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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate Case 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. 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

Charter Consolidated Ltd., ESAB Corporation, and Central Mining & Investment Corporation Ltd. are the

Appellants.

PETITION FOR REHEARING *EN BANC*
BY APPELLANTS CHARTER CONSOLIDATED LTD., ESAB CORPORATION, AND
CENTRAL MINING AND INVESTMENT CORPORATION LTD.¹

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 Petition for Rehearing En Banc of the Court’s Order of September 18, 2024 dismissing the appeal (the “Sept. 18 Order”).² The Sept. 18 Order granted the Motion to Dismiss Appeals filed by Peter D. Protopapas, in his purported capacity as the court-appointed receiver for Cape PLC (“Mr. Protopapas” or “Receiver”).

The Court, in issuing the Sept. 18 Order, overlooked and/or misapprehended the following:

1. That the Charter Appellants are constitutionally entitled to a jury trial as a matter of law on the first-party trial between the *Tibbs* plaintiffs and the Receiver—before any trial on the third-party complaint—because they are entitled to “stand in the shoes” of Cape PLC to defend against Tibbs’ claims against Cape PLC, without which no claims exist against Appellants.
2. As even the Receiver admits, its claims are both legal and equitable in nature and, therefore, because the “main purpose” of the Receiver’s Third-Party Complaint is

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, SCRPC; and these proceedings and the claims asserted and relief sought against the Charter Appellants violate their fundamental procedural and substantive constitutional rights and protections.

² The Charter Appellants incorporate herein the Suggestion of Rehearing *En Banc* as stated in THE ALTRAD DEFENDANTS’ PETITION FOR REHEARING AND REHEARING EN BANC REGARDING THEIR RIGHT TO A JURY TRIAL.

to recover damages for tort liability, the Charter Appellants are entitled as a matter of law to a trial by jury.

I. INTRODUCTION

The Court should rehear the Charter Appellants' appeal of the Bench Trial Order because it affects their "substantial rights" and is, therefore, immediately appealable pursuant to S.C. Code Ann. § 14-3-330. 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 trial by jury. Importantly, the Bench Trial Order deprives Appellants of the right to first have a jury trial on the *Tibbs* Plaintiffs' first-party asbestos tort claims against Cape PLC—a point the Sept. 18 Order appears to have wholly overlooked. Additionally, the Sept. 18 Order overlooked and/or misapprehended the thrust of the Charter Appellants' arguments that it is the "main purpose" of the Receiver's so-called third-party claims, not the labels on the causes of action, that dictate whether the Charter Appellants are entitled to a jury. Here, the third-party claims sound in tort and seek monetary damages such that they are claims "at law" entitling the Charter Appellants to an "inviolable" constitutional right to a trial by jury.

Furthermore, a rehearing of this appeal is critically important as the Sept. 18 Order, issued in a cursory fashion without substantive briefing on the merits, has a far-reaching impact on core rights that are enshrined in South Carolina's Constitution. In order to dismiss the appeal as interlocutory and find that the Bench Trial Order did not affect a substantial right, the Court prematurely ruled substantively on the merits of the appeal. The very crux of the appeal is that Appellants are entitled to a jury trial because the essence of the Third-Party Complaint is "at law," even if the Receiver styles the claims as equitable in nature. Instead of allowing full briefing on this complicated issue, the Court made a truncated decision on an expedited basis, without even the full record for review, placing form over substance. Such a result—where a party cannot even

be substantively heard in an appeal court on whether it has a constitutional right to a jury—effectively eliminates a party’s ability to enforce its constitutional right to a jury trial in South Carolina that is purportedly “inviolable.” As such, the Court should rehear the appeal.

II. PROCEDURAL HISTORY

The details of the receivership appointment and issuance of an order setting a bench trial are chronicled in Appellants’ Return to Motion to Dismiss and Expedite in this Appeal and that Return is incorporated herein by reference.³ An abbreviated procedural history is provided below.

On April 5, 2023, Mr. and Mrs. Tibbs filed the present action and named Cape PLC as a defendant, asserting tort causes of action for negligence, strict liability, breach of warranties, and loss of consortium. The law firm of Rikard & Protopapas filed a “General Denial” for Cape PLC “by and through its Receiver Peter D. Protopapas.”⁴ The following day, Mr. Protopapas filed a document entitled “Third-Party Complaint,” purporting to be the “duly appointed receiver” over “Cape PLC” asserting causes of action against the Charter Appellants.⁵

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. No jury trial was held on April 15, 2024, and no jury trial for the underlying claims was rescheduled. Instead, the circuit court issued the Bench Trial Order setting the third-party case for *a bench trial* in December 2024, prior to any trial (much less any determination) on liability or damages as to Cape PLC.

³ Cf. Rule 208(b)(6), SCACR.

⁴ See Sparrows App. at 269-277.

⁵ See Sparrows App. at 278-339.

III. ARGUMENT

A. **The Sept. 18 Order Overlooks That the Charter Appellants Are Entitled to Stand in the Shoes of the Receiver in a Jury Trial on the *Tibbs* Plaintiffs' Claims Prior to a Trial on the Third-Party Complaint.**

This Court should re-examine the order dismissing the appeal of the Bench Trial Order as the Sept. 18 Order appears to have overlooked or misapprehended the Charter Appellants' arguments related to their constitutional right to first have a jury trial on the *Tibbs* Plaintiff's claims against Cape PLC. Orders impacting the mode of trial, including trial by jury, are subject to immediate appeal because they "affect substantial rights under S.C. Code Ann. § 14-3-330(2)." *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997); *see also Hagood v. Sommerville*, 362 S.C. 191, 196–97, 607 S.E.2d 707, 709 (2005) (mode of trial is a "well-established exception to the general rule" that nonfinal orders are nonappealable); *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 78, 533 S.E.2d 575, 577 (2000) ("The majority of cases requiring immediate appeal involve review of denials of trial by jury and are based on the public policy consideration of advancing the constitutional mandate to preserve the right to trial by jury inviolate.") (collecting cases). Here, by setting a non-jury trial on the Receiver's claim prior to any jury trial on the first party claims against the Receiver, the Bench Trial Order has affected the Charter Appellants' "substantial rights" and, therefore, the Sept. 18 Order incorrectly dismissed the appeal.

The very nature of the 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 the 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."). Importantly, the Bench Trial Order, which sequences the trial of the "Third-Party Complaint" before any trial on the first-party action, is wrong as a matter of law because a third-party trial must be limited to evaluating only potential "derivative" liability that the third-party plaintiff owes the first-party plaintiff. Rule 14, SCRPC; *see, e.g., First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (1994) ("Under Rule 14, the third-party plaintiff must have a substantive claim against the third-party defendant founded upon derivative liability.").

Here, the *Tibbs* Plaintiffs asserted tort claims of negligence, strict liability, breach of warranties, and loss of consortium against Cape PLC and all other so-called "products defendants." There can be no doubt that these issues 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).

Accordingly, it is improper to set this matter for a nonjury trial before all of the jury issues—first in the first-party action, and then in the third-party action (if any liability is first assigned by a jury to Cape PLC in the first-party action)—are resolved.

B. The Sept. 18 Order Misapprehends Well Established Law That the Main Purpose of the Receiver's Claims Determine Whether Appellants Are Entitled to a Jury Trial, Not the Title of the Cause of Action.

The truncated Sept. 18 Order does little to explain the basis of its reasoning beyond citing a handful of cases for the generic proposition that parties are not entitled to a jury trial for equitable

claims. However, this ignores South Carolina law that mandates courts look at the actual nature or “main purpose” of the claim, not its mere label, to determine whether it was equitable or legal in nature such that the parties are entitled to a trial by jury. *See Verenes v. Alvanos*, 387 S.C. 11, 16, 690 S.E.2d 771, 773 (2010) (characterization of an “action as equitable or legal depends on the [plaintiff’s] ‘main purpose’ in bringing the action”); *Brawley v. Richland County*, Op. No. 6090, Howard Ad.Sh. 37, at 26 (S.C. Ct. App. Sept. 25, 2024) (“‘The substance of the relief sought,’ not the form, is typically what matters.”). Indeed, “the ‘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).

Simply because the Receiver has cloaked his claims in purported equitable causes of action, however, 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.”). In reality, the Receiver’s “Third-Party” Complaint seeks monetary damages for tort liability, a classic example of an action at law for which a party is entitled to a jury. For example, 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 Third-Party 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...” Third-Party Complaint, p. 16, ¶ 37(iii), (iv). The Third-Party 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.*

(Complaint p. 17, ¶ 39) (emphasis added).

Furthermore, although the prayer for relief is couched in terms of “a full accounting” in equity, the Receiver seeks 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).

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*, 433 S.C. 405, 415, 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). Indeed, the Receiver even conceded in his filings to the circuit court that his claims “sound[] in equity and law.” See Receiver’s Motion to Preadmit Exhibits as a Discovery Sanction at 2 (Apr. 3, 2024) (emphasis added).

Furthermore, when other courts have evaluated this exact issue—*i.e.*, whether a claim for monetary damages via a piercing the corporate veil claim is a legal or equitable claim entitling a defendant to a jury trial—courts have repeatedly found that such claims are “legal in nature” requiring a trial by jury. See, e.g., *In re Bonds Distrib. Co., Inc.*, 2000 WL 33682815, at *8 (Bankr. M.D.N.C. Nov. 15, 2000) (“The weight of authority appears to recognize a right to jury trial with respect to claims seeking to pierce the corporate veil based upon the theories of alter ego or mere instrumentality. Although not entirely clear from the opinions, the courts in these decisions apparently have concluded that where such claims seek to impose liability upon the defendant for the debts or obligations of another, the remedy sought is monetary damages and, hence, is legal in

nature.”); *In re G-I Holdings, Inc.*, 380 F. Supp. 2d 469, 475-476 (D.N.J. 2005) (finding that party was entitled to a jury trial on whether they were liable for asbestos claims under an “alter ego” or “veil-piercing” theory); *United States v. Godley*, 2020 WL 4507324, at *7 (W.D.N.C. Aug. 5, 2020) (finding that, under North Carolina law, defendants were “entitled to a jury trial on the issue of piercing the corporate veil” because the remedy sought was legal in nature); *Wm. Passalacqua Builders, Inc. v. Resnick Devs. S., Inc.*, 933 F.2d 131, 136 (2d Cir. 1991) (“Because the action for piercing the corporate veil appears to have its roots in both law and equity, and the nature of the relief sought here supports the conclusion that plaintiff’s cause of action is legal in nature, it was entirely proper for the district court to submit the corporate disregard issue to the jury.”).

Here, the Sept. 18 Order should have looked beyond the mere label of the Receiver’s claim as equitable and analyzed the actual nature of the relief sought, which is legal in nature. Given that the “main purpose” of the Receiver’s Third-Party Complaint against the Charter Appellants is to obtain a money judgment under tort theories, the claims are matters at law, not in equity. The Charter Appellants are therefore entitled to the jury trial they timely demanded.

CONCLUSION

For the reasons set forth herein, the Charter Appellants respectfully request this Court grants the Charter Appellants’ petition for rehearing.⁶

⁶ Per Rule 208(b)(6), SCACR, Charter Appellants incorporate herein their opposition to Respondent’s Motion to Dismiss Appeal and, 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.

Respectfully submitted,

Dated: October 10, 2024

BLUESTEIN THOMPSON SULLIVAN LLC

By s/John S. Nichols.

John S. Nichols (SC 04210)

Email: john@bluesteinattorneys.com

1614 Taylor Street

Columbia, SC 29202

Telephone: 803-779-7599

GORDON REES SCULLY MANSUKHANI LLP

s/A. Victor Rawl, Jr.

A. Victor Rawl, Jr. (SC 9261)

Email: vrawl@grsm.com

677 King Street, Suite 450

Charleston, SC 29403

Telephone: (843) 278-5900

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

PROOF OF SERVICE

I, the undersigned of the law offices of Gordon Rees Sculls Mansukhani LLP, attorneys 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): Petition for Rehearing En Banc of Appellants Charter Consolidated Ltd., ESAB Corporation, and Central Mining & Investment Corporation Ltd.

Parties Served:

John T. Lay, Jr. (jlay@gwblawfirm.com)
Gray T. Culbreath (gculbreath@gwblawfirm.com)
Lindsay A. Joyner (ljoyner@gwblawfirm.com)
Laura W. Jordan (ljordan@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. Scudato (paul.scudato@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 Defendants

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 Mohed Altrad and Altrad Investment Authority SAS

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.

October 10, 2024