal, requesting that the Court act on their behalf. For the Oppenheimer Defendants to now suggest that this Court's

[6] Third-Party Defendants apparently take the position their Protective Order Motions remained pending because some of them requested a continued stay of all discovery throughout any hypothetical appeal of any order the Court might issue should such an appeal be filed at some point in the future. There were no appeals pending at the time the Court ruled on the Protective Order Motions, and any ruling addressing this hypothetical ground would have been inappropriately advisory. No additional Protective Order Motions have been filed by Third-Party Defendants following their appeals, nor have they filed any other motions following their appeals requesting such a stay.

ability to act was automatically stayed upon the filing of their Notice of Appeal is entirely inconsistent with their prior arguments and actions.

The Court of Appeals has already addressed—and rejected—Third-Party Defendants' argument that discovery in this case is automatically stayed following the appeal of an order denying a motion to dissolve a receivership; indeed, the Court of Appeals expressly found that the appeal of a dissolution order does **not** stay the Receiver's ability to carry out his duties in the case below. *See* Order, *Childers v. Davis Mech. Contractors, Inc. et al.*, No. 2023-000727 (S.C. Ct. App. Sept. 8, 2023) (ruling that the "receivership shall proceed" and the "order is not stayed during pendency of this appeal," such that "the receivership action and the receiver's ability to carry out his duties are not stayed"); *see also* Order, *Childers v. Davis Mech. Contractors, Inc. et al.*, No. 2023-000727 (S.C. Ct. App. Nov. 23, 2023).

Once the Court resolved all pending motions to dismiss and the default-judgment motions, which it did by December 15, 2024, there was no further need for a stay: Discovery was to continue. In multiple communications to the Third-Party Defendants, the Receiver communicated that understanding as well as his proper expectation the Third-Party Defendants would provide "fulsome responses to [discovery] requests . . . on or before January 5, 2024, with depositions to start soon after." No Third-Party Defendant contested that understanding or otherwise indicated they believed Protective Order Motions were outstanding; indeed, no Third-Party Defendant responded at all.

Although the Third-Party Defendants could have addressed (in a timely manner) any concerns about engaging in discovery immediately following the filing of their December 18 notices of appeal, no such objections were raised. Rather, the Third-Party Defendants waited until January 5—*i.e.*, the day that proper discovery responses were due, and less than a week before the

re-noticed depositions were set to begin—to assert they were taking the position they had no obligation to participate in the case during the pendency of their appeals. Simply put, there is no sound legal basis for the Third-Party Defendants' assertion that discovery in this proceeding has been stayed, and the Court **GRANTS** each of the Receiver's Motions to Compel.

* * * * *

For the reasons set forth herein, the Court **GRANTS** the Receiver's Motions to Compel and **ORDERS** Third-Party Defendants (i) to provide responsive, substantive, and complete answers to the Receiver's Discovery Requests within 14 days of entry of this Order and (ii) to begin producing documents in response to the Receivers' Requests for Production the same day. The Court also **ORDERS** Arranco and Central Mining to designate witnesses for the Rule 30(b)(6) depositions noticed by Receiver within 7 days of entry of this Order and produce those witnesses within 21 days of entry of this Order.

IT IS SO ORDERED

SIGNED this _____ day of _____, 2024

_____

HON. JEAN H. TOAL, CHIEF JUSTICE (Ret.)

[JUDGE'S E-SIGNATURE FOLLOWS]

Richland Common Pleas

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

Case Number: 2023CP4001759

Type: Order/Compel

So Ordered

Jean H. Toal

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

The Honorable Jean H. Toal,
Acting Circuit Court Judge

Case No. 2023-CP-40-01759

Appellate Case Nos.
2024-001063
2024-001064
2024-001065

John A. Tibbs v. Asbestos Corporation Limited, et al

PROOF OF SERVICE

I, Lindsay A. Joyner., of Gallivan White and Boyd, PA, *Attorney for Respondent Cape PLC, individually and as successor in interest to Cape Asbestos Company Limited, by and through its duly appointed Receiver Peter D. Protopapas,* hereby certify that the **REPLY TO APPELLANTS' RETURNS TO MOTION TO DISMISS APPEALS OF INTERLOCUTORY ORDERS** was served on all other parties to this appeal on September 12, 2024, via email to their following counsel of record:

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September 12, 2024

Lindsay Joyner

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Subject: Tibbs v Cape PLC, et al. Appellate Case Nos. 2024-001063, 2024-001064, 2024-001065 [IMAN-IMANMAIN.FID1086139]
Attachments: 2024.09.12 Reply of Cape plc.pdf; 09.12.24 POS for REPLY TO APPELLANTS' RETURNS TO MTD.pdf

All,

Please find served upon you, in compliance with the Supreme Court's Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024), Respondent's Reply to Appellants' Returns to Motion to Dismiss Appeals of Interlocutory Orders in the above-referenced appellate cases, which we will be filing with the Court of Appeals of South Carolina momentarily and to which will include a copy of this email with the POS attached here as well.

Please let me know if you have any questions.
Thanks,
Lindsay

GALLIVAN WHITE BOYD
CELEBRATING 75 YEARS
1948 - 2023

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