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S.C. SUPREME COURT

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February 5, 2025

Via Electronic Filing

The Honorable Patricia A. Howard
Clerk of the South Carolina Supreme Court

Re: *Tibbs v. Asbestos Corporation Limited et al.*

Appellate Case Nos. 2024-000916, 2024-001423, 2024-002114, 2024-002117,
2025-000052

Dear Madam Clerk:

We represent Charter Defendants in the above referenced appeals.¹ The Court has indicated its intent to address issues related to the propriety and scope of authority of receivers appointed pursuant to S.C. Code §15-65-10(4). The consolidated appeals of Atlas Turner (Atlas) and Asbestos Company Limited (ACL) Appellate Case No. 2023-001461 have been scheduled for oral argument on February 11, 2025. The scope of receiver-related issues in the ACL/Atlas consolidated appeals are far narrower than those at issue in the present Cape PLC/Cape Intermediate Holding Ltd (Cape) receiver appointment orders and not dispositive of most of the receivership issues raised in Cape, which involves different facts, a different receivership, and different state law and Constitutional arguments challenging the receivership.

Notwithstanding the numerous differences between the Cape litigation and appeals and the ACL and Atlas Turner litigation and appeals, this Court issued an order in all pending Cape appeals indicating that the allowable scope of the receiver appointed in Cape will be decided by the ACL/Atlas appeal.² Specifically, the Court stated: “The dispute giving rise to the English Court’s attempt to intervene in these matters involves the appropriate reach of the Receiver appointed by the South Carolina Circuit Court - an issue this Court will hear during its February term of court

¹ By continuing to prosecute this appeal, Charter Consolidated Ltd., ESAB Corporation, and Central Mining & Investment Corporation Ltd. (“Charter Defendants”) do not waive, and expressly preserve, all defenses to the underlying action, including the defense of lack of personal jurisdiction.

² As the Court is aware, there are numerous certiorari petitions pending before the Court that involve the CIHL (and Cape PLC) receiverships—the Charter Defendants have filed five themselves, and the Altrad Defendants have filed several as well.

and resolve after oral argument.” (Order (Jan. 16, 2025))³. Charter Defendants believe it imperative to bring the significant distinctions between the Cape appeal and the ACL/Atlas appeal to the Court’s attention.

ACL/ATLAS Appellate Issues Are Far Different Than those in Cape

The receivership issues raised in the ACL/Atlas matters scheduled for oral argument in February are fundamentally different from the receivership issues raised in the present case. (*Cf.* Appellate Case No. 2023-001461 and Appellate Case Nos. 2024-000916, 2024-001423, and 2024-001499.) Accordingly, if the Court intends to resolve the appropriate reach of “the Receiver” in this case, it is imperative that the Court independently grant and decide the outstanding certiorari petitions in Appellate Case Nos. -001423 and 2024-001499.

The ACL/Atlas consolidated appeal and the Cape appeal involve only two limited overlapping legal issues regarding the initial appointment process of a receiver, namely:

- the improper appointment of a receiver over foreign active corporations with no assets located in South Carolina under S.C. Code § 15-65-10(4); and
- that the receiver appointed was Peter Protopapas (specifically requested by underlying plaintiffs’ counsel – also same in all three receiver appointments).

Moreover, even with respect to these overlapping *legal* issues, the relevant facts differ, as do the appellate arguments, which are tied to the particular facts in each case. For example, in the ACL and Atlas Turner appeals, the Receiver argues that insurance policies covering obligations that arose from in state injuries are themselves in state assets of ACL and Atlas Turner. No such argument is made in the Cape litigation, which seeks to pursue novel claims in the name of Cape based on allegations of alter ego and veil piercing against Charter Defendants, the Altrad defendants and Anglo American/De Beers defendants, even though neither Cape nor any of the defendants in the Cape litigation has assets in the state.

There are numerous other differences between ACL/Atlas and Cape. Unlike in Cape, ACL and Atlas were parties to the case in which the motion to appoint a receiver was filed, ACL and Atlas were served with the complaint, ACL and Atlas were served with the motion to appoint a receiver, the motion to appoint a receiver was filed before the case had ended in ACL and Atlas, and ACL and Atlas had the opportunity to respond the motion to appoint the receiver. In ACL/Atlas, the receiver argues that the Canadian corporations’ South Carolina assets that are subject to S.C. Code §15-65-10(4) are the Canadian insurance policies, and that the Canadian corporations were “in danger of insolvency.” In Cape, the receiver again does not allege the existence of a South Carolina asset (insurance policy or otherwise), and it is undisputed that Cape is not “dissolved, insolvent or in imminent danger of insolvency.” *Id.*

³ Order denying receiver’s request to stay appellate briefing “[w]hile the Court considers the Receiver’s Emergency Motion requesting the Court confirm the jurisdiction of this Court over the pending appeals and the South Carolina courts’ jurisdiction over the Cape Receivership...”

Critically, ACL/Atlas does not involve issues related to a prejudgment receiver's ability/authority to act beyond the case in which he is appointed – much less a prejudgment receiver's authority to sue third parties in new cases in the name of the foreign corporation.

In addition, there are a multitude of other issues raised by the Charter Defendants (and others in Cape) regarding the appointment, scope and authority of a receiver that have not been raised by ACL/Atlas, including but not limited to:⁴

1. May a pre-judgment receiver appointed over a foreign corporation in one case pursuant to S.C. Code Ann. § 15-65-10, et seq, act in and assert causes of action in another case in which he was not appointed?
2. May a pre-judgment receiver appointed over a foreign corporation pursuant to S.C. Code Ann. § 15-65-10, et seq, be given the authority of a general/corporate receiver over a domestic corporation pursuant to S.C. Code Ann. § 33-14-320? (i.e. – “dispose of all or any part of the assets of the corporation wherever located... and may sue and defend in his own name as receiver of the corporation in all courts of this State...”)
3. May a pre-judgment receiver appointed over a foreign corporation pursuant to S.C. Code Ann. § 15-65-10, et seq, also act as receiver for another (different) foreign company for which there is no appointment motion or order?
4. May a pre-judgment receiver appointed over a foreign corporation in one case pursuant to S.C. Code Ann. § 15-65-10 act as a receiver over that foreign corporation in another case in which the foreign corporation was not properly served with process and therefore cannot be deemed to be in default?
5. To act as a pre-judgment receiver over a foreign corporation in a case, must some party in the case first make a motion to appoint a receiver in that case and/or must the trial court first issue an order appointing a pre-judgment receiver in that case?
6. May a pre-judgment receiver be appointed over a foreign company that is not a party to the case?
7. Must a court first have personal jurisdiction over a foreign corporation in order to appoint a receiver?
8. May a pre-judgment receiver be appointed over a foreign company that has never been served with a motion to appoint a receiver?
9. Must the pre-judgment receiver appointment order over a foreign corporation be dissolved after the party moving to appoint the receiver has resolved his case?

⁴ The following issues are more fully explained in Charter Defendant's Petition for Certiorari and Charter Defendants' Reply in Support of Certiorari filed in Appellate Case No. 2024-001423.

10. Is a pre-judgment receiver appointment order void *ab initio* pursuant to S.C. Code Ann. § 15-65-60 when the appointment order does not contain the mandatory clause “fixing the value of the property for which the bond may be given.”? *Truesdell v. Johnson*, 144 S.C. 188, 142 S.E. 343, 348 (1928) (interpreting the provision under the previous receivership statute containing substantively identical language to Section 15-65-60 and holding that “[t]he provision for inserting a clause fixing the value of the property in the order appointing a receiver is mandatory, and without such clause the order is void.)”
11. May the Circuit Court ignore the pre-judgment right to tender a bond to dissolve a receivership pursuant to S.C. Code Ann. § 15-65-60?
12. May a pre-judgment receiver appointed over an active foreign corporation file a new action alleging massive wrongdoing and or admit liability?
13. Do the receiver appointment orders and actions of the receiver in this case violate the Commerce Clause, the Due Process Clause, the Equal Protection Clause, the Takings Clause, and the Excessive Fines Clause? Such constitutional violations can only be assessed on a case-by-case.

As there are numerous legal and factual issues regarding the propriety of receivership appointments and the scope of a receiver’s authority raised in this matter that are not present in ACL/Atlas appeal, the Court cannot determine “the appropriate reach of the Receiver [Cape] appointed by the South Carolina Circuit Court” by deciding only the issues in the ACL/Atlas appeal.

If the Court is attempting to address the broader receivership issues at issue in Cape (issues that actually impact the numerous cases where a receiver appointed pursuant to S.C. Code Ann. § 15-65-10, et seq. is bringing litigation against third parties in cases beyond the case in which he was appointed) then the Court should grant the petitions for certiorari in this case, invite merits briefing and schedule oral argument so that the appellants in this case – none of whom are parties to the ACL /Atlas Turner consolidated appeal -- have an opportunity to present their state law and Constitutional challenges to the Cape Receiver, and so the Court can resolve the distinct legal and factual issues raised on the appeals in the Cape case. Charter would welcome this outcome and indeed, the entire premise of Charter Defendant’s appeals to date has been that these threshold questions of whether the Cape Receiver’s appointment and actions are consistent with South Carolina law and the U.S. Constitution should be decided before any trial adjudication.

Respectfully submitted,

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/s/ A. Victor Rawl, Jr.

Attorneys for Charter Defendants

cc: Counsel of Record (via email)