IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

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

I. FACTUAL AND PROCEDURAL HISTORY

On June 30, 2023, Plaintiff Cape plc, by and through its Receiver, Peter D. Protopapas (the "Receiver"), filed a third-party complaint in the Richland County, South Carolina, Court of Common Pleas, against numerous third-party defendants. The Receiver alleges the third-party defendants, including their predecessors in interest, agents, co-conspirators, and/or amalgamated corporate parents, transacted business throughout the United States, including South Carolina, for the sale and use of asbestos or asbestos-containing products that resulted in thousands of injuries and deaths from mesothelioma and other asbestos-related diseases. The Receiver alleges a complex scheme whereby

Cape plc and the third-party defendants cooperated in marketing and distributing asbestos to South Carolina-based clients, including Raybestos Manhattan, Inc. and Westinghouse Electric Corp., and to other entities conducting business in South Carolina. According to the Receiver, Cape plc and the third-party defendants, fully aware of the hazards of exposure to asbestos, structured their relationships and coordinated their activities to avoid the potential for substantial financial liability. The Receiver asserts causes of action for unjust enrichment (First Cause of Action), constructive trust (Second Cause of Action), alter ego and veil-piercing liability (Third Cause of Action), and accounting (Fourth Cause of Action), *See generally* Third-Party Compl., ECF No. 1-2.

On June 28, 2024, Defendant Anglo American plc ("Anglo American") filed a notice of removal pursuant to 28 U.S.C. §§ 1332, 1441, and 1446. Anglo American asserts it learned on June 18, 2024 that the state court personal injury complaint from which the third-party complaint is purported to be derived, *Tibbs v. 3M Company*, C/A No. 2023-CP-40-01759, had been dismissed weeks before the Receiver filed the third-party complaint. Anglo American submits the Receiver's lawsuit is, and always has been, a first-party action removable on the basis of diversity jurisdiction.

This matter is before the Court on the Receiver's motion to remand, which motion was filed on July 2, 2024. ECF No. 7. Anglo American filed a response in opposition to the motion to remand on July 16, 2024. ECF No. 45. Also on July 16, 2024, responses in opposition to the motion were filed by Defendants Charter Consolidated Ltd., ESAB Corporation, and Central Mining & Investment Corporation Ltd. (the "Charter Defendants"); Mohed Altrad and Altrad Investment Authority, SAS (the "Altrad Defendants"); and ArranCo US, LLC; Hawk Bidco (US) Inc.; and Sparrows Offshore, LLC (the "Sparrows Defendants") (collectively with Anglo American the "Responding Defendants"). ECF Nos. 46, 47, 48. The Receiver filed a reply to the Responding

Defendants' responses on July 23, 2024. ECF No. 67. Having carefully considered the motion, the notice of removal, the responses, the reply, the record, and the applicable law, it is the judgment of the Court the Receiver's motion to remand will be granted.

II. STANDARD OF REVIEW

The burden of establishing federal jurisdiction is placed upon the party seeking removal. *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994). When considering a motion to remand, the Court accepts as true all relevant allegations contained in the complaint and construes all factual ambiguities in favor of the plaintiff. *Woods v. Marshak*, Civil Action No. 3:23-4472-MGL, 2024 WL 3541217, at *2 (D.S.C. July 25, 2024) (citing *Willy v. Coastal Corp.*, 855 F.2d 1160, 1163–64 (5th Cir. 1988)). "'Jurisdictional rules direct judicial traffic. They function to steer litigation to the proper forum with a minimum of preliminary fuss.'" *Id.* (quoting *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 425 (4th Cir. 1999)). The Court is "'obliged to construe removal jurisdiction strictly because of the significant federalism concerns implicated.'" *Id.* (quoting *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004)). Federal courts consider the facts disclosed on the record as a whole. *Capitol Cake Co. v. Lloyd's Underwriters*, 453 F. Supp. 1156, 1160 (D. Md. 1978)(citing 14 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure § 3734, at 738 (1976)(collecting cases)).

III. DISCUSSION

A. ***Barton*** **Doctrine**

The Receiver first argues that this Court lacks subject matter jurisdiction because the Receiver's third-party claims fall within the exclusive jurisdiction of the Receivership Court under the doctrine articulated in *Barton v. Barbour*, 104 U.S. 126 (1881). This Court agrees.

In *Barton*, the plaintiff was injured when a railroad sleeping car in which she was a passenger derailed. She brought a claim for her injuries against the receiver of the railroad company in the Supreme Court of the District of Columbia. The receiver asserted the District of Columbia court lacked jurisdiction because, having been appointed receiver "of all the property, rights, and franchises of said railroad company" by virtue of a decree made by the circuit court for the City of Alexandria, Virginia, the property of the railroad company could not be subject to any claim absent leave of the Alexandria circuit court. 104 U.S. at 127. The Court found that leave of the appointing court is necessary to prevent a claimant from taking property from the receivership "without regard to the rights of other creditors or the orders of the court which is administering the trust property." *Id.* at 129. The Court observed:

> The property is a fund in court to abide the result of the litigation, and to be applied to the payment of the judgment creditor who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And in order to effect this, the court must administer it independently of any rights acquired by third persons pending the litigation. Otherwise the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless.

Id. (quoting *Wiswall v. Sampson*, 55 U.S. 52 (1852)).

Later, in *Porter v. Sabin*, 149 U.S. 473 (1893), two officers of Northwestern Manufacturing & Car Company ("Northwestern") allegedly engaged in fraudulent misappropriation of property of the company. A receiver was appointed who took control of Northwestern's property and tangible assets. The receiver petitioned the appointing court for authority to bring an action against the officers, but the petition was denied. Consequently, stockholders of the company sought to maintain the claim and to make the receiver a defendant. The district court dismissed for lack of jurisdiction.

On appeal, the Supreme Court upheld the lower court's ruling, explaining:

> When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate. The possession of the receiver is the possession of the court; and the court itself holds and administers the estate through the receiver, as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it.
>
> It is for that court, in its discretion, to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against the receiver without the permission of the court which appointed him.
>
> The reasons are yet stronger for not allowing a suit against a receiver appointed by a state court to be maintained, or the administration by that court of the estate in the receiver's hands to be interfered with, by a court of the United States, deriving its authority from another government, though exercising jurisdiction over the same territory. The whole property of the corporation within the jurisdiction of the court which appointed the receiver, including all its rights of action, except so far as already lawfully disposed of under orders of that court, remains in its custody, to be administered and distributed by it. Until the administration of the estate has been completed, and the receivership terminated, no court of the one government can, by collateral suit, assume to deal with rights of property or of action constituting part of the estate within the exclusive jurisdiction and control of the courts of the other.

Id. at 479-80.

Here, the state court appointed the Receiver pursuant to S.C. Code Ann. § 15-65-10. "A receiver represents the Court appointing him; he is an officer of the Court and is the agency through which the Court acts. As he has no power other than that given him by the Order of appointment, his authority is derived solely from the Court. He is subject only to the Court's direction." *Kirven v. Lawrence*, 137 S.E.2d 764, 768 (S.C. 1964)(citing cases). These precedents make clear this Court lacks subject matter jurisdiction over this matter absent approval by the state court.

The Court of Appeals for the Fourth Circuit recently considered *Barton* and *Porter* in a case related to this action, *Protopapas v. Travelers Casualty & Surety Co.*, 94 F.4th 351 (4th Cir. 2024). In *Travelers*, Peter D. Protopapas, as receiver for Payne & Keller Company, brought an action in state court against various insurance companies, alleging the insurers failed to defend or indemnify Payne & Keller Company with respect to asbestos law suits in South Carolina. The receiver sought declaratory relief and asserted causes of action for breach of contract, accounting, and failure to procure insurance. Travelers Casualty & Surety Company ("Travelers") filed a notice of removal on the grounds of diversity jurisdiction. *See Protopapas v. American Int'l Grp.*, C/A No. 3:21-4086-DCC. The receiver filed a motion to remand. The district court granted the motion, relying, in part, on *Barton* and *Porter*. The district court concluded that "*Barton*, and its subsequent application in *Porter*, act as a limitation on federal jurisdiction when a state court has previously exercised its authority by appointing a receiver to handle the administration of property; to allow this matter to continue in federal court would directly interfere with the exclusive jurisdiction of the receivership court over this dispute." Op. and Order, ECF No. 180 at 5-6 (C/A No. 3:21-4086-DCC). Travelers appealed.

The Fourth Circuit dismissed the appeal under 28 U.S.C. § 1447(d).[1] In doing so, the Fourth Circuit was required to ascertain whether the district court "relied upon a ground that is *colorably*

[1]"An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise." This section, read in conjunction with 28 U.S.C. § 1447(c), "bars appellate court review of remand orders when they are based on (1) a district court's lack of subject matter jurisdiction or (2) a defect in removal other than lack of subject matter jurisdiction that was raised by the motion of a party within 30 days after the notice of removal was filed." *Travelers*, 94 F.4th at 356 (internal quotations omitted)(quoting *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 196 (4th Cir. 2008)).

characterized as subject-matter jurisdiction[.]" *Travelers*, 94 F.4th at 356 (emphasis in original) (quoting *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 234 (2007)). The Fourth Circuit proceeded to "take a brief peek at the district court's reasoning to satisfy [itself] that a lack of subject-matter jurisdiction was a colorable or plausible explanation of the legal ground on which the court actually relied for remand." *Id.* The Fourth Circuit concluded:

> Thus, when applying the *Barton* doctrine, the district court plausibly concluded that a federal court lacks jurisdiction over a state receivership or a state-court appointed receiver with respect to assets of the receivership because the state court has exclusive jurisdiction over the assets of the receivership. Exercising federal jurisdiction over a suit by or against a state-appointed receiver, who functions as an "arm" or "executive" of the state-receivership court, would infringe on the state court's control over the receivership assets — its exclusive jurisdiction. Thus, as a matter of comity, as well as custom, the *Barton* doctrine rests on this exclusivity of the state receivership over the assets before it as a matter of jurisdiction[.]

Id. at 358 (citing cases).

The Removing Defendants contend the *Barton* doctrine does not apply because (1) since the Removing Defendants do not have assets in South Carolina, removal does not interfere with the state court's control over in-state assets; (2) the Receiver is acting *ultra vires* because he cannot assert control over assets outside of South Carolina; (3) the Receiver's lawsuit violates the Commerce Clause of the United States Constitution; (4) and the Receiver's lawsuit violates South Carolina's receivership statute. Anglo American's Opp'n to Pl.'s Mot. to Remand, ECF No. 45 at 19-28.[2]

[2]The Court will generally reference Anglo American's response in opposition to the Receiver's motion to remand. The Charter Defendants join in the briefs filed by the other Responding Defendants. ECF No. 46. The Altrad Defendants reiterate Anglo American's assertions neither *Home Depot* nor *Barton* deprives the Court of subject matter jurisdiction. ECF No. 47. The Sparrows Defendants claim the Receivership violates the United States and South Carolina Constitutions. They also argue the Receivership violates the South Carolina statutory receivership framework and precedent by purporting to exert control over foreign third parties and foreign assets and expanding into matters unrelated to the initial appointment by the state court. The Sparrows Defendants also contend the *Barton* doctrine and the *Home Depot* opinion are inapplicable. ECF

These and other questions interpreting the statutory authority of the Receiver must be raised in state court and, if necessary, appealed through the state system. It is not for this Court to sit in judgment of the Receiver's actions taken as a representative of the court that appointed him. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

The Receiver's motion to remand is granted on this ground.

B. *Home Depot* Ruling

The Receiver also contends the holding in *Home Depot U.S.A., Inc. v. Jackson*, 587 U.S. 435 (2019), compels remand. This Court agrees.

In *Home Depot*, a third-party counterclaim defendant attempted to remove the counterclaim filed against it. The Court reviewed the limited jurisdiction granted to the federal courts by Congress, and noted Congress enacted provisions permitting parties to remove cases originally filed in state court to federal court, 28 U.S.C. § 1441(a), under federal question jurisdiction, 28 U.S.C. § 1331, or diversity jurisdiction, 28 U.S.C. § 1332(a); or pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1453(b). *Home Depot*, 587 U.S. at 438. The Supreme Court framed the issue as "whether the term 'defendant' in either § 1441(a) or § 1453(b) encompasses a party brought into a lawsuit to defend against a counterclaim filed by the original defendant or whether the provisions limit removal authority to the original defendant." *Id.* at 439. The Court reiterated its prior rulings that "a district court, when determining whether it has original jurisdiction over a civil action, should evaluate whether that action could have been brought originally in federal court." *Id.*

No. 48. The Court appreciates the efforts and arguments of all parties, and intends this order to resolve each response.

at 441 (citing cases). The Court continued:

> This requires a district court to evaluate whether the plaintiff could have filed its operative complaint in federal court, either because it raises claims arising under federal law or because it falls within the court's diversity jurisdiction. Section 1441(a) thus does not permit removal based on counterclaims at all, as a counterclaim is irrelevant to whether the district court had "original jurisdiction" over the civil action. And because the "civil action . . . of which the district cour[t]" must have "original jurisdiction" is the action as defined by the plaintiff's complaint, "the defendant" to that action is the defendant to that complaint, not a party named in a counterclaim. It is this statutory context . . . that underlies our interpretation of the phrase "the defendant or the defendants."

Id. at 441-42 (internal citations omitted).

The *Home Depot* opinion is consistent with Supreme Court precedent. In *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), the question was whether a state court plaintiff subject to a counterclaim could remove the action to federal court on the grounds of diversity jurisdiction. The Court held amendments to the general removal statute indicated Congressional intent to limit the right to removal solely to defendants.[3] *Id.* at 107; *see Home Depot*, 587 U.S. at 443 (examining *Shamrock Oil* and finding no textual reason to distinguish between a counterclaim defendant who was also the original plaintiff and a counterclaim defendant who was not originally part of the lawsuit). Even though the case is not precisely on point, courts subsequently applying *Shamrock Oil* consistently refuse to grant removal power under § 1441(a) to third-party defendants. *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 332-33 (4th Cir. 2008)(collecting cases).

As alluded to previously, Responding Defendants contend removal is appropriate because the *Tibbs* plaintiffs' personal injury claims against Cape plc had been dismissed prior to the Receiver's filing of the third-party complaint in state court, making the third-party defendants

[2]Between 1875 and 1887, the general removal statute authorized "either party" to remove the action to federal court.

"indisputably original defendants." ECF No. 45 at 8. The Responding Defendants argue the Receiver cannot defeat their statutory right of removal "by filing a first party lawsuit disguised as a third party lawsuit and based upon 'first party' claims that were dismissed weeks before the sham 'third party' lawsuit was filed." *Id.* at 15.

In his reply, the Receiver submits there has been no filing of an actual dismissal of Cape plc from the *Tibbs* case because the *Tibbs* plaintiffs never dismissed Cape plc from their personal injury complaint. The Receiver states an answer on behalf of Cape plc was filed in the *Tibbs* case on June 29, 2023 because Cape plc remains a defendant in that action. The Receiver further states the tolling agreement is not a dismissal, but simply extends the statutory limitations period.[4]

A transcript of a state court hearing reflects, in part, a pretrial hearing status report in *Tibbs*. ECF No. 45-7. The following exchange took place regarding Cape plc's participation in the case.

> MR. CARROLL: Your Honor, may I – may I inquire . . . . This morning, Ms. – Ms. McVey mentioned that there are only two defendants left in Tibbs: Atlas and ACL. My understanding of – of third party practices is the cases are supposed to be tethered together. But – but I don't – . . . . I'm just wondering what happened to Cape.
>
> MS. McVEY: Cape is still in, the tolling agreement.
>
> THE COURT : Cape is still very much in it.
>
> MR. CARROLL: The tolling agreement. Okay. So they are?

ECF No. 45-7 at 156-57.

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[3]A copy of the tolling agreement memorializing the purported dismissal of the *Tibbs* plaintiffs' claims against Cape plc is filed under seal. The tolling agreement provides that the Receiver and certain counsel consent to the dismissal of specific claims filed by counsel's clients against Cape plc without prejudice in exchange for Cape plc's assent to tolling the applicable limitations period. The purpose of the agreement is to allow the parties evaluate the dismissed claims outside of litigation. The agreement provides for refiling of the dismissed claims in the event settlement is not effectuated.

The Court finds, based on the state court judge's understanding, Cape plc was not dismissed from the *Tibbs* action prior to the Receiver's filing of the third-party complaint. Accordingly, *Home Depot* bars removal.

Assuming for purposes of discussion the *Tibbs* plaintiffs' person injury claims against Cape plc had been dismissed as alleged, there exists some authority for Responding Defendants' position. In *Columbian Chemicals Co. v. AIG Specialty Ins. Co.*, Civil Action No. 5:14-CV-166, 2015 WL 12755709 (N.D.W. Va. Mar. 27, 2015), Columbian Chemicals Company ("Columbian") was the defendant in a class action filed in state court. The case was resolved. The same day the class action settlement was approved, Columbian moved the state court for leave to file a third-party complaint against one of its insurers, AIG Specialty Insurance Company ("AIG"), seeking a declaration AIG was obligated to indemnify Columbian for the class action settlement. AIG removed the third-party complaint on grounds of diversity jurisdiction. Columbian moved to remand.

In addressing the motion to remand, the West Virginia district court observed some district courts hold removal is not precluded when a third-party complaint is filed after the original plaintiff's claims are dismissed. As an example, the West Virginia district court referenced *Rivera v. Fast Eddie's Inc.*, 829 F. Supp. 2d 1088 (D.N.M. 2011). In *Rivera*, Melba Rivera ("Rivera") brought a personal injury action in state court against Fast Eddie's Inc. ("Fast Eddie's"). Fast Eddie's maintained insurance policies with Philadelphia Insurance Co. ("Philadelphia") and Valley Forge Insurance Co. ("Valley Forge"). Philadelphia provided legal counsel and settled the case. As part of the settlement agreement, Fast Eddie's assigned Rivera its legal rights against Valley Forge. Rivera then filed a third-party complaint against Valley Forge, asserting Fast Eddie's claims for breach of contract and bad faith. Valley Forge removed the case to federal court. Rivera moved to

remand.

The New Mexico district court determined that Valley Forge, despite being denominated a third-party defendant, could remove the third-party complaint. The *Rivera* court reasoned:

> Here, the original controversy is no longer in litigation; all claims between the original Plaintiff and Defendants have been resolved in a court-approved settlement. Rivera is pursuing its current claim by virtue of an assignment that was a part of her settlement with Fast Eddie's. Therefore, this is not a case where Plaintiff's choice of forum could be defeated by the actions of a party against which she did not bring suit. Rivera, the original Plaintiff, is indeed bringing suit against Valley Forge, though she is doing so in the shoes of Fast Eddie's, the original Defendant. Therefore, for all practical intents and purposes, this suit is identical to an ordinary claim by a plaintiff (Rivera) against a defendant (Valley Forge). It would be anomalous on the one hand to accord an ordinary defendant a right of removal, while on the other hand denying Valley Forge that right simply because of the peculiar stylings of state-law procedure. "The removal statute which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104 [] (1941). Therefore, the Court will treat Valley Forge as a defendant for purposes of § 1441(a), and accord it a right of removal.

Rivera, 829 F. Supp. 2d at 1091-92.

The West Virginia district court found this reasoning to be persuasive in the *Columbian Chemicals* matter because the underlying class action claims had been or were anticipated to be dismissed when the third-party complaint was filed. The West Virginia district court also opined that "Columbian's waiting until the eleventh hour to file its complaint against AIG indicates procedural gamesmanship, which is highly disfavored." *Columbian Chemicals*, 2015 WL 12755709, at *3. According to the West Virginia district court:

> Holding that AIG should be treated as a defendant for purposes of removal is consistent with the competing policies underlying removal to federal court. On one hand, courts are obligated to respect the plaintiff's choice of forum, and on the other, allow defendants to be free from state court bias. Here, the [class action] plaintiffs' claims have been settled and dismissed; therefore, "this is not a case where plaintiff's choice of forum could be defeated" by a third-party defendant. Here, the plaintiff,

> Columbian, sought a state forum for its declaratory judgment action against AIG. Having met its burden demonstrating diversity jurisdiction, AIG, as defendant, wishes to exercise its right to remove this case to federal court, which this Court will honor.

Id. (internal citations omitted).

Nevertheless, the exception for third-party defendants carved out in *Rivera* and *Columbian Chemicals* provides no solace for Responding Defendants. As related above, this Court lacks subject matter jurisdiction over litigation brought by or against the Receiver. "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). The plain language of § 1447(c) provides no discretion but to remand an action removed from state court over which the federal court lacks subject matter jurisdiction. *See Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991) (citing *Maine Ass'n of Interdependent Neighborhoods v. Commissioner*, 876 F.2d 1051, 1054 (1st Cir. 1989)). On these alternate grounds, the Receiver's motion to remand is granted.

IV. CONCLUSION

For the reasons stated, the Receiver's motion to remand, ECF No. 7, is **GRANTED**. This matter is REMANDED to the Court of Common Pleas for the County of Richland, State of South Carolina.

IT IS SO ORDERED.

Signed this 13th day of August 2024, in Columbia, South Carolina.

s/ Mary Geiger Lewis
MARY GEIGER LEWIS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Pipe & Boiler Insulation, Inc., by and through its duly appointed Receiver Peter D. Protopapas, Plaintiff, v. Continental Insurance Company, formerly known as Niagara Fire Insurance Company; Arrowood Indemnity Company, formerly known as Security Insurance Company of Hartford; Liberty Mutual Insurance Company; United States Fire Insurance Company; and Aon Corporation and Aon Insurance Managers (USA) Inc., as successor-in-interest to Bayly, Martin & Fay, Defendants.	Case No.: 3:21-CV-3033-SAL **ORDER**

This matter is before the court on Plaintiff Pipe & Boiler Insulation, Inc., by and through its duly appointed Receiver Peter D. Protopapas's motion to remand. [ECF No. 114.] For the reasons below, the court grants the Receiver's motion and remands this case to the Richland County Court of Common Pleas.

BACKGROUND

This is an insurance coverage dispute that arises out of ongoing asbestos litigation pending in a South Carolina state court. Pipe & Boiler is a defunct South Carolina corporation whose operations included the installation, repair, replacement, removal, or disturbance of thermal insulation and other building materials. [ECF No. 1-1, Compl. ¶ 13.] Pipe & Boiler's operations allegedly exposed individuals to asbestos, who then sued Pipe & Boiler for alleged resulting bodily

injuries. *Id.* The Richland County Court of Common Pleas ("Receivership Court") appointed Peter D. Protopapas as receiver for Pipe & Boiler after it failed to answer in one of the cases. [ECF No. 1-1, Order Appointing Receiver ("Receivership Order") at 1.] The Receivership Court authorized the Receiver to "fully administer all assets of Pipe & Boiler, accept service on behalf of Pipe & Boiler, engage counsel on behalf of Pipe & Boiler[,] and take any and all steps necessary to protect the interests of Pipe & Boiler whatever they may be." *Id.*

The Receivership Order also references insurance coverages. The order includes "the right and obligation to administer any insurance assets of Pipe & Boiler as well as any claims related to the actions or failure to act of Pipe & Boiler's insurance carriers." *Id.* Indeed, the Receivership Court explicitly ruled it "expects the Receiver to investigate the existence of all insurance coverages potentially available to the company in receivership." *Id.* at 1-2. It ordered the Receiver to provide specific information to potential insurers to aid with the insurers' searches for coverage, and "expects all insurers to comply with subpoenas issued by this Court and its Receiver in effectuating these thorough searches." *Id.* at 2. Finally, the Receivership Court "further order[ed] that, as the Receiver Court, that the Receiver or Pipe & Boiler Insulation, Inc. may not be sued outside this Court without obtaining the Receiver's consent or an order of this Court prior to doing so." *Id.*

The Receiver later sued several insurance companies in the Receivership Court seeking defense and coverage in suits the Receivership Court is overseeing. [*See* ECF No. 1-1, Compl.] One of the insurers, Amerisure Mutual Insurance Company, removed the matter under the court's diversity jurisdiction in September 2021, and several defendants asserted counterclaims against the Receiver. [*See* ECF No. 1; *see, e.g.*, ECF No. 75 (Continental Insurance Company's Answer

to Amended Complaint and Counterclaim); ECF No. 76 (Liberty Mutual Insurance Company's Answer to Amended Complaint and Counterclaim).]

The Receiver has attempted to get back to state court since Amerisure removed the matter. In this attempt, the Receiver argues the court does not have subject matter jurisdiction over the claims under *Barton v. Barbour*, 104 U.S. 126 (1881). [*See* ECF No. 114.] According to the Receiver, the *Barton* doctrine holds "the state court that appoints a receiver maintains exclusive jurisdiction over all claims filed by and against that receiver—subject only to the state court's own waiver of that exclusive jurisdiction." *Id.* at 1. The Receiver also submits the Supreme Court has "expanded" the *Barton* doctrine over time and, in *Porter v. Sabin*, 149 U.S. 473 (1893), confirmed the doctrine applies to claims filed *by* and against a receiver. *Id.* at 6. Because defendants did not seek the Receivership Court's permission to remove this action or counterclaim, the Receiver urges, we must remand the matter to the Receivership Court. [*See* ECF No. 114.]

Defendants Continental Insurance Company and Liberty Mutual Insurance Company, the last two defendants opposing the motion, disagree.[1] They argue that *Barton* does not trump a

[1] All but two of the original defendants (Continental Insurance and Liberty Mutual) have either resolved the Receiver's claims or been dismissed since Amerisure removed this matter. *See* ECF Nos. 36 (voluntary dismissal of Amerisure), 128 (stipulation of dismissal of Aon Corporation and Aon Insurance Managers (USA) Inc.), 148 (notice of settlement with Arrowood Indemnity Company). The Aon parties and Arrowood opposed the motion to remand, but since they have either been dismissed from this action or settled the Receiver's claims, the court focuses only on Continental Insurance and Liberty Mutual's opposition to the motion.

The Receiver added defendant United States Fire Insurance Company as a party when he filed his amended complaint. [ECF No. 70.] Defendants Continental Insurance and Liberty Mutual and Arrowood promptly moved to strike the amended complaint or dismiss or drop the improperly joined parties, including United States Fire Company. [ECF Nos. 74 (Continental Insurance and Liberty Mutual), 77 (Arrowood).] The Receiver then moved to amend his complaint. [ECF No. 87.] Although Arrowood withdrew its motion, ECF No. 148, Continental Insurance and Liberty Mutual's motion, and the Receiver's motion to amend, all remain pending. United States Fire Insurance Company did not respond to the Receiver's motion to remand.

defendant's right to remove an action to federal court. [ECF No. 118 at 4-7.] They also argue that the doctrine does not apply here because the Receiver began the action, there are no claims against the Receiver, and the action concerns the rights and obligations of the parties. *Id.* at 7-14. Finally, the Receiver filed a reply in support of his motion to remand. [ECF No. 120.]

The motion is fully briefed and is ripe for resolution.

LEGAL STANDARD

Defendants have a heavy burden to defeat the Receiver's motion. Federal courts are courts of limited jurisdiction, "constrained to exercise only the authority conferred by Article III of the Constitution and affirmatively granted by federal statute." *In re Bulldog Trucking, Inc.*, 147 F.3d 347, 352 (4th Cir. 1998). When a defendant removes a case to federal court, he bears the burden of establishing jurisdiction. *Strawn v. AT&T Mobility LLC*, 530 F.3d 293, 296 (4th Cir. 2008). The weight of the burden differs depending on whether removal is challenged. The "notice of removal . . . need only *allege* federal jurisdiction with a short plain statement." *Id.* at 297 (emphasis in original). If removal is challenged, however, "the removing party bears the burden of *demonstrating* that removal jurisdiction is proper." *Id.* In assessing whether removal is proper, this court must "construe removal jurisdiction strictly because of the 'significant federalism concerns' implicated." *Md. Stadium Auth. v. Ellerbe Becket, Inc.*, 407 F.3d 255, 260 (4th Cir. 2005) (citing *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994)). Thus, "[i]f federal jurisdiction is doubtful, remand is necessary." *Mulcahey*, 29 F.3d at 151. Finally, if at *any time* before the court enters final judgment it appears the court lacks subject matter jurisdiction, the court *must* remand the case. *See* 28 U.S.C. § 1447(c).

DISCUSSION

As discussed above, the Receiver argues the court does not have jurisdiction over this matter under the *Barton* and *Porter*. In light of recent guidance from this district, we agree and remand this matter to the Receivership Court.

The question before us is a narrow one: whether the *Barton* doctrine prevents Defendants from removing this matter, filed *by* a Receiver, to federal court. The parties agree this precise question is unprecedented. [ECF No. 118 at 2; ECF No. 120 at 13.] To the extent the Fourth Circuit has examined *Barton*, it has done so in the bankruptcy context. *See McDaniel v. Blust*, 558 F.3d 153, 157 (4th Cir. 2012). *Barton* unquestionably protects bankruptcy trustees appointed by federal courts—neither party disputes that. But neither *McDaniel*, nor any other case the parties discuss in their submissions, holds *Barton* and *Porter* do *not* apply where, as is the case here, a defendant pulls a receiver out of the receivership court into federal court.

The court is not without guidance, though: Mr. Protopapas is the receiver for another insolvent corporation involved in ongoing asbestos litigation (Payne & Keller Company). *Protopapas v. Zurich Am. Ins. Co.*, No. 3:21-4086-DCC, 2022 WL 17668402 (D.S.C. Oct. 20, 2022) ("*Payne & Keller*"). Payne & Keller is a defunct corporation facing personal injury suits by claimants who were allegedly exposed to asbestos. *Id.* at *1. The Richland County Court of Common Pleas—the Receivership Court in this matter—appointed Mr. Protopapas receiver of Payne & Keller. *Id.* The receiver later sued several defendants in the receivership court seeking defense and coverage in the asbestos suits. *Id.* One of the insurer defendants removed the matter to the district court under the court's diversity jurisdiction, and the receiver moved to remand on several grounds. *Id.* One of those grounds is that the *Barton* doctrine requires the action to be litigated in the receivership court. *Id.* at *2.

The magistrate judge issued a report recommending the district court decline the receiver's motion to remand on that basis, though she recommended the court remand the matter on other grounds. *Id.* at *6. The receiver objected to the magistrate judge's report, and the district judge, Judge Coggins, later issued an order declining to adopt that section of the report. *Protopapas v. Zurich Am. Ins. Co.*, No. 3:21-4086-DCC, 2023 WL 2206640 (D.S.C. Feb. 24, 2023). Instead, Judge Coggins sustained the receiver's objections and remanded the matter back to the receivership court. *Id.* at *2.

Acknowledging that *Barton*, as applied in *Porter*, is "old law," Judge Coggins nonetheless found the Supreme Court's directive clear:

> [I]t is in the appointing court's discretion "to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere" and that the appointing court "may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit. . . . *Porter* further states "[t]he reasons are yet stronger for not allowing a suit against a receiver appointed by a state court to be maintained, or the administration by that court of the estate in the receiver's hands to be interfered with, by a court of the United States, deriving its authority from another government, though exercising jurisdiction over the same territory."

Id. at *2 (internal citations omitted).

Judge Coggins noted the receivership court appointed a receiver who attempted to preserve and collect assets of Payne & Keller as part of his fiduciary duty. *Id.* Finding "that *Barton*, and its subsequent application in *Porter*, act as a limitation on federal jurisdiction when a state court has previously exercised its authority by appointing a receiver to handle the administration of property," he concluded allowing the matter to continue in federal court "would directly interfere with the exclusive jurisdiction of the receivership court over the dispute." *Id.* He thus sustained the receiver's objections, respectfully declined to adopt that section of the report, and remanded the case to the receiver court. *Id.* at *2, 5.

This recent guidance from our district weighs in favor of remand. As in *Payne & Keller*, the Richland County Court of Common Pleas appointed a receiver for Pipe & Boiler, a defunct corporation. The Receivership Court specifically authorized the Receiver to locate all insurance coverage potentially available to Pipe & Boiler, administer any insurance assets of Pipe & Boiler, administer any claims related to "the actions or failure to act" of Pipe & Boiler's insurers, and "take any and all steps necessary to protect the interests of Pipe & Boiler, whatever they may be." [ECF No. 1-1, Receivership Order, at 1-2.] The Receiver then sued Pipe & Boiler's insurers in the Receivership Court seeking a defense and coverage in accordance with his fiduciary duties. Given these facts, we agree with Judge Coggins that allowing this litigation to proceed in federal court would directly interfere with the Receivership Court's jurisdiction over the dispute.

Moreover, while *Porter* is unquestionably "old law," the Receiver has pointed to more recent authority that also favors remanding this matter. In *McIntire v. China MediaExpress Holdings, Inc.*, 113 F. Supp. 3d 769 (2015), a securities fraud class action pending in the Southern District of New York, the court appointed a receiver for China MediaExpress Holdings ("CCME") and authorized him to marshal CCME's assets, including pursuing claims against its former insurers. *Id.* at 773-74. Some of those insurers filed a demand for arbitration in Hong Kong, naming the receiver in his capacity as court-appointed receiver for CCME's assets. *Id.* at 771. The insurers did not obtain permission from the Southern District of New York, the receiver court, before naming the receiver in the arbitration demand. *Id.*

When the receiver moved to enjoin the arbitration under *Barton*, the insurers objected, arguing it was "questionable" that *Barton* applied in this scenario: a non-bankruptcy proceeding where they only sought a declaration that CCME wasn't covered by a liability policy written by the insurers. *Id.* The insurers also argued that *Barton* is intended to protect receivers from personal

liability for actions taken in the course of their duty and to prevent some claimants to a bankrupt estate from gaining an advantage as to assets controlled by the receiver. *Id.* at 772-73. Neither of those justifications applied, they argued, because the arbitration proceeding did not seek any money damages from the receiver or directly impact CCME's assets. *Id.* at 773.

The Southern District of New York rejected these arguments. First, it noted that *Barton* "clearly applies to all proceedings involving receivers—not bankruptcy alone." *Id.* Second, *Barton* is *not* limited to suits against a receiver for damages. While *Barton* does protect a receiver from personal liability, it "is intended to protect the receivership court's 'overriding interest in [the] administration of the estate.'" *Id.* (quoting *In re Lehal Realty Assocs.*, 101 F.3d 272, 277 (2d Cir. 1996)). Indeed, the court described one of *Barton*'s "central purpose[s]" as "ensur[ing] the receiver's appointing court control over the receivership assets," and courts enforce "the jurisdictional requirement that plaintiffs seek leave before filing suit . . . 'because [it] implement[s] major policies deemed to be of overriding importance." *Id.* at 775 (citation omitted). Finally, the court pointed out that pursuing claims against CCME's former insurers is within the receiver's powers. The declaratory relief the insurers sought involved "the very assets that the Receiver was appointed to marshal." *Id.* at 773-74. The insurers' claim that the arbitration did not impact CCME's assets, then, was incorrect. The court thus found *Barton* applied to the case and prohibited the insurers from naming the receiver in his capacity as court-appointed receiver.

To be sure, *McIntire* does not answer our precise question, as the receiver did not invoke *Barton* to avoid a court's removal jurisdiction. But, like *Porter*, it points to a "central concern" of *Barton*: the receivership court's "overriding interest" in administration of the estate in receivership. The court "assumes the administration of the estate" when it "appoints a receiver of all the property of a corporation." *Porter*, 149 U.S. at 479. And like in *Payne & Keller*, the Receiver's claims—

and, here, Defendants' counterclaims—involve "the very assets that the Receiver was appointed to marshal." *See McIntire*, 113 F. Supp. 3d at 774.

As discussed above, Defendants have a heavy burden in proving the court has subject matter jurisdiction. In light of Judge Coggins' order in *Payne & Keller*, and the Southern District of New York's decision in *McIntire*, we cannot say with certainty that *Barton*, as applied in *Porter*, does not apply here. Indeed, these decisions weigh in favor of remanding the matter to the Receivership Court. It appears to the court that remanding the matter will also aid in efficiently managing the parties' remaining claims; indeed, the Receiver and Defendant Arrowood have informed us that their settlement agreement is not final until the *Receivership Court* approves the settlement. [ECF No. 148.]

For these reasons, and considering recent guidance issued in this district, we grant the Receiver's motion to remand. The court thus remands this matter to the Receivership Court. We leave it to the Receivership Court to resolve the remaining pending motions.

CONCLUSION

For the reasons discussed above, the court **GRANTS** the Receiver's motion to remand, ECF No. 114, and remands this case to the Court of Common Pleas for Richland County.

As a result, we are without jurisdiction to hear and decide Defendants' motion to strike, ECF No. 74, or the Receiver's motion to amend complaint, ECF No. 87.

IT IS SO ORDERED.

/s/ Sherri A. Lydon
United States District Judge

March 9, 2023
Columbia, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Peter D. Protopapas, *as the Receiver for Payne & Keller Company*, Plaintiff, v. Zurich American Insurance Company; Travelers Casualty & Surety Company, *formerly known as Aetna Casualty & Surety Company*; Continental Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA; Medmarc Casualty Insurance Company; Berkshire Hathaway Specialty Insurance Company, *formerly known as Stonewall Insurance Company*; Lexington Insurance Company; Certain Underwriters at Lloyd's of London and Various London Market Companies; South Carolina Property and Casualty Insurance Guaranty Association; First State Insurance Company; and Birmingham Fire Insurance Company. Defendants.[1]	C/A No. 3:21-cv-04086-DCC **OPINION AND ORDER**

This matter is before the Court on Plaintiff's Motion to Remand. ECF No. 24. The Motion was referred to United States Magistrate Judge Paige J. Gossett for pre-trial handling and a Report and Recommendation ("Report"). ECF No. 154. On October 4,

[1] Defendants R.L. Jarrett (Underwriting) Agency, Inc. and U.S. Risk, LLC have been deleted from the caption to reflect their dismissal as parties to this action. ECF Nos. 176, 177.

2022, the Magistrate Judge held a hearing on the Motion. ECF No. 163. On October 20, 2022, the Magistrate Judge issued a Report recommending that the Motion to Remand be granted because not all properly joined and served Defendants validly joined in or consented to removal as required by 28 U.S.C. § 1446(b)(2)(A). ECF No. 167. Plaintiff filed objections to the Report. ECF No. 169. Defendant Travelers Casualty and Surety Company ("Travelers") filed a partial objection to the Report, in which Defendants Zurich American Insurance Company, Medmarc Casualty Insurance Company, and U.S. Risk, LLC (collectively, "the Objecting Defendants") joined. ECF Nos. 168, 170, 171, 172. Plaintiff and the Objecting Defendants filed Replies. ECF Nos. 173, 174, 175.

BACKGROUND

Plaintiff filed this action in the Richland County Court of Common Pleas on November 23, 2021, as the Receiver for Payne & Keller, a defunct corporation facing personal injury lawsuits by non-party claimants who were allegedly exposed to asbestos. ECF No. 1-1. Defendants removed the case to this Court on December 20, 2021, based on diversity jurisdiction under 28 U.S.C. § 1332. ECF No. 1.

On January 18, 2022, Plaintiff filed a Motion to Remand. ECF No. 24. Defendants filed Responses in Opposition, Plaintiff filed a Reply, and Defendants filed a Sur-Reply. ECF Nos. 47, 48, 49, 50, 52, 118, 145, 150. Both parties also filed supplemental briefing, and Travelers filed a Reply to Plaintiff's Supplement. ECF Nos. 141, 142, 143, 144. On October 20, 2022, the Magistrate Judge issued a Report recommending that the Motion to Remand be granted. ECF No. 167. Plaintiff and the Objecting Defendants filed

objections to the Report as well as Replies to the objections. ECF Nos. 168, 169, 170, 171, 172, 173, 174, 175.

STANDARD OF REVIEW

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. *See Mathews v. Weber*, 423 U.S. 261, 96 S. Ct. 549, 46 L. Ed. 2d 483 (1976). The Court is charged with making a de novo determination of any portion of the Report of the Magistrate Judge to which a specific objection is made. The Court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or recommit the matter to the Magistrate Judge with instructions. *See* 28 U.S.C. § 636(b). The Court will review the Report only for clear error in the absence of an objection. *See Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (stating that "in the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." (citation omitted)).

DISCUSSION

The Report contains a thorough recitation of the facts and the applicable law, which the Court incorporates by reference, except as specifically noted below. Because neither Plaintiff nor Defendants object to the Magistrate Judge's finding that Defendant South Carolina Property and Casualty Insurance Guaranty Association was fraudulently joined,

the Court finds no clear error concerning this portion of the Report and adopts the Report's finding that diversity jurisdiction exists.

A. Removal Generally

28 U.S.C. § 1441(a) provides, "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States . . . ." Removal under § 1441(a) is governed by the requirements of 28 U.S.C. § 1446(b)(2)(A), which instruct that "[w]hen a civil action is removed solely under section 1441(a), *all* defendants who have been *properly joined and served* must join in or consent to the removal of the action." *Id.* (emphasis added); *see also Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co.*, 736 F.3d 255, 259 (4th Cir. 2013) (noting "[t]he Supreme Court has construed these statutes to require all defendants in a case to join in or consent to removal"). "The burden of establishing federal jurisdiction is placed on the party seeking removal." *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994) (citing *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921)). Because removal jurisdiction raises significant federalism concerns, courts must strictly construe removal jurisdiction. *Bartnikowski v. NVR, Inc.*, 307 F. App'x 730, 739 (4th Cir. 2009). Thus, remand is necessary if federal jurisdiction is doubtful. *Mulcahey*, 29 F.3d at 151 (citing *In re Business Men's Assur. Co. of Am.*, 992 F.2d 181, 183 (8th Cir. 1993)).

B. Plaintiff's Objections

Plaintiff objects to the Magistrate Judge's interpretation of the *Barton* doctrine, insisting that the *Barton* doctrine bars a party from litigating a claim of or against a court-appointed receiver without first obtaining leave of the appointing court based on the Supreme Court's decision in *Porter v. Sabin*, 149 U.S. 473, 479–80 (1893). ECF No 169 at 5. The Court agrees. Albeit old law, *Porter* is clear that it is in the appointing court's discretion "to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere" and that the appointing court "may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit." *Porter*, 149 U.S. at 479. *Porter* further states "[t]he reasons are yet stronger for not allowing a suit against a receiver appointed by a state court to be maintained, or the administration by that court of the estate in the receiver's hands to be interfered with, by a court of the United States, deriving its authority from another government, though exercising jurisdiction over the same territory." *Id.* at 480.

Here, the receivership court has appointed a receiver who is attempting to preserve and collect assets of the defunct corporation as part of his fiduciary duty. This Court finds that *Barton*, and its subsequent application in *Porter*, act as a limitation on federal jurisdiction when a state court has previously exercised its authority by appointing a receiver to handle the administration of property; to allow this matter to continue in federal court would directly interfere with the exclusive jurisdiction of the receivership

court over this dispute. Accordingly, Plaintiff's objections are sustained, and the Court respectfully declines to adopt this section of the Report.

C. Objecting Defendants' Partial Objection

The Objecting Defendants challenge the Magistrate Judge's determination that they have failed to meet the requirements for removal under 28 U.S.C. § 1446(b)(2)(A). ECF No. 167 at 14. They argue first that under *Mayo v. Board of Education*, 713 F.3d 735, 741–42 (4th Cir. 2013), they have met this Circuit's standard for obtaining proper consent. ECF No. 168 at 3. Relying on *Mayo*, they assert that, because Defendant Travelers signed and filed a notice of removal "representing unambiguously that the other defendants consent[ed] to the removal," removal was proper under the Fourth Circuit's requirements. *Id.* However, this matter is distinguishable from *Mayo,* which concerned the risk of one defendant misrepresenting a co-defendant's decision to remove the case. *Mayo*, 713 F.3d at 742. The *Mayo* court's analysis is based on the premise that the defendants retained their right to remove and exercised their option to invoke that right, in contrast to the matter at hand. Simply because Defendants in this case have all authorized the removal of their case to federal court via a signed affidavit does not necessarily mean they each retained a right to do so and that their authorization was valid; Defendant Berkshire Hathaway's "service of suit" clause effectively waived its right to validly consent to removal for the reasons set forth below. As such, Defendants' affidavit does not satisfy the Fourth Circuit's standard for establishing compliance with 28 U.S.C. § 1446(b)(2)(A)'s requirements that all defendants who have been properly joined and served must join in or consent to the removal of the action.

The Objecting Defendants also argue that the Policy's "service of suit" clause does not act as a bar to removal. ECF No. 168 at 2. Specifically, they argue that 1) Plaintiff has provided limited evidence that this provision is in any other Defendants' policy; 2) the clause's jurisdictional language should be interpreted as a waiver of personal jurisdiction alone, rather than a waiver of one's right to remove to federal court, and 3) that Plaintiff has not sufficiently pled his complaint to trigger the clause's necessary "triggering events." *Id.* at 4–12. Upon review, the Court finds Plaintiff has provided sufficient evidence to merit remand. Plaintiff's allegations in conjunction with his filed supplement suggest to the Court that at least one Defendant (Berkshire Hathaway) is unable to consent to removal. ECF Nos. 141, 141-1. While there is a dispute as to which other, if any, Defendants have a "service of suit" clause with Plaintiff, Plaintiff has sufficiently established that Defendant Berkshire Hathaway is bound by one and thus could not consent to removal.

The "service of suit" language in Defendant Berkshire Hathaway's policy has been widely litigated across this Circuit, with courts consistently finding the clause acts as a waiver of an insurer's right to remove a case from the forum selected by the plaintiff. *See C3 Invs. of N.C., Inc. v. Ironshore Specialty Ins. Co.*, No. 2:19-cv-2609-DCN, 2020 U.S. Dist. LEXIS 24498, at *11 (D.S.C. Feb. 12, 2020) ("Most courts that have enforced service-of-suit provisions have done so in the context of removal, finding that an insurer waives its right to remove a matter to federal court where the relevant policy includes a service-of-suit provision and the insured brought suit in state court."); *see also Welborn v. Classic Syndicate Inc.*, 807 F. Supp. 388, 390 (W.D.N.C. 1992) ("Based upon the numerous cases which have held that service of suit clauses such as the one at issue

here act as waivers of the right to remove, the Court finds that the defendants have waived their removal rights in the insurance contract."); *Black & Decker, Inc. v. Twin City Fire Ins. Co.*, No. HAR 92-3352, 1993 U.S. Dist. LEXIS 2838, at *11 (D. Md. Feb. 9, 1993) ("[T]he specific language of the Service of Suit Clause, 'and will comply with all requirements to give such Court jurisdiction,' implies that [defendants] would not avail themselves of procedures like 28 U.S.C. § 1441(a) which would deprive a court of [the plaintiff's] choosing the opportunity to adjudicate the case."); *United States Fire Ins. Co. v. Arch Specialty Ins. Co.*, No. WDQ-08-1249, 2008 U.S. Dist. LEXIS 125175, at *6 (D. Md. July 15, 2008) ("Inclusion of a Service of Suit Clause in an insurance policy generally waives an insurer's right of removal."). This application is not unique to the Fourth Circuit, as multiple other circuits have held that "service of suit" provisions have acted as a waiver of a defendant's right to removal. *See, e.g., Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 160 (3d Cir. 2000); *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1206 (5th Cir. 1991); *In re Delta Am. Re Ins. Co.*, 900 F.2d 890, 894 (6th Cir. 1990). Based upon this Circuit's case law, the Court agrees that Defendant Berkshire Hathaway's "service of suit" clause acts as a waiver of its right to remove.

Next, the Objecting Defendants contend that the "service of suit" clause should be interpreted as a waiver of personal jurisdiction, rather than a waiver of its right to remove, based upon the remaining paragraphs listed in the "Service of Suit" section that detail how service of process should be perfected. ECF No. 168 at 6–7. They argue that for the right to removal to be waived, it must have been "clear and unequivocal," citing both *Grubb v. Donegal Mutual Insurance Company*, 935 F.2d 57, 59 (4th Cir. 1991) and

London Manhattan Company v. CSA-Credit Solutions of America, Incorporated, No. 2:08-cv-00465-PMD, 2008 U.S. Dist. LEXIS 38163, at *9 (D.S.C. May 9, 2008). ECF No. 168 at 9.

However, the facts of these cases are significantly different from the facts at hand. *Grubb* deals exclusively with a litigation-based waiver premised on the defendant's failure to immediately assert their right to removal after the dismissal of a necessary party. *Grubb*, 935 F.2d at 58. *London*, on the other hand, disputed whether a clause agreeing that the forum would be in "Charleston County, South Carolina" could include a federal court within Charleston County or whether the clause exclusively meant the state court. *London*, 2008 U.S. Dist. LEXIS 38163, at *2. Neither address contractual waiver, much less one that explicitly states that a party would "submit to the jurisdiction of any court of competent jurisdiction," as is the case here. ECF No. 167 at 14. In fact, other courts in this Circuit have held the "clear and unequivocal" standard cited by the Objecting Defendants is not appropriate in the realm of similar contractual waivers. *See, e.g., Welborn,* 807 F. Supp. at 390–91 ("We think the 'clear and convincing' [sic] standard so stringent as to be contrary to the right of parties to contract in advance regarding where they will litigate. A court simply should determine contractual waiver of the right to remove using the same benchmarks of construction and, if applicable, interpretation as it employs on resolving all preliminary contractual questions." (*citing Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207, 1218 n.15 (3d Cir. 1991))).

As such, courts should "resolve any such ambiguity against the insurer and in favor of the insured party." *Am. S.S. Owners Mut. Prot. & Indem. Ass'n v. Dann Ocean Towing,*

Inc., 756 F.3d 314, 319 (4th Cir. 2014); *see also Welborn*, 807 F. Supp. at 391 *("*Applying the basic contract construction principle that any ambiguities in a contract are to be resolved against the party who drafted the contract, this Court finds that the service of suit clause in the insurance contract waived the defendants' right to remove."); *Black & Decker, Inc.*, 1993 U.S. Dist. LEXIS 2838, at *11 ("Finally, had the sophisticated [Defendants], not unfamiliar with the insurance industry's widespread experience with the effects of Service of Suit clauses, desired to reserve the right of removal, they could have bargained for a clause 'reserving the insurer's right to remove to federal court.'" (internal citations omitted)). This Court likewise concludes that the "service of suit" clause waives removal and that any ambiguities as to the meaning of the clause should be resolved in favor of the insured.

Lastly, the Objecting Defendants argue the "triggering events" necessary for the "service of suit" clause to be applicable have not yet occurred, making any effect the clause has irrelevant. ECF No. 168 at 9–11. However, the Court agrees with the Magistrate Judge that this argument disregards Plaintiff's allegations. *See* ECF No. 1-1 at 16, 18 (expressly alleging that the Lloyds Defendants and Defendant Berkshire Hathaway have "failed to fully acknowledge or accept their insuring obligations"); *id.* at 27–30 (seeking damages against all defendants); *see also* ECF No. 23 at 16, 20 (same).

Given the waiver, and thus the inability to obtain valid consent from all defendants, Defendants have not adequately demonstrated they meet the requirement under § 1446(b)(2)(A) that all properly joined and served Defendants must join in or consent to

the removal of the action. Accordingly, the Objecting Defendants' partial objection to the Report is overruled.

CONCLUSION

For the reasons set forth above, the Court **SUSTAINS** Plaintiff's Objections [169], **OVERRULES** the Objecting Defendants' Partial Objection [168], and **ADOPTS IN PART** and respectfully **DECLINES TO ADOPT IN PART** the Report [167]. Accordingly, Plaintiff's Motion to Remand [24] is **GRANTED**. This case is hereby remanded to the Richland County Court of Common Pleas.

IT IS SO ORDERED.

s/ Donald C. Coggins, Jr.
United States District Judge

February 24, 2023
Spartanburg, South Carolina

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1339

PETER D. PROTOPAPAS, as the Receiver for Payne & Keller Company on behalf of Payne and Keller Company,

Plaintiff - Appellee,

v.

TRAVELERS CASUALTY AND SURETY COMPANY, f/k/a Aetna Casualty & Surety Company,

Defendant - Appellant,

and

ZURICH AMERICAN INSURANCE COMPANY, CONTINENTAL INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; MEDMARC CASUALTY INSURANCE COMPANY; BERKSHIRE HATHAWAY SPECIALTY INSURANCE COMPANY, f/k/a Stonewall Insurance Company; LEXINGTON INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON AND VARIOUS LONDON MARKET COMPANIES; SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION; FIRST STATE INSURANCE COMPANY; BIRMINGHAM FIRE INSURANCE COMPANY,

Defendants.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Donald C. Coggins, Jr., District Judge. (3:21-cv-04086-DCC)

Argued: January 25, 2024 Decided: February 26, 2024

Before DIAZ, Chief Judge, and NIEMEYER and WYNN, Circuit Judges.

Dismissed by published opinion. Judge Niemeyer wrote the opinion, in which Chief Judge Diaz joined. Judge Wynn wrote an opinion concurring in the judgment.

ARGUED: Harry Lee, STEPTOE LLP, Washington, D.C., for Appellant. David B. Salmons, MORGAN LEWIS & BOCKIUS LLP, Washington, D.C., for Appellee. **ON BRIEF:** Kevin A. Hall, M. Todd Carroll, Columbia, South Carolina, M. Elizabeth O'Neill, WOMBLE BOND DICKINSON (US) LLP, Charlotte, North Carolina, for Appellant. John B. White, Jr., Marghretta Hagood Shisko, JOHN B. WHITE, JR., P.A. LAW FIRM, Spartanburg, South Carolina; Jonathan McLean Robinson, Shanon N. Peake, SMITH ROBINSON HOLLER DUBOSE & MORGAN, LLC, Sumter, South Carolina; Bryan M. Killian, Amanda L. Salz, MORGAN, LEWIS & BOCKIUS LLP, Washington, D.C.; Brian Montgomery Barnwell, RIKARD & PROTOPAPAS, LLC, Columbia, South Carolina, for Appellee.

NIEMEYER, Circuit Judge:

Travelers Casualty and Surety Company, which had removed this case from state court to federal court, challenges the district court's order remanding it back to state court pursuant to 28 U.S.C. § 1447(c).

A South Carolina court-appointed receiver brought this action against Travelers and other insurers on behalf of a defunct company within a state receivership, alleging breaches of insurance policies issued to the company, and Travelers removed the action to federal court under 28 U.S.C. § 1441(a), based on diversity jurisdiction under 28 U.S.C. § 1332. The district court, however, granted the receiver's motion to remand, holding (1) that even though Travelers invoked diversity jurisdiction under §1332, the court nonetheless lacked subject-matter jurisdiction under the doctrine articulated in *Barton v. Barbour*, 104 U.S. 126 (1881), because the case involved the property of a state receivership that was in the exclusive jurisdiction of the state court, and (2) that the removal lacked unanimous consent of the defendants because a forum selection clause in insurance policies issued to the defunct company by some of the defendants rendered their consent invalid and thus they could not join in or consent to removal, as required by 28 U.S.C. § 1446(b)(2)(A).

Because the district court's conclusions in support of remand were at least *colorably* supported, we dismiss this appeal under § 1447(d), which provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal." *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 234 (2007) (holding that a removal order is not reviewable if the district court "relied upon a ground that is colorably characterized" as a lack of subject-matter jurisdiction); *see also Harvey v.*

UTE Indian Tribe of the Uintah & Ouray Rsrv., 797 F.3d 800, 805 (10th Cir. 2015) (holding that the court "will not review the district court's remand order if it can be colorably characterized as grounded" in a procedural defect).

I

The Court of Common Pleas in Richland County, South Carolina, invoking its equity powers granted by South Carolina Code § 15-65-10(4), created a receivership over the South Carolina assets of Payne & Keller Company, a Texas corporation, as well as related entities, after Payne & Keller had become defunct. Before the receivership, Payne & Keller had been engaged in manufacturing and construction and was facing personal injury claims by or on behalf of individuals exposed to asbestos in its products. The state court appointed Peter D. Protopapas as the receiver of Payne & Keller and directed him to collect all of Payne & Keller's assets and protect them, subject to order of the court. Among other things, the court directed Protopapas "to administer any insurance assets of Payne & Keller as well as any claims related to the actions or failure to act of Payne & Keller's insurance carriers" and "to investigate the existence of all insurance coverages potentially available to the company in receivership." Under South Carolina law, Protopapas as a receiver was "an executive officer of the court, to administer the assets of the estate under the direction of the court." *In re Fifty-Four First Mortg. Bonds*, 15 S.C. 304, 314 (1881) (quoting *Gadsden v. Whaley*, 14 S.C. 210, 215 (1880)). He thus held possession of Payne & Keller's assets as an "arm of the court." *In re Am. Slicing Mach. Co.*, 118 S.E. 303, 304 (S.C. 1923).

Acting under the authority and control of the South Carolina court, Protopapas, as receiver, commenced an action on behalf of Payne & Keller in state court against several insurance companies, including Travelers, for coverage of the personal injury claims pending against Payne & Keller. Travelers removed the receiver's action to federal court under 28 U.S.C. § 1441(a), asserting diversity jurisdiction under 28 U.S.C. § 1332. In doing so, it obtained consents to removal from all other defendant insurance companies, except one, which the district court later found to be fraudulently joined to defeat removal jurisdiction. Therefore, it appeared that the defendants had unanimously consented to removal, as required by 28 U.S.C. § 1446(b)(2)(A).

Protopapas filed a motion in the district court to remand the case to state court arguing (1) that a forum selection clause in some of the defendants' insurance policies issued to Payne & Keller prevented those companies from consenting to removal, thus defeating the unanimous consent required, and (2) that the federal court did not have subject-matter jurisdiction over the state receivership under the *Barton* doctrine.

The magistrate judge, to whom the case was initially referred, recommended granting Protopapas's motion and remanding on the basis that not all of the defendants had consented to the removal. As to the argument under the *Barton* doctrine, she expressed skepticism over whether the doctrine was indeed a matter of subject-matter jurisdiction, suggesting that it was instead a prudential limit based on abstention principles.

The district court affirmed the magistrate judge's recommendation to remand, but it did not affirm all of the magistrate judge's reasoning. First, the district court concluded that the *Barton* doctrine did indeed preclude removal to federal court because the doctrine

"act[ed] as a limitation on *federal jurisdiction* when a state court ha[d] previously exercised its authority by appointing a receiver to handle the administration of property." (Emphasis added). The court explained that "to allow this matter to continue in federal court would directly interfere with the exclusive jurisdiction of the receivership court over this dispute." In addition to relying on the *Barton* decision itself, the court also relied on *Porter v. Sabin*, explaining that "it is in the appointing court's discretion 'to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere' and that the appointing court 'may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit.'" (Quoting 149 U.S. 473, 479 (1893)).

Second, the district court agreed with the magistrate judge that the forum selection clause in some of the insurance companies' policies issued to Payne & Keller precluded them from validly consenting to removal such that the removal was not procedurally compliant with § 1446(b)(2)(A). The court noted that language very similar to that in the clauses before it "ha[d] been widely litigated across this Circuit, with courts consistently finding the clause acts as a waiver of an insurer's right to remove a case from the forum selected by the plaintiff," citing four decisions from courts in the Fourth Circuit, as well as three from outside the Circuit.

From the district court's remand order dated February 24, 2023, Travelers filed this appeal, challenging the correctness of both of the district court's rulings. Protopapas filed a motion to dismiss the appeal for lack of appellate jurisdiction under 28 U.S.C. § 1447(d), which provides that remand orders are "not reviewable on appeal."

II

Because Protopapas's motion to dismiss this appeal is based on his claim that we lack appellate jurisdiction, we address that motion first.

Protopapas contends, for the first of his two arguments, that his claims against the insurers are assets within the exclusive jurisdiction of the state-receivership court held by the receiver as an arm of that court, citing *Barton v. Barbour* and *Porter v. Sabin*. He notes that the basis for the *Barton* doctrine is that "federal courts have no jurisdiction over property managed by a court-appointed receiver because the property is subject to the exclusive jurisdiction of the receivership court for whom the receiver acts," citing *Davis v. Gray*, 83 U.S. (16 Wall.) 203, 217–19 (1872); *Wiswall v. Sampson*, 55 U.S. (14 How.) 52, 65–66 (1852). And he adds that we have previously recognized that the doctrine is jurisdictional. *See Conway v. Smith Dev., Inc.*, 64 F.4th 540, 545 (4th Cir. 2023) (noting that "*Barton* concerns *subject-matter jurisdiction*" (emphasis added)); *McDaniel v. Blust*, 668 F.3d 153, 156 (4th Cir. 2012) (noting that the "Supreme Court established in *Barton* that before another court may obtain *subject-matter jurisdiction* over a suit filed against a receiver for acts committed in his official capacity, the plaintiff must obtain leave of the court that appointed the receiver" (emphasis added)).

Travelers contends that Protopapas's understanding of *Barton* is too expansive, arguing that the doctrine applies only to actions filed *against a state-appointed receiver*. It notes that *Barton* itself set forth that limitation, recognizing the "general rule that before suit is brought *against a receiver*[,] leave of the court by which he was appointed must be

obtained." *Barton*, 104 U.S. at 128 (emphasis added). In the case before us, of course, the receiver commenced the action.

Section 1447(d) places "broad restrictions," *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995), on the jurisdiction of courts of appeals to review remand orders. In enacting this limitation, Congress prioritized finality and efficiency at the expense of absolute accuracy, implying a certain level of fungibility of federal and state courts. Specifically, the statute provides broadly that, with some exceptions not applicable here, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). But the Supreme Court has held that the provision is not to be read without limitation. Rather, it explained, the provision "must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." *Things Remembered,* 516 U.S. at 127 (citing *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345–46 (1976)). Thus, § 1447(d) bars appellate court review of remand orders when they are based on "(1) a district court's lack of subject matter jurisdiction or (2) a defect in removal 'other than lack of subject matter jurisdiction' that was raised by the motion of a party within 30 days after the notice of removal was filed." *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 196 (4th Cir. 2008).

When a statute *bars* appellate review of remand orders — thus defining appellate jurisdiction — it arguably prohibits the appellate court from reviewing even whether the district court was correct in the substance of the order. Thus, we have noted that the § 1447(d) bar stands even when the appellate court believes that the district court's order

may have been "erroneous." *Ellenburg*, 519 F.3d at 196 (cleaned up). And Justice Kennedy has observed similarly, noting that courts adhere to this limited review even if it might be "troubling" to allow an erroneous decision to remain untouched; § 1447(d) "leave[s] us no other choice." *Powerex*, 551 U.S. at 239 (Kennedy, J., concurring). Indeed, as the Supreme Court has noted, it might be enough for the appellate court to deny review simply when the district court "*purport[s]* to remand" for a lack of subject-matter jurisdiction by labeling that such is the ground. *Id.* at 232–33 (emphasis added). But because the lack of subject-matter jurisdiction still has to be a basis for a district court's remand order and the appellate court has to be able to so verify when declining to review it, the appellate court should take a peek at the district court's ruling to confirm that fact. In doing so, however, it "should be limited to confirming that [the district court's] characterization was *colorable*," *id.* at 234 (emphasis added), i.e., that a lack of subject-matter jurisdiction was a "*plausible* explanation of what legal ground the District Court actually relied upon for its remand," *id.* at 233. The *Powerex* Court explained, "Lengthy appellate disputes about whether an arguable jurisdictional ground invoked by the district court was properly such would frustrate the purpose of § 1447(d) . . . ." *Id.* at 234. Thus, it held that "when . . . the District Court relied upon a ground that is *colorably* characterized as subject-matter jurisdiction, appellate review is barred by § 1447(d)." *Id.* (emphasis added).

With that standard in hand, we take a brief peek at the district court's reasoning to satisfy ourselves that a lack of subject-matter jurisdiction was a colorable or plausible explanation of the legal ground on which the court actually relied for remand.

To start, the district court *purported* to rely on a lack of subject-matter jurisdiction in remanding this case, announcing that that was the ground on which it was relying. That alone might satisfy § 1447(d) because without jurisdiction, we have no power to review more. Indeed, some of the Justices in *Powerex* would bar review simply on the district court's announcement — i.e., that it "*purported* to remand for lack of subject-matter jurisdiction." *Powerex*, 551 U.S. at 233 (emphasis added). But the actual holding of *Powerex* demands a greater level of review, presumably on the basis that a court can address what is necessary for it to determine its own jurisdiction. The *Powerex* Court thus held that we must determine whether the district court's explanation was "colorable" or "plausible," but we should not review the substance of the explanation to determine whether it was, in fact or in law, correct.

In taking that peek in this case, we note that the district court's explanation for relying on a lack of subject-matter jurisdiction to justify remand was as follows:

> Here, the receivership court has appointed a receiver who is attempting to preserve and collect assets of the defunct corporation as part of his fiduciary duty. This Court finds that *Barton*, and its subsequent application in *Porter*, act as a *limitation on federal jurisdiction* when a state court has previously exercised its authority by appointing a receiver to handle the administration of property; to allow this matter to continue in federal court would directly interfere with *the exclusive jurisdiction of the receivership court* over this dispute.

(Emphasis added).

On its face, this seems like a plausible characterization of subject-matter jurisdiction. Mindful that a lengthy discussion over the merits of the district court's finding is neither appropriate nor necessary, *see Powerex*, 551 U.S. at 234, we do, however, take a

quick look at *Barton* to confirm that the district court's characterization of and reliance on it as involving subject-matter jurisdiction was indeed colorable.

In *Barton*, Frances Barton was injured while riding as a passenger on a train owned by a railroad that had been placed in a state receivership. Barton sued the state-appointed receiver in federal court, seeking $5,000 in damages for the railroad's negligence. The receiver challenged the federal court's jurisdiction, arguing that he was subject exclusively to the state-receivership court and that he could not be sued without leave of the receivership court. *Barton*, 104 U.S. at 127–31. The lower federal court agreed, and the Supreme Court affirmed. It stated that the suit "brought without leave to recover judgment against a receiver for a money demand, [was] virtually a suit the purpose of which [was], and effect of which [would] be, to take the property of the trust from his hands and apply it to the payment of the plaintiff's claim." *Id.* at 129. This was because, as the Court explained, the suit was against the defendant "in his capacity as receiver, and the execution [of a judgment] would run against the property in his hands as such." *Id.* at 128. The Court noted that it was "immaterial whether the suit [was] brought against [the receiver] to recover specific property or to obtain judgment for money demand. In either case leave should be first obtained [from the receivership court]." *Id.* at 129. The Court accordingly held, "Upon these facts[,] we are of opinion that [the federal court] had no jurisdiction to entertain a suit." *Id.* at 131 (citing *Peale v. Phipps*, 55 U.S. (14 How.) 368, 374 (1852) (holding in similar circumstances to those before us, "[w]e see no ground upon which *the jurisdiction* of the court can be sustained" (emphasis added))).

The similarities between *Barton* and the instant case convince us that its holding is at least arguably applicable here, despite Travelers' protestations to the contrary. For instance, Travelers argues that notwithstanding *Barton*, this is simply a common law breach of contract case for which neither Travelers nor Barton would need permission from the receivership court. But the Supreme Court in *Barton* rejected such an argument; the Court specifically dismissed Barton's argument that she was injured in tort and therefore could bring suit for injuries "without leave of the court by which [the receiver] was appointed." 104 U.S. at 130–31.

Travelers also argues that *Barton* is applicable only to suits brought *against* the receiver, but *Barton* also rejects that notion. *Barton* found a lack of jurisdiction because the claims and property were the subject of the state receivership and could not be adjusted in federal court without the receivership court's approval. As the *Barton* Court explained, the plaintiff's judgment "would be against the defendant in his capacity as receiver, and the execution would run against the property in his hands as such." 104 U.S. at 128. And *Porter v. Sabin*, a later case applying *Barton*, confirmed that the doctrine applies to *both suits by and against* the receiver because, when a state court appoints a receiver, "the court assumes the administration of the estate" and "[t]he possession of the receiver is the possession of the court." 149 U.S. at 479; *cf. Marshall v. Marshall*, 547 U.S. 293, 311–12 (2006) (recognizing the "general principle that, when one court is exercising *in rem* jurisdiction of a *res*, a second court will not assume *in rem* jurisdiction over the same *res*" and articulating that the "probate exception" to federal jurisdiction "precludes federal

courts from endeavoring to dispose of property that is in the custody of a state probate court").

Thus, when applying the *Barton* doctrine, the district court plausibly concluded that a federal court lacks jurisdiction over a state receivership or a state-court appointed receiver with respect to assets of the receivership because the state court has exclusive jurisdiction over the assets of the receivership. Exercising federal jurisdiction over a suit by or against a state-appointed receiver, who functions as an "arm" or "executive" of the state-receivership court, would infringe on the state court's control over the receivership assets — its exclusive jurisdiction. Thus, as a matter of comity, as well as custom, the *Barton* doctrine rests on this exclusivity of the state receivership over the assets before it as a matter of jurisdiction, and indeed we have confirmed as much. *See, e.g.*, *Conway*, 64 F.4th at 545 (noting that "*Barton* concerns subject-matter jurisdiction"); *McDaniel*, 668 F.3d at 156 (noting that "[t]he Supreme Court established in *Barton* that before another court may obtain subject-matter jurisdiction over a suit filed against a receiver for acts committed in his official capacity, the plaintiff must obtain leave of the court that appointed the receiver").

In these circumstances, our quick look confirms that the district court's characterization of its remand as relying on a lack of subject-matter jurisdiction was colorably supported, thus barring our review by reason of § 1447(d).

III

For the avoidance of doubt, we also address Protopapas's second argument that the district court's conclusion in its remand order that a procedural defect precluded removal was also colorably supported and thus also bars our review. Specifically, Protopapas contends that, while all defendants signed documents consenting to removal, the forum selection clause in the insurance policy issued to Payne & Keller by at least one defendant prevented that defendant from validly consenting to removal, thus denying Travelers the ability to satisfy the requirement that removal be unanimous. *See* 28 U.S.C. § 1446(b)(2)(A). The forum selection clause at issue provides:

> It is agreed that in the event of the failure of the company hereon to pay any amount claimed to be due hereunder, the company hereon, at the request of the insured, *will submit to the jurisdiction of any court of competent jurisdiction* within the United States of America and will comply with all requirements necessary to give such court jurisdiction *and all matters arising hereunder shall be determined in accordance with the law and practice of such court*.

(Emphasis added).

The district court concluded that this clause barred at least one insurer from consenting to removal to federal court. As it explained, it was remanding the case to state court because, "[g]iven the waiver [contained in the forum selection clause], and thus the inability to obtain valid consent from all defendants, *Defendants have not adequately demonstrated they meet the requirement under* § 1446(b)(2)(A) that all properly joined and served Defendants must join in or consent to the removal of the action." (Emphasis added).

Because the district court purported to rely on a procedural defect, our review, again, is limited to whether that characterization is colorable. *See Powerex*, 551 U.S. at 234; *see also Harvey*, 797 F.3d at 805.

Travelers contends that it is not because we routinely review on appeal forum selection clauses. *See, e.g.*, *Bartels v. Saber Healthcare Grp., LLC*, 880 F.3d 668, 673 (4th Cir. 2018); *FindWhere Holdings, Inc. v. Sys. Env't Optimization, LLC*, 626 F.3d 752, 755 (4th Cir. 2010). But in both *Bartels* and *FindWhere Holdings*, the district court's decision was based on a contractual application of where the forum selection clause at issue required the suit to be brought and *not* whether those clauses had any bearing on a defendant's ability to comply with the requirements for removal to federal court. *See Bartels*, 880 F.3d at 672–73 (noting that the district court concluded that the contract required bringing the suit in state court because "the forum-selection clause required the action to proceed in Franklin County" and there was no "federal courthouse in Franklin County"); *FindWhere Holdings*, 626 F.3d at 754 (noting the district court remanded because it interpreted the language of the forum selection clause that suits must be brought "exclusively in, or be transferred to, the courts of the State of Virginia" to mean state courts in Virginia).

Instead, the issue before us is more like that addressed in *Overlook Gardens Properties, LLC v. ORIX USA, L.P.*, 927 F.3d 1194 (11th Cir. 2019). There, the plaintiff's loan agreement included a forum selection clause, which, the district court held, precluded removal because the lender "could not validly consent to the removal of this action, so the unanimity requirement [was] not met." *Id.* at 1197 (cleaned up). On appeal from the district court's remand order, the Eleventh Circuit held that it lacked jurisdiction under

§ 1447(d) to review the order. It distinguished its review of an order enforcing a forum selection clause from an order remanding for a lack of unanimous consent because of the effect of the forum selection clause and concluded that only the latter reflected a defect in removal. "While a remand based on interpretation and enforcement of a valid forum selection clause is neither a defect in removal process nor a jurisdictional flaw, a lack of unanimous consent to removal is a defect in the removal process." *Id.* at 1198 (cleaned up). Because the district court's remand order here was similarly based on the effect that a forum selection clause had on the defendants' ability to comply with a procedural requirement for removal, we find *Overlook Gardens* more relevant to the issue here than the cases cited by Travelers.

In short, the district court concluded that because at least one insurer agreed to litigate coverage wherever the claimant chose and the claimant chose a state court in South Carolina, the insurer was barred thereafter from consenting to a federal forum. Under the applicable standard for review of that issue, we conclude that the district court's characterization of a procedural defect in these circumstances was at least colorable, inasmuch as unanimous consent to removal was required by § 1446(b)(2)(A). Thus, any further analysis and review would not be appropriate.

* * *

For the reasons given, we conclude that we lack jurisdiction to review the district court's remand order under § 1447(d) and accordingly dismiss this appeal.

DISMISSED

WYNN, Circuit Judge, concurring in the judgment:

I concur in holding that, because the district court based its remand order on the *Barton* doctrine and colorably described the *Barton* doctrine as a mandatory limit on its subject matter jurisdiction, the appeal must be dismissed. But today, my good colleagues in the majority choose to go well beyond what is needed to resolve this appeal. By addressing unnecessary issues, they contravene a clear directive from our Supreme Court not to do so.

We lack jurisdiction to review a remand order if the district court's basis for remand "is colorably characterized" as a lack of subject-matter jurisdiction or a procedural defect in removal, and the bar for whether the district court's description of its basis for remand is "colorable" is exceedingly low. *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 234 (2007). Thus, quite clearly, the Supreme Court has directed that our analysis of whether a district court's basis for remand is colorable should be extremely brief. In other words, we may not delve into whether the district court's application of the basis for remand was "erroneous." *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 196 (4th Cir. 2008) (quoting *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976), *abrogated on other grounds by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996)). And we should not endeavor to resolve any open questions beyond what is necessary to determine whether a remand order is colorably based on a lack of subject matter jurisdiction or a procedural defect in removal.

Our precedent offers a simple resolution to this case. In *McDaniel v. Blust*, we stated that "[t]he Supreme Court established in *Barton* that before another court may obtain

subject-matter jurisdiction over a suit filed against a receiver for acts committed in his official capacity, the plaintiff *must* obtain leave of the court that appointed the receiver." *McDaniel v. Blust*, 668 F.3d 153, 156 (4th Cir. 2012) (emphasis added). We were not asked to decide in *McDaniel* whether the *Barton* doctrine is based on abstention or imposes a mandatory limit on subject-matter jurisdiction. But our reference to the steps a party "must" take before we can exercise subject matter jurisdiction provides, at a minimum, a colorable basis on which the district court could conclude that the *Barton* doctrine imposed a mandatory limitation on its subject matter jurisdiction. Because State Farm cites no case explicitly contradicting that description, and we are not permitted to examine whether the district court's conclusion was erroneous, our analysis can start and end with *McDaniel*.

Unfortunately, the majority opinion chooses to say more than is needed to resolve this appeal in the manner which the Supreme Court has directed.

First, the majority opinion issues an unnecessary, and I would say advisory, proclamation that the *Barton* doctrine applies to cases brought both against *and* by a receiver. Majority Op. at 12. Classically, the *Barton* doctrine applies in "a suit filed *against* a receiver[.]" *McDaniel*, 668 F.3d at 156 (emphasis added). While the main justification for the *Barton* doctrine—protecting the estate's property—could support extending the doctrine to suits brought *by* a receiver, no case has held that the doctrine extends that far. True, in *Porter v. Sabin*, the Supreme Court stated that the *Barton* doctrine applies to "claims of or against" a receiver. *Porter v. Sabin*, 149 U.S. 473, 479 (1893). But that statement was dicta, and, throughout the rest of the opinion, the Supreme Court referred only to claims against a receiver. More importantly, as the magistrate judge recognized,

the complete dearth of decisions applying the *Barton* doctrine to cases brought by a receiver weighs against extending the doctrine.* *See Protopapas v. Zurich Am. Ins. Co.*, No. CV 3:21-4086-DCC, 2022 WL 17668402, at *5 (D.S.C. Oct. 20, 2022) ("[N]o precedential authority has actually applied the *Barton* doctrine to foreclose claims brought by a receiver in pursuit of his official duties to affirmatively collect potential assets for an insolvent corporation."). And the majority opinion's conclusion that the *Barton* doctrine applies to cases brought by a receiver goes to whether the district court erred in its application of the *Barton* doctrine, *not* to whether it colorably described the *Barton* doctrine as imposing a mandatory limitation on subject matter jurisdiction. Because the issue is unresolved and unnecessary to our conclusion, it should not be reached.

Second, in Part III of its opinion, the majority unnecessarily, and again in my opinion, advisorily, addresses an alternative basis for the district court's remand order. *Either* a lack of subject matter jurisdiction or a procedural defect in removal can justify remand. 28 U.S.C. § 1447(c). Here, the district court ordered remand based on both a lack of subject matter jurisdiction and a procedural defect in removal. *See Protopapas v. Zurich Am. Ins. Co.*, No. 3:21-CV-04086-DCC, 2023 WL 2206640, at *3 (D.S.C. Feb. 24, 2023). The majority addresses both bases for the district court's decision. To be sure, we may sometimes issue alternative holdings. *See Gestamp S.C., LLC v. NLRB*, 769 F.3d 254, 262 n.4 (4th Cir. 2014). But it makes no sense to do so when the first holding in a decision is

* In opposing the majority opinion's decision to address this issue, I express no opinion about the ultimate question of whether the *Barton* doctrine applies only to suits brought against a receiver or if it also extends to suits brought by a receiver.

that we lack jurisdiction. Because we have already decided that we lack jurisdiction based on the district court's application of the *Barton* doctrine, the portion of the majority opinion addressing the alleged procedural defect has no importance for its resolution of the case. To comply with the well-established principle against issuing "advisory opinions," *Flast v. Cohen*, 392 U.S. 83, 96 (1968), we should decline to express a viewpoint where none is needed.

In appeals like this one, Congress has sought to keep our review to a minimum. I suggest that future panels carefully heed that directive. Because the majority opinion in this case does not, I concur only in the judgment.

113 F.Supp.3d 769
United States District Court, S.D. New York.

Daniel MCINTIRE, Plaintiff,
v.
CHINA MEDIAEXPRESS HOLDINGS, INC., et al. Defendants.
In re Chinamedia Express Holdings, Inc. Shareholder Litigation

11–cv–804 (VM)
|
Signed October 21, 2015

Synopsis

Background: In securities fraud class action, court-appointed receiver of company's assets moved to enjoin non-party insurers from proceeding with arbitration of coverage dispute, and insurers moved for leave to retroactively name receiver as respondent in arbitration.

Holdings: The District Court, Victor Marrero, J., held that:

insurers were required to obtain court's permission before naming receiver as respondent in arbitration;

only appropriate remedy was to order cessation of improper action; and

order enjoining all future litigation, including arbitration, regarding dispute was not warranted.

Receiver's motion granted, and insurers' motion denied.

Attorneys and Law Firms

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DECISION AND ORDER

VICTOR MARRERO, United States District Judge

This action arises from a dispute over insurance coverage for China MediaExpress Holdings Inc. ("CCME") written by non-parties Torus Insurance UK ("Torus") and Starr Underwriting Agents Limited ***771** (on behalf of Lloyd's Syndicate CVS 1919)("Starr")(collectively "Insurers"). Karl Barth ("Barth" or "Receiver"), as Court-appointed Receiver for CCME's assets, seeks to enjoin the Insurers from proceeding with an arbitration of that coverage dispute in Hong Kong naming Barth as a respondent. Numerous letters from Insurers and Barth have been filed with the Court. The Court now enjoins Insurers from proceeding with the current arbitration because the Court did not grant leave to join Barth as a respondent prior to Insurers' filing. In light of federal law and policy favoring enforcement of valid arbitration provisions, however, the Court reserves judgment at this time as to whether future arbitration filed with leave of the Court would be proper, and directs Barth to show cause why the underlying insurance coverage dispute should not be submitted to arbitration, under the terms of the parties' agreement, with leave of the Court.

I. *BACKGROUND*

On August 13, 2015, Insurers filed in Hong Kong a Demand for Arbitration naming Barth in his capacity as court-appointed Receiver for CCME's assets. ("Demand for Arbitration," Dkt. No. 262 Ex. A.) The Demand for Arbitration sought a declaration that CCME was not covered by Directors and Officers Liability and Company Reimbursement Liability Insurance Policy No. DO10AA47U (the "Policy") written by Insurers in 2010. The Policy's arbitration provisions specified Hong Kong as the forum for dispute resolution.

By letter to the Court dated August 29, 2015 ("Aug. 29 Letter") Barth requested leave to file a motion to enjoin Insurers from proceeding with an arbitration naming Barth as a respondent. (Dkt. No. 262.) Barth argues that because he serves as a Court-appointed receiver, the common law *Barton* Doctrine, as enunciated by the Supreme Court in *Barton v. Barbour,* 104 U.S. 126, 26 L.Ed. 672 (1881), required the Insurers to obtain leave from the Court prior to naming Barth as a respondent in the arbitration. (*Id.* at 2.) Barth further contends that because compliance with the *Barton* Doctrine is jurisdictional, Insurers' failure to obtain leave of the Court prior to filing the arbitration "definitively renders the arbitration void *ab initio*." (*Id.* at 2–3.)

Insurers responded by letter to the Court dated September 1, 2015 ("Sept. 1 Response Letter"), countering that it is "questionable" whether the *Barton* Doctrine applies in a non-bankruptcy proceeding where the only remedy sought is declaratory relief. (Dkt. No. 259 at 2.) Insurers filed a second letter on September 1, 2015 ("Sept. 1 Motion Letter") requesting court approval to file a motion granting Insurers leave retroactively to name Barth as a respondent in the arbitration. (Dkt. No. 261.) Barth replied by letter dated September 3, 2015, ("Sept. 3 Letter") asserting again that the Insurers' failure to obtain prior leave from the Court deprived the arbitration of subject matter jurisdiction, which could not be remedied by retroactive leave to file. (Dkt. No. 260 at 1.)

On September 17, 2015, the Court held a telephone conference with Barth and Insurers. The Court directed Insurers to submit a letter-brief to the Court addressing the application of the *Barton* Doctrine in this case. By letter dated September 28, 2015 ("Sept. 28 Letter"), Insurers outlined their objections to the application of the *Barton* doctrine in this case. (Dkt. No. 265.) They argue that bankruptcy cases and actions for monetary judgment—in which the doctrine is routinely applied—"implicate [ ] entirely different ***772** concerns than a declaratory relief coverage action naming Mr. Barth, a limited purpose receiver." (*Id.* at 3.) In addition, Insurers raise objections to the *Barton* Doctrine's application in light of federal policy in favor of arbitration, which Insurers argue would deprive the Court of jurisdiction over the arbitration even if it determined the *Barton* Doctrine did apply. (*Id.* at 5.) In response, Barth filed a letter dated October 1, 2015 ("Oct. 1 Letter") contending that the *Barton* Doctrine applies broadly to suits including non-bankruptcy cases and declaratory judgment actions. (Dkt. No. 266, at 1.)

Before the Court had taken action on the Receiver's motion, Barth filed a second letter on October 8, 2015 ("Oct. 8 Letter"), requesting that the Court amend its Order appointing Barth as Receiver to include an anti-litigation provision that would prohibit "any person or entity" from taking any action that would "impact the property and assets" subject to the Receiver's control. (Dkt. No. 269, at 1.) Insurers responded on October 13, 2015 ("Oct. 13 Letter") arguing that the proposed anti-litigation order would function as an anti-arbitration injunction in violation of the Federal Arbitration Act ("FAA") and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). (Dkt. No. 267, at 2.) Barth and Insurers exchanged three additional letters related to the propriety of the proposed anti-litigation order on October 14 and October 15.

The Court has received no further correspondence relating to the Insurers' Demand for Arbitration or the proposed anti-litigation provision. The Court construes Barth's Aug. 29 Letter and subsequent Letters as a motion to enjoin the arbitration filed by the Insurers, and further construes Insurers' Sept. 1 Response Letter and subsequent Letters as a motion for retroactive leave to file the Demand for Arbitration naming Barth as a respondent. The Court now considers those motions.

II. *DISCUSSION*

A. *Applicability of the Barton Doctrine*

A receiver is an officer of the court which appointed him or her and "cannot be sued without the court's consent." *Chicago Title & Trust Co. v. Fox Theatres Corp.,* 69 F.2d 60, 62 (2d Cir.1934)(citing *Barton,* 104 U.S. at 137. The *Barton* Doctrine, developed from common law by the Supreme Court, provides that a suit may not be brought against a receiver without leave of such receiver's appointing court. It has been applied in a "well-recognized line of cases." *In re Lehal Realty Associates,* 101 F.3d 272, 276 (2d Cir.1996); *see also Matter of Linton,* 136 F.3d 544, 545 (7th Cir.1998) ("An unbroken line of cases ... has imposed this requirement as a matter of federal common law.") The Second Circuit has recognized that the *Barton* Doctrine extends to bankruptcy as well as receivership, *see Vass v. Conron Bros.,* 59 F.2d 969, 971 (2d Cir.1932), and lower courts have applied it to declaratory judgment actions, *see Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC,* 460 B.R. 106, 116 (Bankr.S.D.N.Y.2011), *aff'd,* 474 B.R. 76 (S.D.N.Y.2012) ("Madoff"), as well as suits seeking damages, *see In re Biebel,*

02–32865, 2009 WL 1451637, at *4 (Bankr.D.Conn. May 20, 2009).

Barth argues that, pursuant to the *Barton* Doctrine, Insurers were required to seek leave of the Court prior to naming Barth, a court-appointed receiver, as a respondent in the arbitration. In response, the Insurers assert that the *Barton* Doctrine does not apply to this action. They argue that the Doctrine applies with less force outside of bankruptcy or where the form of relief sought is a declaratory judgment. The Insurers reason that the justifications ***773** behind the *Barton* Doctrine are twofold: first, to protect receivers from personal liability for actions taken in the course of their duty; and second, to prevent some claimants to a bankrupt estate from gaining advantage over other claimants as regards assets controlled by the receiver. They argue that neither of these justifications apply here, because the Hong Kong arbitration proceeding does not seek monetary judgment against Barth, nor does it directly impact any assets of CCME.

Instead, Insurers contend that the Court should follow the example of two district courts outside of the Second Circuit that have found the *Barton* Doctrine inapposite. Those decisions—arising from a suit to enjoin discovery by a trustee, *PFS Investments v. Imhoff,* No. 11–10142, 2012 WL 254125 (E.D.Mich. Jan. 27, 2012), and an action seeking a declaration resolving ownership of certain causes of action, *In re TierOne Corp,* 4:10–BK–41974, 2013 WL 5526721 (Bankr.D.Neb. Oct. 4, 2013)—relied largely on the courts' findings that the proceedings did not affect either the receiver's personal liability or the receivership assets. Insurers claim that these cases stand broadly for the proposition that declaratory judgment actions which do not seek money or estate property from the trustee are not covered by the *Barton* Doctrine.

The Court is not persuaded that the *Barton* Doctrine is inapplicable under the circumstances Insurers describe. First, the *Barton* Doctrine clearly applies to all proceedings involving receivers—not bankruptcy alone. *Barton* was itself a receivership case, and only later was the Doctrine extended to bankruptcy actions. *See Vass,* 59 F.2d at 970. Insurers cite *In re Crown Vantage,* 421 F.3d 963 (9th Cir.2005) stating that the policies underlying the Doctrine apply "with greater force to bankruptcy proceedings than to other proceedings involving receivers." *Id.* at 971. The holding of *Crown Vantage,* however, undercuts the Insurers' claim, as the Ninth Circuit specifically found that the *Barton* Doctrine applied with equal validity where the court-appointed officer was not a bankruptcy trustee. *See id.* at 973. Regardless of whether other unique considerations may apply in bankruptcy, the Court concludes that the requirements of the *Barton* Doctrine apply equally to bankruptcy trustees and other court-appointed receivers.

Second, the *Barton* Doctrine is not restricted to suits against a receiver for damages. The Doctrine holds broadly that "before suing a court-appointed receiver, the petitioning party must first seek leave of the court that appointed him or her." *Madoff,* 460 B.R. at 116. In addition to protecting a court-appointed receiver from personal liability, the Doctrine is intended to protect the receivership court's "overriding interest in [the] administration of the estate." *In re Lehal,* 101 F.3d at 277. Insurers ask the Court to read into the *Barton* Doctrine a limitation that is not supported by the Doctrine on its face or by Second Circuit authority. In *Madoff,* 460 B.R. 106, the court enjoined a declaratory judgment action brought against a trustee in the Cayman Islands, finding that the action violated the *Barton* Doctrine. In the same vein, the *Barton* Doctrine has been consistently applied to declaratory judgment actions. *See In re Gen. Growth Properties, Inc.,* 426 B.R. 71, 76 (Bankr.S.D.N.Y.2010); *Seaman Paper Co. of Mass., Inc. v. Polsky,* 537 F.Supp.2d 233, 236 (D.Mass.2007).

Here, contrary to the Insurer's argument that the arbitration does not impact CCME's assets, the declaratory relief sought in the arbitration action involves the very assets that the Receiver was appointed ***774** to marshal. The Court's order appointing Barth as Receiver defines his appointment as "for the limited purpose of marshaling CCME's assets" (Dkt. No. 230); a later order clarified that pursuing claims against third parties, including CCME's former insurers, is within Barth's powers as Receiver. (Dkt. No. 246.) [1]

Finally, that Insurers seek to file an arbitration does not lead the Court to conclude that the *Barton* Doctrine does not apply. Although this Court recognizes the important policy considerations surrounding the role of federal district courts in contractual arbitration agreements, discussed further *infra* at II(C), it also notes that the rationale underlying *Barton* extends to arbitrations and that district courts have at times stayed arbitration to protect a receivership court's control over receivership assets. *See S.E.C. v. Byers,* 08–CV–7104, 2012 WL 954254, at *3 (S.D.N.Y. Feb. 28, 2012). The Second Circuit has not considered whether the *Barton* Doctrine applies equally to arbitration, and the Court declines to create such an exception here.

Therefore, the Court finds that the *Barton* Doctrine applies in this case to prohibit the Insurers from naming Barth in his capacity as Court-appointed Receiver as a respondent to the August 2013 arbitration.

B. *Retroactive Leave to File The Arbitration*

Insurers argue that even if the *Barton* Doctrine applies in this case, they should, in the alternative, be granted leave retroactively to file the Demand for Arbitration against Barth.

The *Barton* Doctrine is jurisdictional in nature, and failure to seek leave of the receiver's appointing court bars exercise of subject matter jurisdiction over any third-party suit. "Where the Doctrine is violated, [t]he only appropriate remedy ... is to order cessation of the improper action." *Madoff,* 460 B.R. at 116 (*quoting Crown Vantage,* 421 F.3d at 970)). In *In re Lehal,* 101 F.3d at 277, the Second Circuit upheld a lower court's decision to bar retroactive leave to file suit against a receiver, and lower courts have cited that decision to enjoin suits filed in violation of *Barton*. *See, e.g., Biebel,* 2009 WL 1451637, at *6 ("Since prior leave of this court was not sought prior to instituting the Defendant's Action, such action must be permanently enjoined.")

The Insurers point to a small handful of bankruptcy courts that granted retroactive relief to petitioners who would be barred by the *Barton* Doctrine.[2] Those decisions stand in contradiction to the Second Circuit's decision in *In re Lehal* and the general rule that a complaint filed without leave of court lacks subject matter jurisdiction and cannot be remedied through retroactive leave. *See In re Summit Metals,* 477 B.R. 484, 503 (Bankr.D.Del.2012) (finding complaint "void *ab initio* for violation ***775** of the *Barton* Doctrine"); *see also McDaniel v. Blust,* 668 F.3d 153, 156 (4th Cir.2012); *Crown Vantage,* 421 F.3d at 970; *Blixseth v. Brown,* 470 B.R. 562, 573 (D.Mont.2012); *In re Biebel,* 2009 WL 1451637, at *4; *In re Kids Creek Partners, L.P.,* 248 B.R. 554, 558–59 (Bankr.N.D.Ill.2000).

The Court notes that a central purpose of the *Barton* Doctrine is to ensure the receiver's appointing court control over the receivership assets, and the jurisdictional requirement that plaintiffs seek leave before filing suit "continue[s] to be enforced because [it] implement[s] major policies deemed to be of overriding importance." *In re Reinert,* No. AP 14–02204–JAD, 2015 WL 1206714, at *4 (Bankr.W.D.Pa. Mar. 12, 2015) (*citing In re Herrera,* 472 B.R. 839, 853 (Bankr.D.N.M.2012)).

Accordingly, the Court declines to grant the Insurers retroactive leave to file the Demand for Arbitration.

C. *Resolution of the Insurance Coverage Dispute*

The Court recognizes that enjoining Insurers' currently filed Demand for Arbitration leaves the underlying dispute regarding CCME's insurance policy coverage unresolved. The Insurers are enjoined from proceeding with the current arbitration but are not prohibited from seeking leave from the Court for a future arbitration.

Barth argues that an order enjoining all future litigation, including arbitration, is necessary to permit him to marshal and preserve CCME's assets as mandated by his position as Receiver. (Oct. 8 Letter at 1). Such an order would presumably leave this Court to interpret the provisions of CCME's insurance policy and ultimately to decide the dispute arising in connection with the Policy, in contradiction to CCME and Insurers' arbitration agreement.

The Court declines to issue the anti-litigation order proposed by the Receiver. Although district courts are authorized to issue stays or enjoin future litigation to preserve their control over receivership assets, *see Byers,* 2012 WL 954254, at *3, an anti-litigation order here would function in practice as an anti-arbitration injunction. The Court's authority to enjoin arbitration proceedings is limited by the Federal Arbitration Act to situations where the underlying arbitration agreement is invalid or nonbinding. *See In re Am. Exp. Fin. Advisors Sec. Litig.,* 672 F.3d 113, 140 (2d Cir.2011); *see also Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002). Anti-arbitration injunctions issued by district courts where a valid agreement to arbitrate exists are strongly disfavored. *See Citigroup, Inc. v. Abu Dhabi Inv. Auth.,* 776 F.3d 126, 134 (2d Cir.2015).

The Federal Arbitration Act ("FAA"), 9 U.S.C. Sections 1–16, and the Convention, 9 U.S.C. Section 201, counsel in favor of resolving the dispute over CCME's insurance coverage through arbitration. The Convention mandates arbitration where (1) there is a written agreement; (2) arbitration is to take place in a Convention signatory; (3) the subject matter is commercial; and (4) one party is not a United States Citizen. *See Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.* 198 F.3d 88, 92 (2d Cir.1999). Each of the Convention's requirements are met here. For the Court to decide the insurance coverage dispute where a binding agreement to arbitrate

exists would contradict the FAA's strong preference in favor of arbitration, particularly with regard to international arbitration agreements. *See* ***776** *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614, 629, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

Insurers have raised compelling points regarding the district court's authority under the FAA and the Convention to enjoin future arbitration where a valid agreement to arbitrate exists. Accordingly, the Court reserves judgment at this time as to whether resolution of the insurance coverage shall be subject to arbitration as provided in the Policy, and directs the Receiver to show cause why a future arbitration naming CCME and Barth as respondents, and filed in accordance with the terms of the parties' agreement with leave of the Court, should not proceed.

III. *ORDER*

Accordingly, it is hereby

ORDERED that the motion of Court-appointed Receiver Karl Barth ("Barth") to enjoin non-parties Starr Underwriting Agents Limited (on behalf of Lloyd's Syndicate CVS 1919) and Torus Insurance UK (collectively "Insurers") from proceeding with the Demand for Arbitration filed on August 13, 2015 is **GRANTED;** and it is further

ORDERED that Insurers' application for leave to file such arbitration retroactively is **DENIED;** and it is further

ORDERED that within five (5) days of the entry of this Order, Barth show cause, by letter not to exceed three (3) pages, why the court should not grant Insurers leave to file arbitration against China MediaExpress Holdings, Inc. by and through Barth to determine coverage under Directors and Officers Liability and Company Reimbursement Liability Insurance Policy No. DO10AA47U.

SO ORDERED.

All Citations

113 F.Supp.3d 769

Footnotes

1 Barth had moved previously for appointment to "investigate the potential value of CCME's insurance coverage ... [and] take any actions, including the filing of litigation or arbitration, that may be necessary to enforce CCME's rights under the insurance policies." (Dkt. No. 224.)

2 Insurers cite *In re Brownsville Prop. Corp., Inc.,* 473 B.R. 89, 92 (Bankr.W.D.Pa.2012) (reasoning that if case was dismissed without prejudice Plaintiff would 'simply reinitiate the process'); *In re Lambert,* 438 B.R. 523 (Bankr.M.D.Pa.2010); and *In re Allied Sign Co, Inc.,* 280 B.R. 688 (Bankr.S.D.Ala.2001) (finding that estate of the debtor would not be impacted by allowing state court action to go forward). *Lambert* was later abrogated by the Third Circuit in *In re VistaCare Group LLC,* 678 F.3d 218 (3d Cir.2012), which affirmed the applicability of the *Barton* Doctrine in the Third Circuit.

562 B.R. 866
United States Bankruptcy Court, S.D. New York.

IN RE: MF GLOBAL HOLDINGS LTD., et al., Debtors.
MF Global Holdings Ltd., as Plan Administrator,
and MF Global Assigned Assets LLC, Plaintiffs,
v.
Allied World Assurance Company Ltd., Iron–
Starr Excess Agency Ltd., Ironshore Insurance
Ltd., Starr Insurance & Reinsurance Limited.,
and Federal Insurance Company, Defendants.

Case No. 11–15059 (MG)
|
Adv. Proc. No. 16–01251 (MG)
|
Signed January 31, 2017

Synopsis

Background: Plan administrator and another entity that was assigned all of Chapter 11 debtor's rights, title and interest in certain assets, including debtor's rights under excess policies issued by Bermuda insurers, brought adversary proceeding against these insurers, in which they contended that insurers had violated terms of bar order and Barton doctrine by virtue of proceedings that they had filed in Bermuda.

Holdings: The Bankruptcy Court, Martin Glenn, J., held that:

[1] *Barton* doctrine applied to protect both the plan administrator and assignee of debtor's rights under policies in their pursuit of court-appointed tasks of marshaling and liquidating estate assets, and

[2] Bermuda insurers, in bringing proceedings in Bermuda to compel plan administrator and assignee to arbitrate any policy claims in Bermuda, without first obtaining leave from bankruptcy court, violated *Barton* doctrine.

So ordered.

West Headnotes (9)

[1] **Bankruptcy** Power and Authority
Bankruptcy Construction, execution, and performance

Even after Chapter 11 plan is confirmed, bankruptcy court retains jurisdiction to interpret and enforce its own orders.

[2] **Receivers** Necessity

Barton doctrine provides that suit may not be brought against a receiver without leave of court that appointed the receiver.

1 Case that cites this headnote

[3] **Bankruptcy** Leave to sue

Barton doctrine applies in bankruptcy context and does not protect only receivers.

1 Case that cites this headnote

[4] **Receivers** Necessity

In addition to protecting court-appointed receiver from personal liability, *Barton* doctrine is meant to protect the receivership court's overriding interest in administration of estate.

[5] **Bankruptcy** Leave to sue
Receivers Necessity

Barton doctrine is not restricted in its application to legal actions brought within the United States, and requires a party who seeks to sue in international forum a court-appointed receiver or bankruptcy trustee to obtain leave of appointing court.

2 Cases that cite this headnote

[6] **Bankruptcy** Leave to sue

When court determines that the *Barton* doctrine has been violated, the only appropriate remedy

is for court to order cessation of the improper action.

1 Case that cites this headnote

[7] **Bankruptcy** Leave to sue

Barton doctrine applied to protect, in pursuit of their court-appointed tasks of marshaling and liquidating estate assets, a plan administrator and another entity that was assigned all of Chapter 11 debtor's rights, title and interest in certain assets, including debtor's rights under excess policies issued by Bermuda insurers; both plan administrator and assignee of debtor's rights, in pursuing claims under excess policies as part of task of liquidating estate assets, occupied positions analogous to that of bankruptcy trustee.

[8] **Bankruptcy** Leave to sue

Bermuda insurers, in bringing proceedings in Bermuda to compel plan administrator and entity that was assigned all of Chapter 11 debtor's rights under excess policies to arbitrate any policy claims in Bermuda, and to prevent plan administrator and this other entity from pursuing such claims in bankruptcy court as part of process of marshalling and liquidating estate assets, without first obtaining leave from bankruptcy court, had interfered with estate administration in manner that the *Barton* doctrine was designed to prevent; *Barton* doctrine applied to require insurers, prior to commencing such proceedings even outside the United States in Bermuda, to first seek bankruptcy court's permission.

5 Cases that cite this headnote

[9] **Bankruptcy** Leave to sue

Barton doctrine is applied broadly to prevent suits against court-appointed officers in a wide variety of circumstances.

2 Cases that cite this headnote

Attorneys and Law Firms

***867** APPEARANCES: WHITE AND WILLIAMS, LLP, Counsel to Allied World Assurance Company, Ltd, 7 Times Square, New York, New York 10036, By: Erica Kerstein, Esq.

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JONES DAY, 250 Vesey Street, New York, New York 10281, By: Edward M. Joyce, Esq., Jane Rue Wittstein, Esq.

MEMORANDUM OPINION AND ORDER FINDING THAT THE BERMUDA INSURERS VIOLATED THE BARTON DOCTRINE

MARTIN GLENN, UNITED STATES BANKRUPTCY JUDGE

This is the fourth written opinion in this adversary proceeding since it was filed on October 27, 2016, with each of the opinions addressing whether this Court or a court in Bermuda can and will address the claims and defenses arising in this case, including whether the underlying disputes must be arbitrated in Bermuda. [1] The complaint names as defendants five insurers ***868** that provided excess errors and omissions ("E&O") insurance coverage to MF Global Holdings Ltd. and its subsidiaries and affiliates, and their officers and directors. The plaintiffs here are MF Global Holdings Ltd. ("MFGH"), as Plan Administrator, and MF Global Assigned Assets LLC ("MFGAA" and together with MFGH, the "Plaintiffs"). The complaint seeks to recover the full policy limits plus additional damages resulting from these insurers refusal to pay policy proceeds in connection with a global settlement of MDL litigation pending in the United States District Court for the Southern District of New York (the "Global Settlement"). The MDL cases asserted claims against the officers and directors of MFGH and its affiliates (and other defendants) for claims arising from the collapse of MF Global in October 2011. On August 10, 2016, this Court entered an order approving the Global Settlement, which included a bar

order ("Bar Order") and an assignment of the settling officers' and directors' rights to coverage under these defendants' E&O policies. (D.I. 2282.) [2]

Four of the five insurer defendants in this case are based in Bermuda (the "Bermuda Insurers"). [3] The Bermuda Insurers responded to the filing of the adversary proceeding by filing cases in the Supreme Court of Bermuda, Civil Jurisdiction (Commercial Court) (the "Bermuda Court") and obtaining *ex parte* anti-suit injunctions (the "Bermuda anti-suit injunctions") prohibiting the Plaintiffs from prosecuting this adversary proceeding. The Bermuda Insurers contend and sought orders from the Bermuda Court requiring the Plaintiffs to arbitrate their disputes in Bermuda based on arbitration clauses contained in their E&O policies. The Plaintiffs contend that this Court, rather than arbitration in Bermuda, is the proper forum to resolve the coverage disputes. The Bermuda Insurers filed motions in this Court to compel arbitration but the Bermuda anti-suit injunctions prevented the Plaintiffs from opposing the motions in this Court.

In the three earlier opinions in this case, the Court first issued a temporarily restraining order ("TRO") barring the Bermuda Insurers from enforcing the Bermuda anti-suit injunctions, then issued a preliminary injunction extending the relief granted in the TRO, and issued an opinion holding the Bermuda Insurers in contempt for violating the TRO. The Plaintiffs have contended since the Bermuda Insurers filed the Bermuda proceedings that the commencement of those proceedings and the obtaining of the anti-suit injunctions violated the *Barton* Doctrine (explained below) and the Bar Order contained in the August 10, 2016 order approving the Global Settlement. The anti-suit injunctions prevented the Plaintiffs from briefing and arguing the issues under the *Barton* Doctrine and the Bar Order. After the Court issued the TRO and preliminary injunction, the Court set a briefing and argument schedule specifically focused on those two issues. The Court heard argument during the morning of January 23, 2017, and announced a ruling from the bench concluding that the Bermuda ***869** Insurers violated the *Barton* Doctrine by filing the Bermuda proceedings. [4] The Court explained the basis for its ruling from the bench, but also indicated that a written opinion would follow. A written order was entered requiring the Bermuda Insurers to dismiss their Bermuda actions (ECF Doc. # 78), followed the next day by another order clarifying that the Court required that the Bermuda actions must be dismissed without prejudice. (ECF Doc. # 82.) This Opinion elaborates on the reasons for the relief ordered by the Court. After the entry of the two orders, the Bermuda Insurers complied with the orders and discontinued the Bermuda actions. The Court has scheduled a case management conference for February 23, 2017, and directed the parties to confer on a schedule for briefing and hearing argument of the Bermuda Insurers' motions to compel arbitration, and other matters.

This Opinion addresses one of the central issues in this adversary proceeding—namely, whether the Bermuda Insurers violated the *Barton* Doctrine by initiating proceedings against the Plaintiffs in Bermuda without leave of this Court. In light of the decision on the *Barton* Doctrine, the Court concludes that it is unnecessary at this time to decide whether the Bermuda Insurers violated the Bar Order in the Global Settlement by filing the Bermuda proceedings.

After the entry of the TRO Opinion, which enjoined the Bermuda Insurers from taking any action to enforce certain provisions of the injunctive orders issued by the Bermuda court, Allied World Assurance Company Ltd. ("Allied") filed the *Memorandum of Law in Support of Defendant Allied World Assurance Company, Ltd's Opposition to Application of the Bar Order and* Barton *Doctrine* (the "Allied Opposition," ECF Doc. # 62), and Iron–Starr Excess Agency Ltd., Ironshore Insurance Ltd., and Starr Insurance & Reinsurance Limited ("the Iron–Starr Insurers") filed the *Iron–Starr Defendants' Memorandum of Law in Opposition to the Application of the Bar Order and* Barton *Doctrine* (the "Iron–Starr Opposition," ECF Doc. # 64). Allied also filed the *Affidavit of Erica Kerstein* (the "Kerstein Affidavit," ECF Doc. # 63) and several exhibits; the Iron–Starr Insurers filed the *Declaration of Mary Jo Barry* (ECF Doc. # 65) and several exhibits. [5]

The Plaintiffs filed the *Memorandum of Law on the Bermuda Defendants' Continued Violation of This Court's Bar Order* (the "Plaintiffs' Opening Brief," ECF Doc. # [—], filed under seal on December 28, 2016) along with certain exhibits, and the *Omnibus Response Memorandum of Law on the Bermuda Defendants' Continued Violation of This Court's Bar Order* (the "Plaintiffs' Response," ECF Doc. # 68), along with the affidavit of Edward Joyce (the "Joyce Affidavit," ECF Doc. # 69) and several exhibits.

I. BACKGROUND

The Prior Opinions describe the background of the MF Global Chapter 11 and SIPA cases, the confirmed Chapter 11 Plan, and the Global Settlement. Additional relevant facts are set forth below.

The *Amended and Restated Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* (the "Plan") was confirmed ***870** on April 5, 2013. (D.I. 1288.) Under the terms of the Plan, MFGH, as Plan Administrator, is responsible for liquidating all property under the Plan and making distributions to creditors.[6] After the Plan was confirmed, a "Sale and Assumption Agreement" (D.I. 2114, Ex. B) was approved on August 19, 2015. (D.I. 2123.) The Sale and Assumption Agreement provides at section 1.1 that MF Global Inc. (or "MFGI") agrees to assign certain rights to MFGH, as Plan Administrator, or MFGH's designee. Specifically, at sections 1.1 (b) and (c), the Sale and Assumption Agreement provides for MFGI to transfer to MFGH its rights, remedies, title, and interests arising out of, or related to any and all existing claims or recoveries arising from certain E&O and D&O policies. (Sale and Assumption Agreement § 1.1.) The order approving the Sale and Assumption Agreement provides that, following certain other distributions, "[a]ll remaining Assigned Rights and their proceeds shall be allocated among the Chapter 11 Debtors by the Plan Administrator ...." (D.I. 2123 at 8.)

MFGAA was formed under Delaware law on August 26, 2015 as a limited liability company to retain the assets assigned in satisfaction of the Debtors' claims. MFGH is the managing member of MFGAA. MFGAA was assigned all claims, rights, title, and benefits of MFGI with respect to certain assets, including with respect to certain E&O and D&O policies, and maintains the right to recover on all claims previously held by MFGI's estates. (*See* Plaintiffs' Response at 10–11.)

The E&O insurance policies issued by the Bermuda Insurers each contain a mandatory arbitration provision. (Allied Response at 3; Iron–Starr Response at 4.) These arbitration clauses[7] provide that all disputes arising under or relating to these policies shall be fully and finally resolved by arbitration in Bermuda. (*Id.*) But where arbitration law and bankruptcy law clash, the analysis whether particular disputes must be arbitrated is more nuanced. As explained in the TRO Opinion and the Preliminary Injunction OpinionPreliminary Injunction Opinion,

> *Under U.S. law*, the answer to the question whether particular disputes must be arbitrated depends on the application of both arbitration law *and* U.S. bankruptcy law. It is a nuanced analysis.....
>
> Courts in this district have recognized that when a Bankruptcy Court is presented with a motion to compel arbitration ... the Court must apply a four-part test:
>
> > [F]irst, it must determine whether the parties agree to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then decide ***871** whether to stay the balance of the proceedings pending arbitration.
> >
> > Naturally, [w]hen arbitration law meets bankruptcy law head on, clashes inevitably develop. Specifically, [t]he issue of waiver predominates arbitration disputes involving bankruptcy claims, and the first indication of waiver is whether a claim is core or non-core. Despite what the Bermuda Insurers may have attested to before the Bermuda Court, the determination of whether a claim is core or non-core can be complex, including in insurance coverage disputes.

TRO Opinion, 561 B.R. at 627 (internal quotation marks and citations omitted); *Preliminary Injunction Opinion*, —— B.R. at ——, 2017 WL 119338, at *4*Preliminary Injunction Opinion*, —— B.R. at ——, 2017 WL 119338, at *4 (internal quotation marks and citations omitted); see also *In re U.S. Lines, Inc.*, 197 F.3d 631, 636–37 (2d Cir. 1999).

II. THE PARTIES' ARGUMENTS

A. The Plaintiffs' Arguments

1. The Bar Order

The Plaintiffs argue that by demanding costs and attorneys' fees in connection with the Bermuda proceedings, the Bermuda Insurers have plainly brought a "claim" against the Plaintiffs in clear violation of the Bar Order.[8] (Plaintiffs' Response at 3–4.) Additionally, the Plaintiffs argue that the Bermuda Insurers are seeking to "collaterally attack" the reasonableness of the MDL settlement. (Plaintiffs' Opening

Brief at 3–5.) Specifically, the Plaintiffs note that the Bermuda Insurers have taken the position that the claims under the Global Settlement are uninsurable claims for "disgorgement and/or restitution," and the Bar Order expressly precludes any insurer not a party to the Global Settlement from challenging the insurability of claims covered under the Global Settlement. (Plaintiffs' Opening Brief at 4.) Therefore, the Plaintiffs reason, this is a challenge to whether the E&O tower was "properly" and "fairly" exhausted. (*Id.* at 5; Plaintiffs' Response at 6.) Relatedly, the Plaintiffs argue that, contrary to Allied's representations, MFGH *does* have rights under the Global Settlement to prosecute the assigned claims under the E&O policies at issue ***872** here, and that Allied is incorrect in asserting that MFGAA is the only entity entitled to pursue the disputed policy proceeds. (Plaintiffs' Response at 6–7.)

2. The Barton *Doctrine*

The Plaintiffs argue that the Bermuda Insurers have violated the *Barton* Doctrine because MFGH and MFGAA were assigned the rights of the individual insureds against the Bermuda Insurers under the Plan, and the Plaintiffs are entitled to the protections of the *Barton* Doctrine in pursuing those rights in an effort to marshal and liquidate estate assets. (Plaintiffs' Response at 11–12.) The Plaintiffs emphasize that MFGAA "is merely the vehicle created by MFGH under the Plan to hold the assets assigned by MFGI," and together with MFGH, is tasked with marshaling and liquidating estate assets. (Plaintiffs' Response at 10–11.)[9] As such, the Plaintiffs maintain that both MFGH, as Plan Administrator, and MFGAA are entitled to protection under the *Barton* Doctrine. Also, the Plaintiffs note that the Bermuda Insurers do not claim to have been unaware of the *Barton* Doctrine, as the Bermuda Insurers cited to case law in their submissions to the Bermuda Court that extensively discusses the Doctrine. (Plaintiffs' Response at 9 n. 16.)

B. The Bermuda Insurers' Arguments

1. The Bar Order

The Bermuda Insurers maintain that the plain text of the Bar Order does not prohibit the Bermuda anti-suit injunctions. (Allied Response at 7–9; Iron–Starr Response at 9–11). The Bermuda Insurers also argue that the intent behind the Bar Order was primarily to prevent collateral attacks against the Global Settlement, and that the filing of proceedings in Bermuda did not violate the spirit of the Bar Order because the Bermuda Insurers do not seek to upend any portion of the Global Settlement. (Allied Response at 10–12; Iron–Starr Response at 11–14.)

2. The Barton *Doctrine*

The Bermuda Insurers argue that the Bermuda proceedings are not a suit against a court-appointed officer in his/her official capacity, and thus does not constitute a *Barton* violation because the Bermuda proceedings were only filed to defend a pre-existing arbitration clause. The Bermuda Insurers maintain that MFGH, though a court-appointed officer, does not directly hold the right to pursue any recovery of the underlying insurance policy proceeds, rendering the *Barton* Doctrine inapplicable. (Allied Opposition at 6.)

Additionally, the Bermuda Insurers contend that the *Barton* Doctrine is typically applied in suits against court officers in entirely different circumstances, such as where a trustee commits malpractice, breaches a fiduciary duty, or violates an individual's constitutional rights. (Allied Response at 13–19; Iron–Starr Response at 15–20.) The Bermuda Insurers also suggest that the Bermuda proceedings do not "interfere with creditors' claims or the administration of the estate," a scenario the *Barton* Doctrine is designed to prevent, because MFGH is the only relevant "estate," and the MFGH does not hold title to proceeds of the underlying policies. (Allied Opp. at 5.)

III. LEGAL STANDARD

A. The Bar Order

[1] It is well settled that a bankruptcy court retains jurisdiction post-confirmation to interpret and enforce its own orders. *See* *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151, 129 S.Ct. 2195, 174 L.Ed.2d 99 (2009) ("[A]s the Second Circuit recognized ... the Bankruptcy Court plainly had jurisdiction ***873** to interpret and enforce its own prior orders."); *see also* *In re Lyondell Chem. Co.*, 445 B.R. 277, 287 (Bankr. S.D.N.Y. 2011) ("The Second Circuit and other

bankruptcy courts in this district have ruled that a bankruptcy court retains core jurisdiction to interpret and enforce its own prior orders, including and especially confirmation orders."); *In re Charter Communications*, 2010 WL 502764, at *4 (Bankr. S.D.N.Y. 2010) ("All courts retain the jurisdiction to interpret and enforce their own orders."). Judge Peck, in *Charter Communications*, discussed how following plan confirmation, a bankruptcy court's jurisdiction "does begin to diminish in importance," but that when a dispute involving the interpretation of prior orders is "sufficiently close in time to confirmation of the [p]lan and sufficiently critical to the integrity of the [p]lan's structure," it may well be appropriate for a court to "take firm control of and decide" an issue. *Charter Communications*, 2010 WL 502764, at *4.

B. The *Barton* Doctrine

[2] "The *Barton* Doctrine, developed from common law by the Supreme Court, provides that a suit may not be brought against a receiver without leave of such receiver's appointing court." *McIntire v. China MediaExpress Holdings, Inc.*, 113 F.Supp.3d 769, 772 (S.D.N.Y. 2015); *Barton v. Barbour*, 104 U.S. 126, 136–37, 26 L.Ed. 672 (1881) ("[W]hen the court of one State has ... property in its possession for administration as trust assets, and has appointed a receiver to aid in the performance of its duty by carrying on the business to which the property is adapted ... a court of another State has not jurisdiction, without leave of the court by which the receiver was appointed, to entertain a suit against him ....").

[3] "The Second Circuit has recognized that the *Barton* Doctrine extends to bankruptcy as well as receivership, and lower courts have applied it to declaratory judgment actions, as well as suits seeking damages." *McIntire*, 113 F.Supp.3d at 772 (internal citations omitted); *see also Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 460 B.R. 106, 116 (Bankr. S.D.N.Y. 2011), *aff'd*, 474 B.R. 76 (S.D.N.Y. 2012) [hereinafter "*Madoff*"] (citing *Lebovits v. Scheffel (In re Lehal Realty Assocs.)*, 101 F.3d 272, 276 (2d Cir.1996)) (describing the "well-recognized line of cases" extending the *Barton* Doctrine to bankruptcy trustees, and its application in the post-receivership context). The court in *McIntire* noted that "the rationale underlying *Barton* extends to arbitrations" in holding that non-party insurers were required to seek leave from the court to name a receiver as a party to an arbitration proceeding. *McIntire*, 113 F.Supp.3d at 774.

[4] "In addition to protecting a court-appointed receiver from personal liability, the *Barton* Doctrine is intended to protect the receivership court's 'overriding interest in [the] administration of the estate.' " *McIntire*, 113 F.Supp.3d at 773 (citation omitted); *see also In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993) (explaining that the *Barton* Doctrine "enables the Bankruptcy Court to maintain better control over the administration of the estate"). Other courts have noted that the *Barton* Doctrine can also serve to "centralize bankruptcy litigation" and "keep a watchful eye" on court-appointed officers. *In re Yellowstone Mountain Club, LLC*, 841 F.3d 1090, 1094 (9th Cir. 2016) (quoting ***874** *In re Yellowstone Mountain Club, LLC*, 2013 WL 1099155, at *3 (Bankr. D. Mont. 2013)).

[5] While there is a limited statutory exception to the Doctrine not applicable here,[10] as this Court recently concluded, the *Barton* Doctrine is not restricted to legal actions brought within the United States, and requires that "a party who seeks to file suit in an international forum" obtain leave of the appointing court. *Preliminary Injunction Opinion*, —— B.R. at ——, 2017 WL 119338, at *6*Preliminary Injunction Opinion*, —— B.R. at ——, 2017 WL 119338, at *6 (quoting *ACE Insurance Co., Ltd. v. Smith (In re BCE West, L.P.)*, 2006 WL 8422206, at *8 (D. Ariz. Sept. 20, 2006)).

Recently, the Ninth Circuit applied the *Barton* Doctrine to bar claims brought against a member of a committee of unsecured creditors. *Yellowstone*, 841 F.3d at 1095 ("Because creditors have interests that are closely aligned with those of a bankruptcy trustee, there's good reason to treat the two the same for purposes of the *Barton* [D]octrine."). The *Yellowstone* court explained that because a creditors' committee is tasked with certain statutory obligations including, among other things, examining the debtor and participating in the formation of a reorganization plan, a lawsuit against the committee or its members would interfere with the bankruptcy proceedings and could cause committee members "to be timid in discharging their duties." *Id.*

Similarly, in applying the *Barton* Doctrine, the Sixth Circuit looks to whether an entity is the "functional equivalent of a trustee." *DeLorean*, 991 F.2d at 1241. In *DeLorean*, the Sixth Circuit held that counsel for a trustee is the "functional equivalent" of the trustee for purposes of estate administration, and is thus protected by the *Barton* Doctrine. *Id.* ("We hold, as a matter of law, counsel for trustee, court appointed officers who represent the estate, are the functional equivalent of a trustee, where as here, they act at the direction of the trustee and for the purpose of administering the estate or protecting its assets."). The *DeLorean* court reasoned that "[t]he protection that the leave requirement affords the [t]rustee and the estate would be meaningless if it could be avoided by simply suing the [t]rustee's attorneys." *Id.*

The Eleventh Circuit adopted the "functional equivalent" test articulated by the Sixth Circuit in finding that officers appointed by the trustee and approved by the bankruptcy court to sell estate property warranted the protection of the *Barton* Doctrine. *See* *Carter v. Rodgers*, 220 F.3d 1249, 1252 n.4 (11th Cir. 2000); *see also* *Lawrence v. Goldberg*, 573 F.3d 1265, 1270 (11th Cir. 2009) (extending the protections of the *Barton* Doctrine to a trustee's hired professionals assisting to "discharge" the trustee's duties, and to creditors who "financed the [t]rustee's efforts," because these entities "functioned as the equivalent of court appointed officers").

Additionally, as this Court discussed in detail in the Preliminary Injunction OpinionPreliminary Injunction Opinion, the District Court of Arizona upheld a ***875** bankruptcy court's finding that a Bermuda-based insurer violated the *Barton* Doctrine by filing an action in Bermuda against the plan trustee of the confirmed Boston Chicken chapter 11 plan. *BCE West*, 2006 WL 8422206, at *1. While many courts have applied the *Barton* Doctrine broadly, the Second Circuit has not articulated a test for determining the application of the *Barton* Doctrine to parties other than a receiver or trustee. But at least one district court within this Circuit has affirmed a bankruptcy court's determination that the Doctrine's protection extended to both the trustee and counsel for the trustee. *See Peia v. Coan*, 2006 WL 798873, at *2 (D. Conn. Mar. 23, 2006).

[6] When a court determines that the *Barton* Doctrine has been violated, "[t]he only appropriate remedy ... is to order cessation of the improper action." *Madoff*, 460 B.R. at 116 (quoting *Beck v. Fort James Corp. (In re Crown Vantage, Inc.)*, 421 F.3d 963, 970 (9th Cir. 2005)); *see also* *In re Baptist Medical Center of New York*, 80 B.R. 637, 643 (Bankr. E.D.N.Y. 1987) (discussing the *Barton* Doctrine, and noting that " '[c]ontempt' is the relief that may properly be granted upon a showing that [a] suitor impermissibly commenced the action against the trustee")

IV. DISCUSSION

A. The Bar Order

As set forth above, any "entity that is not a [p]arty to the Settlement Agreement is permanently barred, enjoined, and restrained from commencing, prosecuting, or asserting any claims arising out of payments made under certain insurance policies in accordance with the [Global Settlement] ...." (Bar Order ¶ 3.) Whether or not the Bermuda Insurers violated the Bar Order, then, may hinge on whether by filing proceedings in Bermuda, the Bermuda Insurers asserted a "claim" against the Plaintiffs. Similarly, if the Court were to conclude that the Bermuda Insurers are attacking the reasonableness of the Global Settlement, the Bermuda Insurers would be in violation of the Bar Order. (*See* Bar Order ¶ 7.)

The Bermuda Insurers maintain that because the Bermuda proceedings were filed as a "defensive action," and because they do not seek to directly upend the Global Settlement, they have not violated the Bar Order. Though the Bermuda Insurers originally requested indemnity costs and fees in connection with the Bermuda proceedings, at this stage in the case, the Bermuda anti-suit injunctions have all been vacated. In any event, the Court may resolve the pending issues by first addressing whether the Bermuda Insurers violated the *Barton* Doctrine.

Because the Court concludes that the Bermuda Insurers violated the *Barton* Doctrine by filing the Bermuda actions without first obtaining leave of this Court, it is unnecessary to resolve whether the Bermuda filings also violated the Bar Order.

B. The *Barton* Doctrine

[7] **[8]** MFGH, as Plan Administrator, is a court-appointed entity tasked with marshaling and liquidating assets, and by initiating this adversary proceeding against the Bermuda Insurers to pursue funds for the benefit of creditors, MFGH was acting in its official capacity.[11] Likewise, MFGAA was created pursuant to the terms and mechanisms of the Plan and the Sale and ***876** Assumption Agreement, both of which were approved by this Court. MFGAA, as holder of the rights to the underlying policies issued by the Bermuda Insurers, together with MFGH, initiated this adversary proceeding in furtherance of the goals laid out in the Plan and Sale and Assumption Agreement with the express authorization of this Court. The proceedings brought by the Bermuda Insurers against the Plaintiffs in Bermuda were initiated following the filing of the Complaint in an attempt to circumvent the adjudication of issues properly before this Court, and abruptly halted the Plaintiffs' efforts to carry out their official responsibilities.

The Bermuda Insurers have undermined this Court's and the Plaintiffs' "overriding interest in [the] administration of the estate" by filing suit against MFGH and MFGAA without leave of this Court. *McIntire*, 113 F.Supp.3d at 773. The Bermuda proceedings have resulted in disjointed and decentralized actions in multiple jurisdictions, and have delayed the administration of this case, and ultimately, distributions to creditors. The *Barton* Doctrine seeks to prevent this very type of interference. The injunctive relief originally sought by the Bermuda Insurers in the Bermuda Court (which has now been vacated) underscores the impermissible intrusion that the Bermuda proceedings had on the Plaintiffs' ability to carry out its obligations, and this Court's ability to adjudicate the issues properly before it.

[9] Courts have consistently applied the *Barton* Doctrine broadly to prevent suits against court-appointed officers in a wide variety of circumstances, and the *Barton* Doctrine is directly applicable to the facts and circumstances of this case.

For example, as noted above, the Eleventh Circuit has held that court-appointed officers assisting a trustee in carrying out official duties are protected by the *Barton* Doctrine. *See* *Lawrence*, 573 F.3d at 1270 (broadly applying the *Barton* Doctrine in determining that the trustee, counsel to the trustee, and certain others who assisted the trustee to recover property of the estate were protected under the *Barton* Doctrine). Here, MFGAA, as the holder of the rights to collect on the policies issued by the Bermuda Insurers, is functionally advancing the efforts of MFGH, as Plan Administrator, in carrying out its official duties. Just as the court in *Lawrence* found that the *Barton* Doctrine protects parties assisting a trustee in pursuing its objectives, so too does this Court find that the *Barton* Doctrine protects both MFGH and MFGAA in undertaking their official obligations, including the filing of the Complaint.

The facts and circumstances of this case are similar in many ways to those in the *Boston Chicken* case. In *Boston Chicken*, as is the case here, a Bermuda-based insurance company obtained *ex parte* injunction orders prohibiting a plan administrator, charged with the collection of certain retained assets (including causes of action relating to insurance policies), from pursuing litigation to collect on the insurance policies issued by the Bermuda insurance company. *See BCE West*, 2006 WL 8422206, at *2. There, the bankruptcy court found that the Bermuda-based insurance company, by filing suit against the Boston Chicken plan trustee without first seeking leave of the bankruptcy court, violated the *Barton* Doctrine, and the district court affirmed the bankruptcy court's decision. *Id.* at *8. Similarly, MFGH, together with MFGAA, is charged with administering certain assets, including the rights to collect on the policies issued by the Bermuda Insurers. The Complaint reflects an effort to collect on these policies, as was the case in *Boston Chicken*.

***877** By marshaling and liquidating assets for the benefit of creditors, MFGH, together with MFGAA, were pursuing goals substantially similar to those of a bankruptcy trustee. The Bermuda proceedings were initiated to handcuff the Plaintiffs following the filing of the Complaint, which the Plaintiffs filed in accordance with their mandate. But the *Barton* Doctrine protects the Plaintiffs in their pursuit of court-sanctioned actions. Parties like the Plaintiffs should not be impeded from carrying out their duties or sidetracked with vexing litigation by frustrated litigants. *Carter*, 220 F.3d at 1252–53 ("If [the trustee] is burdened with having to defend against suits by litigants disappointed by his actions on the court's behalf, his work for the court will be impeded.... Without the requirement [of leave], trusteeship will become a more irksome duty ....") (quoting *Matter*

of Linton, 136 F.3d 544, 545 (7th Cir. 1998)). In order to bring arbitration proceedings against MFGH and MFGAA, the Bermuda Insurers were required, under the *Barton* Doctrine, to obtain leave of this Court.

The proceedings initiated by the Bermuda Insurers were brought outside the United States, but the *Barton* Doctrine requires "a party who seeks to file suit in an international forum" to obtain leave of the appointing court. *See Preliminary Injunction Opinion*, —— B.R. at ——, 2017 WL 119338, at *6*See Preliminary Injunction Opinion*, —— B.R. at ——, 2017 WL 119338, at *6.

V. CONCLUSION

The Court finds and concludes that by filing proceedings against MFGH and MFGAA in Bermuda, the Bermuda Insurers violated the *Barton* Doctrine. Therefore, the appropriate remedy was for this Court to order the Bermuda Insurers to terminate proceedings in Bermuda against MFGH and MFGAA without prejudice, as they have already done. Accordingly, the Court need not address whether the filing of proceedings in Bermuda violated the Bar Order in the Global Settlement.

The conclusion that the Bermuda Insurers violated the *Barton* Doctrine does not mean that arbitration in Bermuda may not be required. But this Court, rather than the Bermuda Court, must resolve the arbitration issue. Once briefing is complete, the Court will hear and decide whether the Bermuda Insurers' motions to compel arbitration must be granted.

IT IS SO ORDERED.

All Citations

562 B.R. 866, 63 Bankr.Ct.Dec. 171

Footnotes

1 The first three opinions can be found at *In re MF Global Holdings Ltd.*, 561 B.R. 608 (Bankr. S.D.N.Y. 2016) (order issuing temporary restraining order) [hereinafter "*TRO Opinion*"]; *In re MF Global Holdings Ltd.*, —— B.R. ——, 2017 WL 119338 (Bankr. S.D.N.Y. Jan. 12, 2017) (order granting preliminary injunction) [hereinafter "*Preliminary Injunction Opinion**Preliminary Injunction Opinion*"]; *In re MF Global Holdings Ltd.*, 562 B.R. 41 (Bankr. S.D.N.Y. Jan. 12, 2017) (order holding Bermuda-based insurers in contempt) [hereinafter "*Contempt Opinion*"] (collectively, the "Prior Opinions"). Familiarity with those opinions is assumed. Those opinions describe the background and circumstances of the issues arising in this adversary proceeding. Capitalized terms not defined herein shall have the definitions ascribed to them in the TRO Opinion.

2 References to the docket in the main chapter 11 case will be denoted as "D.I."

3 The Bermuda Insurers are Allied World Assurance Company Ltd., Iron–Starr Excess Agency Ltd., Ironshore Insurance Ltd., and Starr Insurance & Reinsurance Limited.

4 The Court announced its decision from the bench, and promptly entered a written order granting relief, because a hearing was scheduled for the Bermuda Court that same afternoon in which the Bermuda Insurers were seeking additional relief.

5 Earlier in the case, on December 7, 2016, Allied filed a brief addressing the Bar Order and *Barton* Doctrine issues (the "Allied Response," ECF Doc. # 28), as did the Iron–Starr Insurers (the "Iron–Starr Response," ECF Doc. # 32.)

6 After confirmation of this Plan, several further amendments to the confirmed plan were made and approved by this Court, but those changes did not materially alter the provisions relating to liquidation and distributions of assets.

7 For example, the Allied Policy's arbitration clause reads in relevant part:

> Any and all disputes arising under or relating to this policy, including its formation and validity, and whether between the Insurer and the Named Insured or any person or entity deriving rights through or asserting rights on behalf of the Named Insured, shall be finally and fully determined in Hamilton, Bermuda under the provisions of The Bermuda International Conciliation and Arbitration Act of 1993 (exclusive of the Conciliation Part of such Act), as may be amended and supplemented, by a board composed of three arbitrators to be selected for each controversy ....

(Complaint, Ex. B at 7.)

8 The Bar Order provides in relevant part:

> 3. [T]he plan injunction ("Plan Injunction") as to the Debtors and their respective property established pursuant to paragraph 75 in the *Order Confirming Amended and Restated Joint Plan of Liquidation* ... shall be modified solely to the extent necessary, and without further order of the Bankruptcy Court, to authorize any and all actions reasonably necessary to consummate the Global Settlement, including without limitation, any payments under certain insurance policies required under the Settlement .... Furthermore, any person or entity that is not a Party to the Settlement Agreement is permanently barred, enjoined, and restrained from commencing, prosecuting, or asserting any claims arising out of payments made under certain insurance policies in accordance with the Settlement Agreement or any other agreement referenced therein or associated therewith.
>
> ....
>
> 7. Upon entry of this Order, any person or entity that is not a Party to the Settlement Agreement, including any Dissenting Insurer, is permanently barred, enjoined, and restrained from contesting or disputing the Reasonableness of Settlement, or commencing, prosecuting, or asserting any claims, including, without limitation, claims for contribution, indemnity, or comparative fault (however denominated an on whatsoever theory), arising out of or related to the MF Global Actions ....
>
> 8. For the avoidance of doubt, nothing in this Order shall preclude: ... (iii) any claims by the Insurance Assignees to enforce the Assigned Rights; (iv) any claim or right asserted by an MFG Plaintiff against any Dissenting Insurer on its own behalf (as distinct from the Assigned Rights) ....

(Global Settlement ¶¶ 3, 7, 8.)

9 The Plaintiffs also point out that "the three remaining Debtors are the only members of MFGAA, the [Allied and Iron–Starr policy] proceeds will flow to them, and MFGH is responsible, as both the managing member of MFGAA and under the Sale and Assumption Agreement, for prosecuting the claims under [these policies]." (Plaintiffs' Response at 11.)

10 The limited exception to the *Barton* Doctrine set forth in 28 U.S.C. § 959(a) provides in relevant part that "[t]rustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property." 28 U.S.C. § 959(a). Given that there is no current business being carried out in connection with this case, this statutory exception is inapplicable. *See* *Lehal Realty*, 101 F.3d at

276 (finding that the exception in section 959 was inapplicable where "a trustee acting in his official capacity conducts no business connected with the property other than to perform administrative tasks necessarily incident to the consolidation, preservation, and liquidation of assets in the debtor's estate") (citations omitted).

11 The Bermuda Insurers concede that MFGH is a court-appointed officer. (Allied Response at 14; Iron–Starr Opposition at 11.)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF HAMPTON	)	
	)	CASE NO.: 2019-CP-25-00111
Renee S. Beach, as Personal Representative of the Estate of Mallory Beach,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
	)	**ORDER GRANTING TEMPORARY INJUNCTION AND APPOINTING CO-RECEIVERS AND CO-RECEIVERS' COUNSEL**
Gregory M. Parker, Inc. a/k/a Parker's Corporation d/b/a Parkers 55, Richard Alexander Murdaugh, and Richard Alexander Murdaugh, Jr.,	)	
	)	
Defendants.	)	
	)	

Before the Court is Plaintiff's motion for a temporary injunction pursuant to Rule 65, SCRCP and the appointment of co-receivers John T. Lay, Jr., Esquire and Peter M. McCoy, Jr., Esquire ("the Co-Receivers") and their counsel, Amy L.B. Hill, Esquire of the law firm Gallivan, White & Boyd, P.A. ("Co-Receivers' Counsel"), pursuant to S.C. Code §15-65-10, the Court's equitable powers, and general principles of fraud and deceit under South Carolina law. Plaintiff's request for injunctive relief and appointment of the Co-Receivers and their counsel is made in regard to all of the Alex Murdaugh Assets, as that term is defined herein, and all of the Buster Murdaugh Assets, as defined herein. Plaintiff seeks an expedited ruling on this Motion, which this Court finds is appropriate given the circumstances.

The term "Alex Murdaugh Assets" as used in this Order shall mean all assets, future interests, beneficial interests, inherited assets, assets transferred, real property, securities, stocks, promissory notes, mortgages, partnership interests, interest in all limited liability companies and similar types of entities, options, bonds, rents, leases, annuities, contract rights, creditor rights,

easements, chattel, livestock, mineral rights, all useful things, liabilities capable of being re-characterized as assets, intellectual property, all rights to name, image or likeness, all publication rights to the events related in any way to Alex Murdaugh and contract rights and all other things, rights and interests without limitation that may be monetized for value, whether known or unknown, whether it is presently owned, held or controlled or was previously owned, held or controlled or will be owned, held or controlled in the future, whether actual or contingent, whether owned, held or controlled directly or indirectly and/or whether owned, held or controlled in whole or in part by Defendant Richard Alexander Murdaugh ("Alex Murdaugh"). For the avoidance of doubt, the term "Alex Murdaugh Assets" includes any and all assets transferred, concealed, hidden, sold, encumbered, or otherwise disposed of which previously were owned, held or controlled by Alex Murdaugh, directly or indirectly and in whole or in part.

The term "Buster Murdaugh Assets" as used in this Order shall mean any or all of the Alex Murdaugh Assets (as defined herein), as well as all intellectual property, all rights to name, image or likeness and all other publication and contract rights to the events related in any way to Alex Murdaugh and/or Buster Murdaugh, whether known or unknown, whether it is presently owned, held or controlled or was previously owned, held or controlled or will be owned, held or controlled in the future, whether actual or contingent, whether owned, held or controlled directly or indirectly and/or whether owned, held or controlled in whole or in part by Defendant Richard Alexander Murdaugh, Jr. ("Buster Murdaugh") and all other assets, interests, real property including any and all rents, profits or value derived therefrom, personal property, rights, chattel and any other thing whatsoever without limitation which has value or can be monetized for value that were or will be gifted, inherited by, sold or in any other manner transferred to Buster Murdaugh from Alex Murdaugh or any other person, whether such transfer was direct or indirect, whether such transfer

involved intermediary third persons that are alive, deceased, operating or defunct, and whether such transferred assets are held, owned and/or controlled by Buster Murdaugh directly or indirectly and in whole or in part.

Temporary Injunction Granted

After careful consideration of the parties' written memoranda and arguments presented at the hearing, this Court finds that irreparable injury, loss or damage will result to Plaintiff in the absence of a temporary injunction prohibiting each of Defendant Alex Murdaugh and Defendant Buster Murdaugh from hiding, concealing, misappropriating, selling, encumbering, transferring, impairing the value of and otherwise disposing of any of the Alex Murdaugh Assets and any of the Buster Murdaugh Assets. Further, after careful consideration of all information presented to the Court, the Court finds that the balance of equities clearly weighs in favor of issuing a temporary injunction to prevent irreparable injury, damage or loss to Plaintiff's ability to recover damages from these Defendants for the wrongful death of her daughter. Therefore, this Court hereby issues a temporary injunction prohibiting each of Alex Murdaugh and Buster Murdaugh from hiding, concealing, misappropriating, selling, encumbering, transferring, impairing the value of and otherwise disposing of any of the Alex Murdaugh Assets and any of the Buster Murdaugh Assets, in whole or in part, during the pendency and through the final resolution of this lawsuit.

Appointment of Co-Receivers and Counsel; Scope and Terms of Receivership

After careful consideration of all information and arguments presented by the parties, this Court finds that Plaintiff's application to appoint the Co-Receivers is meritorious under the S.C. Code §15-65-10, the Court's equitable powers, and general principles of fraud and deceit under South Carolina law. Therefore, the Court hereby appoints Mr. Lay and Mr. McCoy as Co-Receivers over all Alex Murdaugh Assets and all Buster Murdaugh Assets and grants them the

broad rights, powers and authority as set forth in this Order. In addition, the Court hereby appoints Amy L.B. Hill, Esquire of Gallivan, White & Boyd, P.A. as counsel for the Co-Receivers in this matter, as further set forth herein.

The Court hereby grants, vests, imbues and otherwise empowers the Co-Receivers with the exclusive power and authority as to all of the Alex Murdaugh Assets and all of the Buster Murdaugh Assets (collectively, "the Subject Assets"), with the exclusive power and authority: (i) to investigate, identify and attempt to locate all of the Subject Assets; (ii) to collect, marshal and administer all of the Subject Assets; (iii) to accept service on behalf of Alex Murdaugh and/or Buster Murdaugh with respect to Alex Murdaugh Assets and/or Buster Murdaugh Assets, as the case may be; (iv) to engage counsel on behalf of Alex Murdaugh and/or Buster Murdaugh as it relates to Alex Murdaugh Assets and/or Buster Murdaugh Assets, as the case may be; and (v) to take any and all steps necessary to identify, recover, protect, collect, preserve, receive, manage, liquidate, sell, administer and marshal, and to do all things incidental, necessary and/or appropriate thereto, all of the Subject Assets during the pendency and final resolution of this lawsuit.

The Court's granting of rights, power and authority by this Order is intended to be as broad as possible for the Co-Receivers to manage and decide all matters related in any way to the Subject Assets, to the express exclusion of any other person(s), except as expressly retained by this Court herein or that the Court is otherwise required to retain under applicable rules or law. In that regard, the Court expressly invalidates all powers of attorney or other grants of authority by Alex Murdaugh to Buster Murdaugh or any other person to act in any capacity with respect to the Subject Assets.

Without limiting any other provision of this Order, the broad rights, powers and authority granted by this Order are inclusive of, but not limited to, the right, power and authority to act in

the following ways with respect to Alex Murdaugh's and Buster Murdaugh's interests in the Subject Assets, taking into consideration the cost benefit analysis and economic viability of performing the following acts, respectively: (a) collect all accounts receivable and all rents from any tenant of any Subject Asset; (b) change locks to all premises at which any of Alex Murdaugh Assets or any of Buster Murdaugh Assets are situated in order to secure Subject Assets; (c) open any mail addressed to any business or professional entity owned solely or in part by Alex Murdaugh or Buster Murdaugh with the exception that Co-Receivers will not open any mail associated with legal clients or legal cases handled by Alex Murdaugh; (d) redirect the delivery of any mail addressed to Alex Murdaugh or to any of his businesses or professional endeavors or to Buster Murdaugh as it may reasonably relate to Buster Murdaugh Assets, so that such mail may come directly to either Co-Receiver; (e) endorse and cash all checks and negotiable instruments payable to Alex Murdaugh, except paychecks for current wages; (f) endorse and cash all checks and negotiable instruments payable to Buster Murdaugh which may relate to the Subject Assets; (f) hire a real estate broker to sell any and all real property and interests in land which constitute an Alex Murdaugh Asset or an Buster Murdaugh Asset; (g) hire any person or company to move and store any and all physical or tangible Subject Assets; (h) insure any Subject Assets (but not the obligation to do so); (i) obtain from any financial institution, bank, credit union, savings and loan or title company, credit bureau, brokerage firm, custodian, investment adviser or any other third party, all financial records, bank statements, wire transfer records, checks and other financial documentation belonging or pertaining to Alex Murdaugh or concerning any Subject Asset of Alex Murdaugh or Buster Murdaugh; (j) obtain from any landlord, building owner or building manager where his or his business is a tenant, copies of the subject lease, lease application, credit application, payment history and copies of Alex Mudaugh's and Buster Murdaugh's checks, wire

transfer records, Venmo records or other records of payment related to any such lease; (k) hire any person or company necessary or appropriate to accomplish any right or power under this Order; (l) direct the liquidation, sale or transfer of any or all the Subject Assets; (m) take all action necessary to gain access to all storage facilities, safety-deposit boxes, real property, and leased premises wherein any of the Subject Assets may be situated, and to review and obtain copies of all documents related to the same; (n) obtain copies of all tax records, financial records and any other documents and information provided to a certified public accountant (CPA) by Alex Murdaugh, Buster Murdaugh and/or concerning any of the Subject Assets; (o) obtain all tax returns and any other documents associated therewith filed or submitted by Alex Murdaugh, individually or jointly with another person, and by Buster Murdaugh with all local, state and federal governments; (p) attempt to identify all Alex Murdaugh Assets already transferred by him to another person, including but not limited to the Buster Murdaugh Assets, and recover possession, custody, control and title to such assets for potential administration; (q) sign on behalf of Alex Murdaugh or Buster Murdaugh, as applicable, any and all documents related to the identification, collection, administration and disposition of any or all of Alex Murdaugh Assets and/or Buster Murdaugh Assets; (r) partition property owned by any group of persons which includes Alex Murdaugh or constitutes an Alex Murdaugh Asset and/or constitutes a Buster Murdaugh Asset; (s) institute, prosecute, compromise or defend civil suits and actions at law or equity related to any Alex Murdaugh Asset and/or to any Buster Murdaugh Asset in order to preserve such asset if such action is economically feasible considering the value of such Subject Asset; (t) pay from the Subject Assets all brokers, contractors, accountants, servants, administrators, representatives, process servers, consultants and attorneys considered by the Co-Receivers to be necessary or advisable in order for them to take the actions permitted and responsibilities under this Order; and

(u) take whatever other actions the Co-Receivers determine is incidental to, necessary or appropriate to protect and preserve Alex Murdaugh Assets and Buster Murdaugh Assets.

Based on the Court's experience in other receivership matters, and in an effort to streamline these proceedings, the Court expects the Co-Receivers to reasonably investigate the existence of all insurance coverages potentially available to Alex Murdaugh and Buster Murdaugh in receivership, including as an "additional insured" under coverage for another person.

The Court further orders that, as the Receiver Court, Alex Murdaugh and Buster Murdaugh, respectively, may not be sued in a civil matter outside this Court without obtaining the Co-Receivers' consent or an order of this Court prior to doing so. Likewise, Co-Receivers and Co-Receivers' Counsel may not be sued in their respective receivership capacities in a civil matter outside of this Court without obtaining the Co-Receivers' consent and/or the Co-Receivers' Counsel's consent, as the case may be, or an order of this Court prior to doing so.

The rights, powers and authority granted herein are in addition to, and not in lieu of, all powers vested in the Co-Receivers by applicable law or rule of the Court. The Co-Receivers shall be responsible only to the Court for the performance of the responsibilities as Co-Receivers. The Co-Receivers shall file reports with the Court only upon request of the Court or of a party to this action. The Co-Receivers and Co-Receivers' Counsel, as designated below, shall each serve without bond.

The Court further orders and hereby appoints Amy L.B. Hill, Esquire, of the law firm Gallivan, White & Boyd, P.A. to serve as counsel to the Co-Receivers in all matters associated with the Co-Receivers' duties, responsibilities, rights, powers and authority granted to them through this Order and any additional duties, rights, responsibilities, rights, power and authority vested in them under South Carolina law in regard to this matter.

This Court authorizes the Co-Receivers to, and expects that the Co-Receivers will, determine between them what, if any, division of actions they will permit to be undertaken by one of them and by Co-Receivers' Counsel. The Court does not require or expect that each and every action be undertaken by both Co-Receivers. The Co-Receivers may authorize or otherwise empower Co-Receivers' Counsel to do all things incidental to, necessary or appropriate to the duties, responsibilities, rights, power and authority granted to the Co-Receivers through this Order and any additional duties, rights, responsibilities, rights, power and authority vested in them under South Carolina law.

No bond was offered by Alex Murdaugh or Buster prior to entry of this Order; however, the Court will entertain a future request for bond by Alex Murdaugh or Buster in an amount commensurate with the gravity of the allegations against each Alex and Buster, the facts of this case, potentially aggravating circumstances, and similar verdicts awarded in comparable cases in the county in which this matter is pending.

The rights, powers, and authority granted or created herein are effective immediately and shall remain effective until the final resolution of this litigation, including all appeals, or until a subsequent order of this Court terminating the same upon a showing of just cause or other applicable standard under South Carolina law.

AND IT IS SO ORDERED this _____ day of _____ 2021.

_____

Daniel D. Hall, Circuit Court Judge

Hampton Common Pleas

Case Caption: Renee S. Beach , plaintiff, et al VS Gregory M. Parker, Inc. , defendant, et al

Case Number: 2019CP2500111

Type: Order/Appointment of Receiver

So Ordered

s/Daniel D. Hall 2753

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Reply To: Columbia

March 4, 2025

Via Email Only – supctfilings@sccourts.org
The Honorable Patricia A. Howard
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

RE: *John A. Tibbs v. Asbestos Corporation Limited* and *Donna B. Welch v. Atlas Turner, Inc.*
Appellate Case Nos. 2023-001461 and 2023-001096

Dear Ms. Howard:

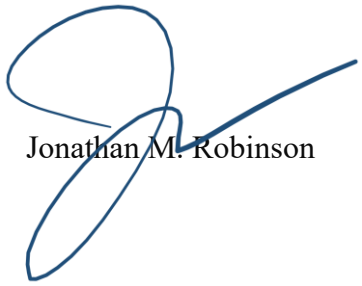
The Receiver is in receipt of Appellants' February 21, 2025 response to the Court's inquiry indicating it does not believe there is a work around for the Québec Business Concerns Records Act ("QBCRA")[1] and supplemental citations letter. The Receiver notes the cases outlined in the supplemental citations letter are addressed in the Receiver's Reply to Amicus Brief at pages 7–8 in the above-referenced appeals and Return to the Petition for Writ of Prohibition at page 40 in Appellate Case No. 2024-001959.

The Receiver is also in receipt of Amicus CLMI's letter submitting additional arguments seeking to "correct" statements made during oral argument. The Receiver objects to CLMI's submission of additional arguments and notes this Court's previous denial of CLMI's request to participate in oral arguments. CLMI's characterization of Appellants' agreements with its insurers are inconsistent with the record and with Appellants' own characterization of the agreements as "buyback" agreements. *See* Oral Argument at 1:38:02.

The Receiver sincerely appreciates this Court's time and careful consideration of this matter. In the event the Court desires any additional information, we stand ready to respond. Thank you for consideration of this matter.

Sincerely,

[1] Appellant's counsel conceded at oral argument that the QBCRA is not before the Court in the appeal. S*ee* Oral Argument at 0:7:33 and 1:36:00.



Jonathan M. Robinson

JMR/dlf

cc: All counsel of record via email only

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Reply To: Columbia

March 4, 2025

Via Email Only – supctfilings@sccourts.org

The Honorable Patricia A. Howard
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

RE: *John A. Tibbs v. Asbestos Corporation Limited* and *Donna B. Welch v. Atlas Turner, Inc.*
Appellate Case Nos. 2023-001461 and 2023-001096

Dear Ms. Howard:

Pursuant to Rule 208(b)(7) of the South Carolina Appellate Court Rules, Respondent Peter D. Protopapas, Duly Appointed Receiver for Asbestos Corporation Limited and Atlas Turner, Inc. ("the Receiver") is writing to notify the Court of authorities pertinent to the above-referenced appeals. The Receiver notifies the Court of the following enclosed authorities:

1. *Cape Plc, et al, v. Anglo American, et al*, No. 3:24-cv-03771-MGL, ECF 75, (D.S.C Aug. 13, 2024) (granting remand and finding the state court's exclusive jurisdiction over the state court-appointed Receiver pursuant to S.C. Code Ann. § 15-65-10). This order is relevant to the second issue in these appeals concerning the appointment of the Receiver, which is discussed on pages 15–20 of the Receiver's brief and was the subject of several of the Court's questions at oral argument.

2. *Pipe & Boiler Insulation, Inc. v. Cont'l Ins. Co. et al.*, No. 3:21-cv-03033-SAL, ECF No. 153, at 4–9 (D.S.C. Mar. 9, 2023) (remanding receivership matter because "the *Barton* doctrine prevents Defendants from removing this matter, filed *by* a Receiver, to federal court," while also considering judicial economy in light of the fact that any "settlement agreement is not final until the *Receivership Court* approves the settlement" (emphasis added)). This order is relevant to the second issue in these appeals concerning the appointment of the Receiver, which is discussed on pages 15–20 of the Receiver's brief and was the subject of several of the Court's questions at oral argument.

3. *Protopapas v. Zurich Am. Ins. Co. et al.*, No. 3:21-cv-04086-DCC, ECF No. 180, at 4–6, 10 (D.S.C. Feb. 24, 2023) (remanding receivership case because "*Barton*, and its subsequent application in *Porter*, act as a limitation on federal jurisdiction when a state court has previously exercised its authority by appointing a receiver," such that allowing removal "would directly interfere with the exclusive jurisdiction of the receivership court over this dispute"). This order is relevant to the second issue in these appeals concerning the appointment of the Receiver, which is discussed on pages 15–20 of the Receiver's brief and was the subject of several of the Court's questions at oral argument.

4. *Protopapas v. Travelers Casualty & Surety Company*, 94 F.4th 351 (4th Cir. 2024) ("Exercising federal jurisdiction over a suit by or against a state-appointed receiver, who functions as an 'arm' or 'executive' of the state-receivership court, would infringe on the state court's control over the receivership assets — its exclusive jurisdiction. Thus, as a matter of comity, as well as custom, the *Barton* doctrine rests on this exclusivity of the state receivership over the assets before it as a matter of jurisdiction, and indeed we have confirmed as much."). This opinion is relevant to the second issue in these appeals concerning the appointment of the Receiver, which is discussed on pages 15–20 of the Receiver's brief and was the subject of several of the Court's questions at oral argument.

5. *McIntire v. China Media Express Holdings, Inc.*, 113 F.Supp.3d 769, 773–74 (S.D.N.Y. 2015) (granting a receiver's motion to enjoin non-party insurers from proceeding with the Demand for Arbitration in Hong Kong because the arbitration action involved the very assets that the receiver was appointed to marshal, including pursuing claims against the company's former insurers). This opinion is relevant to the second issue in these appeals concerning the appointment of the Receiver, which is discussed on pages 15–20 of the Receiver's brief and was the subject of several of the Court's questions at oral argument.

6. *In re MF Global Holdings Ltd.*, 562 B.R. 866 (Bankr. S.D.N.Y. 2017) (noting that "the Barton Doctrine extends to bankruptcy as well as receivership, and lower courts have applied it to declaratory judgment actions, as well as suits seeking damages" and holding Bermuda insurers, in bringing proceedings in Bermuda to compel plan administrator and assignee to arbitrate any policy claims in Bermuda, without first obtaining leave from bankruptcy court, violated Barton doctrine). This opinion is relevant to the second issue in these appeals concerning the appointment of the Receiver, which is discussed on pages 15–20 of the Receiver's brief and was the subject of several of the Court's questions at oral argument.

7. Order Granting Temporary Injunction And Appointing Co-Receivers And Co-Receivers' Counsel, *Renee S. Beach, as Personal Representative of the Estate of Mallory Beach, Plaintiff, v. Gregory M. Parker, Inc. a/k/a Parker's Corporation d/b/a Parkers 55, Richard Alexander Murdaugh, and Richard Alexander Murdaugh, Jr.*, C/A No. 2019-CP-25-00111 (filed Nov. 4, 2021) (authorizing a prejudgment appointment of Receiver "pursuant to S.C. Code §15-65-10, the Court's equitable powers, and general principles of fraud and deceit under South Carolina law" and ordering co-receivers to reasonably investigate the existence of all insurance coverages potentially available to Alex Murdaugh and Buster Murdaugh in receivership). This order is relevant to the second issue in these appeals concerning the appointment of the Receiver, which is discussed on pages 15–20 of the Receiver's brief and was the subject of several of the Court's questions at oral argument.

Sincerely,

Jonathan M. Robinson

Enclosures

JMR/dlf

cc: All counsel of record via email only