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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Supreme Court Case Nos. 2024-000916 and 2024-001499
Circuit Court Case No. 2023-CP-40-01759

John A. Tibbs and Margaret B. Tibbs,..... Plaintiffs,

v.

3M Company; 4520 Corp., Inc.; A.O. Smith Corporation; A.W. Chesterton Company; ABB Inc.; Air & Liquid Systems Corporation; AIW-2010 Wind Down Corp.; Amentum Environment & Energy, Inc.; Anchor/Darling Valve Company; Armstrong International, Inc.; Asbestos Corporation Limited ASCO, L.P.; Atlas Asbestos Co.; Atlas Turner, Inc.; AWT Air Company, Inc.; Bahnson, Inc.; Banner Industries International, Inc.; Banner Industries, LLC; Banner Industries of N.E., Inc.; Barretts Minerals Inc.; Beaty Investments, Inc.; Bechtel Corporation; The Bonitz Company; Brand Insulations, Inc.; BW/IP Inc.; Canvas CT, LLC; Cape PLC; Carboline Company; CB&I Laurens, Inc.; Cleaver-Brooks, Inc.; Consolidated Electrical Distributors, Inc.; Copes-Vulcan, Inc.; Covil Corporation; Crane Instrumentation & Sampling, Inc.; Crosby Valve, LLC; Daniel International Corporation; Davis Mechanical Contractors, Inc.; Dezurik, Inc.; Duke Energy Carolinas, LLC; Duke Energy Corporation; Eaton Corporation; Ellington Insulation Company, Inc.; Emerson Electric Co.; Fisher Controls International LLC; Flame Refractories, Inc.; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services; Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Gardner Denver Nash, LLC; General Boiler Casing Company, Inc.; General Cable Corporation; General Cable Industries, Inc.; General Electric Company; Gould Electronics Inc.; Goulds Pumps, Incorporated; Goulds Pumps LLC; Great Barrier Insulation Co.; Grinnell LLC; Hajoca Corporation; Howden North America Inc.; HPC Industrial Services, LLC; IMO Industries Inc.; ITT LLC; Joy Global Underground Mining LLC; K-Mac Services Incorporated; Metropolitan Life Insurance Company; Mine Safety Appliances

Company, LLC; MP Supply, Inc.; The Nash Engineering Company; Occidental Chemical Corporation; Paramount Global; Patterson Pump Company; PECW Holding Company; Pfizer Inc.; Piedmont Insulation, Inc.; Plastics Engineering Company; Presnell Insulation Co., Inc.; Redco Corporation; Riley Power Inc.; Rockwell Automation, Inc.; RSCC Wire & Cable LLC; Schneider Electric USA, Inc.; Sequoia Ventures Inc.; Spirax Sarco, Incl; SPX Corporation; Stafford Insulation Company; Standard Insulation Company of N.C., Inc.; Starr Davis Company, Inc.; Starr Davis Company of S.C., Inc.; Sterling Fluid Systems (USA) LLC; TE Wire & Cable, LLC; Thermo Electric Company, Inc.; Union Carbide Corporation; Valves and Controls US, Inc.; Velan Valve Corp.; Viking Pump, Inc; Vistra Intermediate Company LLC; The William Powell Company; Wind Up, Ltd.; Yuba Heat Transfer LLC; and Zurn Industries, LLC, ... Defendants,

of which

Asbestos Corporation Limited is the..... Appellant,

and

Cape PLC, individually and as successor in interest to Cape Asbestos Company Limited, by and through its duly appointed Receiver Peter D. Protopapas,..... Third-Party Plaintiff/ Respondent,

v.

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

of which

Mohed Altrad and Altrad Investment Authority SAS are the..... Appellants.

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Wednesday, 9 October 2024

(10.38 am)

Application by MR PHILLIPS

MR PHILLIPS: My Lord, in this matter I appear on behalf of CIHL and Cape plc with my learned friends Mr Dale and Mr Willson. Mr Dale and I will divide today's application into two parts if we may. I, my Lord, will give you the framework for this matter by reference to the documents in the core bundle and the decision in Adams v Cape. I will not be developing the arguments, unless your Lordship invites me to on any particular point, in which case I will. My learned friend Mr Dale will then deal with the question of expedition.

Can I give your Lordship a short route map as to the documents that I will be looking at. I wish to take your Lordship to the motion, to the order appointing the receiver, to the third party complaint, to Adams v Cape and then to the Cape scheme.

MR JUSTICE TROWER: Yes.

MR PHILLIPS: If I may start with the motion to appoint the receiver, which, my Lord, is in tab 6 of the core bundle, or 1594 if your Lordship wants the page reference.

MR JUSTICE TROWER: I had a look at this and tab 7, as well, if that helps you.

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MR PHILLIPS: Yes, that helps very much. Those are the first two documents we're going to look at. What your Lordship sees is the background, which your Lordship will have noted what it says, picking it up four lines down:

"At all times relevant, Cape was involved in all elements of the global asbestos industry, but in particular mining many thousands of tons of raw asbestos fibre in South Africa and then selling it to the most dominant manufacturers in the United States."

Then over the page, it goes on to deal with Cape establishing an American presence and operations through NAAC, and at (i), three lines up from the bottom:

"Serving as Cape's sales agency in the United States, with sole authority to offer Cape products and responsibility for transmitting information about customer needs to Cape mines."

Then on page 1596, the first full paragraph:

"NAAC was 'essentially a one man operation' considering of an operational lead supported by four office clerks... "

And so on. Then over the page, 1597, Cape dominated NAAC's decision making.

Then moving on to section B, "Cape accepts default judgments and liquidates NAAC to evade claimants." On

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1598, three lines up from the bottom:

"NAAC's liquidation was central to Cape's litigation-avoidance strategy, based on legal advice that no British or South African court would enforce a judgment against a Cape entity if it never appeared again in the United States."

Then on 1599, you get the reference at the top to CPC and AMC being agents. Then in C, "A receiver can marshal Cape's assets," and it refers, four lines down, "Cape left its creditors."

MR JUSTICE TROWER: And who is Cape for these purposes?

MR PHILLIPS: My Lord, that is a point which has been considered in the South Carolina court, because at first Mr Protopapas obtained -- well, the Tibbs plaintiffs obtained an order against Cape plc.

MR JUSTICE TROWER: Yes.

MR PHILLIPS: That has subsequently been considered, and that point was rejected by Madam Justice Toal on the grounds that it was a misnomer and was intended to be CIHL, CIHL being the company that was incorporated back in 1893. So of course Cape plc is the Jersey entity, which is only 11 years old.

MR JUSTICE TROWER: So the plea at the beginning under "Background" is no longer what the position is?

MR PHILLIPS: No. My Lord, there are technical points in

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relation to that, but for present purposes we want to focus on the substance, because if one focuses on Cape plc alone, none of these points conceivably make any sense. But we want to concentrate on the substance.

MR JUSTICE TROWER: Thank you.

MR PHILLIPS: Then under, "Law and argument", my Lord, your Lordship sees that it refers to two subparagraphs. The first is 15-65-10(4), and that provides that:

"When a corporation has been dissolved, is insolvent or in imminent danger of insolvency or has forfeited its corporate rights ..."

And then in (5), which is:

"A receiver may be appointed by a judge of the circuit court, either in or out of court: ... (5) In such other cases as are provided by law or may be in accordance with the existing practice ..."

So, my Lord, your Lordship has seen that there were two bases originally, and what I'm going to show your Lordship is that following various challenges in the South Carolina court, the order that was made in December limited it to subsection (5), and I'll show your Lordship how that works.

If I can then turn to the order that is made, which your Lordship has looked at, and picking up on the point we've just been discussing, it says in the first and

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second lines, "pursuant to South Carolina code 15-65-10(4) to (5)," so it refers to both of them. But then the important point for present purposes, my Lord, is the rights. Your Lordship sees those on 1605, and I won't go through the full run of them now, but your Lordship will have seen those are considered both in Mr Oren's statement and also in our skeleton, because it is wide-ranging, it's fair to say.

MR JUSTICE TROWER: Yes.

MR PHILLIPS: My Lord, then if I can go to tab 9.

MR JUSTICE TROWER: On one view a lot of this isn't really very applicable, on the basis of the fact that Cape doesn't have a presence in South Carolina, apart from insurance claims, if it has any, which --

MR PHILLIPS: It hasn't.

MR JUSTICE TROWER: Yes, I know that's what you say, and I'll accept that's right, but it seems a bit sort of odd, really, because it's all about different sorts of procedure, one would have thought.

MR PHILLIPS: Absolutely, and, my Lord, without being tendentious, what one has here is a standard form of order which Mr Protopapas has obtained from Justice Toal on a regular basis in the asbestos context, and in the context of Cape, it really isn't apt.

Can I then turn to tab 9, my Lord, which is

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(Inaudible) as well. This is the order that was made following a series of challenges. I won't trouble your Lordship with the challenges that were made at this point. I wanted to show your Lordship at page 3013, the bottom right hand corner. The court gets on to the authority to appoint a receiver, and what it says over the page -- I should start at the beginning:

"Third-Party Defendants attack the Court by claiming it failed to take what they erroneously claim are 'necessary steps' prior to instituting the Receivership, including holding Cape in default and entering a judgment reflecting a liquidated sum due to the Park Plaintiffs. This argument reads requirements into the statute that do not exist, completely misconstruing what is required for appointment of a receiver under South Carolina law -- especially in the context of a company like Cape, for which a receiver was appointed under subsection (5)."

It was really that point I wanted your Lordship to see. Because then, the next paragraph is important in the sense that it tells us what it is that gives rise to the jurisdiction under subsection (5):

"[It] does not require entry of default or much less entry of a judgment; instead, it authorises the Court to appoint a receiver 'either in or out of court ... [i]n

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such other cases as are provided by law or may be in accordance with the existing practice, except as otherwise provided in this Code.' In turn, appointment of a Receiver over Cape was proper under subsection (5) based on evidence of Cape's long-running, intentional scheme to evade its tort creditors by refusing to appear in the United States, including in South Carolina. Subsection (5) reflects an 'old practice' of equity and 'important principle of law' to correct injustice which is particularly applicable to Cape given its efforts 'to defeat [its] creditors by an act or course of conduct which indicates moral fraud -- a conscious intent to defeat, delay, or hinder his creditors in the collection of their debts'."

Your Lordship might wish to cast your eye over the rest of the paragraph.

MR JUSTICE TROWER: So this is a concept, because when one first looks at this sort of thing, you wonder whether it's a receiver appointed by way of equitable execution, and this rather indicates it isn't?

MR PHILLIPS: No, it isn't, my Lord, and of course there is no judgment, and that is one of the points that we will come on to substantively, given the decision in Adams v Cape. Perhaps I'll come back to that.

MR JUSTICE TROWER: But just so I have this clear,

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Mr Phillips, and maybe you're going to come on to this anyway, but as I understand there has been a challenge to this receivership appointment, albeit by third parties, in the context of the, I think you call it 3P Application.

MR PHILLIPS: Correct.

MR JUSTICE TROWER: And it's gone to the appeal court in South Carolina, who have maintained the receiver's appointment?

MR PHILLIPS: Yes, the motions to set aside, which then result in this order, went to the Court of Appeal, and the Court of Appeal said they wouldn't take it because it's interlocutory. So there's not been a substantive determination.

The next relevant document is the third party complaint.

MR JUSTICE TROWER: So how do you challenge the receivership point in South Carolina if you don't agree with the decision of the judge at first instance, or is there no appeal process?

MR PHILLIPS: My Lord, one of the things that we are very conscious of is not criticising the South Carolina courts, but the answer is that there's something called the Barton Doctrine. The Barton Doctrine provides that the only court that can reconsider the appointment of

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the receiver is the court that made the appointment.

MR JUSTICE TROWER: Right.

MR PHILLIPS: So that question has been considered by Madam Justice Toal, the various complaints that were made were considered by Madam Justice Toal. For reasons that we will explain to your Lordship, there are a number of points that were not taken, and of course we were not parties to it. But that's the answer. It's dealt with by Madam Justice Toal.

Madam Justice Toal, it's right to say, in the transcript said, "these are not appealable decisions". That notwithstanding, the third parties launched various appeals on various grounds, and I don't go through them now, but they were then thrown back and it was remitted back to Madam Justice Toal, because it was interlocutory, which means that on the face of it, the matter goes to trial, and if they wish to take those points again, one presumes that that's something that can be raised later. Of course, in the context of something like this, that is wholly unsatisfactory.

MR JUSTICE TROWER: The only reason I'm interested in this, Mr Phillips, as I'm sure you'll appreciate, is that one of the factors that the court will have to look at at trial of your claim, particularly in the context of the injunction application, is what's actually been going on

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in South Carolina to do that which you seek to achieve by your application for an injunction. Because as everybody knows, an injunction to restrain proceedings is something that is generally regarded as, particularly in a vexatious sense rather than a contractual sense, is something that requires a considerable level of understanding of what's actually happened in the foreign jurisdiction.

MR PHILLIPS: Absolutely, and, my Lord, all of the materials, what's been going on in the United States, are in these files, but now is not the time to trouble your Lordship.

MR JUSTICE TROWER: No, I understand.

MR PHILLIPS: But we absolutely understand that argument.

Could I take my Lord to the third party complaint, which you should find in tab 8, or page 1993.

MR JUSTICE TROWER: I'm afraid this was one of the documents I didn't look at, I know you wanted me to read this bundle, but I didn't have time.

MR PHILLIPS: Of course. Let me just show your Lordship the relevant points which I ask you to bear in mind.

The first page I wish to show you is on 1995. If you look just below the line of little stars at the top, you get:

"Cape plc, individually and as successor in interest

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to Cape Asbestos Company Limited, by and through its duly appointed receiver Mr Protopapas."

Now that is very important, because when we're looking at Cape plc, or CIHL, because it's a misnomer, whichever it is, it is that entity that is the plaintiff. In other words, my clients are the plaintiffs, and my clients are acting through Mr Protopapas as receiver. Mr Protopapas does not have any independent locus in his own right. From that it follows that the claim must be a claim which CIHL can bring, and the facts alleged have to be facts which CIHL can allege.

MR JUSTICE TROWER: Sorry, CIHL, because it should be CIHL?

MR PHILLIPS: Yes, my Lord. If your Lordship will just allow me to use CIHL.

MR JUSTICE TROWER: Yes, I understand.

MR PHILLIPS: I can just say Cape.

If I can then go over to 2001, and your Lordship sees:

"COMES NOW Cape plc, individually and as successor in interest [again] through its duly appointed receiver Peter D Protopapas."

MR JUSTICE TROWER: Yes.

MR PHILLIPS: And then further down, there are a series of defendants, and the defendants that I wish to draw

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your Lordship's attention to start with Cape Holdco, and then you see The Law Debenture Corporation. Just to explain very briefly, The Law Debenture Corporation are the shareholders who hold the scheme share under the scheme. But they have now been taken out. Various Cape entities, and then Mr Altrad, various Altrad entities, and various entities that are called the Sparrows entities. The detail doesn't matter for now.

Then you get to the overview, which is on 2002. This does matter, my Lord, because this tells you what Mr Protopapas has caused my client to plead:

"This lawsuit seeks to finally hold accountable three groups of Third-Party Defendants (including their predecessors in interest) who are responsible for the sale and use of asbestos or asbestos-containing products throughout the United States, including in South Carolina, and which caused or materially contributed to thousands of deaths from mesothelioma or other asbestos-related disease, and billions of dollars of past, present, and calculable future damages. For decades, certain of these Third-Party Defendants created sham transactions to feign exits of the asbestos industry in the United States, leaving shells and an absence of insurance coverage to account for their massive liability exposure. And also for decades, they

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hid behind (or within) byzantine collectives of limited liability and other holding companies internationally, avoiding responsibility while continuing to reap the profits from the sales of asbestos and asbestos-containing products throughout the United States, including in South Carolina. In sum, these three groups of Third- Party Defendants have wreaked havoc in the United States, padded their already massive coffers with blood money on top of blood money, and amused themselves with the supposed ingenuity of their scheme to avoid any responsibility. This lawsuit begins their reckoning."

MR JUSTICE TROWER: So it's a different style of pleading, it's fair to say?

MR PHILLIPS: It's a very different style, my Lord, but I'm interested in fact in the substance rather than the style.

MR JUSTICE TROWER: I mean, we find it offensive in this jurisdiction, but it's commonplace in plenty of jurisdictions in the US.

MR PHILLIPS: Yes, my Lord. As I say, I want to focus on the substance. So that's the overview.

Then what I invite you to do, and I hope I'm not taking too long, is if you can turn forward to 2009, paragraphs 40 to 44, if my Lord could just cast your

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eyes over what is there written there. I'm sorry, it's a couple of pages.

MR JUSTICE TROWER: Sorry, you want me to read 40 to 42?

MR PHILLIPS: 40 to 44.

MR JUSTICE TROWER: All right.

MR PHILLIPS: It's not important that your Lordship focuses too much on the detail. The next point is much more important.

MR JUSTICE TROWER: Let me just quickly read 40 to 44.

(Pause)

MR PHILLIPS: I then want to take your Lordship to 2027, where there is a heading, "Cape created NAAC to facilitate its asbestos scheme."

MR JUSTICE TROWER: Right.

MR PHILLIPS: Further down, it describes Cape operating NAAC.

Then on page 2028, "Cape designed NAAC to operate as Cape's wholly controlled instrumentality."

On 2038 we then get to paragraph 94, where it says, "Cape liquidates NAAC as part of its liability avoidance scheme on 31 January 1978."

I won't go through all the detail in here, but I wanted your Lordship to see the gist. But I now take to you Adams v Cape, if I may.

MR JUSTICE TROWER: Right. What's the punchline of this,

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Mr Phillips?

MR PHILLIPS: The punchline to this is that in Adams v Cape there was a 34 day trial followed by a 17 day appeal, in which the Court of Appeal gave a judgment of the court, and there was then a petition -- so that was Lord Justices Slade, Mustill and Ralph Gibson -- and there was then a petition to the House of Lords, who rejected the appeal. I know that your Lordship may well have looked at this in the past.

MR JUSTICE TROWER: I've not read Adams v Cape for today's purposes, but I'm familiar with it as a case.

MR PHILLIPS: Yes. To just cut to the chase --

MR JUSTICE TROWER: Yes, that's what I really want.

MR PHILLIPS: -- because everyone thinks that Adams v Cape is just there as authority for the proposition that if a party is not present in a foreign jurisdiction, there is no jurisdiction over it, it can't enforce a judgment. The point about Adams v Cape is it was a 34 day trial of the underlying merits of the allegations that Cape was running the asbestos business in the United States through NAAC, and through CPD and (Inaudible).

MR JUSTICE TROWER: Which you say is flatly inconsistent with what is now said by the receiver in the US?

MR PHILLIPS: Precisely, yes. And it's not just that it's flatly inconsistent, those allegations are binding on

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Cape, they are binding on CIHL, they are allegations that Mr Protopapas cannot make. He can't make them, because it's been determined by the Court of Appeal.

MR JUSTICE TROWER: Yes, and how does that operate as a matter of South Carolina law, if Mr Protopapas proceeds in South Carolina in the name of Cape? Is there an issue estoppel that's arisen under South Carolina law?

MR PHILLIPS: It hasn't been raised at this point, and that is one of the things that this process should tease out.

MR JUSTICE TROWER: Right.

MR PHILLIPS: Because at the moment your Lordship will appreciate that my clients have not yet made any applications, for obvious reasons, because we are not yet --

MR JUSTICE TROWER: You haven't submitted in Carolina.

MR PHILLIPS: -- we've not submitted. So I do not know whether Justice Toal is even aware of this. I do not know whether Mr Protopapas is even aware of this. But the fact is that they have a party who is litigating on the basis of submissions flatly inconsistent.

MR JUSTICE TROWER: So your claim over here in England on the grounds of vexation will include an allegation that it's vexatious for anyone in the name of Cape to take points which are adverse, run contrary, to the decision

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of the Court of Appeal?

MR PHILLIPS: Absolutely.

MR JUSTICE TROWER: Okay, yes, I have the point.

MR PHILLIPS: Yes, that's the point.

Can I briefly take your Lordship to the scheme, or shall I just tell your Lordship about the scheme?

MR JUSTICE TROWER: Well I know quite a lot about the scheme, Mr Phillips, but if there are particular points you want to draw my attention to, please do.

MR PHILLIPS: Let me do it by way of description, because I appreciate your Lordship knows about the scheme.

The Cape scheme was unusual, as opposed to a number of other schemes at the time, for example T&N, because Cape was solvent. What the Cape scheme has done is it has provided a mechanism by which the scheme claimants, who are all UK-based scheme claimants, because they are either the employees or those associated with the UK factories of Cape, they can establish their claims, but then they enforce through CCS, which is a company that then pays their claims in full, unless certain circumstances arise, and there are top-up mechanisms. That particular scheme has to date paid several tens of millions and is continuing. One of the purposes of the Cape scheme was to maintain Cape as a solvent, existing entity, which it has done.

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MR JUSTICE TROWER: Has the scheme received any recognition in the United States?

MR PHILLIPS: I do not know the answer to that, but I don't think so, my Lord. I think not. But what might be important is that the scheme only affects, of course, only affects scheme creditors. If there are -- it does not affect any US claimants. So if there were claimants with valid claims, those claims are not affected, they've not been in play.

MR JUSTICE TROWER: Is that because they're just simply not scheme creditors?

MR PHILLIPS: They're not scheme creditors, they're not part of the scheme. So whatever rights they may have, or they had before, they have now. Your Lordship will know, but I won't turn it up, that in the Court of Appeal in Adams v Cape, the Court of Appeal said in terms the United States claimants in that case -- it was I think the polar(?) claim it was described as -- could have brought their claims in England, but they chose to bring their claims in the United States.

MR JUSTICE TROWER: Right.

MR PHILLIPS: So there is that. Your Lordship has an idea about the scheme. That's really all I think you need for present purposes.

MR JUSTICE TROWER: Thank you.

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MR PHILLIPS: Can I just say two more things. Number one, at the hearing we will develop obviously a number of points, but there are two that your Lordship I hope will have picked up from our skeleton. The first one is that the court in South Carolina was not a competent court, as a matter of private international law, not a competent court to appoint receivers over an English company, and that's the (Inaudible) point, and that goes to the point that there were insufficient connections between Cape and the court in South Carolina.

MR JUSTICE TROWER: Is another way of putting that, rather than characterising the South Carolina court as not competent, which carries with it certain connotations that I'm sure your clients don't really mean, is another way of putting the point that English law does not recognise the receiver who has been appointed by the South Carolina court, whatever South Carolina law may be, English law just doesn't recognise it?

MR PHILLIPS: My Lord, that is a better way of putting it, and we will do that. That's the first point.

The second point was of course a very simple point, which is that following Adams v Cape, a judgment of the South Carolina court would not be enforceable. The appointment of a receiver by way of equitable execution would not be recognised in England, and an interim

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receiver cannot possibly be in a better position.

MR JUSTICE TROWER: Yes.

MR PHILLIPS: My Lord, that was the framework. Before I hand over to Mr Dale, who is going to deal with urgency, may I just deal with one other point, which your Lordship has already amply demonstrated why this is right.

May I just mention that if the matter is to be heard urgently, we would ask for the matter to come back before your Lordship. It's not just for the usual reason that your Lordship has looked at the papers, it's because your Lordship is familiar with the asbestos scheme cases, you are familiar with Adams v Cape, and if that was at all possible, we would ask that that can be done.

MR JUSTICE TROWER: I simply can't say that.

MR PHILLIPS: I know.

MR JUSTICE TROWER: It was one of the points I was going to discuss with one or other of you anyway, which is if I expedite the hearing, there's a bit of ambiguity on the papers as to whether you are saying it really must have a full time High Court Judge, or whether you're saying, "What we want to avoid is a Master dealing with it."

MR PHILLIPS: We would in these circumstances like a full

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time, category A, High Court Judge.

MR JUSTICE TROWER: Yes. You may not get one. The problem is that judges' diaries fill up.

MR PHILLIPS: Of course.

MR JUSTICE TROWER: I'm not saying you won't, but the problem is that there are already commitments throughout this term which the court has already undertaken in relation to particular judges dealing with particular cases. I understand why you say it, and I will see what can be done, and the court is -- I mean I will say straight away I'm sympathetic to this application for expedition, and so I have made inquiries, and the court is able to fit something in in that week you say you want it, which is the 11th.

MR PHILLIPS: Or the 18th, my Lord.

MR JUSTICE TROWER: Yes, well actually as it happens it's the 11th you're going to get, if you get it at all, which I think you probably will. We simply cannot tell you who's going to hear it at this stage.

MR PHILLIPS: I understand, my Lord.

MR JUSTICE TROWER: One thing I will do, though, is say that it certainly is not a case for a Master, I can tell you that, but it is possible you will end up with an expert Deputy. I'm not saying that that's likely, but it is certainly possible that that's the only way it will be

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able to be tried that week.

MR PHILLIPS: I understand. Your Lordship knows the reasons why we wanted you to hear it.

May I hand over to Mr Dale, who I'm not sure has a lot to say.

Submissions by MR DALE

MR JUSTICE TROWER: One of the things I do want to know, Mr Dale, is I want to understand the service bit, because I think it's technically on your bit of the application to explain to me what's being done about service.

MR DALE: Yes, you can cut me short on any of these.

Thank you very much to Mr Phillips for simplifying what I have to do. I'm going to take the format through the skeleton, and I will deal with the service at the same time, and obviously I will deal with everything slightly more shortly in the light of what your Lordship has said. I can take your Lordship to various documents as and when they arise.

MR JUSTICE TROWER: Yes.

MR DALE: I wanted to deal with it under these headings first very quickly. The first topic is the chronology of the US proceedings, just quickly drawing that together. The second is the UK chronology. The third is the service position, both in relation to service out

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and then service of the application, today's application, the position in relation to that. And then just to deal with what we're actually seeking and the test for expedition. So that's the framework.

Very quickly, my Lord, drawing together what Mr Phillips has said in terms of the US chronology, this is covered at paragraphs 26 to 31 of our skeleton, so you'll have that to hand. Just going to the essential five or six points in terms of chronology. The Park claims started on 4 June 2021. That is referenced in Mr Oren's witness statement; indeed, all of these references are.

The first important thing about the Park claim is that on 3 June 2022 there was an email sent on behalf of the Park claimants, the Park claim had been fully resolved. So that's the position on 3 June 2022. Thereafter, this receivership motion is made by the plaintiffs in the Park claim, on 6 March 2023, and a receivership order is then made on 16 March 2023 by Justice Toal. So that's the Park claim.

What happens thereafter is you then, on 5 April 2023, you get the Tibbs claim being commenced. You might have seen reference to this in Mr Oren's witness statement. The receiver, acting purportedly on behalf of Cape, enters into what's referred to as a dismissal

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agreement in relation to the Tibbs claim with the Tibbs plaintiffs. That is covered in Mr Oren's witness statement at paragraphs 213 to 220. We don't have a copy of that, but in the bundle reference it's hearing bundle 1, tab 9, 554 to 555, just so you have the reference to where Mr Oren deals with it.

But the significance of that, the status of the main action against Cape, CIHL, is that there is no trial proceeding against CIHL at this stage, or at all. The position is the same in relation to the Park claim. So what we have are two claims that have been brought, one of which on the face of it seems to be resolved, the other on the face of it is subject to a dismissal agreement.

It's in that context that you get the third party complaint that's been issued thereafter, after the dismissal agreement, on 30 June 2023. I'm not going to take you through any of that, because Mr Phillips has referred to it, but for the purposes of today that involves highly contentious assertions, allegations, admissions made by Mr Protopapas, purportedly on behalf of Cape, against these third party defendants, subsidiaries, parent companies and so on and so forth.

Just getting to the end of the chronology now. Thereafter, from 23 August 2023 onwards to effectively

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the middle of this year, there have been various motions that have been made by the third party defendants dealing with making applications in relation to the order and the third party complaint.

The judgment of Madam Justice Toal on 6 December 2023 denied the third party defendants a motion seeking to bring to the end the third party complaint for lack of personal jurisdiction and service.

Then from then on, from the end of last year, you then get the appeal process commencing.

MR JUSTICE TROWER: I perhaps should have asked Mr Phillips this, but is there anything which indicates whether Madam Justice Toal thought that the receiver she was appointing, and whose conduct she was supervising, was going to be operating outside the United States, or might operate outside the United States?

MR DALE: There are two things. One is the terms of the order are not limited to the jurisdiction, and the second is in the opposition memorandum of Mr Protopapas back in November, he was not accepting any limitations at all in relation to its operation, and my recollection is in Justice Toal's judgment of 6 December, there is an acceptance entirely of what Mr Protopapas has said.

So there has been no attempt -- I'm putting this in a very broad brush because I don't have the answer

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chapter and verse -- there's been no attempt by, as I understand it, Madam Justice Toal to limit its scope at all.

MR JUSTICE TROWER: Okay.

MR DALE: And the position taken by Mr Protopapas is that it covers everywhere.

MR JUSTICE TROWER: The reason I ask the question is if you go right back to the beginning and look at the basis upon which the application was made, it focuses essentially on the insurance claims in the United States as being the asset. I know it goes a bit wider --

MR DALE: It does. This is why it's a strange thing that's happening, because it also focuses right at the outset on Cape having been dissolved, in the process of insolvency, has forfeited its charter. So it's saying this is a company which doesn't exist anywhere.

I'm conscious of the time, but one of the things that doesn't happen here in these proceedings to date at all is any direct engagement by Mr Protopapas with the directors of CIHL or Cape. What he does is he avoids dealing with them. He obviously deals with Winston & Strawn and attacks them, but there's no direct engagement with the directors by him on any basis at all, other than --

MR JUSTICE TROWER: Is that issue going to be fleshed out in

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the evidence before the trial?
MR DALE: Yes, it's there in front --
MR JUSTICE TROWER: I'm not --
MR DALE: At the end of the day this isn't going to turn on the evidence as to who's been doing what in the interim in relation to the UK. There's an absence of any conduct by Mr Protopapas in relation to the directors here in the UK, and the most important thing of course that's started to happen here in the UK, or that affects -- there are various ways in which it does affect it, but the application against Winston & Strawn is a very good example of how this is a power struggle, this is a clear power struggle between two conflicting centres of authority.
MR JUSTICE TROWER: The reason I ask the question, we obviously don't have time to debate it at any length, but the reason I ask the question is one can see that English law may regard as much more offensive an appointment of this sort, which purported to have worldwide effect, than would an appointment of this sort that was restricted to the jurisdiction in which the order was made.
MR DALE: Quite.
MR JUSTICE TROWER: Because then it has much more of a feel of, "we're trying to preserve and protect the local

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assets for a particular purpose." That's not to say there won't still be a power struggle issue which arises, I understand that, but it's a very different animal.

MR DALE: I completely agree with you. The seismic difference here, of course, is of course there's no judgment, it's the third party complaint, it's what is happening in the third party complaint, and the two limbs of course upon which we would be bringing proceedings is (a) it's not a recognisable court, the court of South Carolina, and that of course is based on the legal concept of competent jurisdiction, and also, and importantly, the abusive, vexatious, unconscionable behaviour which Mr Phillips has mentioned, and that can't possibly -- obviously it is contrary to the interests of Cape itself, and also it's not possible for Mr Protopapas, purporting to act on behalf of Cape, to go against Adams v Cape and what findings of fact and law are there.

So that's the strand there, again, it's not for me to deal with all of that today. Where I wanted to end up very quickly -- I am very conscious of your Lordship's time -- is that Justice Toal set down the trial in June for December, and that has been moved, as your Lordship will have seen, to February. That was

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relisted at a hearing on 24 September, where she moved it to 3 February. At that hearing, she made also what's called a scheduling order, which you will see at hearing bundle 1, tab 6, page 442 to 444. If I just quickly show you that, because that really shows you what's going to happen in those proceedings.

MR JUSTICE TROWER: Is this in the core bundle?

MR DALE: No, it's in what's called hearing bundle 1, tab 6, page 442 to page 444. While we're turning that up, at that hearing --

MR JUSTICE TROWER: Tab 6?

MR DALE: It's tab 6 of this bundle.

MR JUSTICE TROWER: 19?

MR DALE: I'm picking it up at page 19, exactly. What you have here is fact discovery taking place on 3 January, expert discovery, and various dates in relation to that. All motions by 6 January. Then at paragraph 4 you will see that there is mandatory mediation, so it's contemplated that Mr Protopapas will be having mediation -- well it's not contemplated, it's ordered, that he will be having mediation purportedly on behalf of Cape as at 10 January, and that the trial date is listed on that date.

At that hearing, as well, my Lord, there are indications by, I think it's the De Beers Group,

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indicating they're going to be seeking disclosure from the claimants, which again we have no idea how that will play out. Justice Toal indicated at that hearing as well she was still expecting Mr Protopapas to marshal the assets of Cape.

So that's the position at the moment in relation to the proceedings in the United States.

A very short chronology in relation to these proceedings. If I can just hand up to your Lordship two documents which haven't actually made it into the bundle we've given you. I'm not going to take your Lordship to any of these in any detail, but just to give you a sense of the potted summary in the chronology. This is at paragraphs 46 to 52 of our skeleton.

You will have seen that the letter before action is dated 30 August. That follows the format of everything that you read in relation to what we've said in the skeleton, and also in terms of why we're asking for this on an urgent basis, and asking for service out and so on and so forth.

For the purposes of just flicking through this, and really just trying to show you that in fact this is obviously sent on behalf of Cape, by which we mean CIHL and Cape plc, and it's written in a professional and polite manner, if I can put it like that, seeking to get

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Mr Protopapas to agree to the orders which we sought in these proceedings. There's nothing that you would say in a sense was inflammatory, other than obviously the content of it.

So that's what happens on 30 August. The claim form is then issued on 6 September, plus Oren 1, plus also the application for service out -- I'll come to that separately -- on that date.

Now, the response that comes back from Mr Protopapas is in the bundle at tab 6 as page 428. This is 5 September. This encapsulates what his position is; if there's any document that really does encapsulate it, it is this. This is what he said. It's addressed to Winston & Strawn here in London. At page 428 he sets out the headings of his three main points. Firstly, as you will see, there is a letter setting forth that part of it is improper and lawful for three reasons:

"One, as an officer ...(reading to the words)... precedent of the United States Supreme Court known as the Barton Doctrine."

Which Mr Phillips has referred to.

"Secondly, your clients have raised issues on each of the issues ...(reading to the words)... the South Carolina Court of Appeal ..."

Et cetera et cetera. The point in relation to that,

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my Lord, is that's incorrect and proceeds on a false premise, of course, because Cape itself has made no such applications at all. He constantly refers to "your clients" as meaning the third party defendants.

Thirdly, he says:

"Your letter demands that I violate court orders, which I am not allowed to do."

We then have several pages on the Barton Doctrine which I don't need to take your Lordship through. If I pick it up at page 431, at the bottom:

"Your letter requests that I ...(reading to the words)... respectfully, you cannot ask me, and I cannot agree, to violate those court orders."

Then over the page he refers to him having been appointed by Justice Toal, and she is one of the most respected judges in South Carolina, et cetera et cetera. Then he says in the second paragraph:

"I am charged by the South Carolina circuit to fully administer all assets of Cape, accept service on behalf of Cape, engage counsel ...(reading to the words)... protect the interests of Cape, whatever they may be."

So he plainly doesn't accept any limitation on his authority.

Then you can see what he does in the penultimate paragraph, where he suggests that he has no choice other

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than to sue Winston & Strawn himself, and he provides with this a copy of the declaratory judgment filing that he's seeking against Winston & Strawn. Then he suggests to Winston & Strawn:

"A sensible solution to this issue is for you to withdraw the letter ...(reading to the words)... to show cause."

So what he's doing there plainly, my Lord, is saying that South Carolina is the only acceptable jurisdiction.

Then that follows through in relation to the motion to show cause for contempt and so on, and given the time I don't think I need to show you any of that, you can take that as read.

So that's his position.

On service out, my Lord, we asked him at the end of that letter, as you will have seen, to accept service out, and he declined to do so on 5 September. A service out application was then made, and the order was made by Master Brightwell, and accepted on an urgent basis. So what was then done was it was directed to serve on his professional address, which was duly done, and so he was personally served with the claim form on 16 September, with the affidavit of service. You will see that at tab 3, pages 31 to 32. That happened on 16 September, albeit he had had it by email before.

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Then, as a result of Master Brightwell's order, the evidence in support of him resisting the application was to be served yesterday, by 8 October.

MR JUSTICE TROWER: Has he acknowledged service?

MR DALE: He hasn't acknowledged service and he hasn't served any evidence in response, nor has he formally engaged with this expedition application, other than to file a motion in the South Carolina court, where he's filed a notice and an application for Justice Toal to contact this court, and I'll show you that. The reference to that, is, my Lord --

MR JUSTICE TROWER: Yes, I've seen that.

MR DALE: You've seen that already. That's at HB1/6, 464 to 465, and his letter is there at 484.

So that's what his response to this application has been. When he was process served with the application, the process server signed a witness statement where it said, slightly dramatically, I suppose, that, "Mr Protopapas slammed the door in my face and told me not to come back, and that if I did he was going to put me on trespassing notice."

So he's been served, is the ultimate in relation to that, and what he's not done is he's not engaged with the directors, he's not engaged with this process.

Moving on quickly to the dates and length of our

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hearing. You have seen the part 8 claim form and the way in which -- that's at tab 7, pages 493 to 497 of the hearing bundle.

MR JUSTICE TROWER: Yes, I looked at this.

MR DALE: What we've done there is to condense for your Lordship, or the judge that will hear the matter, what the legal arguments are in relation to -- what the essential facts and legal arguments are. I don't need to take your Lordship through it, but what you can see what we've done is set out what are the essential facts here, all of which are a matter of record, all of which are uncontentious matters in relation to what has actually happened in South Carolina, and what we have then done is set out what the propositions of law are that will be necessary to go through in relation to this matter. There are obviously a number of them, and they all interlock with each other, as we say.

But this is highly suitable for part 8 litigation and determination, and an important point of taking your Lordship through that today, just to show you that, is that this is not a trial, we're not seeking an expedited trial as such, we're seeking a final determination, but there isn't going to be live evidence.

MR JUSTICE TROWER: I think technically it is a trial, it's

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a part 8 trial.

MR DALE: It's a part 8 trial. I mean it as in it's a hearing without live evidence.

We've asked for, as you know, the 11th or the 18th. All that practically needs to be done for this hearing, trial, is a direction really in relation to bundles to be filed, and we would suggest ten days beforehand, and skeletons three days beforehand, otherwise this matter is ready for determination.

MR JUSTICE TROWER: Yes, I just want to ask you about that. I think so far as the evidence of what's actually happened is concerned, I can see that -- you're satisfied that that's complete, is it?

MR DALE: From our perspective, we've been obviously adding things as we've gone along, and from his perspective, of course, we have had the order made by Master Brightwell saying that he needed to serve his evidence in response.

MR JUSTICE TROWER: Yes.

MR DALE: All I can say is this in relation to the letter of 5 September, which I've just shown you: he's not taking any issue on the facts, he's taking legal propositions, the Barton Doctrine, et cetera.

MR JUSTICE TROWER: Are you intending to put in any expert evidence of US law?

MR DALE: No, because we regard this as being a matter of --

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MR JUSTICE TROWER: I'm not suggesting you need to, I haven't really thought about it, but I can see that maybe there might be issues which you would wish to have explained. I don't know whether there are any questions of US law which arise as to how the jurisdiction which the judge actually exercised is normally exercised.

MR DALE: We've considered that when we were putting together Mr Oren's witness statement.

MR JUSTICE TROWER: Right.

MR DALE: And we've set out in a sense what have been the fundamental different arguments taken on behalf of the third party defendants, if I can put it that way, and Mr Protopapas. In the end, our application is sort of irrespective of whatever the jurisdiction is that is granted by the South Carolina court, it's a bigger exocet than that.

MR JUSTICE TROWER: Yes, I think the point I was more on is obviously it's the foundation of your claim that what's going on in the United States, that pursuit of this receiver, is vexatious, and it just struck me that it was possible -- and I don't put it any higher than that -- that there may be questions of US law which would arise, particularly I think in this sense: that there are indications, and I don't know whether this is right or this is wrong, but certainly he holds himself

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out as effectively being the court.

MR DALE: Yes.

MR JUSTICE TROWER: That may not actually be the right way of thinking about it, when he's taking decisions which are not of themselves sanctioned by the court, I don't know, they may or may not have been, I have no idea.

MR DALE: My Lord, that's helpful, and just thinking, there may well be factual evidence that we will need to update the court on. It may that be the right thing for your Lordship to do is to direct that any further evidence is served by a particular date, and we need to consider what your Lordship has said.

MR JUSTICE TROWER: I won't give any directions in relation to expert evidence, even if on reflection you think it's a good idea now, but I do think you need to just think about that, because if we are going to do that, I think it needs to be done sooner rather than later.

MR DALE: Yes, that's very helpful, because the way I've certainly been looking at it is it's plain as a pikestaff, but that's perhaps not necessarily a legal formulation.

MR JUSTICE TROWER: Yes. Because don't forget that this whole jurisdiction, particularly in relation to the injunction, the courts have been at pains to stress historically that they're not injuncting a foreign

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court, and that becomes a slightly more nuanced question if it's an officer of the court.

MR DALE: Indeed, and there is of course here an interesting bifurcation, and we don't need to dwell on it now, but what the court has done is authorised him to do certain things. The third party complaint is not something that he was told to do.

MR JUSTICE TROWER: That may be the short answer, in the sense that on the facts the point doesn't arise when one looks at it.

MR DALE: But what does happen, of course, is that the court subsequently sort of certainly doesn't say, "What you've done is wrong".

MR JUSTICE TROWER: Yes. Well anyway, I'm not going to take this any further, I just wanted to raise it with you in case there was an issue.

MR DALE: In my final minutes I think what I now need to say to your Lordship is just deal with the test, obviously, on expedition and how it applies here. I'm not going to take you -- Gore v Geox is obviously the authority, and it's in tab 7 of the authorities bundle, it's also in bundle 1 as well. But the criteria are set out very shortly by Lord Neuberger at paragraph 25. There are four. One is, and we've again set this out at paragraphs 56 to 58 in our skeleton, is there a good

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reason? It's only justified on the basis of real objective evidence, I think are the words, and good urgency. Secondly, does it interfere with the administration of justice? Thirdly, does it cause prejudice to the other side? Fourthly, are there any other special factors?

Of course the Chancery Guide says at paragraph 3.19 that parties are to make an application on notice at the earliest possible opportunity, which is obviously what we have done.

Now, good reasons for the expedition. There are about five or six here. One is the nature of the case, it's a part 8 claim, which involves seeking injunctions. These injunctions sought are final, and this is precisely the sort of relief that's obviously urgent, to stop damage or further damage occurring on the basis of what is happening in South Carolina.

Secondly, there is an ongoing issue of legitimacy within CIHL and Cape plc. The receivership order is wide-ranging, it covers worldwide assets and business, and so on and so forth as you've seen. So this does generate a corporate crisis where you have two conflicting sources of authority, and that is an unsustainable and intolerable position for any company to be in.

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Thirdly, the third party complaint, I don't need to labour that, your Lordship has that point. That is highly damaging to Cape, and the directors regard it as vexatious, abusive, unconscionable. They've not authorised it, and they have a right that somebody should not pursue such a claim purportedly in their name where the matter will have that effect. That creates a real and immediate danger, and indeed if we don't have expedition, there will now be a mediation, purportedly indeed name of Cape, unless this is stopped.

Fourthly, there's a marshalling of assets which I have referred to which Justice Toal expects him to do.

Then, just in terms of the concrete example of the day to day management, it's been referred to in the evidence, again, the directors want to close out the accounts for the year of 31 August. There is obviously an issue in relation to the filing of accounts, we don't know what Mr Protopapas has been doing, and there's a risk, obviously, of ongoing paralysis.

Mr Oren has set out in his witness statement issues in relation to the impact on reputation and suppliers. He's also set out the impact on the scheme, and again you don't need me to go into that in great detail, Mr Phillips has covered that, but at Oren 364 to 368, he does set out the bit of the scheme, the bit of the

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judgment, the viability of Cape as an ongoing entity is based on Adams v Cape, and its ongoing ability to fund that scheme is set out at note 26, which is referred to at paragraph 367.

Wider considerations involve the financing arrangements of the Altrad group, and you will have seen -- again, we've dealt with this quite lightly for obvious reasons, but on the face of it the appointment of a receiver could be said to constitute a potential event of default, and which could potentially in a sense have effect vis-à-vis lenders. That's a point that's more generally about prejudice, but that's an ongoing situation which isn't in the best interests of the company.

Finally on this point of good reasons, there has been of course no attempt to engage with the directors at all. In fact he's ignored the directors. What he has done is embarked upon an attack on Winston & Strawn, which has had an effect of them having to come off the record in these proceedings and to defend that motion, and that motion for contempt in the South Carolina court. So he's asked them to swap sides and put pressure on them, but in reality they just had to withdraw from the field. But that has made our position again more difficult, but also just shows that we're in

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a battle royal, if I can put it like this, for the control of the company.

MR JUSTICE TROWER: Yes.

MR DALE: In terms of time, time is short. Again, if we had the hearing in mid-November, the judge needs time to write a judgment, and then that judgment will need to be dealt with and considered by the court in South Carolina.

Finally, my Lord, if I can just deal with the question of prejudice and no prejudice, in a sense these can be dealt with very quickly. He's not objected to expedition, Mr Protopapas, his objection is to jurisdiction per se. He doesn't appear to dispute the facts, and indeed the material facts aren't in dispute for the reasons I've set out. He has the ability to defend these proceedings, he's been involved as receiver for a long period of time already, and he is obviously capable and is taking such acts as he regards as being in his best interests in the name of Cape.

In terms of whether this application could be said to have any effect at all, well it could delay the trial of the third party complaint. It could be said that it might do that. But the whole purpose of the application is to stop that in its tracks, and even if the third party complaint was delayed, that can't be said to cause

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any prejudice to Mr Protopapas. There's no trial listed in the United States against Cape, and there's no judgment to enforce. So this third party complaint is proceeding in a vacuum at the moment. There's no need for it to proceed in the way that it does.

Finally, to the extent there is any prejudice, as I think Mr Justice Mann said in the Debenhams Retail case, it's acceptable, because the expedition is necessary and appropriate.

I don't think there are any provisions in relation to -- I would just be repeating or repackaging the points that I've said to you in relation to justice and special factors, other than to say this is obviously appropriate for expedition.

Finally, as I said, we dealt with this matter as speedily as possible, seeking this application. Mr Justice Mann said in the Debenhams case you usually see these applications as being pretty clear, or clear that reasons don't exist, and we would say this is very clear, it's extremely serious and immediate, and it's an unsustainable situation where (Inaudible).

My Lord, those are my submissions.

Ruling

MR JUSTICE TROWER: Thank you very much, Mr Dale.

As I indicated during the course of the argument,

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I will make an order for expedition of the trial of this part 8 claim. I don't think it's necessary, particularly given I'm sitting in the applications court, for me to give a reasoned judgment as to why that is, although I have satisfied myself that the claimants have shown good reason for expedition. There is in this instance clear, real, objective and good urgency.

The reasons were summarised with clarity during argument by Mr Dale, but essentially they relate to the importance of ensuring that this court determines one way or the other, as a matter of English law, who is entitled to control the claimants.

It is not necessary to explain why that is the case. In some respects it is self-evident. I am quite satisfied that as matters presently stand, the position for the directors of the claimants is becoming increasingly difficult as a consequence of the uncertainty that has been engendered by the appointment of a receiver in South Carolina.

The second question for me is whether expedition would interfere with the good administration of justice. In my judgment it does not in this particular case. There are occasions on which it is very difficult to say that the urgency is sufficiently acute for a claimant to be able to jump the queue of other litigants. The court

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is able to accommodate a hearing in November, and in my judgment that factor does not point against the granting of an order for expedition; if anything it supports it.

I have also given careful consideration to the question of whether expedition might cause prejudice to the other party. I am conscious of the fact that I have heard no specific representations from Mr Protopapas, who has not attended to explain his position on this hearing.

But it seems to me that for the reasons identified by Mr Dale it is unlikely that any objective prejudice could be suffered by the defendant because, given the uncertainty that is presently self-evident in relation to the control of Cape, it is in his interests, as much as in the interests of the de jure directors of Cape, to ensure that the uncertainty is brought to an end as soon as practicable, and it is particularly important for him to know what the position of English law is in relation to his appointment, given that English law is the law which on any basis governs the relationship between the company and its constituent organs.

There are no other special factors that in my judgment count one way or the other against an order for expedition, so I propose to make the order sought. In practical terms what that means is the matter will be

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listed for a hearing in the week commencing 11 November. I am going to direct that Mr Protopapas is notified immediately of the order that this court has made, although I am sure the claimants would have done that in any event.

I have raised with counsel the question of whether any further directions are required. I give them permission to apply for further directions if, on consideration of this hearing and having taken instructions and received any reaction from Mr Protopapas, they consider it necessary to do so, but otherwise the matter will be listed for hearing that week, with one day's pre-reading for the judge and a time estimate of two to three days for the hearing itself.

I am not going to say anything further about bundles or the like. I think all of those matters are dealt with in the Chancery Guide, and the claimants and indeed Mr Protopapas, insofar as he decides that he wishes to participate in these proceedings, will be able to have regard to the Chancery Guide for the purposes of working out what they need to do.

Is that all, Mr Phillips?

MR PHILLIPS: My Lord, yes. We will draft the order and send it through to you in the usual way.

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MR JUSTICE TROWER: I'm not going to say anything more about who's going to hear it. It would be somebody exercising the power of a High Court Judge, not a Master, I can tell that you much, but more than that I'm not going to say at the moment.

MR PHILLIPS: Thank you very much.

(11.50 am)

(The hearing concluded)

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND JOHN A. TIBBS and MARGARET B. TIBBS, Plaintiffs, v. 3M COMPANY *et al.*, Defendants. ********** CAPE PLC, individually and as successor in interest to CAPE ASBESTOS COMPANY LIMITED, by and through its duly appointed Receiver Peter D. Protopapas, Third-Party Plaintiff, v. ANGLO AMERICAN PLC, individually and as successor in interest to ANGLO AMERICAN CORPORATION OF SOUTH AFRICA LTD.; DE BEERS PLC, individually and as successor in interest to DE BEERS S.A., et al., Third-Party Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A No. 2023-CP-40-01759 In Re: Asbestos Personal Injury Litigation Coordinated Docket

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THE RECEIVER'S MOTION FOR SUMMARY JUDGMENT AGAINST THE CHARTER AND ALTRAD THIRD-PARTY DEFENDANTS

Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, Third-Party Plaintiff Peter D. Protopapas, as duly appointed receiver for Cape PLC, individually and as successor in interest to Cape Asbestos Company Ltd., n/k/a Cape Intermediate Holdings Ltd. (the "Receiver" or "Receivership"), by and through undersigned counsel, hereby moves this Court for an Order granting summary judgment in his favor with respect to successor liability and/or alter ego/veil piercing liability against (i) Charter Consolidated Ltd. ("Charter"), and ESAB Corporation ("ESAB"; together with Charter, the "Charter Third-Party Defendants"), and (ii) Mohed Altrad and Altrad Investment Authority S.A.S. ("AIA"; together with Mr. Altrad, the "Altrad Third-Party Defendants").[1]

I. INTRODUCTION

In 1977, Cape, the leading supplier of amosite asbestos to the United States found itself at a crossroads. Cape's international sale of asbestos made it the profit center of Charter, its parent within the broader network of interconnected companies with overlapping leadership, ownership, and holdings that formed the Oppenheimer Group System. But entering into settlement discussions

[1] Eleven entities within the Altrad Group, along with Mohed Altrad, its founder and President, were named as Third-Party Defendants. Seven of those 12 defendants failed to respond to the Third-Party Complaint: Altrad UK Ltd.; Cape Industrial Services Ltd., n/k/a Altrad Services Ltd. (since June 1, 2021); Cape Holdco Ltd.; Cape Industrial Services Group Ltd.; Cape UK Holdings Newco Ltd.; Sparrows Offshore Group Ltd.; and The Sparrows Group LLC. As a result, on December 6, 2024, the Court entered default against those seven non-responding Altrad entities, several of which—including Altrad UK Ltd.—have the same registered address of Cape Intermediate Holdings Ltd. (*i.e.*, the current name of the Cape Asbestos Company Ltd.) in England at 6-7 Lyncastle Way Barleycastle Lane, Appleton, Warrington. *See generally* Order Entering Default (December 6, 2023).

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its first-ever asbestos-related product liability lawsuit in Tyler, Texas that summer, the threat of becoming embroiled in U.S. litigation loomed:

> We here, having heard more disturbing information recently about the value of Texas awards are rapidly coming to the conclusion that Cape and Cape Fibres should take a risk on the UK enforceability and withdraw, as in practice we cannot foresee any court or government here enforcing a judgment which would have enormous financial and employment repercussions, when we really cannot be said to have a moral responsibility and are simply victims of the US product liability cult.
>
> An urgent meeting is obviously essential as clearly you cannot indefinitely continue my instructions of taking no further steps in the proceedings. Suggest 21st and 22nd July in London.[2]

Cape did not face the decision of how to respond to this looming risk alone. It was a subsidiary in a much larger Group System controlled by the Oppenheimer family. Designed to dominate the mining industry, the Oppenheimer Group System employed a system of top-to-bottom control to manage what was, by that time, over 1,000 companies under the Anglo American Corporation of South Africa, Ltd. ("Anglo American") umbrella. While the Oppenheimers and their close allies ran the companies as one, the Group System afforded them the flexibility of walling off liabilities and evading responsibilities or authorities at critical moments such as this.

Given the Group System's *modus operandi*, Cape's predictable reaction to the looming risk of U.S. liability for the known harms of its asbestos was to (i) strip its wholly owned U.S. subsidiary, North American Asbestos Company ("NAAC"), of assets and shutter it; (ii) ostensibly flee the jurisdiction; and (iii) establish a new Lichtenstein corporation (still part of the Oppenheimer Group System) to mask Cape's identity in the United States so that it could continue to profit from asbestos sales to the U.S. market. Because of the Group System protections, these

[2] Ex. 1, Cape General Counsel A. Penna telex to Lord Bissell in Chicago, July 4, 1977, Cape_Receiver_00133865.

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decisions were effective. Cape and Charter have evaded their U.S. liabilities for the devasting harm caused to U.S. claimants exposed to Cape's asbestos for more than four decades.

Even now, decades later, Cape and Charter, along with their new owners—in Cape's case, AIA and Mohed Altrad, its founder, President, and majority owner, and in Charter's case, ESAB—continue to refuse to answer for the harm they caused in the United States. Through baseless legal challenges to this Court's appointment of the Receiver, to serial improper appeals of this Court's discovery orders, to an outright refusal to participate in the discovery process, the Charter and Altrad Third-Party Defendants persist in the scheme of litigation avoidance.

Even with the Charter and Altrad Third-Party Defendants' continued obstructionism, the evidence adduced by the Receiver is damning. It is also completely unrebutted, and further supported by the adverse inferences drawn by this Court as a result of their discovery misconduct. For the reasons set forth below, there is no genuine issue of material fact that could prevent summary judgment in the Receiver's favor with respect to his equitable claim of alter ego and veil-piercing liability.

II. RELEVANT BACKGROUND

A. Cape Is Responsible for NAAC's Fraud on the U.S. Market.

The story of Charter, Cape, and NAAC's conscious—and coordinated—decision to protect Cape from U.S. liability related to the sale of tens of thousands of tons of raw asbestos fiber into the U.S. market is not just about three companies. It is a story of a highly efficient and integrated operation that originated in the South African mining industry, spread internationally, made huge profits by suppressing the known health risks associated with asbestos, and successfully avoided the attendant U.S.-based liabilities for the harm caused by their operation.

Nobody questions the identity of the wizards behind the curtain: Ernest and Harry Oppenheimer. NAAC, Cape, and Charter are not separate. The Oppenheimers and their super-

executive committee controlled all of these companies. The evidence of top-to-bottom control is abundant—and completely unrebutted by the Charter and Altrad Third-Party Defendants—and extends to both daily activities and critical decisions. Indeed, there is no more compelling evidence of control and dominion than the directive Charter gave Cape that its profits were not Cape's to control. The Oppenheimer control over Charter and Cape here aligns fully with the analysis of the South African Group System submitted to this Court by Dr. Steven Press. Dr. Press's report outlines the hallmarks of the Group System control, perfected by the Oppenheimer family and clearly documented in the relationship between Charter and Cape.

Charter and Cape's use of the Group System to cover up their knowledge of the hazards associated with asbestos, as detailed in Dr. Barry Castleman's report and corroborated in NAAC's and Cape's historical documents, is a scheme for which Charter's and Cape's successors, Altrad and ESAB, should be held liable.

This story is most clearly told through NAAC due to NAAC's participation in the U.S. litigation system, as compared to Charter and Cape, which maneuvered to minimize their participation in that system. But the Group System permeated the relationships among Charter, Cape, and NAAC—all one and the same—and makes each company equally responsible for the bad acts of the group. These companies must be held responsible for their conscious choices to send tens of thousands of pounds of raw asbestos fibers into the U.S. market and strategically avoid those liabilities through complex corporate maneuvering. They cannot be permitted to continue to profit on their scheme.

B. The Oppenheimer Family Built an Empire Based on Group Control.

To dominate the South African commodity mining industry, the Oppenheimer family perfected the South African Group System. "Although the full picture of these corporate relationships remains murky, it is generally acknowledged that the Oppenheimers' reach extends

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to some six hundred corporations involved in everything from diamonds and gold to insurance and investment houses. The details of cross-ownership have never been fully revealed, but evidence indicates that ultimate control over all the companies remains firmly in the hands of E. Oppenheimer & Sons, a privately held family concern. For all practical purposes, then, the entire conglomerate functions under the direction and at the will of the Oppenheimers."[3]

This system, in which the Oppenheimer family could create an empire with only limited investments in hundreds of companies, is best described in the family's own words. Ernest Oppenheimer, the original Oppenheimer family patriarch explained, "it has been shown that the mining companies individually and the industry as a whole have benefited to an enormous extent through the presence of strong parent companies. The advantages of the [Group] system are manifold, the financing of the individual mining enterprises is facilitated thereby, the parent company provides the link between the various producing companies and promotes co-operation on matters of common interest, and, perhaps most important, by engaging a staff of highly skilled experts, is able to give valuable technical assistance."[4]

Harry Oppenheimer, Ernest's son, who controlled the family empire for decades after his father, further explained that "[t]he control of the parent company in each group over its associated concerns is normally fully effective."[5] "The controlling corporation undertakes the administration of all the companies in the group, provides centralized secretarial services, attends to the share

[3] Ex. 2, Debora L. Spar, THE COOPERATIVE EDGE: THE INTERNAL POLITICS OF INTERNATIONAL CARTELS 76 (1994).

[4] Ex. 3, T.E. Gregory, SIR ERNEST OPPENHEIMER AND THE ECONOMIC DEVELOPMENT OF SOUTH AFRICA 98 (1962).

[5] Ex. 4, Union's Group Mining System, H.F. Oppenheimer, The Mining and Industrial Magazine of Southern Africa, Vol. 44, No. 9 (Sept. 1954), at Cape_Receiver_00215701-6.

transfer work and maintains a central buying department to ensure that the buying for all the group companies is conducted by experts."[6]

The Oppenheimer family's perfection of the Group System led to nearly unparalleled financial results. In its issue dated July 1, 1989, *The Economist* wrote: "By any measure, the Oppenheimers are the Rockefellers, Morgans and Gettys of South African all rolled into one. Anglo American, the holding company which the family created and still guides, is vast. It is at the center of the world's largest mining group, producing a fifth of the non-communist world's gold. Anglo also has a firm grip on the platinum market and towers over the South African economy with interests in industry, farming and finance. De Beers, its sister company, controls the world diamond market."[7]

C. The Operating Principles of the Group System: Minimum Investment, Maximum Control.

The Oppenheimer Group System's dominance was predicated on the theory of "minimum investment, maximum control."[8] The Group System relied on three pillars: (i) minimum investment—harness outside investment to spread risk, (ii) maximum control—run all companies as a single unit with top-to-bottom control, and (iii) illusion of separateness to limit liability and risk.

Minimum Investment. The Group System did not require full ownership of subsidiary entities—or even a controlling share. Dr. Steven Press, an expert on the Oppenheimer empire,

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[6] *Id.*

[7] Ex. 5, *The Oppenheimer Empire: South Africa's Family Affair*, THE ECONOMIST, July 1, 1989, 73-75.

[8] Ex. 6, Anglo American Corp., FORBES, June 15, 1973, 49, at Cape_Receiver_00215757; Ex. 7, A.J. Limebeer, "The Group System of Administration in the Gold Mining Industry," *Optima*, vol. 1, no. 1 (1951), 26-30.

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describes the Oppenheimer Group System as a complicated web of perhaps hundreds of companies that "was typically not detectable in majority stock shareholdings."[9] Indeed, in an "off-the-cuff" portion of an interview in 1969, Harry Oppenheimer addressed "taking control" of "big enterprises," stating "[w]hen I say 'control,' I don't necessarily mean 51 per cent."[10] Instead, the Oppenheimer family owned a portion of each company in the web, but relied on outside investors to supply additional capital and, perhaps most importantly, to spread the risk.

Dr. Press's account of the founding of Anglo American Corporation of South Africa, Limited ("Anglo American"), a Third-Party Defendant that is not the focus of this Motion, best describes this investment strategy. As he explains, early in the company's history, Ernest Oppenheimer relied on an Anglo American investor to help guide Anglo American's purchase of a crucial diamond asset: "Late in the course of World War I, Ernest Oppenheimer received insider information concerning the fate of diamonds in German Southwest Africa—a German colony that South Africa had occupied after defeating German colonial forces here. A South African state official and former treasury secretary, H.C. Hull, who had been a participant in Anglo American's founding, indicated to Oppenheimer that the German rights holders in Southwest Africa were willing to sell their diamond claims."[11] Oppenheimer was able to purchase the diamond rights because of his American investors in Anglo American.[12] The Oppenheimers' focus on investment

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[9] Ex. 8, Expert Report of Steven Press, Nov. 8, 2024 ("Press Report") at 12.

[10] Ex. 8, Press Report at 83 (citing Ex. 9 "I'm not keen on power," *Anglo: Supplement to the Financial Mail*, July 4, 1969, at Cape_Receiver_00215719-24).

[11] Ex. 8, Press Report at 42.

[12] Indeed, according to Press, in 1935, William Westrup, an Anglo American director, described the goal of attracting U.S. investors: "Mr. Honnold [cofounder of Anglo along with Ernest Oppenheimer] was a resident of the United States and was in close touch with various financial houses there. In consideration of his efforts to obtain American capital and introduce the Corporation's shares in America, Mr. Honnold was made a permanent director […] *his remuneration was granted in effect on American capital*." *Id.* at 40, *citing* W. Westrup to Receiver

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from the outside allowed them to leverage significantly more capital and capitalize on the social networks of those investors for additional investment and insider knowledge of new opportunities to build the empire.

Maximum Control. The Oppenheimers used certain hallmarks of control to dominate the companies within the group. It allowed the Group entities to function as a single unit, no matter how much the empire expanded. As Dr. Press describes, these hallmarks include the deployment of "super-directors to the boards of individual Group companies,"[13] maintaining "a culture of subservience among directors in individual companies within the Group," "dominat[ing] financing arrangements made by, and for, individual companies within the Group," and "siphon[ing] off profits and dividends from individual companies and moved them to entities at the head of the Group, which used this revenue stream to pay dividends to shareholders in the Group parent's holding companies."[14]

The following table of interconnected board memberships across NAAC, Cape, Charter, and Charter's parent, Anglo American, illustrates how Harry Oppenheimer deployed (and re-deployed) individuals across Oppenheimer Group companies to assert top-to-bottom control over them:

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of Revenue in Johannesburg, William L. Honnold Papers Collection (H.MSS.0381, Box 42, Folder 32. Honnold himself attested to the "strength" and importance of these American connections. *Id.* at fn. 105, *citing* Letter from Honnold to E. Oppenheimer, Aug. 17, 1943, William L. Honnold Papers Collection (H.MSS.0381, Box 42, Folder 32) (emphasis added).

[13] Ex. 8, Press Report at 12.

[14] *Id.*

1976	Anglo American	De Beers	Charter	Minorco	Cape	NAAC
Chairman	Harry F. Oppenheimer	Harry F. Oppenheimer	Sidney Spiro	W.D. Wilson	R.H. Dent	C.G. Morgan
Deputy Chairman	Sir Keith Acutt	N/A	Sir Philip Oppenheimer	Sidney Spiro	L.G. Stopford-Sackville	Max E. Meyer
	W.D. Wilson					
Directors	Sidney Spiro	Sidney Spiro	W.D. Wilson	Z.J. de Beer	Sidney Spiro	Robert Brook
	William Graham Boustred	Sir Keith Acutt	Murray Hoffmeyr	G.A. Carey Smith	Geoffrey Higham	R.H. Dent (former)
	Z.J. De Beer	E.T.S. Brown	G.A. Carey-Smith	Murray Hoffmeyr	F.P. Parkes	Geoffrey Higham (former)
	J.N. Clarke	E.M. Charles	J.N. Clarke	F.S. Benning	B.B. Stevenson	R. Gaze (former)
	Murray Hoffmeyr	P.J.L. Crokaert	F.S. Berning	H.R. Fraser	M.W. Stevenson	
	D.A. Etheredge	E.G.J. Dawe	J.E.H. Collins	G.C. Fletcher	R. Gaze	
	G.C. Fletcher	M.H. de Kock	R.H. Dent	N.K. Kinkead-Weekes	R.A.W. Caine	
	H.R. Fraser	H.B. Dyer	H.R. Fraser	Sir Philip Oppenheimer	M.A.F. Newton	
	C.J.L. Griffith	G.C. Fletcher	J.O. Hambro	Harry R. Oppenheimer	J.G. Mackcurtan	
	N.K. Kinkead-Weekes	A.S. Hall	N.K. Kinkead-Weekes	J.G. Richardson	W.R. Doughty	
	G. Langton	L.G. Murray	Harry F. Oppenheimer	B.W. Pain	A.E. Hepper	
	D.G. Nicholson	Sir Philip Oppenheimer	J.G. Richardson	Gavin Relly	J.R. Sim	
	Nicky Oppenheimer	A.E. Oppenheimer	J. Ogilvie Thomson	L.G. Stopford-Sackville	J.G. Richardson	
	Sir Philip Oppenheimer	B.W. Pain	B.W. Pain	J. Ogilvie Thompson	G.A. Carey-Smith	
	B.W. Pain	J. Ogilvie Thompson	Gavin Relly	Gordon H. Waddell	H.R. Fraser	
	Gavin Relly	A. Wilson	M.W. Thomas	E.P. Gush		
	F.S. Berning		L.G. Stopford-Sackville	Sir H. Tucker		
	L.G. Stopford-Sackville		P.C.D. Burnell	Sir J.E. Pearman		
	LJ. Oilvie Thompson			F.M.F. Ellis		
	Gordon H. Waddell					
	E.P. Grush					
	A. Wilson (Alternate)					
	M.W. Stephenson (Alternate)					
	G.A. Carey-Smith (Alternate)					

Dr. Press describes this as "a visual depiction of board membership for certain 'Group' companies in 1976: Anglo American, De Beers, Charter Consolidated, Minorco (see later in this report), Cape Industries, and NAAC. Names marked in red on this chart are repeat directors within the Anglo American / De Beers Group. In a few cases, such as that of J.E.H. Collins, 'repeat' directors are marked red because of additional board memberships within the Group that are not depicted in the chart."[15] Harry Oppenheimer's trusted advisors were the engine of his Group System; they allowed him to run what appeared to be a web of entities as a single unit.

The Illusion of Separateness. This tenet of the Group System refers to maintaining separate corporate entities to create a mechanism to wall off potential risk, and to create a fluid structure to evade government investigation both in South Africa and elsewhere.

[15] *Id.* at 48.

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Initially, these separations played an important role in maintaining a strong relationship with the South African government.[16] But it became clear that the illusion of separateness was critical in the United States, where antitrust laws threatened the Oppenheimers' De Beers diamond cartel. As Dr. Press recounts, "Around 1943, the US government believed that Anglo American[]was involved in an amalgamated enterprise with De Beers: the running of a global diamond cartel."[17]

Once W.L. Honnold, a trusted U.S. Oppenheimer advisor responsible for engaging American capital to build Anglo American, became aware that the U.S. government was intercepting his communications with Ernest Oppenheimer, "[t]here was a stark shift in Anglo American's documented corporate behavior . . . ."[18] Another Oppenheimer entity, Rand Selection, "received some of Anglo Group's diamond business without any real transaction taking place."[19] Rand Selection formed a new company under its control, Industrial Distributors Limited; as Ernest Oppenheimer reported to Anglo American's board, this new company would be the conduit for all industrial diamonds to be sold, separately from the sale of gem diamonds.[20] A new company was being created by Oppenheimer, and an old "alter ego" partially repurposed, with the effect of shielding one part of the amalgamated business enterprise (industrial diamonds) from another, and further obscuring the amalgamation of the business enterprise itself. Anglo American retained

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[16] *Id.* at 45 ("Partly, the nominal separation of Anglo American and De Beers was maintained because Oppenheimer, Anglo American, and De Beers were seen as 'English' concerns in a South Africa where Afrikaner nationalism was a potent force, and where the threat of antimonopoly action by the state was quite real in the 1930s and 1940s. To have combined all the Oppenheimer businesses formally into one unit would have brought unwanted attention.").

[17] *Id.* at 49.

[18] *Id.*

[19] *Id.* at 49-50.

[20] *Id.* at 50.

control, however, because of its "group system."[21] The Oppenheimer empire was able to continue its diamond sales—and effectively evade detection—because of its façade of separateness.

The appearance of separation, though highly effective, was a pure fiction. Harry Oppenheimer and his closest advisors used it as a façade for walling off liability and government investigation. This Group System model of control created by the Oppenheimers governed the relationships among Anglo, Charter, Cape, and NAAC: while separate on paper, they operated as a single unit.

D. Charter Controlled Cape.

As Cape's parent in the Group system, Charter controlled Cape's overall decision making on all issues, including over anything related to Cape's dividend. Francis Howard, a Charter employee who sat on Cape's board,[22] explained that Charter, not Cape, set the Cape dividend: "the directors of Cape, who were in the employment of Charter, would discuss within Charter with its executive committee that recommendation. There was no involvement of Cape personnel."[23] This testimony is consistent with documented Charter Executive Board meeting minutes. For example, the minutes dated October 28, 1969 included the following entry: "It was agreed that in the future Cape dividend recommendations would be discussed with Charter before being presented to the board."[24] Even Richard Dent, the one-time Cape chairman who attempted unsuccessfully to

[21] *Id.* (noting that his reference to "alter ego" as found in historical document: "Rand Selection," *Financial Mail*, Feb. 25, 1972).

[22] Howard agreed that he was on the Cape board only because he was a Charter employee; his board membership would cease if he retired from Charter. *See* Ex. 10, Deposition of F. Howard, Nov. 13, 1980, at Cape_Receiver_00100173.

[23] *Id.* at Cape_Receiver_00100270.

[24] *Id.* at Cape_Receiver_00100266-7.

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distance the company from Charter's control, agreed that Charter discussed and decided the Cape dividend before the issue was discussed at Cape board meetings.[25]

To set its subsidiary's dividend, Charter's financial department was responsible for reviewing subsidiary financial reporting, performing internal calculations, and recommending a dividend. The Charter financial department issued a memorandum to the Charter representatives on the Cape board to explain the rationale behind the dividend and to establish the dividend amount. An example dated October 25, 1971, just one day before a Cape board meeting, opens as follows: "This short note comments on the papers for the Cape Board Meeting to be held on 26th October. Charter is represented on the Board by Mr. S. Spiro, Mr. L.G. Stopford Sackville and Mr. J.G. Richardson."[26] The memo summarizes Cape's financials, including an analysis of the projected pre-tax profits compared to recent years.[27] Based on the analysis, the financial team recommended a 7.5% dividend, noting that Charter's portion "would amount to £196,000," the payment of which in December 1971 "should not present any problems."[28]

Charter's dominance over Cape also extended to secondments, another hallmark of group system control. As Dr. Press explains in one example of many, "Geoffrey A. Higham, as of 1967, was a director of Cape Asbestos – two years after Higham started with Cape Asbestos in 1965.

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[25] Ex. 11, Deposition of R. Dent, Apr. 7, 1981, at Cape_Receiver_00098922 ("I would not like to say that there was no occasion on which we did not discuss dividend possibilities with the Charter directors ahead of a Cape board meeting, but the operative decision was taken at an open meeting of the [C]ape board with all directors present.").

[26] Ex. 12, Memorandum, "The Cape Asbestos Company Limited," Oct. 25, 1971, at Cape_Receiver_00002569-70.

[27] *Id.* ("When it is borne in mind that Ordinary Dividends were not reduced in 1970 despite the 15% fall in earnings there seems little reason for thinking that there is any prospect of the 1971 distributions being increased because we are forecasting a return to profits close to the 1969 level.").

[28] *Id.*

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Higham received payment for this work through Cape Building Products Limited, not Cape Asbestos. Later, after Higham became Chairman of Cape Industries PLC (the renamed Cape Asbestos), Higham received payment for his work from Charter Consolidated Services."[29]

Charter also relied on key executives to dominate Cape's board during crucial moments—another hallmark of group system control. By way of example, Stephen Pollen, an Oppenheimer insider, dominated the Cape board at significant moments in the company's history. Charter Executive Committee meeting minutes dated April 25, 1967 address Cape Asbestos, stating that "[Pollen] has suggested that an executive committee of the board should be appointed. Mr. R. Dent has agreed with this proposal and confirmed that [Pollen] should be appointed to the committee on its formation."[30]

Similarly, when the Charter executive committee determined in a November 13, 1972 meeting that tighter control of the "local management of subsidiaries" was warranted, meeting minutes indicated that "[i]t was therefore agreed that the subsidiaries would be retained directly, that an executive director of Charter would take over as chairman for Mr. Dent, who would remain a director; that local management should be strengthened; that greater financial control should be exercised by Charter." [31]

Consistent with the Group System, Charter's control over Cape was absolute in meaningful moments throughout Cape's history.[32] Indeed, several courts have found that Charter "controlled"

[29] Ex. 8, Press Report at 93.

[30] Ex. 13, Charter Consolidated Limited Executive Committee Minute No. 51/67, Apr. 25, 1967, at Cape_Receiver_00002539.

[31] Ex. 14, Charter Consolidated Limited Executive Committee Minute No. 124/72, Nov. 13, 1972, Cape_Receiver_00002554.

[32] Ex. 8, Press Report at 8.

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Cape. *See Craig v. Johns Manville*, No. 82-0321, 1987 WL 10191 (E.D. Pa. Apr. 23, 1987), at *1 (list of other courts finding Charter controlled Cape). That conclusion also accords with this Court's adverse inferences as to Charter.[33]

E. Cape Controlled NAAC in Its Scheme to Maximize Sales from a Deadly Product and Siphon Proceeds Out of the United States to Protect Against the Reach of U.S. Creditors.

Just as Charter controlled Cape, Cape in turn controlled its U.S. subsidiary, NAAC. In contrast to Cape's sprawling South African operation, with thousands of mine workers employed at the asbestos mines, NAAC was small. NAAC's president described the company as a "one-man" operation, which consisted of "myself and four girls."[34] This small footprint protected Cape from exposure to U.S. tax liabilities and, more importantly, allowed for a quick collapse of the company's U.S. presence to escape looming tort liability.

From the beginning, Cape worked to ensure the appearance of separateness between it and NAAC, both for tax purposes and liability avoidance.[35] Behind this façade, Cape fully and

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[33] *See* Order Granting Cape Receiver's Motion for Sanctions, May 23, 2024 ¶¶ 20, 22 ("Charter[]owned, dominated, and controlled Cape and its subsidiaries, including NAAC, between 1965 and 1996, including with respect to their financing and capitalization."; "Charter[]and Central Mining seconded employees and other officials to work for Cape, or otherwise financed and spent resources for Cape, including operational, marketing, research and development, and lobbying activities.").

[34] Ex. 15, Deposition of C. Morgan, May 20, 1975, at Cape_Receiver_00095787-90; *see also* Ex. 16, Answers to Plaintiff's Request for Production, Nov. 24, 1982, at Cape_Receiver_00127971-72 (describing NAAC's lean staffing); Ex. 17, Letter to J. Morris, Dec. 3, 1975, at Cape_Receiver_00127267 ("Despite the volume of sales and profits of NAAC, our operation is a very small one, with only a total of 5 employees").

[35] *See* Ex. 18, Deposition of M. Meyer, Mar. 24, 1981, at Cape_Receiver_00098400-1 ("I came to the firm and I was a new partner at the time, but I was involved in tax work. One of the things involved in connection with [NAAC] was, since it was to be the wholly-owned subsidiary of an English company, a tax question and to be sure that tax questions were considered and be sure that it wasn't done in a wrong manner, make sure that [NAAC] was independent and that Cape wasn't doing business in this country.").

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carefully controlled every facet of NAAC through its U.K. staff, including Ronald Dent, Richard Gaze, and Tony Penna. When day-to-day decisions required on-the-ground monitoring and decision making, Cape relied on its Chicago team of lawyers at Lord Bissell, led by Max Meyer. This U.K. and Lord Bissell team made every necessary decision for NAAC—from the content of its by-laws[36] to the makeup of its board,[37] the content of board meeting minutes,[38] the

[36] Ex. 19, Letter from M. Meyer to R. Cryor, Jan. 19, 1954, at Cape_Receiver_00133477-8 (responding to Dent's detailed inquiries into whether certain potential by-laws would be permissible under U.S. law).

[37] *See* Ex. 20, Letter from R. Dent to R. Cryor, Apr. 13, 1959, at Cape_Receiver_00133219-20 ("I have discussed this with Mr. Newton and we both feel that the best method would be to approach Lord, Bissell & Brook and to ask them whether they would be kind enough to nominate one or the other in accordance with their own wishes. Mr. Newton, I think, would like to write to John Lord himself asking him to do this, and subject to your reply he will do so accordingly."). Dent also rejected Cryor's suggestion as to an additional board member suggestion, Harper Boyd); *see also* Ex. 21, Letter from R. Dent to R. Cryor, Dec. 17, 1953, at Cape_Receiver_00231839-40 (Dent noting that he believed that the corporate secretary should be "a member of the firm of Lord, Bissell & Kadyk or the Accountants.").

[38] Cape sought tight control over the content of the NAAC board meeting minutes—requiring not only detailed financial information, but strict adherence to a form for the minutes themselves. Ex. 21, Cape_Receiver_00231839-40.

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determination of its commission,[39] the process by which it was paid for its work,[40] the strategic

[39] *See* Ex. 22, Management Report to the Nov. 29, 1955 NAAC Board of Directors Meeting, Cape_Receiver_00232090-8 ("early in September, it became apparent that NAAC could not in the future expect to enjoy the same freedom in establishing profit margins on Amosite as in the past. Effective January 1, 1956, NAAC will have 2-1/2 per cent commission on all sales of fiber to established customers and 5 per cent on sales to new users. NAAC may not, under the terms of new agreement now in negotiation with the Mines, resell Amosite or Blue asbestos at prices and profit margins of its own choosing. Rather, we will be required to operate on a fixed price list established by the Mines"); *see also* Ex. 23, Letter from R. Gaze to R. Cryor, June 6, 1969, at Cape_Receiver_00134097 ("I feel that in any event I should emphasize that while the overall profit of N.A.A.C. is an important consideration, the actual movement of large tonnages of fibres must have priority."); Ex. 24, Letter from R. Cryor to R. Gaze, July 8, 1969, at Cape_Receiver_00134093-4 ("Whatever the financial arrangements between the Mines and NAAC that you may plan for the future, I hope you will keep in mind that we have an increasing burden here in the cost of doing business, in increased services, and the administration of these services. . . . Naturally, I accept your decision in this matter and we can revert to the 2.5% basis whenever you wish to have it become effective, although, as you point out, it is a source of some disappointment and concern to me.").

[40] *See* Ex. 25, Deposition of J. Holtze, Nov. 7, 1980, at Cape_Receiver_00097895-6 (Cape Asbestos Fibers paid NAAC commissions on a monthly basis that was "based on sales – on fiber shipped during a given month.").

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practice of underinsurance,[41] the setting of dividends,[42] and the salaries of its employees.[43]

Cape's control over NAAC infiltrated every aspect of the company's operations. Charles Morgan, who joined NAAC in 1970 as company vice president, and served as president from 1975 until the company's closure in 1978, described Cape's Richard Gaze and Lord Bissell's Max

[41] Officially, Cape had a company-wide policy to purchase insurance "at minimum cost consistent with adequate cover." Ex. 26, Memo, Oct. 10, 1975, at Cape_Receiver_00127206-8. But in reality, NAAC felt "pressure from [its] Home Office in London [that] forced [it] to seek lower rates" and choose carriers and policy terms based solely on short-term cost. *See* Ex. 27, Letter from NAAC to J. Kirk of Talbot Bird & Co. (Nov. 17, 1959), at Cape_Receiver_00231434-5; *see also* Ex. 28, Letter from Meyer to Gaze, June 29, 1977, at Cape_Receiver_00244712-3 (Having explained two quoted options for new coverage, Meyer noted, "[o]bviously the premiums involved would have exceeded the net income of the corporation in some years and would gradually have eaten up the net worth that has accumulated."[41] Having failed at an attempted to ask NAAC's prior year insurer to insure NAAC for one more year, Meyer noted, "we appear to be at the end of the rope at the present time.").

[42] *See, e.g.,* Ex. 29, Letter from R. Dent to C. Morgan dated Apr. 8, 1974, at Cape_Receiver_00133126 ("In view of the situation in the U.K., and having regard to the cash balances in N.A.A.C., we must ask you this year to increase the dividend to the sum of $120,000."); Ex. 30, Letter from R. Dent to C. Morgan, May 1, 1974, at Cape_Receiver_00133958 (stating "I would be grateful if the dividend requested [of $120,000] could be declared. There is no need for it to be paid immediately and it could be remitted in instalments, or in full at any time between now and the end of December 1974," even "if it involves an overdraft in NAAC," and dismissing Meyer's "argument" that "solely because of a dividend which is some $60,000 - $80,000 in excess of the normal, that there should need to be a bank loan 'more or less permanently on the books' amounting to $50,000 - $100,000."); Ex. 31, Letter from Gaze to Morgan, Apr. 15, 1975, Cape_Receiver_00133528 ("So far as the dividend is concerned, we should expect this to be not less than two thirds of the after tax profit, and a dividend of $150,000 is expected in 1975. The question of payment of the dividend should be delayed in this instance, until November.").

[43] While Cape controlled all NAAC employee salaries, the story of Cape's decision to reduce NAAC's West Coast agent, Jim Polizzi's, retainer amount best illustrates this facet of control. In a letter to Meyer, dated November 16, 1972, Dent wrote, "We have agreed that this should be reduced from the present $10,000 per annum to $5,000 per annum, to take effect from 1st January next year." Ex. 32, Letter from R. Gaze to M. Meyer, Nov. 16, 1972, at Cape_Receiver_00240205. Not only did Dent make the decision, but he also was the one to meet with Polizzi and inform him of the change. Dent noted, "I pointed out, of course, that this resulted from our need to keep down expenses in the United States and in the light of our reduced activity on the West Coast." *Id.* Dent asked Meyer to inform Morgan of this change: "I hope that you will be satisfied with the outcome of this discussion and if so, I should be grateful if you would inform Gerry and make the appropriate arrangements." *Id.*

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Meyer in the context of their interview of him for a position at NAAC. Morgan described Max Meyer's many roles at NAAC, stating "[w]ell, he actually held three positions, I suppose I should say. He was a Director, he was the Acting President of North American Asbestos, and he was also legal counsel for North American Asbestos."[44]

Morgan described his second interviewer, Dr. Richard Gaze, as in charge of NAAC: "Well, it was my understanding that Dr. Gaze was on the Board of Directors, and he was, I guess, theoretically, in charge of this North American Asbestos organization, and he would be the gentleman that would probably say, 'Yes' or 'No' after I talked to him."[45] Morgan's impression of Gaze persisted after he began working for NAAC, with Gaze having the final say "[a]s far as the distribution of fibers."[46] The clearest evidence of Gaze's control over NAAC, though, was his role in NAAC after he resigned from the company's board. He held no office in NAAC, but continued to communicate with Morgan through written correspondence, telex, telephone, and visits.[47] Even after resigning, Gaze effectively still ran NAAC:

> Q. It would be fair to say – wouldn't it, Mr. Morgan – even after Gaze resigned from the Board of Directors you considered him your superior as it related to the discharge of your duties at North American Asbestos Corporation, isn't that correct?
> A. Yes.
> Q. He, in fact, ran the company, didn't he?
> A. It would appear he did.[48]

Cape's control over NAAC was sweeping and absolute.

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[44] Ex. 33, Deposition of C. Morgan, Oct. 31, 1980, at Cape_Receiver_00096079-81.

[45] *Id.* at Cape_Receiver_00096219.

[46] Ex. 15, Deposition of C. Morgan, May 20, 1975, at at Cape_Receiver_00095835.

[47] Ex. 34, Testimony of C. Morgan, Sept. 18, 1986, at Cape_Receiver_00133416-7.

[48] *Id.* at Cape_Receiver_00133417-8.

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1. Cape Knew of the Hazards of Asbestos, but Suppressed—and Acted Contrary to—that Knowledge.

Throughout the era of the Oppenheimer Group System expansion, top executives were aware of the devastating health hazards associated with asbestos exposure. Indeed, over time they were met with stricter and more careful scrutiny in the U.K., where asbestos regulations first developed. Cape nevertheless did nothing to protect workers in South Africa or consumers in the United States – it only accelerated South African mining and U.S. sales.

a. Cape Had Every Reason to Be on the Leading Edge of Asbestos Hazard Knowledge.

In 1953, Cape's amosite asbestos mine achieved an output of 50,000 tons and employed 5,000 African workers.[49] Cape's South African mines produced 95 percent of the amosite and 60 percent of the crocidolite in South Africa.[50] In addition to its mining operations, Cape had five factories in England, and others in France, Italy, and South Africa. By 1974, Cape's subsidiaries sold its asbestos in the United States, Germany, Belgium, India, Sweden, and New Zealand.[51] There is no question that Cape's operations were sprawling.

There is also no question that Cape was aware of the hazards associated with breathing asbestos dust by the early 1930s. Dr. Barry Castleman, a chemical engineer and researcher specializing in health issues, has spent the last several decades working with public interest groups on the control of asbestos and chemical hazards. His research into Cape indicates that when the U.K. Factory Inspectorate "moved to develop regulations for the asbestos industry following the issuance of the first survey of the prevalence of asbestosis in asbestos factory workers, government

[49] Ex. 35, Expert Report Barry Castleman, Nov. 8, 2024 ("Castleman Report") at 3.

[50] *Id.* (citing Ex. 36, Cape_Receiver_00133187).

[51] *Id.*

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engineers met with representatives of the three largest UK asbestos companies, including Cape."[52] The U.K. Asbestos Industry Regulations took effect in 1933.[53]

Cape's participation in these discussions with the government came at the same time as health officials and the popular press reported on employees of the Cape Barking plant in East London who were suffering and dying from asbestosis and lung cancer at rates well above general population levels.[54] Cape had the technical know-how to understand the medical literature, with doctors and other medical advisers on staff.[55]

Through NAAC, Cape nevertheless continued mining and selling amosite and crocidolite asbestos to an ever-expanding client list in the United States and elsewhere well into the late 1970s.[56]

b. Cape Had Every Reason to Cover Up the Knowledge of Asbestos Hazards.

Information demonstrating the hazards associated with asbestos threatened Cape's survival. While "Cape returned a dividend to its shareholders in excess of twenty per cent per annum in each year from 1950 to 1965, its "most bountiful years were the two decades until 1976," *i.e.*, the period after medical research "had established conclusively the dangers of exposure to

[52] *Id.* at 1.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 3 (noting "Dr. Wyers, who worked for Cape until his death in 1956, published a report of his findings in 115 fatal cases. He noted that an excess mortality from cancer of the lung and pleura in cases of asbestosis had been reported by the UK Factory Inspectorate (13.2%, compared with 1.32% in silicotics) and that German authors had written about asbestos causing pulmonary cancer, too. In his series, 17 out of 115 (14.8%) died from cancers of the lung and pleura (Ex. 37, Asbestosis, *Postgrad. Med. J.* Dec. 1949 [Cape_Receiver_00193212-9]). The rate of pulmonary cancer at autopsy in the general population was about 1%.").

[56] *See* Ex. 38, NAAC Customer Lists, Cape_Receiver_00138265-82.

crocidolite and amosite."[57] Facing the ever-expanding body of medical research demonstrating the dangers of the products it sold, Cape determined the best path forward was an extensive cover-up both in South Africa and in the United States. This was carefully executed primarily by two Cape insiders: Dr. Walter Smither and Dr. Richard Gaze.

(i) Dr. Walter Smither's cover-up of the Pneumoconiosis Research Unit ("PRU") Investigation.

Dr. Walter Smither was Cape's senior medical officer beginning in the 1950s. He attended almost every major international conference regarding the health hazards of asbestos between 1960 and 1972,[58] gaining state of the art knowledge on asbestos and its associated health risks. As a result of this knowledge, he was the ideal candidate to travel to South Africa on behalf of Cape in June 1962. Just two months earlier, the South African PRU published a field study of the North Western Cape and at Penge in the Transvaal, which detailed the rates of asbestosis and cancer among asbestos mine workers in the area. The report made the following statement "based on proven fact": "an alarmingly high number of cases with mesothelioma of the pleura have been discovered among people who live or who have lived in the North Western Cape area, and that there is evidence to suggest that this condition is associated with exposure to asbestos dust inhalation which need not be industrial."[59]

Dr. Smither visited Prieska—the site of one of Cape's asbestos mines—where he described "the conditions around and about the mill are not good," and "it was obvious that quite a cloud of

[57] Ex. 39, Jock McCulloch, *Women Mining Asbestos in South Africa, 1893-1980*, 29 J. S. AFR. STUD. 2 (Jun. 2003), at Cape_Receiver_00248445.

[58] Ex. 40, Attendance at Conferences Etc. (1959-1972), at Cape_Receiver_00133479.

[59] Ex. 41, Pneumoconiosis Research Unit, Report on the Progress of the Mesothelioma Survey, Apr. 30, 1962, at Cape_Receiver_00248466.

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dust was being produced and blown away by a fairly strong wind toward the town."[60] After local doctors advised Smither they had 10 active mesothelioma patients, Smither insisted that those patients be moved to Johannesburg at Cape's cost.[61] According to Smither, "[t]he advantage from the standpoint of the company is that these cases will be treated as a group, will be removed from the area of conflict, if one may call it that, and taken some hundreds of miles away."[62]

As Dr. Castleman explains, "Smither was concerned that discovery or documentation of so many cases in the Prieska hospital could further establish the lethality of crocidolite. The removal of the 10 Prieska patients was contrary to their best interests. They would endure a painful and frightening trip, be removed from their families who could not afford to go to Johannesburg, and there was no treatment for mesothelioma."[63]

Dr. Smither ultimately recommended that Cape ***suspend*** its support of the PRU Surveys: "My recommendation would be that the company should not support any future wide-ranging survey of the industry with a view to discovering either asbestosis or mesothelioma. The reason for this is that the company is well aware of the problem and has already some idea of its extent."[64] Following this recommendation, the PRU conducted no further asbestos surveys.

(ii) Dr. Richard Gaze's cover-up of the harm caused by amosite asbestos.

Dr. Richard Gaze, an employee of Cape beginning in 1943, served as Cape's Chief Scientist, and was an executive director of Cape beginning in 1961. He also served on NAAC's

[60] Ex. 42, Visit to South Africa by W.J. Smither, Aug. 1962 ("Smither Report"), at Cape_Receiver_00248283.

[61] Ex. 35, Castleman Report at 5.

[62] *Id.*

[63] *Id.*

[64] Ex. 42, Smither Report at Cape_Receiver_00248286.

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board of directors, and was spokesperson for the Asbestosis Research Council, which eventually purported to collaborate with "the Environmental Services Laboratory of Cape Industries Limited," set up by Cape in 1970, on monitoring techniques for asbestos dust.

As Cape's Chief Scientist, Gaze was responsible for educating customers on Cape's products. When Dr. Irving Selikoff produced a landmark 1964 study warning "that all the construction trades that worked alongside the insulators shared their risk, even the supervising architect," Gaze worked to distinguish Cape's asbestos fibers from that which already was identified as causative of disease and death. [65]

By March 1966, Gaze formulated Cape's response to valid concerns generated by Selikoff's report, which he characterized as a "scare":

> whether or not one accepts all of the clinical and statistical evidence concerning mesothelioma and its association with asbestos, it is a fact that not one authenticated case of mesothelioma has been associated with exposure to amosite anywhere in the world.[66]

In August 1966, the foregoing articulation became the company line to be used by Cape's salespeople.[67]

There was one problem with Gaze's statement: it was false, and he knew it. Gaze had spent seven years working at the Cape Barking plant in East London along with the then-plant manager, Anthony Mendelle, who described Gaze as a "very close" colleague. At a 1984 trial in Pennsylvania, Mr. Mendelle testified that in his time at the factory between 1956 and 1968,

[65] Ex. 35, Castleman Report at 7.

[66] Ex. 43, Letter from R. Gaze to R. Cryor, Mar. 22, 1966, at Cape_Receiver_00134022-3 (emphasis in original).

[67] *See* Ex. 44, Confidential Memo, Aug. 19, 1966, at Cape_Receiver_00134000 ("The same careful research, to which I have referred, has so far revealed not one case of mesothelioma associated with exposure to amosite asbestos.").

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Barking factory workers who worked in the amosite department were diagnosed with mesothelioma:

> Q. Mr. Mendelle, with respect to the Caposite department, where I think you testified amosite was used exclusively, were there any mesothelioma cases that came out of that department?
>
> A. Yes, many.[68]

Cape knew amosite asbestos caused mesothelioma. This and other concerns related to asbestos hazards ultimately led to Cape closing the Barking plant in 1968.[69]

2. Charter, Cape, and NAAC Perpetrated a Fraud on the U.S. Market.

Cape knew that asbestos was harmful decades before it established NAAC in the United States in 1953. That knowledge only deepened after it established NAAC; even as it experienced record sales of amosite and crocidolite fiber in the United States, Cape grew increasingly aware that people working at and living nearby its South African mines were developing and dying from mesothelioma, and that workers in the amosite-only portions of its Barking plant in East London were dying of mesothelioma and other asbestos-related diseases. Despite its longstanding understanding of the serious health hazards associated with asbestos, including mesothelioma and death, Cape suppressed this information, rejected initial consideration of a warning label, lobbied government agencies to accept less onerous standards, and made misleading public statements

[68] Ex. 45, Trial Testimony of A. Mendelle, Nov. 13, 1984, at Cape_Receiver_00116253.

[69] *Id.* at Cape_Receiver_00116235-6 ("Q. Mr. Mendelle, you said you closed the Barking plant in 1968; is that correct? A. Yes. Q. Do you know the reasons for that plant being closed? A. Yes Q. Did you close it or did you have orders to close it? A. I made recommendations to close it. Q. Why was the recommendation made? A. Because of the high incidence of asbestosis and death in the factory.").

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minimizing the risk of asbestos.[70] And it continued to sell its products to the U.S. market through its agent, NAAC.

It was only after Cape risked exposure to U.S. litigation that it considered leaving the U.S. market. Even when it closed NAAC's doors, though, Cape could not resist the opportunity to sell asbestos to U.S. companies. To avoid tort liability, Cape created a new sales company with a Liechtenstein parent company.

a. Cape Engaged in a Purposeful Scheme to Insulate Itself from Liability While Continuing to Take Advantage of the U.S. Market.

Following the federal Fifth Circuit's landmark 1973 decision in *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, the threat of litigation was looming in the United States. The threat was made more real the following year, when Cape was sued by William Morris and more than 400 other asbestos workers in what became known as the Tyler, Texas Action.[71]

This U.S. litigation precipitated a flurry of communications between Cape and NAAC regarding the future of NAAC and a concerted effort to insulate Cape from liability:

June 20, 1975: "it is possible that we may wish to do something to change the identity of NAAC in order to avoid exposing the company unnecessarily. At the same time, I am determined to do everything possible to maintain a successful selling operation in the United States."[72]

[70] *See* Ex. 46, Haroon Siddique, UK Asbestos Maker Withheld Information on Material's Risks, Court Papers Show (Mar. 20, 2022), https://www.theguardian.com/uk-news/2022/mar/20/uk-asbestos-maker-withheld-information-on-material-risks-court-papers-show#:~:text=%E2%80%9CThey%20clearly%20show%20that%20Cape,father%2C%20have%20lost%20their%20lives.

[71] Ex. 47, David Burnham, *Asbestos Workers' Illness—and Their Suit—May Change Health Standards*, N.Y. Times (Dec. 20, 1977), at Cape_Receiver_00248287-93.

[72] Ex. 48, Letter from Gaze to Morgan, June 20, 1975, at Cape_Receiver_00133112 ("thought I should send this to your home address so as to avoid unnecessary speculation in the office.").

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June 25, 1975: "we feel that it may be advisable to change the identity of NAAC in an attempt to limit its and Cape's exposure to future U.S. litigation."[73]

July 4, 1975: to avoid future Cape liability for NAAC, Gaze and Higham resigned from the NAAC board: "Tony [Penna] has recommended that it would be as well for Mr. Higham and me to resign from these and other boards which could conceivably be involved in future actions. You will understand that the reason for this is to dissociate the Parent Company as fully as possible from the operating companies and that it does not imply any change whatever in the method of operation or the present responsibilities of individuals concerned, including yourself."[74]

July 15, 1975: Tony Penna sends Gaze and Higham's resignation letters to Max Meyer, noting "we feel that it would be a sensible precaution against Cape involvement in any future proceedings for Mr. Higham and Dr. Gaze to resign from the N.A.A.C. Board."[75]

October 3, 1975: Max Meyer writes a detailed strategy letter to Tony Penna, opening with, "The objective under consideration is an attempt to limit NAAC's and Cape's exposure to future United States litigation," and going on to discuss the potential liquidation of and replacement for NAAC.[76]

Indeed, in connection with that personal injury action, Cape and NAAC ultimately entered into a $1 million settlement in litigation, with NAAC contributing $100,000 toward settlement.[77] But rather than take responsibility for their tortious conduct, the Tyler, Texas litigation prompted Cape

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[73] Ex. 49, Letter from A. Penna to M. Meyer, June 25, 1975, at Cape_Receiver_00133116-7 (observing that if Cape Canada were to replace NAAC, "we would probably change the name and ensure that shareholding was held through another *seemingly unconnected subsidiary* such as Amosa."). Ultimately, Cape elected not to use Cape Canada but did use a "seemingly unconnected subsidiary" in Lichtenstein called Associated Mines Company to escape detection and exposure, *see infra*.

[74] Ex. 50, Letter from R. Gaze to C. Morgan, July 4, 1975, at Cape_Receiver_00133328.

[75] Ex. 51, Letter from A. Penna to M. Meyer, July 15, 1975, Cape_Receiver_00133347.

[76] Ex. 52, Letter from M. Meyer to A. Penna, Oct. 3, 1975, at Cape_Receiver_00133925-30.

[77] *See* Ex. 52, Deposition of M. Meyer, Mar. 24, 1981, at Cape_Receiver_00098328. In addition to the $100,000 from NAAC, Cape contributed $1,000,000, and NAAC's insurers contributed $4,000,000. *See* Ex. 53, Deposition of A. Penna, Mar. 14, 1988, at Cape_Receiver_00132204. Cape admitted that some insurance was still available and that it was in the best interest of Cape companies, other than NAAC, to not respond to new litigation. *See* Ex. 54, Cape_Receiver_00127912; Ex. 55, Cape_Receiver_00127885.

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to liquidate NAAC, create a new, disguised U.S. company to continue its U.S. operations, and openly refuse to participate in future U.S. litigation.[78] A single tort case against Cape was enough to begin the process of extracting Cape from the U.S. market.

NAAC was liquidated effective January 31, 1978.[79] Existing commercial debts were paid, with any remaining assets transferred upstream to NAAC's direct parent company at the time, Cape Industries Overseas Ltd.—a U.K. entity wholly owned by Cape Industries Ltd., formed in 1975 to create the ***appearance*** of separation.[80] As part of its overall scheme, and in light of Cape's funneling of cash from NAAC to overseas entities over many years, NAAC's assets at liquidation were minimal, especially when compared to the total wealth of Cape and the broader Oppenheimer empire.[81] NAAC's liquidation was central to Cape's liability-avoidance strategy, based on legal

[78] Ex. 56, Dec. 23, 1975 Correspondence from S. Milwid to A. Penna, Dec. 23, 1975, at Cape_Receiver_00127259-61. A memorandum laid out that "a new corporate arrangement is being made concerning entities which will sell asbestos to purchases in the Western Hemisphere" and that the purpose of doing so is to eliminate or reduce as much as much exposure as possible. *See* Ex. 57, Memo from M. Meyer to A. Sarabia, Jan. 23, 1978, at Cape_Receiver_00133618-20.

[79] *See, e.g.* Ex. 58, Letter from J. Holtze to J. Sparkes, Apr. 19, 1978, at Cape_Receiver_00134134 (April 1978 letter noting liquidation and requesting, "for safety's sake," that Cape officials stop sending accounting memoranda to former NAAC officials).

[80] *See* Ex. 59, Memo from M. Grear to M. Meyer, Dec. 30, 1980, at Cape_Receiver_00127960-62 (noting conveyance of assets); Ex. 58, Letter from J. Holtze to M. House, Oct. 7, 1975, at Cape_Receiver 00127204 (noting new entity).

[81] *See, e.g.,* Ex. 54, Letter from A. Penna to M. Meyer, Mar. 23, 1979, at Cape_Receiver_ 00127912 (Cape counsel writing in 1979 with respect to whether the remaining assets in the NAAC liquidating trust should be written off, soon after its creation); *see also* Ex. 60, Letter from S. Milwid to A. Penna, Mar. 7, 1979, at Cape_Receiver_00127909 (1979 correspondence noting that NAAC's auditor "agree[d] that the potential loss of all NAAC's outstanding assets is not material in the Cape Group context" (capitalization altered)); Ex. 61, Letter from S. Milwid to C. Morgan, May 24, 1978, at Cape_Receiver_00127882 (1978 correspondence noting judgment non-enforceability and "[auditor] advice to [Cape] that the loss of NAAC's outstanding assets is not material in the Cape Group context").

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advice that no British or South African court would enforce a judgment against a Cape entity if it never appeared again in the United States.[82]

At the same time, the Oppenheimer entities, fixated on maximizing profits,[83] schemed to continue selling Cape asbestos—and many other Charter products[84]—in the United States.[85] Their scheme, which included establishing a Lichtenstein invoicing company, allowed the

[82] *See, e.g.*, Ex. 56, Letter from S. Milwid to A. Penna, Dec. 23, 1975, at Cape_Receiver_00127259-61 (1975 legal letter advising Cape on default-judgment risk); Ex. 55, Memo, S. Milwid to A. Penna, May 24, 1978, at Cape_Receiver_00127885 (1978 memorandum agreeing that it would be in the "best interests of Cape companies other than NAAC" to make "no response" to litigation); Ex. 62, Memo, S. Milwid to E. Burkholder, Nov. 28, 1984, at Cape_Receiver_00128026-8 (summarizing 1984 deposition testimony regarding litigation strategy).

[83] The decision to liquidate NAAC occurred notwithstanding consistent years of record profits from Cape's sale of asbestos fiber in the United States. *See, e.g.* Ex. 63, Charter, Annual Report (1976), at Cape_Receiver_00075720, Cape_Receiver_00075751-52 (reporting £10.2 million of operating profit "in spite of difficult trading conditions, with the "greatest increase" in improved profit "arising in the mining division, which raised total tonnage both mined and sold," even despite "substantial price increases"); Ex. 064, Charter, Annual Report (1977), at Cape_Receiver_00075769, -75773 (reporting another "record year" from Cape with pre-tax profit of £14.2 million, with the "mining division again perform[ing] exceptionally well").

[84] Ex. 065, J. Clarke Deposition, Apr. 21, 1983, at Cape_Receiver_00100736-7.

[85] *See* Ex. 53, Testimony of A. Penna, Mar. 14, 1988, at Cape_Receiver_00132232 (discussing Cape board meeting minutes from November 1, 1977, Penna testified, "It is clearly indicated in [paragraph] 9 that there was to be a reorganization of the selling arrangements following from the liquidation of NAAC.").

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Oppenheimers to continue to profit from the lucrative U.S. market while hiding themselves from future U.S. asbestos plaintiffs.[86] In short, it was profits over people.[87]

Cape even disguised its scheme from NAAC's then-president, Charles Morgan. He testified that he was not made aware of the decision to close NAAC until the decision had been made: "I remember it well, I don't remember the exact date, but I remember it well. I think it was in late October of 1977. I was called down to Lord, Bissell & Brook and a Dr. Gaze, who was visiting, took me into a private room and gave me the big news. It was my very first indication. . . . He said that they had elected to discontinue distributing asbestos in this market and that they were liquidating [NAAC]."[88] When Dr. Gaze told Morgan that his employment was being terminated, Gaze was not in any executive position, nor was he a member of the board of directors of NAAC.[89] The news similarly came to Joan Holtze, NAAC's corporate secretary, "as an utter and absolute shock out of the blue."[90]

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[86] Due to the rising threat of civil litigation against Cape for its tortious and fraudulent conduct in hurting U.S. citizens, in 1975, Cape and its lawyers had to do "something to change the identity of NAAC" in order to avoid exposing [Cape Industries]." Ex. 48, Letter from R. Gaze to C. Morgan, June 20, 1975, at Cape_Receiver_00133112. *See also* Ex. 53, Testimony of A. Penna, Mar. 14, 1988, at Cape_Receiver_00132249 ("Q. With respect, what Cape wanted was to have the benefits of a presence in the United States of America without it being recognized, and hence the camouflage? A. That is an inference you could make if you chose to make it. . . . Q. What would be the would-be enquirer one was trying to disguise it from? A. The Would-be enquirer could potentially be plaintiffs in future U.S. asbestos litigations.").

[87] Indeed, NAAC could have purchased additional insurance—it had the resources—but doing so was viewed as too expensive. *See* Ex. 132, Minutes of Annual Meeting of Directors of North American Asbestos Corporation, Apr. 28, 1977, at Cape_Receiver_00133883; *see also* Ex. 53, Excerpts of Testimony of A. Penna, Mar. 14, 1988, at Cape_Receiver_00132233 ("As the shareholder in NAAC, Cape certainly did not want to be putting more and more money into NAAC to fight legal claims if the insurers were not handling them, and bearing in mind NAAC's revenues which were not large.").

[88] Ex. 66, Deposition of C. Morgan, Feb. 20, 1981, at Cape_Receiver_00095966.

[89] Ex. 33, Deposition of C. Morgan, Oct. 31, 1980, at Cape_Receiver_00096088.

[90] Ex. 25, Deposition of J. Holtze, Nov. 7, 1980, at Cape_Receiver_00097943.

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Anthony Penna, in-house counsel for Cape with other senior roles in the Oppenheimer-related companies, orchestrated the plan to have Morgan open a new company—Continental Products Corporation ("CPC")—to perform the same facilitation services for Cape that NAAC had previously performed, with only "a difference in form."[91] It was plug and play, pure and simple.

CPC's offices were in the same building as NAAC had previously had its offices: "North American Asbestos was on the 29th floor and Continental Products Corporation took a lease on the 12th floor."[92] All of the NAAC filing cabinets that had been on the 29th floor had moved to the 12th floor, and all of the NAAC employees—Joan Holtze, Jean Canzoneri, and Sue Purrington—moved with Charles Morgan to CPC.[93] CPC also took over the NAAC employees' pension plan.[94] Joan Holtze testified that she sat at the same physical desk at CPC as she had when she worked for NAAC.[95]

Even before NAAC closed, Morgan reached out to customers to let them know of the formation of CPC, thereby ensuring a seamless sales transition between the companies.[96] To ensure

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[91] Ex. 53, Testimony of A. Penna, Mar. 14, 1988, at Cape_Receiver_00132247 ("It was a difference in form; and, as I have said, the Morgan company, new company, CPC, did carry on very much the same role that NAAC had carried on in trading terms."); *id.* at Cape_Receiver_00132236 ("Our mining companies wished to continue selling asbestos in the United States, yes. . . . There needed to be an organization which could liaise with the customers."), *id.* at Cape_Receiver_00132247 ("Certainly, Howard Tanner, the Sales Director of the South African mining companies was extremely keen to ensure that sales to America, that is there could be some continuation of sales to American customers.").

[92] Ex. 66, Excerpts of Deposition of C. Morgan, Feb. 20, 1981, at Cape_Receiver_00095991.

[93] *Id.* at Cape_Receiver_00095992-3.

[94] *Id.* at Cape_Receiver_00096066.

[95] Ex. 67, Deposition of J. Holtze, Apr. 12, 1979, at Cape_Receiver_00097838-9.

[96] Ex. 66, Deposition of C. Morgan, Feb. 20, 1981, at Cape_Receiver_00096022. ("I advised them that North American Asbestos was being liquidated, it was no longer to be in the position to supply them with fiber, I had made a connection where I thought I could supply them with fiber, I would

the success of the new venture, Morgan testified that CPC received a $12,000 check "[c]are from North American Asbestos" to start the company.[97] Once Morgan agreed to establish CPC, Cape's lawyers at Lord Bissell drew up the incorporation documents.[98] Rather than establishing a direct connection between the newly formed CPC and a Cape-named company, Penna spearheaded the creation of a Liechtenstein company, Associated Minerals Corporation ("AMC"), a seemingly unrelated entity, which was in truth an Oppenheimer subsidiary. As Penna described, "everyone was concerned whether they were mining companies or Cape Industries or any company that was a party to these sales should not by its actions put either the mining companies or Cape at risk."[99] "The Lichtenstein company was a separately constituted company but it certainly had no direct employees of its own. . . . It was primarily an invoicing company."[100] Cape's fingerprints were all over the deal. Confronted with evidence, Penna was forced to admit, "Yes, it seems to be contemplated that Cape Asbestos Fibres would subscribe the initial capital."[101]

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like their consideration very much."); Ex. 66, Deposition of C. Morgan, Feb. 20, 1981, at Cape_Receiver_00096003, Cape_Receiver_00096063-4 ("Q. When Tony Penna contacted you on behalf of the Lichtenstein corporation you knew, did you not, in fact he was actually contacting you on behalf of Cape Asbestos? A. No, Sir, I did not know that."); *id.* at Cape_Receiver_00096064 ("Q. Do you know who owns the Lichtenstein corporation? A. No, Sir. Q. Has anyone ever suggested to you that Cape Asbestos has some ownership in the Lichtenstein corporation, Associated Minerals Corp.? A. Definitely not. Q. has anyone ever suggested to you that any of the principals of Cape Asbestos had some interest in that Liechtenstein corporation? A. No, Sir.").

[97] Ex. 66, Deposition of C. Morgan, Feb. 20, 1981, at Cape_Receiver_000 96000.

[98] *Id.* Cape_Receiver_000 95988 ("Q. Who drew the Articles of Incorporation? A. Mr. Max Meyer. At least I asked him to do this work for me. Who actually did the work I couldn't say.").

[99] Ex. 53, Excerpts of Testimony of A. Penna, Mar. 14, 1988, at Cape_Receiver_00132246.

[100] *Id.* at Cape_Receiver_00132239-40.

[101] *Id.*

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While Cape averred that Morgan was well aware of the connection to Cape,[102] in reality, the true scheme was on a need-to-know basis, and Morgan did not need to know anything. He was simply Cape's U.S. puppet. Morgan testified that Tony Penna "said he was the attorney representing Associated Minerals Corporation."[103] Morgan testified that he did not know that Penna was contacting him on behalf of Cape.[104] He did not know who owned AMC, and no one had suggested to him that there was a relationship between Cape and it.[105] In this way, Cape escaped liability, but continued selling asbestos fibers to virtually the same contact list using a shell game and companies in Liechtenstein and South Africa to conceal any connection between it and the United States.

b. Charter Participated in the Fraud.

Cape, of course, did not act in a vacuum. It was part of the Oppenheimer Group System and was the profit generating center of Charter. Charter relied on Cape for dividends and service fees, the payment of which were premised on Cape making a profit. Importantly, Charter was a

[102] *Id.* at Cape_Receiver_ 00132215 ("Q. And also the reason why you did not wish the new arrangements [related to Cape's involvement in setting up CPC] to become publicly known? A. Yes, I did. I think that it probably omitted one additional reason – that certainly Mr. Morgan in his new entity would not have wanted it to be disclosed that he was dealing with a company that was still related to Cape.").

[103] Ex. 66, Deposition of C. Morgan, Feb. 20, 1981, at Cape_Receiver_00096003.

[104] *Id.* at Cape_Receiver_00096063-4 ("Q. When Tony Penna contacted you on behalf of the Lichtenstein corporation you knew, did you not, in fact he was actually contacting you on behalf of Cape Asbestos? A. No, Sir, I did not know that.").

[105] *Id.* at Cape_Receiver_00096064 ("Q. Do you know who owns the Lichtenstein corporation? A. No, Sir. Q. Has anyone ever suggested to you that Cape Asbestos has some ownership in the Lichtenstein corporation, Associated Minerals Corp.? A. Definitely not. Q. Has anyone ever suggested to you that any of the principals of Cape Asbestos had some interest in that Liechtenstein corporation? A. No, Sir.").

holding company which conducted virtually all of its business through subsidiaries like Cape, and the Charter made money through dividends and the like from such investments.[106]

Cape's board, whose membership included Charter employees, was made aware of the progress of the Tyler, Texas litigation against Cape, and of Cape's decisions related to its continued sale of asbestos in the United States. Geoffrey Higham, who served as both a Cape board member and a Charter employee (as well as a Cape employee and a NAAC board member at various points), testified at deposition that he was aware plans were being made to continue to sell asbestos in North America as soon as NAAC closed: "I mean clearly I would have known generally that it was being done and it was clearly necessary that it should be done."[107] He further testified, "I think all of this is entirely consistent with Cape's position that it did not feel liable for damage to people in the United States caused by asbestos, which it had supplied through subsidiaries, but felt that employers here should be picking up that tab. Equally, I think Cape felt that the supply of asbestos was not of itself an iniquitous thing to do since, if handled properly, it is not dangerous."[108]

At another deposition ten years later, Higham testified as follows: "[w]e didn't like the rules, we didn't think that it was a reasonable burden to place upon a supplier of material that he should control how the material was used. We thought, we still think, I feel very strongly that it was a totally ridiculous way of proceeding and so, we withdraw. We say, fine, we don't like the rules, we don't like that playing field so we won't have any more to do there."[109]

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[106] Ex. 68, Deposition of G. Higham, Oct. 17, 1986, at Cape_Receiver_00096909.

[107] *Id.* at Cape_Receiver_00096935.

[108] *Id.* at Cape_Receiver_00096936.

[109] Ex. 68, Deposition of G. Higham, Oct. 24, 1996, at Cape_Receiver_00097120. This testimony was consistent across Cape's board of directors. *See, e.g.*, Ex. 10, Deposition of F. Howard, Nov. 13, 1980, at Cape_Receiver_00100178-9 ("I think it was something along the lines that there were cases against the company which would eventually exhaust its funds and, therefore, there was no further purpose in continuing the company's operations."); Ex. 69, Deposition of A. Hepper, Oct.

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Indeed, Charter reported on Cape's liability avoidance scheme in its 1982 Annual Report:

> Cape has received legal advice that default judgments, in certain of which plaintiffs have been granted damages totalling approximately US$57 million, and any other judgments obtained in the United States in such actions against Cape group companies will not be enforceable in the United Kingdom. The directors believe, in light of legal advice received, that the outcome of all the actions against Cape and Charter and the obligations retained by Cape are unlikely to have any material effect on Charter's financial position, and accordingly no provision for them has been made.[110]

c. Cape Pivots to Asbestos Abatement.

In 1982, Cape purported to cease all manufacturing of asbestos products.[111] Cape then made the incredible about-face into "[a]sbestos management and removal," leveraging its history of dominance in asbestos manufacturing and distribution.[112] It later evolved into a scaffolding company primarily for the oil and gas industry.[113]

F. Altrad and ESAB Acquire Cape and Charter, Respectively.

Although neither individually was present for the initial decision to perpetrate the liability avoidance scheme that has worked a fraud on the U.S. market, both Altrad and ESAB benefitted

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6, 1986, at Cape_Receiver_00095547 ("I don't think the company were in a – the company felt that they were not responsible for other people's employees. They were responsible for employees in the United Kingdom and they were adopting a responsible attitude in that regard. They were not in a position financially to withstand claims the size that were being mounted in the United States.").

[110] Ex. 70, Charter, Annual Report (1982), Cape_Receiver_00076050.

[111] Ex. 71, Cape_Receiver_00244898-9, *Cape Website: Our History* (May 17, 2013), *available at* https://web.archive.org/web/20130517130040/http:/www.capeplc.com/about-cape/our-history.aspx (last visited Nov. 8, 2024).

[112] Ex. 72, Cape_Receiver_00244891-2, *Cape Website: Our Services, Insulation* (Oct. 20, 2012), *available at* https://web.archive.org/web/20121020173812/http://www.capeplc.com/services-and-markets/our-services/insulation.aspx (last visited Nov. 8, 2024).

[113] Ex. 71, Cape_Receiver_00244898-9, *Cape Website: Our History* (May 17, 2013), *available at* https://web.archive.org/web/20130517130040/http:/www.capeplc.com/about-cape/our-history.aspx (last visited Nov. 8, 2024).

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from and bear responsibility for that decision—as well as for the litigation avoidance scheme that they actively continue today, including in this action.

1. *The Altrad Owners Acquired 100% of Cape and Are Responsible for Cape.*

Since 2017, Cape has been part of the Altrad Group, a self-described "world leader in industrial services with a turnover of £5 billion per year."[114] In particular, on or around October 9, 2017, AIA, through Altrad UK Ltd. (controlling Cape UK Holdings Newco Ltd.), acquired Cape for £332 million, and has controlled it since that time.[115] AIA, the head of the Altrad Group, purchased Cape through its wholly owned subsidiary, the defaulted Third-Party Defendant Altrad UK Ltd., which (i) was incorporated in June 2017 for the purpose of acquiring Cape, (ii) acts as a "wholly owned subsidiary of AIA [that has been] financed by AIA through a current account," and (iii) also "proceeded to refinance Cape's debt" as part of the acquisition.[116] AIA publicly touted the acquisition of Cape as an "exceptional opportunity" to acquire "one of the world's leading providers of services to industry."[117]

The Altrad Group—and thus Cape—is controlled by its President and Founder, Mohed Altrad, the so-called "Scaffolding King" who was convicted of corruption charges in a French

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[114] Ex. 73, Correspondence from Winston & Strawn London LLP to Peter D. Protopapas, at 2 (Aug. 30, 2024).

[115] Ex. 74, Altrad, Annual Report (2017), at Cape_Receiver_00040530 ("The acquisition of Cape PLC shares was carried out through the intermediary holding company Altrad UK, a wholly owned subsidiary of AIA and financed by AIA through a current account."); *see id.* at Cape_Receiver_00040529.

[116] Ex.75, Certificate of Incorporation of a Private Limited Company, Altrad UK Limited (June 1, 2017), at Cape_Receiver_00185738-72 (identifying AIA as owner of all shares and Mohed Altrad as sole "Individual Person with Significant Control" and as Company Director 1 and Chairman); Ex. 74, Altrad, Annual Report (2017), at Cape_Receiver_00040530-1;; Reuters, Altrad Investment to Buy UK Oil Services Firm Cape for 332.2 Mln Pounds (July 7, 2017), https://www.reuters.com/article/cape-ma-altrad-investment/altrad-investment-to-buy-uk-oil-services-firm-cape-for-332-2-mln-pounds-idUSL4N1JY2KG.

[117] Ex. 74, Altrad, Annual Report (2017), at Cape_Receiver_00040529.

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court in 2022.[118] Upon Altrad UK Ltd.'s formation in 2017 for the purpose of the acquisition of Cape, and continuing after the acquisition, Mr. Altrad was director of Altrad UK Ltd. and later a director of Cape UK Holdings Newco Ltd. and Cape Industrial Services Group Ltd.[119] Indeed, in the year the Altrad Group acquired Cape, Mr. Altrad "h[e]ld 77.78% of the [Altrad Group's] shares."[120] Since AIA's acquisition of Cape, Mr. Altrad's control has only grown. The annual reports of Altrad UK identifies AIA as being "controlled by Dr M Altrad."[121] Further, as of September 30, 2023, Mr. Altrad controlled 97.60% of the Altrad Group.[122]

Altrad purchased Cape fully aware of Cape's asbestos liabilities.[123] When Altrad purchased Cape in 2017, it stated its intention to ensure that members of the Cape Group continued

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[118] *See* Ex. 76, Altrad, Annual Report (2022), at Cape_Receiver_00040825; *see also* Ex. 77, Gaspard Sebag & Tara Patel, *Billionaire Scaffolding 'King' Guilty of Bribing Rugby Boss*, Bloomberg (Dec. 13, 2022) (reporting Mr. Altrad's 2022 conviction of bribery, influence peddling, and misuse of corporate assets charges, punished with an 18-month suspended jail term and €50,000 fine), https://www.bloomberg.com/news/articles/2022-12-13/scaffolding-billionaire-convicted-of-corruption-over-sponsorship#xj4y7vzkg.

[119] Ex. 75, Certificate of Incorporation of Altrad UK Ltd., June 1, 2017, at Cape_Receiver_00185738 (showing creation of company one month prior to media reports of Cape takeover); Ex. 74, Altrad, Annual Report (2017), at Cape_Receiver_00040530 ("The acquisition of Cape PLC shares was caried out through the intermediary holding company Altrad UK, a wholly owned subsidiary of AIR and financed by AIA." (modified from all caps)); *see also* Ex. 78, Termination of a Director Appointment of Altrad UK Ltd., Nov. 11, 2017, Cape_Receiver_00185779; Ex. 79, Termination of a Director Appointment of Cape UK Holdings Newco Ltd., Oct. 29, 2020, Cape_Receiver_00187939; Ex. 94, Termination of a Director Appointment of Cape Industrial Services Group Ltd., Oct. 29, 2020, Cape_Receiver_00187592.

[120] Ex. 74, Altrad, Annual Report (2017), at Cape_Receiver_00040519.

[121] Ex. 80, Altrad UK Ltd., Annual Report (2021), at Cape_Receiver_00185906.

[122] Ex. 81, Altrad, Annual Report (2023), at Cape_Receiver_00040879.

[123] Altrad's 2017 Annual Report acknowledged Cape's establishment (pursuant to a Scheme of Arrangement) of a compensation fund in 2006 for its employees who were exposed to asbestos. Ex. 74, Altrad, Annual Report (2017), at Cape_Receiver_00040530; *see also* Ex. 82, The Scheme Of Arrangement, June 9, 2006, Cape_Receiver_00104532-56.

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to fund their commitments to the Scheme of Arrangement established in 2006 (the "IDC Scheme") to address certain asbestos liabilities:

> Altrad has undertaken to the IDC Scheme Directors and the IDC Scheme Shareholder that, whilst it intends to explore collaboratively with the IDC Scheme Directors and the IDC Scheme Shareholder (subject always to the appropriate consent of the IDC Scheme Directors and the IDC Scheme Shareholder) certain administrative revisions or clarifications to Cape's constitutional documents to facilitate intra-group transactions between members of the Enlarged Group post-Acquisition and to assist financial reporting following the Acquisition, ***it intends to procure that each member of the Cape Group honours its obligations under, or in connection with, the IDC Scheme (including with respect to the funding commitments for future liabilities of the IDC Scheme, the current IDC Scheme administrative arrangements and all related contractual obligations to which members of the Cape Group are subject) following completion of the Offer***.[124]

In the years since the acquisition, Altrad has continued to acknowledge Cape's asbestos liabilities—and reaffirm its responsibility for them. For example, in its annual report for the year ended August 31, 2022, Altrad Services Ltd. (a member of the Altrad Group and another Third-Party Defendant against which default has been entered) not only acknowledged Cape's responsibility for harm from asbestos exposure, reporting that the Altrad Group had set aside £118 million to address certain ***non-U.S.*** historical claims relating to asbestos exposure, but also disclosed AIA's letter of support of it as a going concern.[125] That 2022 annual report stated that

[124] Ex. 83, Recommended Cash Offer for Cape plc, Cape_Receiver_00104914-40 (emphasis added).

[125] Ex. 84, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2022, at Cape_Receiver_00248438 ("The Group continues to receive claims, from both individuals and insurance companies, in connection with historical alleged exposure to asbestos. Where claims are determined to have merit, the costs are provided for and claims are settled in the ordinary course, otherwise claims are defended."); Ex. 85, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2023, at Cape_Receiver_00248371 (referring to the letter of support from AIA, which "confirms continuing support for the going concern period until 30 April 2025").

AIA "manages risk at a Group level"[126] and further acknowledged that "[m]any of [AIA's] operating environments have associated health and safety risks," including Cape: "The Company [Altrad Services Ltd.] is maintaining a provision in respect of lodged and future industrial disease claims for which the Board of Directors of Cape plc believes the Group to be liable, arising on alleged exposure to previously manufactured asbestos products."[127] The Altrad Group thus made a £118.1 million provision of funds to address certain non-U.S. historical asbestos claims that reportedly "captured all expected material industrial disease scheme liabilities for which the Board believes ***the Group may become liable***" (the "Provision of Funds").[128]

Most recently, AIA's 2023 Annual Report acknowledged its asbestos liability and affirmed its commitment to pay a limited number of claims pursuant to a court order:

> When Altrad acquired Cape in 2017, the acquired business had well disclosed outstanding claims related to the manufacture and distribution of asbestos in the mid twentieth century and the resulting damaging health consequences of exposure, leading to related industrial diseases including mesothelioma. Altrad . . . ***is fully committed to settling claims that are determined to have merit*** pursuant to Cape's court approved mechanism for settling such claims. An amount of £ 118 million has been paid or set aside for the settling of valid claims.[129]

[126] Ex. 84, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2022, at Cape_Receiver_00248391.

[127] *Id.* at Cape_Receiver_00248392.

[128] *Id.* at Cape_Receiver_00248438 (emphasis added); *see also* Joshua Stein, *Altrad Makes £118m Provision for Asbestos Claims*, Construction News (Apr. 14, 2023), *Available at* https://www.constructionnews.co.uk/health-and-safety/altrad-makes-118m-provision-for-asbestos-claims-14-04-2023/#:~:text=Altrad%20has%20set%20aside%20%C2%A3,historic%20alleged%20exposure%20to%20asbestos

[129] Ex. 81, Altrad, Annual Report (2023) at Cape_Receiver_00040862 (emphasis added). This mechanism for payment of claims, of course, does not account for claims by U.S. plaintiffs; it is limited to Cape's former U.K. employees.

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In the years since it acquired Cape, AIA also has exercised operational control over Cape on issues ranging from branding—as reflected by its renaming of Cape entities, including defaulted Third-Party Defendant Altrad Services Ltd. (f/k/a Cape Industrial Services Ltd.)—to risk management.[130] As part of its risk management for the Altrad Group, AIA has continued Cape's policy of litigation avoidance, with Cape refusing to participate in litigation in the United States relating to its historic asbestos sales (including in the *Park* lawsuit), and instead accepting default judgments.[131]

2. *ESAB Is Responsible for Charter*.

The story of Charter is a tortured one of constant reorganizations. Despite this history, there is no question that ESAB, a Delaware company created in 2022, holds the liability for Charter.

Beginning in 1994, Charter became intertwined with ESAB, first with ESAB as a subsidiary of Charter, and then ultimately, with ESAB as Charter's parent. The following is a timeline of critical events in this history:

1993: Charter plc ("New Charter") acquires all the interest of Charter Consolidated pursuant to a 1993 Scheme of Arrangement.[132]

1994: New Charter acquires all of the equity interests of ESAB AB.[133]

[130] Ex. 84, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2022, at Cape_Receiver_00248391 ("The Board of [AIA] (the ultimate parent company) manages risk at a Group level"); *id.* at Cape_Receiver_00248439 ("Altrad Services Limited (formerly Cape Industrial Services Limited)").

[131] Ex. 84, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2022, at Cape_Receiver_00248391 (AIA "manages risk at a Group level," including with respect to asbestos-related claims).

[132] Ex. 86, 1993 Scheme of Arrangement, Aug. 18, 1993, Cape_Receiver_00178003-16.

[133] Ex. 87, ESAB Holdings Limited Annual 1994 Report (ESAB Holdings Limited was a subsidiary of ESAB AB).

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2008: Charter International Limited ("PubCo Charter", and formerly known as Charter International PLC) is formed. Pursuant to a 2008 Scheme of Arrangement, Pubco Charter acquires all of the equity interest of New Charter.[134]

2011: Colfax UK Holdings Ltd., a wholly-owned subsidiary of Colfax Corporation ("Colfax Parent"), acquires all of the equity interest of Pubco Charter (including Esab) pursuant to an Implementation Agreement and effected by a Scheme of Arrangement.[135]

2021: Colfax Parent forms ESAB Corporation, a Delaware corporation.[136]

2022: Colfax Parent, the ultimate parent of Colfax UK Holdings, completes a spin-off of ESAB Corporation, the parent of Colfax UK and indirect parent of PubCo Charter. In this spin-off, PubCo Charter, which holds the Charter liabilities, spun off into ESAB Corporation.[137]

When Colfax spun off ESAB Corporation as a public entity which was the parent company of Charter, it agreed to assume certain liabilities of its subsidiaries and provided certain financial guarantees to its subsidiaries.[138] Indeed, post-separation, several Charter subsidiaries reported that ESAB Corporation was their ultimate parent and "controlling party" and that ESAB Corporation had agreed to meet all liabilities with respect to their ability to operate as going

[134] Ex. 88, 2008 Scheme of Arrangement, Cape_Receiver_00182324-31.

[135] Ex. 89, Implementation Agreement, dated as of September 12, 2011, by and among Colfax Corporation, Colfax UK Holdings LTD and Charter International PLC, Cape_Receiver_00102613-95.

[136] Ex. 90, Certificate of Incorporation of ESAB Corporation, dated May 19, 2021, Cape_Receiver_00185411-3.

[137] Ex. 91, Separation and Distribution Agreement, by and between Colfax Corporation and ESAB Corporation (hereinafter "Separation Agreement") (April 4, 2022), at Cape_Receiver_00183869-936. New Charter later transferred the shares of ESAB AB to ESAB Group Limited, a newly formed wholly owned subsidiary, which itself was later renamed Charter Overseas Holdings Limited and was the parent company of various ESAB entities until 2011.

[138] Ex. 91, Separation Agreement, § 2.1(a), at Cape_Receiver_00183887 ("Transfers of Assets and Assumptions of Liabilities; ESAB Assets; Enovis Assets.") (emphases added).

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concerns.[139] Post-separation, ESAB has continued the familiar liability avoidance strategy, refusing to acknowledge this Court's jurisdiction over it or to participate in discovery.

G. Procedural History.

1. *This Court Appointed the Receiver When Cape Failed to Appear in an Asbestos Personal Injury Action.*

On June 4, 2021, Isabella Park filed a lawsuit in Richland County, South Carolina asserting personal injury claims arising from asbestos exposure against (among others), Cape plc, individually and as successor in interest to Cape Asbestos Company Ltd. *See* Compl., *Park v. Armstrong Int'l, Inc. et al.*, No. 2021-CP-4002727 (June 4, 2021), at 1, 7. Ms. Park sought relief after being "diagnosed with mesothelioma caused by exposure to asbestos dust and fibers" unintentionally "brought home" for years "as a result of her husband's work with and around asbestos-containing products." *Id*. at ¶ 4.

On June 9, 2021, less than five months after her diagnosis, and within five days of filing her lawsuit, Ms. Park passed away. On November 17, 2021, Ms. Park's son, Keith, amended the complaint, appearing individually and as personal representative to Ms. Park's estate (the "*Park* Plaintiffs), to assert a wrongful death action. *See* First Amended Compl., *Park et al. v. Armstrong Int'l, Inc., et al.*, No. 2021-CP04002727 (Nov. 17, 2021). The amended complaint added Cape Intermediate Holdings Limited (f/k/a Cape Intermediate Holdings PLC) as a defendant, though both Cape Intermediate Holdings Limited and Cape PLC referred to the same English company originally named Cape Asbestos Company Ltd. and were both identified as the successors in interest to that company. *Id.* at 9; *see also id.* at ¶¶ 26–27. In December 2021, the *Park* Plaintiffs

[139] *See, e.g.*, Ex. 92, 2022 Charter Consolidated Ltd. Report (Oct. 25, 2023), Cape_Receiver_00172486; Ex. 93, 2023 Central Mining & Inv. Corp. Ltd. Report (Mar. 27, 2024), Cape_Receiver_00172654.

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served the named Cape entity, which (as has been Cape's practice for decades) never answered, moved, or otherwise responded.

After Cape failed to answer the *Park* Complaint, Ms. Park moved for the appointment of a Receiver. *See* Mot. to Appoint Receiver (March 6, 2023) (2021-CP-40-02727, Richland County). On March 17, 2023, this Court appointed Peter D. Protopapas as a receiver for an entity identified as "Cape PLC as successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.)" pursuant to S.C. Code § 15-65-10(5), as well as § 15-65-10(4) in the alternative. *See* Order, *Park et al. v. Armstrong Int'l, Inc., et al.*, No. 2021-CP-4002727 (Mar. 17, 2023) ("Appointment Order"), at 1.

2. *The Receiver Initiated this Third-Party Action Against Participants to and Beneficiaries of Cape's Liability Avoidance Scheme.*

Following his appointment, the Receiver confirmed from court records and other publicly available information that Cape's failure to appear in *Park* was just one example of a decades-long liability avoidance scheme described herein. Further, the Receiver discovered that rather than perpetuate that scheme alone, Cape's business practices were directed, guided, and inured to the benefit of numerous entities associated with Cape over their histories.

On June 30, 2023, the Receiver filed the above-captioned action against third-party defendants with responsibility for Cape's fraud on the U.S. market in arising from its Cape's U.S.-based asbestos sales and associated diversion of proceeds outside of the United States and its attendant Cape's liability avoidance scheme, including the Charter and Altrad Third-Party Defendants.

H. The Altrad and Charter Third Party Defendants' Ongoing Refusal to Participate in Discovery Results in Adverse Inferences.

The Altrad and Charter Third Party Defendants' refusal to participate in discovery, as chronicled below, has limited the Receiver's ability to learn key information related to its causes

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of action other than from publicly available sources. After a series of Motions to Compel directed to the Altrad and Charter Third-Party Defendants' wholesale refusal to participate in the discovery process, this Court entered adverse inferences against the Charter and Altrad Third-Party Defendants.[140] To date, the Altrad and Charter Third-Party Defendants have made no attempt to rebut those adverse inferences.

1. *Trial Continued Due to Third-Party Defendants' Refusal to Participate.*

Although originally set for a bench trial in the trial block set to commence April 15, 2024, the Court was forced to continue the trial during the April 10, 2024 pre-trial hearing "because of the Altrad and Charter Third Party Defendants' refusal to provide **any** discovery to the Receiver to prepare this case for trial." Order Granting Cape Receiver's Mot. for Sanctions (May 23, 2024); *see also* Order Setting Trial Date (June 20, 2024) (trial continued "due to the lack of participation in the discovery process" by the Charter and Altrad Third-Party Defendants). This matter was ultimately reset for trial on February 3, 2025.

2. *This Court Enters Adverse Inferences After It Grants Two Motions to Compel.*

Two Orders on Motions to Compel further demonstrate the Charter and Altrad Third-Party Defendants' discovery recalcitrance. First, on March 12, 2024, this Court directed all Third-Party Defendants "(i) to provide responsive, substantive, and complete answers to the Receiver's Discovery Requests within 14 days of entry of this Order and (ii) to begin producing documents in response to the Receiver's Requests for Production the same day," among other things.[141] The Third-Party Defendants did not meaningfully comply with this Order.

[140] *See generally* Order Granting Cape Receiver's Mot. for Sanctions (May 23, 2024).

[141] Order Granting Receiver's Mot. Compel Disc. Resps. (March 12, 2014), at 13.

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As a result, on May 23, 2024, this Court granted the Receiver's second Motion to Compel. This time, the Court found that the "only excuses offered by these Third-Party Defendants are frivolous. . . . They argue that Rule 205, SCACR, poses a jurisdictional bar preventing this third-party action from continuing, because by simply appealing [their] denied motions to dissolve the receivership, they can deprive the trial court of jurisdiction for an indeterminate time period." May 23, 2024 Order at 11-12. Citing a string of orders by the South Carolina Court of Appeals and the South Carolina Supreme Court in receivership actions, the Court reasoned, "Thus, the Supreme Court and Court of Appeals have made clear that—categorically—the denial of motions to dismiss and dissolve a receivership, like discovery orders, are not immediately appealable." *Id.* at 12.

The Court found that the Charter and Altrad Third-Party Defendants' "continued discovery misconduct"—*i.e.*, their refusal to participate in discovery "amount[ed] to bad faith, willful disobedience, and gross indifference to the rights of the Receiver and this Court's management of its docket," entered a series of adverse inferences against the Charter and Altrad Third-Party Defendants.[142]

As to Charter, adverse inferences included the following:

- It is " part of a single business enterprise . . ., ha[s] an amalgamation of corporate interests, entities, and activities, and ha[s] unified, integrated, and intertwined business operations and resources to achieve and act with a common business purpose" (Adverse Inference No. 71);
- It was" responsible for efforts to misinform companies, persons, and the general public about the health hazards associated with asbestos" (Adverse Inference No. 16);

[142] Order Granting Cape Receiver's Mot. Sanctions (May 23, 2024), at 15, 17, 27-31 ("[T]he Altrad and Charter Third-Party Defendants continue to refuse any effort at compliance with the Court's orders and the discovery rules of this State. Despite multiple warnings by this Court and directives to **proceed with discovery**, these Third Party Defendants have continued their misconduct while filing multiple frivolous appeals that, based on clearly applicable precedent, will inevitably be dismissed." (emphasis in original)).

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- It was "responsible for operating NAAC in an undercapitalized manner, including through the siphoning of funds from NAAC" (Adverse inference No. 17);

- Along with Central Mining, it "owned, dominated, and controlled Cape and its subsidiaries including NAAC, between 1965 and 1996, including with respect to their financing and capitalization" (Adverse Inference No. 20);

- It "seconded employees and other officials to work for Cape, or otherwise financed and spent resources for Cape, including for operational, marketing, research and development, and lobbying activities" (Adverse Inference No. 22);

- It was "aware that Cape asbestos was being sold or ultimately distributed into the State of South Carolina" (Adverse Inference No. 23);

- Charter was responsible for (i) "the decision to close and liquidate NAAC," and (ii) "designing ways to continue the flow of South African asbestos to US customers and the counterflow of asbestos profits out of the United States after the liquidation of NAAC," (Adverse Inference Nos. 30 and 32); and

- It was "part of a corporate arrangement to eliminate or reduce as much as possible [its] exposure in the United States to lawsuits brought against them for the sale of asbestos in the United States" (Adverse Inference No. 39).[143]

As to the Altrad Third-Party Defendants, the Court drew the adverse inference that "each of the Altrad Third-Party Defendants is responsible for or has benefitted unjustly from Cape's liability-avoidance scheme."[144] The Court also entered 46 separate adverse inferences, including as follows:

- Mr. Altrad is the majority shareholder of the Altrad Group and "controls the Altrad Group, including AIA" (Adverse Inference Nos 1, 2, 42);

- AIA and Mr. Altrad dominate and control Altrad UK Ltd. (Adverse Inference No. 11);

- AIA and Mr. Altrad were aware of Cape's asbestos-related liabilities and liability avoidance scheme prior to the acquisition of Cape" and "acquired Cape with the intent to continue Cape's liability avoidance scheme and refusal to respond to litigation in the United States" (Adverse Inference Nos. 12 and 13);

[143] *See generally* Order Granting Cape Receiver's Mot. for Sanctions (May 23, 2024).

[144] *Id.* at 27.

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- Since the acquisition, AIA and Mohed Altrad have dominated and controlled Cape, including with respect to its financing and capitalization" as well as appointment of executive personnel and directors (Adverse Inference Nos. 14 and 15); and

- AIA and Mr. Altrad "are responsible for Cape's continued failure to respond to litigation against Cape in the United States" (Adverse Inference Nos. 18, 32, and 33).[145]

As to ESAB, the Court drew several adverse inferences, including as follows:

- ESAB " obfuscated the relationship between ESAB and its post-spinoff subsidiaries—including Charter Consolidated Ltd. and Central Mining—and also historically with Cape, with the purpose of frustrating creditors and avoiding liability" (Adverse Inference No 55);

- ESAB " is the successor in interest to Central Mining and Charter Consolidated Ltd" (Adverse Inference No 56);

- "Charter Consolidated Ltd. [is] financially dependent upon ESAB Corporation" (Adverse Inference No 63); and

- "The Charter Third-Party Defendants—with Cape prior to 1996—are subject to the same total dominion and control, and ability to be influenced with respect to major business decisions and are mere instrumentalities for the purposes of committing fraud or other violations of statutory or legal duties—namely, by ESAB Corporation currently, and by Charter Consolidated Ltd. previously" (Adverse Inference No 69).

The Court emphasized that those inferences were rebuttable, should these Third-Party Defendants choose to start participating in the litigation and offering a viable defense. They have not.

3. *The Charter and Altrad Third-Party Defendants Persist in Refusal to Participate in Discovery.*

After entry of those adverse inferences, the Charter and Altrad Third-Party Defendants continued to pursue their strategy of stonewalling by filing serial improper interlocutory appeals[146]

[145] *Id.* at 27-31.

[146] In an attempt to avoid trial in this matter, the Third-Party defendants have filed 16 improper appeals of interlocutory orders. Most recently, on November 1, 2024, the Charter and Altrad Third-Party Defendants each filed appeals of the Court's October 2, 2024 Scheduling Order.

and then incorrectly claiming that the pendency of those appeals protects them from answering discovery.[147] The Altrad Third-Party Defendants also have refused to appear for depositions or provide substantive responses to any other discovery.[148] While the Receiver has reported these continued deficiencies to the Court, including initially in a June 11 report of the Third-Party Defendants' continued non-compliance, the Charter and Altrad Third-Party Defendants continue their non-compliances while fighting progress of this action in other ways.[149]

Because the Altrad and Charter Third-Party Defendants' ongoing wholesale refusal to participate in discovery, they have failed to adduce any evidence to contest their liability, much

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[147] *See, e.g.*, Ex. 95, Third-Party Def. Mohed Altrad's Resps. and Objs. Receiver's Second Set of Interrogs. and Second Set of Reqs for Produc., at 3 ("In addition to the Reservation of Rights stated above, the Third-Party Defendant objects to this Interrogatory on the grounds that the Circuit Court lacks jurisdiction, and the Receiver is without authority, to proceed with this matter at the present time, as all issues regarding the purported Receiver's appointment and his purported authority to engage in litigation are presently pending before the South Carolina Court of Appeals").

[148] *E.g.*, Ex. 96, Correspondence from T. Carroll to L. Seaborn et al. (Sept. 3, 2024) ("[T]he Altrad Defendants will not be attending these depositions. . . I'll be sending . . . our objections by separate cover[.]"); *see also, e.g.*, Ex. 133, Third-Party Defs.' Charter's Resps. Second Set Interrogs. (May 31, 2024) (refusing to provide responses to Second Set of Interrogatories); Ex. 97, Altrad Owners Third-Party Def. Mohed Altrad's Resps. and Objs. Receiver's Second Set of Interrogs. and Second Set of Reqs for Produc. (May 31, 2024) (refusing to provide responses to Second Set of Interrogatories and, as to Mohed Altrad, Second Set of Requests for Production); Ex. 98, Third-Party Def. Charter's Objs. Deps. (June 3, 2024) (stating no witnesses to appear on June 5–7, 2024); Ex. 99, Altrad Owners Third-Party Defs.' AIA and Mohed Altrad Objs. Deps. (June 9, 2024) (stating no witnesses to appear on June 10–11, 2024); Ex. 100, Third-Party Defs.' Arranco, Hawk Bidco, and Altrad Sparrows Objs. Deps. (June 10, 2024) (stating no witnesses to appear for depositions noticed for June 12–14, 2024); Ex. 101, Charter Third-Party Defs.' First Obj. Letter (July 8, 2024) (refusing to provide responses to Second Set of Requests for Production); Ex. 102, Charter Third-Party Defs.' Second Obj. Letter (July 16, 2024) (refusing to provide responses to Third Set of Requests for Production); Ex. 96, Altrad Owners Third-Party Defs.' Obj. Letter (Sept. 4, 2024) (stating no witnesses to appear on September 4 and 5, 2024); Ex. 103, Arranco, Hawk, and Sparrows' Third-Party Defs.' Obj. Letter, at 2 (Sept. 4, 2024) (stating no witnesses to appear on September 6, 10, and 11, 2024); Ex. 104, Charter Third-Party Defs.' Obj. Letter (Sept. 4, 2024) (stating no witnesses to appear on September 9, 12, and 13, 2024).

[149] *See, e.g.*, Altrad Third-Party Defs.' Obj. to Entry of New Order Setting Nonjury Trial (Sept. 26, 2024); Charter Third-Party Defs.' Obj. to Entry of New Order Regarding Non-Jury Trial (Sept. 26, 2024).

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less evidence sufficient to create a genuine issue of material fact or otherwise rebut the record evidence (or the adverse inferences made by this Court in its May 23 Order).

III. LEGAL STANDARD

"Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 575, 757 S.E.2d 399, 404 (2014) (citing Rule 56(c), SCRCP). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *McNair v. Rainsford*, 330 S.C. 332, 342, 499 S.E.2d 488, 493 (Ct. App. 1998) (citing *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 401 S.E.2d 537 (1991)). "With respect to any issue upon which the nonmoving party bears the burden of proof, this initial responsibility may be discharged by showing the trial court where there is an absence of evidence to support the nonmoving party's case." *McNair v. Rainsford*, 330 S.C. at 342, 499 S.E.2d at 493.

When opposing a summary judgment motion, the nonmoving party must do more than 'simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.*"* *Dunes W. Golf Club, LLC v. Town of Mt. Pleasant*, 401 S.C. 280, 293, 737 S.E.2d 601, 608 (2013) (citing *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003) (quoting *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545)). Once the initial burden of showing an absence of evidentiary support for the opponent's case is met, "the opponent cannot simply rest on mere allegations or denials contained in the pleadings . . . [r]ather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005) (citing *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003)); *see also Moody v. McLellan*, 295 S.C. 157, 163, 367 S.E.2d 449, 453 (Ct. App. 1998)

(genuine issues of fact must be supported by "admissible . . . evidence" and "summary judgment should be entered" if the opposing party fails to "so respond").

In determining whether a genuine issue of material fact exists, the court views the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009). However, "when the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted." *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997).

IV. ARGUMENT

A. The Receiver Is Entitled to Summary Judgment on Liability Under Various Successorship or Veil Piercing Theories (Third Cause of Action).

1. *Charter Is Liable for Cape's Actions and Debts Under an Alter Ego Theory.*

The Receiver is entitled to summary judgment that each of the Charter Third-Party Defendants are the alter egos of Cape, which in turn is the alter ego of NAAC. The question of whether to pierce the corporate veil via an allegation of alter ego sounds in equity. *Oskin v. Johnson*, 400 S.C. 390, 397, 735 S.E.2d 459, 463 (2012) (Toal, C.J.); *see also Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008) (Toal, C.J.) ("In general, equitable principles govern the veil-piercing remedy," and "[i]n applying South Carolina's veil-piercing doctrine, as all forms of equitable relief, the equities of both sides are to be considered, and each case must be decided on its own particular facts." (internal quotation marks and citations omitted)). Indeed, "[t]he entire point of the alter-ego doctrine is that a defunct, dissolved or undercapitalized entity is responsible for causing injury," but because that entity is dominated or controlled by others, those others are also liable. *Hagan v. Armstrong Int'l*, 2020 S.C. C.P. LEXIS 649, at *14 (Richland Cnty. Ct. Com. Pl. June 29, 2020).

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"An alter-ego theory requires a showing of (1) total domination and control of one entity by another and (2) inequitable consequences caused thereby." *Oskin*, 400 S.C. at 400, 735 S.E.2d at 465 (citing *Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty.*, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006) (Toal, C.J.)). "This theory does not apply . . . in the absence of fraud, injustice, or contravention of public policy." *Oskin*, 400 S.C. at 400, 735 S.E.2d at 465 (citing *Colleton Cnty.*, 371 S.C. at 237, 638 S.E.2d at 692). The alter ego theory nevertheless "is meant to be 'flexible' to enable courts to 'weigh the circumstances of the individual case.'" *Ret. Plan of UNITE HERE Nat'l Ret. Fund v. Kombassan Holdings A.S.*, 629 F.3d 282, 288 (2d Cir. 2010) (using flexible alter ego test in ERISA context (citation omitted)). Acknowledging the need for flexibility to achieve justice, the "majority of jurisdictions addressing" this issue "allow veil-piercing against nonshareholders." *Buckley v. Abuzir*, 8 N.E.3d 1166, 1172 (Ill. App. 2014). "[W]ith few exceptions, those jurisdictions that allow veil-piercing against nonshareholders have not required that the nonshareholder hold other formal roles within the corporation—for instance, as an officer, director, or employee—but rather abandon such formalism in favor of an equitable approach focusing on the individual's domination of the corporation." *Id.* "If veil piercing were solely dependent on a party's ownership interest in an entity, unscrupulous parties could avoid personal liability under the doctrine by simply acting in a capacity that does not involve ownership." *Equity Trust Co. v. Cole*, 766 N.W.2d 334, 339 (Minn. Ct. App. 2009).

Based on the unrebutted record evidence, there is no genuine issue of material fact that, just as Cape was NAAC's alter ego, and Charter was Cape's alter ego.

a. Cape Is NAAC's Alter Ego.

At the outset, there is no genuine issue of material fact that Cape is NAAC's alter ego. As set forth at length in Section II.E *supra*, Cape established NAAC in 1953 as a direct subsidiary designed to operate as its wholly controlled instrumentality for the "purpose of expediting and

facilitating the movement" of asbestos from South African mines into the United States (including South Carolina).[150] Throughout NAAC's existence, Cape exercised total dominion and control over NAAC, and that dominion and control produced gravely inequitable consequences. *See Oskin*, 400 S.C. at 400, 735 S.E.2d at 465.

(i) Cape exercised total dominion and control over NAAC.

NAAC was Cape's sales agent in the United States, with exclusive authority to offer Cape products and responsibility for transmitting information about customer needs to Cape mines, and ensure that shipments from South African mines made it "all the way through to the customer's plant," including to locations in South Carolina or through South Carolina ports.[151] NAAC "effect[ively] . . . put the Mines at every U.S. port."[152] Indeed, Cape's "most bountiful years were the two decades until 1976"—the period when Cape operated NAAC to provide raw amosite asbestos fiber to customers in the United States.[153] By 1970, NAAC was the "largest U.S. importer of Amphibole Fibres," which were "re-distributed from . . . warehouse locations in East Coast, Gulf Coast and West Coast Ports."[154]

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[150] *See* Ex. 105, Cape_Receiver_00127365; Ex. 16, Cape_Receiver_00127971-2 (1982 court filing describing NAAC's history); Ex. 106, Cape_Receiver_00128081 (identifying NAAC as the sole U.S.-based entity of the Cape mining division); Ex. 107, Cape_Receiver_00126974 (1973 letter describing NAAC as "a division of Cape Asbestos Co. Ltd., with corporate offices in London").

[151] *See* Ex. 108, Cape_Receiver_00126392-4 (describing intended business of NAAC); Ex. 109, Cape_Receiver_00127141 (1975 Cape cover letter of NAAC director resignations); Ex. 110, Cape_Receiver_00128071 (appointment announcement describing NAAC as "specialize[d] in marketing and distribution of Blue and Amosite asbestos in the United States, Canada, Mexico and the Caribbean"); Ex. 111, Cape_Receiver_00126847-8 (1969 NAAC memorandum describing customer services).

[152] Ex. 111, Cape_Receiver_00126847-8.

[153] Ex. 112, Jock McCulloch, Asbestos Blues: Labour, Capital, Physicians & the State 68 (2002).

[154] Ex. 113, Cape_Receiver_00126883-4.

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Cape and NAAC implemented a "conscious pattern of product distribution [of asbestos] nationally"—particularly, amosite, over which Cape had a monopoly. *See In re: Asbestosis Cases*, Case No. 78-CP-06-105, Order (S.C. Common Pleas Apr. 7, 1980) (rejecting objection to the exercise of personal jurisdiction over NAAC in South Carolina). Despite this "conscious pattern of product distribution," and NAAC's success in distributing Cape's asbestos, in fact, it was "essentially a one-man operation" consisting of an operational lead supported by four office clerical personnel.[155] All key decisions, including with respect to the fulfillment of specific purchase orders, were closely coordinated with and directed by Cape, or made by a board made up of Cape lawyers and executives (until Cape executives resigned in 1975, in what they described at the time as a "sensible precaution" against U.S. litigation).[156]

As detailed in Section II.E, Cape's control over NAAC was vast and complete; it controlled company governance issues, board make-up, the content of board meeting minutes, the determination of its commission, the process by which it was paid, its strategic underinsurance, the establishment of dividends, and the salaries of its employees.

(ii) Cape's dominion and control over NAAC caused gravely inequitable consequences.

Cape exercised this absolute control over NAAC to devastating, and plainly inequitable, end. As set forth in Section II.E.1, Cape actively suppressed its knowledge of the health hazards of asbestos to protect and expand its mining efforts and U.S. sales. After the onset of asbestos-related products liability litigation in the early 1970s, Cape undertook numerous actions in a

[155] *See* Ex. 16, Cape_Receiver_00127971-2 (describing NAAC's lean staffing); Ex. 17, Cape_Receiver_00127267 ("Despite the volume of sales and profits of NAAC, our operation is a very small one, with only a total of 5 employees").

[156] *E.g.*, Ex. 114, Cape_Receiver_00127141; Ex. 115, Cape_Receiver_00127025 (listing six directors in 1970)

deliberate effort to limit its own responsibility for the known harm caused by its products.[157] While Cape went through tortured machinations to make it *appear* it was reducing oversight over NAAC, in reality, NAAC continued to operate as a controlled instrumentality under Cape's domination.[158] Indeed, these changes were the result of careful assessments by Cape officials—with the help of its lawyers and other advisors—regarding how to minimize the liability exposure of Cape and others in the Group system.[159]

Cape's records confirm its implementation of a litigation-avoidance scheme that involved, among other things, (i) taking steps to make it appear—falsely—that Cape was reducing oversight of NAAC, (ii) disclaiming any "moral responsibility" to respond to products liability lawsuits in the United States, (iii) strategically declining to reserve funds in the United States to address those liabilities, and (iv) refusing to accept process or appear in any U.S. judicial proceedings (including

[157] *See, e.g.*, Ex. 116, Cape_Receiver_00127185-90 (1975 lawyer letter referring to "attempt to limit NAAC's and Cape's exposure to future United States litigation"); *see also Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973) (successful suit by insulation worker, widely acknowledged to have precipitated a wave of asbestos litigation in the 1970s).

[158] *See* Ex. 117, Cape_Receiver_00127808 (NAAC discouraging Cape visits to the U.S. in 1978 or else negate "maneuvers" related to "continued problems with product liability litigation"); Ex. 118, Cape_Receiver_00127138 (1975 letter suggesting to "disassociate the Parent Company as fully as possible from the operating companies"); Ex. 119, Cape_Receiver_00127140 (1975 letter raising whether to "do something to change the identity of NAAC in order to avoid exposing the company unnecessarily," while doing "everything possible to maintain a successful selling operation in the United States"); Ex. 120, Cape_Receiver_00127008-9 (1974 NAAC letter suggesting that "no one from Cape be an officer of NAAC since we want it to be as independent as possible in order to avoid any contention that it is the alter ego of Cape and that Cape is doing business in the United States"); Ex. 114, Cape_Receiver_00127141 (1975 Cape Asbestos letter stating "that it would be a sensible precaution against Cape's involvement in any future proceedings for [Cape personnel] to resign from the N.A.A.C. Board," and enclosing resignation letters).

[159] *See* Ex.56, Cape_Receiver_00127259-61 (NAAC counsel advising Cape on risk of judgments attaching to Charter assets).

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in the Park lawsuit pending here).[160] Cape's communications with its former counsel reveal a focus on avoiding exposure to U.S. litigation or assets that could be garnished in the United States in light of the strategy of accepting default judgments:

> If Cape in the future should set up or acquire any U.S. Company or business, then such Company or business would be deemed to be an asset of Cape, even though acquired after entry of any default judgments. Such new Company or business would be considered an asset of Cape in the U.S. and subject to garnishment to satisfy the default judgments.[161]

Put simply, NAAC existed only to do the bidding of Cape and the entities that controlled Cape, *i.e.*, to serve as a mechanism to both extract profits from the sale and distribution of deadly asbestos in the U.S. market and to insulate Cape from suit in the United States. The unrebutted evidence makes clear that Cape was NAAC's wholly controlled agent, and further that Cape exercised that control for fraudulent purposes, *i.e.*, using NAAC to make sales of its asbestos in the lucrative U.S. market, siphon those profits outside of the United States, and avoid answering to the U.S. legal system for the resulting harms.

b. Charter Is Cape's (and in Turn, NAAC's) Alter Egos.

There is likewise no genuine issue of material fact with respect to Charter's status as alter egos of Cape. Just as NAAC operated as an instrumentality for Cape, Cape was an instrumentality for the Oppenheimer Group System, including Charter. That is how the Group System was designed to operate, and it functioned perfectly here.

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[160] Ex. 1, July 4, 1977 Letter from A. J. Penna, Esq. Group Solicitor, Cape Industries Limited, Cape_Receiver_00133865 ("We here, having heard more disturbing information recently about the value of Texas awards are rapidly coming to the conclusion that Cape and Cape Fibers should take a risk on the UK enforceability and withdraw, as in practice we cannot foresee any court or government here enforcing a judgement which would have enormous financial and employment repercussions, when ***we really cannot be said to have a moral responsibility and are simply victims of the US product liability cult***." (emphasis added)).

[161] Ex. 56, Cape_Receiver_00127259-61; *see also* Order Granting Cape Receiver's Mot. for Sanctions (May 23, 2024).

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(i) Charter exercised total dominion and control over Cape (and, in turn, over NAAC).

Cape had no true control over its own operations—it was part of a Group System in which power was concentrated in the hands of the Oppenheimer family and their trusted advisors. The top-to-bottom control exercised in the Group System governed every aspect of a Group subsidiary's operations, made possible by control at the board level and operational control through immediate parent entities. For Cape, its immediate parent Charter. Within the Group System, Charter was designed to exert full dominion and control over Cape.

Cape became part of the Oppenheimer Group by the late 1950s as part of the Oppenheimer Group's plan to dominate the global mining industry. As Dr. Press explains, after Ernest Oppenheimer "poached the Corner House's diamond business, as run by De Beers, in the 1920s," Harry Oppenheimer would "swallow and rearrange the various parts of the Corner House" starting in the late 1950s.[162]

By 1960, the former Corner House interests, including Cape, were fused with an Anglo American subsidiary, Rand Selection.[163] Then, as part of a broader reorganization, Harry Oppenheimer created Charter in 1965 as a "pet project" designed to diversify the Oppenheimer business operations.[164]

As a holding company, Charter conducted virtually all of its business through subsidiaries like Cape, such that it made money through dividends and other diverted funds, payments, or

[162] Ex. 8, Press Report at 56.

[163] First, Harry Oppenheimer relied on his American business partner, Charles Engelhard, to take over the Corner House through Rand American Investments. Second, in 1960, Rand American Investments merged into an Anglo American entity, Rand Selection. *See* Ex. 8, Press Report at 54-58.

[164] Ex. 8, Press Report at 54-58.

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returns from such investments.[165] As detailed in Section II.D, Cape was Charter's profit-generating center, and Charter relied on Cape to operate NAAC in an undercapitalized manner such that dividends and service fees could be siphoned from NAAC and diverted first to Cape and then to Charter.[166] Charter owned, dominated, and controlled Cape and its subsidiaries, including NAAC, between 1965 and 1996, including with respect to their financing and capitalization; by exercising influence in Apartheid-era South Africa, thereby allowing Cape to profitably mine and export asbestos to the United States and distribute it throughout the nation, including in South Carolina; and by its presence on Cape's board and operational team, including through seconded employees and expenditures to support Cape's operations, marketing, research, and lobbying.[167]

(ii) Charter exercised its control over Cape (and NAAC) to produce inequitable results.

Charter used its control over Cape and NAAC to effect a fraud on the U.S. market that remains unaddressed decades later. As set forth in Sections II.E.1 and II.E.2, Charter knew of the health risks of asbestos, including death, throughout Cape's efforts to expand distribution of its asbestos in the United States. It directed and financed efforts to conceal these risks and provide false information about the health hazards of asbestos to the general public. It was responsible for operating NAAC in an undercapitalized manner, including by siphoning off funds from NAAC and diverting them outside of the United States, and for NAAC's inadequate risk management and strategic underinsurance decisions. When the risk of litigation loomed, Charter was responsible for the decisions to create the appearance of separation between NAAC and Cape, to deplete

[165] Ex. 68, Deposition of G. Higham, Oct. 17, 1986, at Cape_Receiver_00096909.

[166] *See* Section II.D; *see also* Order Granting Cape Receiver's Mot. for Sanctions (May 23, 2024), at 18 ¶ 17.

[167] *See* Section II.D; *see also* Order Granting Cape Receiver's Mot. for Sanctions (May 23, 2024), at 19 ¶¶ 20-23.

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NAAC of assets that would be available to claimants, and to implement Cape's litigation avoidance strategy.[168] Charter also was responsible for the decision to close and liquidate NAAC, to permit default judgments to be entered against Cape and its subsidiaries, and to design new ways to continue the flow of South African asbestos to the United States after NAAC's liquidation.[169]

2. *Charter Is Liable for Unaddressed Harm Caused by Cape's Asbestos Under a Veil Piercing Theory.*

Charter is likewise responsible for the harm caused by Cape (and NAAC) through a traditional veil piercing theory. Although it overlaps to some extent with alter ego analysis, courts in South Carolina considering whether to pierce the corporate veil undertake a separate inquiry based on the South Carolina Court of Appeals' decision in *Sturkie v. Sifly*, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984). A two-prong test is used to determine whether the corporate entity should be disregarded. The first part of the test is an eight-factor analysis that looks to observance of the corporate formalities by the dominant shareholders. The second part of the test requires that there be an element of injustice or fundamental unfairness if the veil were not pierced. *Sturkie*, 280 S.C. at 458-59.

In determining whether the corporate formalities were observed under the first prong of the *Sturkie* test, courts consider the following eight factors:

(1) whether the corporation was grossly undercapitalized;

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[168] Ex. 70, Charter Annual Report (1982), at Cape_Receiver_00076050 ("Cape has received legal advice that default judgments, in certain of which plaintiffs have been granted damages totalling approximately US$57 million, and any other judgments obtained in the United States in such actions against Cape group companies will not be enforceable in the United Kingdom. The directors believe, in light of legal advice received, that the outcome of all the actions against Cape and Charter and the obligations retained by Cape are unlikely to have any material effect on Charter's financial position, and accordingly no provision for them has been made.").

[169] *See* Section II.E.2; Ex. 68, Deposition of G. Higham, Oct. 17, 1986, at Cape_Receiver_00096935-6; *see also* Order Granting Cape Receiver's Mot. for Sanctions (May 23, 2024), at 19 ¶¶ 20-23.

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(2) failure to observe corporate formalities;

(3) non-payment of dividends;

(4) insolvency of the debtor corporation at the time;

(5) siphoning of funds of the corporation by the dominant stockholder;

(6) non-functioning of other officers or directors;

(7) absence of corporate records; and

(8) the fact that the corporation was merely a facade for the operations of the dominant stockholder.

Hunting v. Elders, 359 S.C. 217, 224, 597 S.E.2d 803, 807 (Ct. App. 2004). "The conclusion to disregard the corporate entity must involve a number of the eight factors, but need not involve them all." *Id.* While the eight *Sturkie* factors may not perfectly fit the facts of any given case,[170] the record evidence makes clear that at least half of the factors are satisfied with respect to Charter's control of Cape (and in turn NAAC):

- ***Factor 1:*** At Charter's direction, Cape ensured that its U.S. subsidiary was grossly undercapitalized, with funds regularly siphoned out of the United States—purportedly out of the reach of U.S. creditors and into the hands of NAAC's ultimate owners;

- ***Factor 5:*** Charter siphoned funds from Cape (and NAAC) for its own benefit, stripping NAAC of funds to answer U.S. claimant harmed by Cape's asbestos;

- ***Factor 6***: Cape and NAAC's employees were directed by Charter leadership;

- ***Factor 8***: Cape and NAAC were mere instrumentalities for Charter and the broader Oppenheimer Group System to profit from the sale of a deadly product in the U.S. market for asbestos while avoiding the attendant liability.[171]

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[170] *See Rochester Gas & Elec. Corp. v. GPU, Inc.*, 355 F. App'x 547, 550 (2nd Cir. 2009) (observing that application of veil-piercing factors "to the infinite variety of situations that might warrant disregarding the corporate form is not an easy task because disregarding corporate separateness is a remedy that differs with the circumstances of each case." (quoting *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 139 (2d Cir. 1991) (internal quotation marks omitted)).

[171] *See* Sections II.D and II.E.

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Neither NAAC nor Cape was permitted to act contrary to its Group Parents' interests. The Group Parents—Charter for Cape, and Cape for NAAC—acted in a self-serving manner by prioritizing their own profits, in the form of subsidiary dividends, over those of their subsidiaries and, more importantly, over the health and safety of U.S. consumers.

Cape, Charter, and the Oppenheimer Group knew that asbestos could cause lung disease, including mesothelioma.[172] To protect the profitability of Cape—Charter's primary profit generator in the 1960s and 1970s—Cape, Charter, and the Oppenheimer Group actively concealed their knowledge of the dangers associated with the high volume of asbestos fibers they sold in the U.S. market.[173]

Moreover, when it became clear that NAAC, Cape, and Charter could face liability in U.S. litigation for its asbestos sales, Cape and Charter worked a fraud on the U.S. market by (i) shuttering NAAC to cut clear ties from the U.S. to the Oppenheimer Group and (ii) concocting a scheme to continue selling Cape raw asbestos fiber to the U.S. market through a new company nearly identical to NAAC, CPC. It would be fundamentally unfair to allow Cape and Charter to benefit from this fraud.

Charter and Cape's activity thus satisfies the second *Sturkie* element. Under the second prong of the *Sturkie* test, the party seeking to pierce the corporate veil must prove an element of "injustice or fundamental unfairness" if the corporate veil is not pierced. To demonstrate fundamental unfairness, the plaintiff must show that "(1) the defendant was aware of the plaintiff's claims against the corporation, and (2) thereafter, the defendant acted in a self-serving manner with

[172] *See* Section II.F.1.

[173] *See* Section II.F.1.

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regard to the property of the corporation and in disregard of the plaintiff's claim in the property." *Dumas*, 463 S.E.2d at 644. The Supreme Court of South Carolina has held that "awareness" of the claims against the corporation need not be actual awareness. *Multimedia Publishing of S.C., Inc. v. Mullins*, 314 S.C. 551, 431 S.E.2d 569 (1993) ("A corporate director is chargeable with all matters pertaining to the corporate affairs, of which he has or should have knowledge in the exercise of the duties required of him as a director. . . . We find that knowledge of the Multimedia account gained by [defendant] in his capacity as the director of FSG was sufficient to put him on inquiry, which, if pursued with reasonable diligence, would have lead [sic] to knowledge that the account was unpaid.").

The Oppenheimers perfected a system of control in which they acted in a capacity that did not involve full ownership—they relied on others to spread risk.[174] They were proud of the "minimum investment, maximum control" system they created.[175] No entity should be permitted to profit from a corporate structure specifically designed to avoid liability in this way. *See Drury Dev. Corp.*, 380 S.C. at 101, 668 S.E.2d at 800.

3. *Cape and Charter Shared an Amalgamation of Interests and/or Were Part of a Single Business Enterprise.*

South Carolina courts recognize another method—distinct from traditional alter ego and veil piercing doctrines—to hold separate entities responsible for harm caused by another business, *i.e.*, the "amalgamation of interests" theory or the "single business enterprise" theory. This theory provides another framework by which this Court should find Charter liable for the harm caused by Cape's distribution of deadly asbestos throughout the United States.

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[174] *See* Section II.C.

[175] Ex. 6, *Anglo American Corp.*, Forbes, June 15, 1973, at 49; Ex. 7, A.J. Limebeer, *The Group System of Administration in the Gold Mining Industry*, I Optima 26, 26-30 (1951); *see also* Ex. 8, Press Report at 10, 34, and 75.

Under this theory, where affiliated entities function as a single enterprise, South Carolina law requires the enterprise as a whole to answer for the debts and liabilities of its members.[176] *See Las Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 235 Cal. App. 3d 1220, 1249–50, 1 Cal. Rptr. 2d 301, 318 (1991) ("In effect what happens is that the court, for sufficient reason, has determined that though there are two or more personalities, there is but one enterprise; and that this enterprise has been so handled that it should respond, as a whole, for the debts of certain component elements of it." (quotations and citation omitted)) (cited by *Pertuis v. Front Roe Rests., Inc.*, 423 S.C. 640, 817 S.E.2d 273, 279 n.5 (2018)).

In 2018, the South Carolina Supreme Court formally recognized and named the theory the "single business enterprise theory," describing it as follows:

> [W]here multiple corporations have unified their business operations and resources to achieve a common business purpose and where adherence to the fiction of separate corporate identities would defeat justice, courts have refused to recognize the corporations' separateness, instead regarding them as a single enterprise-in-fact, to the extent the specific facts of a particular situation warrant.

Pertuis, 817 S.E.2d at 279; *see also id.* at 281. In doing so, the Court in *Pertuis* made clear that, to combine different corporate entities into a single business enterprise, there must also be a showing

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[176] This concept was first recognized in South Carolina by the court of appeals in *Kincaid v. Landing Development Corp.*, 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986) and initially described as the "amalgamation of interests" theory. The Court of Appeals in *Kincaid* affirmed the trial court's finding that three related corporations (a development corporation, a management corporation, and a construction corporation) sued for negligent construction and breach of warranty were properly regarded as a single entity, because the evidence showed "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities." *Kincaid*, 344 S.E.2d at 874. Thereafter, the South Carolina Supreme Court recognized the theory in *Kennedy v. Columbia Lumber & Manufacturing Co., Inc.*, finding a lender could be liable if "it is so amalgamated with the developer or builder so as to blur its legal distinction." 299 S.C. 335, 384 S.E.2d 730, 734 (1989) (concluding amalgamation was not appropriate at liability stage and affirming trial court). The theory also was considered in a series of cases involving construction defects. *Magnolia N. Prop. Owners' Association v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012); *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011).

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of "bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." *Id.* at 281. In other words, "when corporations are not operated as separate entities but rather integrate their resources to achieve a common business purpose, each constituent corporation may be held liable for debts incurred in pursuit of that business purposes." *Id.* at 279 n.5 ("Factors to be considered in determining whether the constituent corporations have not been maintained as separate entities include but are not limited to the following: common employees; common offices; centralized accounting; payment of wages by one corporation to another corporation's employees; common business name; services rendered by the employees of one corporation on behalf of another corporation; undocumented transfers of funds between corporations; and unclear allocation of profits and losses between corporations.").

Despite the Charter Third-Party Defendants' refusal to participate in the discovery process, the record is replete with evidence that Cape and Charter "unified their business operations and resources to achieve a common business purpose"—namely, promoting both the sale and distribution of hazardous asbestos from South African mines into the United States and the flow of resulting funds out of the United States, including for the purpose of stripping their U.S.-based instrumentality, NAAC, of funds that could otherwise be available to U.S. creditors. Moreover, there is no legitimate dispute that the adherence to the fiction of separate corporate entities would defeat justice and deny U.S. citizens harmed by Cape's asbestos any recourse for that harm.[177] *See Walbeck v. I'on Co., LLC*, 439 S.C. 568, 889 S.E.2d 537 (2023) ("While it is true that courts should be hesitant to invade the corporate form, here there is more than enough evidence that the creation of various entities furthered Developers' abilities to refrain from doing that which they repeatedly

[177] *See* Sections II.D and II.E; *see also* Order Granting Cape Receiver's Mot. for Sanctions (May 23, 2024), at 16-21, 25-26.

told the HOA and the residents they would do . . . [T]he corporate structure should not shield—fraud, ***evasion of existing obligations***, circumvention of statutes, monopolization, criminal conduct, and the like." (emphasis in original)).

4. *AIA Is Liable for Cape's Asbestos-Related Liabilities as the Successor to Cape Based on Its Express Assumption of Responsibility or, in the Alternative, as Cape's Alter Ego with Respect to Its Continuing Litigation Avoidance.*

a. AIA Expressly Assumed Responsibility for Cape's Asbestos-Related Liabilities.

In connection with its 2017 acquisition of Cape, AIA expressly affirmed the assumption of responsibility for Cape's historical asbestos liability, and it has continued to affirm that responsibility over the intervening years. As a result of this express assumption of responsibility, AIA is liable as a successor for Cape's asbestos-related liabilities.

AIA formed Altrad UK Ltd. (or Altrad Bidco) in June 2017 for the purpose of acquiring Cape.[178] At the time of its purchase of Cape, AIA expressly acknowledged the asbestos-related liabilities of Cape.[179] More significantly, as part of its recommended tender offer for Cape, AIA stated its commitment to ensuring that Cape's asbestos liabilities be honored, affirming its "inten[tion] to procure that each member of the Cape Group honours its obligations under, or in

[178] Ex. 75, Certificate of Incorporation of a Private Limited Company, Altrad UK Limited (June 1, 2017), Cape_Receiver_00185738-72 (identifying AIA as owner of all shares and Mohed Altrad as sole "Individual Person with Significant Control" and as Company Director 1 and Chairman; Ex. 74, Altrad, Annual Report (2017), at Cape_Receiver_00040530 ("The acquisition of Cape PLC shares was carried out through the intermediary holding company Altrad UK, a wholly owned subsidiary of AIA and financed by AIA through a current account."); *see id.* at Cape_Receiver_00040529.

[179] Altrad's 2017 Annual Report acknowledged Cape's establishment (pursuant to a Scheme of Arrangement) of a compensation fund in 2006 for its employees who were exposed to asbestos. Ex. 74, Altrad 2017 Annual Report, at Cape_Receiver_00040530; *see also* Ex. 82, The Scheme Of Arrangement, In the High Court of Justice, Chancery Division (June 2006), at Cape_Receiver_00104532-56.

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connection with, the IDC Scheme (including with respect to the funding commitments for future liabilities of the IDC Scheme, the current IDC Scheme administrative arrangements and all related contractual obligations to which members of the Cape Group are subject) following completion of the Offer."[180]

In the years since the acquisition, AIA has continued to acknowledge Cape's asbestos liabilities and reaffirm its responsibility for them. For example, in its annual report for the year ended August 31, 2022, defaulted Third-Party Defendant Altrad Services Ltd. (f/k/a Cape Industrial Services Ltd.) acknowledged Cape's responsibility for harm from asbestos exposure and reported the Altrad Group had set aside £118 million in a Provision of Funds to address certain non-U.S. historical claims relating to asbestos exposure "for which the Board believes ***the Group may become liable***."[181] That 2022 annual report further explained that that "[t]he Company [Altrad Services Ltd.] is maintaining a provision in respect of lodged and future industrial disease claims for which the Board of Directors of Cape plc believes the Group to be liable, arising on alleged exposure to previously manufactured asbestos products."[182] That annual report further stated that "[t]he Group continues to receive claims, from both individuals and insurance companies, in connection with historical alleged exposure to asbestos. ***Where claims are***

[180] Ex. 83, Recommended Cash Offer for Cape plc, at Cape_Receiver_00104914-40 (touting the acquisition as an opportunity to "deliver attractive near and longer term benefit for the Cape Group and the Altrad Group and their respective stakeholders, ***including the IDC Scheme***" (emphasis added)).

[181] Ex. 84, Altrad Servs. Ltd. Annual Report and Financial Statements for the Year Ended 31 August 2022, at Cape_Receiver_00248438-441. Corporate documents define Altrad Group to mean AIA. Ex. 83, Recommended Cash Offer, at Cape_Receiver 00104914.

[182] Ex. 84, Altrad Servs. Ltd. Annual Report and Financial Statements for the Year Ended 31 August 2022, at Cape_Receiver_00248438-441

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determined to have merit, the costs are provided for and claims are settled in the ordinary course, otherwise claims are defended." [183]

AIA's 2023 annual report likewise acknowledged its responsibility for Cape's asbestos-related liabilities and stated "Altrad . . . is ***fully committed to settling claims that are determined to have merit*** pursuant to Cape's court approved mechanism for settling such claims. An amount of £ 118 million has been paid or set aside for the settling of valid claims.[184] Of course, a purchaser like AIA can assume the liabilities of an acquired entity if it does so expressly.[185] *Cf. Portfolio Fin. Servicing Co. ex rel. Jacom Computer Servs. v. Sharemax.com, Inc.*, 334 F. Supp. 2d 620, 625 (D.N.J. 2004) (quoting *Arch v. Am. Tobacco Co.*, 984 F. Supp. 830, 841 (E.D. Pa. 1997)) ("where a corporation acquires the stock of another corporation and the target corporation continues to operate as a separate corporate entity, the purchaser corporation does not thereby assume the liabilities of the acquired corporation ***unless it does so expressly***" (emphasis added)).

[183] Ex. 84, Altrad Servs. Ltd. Annual Report and Financial Statements for the Year Ended 31 August 2022, at Cape_Receiver_00248438 n.23; *id.* at Cape_Receiver_00248392 (reporting that "[m]any of [AIA's] operating environments have associated health and safety risks," including Cape: "The Company [Altrad Services Ltd.] is maintaining a provision in respect of lodged and future industrial disease claims for which the Board of Directors of Cape plc believes the Group to be liable, arising on alleged exposure to previously manufactured asbestos products.").

[184] Ex. 81, Altrad 2023 Annual Report, at Cape_Receiver_00040862. This mechanism for paying claims does not account for U.S. plaintiffs, but is limited to Cape's former U.K. employees.

[185] It is likewise the case that a purchaser can agree to assume liabilities in the context of an asset purchase. In the context of an asset purchase rather than a stock purchase, and in the absence of a statute, a successor corporation is not ordinarily liable for the obligations of the predecessor, unless (i) there was an agreement to assume those obligations, (ii) the circumstances surrounding the transaction amount to a consolidation or merger of the two corporations, (iii) the successor company was a mere continuation of the predecessor, or (iv) the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims. *Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 818 S.E. 2d 447 (2018) (citing *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924)).

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b. Even If AIA Had Not Assumed Cape's Asbestos Liabilities, It Is Cape's Alter Ego With Respect to Its Ongoing Litigation Avoidance.

Even if AIA were deemed not to have assumed Cape's asbestos liabilities despite its repeated public statements to the contrary, AIA would be liable for Cape's ongoing efforts to avoid responsibility as the alter ego of the acquired Cape entities (including Altrad UK Ltd and Altrad Services Ltd.) for continuing the long-running litigation avoidance scheme. *Oskin*, 400 S.C. at 400, 735 S.E.2d at 465 ("An alter-ego theory requires a showing of (1) total domination and control of one entity by another and (2) inequitable consequences caused thereby.").

(i) AIA dominates and controls its wholly owned subsidiaries through which it purchased Cape and that have provided for funds to resolve non-U.S. asbestos claims.

As set forth in Section II.F.1, AIA dominates and controls its wholly owned subsidiaries that acquired Cape (Altrad UK Ltd.) and that have made provisions of funds to address non-U.S. claims stemming from Cape's asbestos liabilities (Altrad Services Ltd.). Altrad UK Ltd. was created by AIA for the sole purpose of effectuating the acquisition of Cape for AIA, and AIA remains its "immediate and ultimate parent undertaking."[186]

In connection with the acquisition of Cape itself, AIA asserted its control, making clear it would ensure that members of the Cape Group continued to fund their existing commitments to the IDC Scheme, stating it

> ***intends to procure that each member of the Cape Group honours its obligations*** under, or in connection with, the IDC Scheme (including with respect to the funding

[186] Ex. 121, Altrad UK Ltd. Annual Report for the Year Ended 31 August 2022, at Cape_Receiver_00185943 ¶ 14 ("Controlling party"; "The company's immediate and ultimate parent undertaking is Altrad Investment Authority S.A.S., a company controlled by M Altrad."); Ex. 122, Altrad UK Ltd. Annual Report for the Year Ended 31 August 2023, at Cape_Receiver_00185987 ¶ 14 ("Controlling party"; "The company's immediate and ultimate parent undertaking is [AI], a company incorporated in France. [AIA], which is controlled by Dr M Altrad.").

> commitments for future liabilities of the IDC Scheme, the current IDC Scheme administrative arrangements and all related contractual obligations to which members of the Cape Group are subject)[.][187]

Moreover, since its acquisition, AIA has controlled Cape financially and with respect to risk management (including the management of asbestos liabilities).[188] Altrad Services' financial statements state that AIA "manages risk at a Group level," including the "health and safety risks" present in "[m]any of [AIA's] operating environments.[189] AIA also provided a letter of support for Altrad Services Ltd., the entity that made the £118.1 million Provision of Funds to address certain non-U.S. historical claims relating to asbestos exposure, as a going concern in connection with that entity's financial statements.[190] Altrad UK Ltd. is substantially indebted to AIA, including

[187] Ex. _83, Recommended Cash Offer for Cape plc, at Cape_Receiver_00104914-40 (emphasis added).

[188] Ex. 84, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2022, at Cape_Receiver_00248391 ("The Board of [AIA] (the ultimate parent company) manages risk at a Group level.").

[189] Ex. 85, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2023, at 3, 4; *see also* Ex. 84, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2022, at Cape_Receiver_00248391.

[190] Ex. 85, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2023, at Cape_Receiver_00248371 (referring to the letter of support from AIA, which "confirms continuing support for the going concern period until 30 April 2025"); Ex. 84, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2022, at Cape_Receiver_00248399; Ex. 84, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2022, at Cape_Receiver_00248412, Cape_Receiver_00248438 n.23; *see also* Joshua Stein, *Altrad Makes £118m Provision for Asbestos Claims*, Construction News (Apr. 14, 2023), *available at* https://www.constructionnews.co.uk/health-and-safety/altrad-makes-118m-provision-for-asbestos-claims-14-04-2023/#:~:text=Altrad%20has%20set%20aside%20%C2%A3,historic%20alleged%20exposure%20to%20asbestos.

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£448,304,150 in 2018, growing to £996,570,000 in 2023, but AIA has confirmed no repayment will be sought until such time as Altrad UK Ltd. has sufficient funds to repay it.[191]

(ii) AIA has exercised its dominion and control to produce inequitable results.

Despite its stated "commit[ment] to supporting victims of asbestos," and its avowed ability to "procure that each member of the Cape Group honor its obligations," AIA has exercised its control to perpetuate Cape's wrongful litigation avoidance scheme, at least with respect to U.S. claimants.[192] The continuation of this scheme is evidenced not only by Cape's lack of appearance in the *Park* lawsuit, even after the appointment of a Receiver, but also by the non-appearance of seven Altrad entities named as Third-Party Defendants ***in this action***, including (i) Altrad UK Ltd., which is represented by the same counsel as AIA, and (ii) Altrad Services Ltd. [193] This unrebutted evidence is consistent with the adverse inferences previously drawn by this Court.[194]

Application of alter ego theory requires fraud, injustice, or contravention of public policy, and each are manifest here. *See Oskin*, 400 S.C. at 400, 735 S.E.2d at 465 (citing *Colleton Cnty.*, 371 S.C. at 237, 638 S.E.2d at 692). AIA publicly purports to be "fully committed to settling [asbestos-related] claims that are determined to have merit," but directs its wholly owned subsidiaries to continue perpetuating Cape's decades-long scheme to avoid answering to U.S.

[191] Ex. 123, 2019 Altrad UK Ltd. Annual Report, at Cape_Receiver_0018526; Ex. 122, 2023 Altrad UK Ltd. Annual Report, at Cape_Receiver_00185980.

[192] Ex. 81, Altrad Annual Report 2023, at Cape_Receiver_00040862 ("Altrad takes these commitments seriously. . . . Looking forward, the company is actively looking for opportunities to support victims of mesothelioma . . .").

[193] Order Entering Default (Dec. 6, 2023); *see also* Ex. 124, Correspondence Between L. Joyner, J. T. Lay, and T. Carroll, dated August 18–20, 2023, at Cape_Receiver_00001982.

[194] Order Granting Cape Receiver's Mot. for Sanctions (May 23, 2024), ¶¶ 18, 33, 34, 36, 44-46 ("AIA and Mohed Altrad are responsible for Cape's and other non-responding Altrad Third-Party Defendants' failure to respond to litigation involving Cape it the United States. . . .").

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citizens harmed or killed by its asbestos.[195] That is precisely the inequitable outcome the doctrine is meant to prevent.

5. *Mr. Altrad Is Liable for Cape's Historic Asbestos Liabilities Based on AIA's Assumption of Liability or, in the Alternative, Is Liable for Cape's Continuing Litigation Avoidance as an Alter Ego.*

Mohed Altrad, the founder and President of the Altrad Group, is the alter ego of AIA and its Cape-related subsidiaries and is liable for Cape's asbestos-related liabilities and ongoing litigation avoidance scheme to the same extent as AIA.[196]

a. Mr. Altrad Dominates and Controls AIA and the Wholly Owned Subsidiaries Through Which AIA Purchased Cape and That Have Provided for Funds to Resolve Non-U.S. Asbestos Claims.

There is no legitimate dispute that Mr. Altrad is the alter ego of AIA and the various subsidiaries that bear his name. Mr. Altrad owns nearly all of the Altrad Group, including Cape. As of 2017, the year AIA acquired Cape, Mr. Altrad "h[e]ld 77.78% of the [Altrad Group's] shares."[197] By September 30, 2022, ***Mr. Altrad held 97.60% of the company's shares***.[198] As of September 30, 2023, Mr. Altrad maintained that near-total ownership level, owning 97.60% of the

[195] Ex. 81, Altrad 2023 Annual Report, at Cape_Receiver_00040862.

[196] *See* Ex. 76, Altrad 2022 Annual Report, at Cape_Receiver_00040825; *see also* Ex. 77, Gaspard Sebag & Tara Patel, *Billionaire Scaffolding 'King' Guilty of Bribing Rugby Boss*, Bloomberg (Dec. 13, 2022) (reporting Mr. Altrad's recent corruption conviction, punished with an 18-month suspended jail term and €50,000 fine), *Available at* https://www.bloomberg.com/news/articles/2022-12-13/scaffolding-billionaire-convicted-of-corruption-over-sponsorship#xj4y7vzkg.

[197] Ex. 74, Altrad, Annual Report (2017), at Cape_Receiver_00040519.

[198] Ex. 76, Altrad, Annual Report (2022), at Cape_Receiver_00040825 (depicting new shareholder structure as of September 30, 2022, as 97.60% owned by Mohed Altrad and 2.40% owned by "Others").

Altrad Group.[199] As the overwhelmingly dominant owner of all of the Altrad Group, all of its entities—including AIA and Cape—are financially dependent on Mr. Altrad and under his control.

Moreover, just as AIA controls Cape's operational policies, including relating to risk management relating to asbestos claims, as detailed above, Mr. Altrad—as its founder, President, dominant majority shareholder, avowed leader, and namesake—controls AIA.[200] Indeed, it acknowledged as much in its Recommended Cash Offer for Cape plc, in which it stated "Altrad [defined as AIA] is a private company which is ***controlled by Mr. Mohed Altrad***." [201] As the Altrad Group's website currently states, Mr. Altrad "still le[ads]" the Altrad Group of companies.[202] The "Governance" section of the Altrad Group's website states that "General Management defines the strategy for the Altrad Group. It is headed by Mohed Altrad, founder and President of the group, and by Jan Vanderstraeten and Ran Oren, joint-Chief Executive Officers."[203]

In addition to his controlling ownership and leadership of the AIA, Mr. Altrad was identified as the "individual person with significant control" over Altrad UK Ltd. upon its

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[199] Ex. 81, Altrad, Annual Report (2023), Cape_Receiver_00040879.

[200] Ex. 125, Affidavit of M. Altrad ¶ 32; Ex. 84, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2022, Cape_Receiver_00248388.

[201] Ex. 83, Recommended Cash Offer for Cape plc, at Cape_Receiver_00104914 ¶ 7 ("Information on the Altrad Group") (emphasis added).

[202] Ex. 126, Altrad Website, *Our History*, https://www.altrad.com/en/our-history.html, Cape_Receiver_00002425-6 ("Today, the group is still led by its founder, Mohed Altrad.") (last visited November 3, 2024).

[203] Ex. 127, Altrad Website, *Governance*, https://www.altrad.com/en/governance.html#:~:text=It%20is%20headed%20by%20Mohed,humanist%20conception%20of%20the%20company, Cape_Receiver_00002423-4 (last visited November 3, 2024).

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formation.[204] Mr. Altrad also was a director of Altrad UK Ltd. at its formation and subsequently became a director of defaulting Third-Party Defendants Cape UK Holdings Newco Ltd. and Cape Industrial Services Group Ltd.[205] Further, in Altrad UK Ltd.'s most recent annual report, Mr. Altrad is identified as the ultimate controlling party: "The company's immediate and ultimate parent undertaking is [AIA]," which in turn "is controlled by Dr M Altrad." [206]

b. Mr. Altrad has exercised his dominion and control to produce inequitable results.

Like AIA, and as set forth in Section II.F.1, Mr. Altrad has exercised his control for fraudulent and inequitable purposes, *i.e.*, to reaffirm AIA's commitment to accept responsibility for Cape's asbestos-related liabilities while continuing to evade those liabilities in the United States, and to perpetuate Cape's wrongful litigation avoidance scheme even today.[207] For the reasons set forth in Sections II.F.1 and IV.A.4, equity requires that he be recognized as the alter ego of AIA and its Cape-related subsidiaries. *Oskin*, 400 S.C. at 400, 735 S.E.2d at 465. This

[204] Ex. 75, Certificate of Incorporation of a Private Limited Company, Altrad UK Limited (June 1, 2017), Cape_Receiver_00185738-72 (identifying Mohed Altrad as sole "Individual Person with Significant Control" and as Company Director 1 and Chairman); Ex. 74, Altrad, Annual Report (2017), at Cape_Receiver_00040529-30; *Altrad Investment to Buy UK Oil Services Firm Cape for 332.2 mln Pounds*, REUTERS (July 7, 2017), https://www.reuters.com/article/cape-ma-altrad-investment/altrad-investment-to-buy-uk-oil-services-firm-cape-for-332-2-mln-pounds-idUSL4N1JY2KG.

[205] Ex. 75, Certificate of Incorporation of Altrad UK Ltd. (June 1, 2017); Ex. 79, Cape_Receiver_00187939, Termination of a Director Appointment of Cape UK Holdings Newco Ltd., dated October 29, 2020; Ex. 94, Cape_Receiver_00187592, Termination of a Director Appointment of Cape Industrial Services Group Ltd., dated October 29, 2020).

[206] Ex. 122, Altrad UK Annual Report for the Year Ended 31 August 2023, at Cape_Receiver_00248387 ("Controlling party.").

[207] Ex. 81, Altrad, Annual Report (2023), at Cape_Receiver_00040862 ("Altrad takes these commitments seriously. . . . Looking forward, the company is actively looking for opportunities to support victims of mesothelioma . . .").

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evidence is unrebutted and consistent with consistent with the adverse inferences previously drawn by this Court.[208]

6. *ESAB Corp. Controls Charter Today and Should Be Held Responsible for Its Wrongful Litigation Avoidance.*

ESAB is the corporate successor-in-interest to Charter and has assumed the historical liability associated with their asbestos-related activities. In August 1993, Charter plc ("New Charter") acquired all of the interests of Charter Consolidated plc (f/k/a Charter Consolidated Limited) under a court-approved Scheme of Arrangement via a share exchange, with Charter Consolidated plc becoming New Charter's subsidiaries.[209] In 2008, Charter International Limited ("PubCo Charter", and formerly known as Charter International PLC) acquired all of the interests of New Charter under a court-approved Scheme of Arrangement, also via a share exchange.[210]

These were not arm's-length transactions with unrelated parties; instead, they were internal reorganizations in which the liabilities of Charter remained Charter's, whether it was called New Charter, PubCo Charter, or some other variant. Stated another way, this was an extension of the Group System and Charter's control over Cape from prior decades. *See Ed Peters Jewelry Co. v. C & J Jewelry Co.*, 124 F.3d 252, 268 (1st Cir. 1997) ("equity is loath to elevate the form of the transfer over its substance, and deigns to inquire into its true nature"); *Kaiser Found. Health Plan of Mid-Atl. States v. Clary & Moore, P.C.*, 123 F.3d 201, 205 (4th Cir. 1997).

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[208] Order Granting Cape Receiver's Mot. for Sanctions (May 23, 2024), at 27-31, ¶¶ 18, 33, 34, 36, 41, 42, 44–46 ("Mohed Altrad controls decision making within the Altrad Group, including for Cape."; "AIA and Mohed Altrad are responsible for Cape's and other non-responding Altrad Third-Party Defendants' failure to respond to litigation involving Cape it the United States. . . .").

[209] Ex. 86, 1993 Scheme of Arrangement, Cape_Receiver_00178003-16.

[210] Ex. 128, 2008 Scheme of Arrangement, Cape_Receiver_00182324-31.

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Meanwhile, in 1994, New Charter had acquired all of the equity interests of ESAB AB (including its South Carolina subsidiary and operations), with the ESAB conglomerate also becoming a subsidiary New Charter.[211] Once PubCo Charter acquired New Charter's interests (and the Charter liabilities), it also acquired the ESAB conglomerate's interests.

In 2011, Colfax UK Holdings Ltd., a wholly owned subsidiary of Colfax Corporation ("Colfax Parent"), acquired all of the equity interest of Pubco Charter (including the ESAB conglomerate) pursuant to an Implementation Agreement, with Pubco becoming a wholly owned subsidiary of Colfax UK Holdings Ltd.[212] In 2021, Colfax Parent formed ESAB Corporation, a Delaware corporation,[213] and the next year, Colfax Parent, the ultimate parent of Colfax UK Holdings, completed a spin-off of the new ESAB Corporation, which became the parent of Colfax UK and indirect parent of PubCo Charter.[214]

As a result of this spin-off, Charter became part of ESAB Corporation. In its prospectus, Colfax stated that "subsidiaries to be contributed by Colfax" to the newly spun off ESAB Corp. were "each one of many defendants in a large number of lawsuits that claim personal injury as a result of exposure to asbestos," including for products that "were provided to meet specifications of the subsidiaries' customers, including the U.S. Navy" (referencing Cape's monopoly over

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[211] Ex. 90, Certificate of Incorporation of ESAB Corporation, May 19, 2021, at Cape_Receiver_00185411 (ESAB Holdings Limited was a subsidiary of ESAB AB).

[212] Ex. 89, Implementation Agreement, dated as of September 12, 2011, by and among Colfax Corporation, Colfax UK Holdings LTD and Charter International PLC, Cape_Receiver_00102613-95.

[213] Ex. 90, Certificate of Incorporation of ESAB Corporation, dated May 19, 2021, Cape_Receiver_00185411-3.

[214] Ex. 91, Separation Agreement, at Cape_Receiver_00183869.

amosite).[215] The contributed subsidiaries included Charter.[216] As part of the spin-off, Colfax and ESAB Corp. executed a 2022 Separation Agreement that addressed the transfer of assets and liabilities to ESAB and memorialized ESAB's assumption of liabilities and provision of financial guarantees to its new Charter subsidiaries:

> In order to effect the Separation, the Parties ***shall, to the extent necessary, cause, and shall, to the extent necessary, cause the members of their respective Groups to cause***, (i) the ESAB Group to own, to the extent it does not already own, all of the ESAB Assets and none of the Enovis Assets, and (ii) ***the ESAB Group to be liable for***, to the extent it is not already liable for, ***all of the ESAB Liabilities***.[217]

"ESAB Group" was defined to include not only ESAB Corp., but also "***each Subsidiary of ESAB***,"[218] which included Charter. "ESAB Liabilities" was defined broadly and included:

> any and all Liabilities relating to, arising out of or resulting from the actions, inactions, events, omissions, conditions, facts or circumstances occurring or existing prior to, at or after the Effective Time (whether or not such Liabilities cease being contingent, mature, become known, are asserted or foreseen, or accrue, in each case before, at or after the Effective Time), in each case to the extent that such Liabilities relate to, arise out of or result from . . . an ESAB Asset . . . , including: (i) all Liabilities included or reflected as liabilities or obligations of ESAB or the members of the ESAB Group on the ESAB Balance Sheet, subject to any discharge of such Liabilities subsequent to the date of the ESAB Balance Sheet; . . . [or] (iv) any and all Liabilities that are expressly provided by this Agreement or any Ancillary Agreement as Liabilities to be assumed by ESAB or any other member of the ESAB Group, and all agreements, obligations and Liabilities of any member of the ESAB Group under this Agreement or any of the Ancillary Agreements; . . .[219]

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[215] Ex. 129, *Information Statement of Colfax Corp.*, at Cape_Receiver_00184395, Cape_Receiver_00184400-1 (Mar. 17, 2022).

[216] ESAB Corp.'s subsidiaries include Charter Consolidated Limited, Charter Overseas Holdings Limited, Charter International Limited, among other related entities..

[217] Ex. 91, Separation Agreement, § 2.1(a) ("Transfers of Assets and Assumptions of Liabilities; ESAB Assets; Enovis Assets.") at Cape_Receiver_00183887 (emphases added).

[218] Ex. 91, Separation Agreement, § 1.1 ("Definitions") at Cape_Receiver_00183874.

[219] Ex. 91, Separation Agreement, § 2.1(d)(i), (iv) ("Transfers of Assets and Assumptions of Liabilities; ESAB Assets; Enovis Assets.") at Cape_Receiver_00183889-90.

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Finally, not only was ESAB Corp. the ultimate parent for the Charter entities post-spinoff, in their annual reports, Charter describes ESAB Corp. as "the controlling party."[220] Several Charter entities also reported post-separation that "***ESAB Corporation will support the company to meet all liabilities for a period to 31 December 2024***, which is consistent with the company's going concern assessment period."[221] Several of these Charter entities appear to have neither operational revenue nor employees.[222] By their very own admissions, Charter no longer operate, have employees, or generate revenue, but instead are shells of what they once were and are "controlled" by their new American parent corporation, ESAB Corp.

As with AIA's control over Cape, ESAB's control over Charter has been exercised to result in inequitable results, *i.e.*, the continuation of a litigation avoidance scheme to deny U.S. claimants redress, including as reflected in the wholesale failure of ESAB and Charter to participate in discovery in this case. This evidence, much of which is a matter of public record, is unrebutted and is consistent with the adverse inferences previously drawn by this Court.[223] Indeed, ESAB

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[220] *See, e.g.*, Ex. 92, Charter Consolidated Ltd. Report (2022), at Cape_Receiver_00177649 (reporting £664,288,000 in net assets in 2022, with the "company's shares . . . held by Charter limited, its immediate parent ***and controlling party***," while it "regards ESAB Corporation . . . as the Company's ultimate parent company ***and controlling party***" (emphasis added)); Ex. 93, Central Mining & Inv. Corp. Ltd. Report (2023), Cape_Receiver_00172654-57 (also reporting ESAB Corporation as "ultimate parent company ***and controlling party***," and net assets of £78,857,000 (emphasis added)).

[221] Ex. 92, Charter Consolidated Limited Audited Financial Statements for the Year Ended 31 December 2022, at Cape_Receiver_00177636; Ex. 131, CAST Limited Audited Financial Statements for the Year Ended 31 December 2022 at 3.

[222] Ex. 130, Central Mining Annual Report for the Period Ended 31 December 2022, at Cape_Receiver_00175381 ("The Company has not prepared a profit and loss account as there was no revenue during the period ended 31 December 2022"); Ex. 92, Charter Consolidated Limited Audited Financial Statements for the Year Ended 31 December 2022, at Cape_Receiver_00177646 (no income or employees); Ex. 131, CAST Limited Audited Financial Statements for the Year Ended 31 December 2022 at 13 (no employees).

[223] Order Granting Cape Receiver's Mot. for Sanctions (May 23, 2024) at 21-26, ¶¶ 54-66, 69-71.

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has not produced a shred of evidence in this action, much less evidence that would relieve it of responsibility for the unaddressed harm of its "controlled" subsidiary, Charter. For decades, Charter has escaped liability by dissolving NAAC and retreating from U.S. shores. Now that they are "controlled" by ESAB Corp., a U.S. corporation, equity demands that this Court hold ESAB responsible for the reprehensible acts of Charter. *Oskin*, 400 S.C. 390, 397.

V. CONCLUSION

For the foregoing reasons, the Receiver respectfully requests entry of summary judgment in his favor and against the Charter and Altrad Third-Party Defendants on the issue of their successor liability and/or alter ego/veil piercing liability for the harm caused by, and the continuing litigation avoidance scheme of, Cape and NAAC.

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Attorneys for Third-Party Plaintiff

November 8, 2024
Columbia, South Carolina

ELECTRONICALLY FILED - 2024 Nov 08 9:41 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

ELECTRONICALLY FILED - 2024 Nov 18 4:44 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
JOHN A. TIBBS and MARGARET B. TIBBS, Plaintiffs, v. 3M COMPANY *et al.*, Defendants. ********** CAPE PLC, individually and as successor in interest to CAPE ASBESTOS COMPANY LIMITED, by and through its duly appointed Receiver Peter D. Protopapas, Third-Party Plaintiff, v. ANGLO AMERICAN PLC, individually and as successor in interest to ANGLO AMERICAN CORPORATION OF SOUTH AFRICA LTD., *et al.* Third-Party Defendants.	C/A No. 2023-CP-40-01759 In Re: Asbestos Personal Injury Litigation Coordinated Docket **MOTION TO COMPEL PRODUCTION OF RECEIVER CORPORATE DOCUMENTS**

Pursuant to the South Carolina Rules of Civil Procedure and this Court's Order appointing a Receiver for Cape PLC, Third-Party Plaintiff Peter D. Protopapas, as duly appointed receiver for Cape PLC, individually and as successor in interest to Cape Asbestos Company Ltd. (the "Receiver"), by and through his undersigned counsel, respectfully files this Discovery Motion to Require Counsel to Produce Promised Documents ("the Motion").

A. Oppenheimer Third-Party Defendants' Counsel at Herbert Smith Have Custody of Cape Documents.

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In this case, the Third-Party Defendants known as the "Oppenheimer Third-Party Defendants"[1] are represented by Mr. Scott Balber of the international law firm of Herbert Smith Freehills ("Herbert Smith").

On September 13, 2024, Mr. Balber, on behalf of his clients the Oppenheimer Third-Party Defendants, filed a Motion to Compel Discovery Responses from the Receiver, seeking all of the Receiver's Cape-related documents. In short, Mr. Balber wanted the Receiver to use the powers of his appointment order to obtain Cape documents, wherever they might be found. Mr. Balber further stated to the Court that he wanted the Receiver to produce "documents from Cape," even quoting from the Receivership Order with respect to his request for Cape documents. Exhibt 1, September 24, 2024 Hearing Transcript . at 41–42.

At the hearing on this motion, Mr. Balber represented to the Court regarding this gathering of Cape documents:

> "I'd like to commit to do more and to find a way forward mutually so that we can all get through discovery and get to the merits." *Id*. at 35.

Mr. Balber further stated,

> "All we want is the same thing. **We want this receiver to obtain the documents of the entity in its receivership**, Cape, and provide the documents to us that are relevant." *Id.* at 44.

[1] Anglo American PLC (individually and as successor in interest to Anglo American Corporation of South Africa Ltd.), De Beers PLC, De Beers UK Ltd., De Beers Centenary AG, and De Beers Consolidated Mines Proprietary Ltd. (jointly, the "Oppenheimer Third-Party Defendants").

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> "I'd be pleased with an order from Your Honor directing us and the receiver to collaborate to try to obtain the documents from Cape. I think we'd all benefit. I'd be happy to be part of that. . . . We think the receiver should be in the best position to obtain those documents. And if not, we should be doing it in tandem." *Id.* at 46.

Unbeknownst to the Receiver, and as elucidated from communications following that hearing, Mr. Balber's law firm, Herbert Smith, appears to maintain a significant collection of the documents responsive to Mr. Balber's Motion to Compel.

The Receiver's investigation has revealed that Mr. Balber's law firm, Herbert Smith, represented Cape at least between 1988 and 2001—as evidenced by Cape's annual reports. *See* Exhibit 2, Extract of Receiver's Trial Exh 671 (Cape 1988 Annual Report); Exhibit 3, Extract of Receiver's Trial Exh 745 (Cape 1996 Annual Report); Exhibit 4, Extract of Cape_Receiver_00198188 (Cape 2001 Annual Report).

Relying on Mr. Balber's offer of cooperation in gathering these documents, on September 30, 2024, the Receiver requested the documents in Herbert Smith's possession related to its representation of Cape. *See* Exhibit 5. The Receiver sent a follow-up letter on October 22, 2024. *See* Exhibit 6. Herbert Smith first responded on October 30, 2024, and noted that it was working with its London office regarding how it could appropriately respond to the Receiver's request. *See* Exhibit 7.

Herbert Smith next communicated on November 8, 2024, stating that it would not comply with the Receiver's request for documents. *See* Exhibit 8. Specifically, Herbert Smith asserted "at this stage we are not satisfied that the Receiver has the authority to require production of material held by this firm on behalf of our former client." *Id.* Further, Herbert Smith contended that it had "not received consent from Cape plc to the transfer of any materials to the Receiver." *Id.*

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The responses received to Receiver's requests are completely contrary to the Oppenheimer Third-Party Defendants' representations to this Court. Specifically, on September 13, 2024, the Oppenheimer Third-Party Defendants filed a Motion to Compel Discovery Responses from the Receiver, seeking all of the Receiver's Cape-related documents. These, of course, include the Herbert Smith files – if Herbert Smith would simply produce them to the Receiver and to the Oppenheimer Third-Party Defendants.

B. The Receiver is Entitled to Cape Documents from Herbert Smith and the Oppenheimer Third-Party Defendants.

As recognized by Herbert Smith, the authority granted by this Court enables the Receiver to obtain assets, including historical Cape documents, to which Cape is entitled. *See* Appointment Order (granting the Receiver the "power and authority fully administer all assets of Cape, accept service on behalf of Cape, engage counsel on behalf of Cape and take any and all steps necessary to protect the interests of Cape whatever they may be"). The Appointment Order also gives the Receiver authority to "obtain from any financial institution, bank, credit union, savings and loan or title company, credit bureau or any third party, any financial records belonging to or pertaining to the Defendants (including Cape)." *Id.*

Cape Annual Reports and Herbert Smith's own communications show that Herbert Smith is or was in possession of documents to which the Receiver is entitled, and that Mr. Balber and Herbert Smith committed to fully participating in obtaining these documents for use in this case. As Mr. Balber stated at the September 24, 2024 hearing, "we want this Receiver to obtain the documents of the entity in its receivership, Cape, and provide the documents to us that are relevant . . . [b]ecause I think we all want to know . . . what Cape's documents say about this liability avoidance scheme." Exhibit 1 at 44:18–25.

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The Receiver requests that the Court compel the production of any and all Cape documents in Herbert Smith's possession.

CONCLUSION

For these reasons, the Receiver respectfully requests that this Court require the production of all Cape-related documents from Herbert Smith and provide all other relief to which the Receiver may be justly entitled.

Respectfully submitted,

November 18, 2024

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EXHIBIT 1

ELECTRONICALLY FILED - 2024 Nov 18 4:44 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4001759

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	FOR THE FIFTH JUDICIAL CIRCUIT
- - -	
JOHN A. TIBBS AND MARGARET B. TIBBS,	
Plaintiffs,	Case No. 2023-CP-40-01759
vs.	
3M COMPANY, ET AL.,	
Defendants.	
**********	
CAPE PLC, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO CAPE ASBESTOS COMPANY LIMITED, BY AND THROUGH ITS DULY APPOINTED RECEIVER PETER D. PROTOPAPAS,	
Third-Party Plaintiff,	
vs.	
ANGLO AMERICAN PLC,	

(CAPTION CONTINUED ON PAGE 2)

HEARING BEFORE: CHIEF JUSTICE JEAN TOAL

DATE TAKEN: Tuesday, September 24, 2024

TIME BEGAN: 9:26 a.m.

TIME ENDED: 11:30 a.m.

LOCATION: Richland County Judicial Center
1701 Main Street
Courtroom 2A
Columbia, South Carolina

REPORTED BY: Cynthia First, RPR, CRR
EveryWord, Inc.
P.O. Box 1459
Columbia, South Carolina 29202
803-212-0012

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On that basis, and because of that finding, based on the pleadings and the other information that's been presented to me in previous hearings on this very issue, we move forward. And as you say, y'all are here. That wasn't always the case, but I am very appreciative of the sanity that has prevailed in more recent times, I think much by the relationship between you and Mr. Elliott, and I appreciate that.

But it means that we don't have to plow that ground right now.

MR. BALBER: Understood. I was simply replying to Mr. Lay's opening statement.

THE COURT: Understood.

MR. BALBER: And let me now talk about what we're here for, if I can, which is discovery.

THE COURT: Thank you.

MR. BALBER: Thank you, Judge. So Mr. Lay asked the question, what have we done. I'd like to give you a sense of that, and I'd like to commit to do more and to find a way forward mutually so that we can all get through discovery and get to the merits.

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that, that he's relying on third-party, publicly available sources.

THE COURT: Well, I think he's going to be relying ultimately on what he gets from y'all. Like all plaintiffs' cases, they begin with a general group of information that gets more granular as discovery is made. I don't think there's any sin in that either way.

MR. BALBER: I'm not suggesting any sin at all. If that is the case, I just want to know it so I don't continue knocking on the door and have nobody answer.

THE COURT: I understand.

MR. BALBER: So if we have nothing other than what's publicly available, no aspersions being cast. I just want to know it so that we can move forward.

The next document, Your Honor, is documents from Cape. My understanding is Cape continues to be an operating entity somewhere in the U.K. They assumedly have documents. And I noted, Your Honor, that in your receivership order appointing Mr. Protopapas, you gave him the power, among others, to, quote -- and I know most judges hate to have

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their orders read back to them, so I apologize in advance.

THE COURT: That's all right.

MR. BALBER: Thank you, Judge.

You gave them the power to "obtain from any financial institution, bank, credit union, savings and loan, or title company, credit bureau, or any other third party any financial records, and to take all action necessary to gain access to all storage facilities, safety deposit boxes, real property and leased premises wherein any property Respondent may be situated, and to review and obtain copies of all documents related to same."

THE COURT: I may say to you that that is a very -- a receivership is formed for one reason and one reason only, and that is to marshal the assets of the receiver corporation. Corporations get put into receivership most commonly because they're defunct or out of business in some fashion, unable to respond. And for many of them in these toxic tort situations, their assets are their insurance policies.

Here we've got a whole nother group of

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recompense to even its shareholders, and move forward with the sale of the business in that regard. That's common in receiverships.

So I want you to understand that that's not some provision in my order that's unique to this situation. It's very common in this state.

MR. BALBER: Understood, Judge.

And my point was exactly that -- not to be presumptuous, but I suspect in the receivership scenario you just described, you and your partners obtained access to the insurance company's documents, right, as part of the exercise and used those documents for the purpose of marshaling assets, identifying and paying creditors, et cetera.

That's all we want here. All we want is the same thing. We want this receiver to obtain the documents of the entity in its receivership, Cape, and provide the documents to us that are relevant. Because I think we all want to know, I suspect -- I know I do. I suspect Mr. Lay does and my guess is Your Honor would -- know what does Cape's documents say about this liability avoidance scheme. Who do

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to an order -- I'm going to do what you tell me to do regardless, but I'd be pleased with an order from Your Honor directing us and the receiver to collaborate to try to obtain the documents from Cape. I think we'd all benefit. I'd be happy to be a part of that.

THE COURT: Well, but, you know, what you're doing is putting some limits on that. You're saying "of Cape." Your clients are more than Cape.

MR. BALBER: Well, my clients aren't Cape at all. At least I don't think so. I'm not even addressing that.

I'm talking about what we want to get from this Cape entity for which the receiver -- there is a living, breathing entity in the United Kingdom.

THE COURT: I understand.

MR. BALBER: Right. We want their documents.

THE COURT: Right.

MR. BALBER: We think the receiver should be in the best position to obtain those documents. And if not, we should be doing it in tandem.

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EXHIBIT 2

Cape Industries

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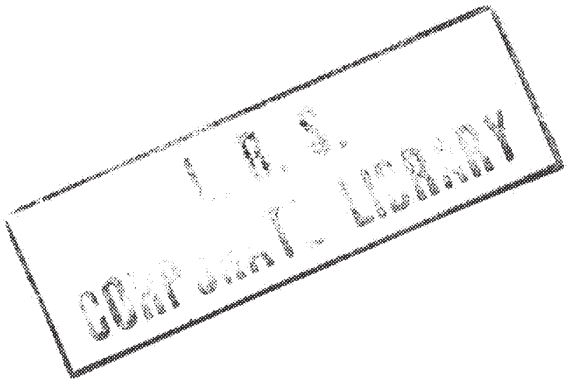

Annual Report 1988

Cape_Receiver_00071215

DIRECTORATE AND ADMINISTRATION

Directors

†Jeffrey William Herbert, Chairman

*John Patrick Farrell, Joint managing director

†Anthony Evelyn Hepper

*Thomas Morrison McKain, Joint managing director

†Alan Michael Millwood, OBE

*Allan Watson Petrie, Finance

Richard Keith Arthur Wakeling

**executive*

†audit committee

Secretary and registered office
John Leslie Sparkes, FCA
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Watford WD1 7EG

Auditors
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London EC4V 3PD

Bankers
National Westminster Bank PLC
Orchard House Branch,
466 Oxford Street, London W1A 3BP

Registrars
Hill Samuel Registrars Limited
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London SW1P 1PL

Solicitors
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12 Bridewell Place,
London EC4V 6AD

Herbert Smith
Watling House, 35 Cannon Street,
London EC4M 5SD

Stockbrokers
Williams de Broe Hill Chaplin & Co. Limited.
P O Box 515, Pinners Hall,
Austin Friars, London EC2P 2HS

Jeffrey Herbert (age 45) was elected Chairman in July 1985 having joined the board in April of that year. He is an executive director of Charter Consolidated P.L.C. He has formerly held positions of Managing Director within the automotive industry and the General Electric Company P.L.C.

John Farrell (age 55) has 29 years experience within the group. He was appointed to the board in 1979 and became Joint Managing Director in 1985. He is responsible for the Industrial Services Division.

Tony Hepper (age 65) a non-executive director was appointed to the board in 1968. He is currently Chairman of Lamont & Partners PLC.

Tom McKain (age 60) joined the group in 1971. He was appointed to the board in 1981 and became Joint Managing Director in 1985. He is responsible for the Building Products Division.

Michael Millwood (age 59) a non-executive director was appointed to the board in January 1986. He is a non-executive director of John Laing PLC having spent his career in the contracting industry.

Allan Petrie (age 47) joined the company as Financial Director in June 1986 having previously been Group Company Secretary of Hollandsche Beton Groepe (UK) Limited.

Richard Wakeling (age 41) a non-executive director joined the board in February 1987. He is Finance Director of Charter Consolidated P.L.C. He was formerly a director of John Brown PLC.

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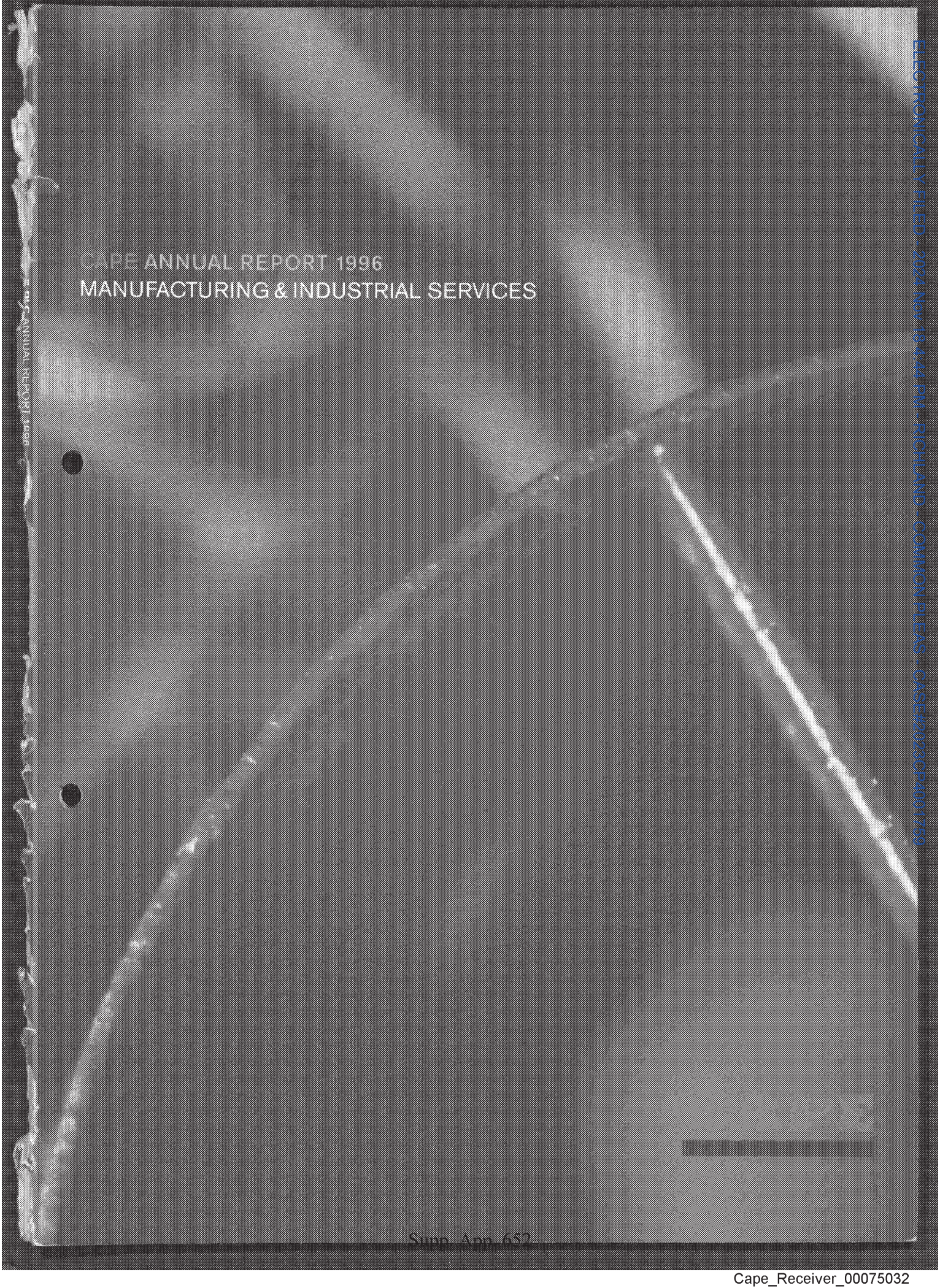
EXHIBIT 3



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DIRECTORATE AND ADMINISTRATION

DIRECTORS
MRF Langdon *Chairman* *†‡
CB Dowling *Chief Executive*
PJ Cartwright *Finance Director*
Sir Michael Grylls *MP* *††+
AM Millwood *OBE* *††+
SS O'Connor ††+

** Supervisory committee*
† Audit committee
‡ Remuneration committee
+ Non executive

SECRETARY & REGISTERED OFFICE
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AUDITORS
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Uxbridge UB8 1QQ

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London W1Y 2HP

SOLICITORS
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London EC4A 8DD

Herbert Smith
Exchange House
Primrose Street
London EC2A 2HS

REGISTRARS
Independent Registrars Group
Bourne House
34 Beckenham Road
Beckenham
Kent BR3 4TU

STOCKBROKERS
Dresdner Kleinwort Benson
20 Fenchurch Street
London EC3P 3DP

Case PLC is a company registered in England and Wales
Registration Number 40200

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CHAIRMAN'S STATEMENT THE NEW MANAGEMENT TEAM ARE NOW TARGETING INVESTMENT IN THE TWO CORE DIVISIONS, MANUFACTURING AND INDUSTRIAL SERVICES.

1996 has been a year of significant change for Cape PLC following the decision by Charter pic to dispose of its majority shareholding in the company. On 18th July 1996 Rutland Trust PLC ("Rutland") acquired 25% of the ordinary share capital of Cape PLC and the balance of the shares held by Charter were placed with institutional investors.

Cape is now an independent company listed on the London Stock Exchange with Rutland as its largest shareholder. In conjunction with my appointment as Chairman of Cape, my colleagues Christopher Dowling and Paul Cartwright have been seconded from Rutland to become Chief Executive and Finance Director respectively. As a new central team we are responsible for implementing the proposals for the restructuring of Cape's businesses that were referred to in the circular which was sent to shareholders in June 1996. Your company has appointed a Supervisory Committee within the main Board which comprises myself, as Chairman, and two non-executive directors, Sir Michael Grylls and Michael Millwood, OBE. The Supervisory Committee is responsible for approving all major strategic and financial issues.

The declared strategy is to restructure Cape's operations to enable the group to pursue its core markets more effectively thereby enhancing shareholder value over the medium term. In my Interim Statement for the half year ended 30th June 1996 I explained that several important initiatives to reshape the group had already been taken. In November 1996 we announced that the first phase of the restructuring was complete with the sale or closure of certain non-core or loss making businesses.

The industrial services businesses in France and Germany had been loss making for some time and Cape was not a significant force in these markets. Consequently both Hessisches Isolierwerk GmbH, based in Borken, Germany, and SOCAP, based in St. Quentin, France were sold for nominal consideration in September and October 1996 respectively. Cape Entsorgungstechnik GmbH, also based in Borken, has been wound down and will cease trading in due course. In addition, the future of the industrial services' operation in Norway, Cape AS, has been under review throughout the second half of 1996. Accordingly, the decision was taken to withdraw from this loss-making business in December 1996, and it was bought recently by the incumbent management for a nominal consideration. The architectural businesses, which are involved in the manufacture of mineral and plaster ceilings and external claddings, were loss making and facing particularly difficult market conditions in continental Europe. For this reason, these businesses were sold to management for £1.1 million in cash with Cape retaining cash balances of £2.4 million and collecting net debtors of £0.25 million.

The disposals and closures referred to above, including trading losses incurred to the date of sale or closure of these businesses, have been carried out within the non-operating exceptional provision of £17.4 million which was made at 30th June 1996 to meet the costs of the restructuring programme.

Cape is now organised into two clearly focused divisions operating as independent businesses. First, the Manufacturing division produces building and insulation products, principally using Cape's expertise in calcium silicate technology, which are sold through Cape's marketing operations in the UK, continental Europe and the Far East. Second, the Industrial Services division provides insulation, scaffolding and related services on major oil, gas and industrial sites around the world.

In the second half of 1996 the new central management team completed a full review of the asbestos claims situation at Cape with the assistance of the group's legal advisors. In addition, we have initiated the computerisation of our claims management systems to provide a full historical database and to enable claims to be handled more effectively.

In the light of the claims experience during the first half of 1996, we became concerned that the level of provisions booked in prior years was insufficient to cover the unsettled claims relating to those years. The Board therefore decided to make an exceptional provision in the group's interim results of £2.5 million to cover this exposure. A further charge of £2.4 million has been

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made for new claims arising during the year ended 31st December 1996 and, whilst your Board is actively seeking ways to mitigate the costs of asbestos claims, it is not anticipated that the level of claims experienced in 1996 will reduce in the short term.

Turnover from continuing operations for the year ended 31st December 1996 was £222.7 million compared with £213.7 million last year. This produced an operating profit before exceptional items of £11.1 million from continuing businesses compared with £12.3 million last year. The operating profit from continuing operations was £7.2 million for the second half of 1996 which reflects in part the normal phasing of profits from the Industrial Services businesses but also an improved second half performance in the Manufacturing business. After taking into account certain exceptional items within our ongoing businesses, and the costs of the restructuring programme referred to above, the loss before taxation was £13.2 million compared with a profit before taxation of £11.5 million last year. Earnings per share on continuing operations before exceptional items were 13.5p compared with 14.4p last year. Net assets were down from £62.5 million at 31st December 1995 to £48.8 million at 31st December 1996, principally due to the write down in carrying values of the businesses disposed of or closed. The cash cost during the year relating to the group restructuring was £2.7 million and net debt at 31st December 1996 was £3.1 million (1995: £0.8 million). Gearing was 6% at the year end.

In line with the policy as indicated at the time of the 1996 interim results, the Board is recommending that the final dividend is cut from 8p in 1995 to 3p. The final dividend will be paid on 16th May 1997 to shareholders on the register at the close of business on 1st April 1997, bringing the total dividend for the year to 6p (1995: 11p). The Board believes that this is the appropriate dividend policy, as it reflects the new circumstances of the group and provides scope for further investment in Cape's core businesses.

With the first phase of the restructuring completed, the new management team are now targeting investment in the two core divisions, Manufacturing and Industrial Services. Having suffered a period of rationalisation and reorganisation, I remain confident that both divisions now have significant opportunity for growth.

I would like to thank Jeffrey Herbert, the previous Chairman, and his Board colleagues from Charter plc for the opportunity to take Cape, as an independent listed company, on to a new phase of its development. In addition, I would like to record the Board's appreciation of the services of Michael Farebrother and Keith Jackson for having successfully guided Cape through the difficult years of the recent recession. In particular, I would also like to thank all the Cape management and employees for their hard work and support throughout a most challenging year. I am confident that there is a successful future in store for the two clearly defined divisions which now comprise the group.

MRF LANGDON
Chairman 12th March 1997

Cape_Receiver_00075036

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EXHIBIT 4

40203

CAPE

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A14 0462
COMPANIES HOUSE 10/10/02
A01 0393
COMPANIES HOUSE 19/09/02

Cape PLC annual report and accounts 2001

Directors and Advisers

P Sellars
Chairman (1,3,4,5)

I D Maclellan
Chief Executive (4)

I R Widdowson
Finance Director

P R Ainley
Managing Director
Cape Industrial Services

S S O'Connor (1,2,3,4,5)
J A Pool (1,2,3,4,5)

1 Non-Executive
2 Audit Committee
3 Remuneration Committee
4 Supervisory Committee
5 Nomination Committee

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Colston Street
Bristol BS1 4RD

Cape PLC is a company registered in England and Wales. Registered number 40203.

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EXHIBIT 5

SMITH ROBINSON
Forward thinking. Results driven.

COLUMBIA
3200 Devine Street
Columbia, SC 29205
P: 803.254.5445
F: 803.254.5007

SUMTER
126 N. Main Street
Sumter, SC 29150
P: 803.778.2471
F: 803.778.1643

CAMDEN
935 Broad Street
Camden, SC 29020
P: 803.432.1992
F: 803.432.0784

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Reply To: Columbia

September 30, 2024

HERBERT SMITH FREEHILLS
NEW YORK LLP
Scott S. Balber (Pro Hac Vice)
200 Park Avenue, 16th Floor
New York, New York 10166
Via Email Only: scott.balber@hsf.com

Re: ***CAPE PLC, individually and as successor in interest to CAPE ASBESTOS COMPANY LIMITED, by and through its duly appointed Receiver Peter D. Protopapas v. ANGLO AMERICAN PLC, individually and as successor in interest to ANGLO AMERICAN CORPORATION OF SOUTH AFRICA LTD., et al***
C/A No. 2023-CP-40-01759

Dear Mr. Balber

It was a pleasure meeting you last week at the hearing and I look forward to working with you on this matter. As you know, the Court has appointed my client, Peter D. Protopapas, as Receiver for Cape PLC as the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.) During the hearing, there was much discussion about the relationship between Cape, PLC (the Petitioner in the English case presently seeking to enjoin the South Carolina court appointed Receiver, Mr. Protopapas) and the clients you represent in the above action, Anglo American PLC, De Beers PLC, De Beers Centenary AG, De Beers UK Ltd., and De Beers Consolidated Mines Proprietary Ltd. ("Anglo Defendants"). As indicated in court, there has been a great deal written on the relationship between Cape PLC and the Third-Party Defendants named in this case. One such collection of work is "Asbestos and Cape: A Tale of Three Stakeholders" written by Peter Gartside, former Cape Managing Director of its overseas industrial services businesses. Like many Directors of the Third-Party Defendants, Mr. Gartside also served as Director of other companies in Cape the network of entities such as: Cape Overseas Limited, Cape Industrial Services Group Limited, Cape Perlite Systems Limited, Altrad Services Limited, Cape East (Uk) Limited, Cape East Limited, Cape Industrial Services Europe Limited, and Cape Contracts International Limited.
https://find-and-update.company-information.service.gov.uk/officers/zZMTnWU-72u1KZRo4aq7RNTyduE/appointments .

There was also much discussion at the hearing regarding efforts by the Receiver to obtain and produce Cape PLC documents in discovery. We were encouraged to hear you acknowledge the

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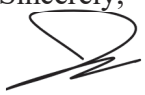
broad powers invested in the Receiver relating to the discovery of documents and your intent to work collectively with the Receiver to find the documents. To that end, in addition to representing the Anglo Defendants, we have learned that your law firm, Herbert Smith, also represented Cape PLC (f/k/a Cape Asbestos Company Ltd.) over several years, as reflected by Cape's annual reports. See Extract of Receiver's Trial Exh 671 (Cape 1988 Annual Report- page 2 of this document it reflects the Solicitors for Cape as being "Herbert Smith" firm out of London), Extract of Receiver's Trial Exh 745 (1996 Annual Report of Cape - page 2 of this document reflects the solicitors for Cape as being Herbert Smith firm out of London), Extract of Receivers Trial Exh 747 (2000 Annual Report of Cape which also shows its solicitors as being Herbert Smith firm out of London). I am also attaching an article which may assist you in locating your documents relating to Cape's relationship with ALTRAD. See 2017 Article reflecting Herbert Smith as counsel for Altrad. "Alex Kay, Kristen Roberts, Nick May, Charles Steward, Elliot Beard and Nick Rutter of Herbert Smith Freehills Paris LLP acted as legal advisors to Altrad." (https://www.marketscreener.com/quote/stock/PRUDENTIAL-PLC-9590193/news/Altrad-Investment-Authority-S-A-S-completed-the-acquisition-of-Cape-plc-from-a-consortium-of-seller-34955679/).

Please immediately produce Herbert Smith's Cape files to the Receiver. We hope this information is helpful in your search for documents as we move forward in this collective process

Sincerely,



Jonathan M. Robinson

Cc: James H. Elliott, Jr., Esquire (jelliott@richardsonplowden.com)

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EXHIBIT 6

PETER D. PROTOPAPAS, RECEIVER
2110 N. Beltline Blvd. Columbia, SC 29204 – 803.978.6111 – pdp@rplegalgroup.com

October 22, 2024

VIA EMAIL & VIA US MAIL

Justin D'Agostino
Global Chief Executive Officer
Herbert Smith Freehills, LLP
23rd Floor Gloucester Tower
15 Queen's Road Central
Hong Kong
Justin.DAgostino@hsf.com

Scott S. Balber
Managing Partner, New York
Herbert Smith Freehills New York, LLP
200 Park Avenue, 16th Floor
New York, New York 10166
Scott.Balber@hsf.com

Re: Request for Herbert Smith Client Files for Cape, PLC

Counsel:

I am the court-appointed receiver for Cape, PLC. I write to follow-up on the attached correspondence wherein my counsel requested Herbert Smith to produce to me copies of its client files related to its prior representation of Cape. To date, we have not received any response. Given the timing of this upcoming trial, I respectfully request that you produce these materials to me immediately. If your firm does not plan to produce these client materials to me, I would appreciate your letting me know that, too. Either way, I would request a response by October 28, 2024.

I look forward to hearing from you soon.

Sincerely,

s/ Peter D. Protopapas

Peter D. Protopapas, Receiver

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EXHIBIT 7

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HERBERT SMITH FREEHILLS

Jonathan M. Robinson
Smith Robinson
3200 Devine Street
Columbia, South Carolina 29205
803-254-5445
jon.robinson@smithrobinsonlaw.com

Herbert Smith Freehills New York LLP
200 Park Avenue, 16th floor
New York, NY 10166
USA
T +1 917 542 7600
F +1 917 542 7601
D +1 917 542 7809
E john.odonnell@hsf.com
www.herbertsmithfreehills.com

Date
October 30 2024

By email

Re: ***Cape plc v. Anglo American plc, et al.*****, Civil Action No. 2023-CP-40-01759**

Dear Mr. Robinson:

I write in response to your letter of September 30, 2024, sent on behalf of Peter Protopapas as receiver for Cape plc (the "Receiver"), and the Receiver's letter of October 22, 2024, requesting production of documents that you allege are in the possession of my law firm.

I have been referred your letters as the risk manager of my firm's New York office. I am actively working with colleagues in London regarding your request and how my firm can appropriately respond to you in accordance with its professional obligations.

Herbert Smith Freehills New York LLP submits this letter on its own behalf and not on behalf of the Anglo American-De Beers Defendants. This letter is not intended to waive, and specifically reserves, all defenses, including but not limited to the defense of lack of personal jurisdiction.

Sincerely,

/s/ John O'Donnell

John O'Donnell

cc: Scott S. Balber (scott.balber@hsf.com)
James H. Elliott (jelliott@richardsonplowden.com)

Herbert Smith Freehills New York LLP and Herbert Smith Freehills, an Australian Partnership, are separate member firms of the international legal practice known as Herbert Smith Freehills.

Herbert Smith Freehills New York LLP is a limited liability partnership registered in England and Wales with registered number OC375072. Its registered office is at Exchange House, Primrose Street, London EC2A 2EG.

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EXHIBIT 8

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HERBERT SMITH FREEHILLS

Jonathan M. Robinson
Smith Robinson
3200 Devine Street
Columbia, South Carolina 29205
803-254-5445
jon.robinson@smithrobinsonlaw.com

Herbert Smith Freehills New York LLP
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F +1 917 542 7601
D +1 917 542 7809
E john.odonnell@hsf.com
www.herbertsmithfreehills.com
www.herbertsmithfreehills.com

Date
08 November 2024

By email

Re: *Cape plc v. Anglo American plc, et al.*, Civil Action No. 2023-CP-40-01759

Dear Mr. Robinson:

I write on behalf of Herbert Smith Freehills New York LLP and the member firms of the international legal practice known as Herbert Smith Freehills located in London, Paris, Brussels, Hong Kong, Singapore, and Bangkok. This letter serves to follow-up on my earlier correspondence dated October 30, 2024, concerning your letter of September 30, 2024, sent on behalf of Peter Protopapas as receiver for Cape plc (the "Receiver"), and the Receiver's letter of October 22, 2024, requesting production of documents that you allege are in the possession of our law firm as a result of past representations of Cape plc, as the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.) (collectively "Cape plc").

We have considered your request as a request by a former client for documents within our files to which a former client would be entitled. Our global firm and the member firms which may hold any Cape plc files are regulated by, among others, the Solicitors Regulation Authority of England and Wales and are subject to its ethical rules. Paragraph 6.3 of the Code of Conduct for Solicitors, RELs and RFLS and of the Code of Conduct for Firms (collectively the "Code") requires that we "keep the affairs of current and former clients confidential unless disclosure is required or permitted by law or the client consents." As I am sure you understand, the requirement of client confidentiality is a bedrock principle of law and one to which we must scrupulously adhere. For the reasons below, at this stage we are not satisfied that the Receiver has authority to require production of material held by this firm on behalf of our former client.

We understand that the Receiver claims he has authority to act for Cape plc pursuant to a receivership order dated March 16, 2023, originally entered in *Park v. Armstrong International Inc., et al.* Civil Action No. 2021-CP-40-02727 in the Court of Common Pleas for the Fifth Judicial Circuit in South Carolina. However, we also understand that Cape plc and Cape Intermediate Holdings Limited have filed suit in the High Court of England and Wales against the Receiver seeking a

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declaration from the High Court finding that the receivership order has no legal effect over Cape plc and that Mr. Protopapas has and had no power or authority to act as a receiver in relation to Cape plc and Cape Intermediate Holdings Limited. *See Cape Intermediate Holdings Limited and Cape plc v. Peter D. Protopapas*, BL-2024-001337 (The High Court of Justice – The Business & Property Courts of England & Wales). We understand that the matter has been set for a final hearing on the merits commencing November 11, 2024. Given the pendency of litigation concerning the Receiver's authority, we cannot transfer any materials from any Cape plc files to the Receiver as there is substantial doubt as to whether the Receiver has the power under the laws of England and Wales to request client documents from our files.

We have also not received consent from Cape plc to the transfer of any materials to the Receiver. It follows we cannot transfer any materials from any Cape plc files to the Receiver due to our ethical obligations pursuant to paragraph 6.3 of the Code.

Finally, we note that you reference a comment by one of our New York partners, Scott Balber, at a hearing on September 24, 2024 in the pending litigation in South Carolina, which you assert constitutes a representation to the Court that our firm was willing to assist in obtaining the requested material. We have reviewed the transcript of the hearing and disagree that Mr. Balber's general comments about working with the Receiver to obtain Cape plc documents somehow translates into a specific agreement to provide confidential materials held within attorney files. *Cape plc v. Anglo American plc, et al.*, Civil Action No. 2023-CP-40-01759, Hearing Tr. dated Sept. 24, 2024, 46:1-6. Moreover, in any event, any request by a client or former client for a transfer of materials from our firm's files requires internal review and consideration by the firm before it can be approved.

Herbert Smith Freehills and all of its affiliated firms reserves all rights and remedies, including among other things, all jurisdictional defenses.

Sincerely,

/s/ John O'Donnell

John O'Donnell

CC: Scott S. Balber (scott.balber@hsf.com)
James H. Elliott (jelliott@richardsonplowden.com)

ELECTRONICALLY FILED - 2024 Nov 12 12:36 PM - RICHLAND - COMMON PLEAS - CASE#2024CP4006639

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF RICHLAND	)	**FOR THE FIFTH JUDICIAL CIRCUIT**

AUGUSTUS A. ADAMS and **DIANE ADAMS**	)	**C/A NO. 2024-CP-40-_____**
TOMMY D. AGNER, SR. as Executor of the Estate of **VONNIE K. AGNER**, deceased	)	In Re: Asbestos Personal Injury Litigation Coordinated Docket
ALLAN N. ANDERSON, JR. and **CYNTHIA ANDERSON**	)	
GEORGE J. ARSENITH and **CHRISTINE A. ARSENITH**	)	**SUMMONS**
DONALD BARNHART, JR. and **MARY BARNHART**	)	
KATHRYN BARONE, individually and as Executrix of the Estate of **NICHOLAS BARONE**, deceased	)	
RICHARD TREE, individually and as successor-in-interest to **RICHARD J. BOETSCH**, deceased, and **LEAH SANDFORD**, individually	)	
BRENDA E. BOSTIAN, individually and as Personal Representative of the Estate of **HOYLE S. BOSTIAN**, deceased	)	
TRACY BOWERY MEYER, as Personal Representative of the Estate of **LEON B. BOWERY**, deceased	)	
RONALD J. BROKSHIRE and **BELVIA R. BROOKSHIRE**	)	
ALICIA KNIGHT, individually and as Administratrix of the Estate of **WALLACE B. CHAMBERS**, deceased	)	
LENORA CHILDERS, individually	)	

and as Personal Representative of the Estate of)
LEWIS C. CHILDERS, deceased)
)
DAVID E. CHRISTENSEN and)
LINDA G. CHRISTENSEN)
)
LINDA A. COOK, individually)
and as Executor for the Estate of)
ROLAND COOK, deceased)
)
DON R. COX, SR.)
)
JAY S. CREEKMORE, individually)
and as Executor of the Estate of)
MARY M. CREEKMORE)
)
JAMES F. DAVIS and)
VERA C. DAVIS)
)
ROBBIE M. EFIRD)
as Administrator of the Estate of)
ROBIN M. EFIRD, deceased, and)
LINDA EFIRD, individually)
)
CHARLES FERRELL and)
PATRICIA A. FERRELL)
)
WENDY M. FITZGERALD, individually)
and as Special Administrator of the Estate of)
DENNIS J. FITZGERALD, deceased)
)
RICKY DEAN FLYNN,)
as the Executor of the Estate of)
JERRY K. FLYNN, deceased)
)
AMY GEE, individually)
and as Personal Representative of the Estate of)
MICHAEL L. GEE, deceased)
)
GLENDA T. GIROIR and)
DALE GIROIR)
)
SANDRA M. GONCE, individually)
and as Executrix of the Estate of)
DWIGHT GONCE, deceased)
)

ELECTRONICALLY FILED - 2024 Nov 12 12:36 PM - RICHLAND - COMMON PLEAS - CASE#2024CP4006639

GEORGE N. GOSNELL and
PATRICIA C. GOSNELL

TERRY L. GREEN, SR.,
as Personal Representative of the Estate of
ROBERT J. GREEN, deceased, and
EVELYN V. GREEN, individually

RACHEL P. GREENE, individually
and as Personal Representative of the Estate of
CHRISTOPHER GREENE, deceased

MICHELLE L. MCCORMICK and
KRISTEN R. HELTON, as Co-Personal
Representatives of the Estate of
KENNETH D. HARDING, deceased

CINDY HARTSELL MARTIN, individually
and as Personal Representative of the Estate of
JERRY G. HARTSELL, deceased, and
JOAN HARTSELL, individually

SHIRLEY ANN CARPIN,
as Independent Executor of the Estate of
SHIRLEY A. HILSTER , deceased

MISTI K. CRAWLEY and
ZACHARY D. HUNT, as
Personal Representatives of the Estate of
LESLEY D. HUNT, deceased

MICHAEL D. JOHNSON and
KRISTI R. JOHNSON

THEODORE L.KELLY, SR. and
BERENICE M. KELLY

SUSAN K. McCARTY
as Executor of the Estate of
JAMES H. KENNON, deceased

GREGORY N. TARBUCK, JR.
as Personal Representative of the Estate of
RICHARD D. KING, deceased

ELECTRONICALLY FILED - 2024 Nov 12 12:36 PM - RICHLAND - COMMON PLEAS - CASE#2024CP4006639

JOLENE R. KOTZERKE, individually as the surviving spouse and Executor for the Estate of **STEVEN D. KOTZERKE**, deceased)

GARY S. LACKEY and **VIRGINIA C. LACKEY**)

PATRICIA LAMM, individually and as Personal Representative of the Estate of **MICHAEL H. LAMM**, deceased)

ROBERT P. LEBLANC)

MICHAEL D. LINK and **SANDRA STRICKLAND LINK**)

RICHARD LONG)

JAMES E. LOVE, JR. and **JOAN M. LOVE**)

ROBERT W. LYNN and **KAREN J. LYNN**)

CRAIG R. HAGAN, as Personal Representative of the Estate of **NIKOLAUS J. MARCHER**, deceased, and **KLAUS MARCHER**, individually and as legal heir to **NIKOLAUS J. MARCHER**, deceased)

DONALD MCDOWELL and **RHONDA V. MCDOWELL**)

PHILIP J. MCGUIRE and **PATRICE MCGUIRE**)

DAVID P. MCKELVEY, as Personal Representative of the Estate of **PAUL R. MCKELVEY**, deceased)

SHARON M. MILAM, individually and as Independent Executor of the Estate of **JIMMIE R. MILAM**, deceased)

ELECTRONICALLY FILED - 2024 Nov 12 12:36 PM - RICHLAND - COMMON PLEAS - CASE#2024CP4006639

MARTHA M. WILSON, individually)
and as Personal Representative of the Estate of)
TED E. MITCHELL, deceased)
)
NELSON W. MOGG and)
DOROTHY MOGG)
)
ELAINE M. MONLUX, individually as the)
surviving spouse and Executor for the Estate of)
RICHARD A. MONLUX, deceased)
)
GARY MULLINS and)
ARVELLA MULLINS)
)
LEONARD O'LOUGHLIN and)
KAREN REISSFELDER)
)
MICHELLE OLIVE, individually)
and as Executor of the Estate of)
EVERETT R. OLIVE, deceased)
)
JUDITH D. PATTERSON, individually)
and as Executor of the Estate of)
JOHN K. PATTERSON, JR., deceased)
)
KELLY PAYNE CLARK and **SHANNON**)
PAYNE LANCASTER, as Co-Executors of the)
Estate of **SHELBY L. PAYNE**, deceased)
)
DORENE L. PEIFER, individually)
and as Trustee for the next-of-kin for)
RONALD M. PEIFER, deceased)
)
RICHARD R. PELFREY and)
PATRICIA H. PELFREY)
)
CURTIS R. PERKINS, Individually)
and as Executor of the Estate of)
PATRICIA L. PERKINS, deceased)
)
LINWOOD W. PIERCE and)
BRIDGET PIERCE)
)
SHANE CHADWICK PIKE and **JASON**)
ANDREW PIKE, as Co-Executors of the Estate)
of **MARSHALL E. PIKE**, deceased)

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ELECTRONICALLY FILED - 2024 Nov 12 12:36 PM - RICHLAND - COMMON PLEAS - CASE#2024CP4006639

ROBERT B. RAY and
BESSIE E. RAY

JACKIE D. ROBERTS and
VICTORIA A. ROBERTS

DEBORAH ROBICHAUD, individually as the surviving spouse and Executor for the Estate of **GARY P. ROBICHAUD**, deceased

SHARON LYNN TESSENIAR, as Personal Representative of the Estate of **ANTHONY D. ROBINSON**, deceased, and **JOYCE J. ROBINSON**, individually

JERRY P. ROSS and
PAULETTE W. ROSS

ALYCE M. SCOGGINS, individually and as successor-in-interest to **DAVID M. SCOGGINS**, deceased; **DAVID D. SCOGGINS**, and **SCHANTEL R. GREEN**, individually and as legal heirs to **DAVID M. SCOGGINS**, deceased

KATHLEEN SCOGGINS, individually and as Special Administrator to the Estate of **DAVID C. SCOGGINS**, deceased

LARRY G. SELLARS and
GLENDA K. SELLARS

ANNA MARIE S. PRITCHETT, as Personal Representative of the Estate of **CHARLES E. SHIPMAN**, deceased, and **DANIELLE B. SHIPMAN**, individually

MICHAEL L. SIMS, as Personal Representative of the Estate of **DONALD E. SIMS**, deceased

GEORGE R. SPAYD, JR.

DELLA JEANETTE KENNEDY, individually and as Administrator of the Estate of

RODNEY L. SPENCE, deceased,
and as Administrator of the Estate of
ANN TAYLOR SPENCE, deceased

TERRY SYLVESTER,
as Personal Representative of the Estate of
EUGENE L. SYLVESTER, deceased, and
SARA SYLVESTER, individually

SANDRA F. TAYLOR, individually
and as Administrator of the Estate of
BRADLEY D. TAYLOR, deceased

SHIRLEY BUTTS TAYLOR, individually
and as Personal Representative of the Estate of
HORACE E. TAYLOR, deceased

JOHN A. TIBBS and
MARGARET B. TIBBS

DONNA B. WELCH, individually and as
Personal Representative of the Estate of
MELVIN G. WELCH, deceased

ROSALIE WILKINSON and
HARRY WILKINSON

RICHARD A. WILLIAMS and
NANCY N. WILLIAMS

BRUCE S. WRIGHT and
LOUISE K. WRIGHT

Plaintiffs**,**

v.

CAPE PLC
by and through its court appointed Receiver
Peter Protopapas, sued as successor-in-interest to
CAPE INDUSTRIES LTD. (f/k/a CAPE
ASBESTOS COMPANY LTD.) and its
subsidiaries and global affiliates

ANGLO AMERICAN PLC
individually and as successor-in-interest to

ELECTRONICALLY FILED - 2024 Nov 12 12:36 PM - RICHLAND - COMMON PLEAS - CASE#2024CP4006639

ANGLO AMERICAN CORPORATION OF SOUTH AFRICA LTD.)
)
)
DE BEERS PLC)
)
DE BEERS CENTENARY AG)
)
DE BEERS CONSOLIDATED MINES LTD.)
)
DE BEERS S.A.)
)
DE BEERS UK LTD.)
)
DE BEERS JEWELLERS LTD.)
)
DE BEERS JEWELLERS US, INC.)
)
ANGLO AMERICAN US HOLDINGS INC.)
)
ELEMENT SIX US CORP.)
)
ELEMENT SIX TECHNOLOGIES US CORP.)
)
ELEMENT SIX TECHNOLOGIES (OR) CORP.)
)
FIRST MODE HOLDINGS, INC.)
)
PLATINUM GUILD INTERNATIONAL (U.S.A.) JEWELRY INC.)
)
LIGHTBOX JEWELRY INC.)
)
FOREVERMARK US INC.)
)
ANGLO AMERICAN CROP NUTRIENTS (U.S.A.), LLC)
)
CHARTER CONSOLIDATED LTD.)
)
ESAB CORPORATION)
)
CENTRAL MINING & INVESTMENT CORPORATION LTD.)
)

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ELECTRONICALLY FILED - 2024 Nov 12 12:36 PM - RICHLAND - COMMON PLEAS - CASE#2024CP4006639

CAPE HOLDCO LTD.	)
	)
THE LAW DEBENTURE CORPORATION PLC	)
	)
CAPE INDUSTRIAL SERVICES GROUP LTD.	)
	)
MOHED ALTRAD	)
	)
ALTRAD UK LTD.	)
	)
CAPE UK HOLDINGS NEWCO LTD.	)
	)
ALTRAD SERVICES LTD. (f/k/a CAPE INDUSTRIAL SERVICES LTD.)	)
	)
ALTRAD INVESTMENT AUTHORITY S.A.S.	)
	)
Defendants**.**	)
	)

SUMMONS

TO DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the Plaintiffs' counsel, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service. If you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Respectfully submitted,

/s/ Charles W. Branham, III

Charles W. Branham, III (SC Bar No. 106178)
DEAN OMAR BRANHAM SHIRLEY, LLP
302 N. Market Street, Suite 300
Dallas, Texas 75202
T: 214-722-5990
F: 214-722-5991
tbranham@dobslegal.com
Other email: tgilliland@dobslegal.com

and

/s/ Theile B. McVey

Theile B. McVey (SC Bar No. 16682)
Jamie D. Rutkoski (SC Bar No. 103270)
KASSEL MCVEY ATTORNEYS AT LAW
1330 Laurel Street
Columbia, South Carolina 29202
T: 803-256-4242
F: 803-256-1952
tmcvey@kassellaw.com
jrutkoski@kassellaw.com
Other email: emoultrie@kassellaw.com

ATTORNEYS FOR PLAINTIFFS

November 11, 2024
Columbia, South Carolina.

ELECTRONICALLY FILED - 2024 Nov 12 12:36 PM - RICHLAND - COMMON PLEAS - CASE#2024CP4006639

ELECTRONICALLY FILED - 2024 Nov 12 12:36 PM - RICHLAND - COMMON PLEAS - CASE#2024CP4006639

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF RICHLAND	)	**FOR THE FIFTH JUDICIAL CIRCUIT**

AUGUSTUS A. ADAMS and **DIANE ADAMS**	)	**C/A NO. 2024-CP-40-_____**
TOMMY D. AGNER, SR. as Executor of the Estate of **VONNIE K. AGNER**, deceased	)	In Re: Asbestos Personal Injury Litigation Coordinated Docket
ALLAN N. ANDERSON, JR. and **CYNTHIA ANDERSON**	)	
GEORGE J. ARSENITH and **CHRISTINE A. ARSENITH**	)	Multi-Plaintiff Cause of Action: Includes Living and Deceased Plaintiffs
DONALD BARNHART, JR. and **MARY BARNHART**	)	**COMPLAINT**
KATHRYN BARONE, individually and as Executrix of the Estate of **NICHOLAS BARONE**, deceased	)	(Jury Trial Demanded)
RICHARD TREE, individually and as successor-in-interest to **RICHARD J. BOETSCH**, deceased, and **LEAH SANDFORD**, individually	)	
BRENDA E. BOSTIAN, individually and as Personal Representative of the Estate of **HOYLE S. BOSTIAN**, deceased	)	
TRACY BOWERY MEYER, as Personal Representative of the Estate of **LEON B. BOWERY**, deceased	)	
RONALD J. BROKSHIRE and **BELVIA R. BROOKSHIRE**	)	
ALICIA KNIGHT, individually and as Administratrix of the Estate of **WALLACE B. CHAMBERS**, deceased	)	

LENORA CHILDERS, individually)
and as Personal Representative of the Estate of)
LEWIS C. CHILDERS, deceased)
)
DAVID E. CHRISTENSEN and)
LINDA G. CHRISTENSEN)
)
LINDA A. COOK, individually)
and as Executor for the Estate of)
ROLAND COOK, deceased)
)
DON R. COX, SR.)
)
JAY S. CREEKMORE, individually)
and as Executor of the Estate of)
MARY M. CREEKMORE)
)
JAMES F. DAVIS and)
VERA C. DAVIS)
)
ROBBIE M. EFIRD)
as Administrator of the Estate of)
ROBIN M. EFIRD, deceased, and)
LINDA EFIRD, individually)
)
CHARLES FERRELL and)
PATRICIA A. FERRELL)
)
WENDY M. FITZGERALD, individually)
and as Special Administrator of the Estate of)
DENNIS J. FITZGERALD, deceased)
)
RICKY DEAN FLYNN,)
as the Executor of the Estate of)
JERRY K. FLYNN, deceased)
)
AMY GEE, individually)
and as Personal Representative of the Estate of)
MICHAEL L. GEE, deceased)
)
GLENDA T. GIROIR and)
DALE GIROIR)
)
SANDRA M. GONCE, individually)
and as Executrix of the Estate of)
DWIGHT GONCE, deceased)

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GEORGE N. GOSNELL and **PATRICIA C. GOSNELL**

TERRY L. GREEN, SR.,
as Personal Representative of the Estate of
ROBERT J. GREEN, deceased, and
EVELYN V. GREEN, individually

RACHEL P. GREENE, individually
and as Personal Representative of the Estate of
CHRISTOPHER GREENE, deceased

MICHELLE L. MCCORMICK and
KRISTEN R. HELTON, as Co-Personal
Representatives of the Estate of
KENNETH D. HARDING, deceased

CINDY HARTSELL MARTIN, individually
and as Personal Representative of the Estate of
JERRY G. HARTSELL, deceased, and
JOAN HARTSELL, individually

SHIRLEY ANN CARPIN,
as Independent Executor of the Estate of
SHIRLEY A. HILSTER , deceased

MISTI K. CRAWLEY and
ZACHARY D. HUNT, as
Personal Representatives of the Estate of
LESLEY D. HUNT, deceased

MICHAEL D. JOHNSON and
KRISTI R. JOHNSON

THEODORE L.KELLY, SR. and
BERENICE M. KELLY

SUSAN K. McCARTY
as Executor of the Estate of
JAMES H. KENNON, deceased

GREGORY N. TARBUCK, JR.
as Personal Representative of the Estate of
RICHARD D. KING, deceased

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JOLENE R. KOTZERKE, individually as the surviving spouse and Executor for the Estate of **STEVEN D. KOTZERKE**, deceased)

GARY S. LACKEY and **VIRGINIA C. LACKEY**)

PATRICIA LAMM, individually and as Personal Representative of the Estate of **MICHAEL H. LAMM**, deceased)

ROBERT P. LEBLANC)

MICHAEL D. LINK and **SANDRA STRICKLAND LINK**)

RICHARD LONG)

JAMES E. LOVE, JR. and **JOAN M. LOVE**)

ROBERT W. LYNN and **KAREN J. LYNN**)

CRAIG R. HAGAN, as Personal Representative of the Estate of **NIKOLAUS J. MARCHER**, deceased, and **KLAUS MARCHER**, individually and as legal heir to **NIKOLAUS J. MARCHER**, deceased)

DONALD MCDOWELL and **RHONDA V. MCDOWELL**)

PHILIP J. MCGUIRE and **PATRICE MCGUIRE**)

DAVID P. MCKELVEY, as Personal Representative of the Estate of **PAUL R. MCKELVEY**, deceased)

SHARON M. MILAM, individually and as Independent Executor of the Estate of **JIMMIE R. MILAM**, deceased)

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MARTHA M. WILSON, individually)
and as Personal Representative of the Estate of)
TED E. MITCHELL, deceased)
)
NELSON W. MOGG and)
DOROTHY MOGG)
)
ELAINE M. MONLUX, individually as the)
surviving spouse and Executor for the Estate of)
RICHARD A. MONLUX, deceased)
)
GARY MULLINS and)
ARVELLA MULLINS)
)
LEONARD O'LOUGHLIN and)
KAREN REISSFELDER)
)
MICHELLE OLIVE, individually)
and as Executor of the Estate of)
EVERETT R. OLIVE, deceased)
)
JUDITH D. PATTERSON, individually)
and as Executor of the Estate of)
JOHN K. PATTERSON, JR., deceased)
)
KELLY PAYNE CLARK and **SHANNON**)
PAYNE LANCASTER, as Co-Executors of the)
Estate of **SHELBY L. PAYNE**, deceased)
)
DORENE L. PEIFER, individually)
and as Trustee for the next-of-kin for)
RONALD M. PEIFER, deceased)
)
RICHARD R. PELFREY and)
PATRICIA H. PELFREY)
)
CURTIS R. PERKINS, Individually)
and as Executor of the Estate of)
PATRICIA L. PERKINS, deceased)
)
LINWOOD W. PIERCE and)
BRIDGET PIERCE)
)
SHANE CHADWICK PIKE and **JASON**)
ANDREW PIKE, as Co-Executors of the Estate)
of **MARSHALL E. PIKE**, deceased)

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)
ROBERT B. RAY and)
BESSIE E. RAY)
)
JACKIE D. ROBERTS and)
VICTORIA A. ROBERTS)
)
DEBORAH ROBICHAUD, individually as the)
surviving spouse and Executor for the Estate of)
GARY P. ROBICHAUD, deceased)
)
SHARON LYNN TESSENIAR,)
as Personal Representative of the Estate of)
ANTHONY D. ROBINSON, deceased, and)
JOYCE J. ROBINSON, individually)
)
JERRY P. ROSS and)
PAULETTE W. ROSS)
)
ALYCE M. SCOGGINS, individually)
and as successor-in-interest to)
DAVID M. SCOGGINS, deceased;)
DAVID D. SCOGGINS, and **SCHANTEL R.**)
GREEN, individually and as legal heirs to)
DAVID M. SCOGGINS, deceased)
)
KATHLEEN SCOGGINS, individually)
and as Special Administrator to the Estate of)
DAVID C. SCOGGINS, deceased)
)
LARRY G. SELLARS and)
GLENDA K. SELLARS)
)
ANNA MARIE S. PRITCHETT,)
as Personal Representative of the Estate of)
CHARLES E. SHIPMAN, deceased, and)
DANIELLE B. SHIPMAN, individually)
)
MICHAEL L. SIMS,)
as Personal Representative of the Estate of)
DONALD E. SIMS, deceased)
)
GEORGE R. SPAYD, JR.)
)
DELLA JEANETTE KENNEDY, individually)
and as Administrator of the Estate of)

RODNEY L. SPENCE, deceased,
and as Administrator of the Estate of
ANN TAYLOR SPENCE, deceased

TERRY SYLVESTER,
as Personal Representative of the Estate of
EUGENE L. SYLVESTER, deceased, and
SARA SYLVESTER, individually

SANDRA F. TAYLOR, individually
and as Administrator of the Estate of
BRADLEY D. TAYLOR, deceased

SHIRLEY BUTTS TAYLOR, individually
and as Personal Representative of the Estate of
HORACE E. TAYLOR, deceased

JOHN A. TIBBS and
MARGARET B. TIBBS

DONNA B. WELCH, individually and as
Personal Representative of the Estate of
MELVIN G. WELCH, deceased

ROSALIE WILKINSON and
HARRY WILKINSON

RICHARD A. WILLIAMS and
NANCY N. WILLIAMS

BRUCE S. WRIGHT and
LOUISE K. WRIGHT

Plaintiffs**,**

v.

CAPE PLC
by and through its court appointed Receiver
Peter Protopapas, sued as successor-in-interest to
CAPE INDUSTRIES LTD. (f/k/a CAPE
ASBESTOS COMPANY LTD.) and its
subsidiaries and global affiliates

ANGLO AMERICAN PLC
individually and as successor-in-interest to

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ANGLO AMERICAN CORPORATION OF SOUTH AFRICA LTD.)
)
)
DE BEERS PLC)
)
DE BEERS CENTENARY AG)
)
DE BEERS CONSOLIDATED MINES LTD.)
)
DE BEERS S.A.)
)
DE BEERS UK LTD.)
)
DE BEERS JEWELLERS LTD.)
)
DE BEERS JEWELLERS US, INC.)
)
ANGLO AMERICAN US HOLDINGS INC.)
)
ELEMENT SIX US CORP.)
)
ELEMENT SIX TECHNOLOGIES US CORP.)
)
ELEMENT SIX TECHNOLOGIES (OR) CORP.)
)
FIRST MODE HOLDINGS, INC.)
)
PLATINUM GUILD INTERNATIONAL (U.S.A.) JEWELRY INC.)
)
LIGHTBOX JEWELRY INC.)
)
FOREVERMARK US INC.)
)
ANGLO AMERICAN CROP NUTRIENTS (U.S.A.), LLC)
)
CHARTER CONSOLIDATED LTD.)
)
ESAB CORPORATION)
)
CENTRAL MINING & INVESTMENT CORPORATION LTD.)
)

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CAPE HOLDCO LTD.	)
	)
THE LAW DEBENTURE CORPORATION PLC	)
	)
CAPE INDUSTRIAL SERVICES GROUP LTD.	)
	)
MOHED ALTRAD	)
	)
ALTRAD UK LTD.	)
	)
CAPE UK HOLDINGS NEWCO LTD.	)
	)
ALTRAD SERVICES LTD. (f/k/a CAPE INDUSTRIAL SERVICES LTD.)	)
	)
ALTRAD INVESTMENT AUTHORITY S.A.S.	)
	)
Defendants**.**	)
	)

PLAINTIFFS' ORIGINAL COMPLAINT

Plaintiffs in the above caption are identified above and on Exhibit A, hereto. Exhibit A details the injured party name, Personal Representative (if applicable), disease, date of diagnosis, date of death (if applicable) and relevant years of exposure and details of alleged exposure to asbestos attributable to Defendants.

Plaintiffs as named above and on Exhibit A, in their just and legal capacities, name Defendants CAPE PLC, by and through its court appointed Receiver, Peter D. Protopapas, as successor-in-interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.) ("CAPE PLC" or "Cape"); Anglo American PLC (individually and as successor-in-interest to Anglo American Corporation of South Africa Ltd.), De Beers PLC, De Beers Centenary AG, De Beers Consolidated Mines Ltd., De Beers S.A., De Beers UK Ltd., De Beers Jewellers Ltd., De Beers Jewellers US,

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Inc., Anglo American US Holdings Inc., Element Six US Corp., Element Six Technologies US Corp., Element Six Technologies (OR) Corp., First Mode Holdings, Inc., Platinum Guild International (U.S.A.) Jewelry Inc., Lightbox Jewelry Inc., Forevermark US Inc., Anglo American Crop Nutrients (U.S.A.), LLC, Charter Consolidated Ltd., ESAB Corporation, Central Mining & Investment Corporation Ltd., Cape Holdco Ltd., The Law Debenture Corporation PLC, Cape Industrial Services Group Ltd., Mohed Altrad, Altrad UK Ltd., Cape UK Holdings NewCo Ltd., Altrad Services Ltd. (f/k/a Cape Industrial Services Ltd.), and Altrad Investment Authority S.A.S. (each a "Defendant" and collectively, and with CAPE PLC the "Defendants") and its subsidiaries and global affiliates, for compensatory and punitive damages, by and through their attorneys, and come before this court and alleges as follows:

GENERAL ALLEGATIONS

1. This action is brought pursuant to the laws of South Carolina for the following causes of action: 1) Negligence; 2) Product Liability: Strict Liability - S.C. Code Ann. § 15-73-10, et seq.; 3) Vicarious Liability of Defendants Based upon Respondeat Superior; 4) Negligence Imparted to Contractor Defendants; 5) Product Liability: Breach of Implied Warranties - S.C. Code Ann. § 36-2-314; 6) Negligence Per Se; 7) Fraudulent Misrepresentation; 8) the South Carolina Unfair Trade Practices Act- S.C. Code Ann. § 39-5-10, *et. seq*.; and 9) Loss of Consortium.

2. In some instances, Plaintiffs also bring this cause of action pursuant to the Wrongful Death Act, S.C. Gen. Stat. 15-51-10 *et seq*., as well as the Survival Action, S.C. Code Ann. § 15-5-90, for the wrongful death of the specified Plaintiffs on Exhibit A, on behalf of all persons entitled to recover damages.

3. Collective Plaintiffs (hereinafter, "Plaintiffs") were all diagnosed with asbestos related diseases caused by exposure to asbestos dust and fibers including but not limited to

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mesothelioma or lung cancer. Plaintiffs' exposure occurred during the course of their employment with and around asbestos-containing products and/or though asbestos fibers carried home on family members' persons and clothing.

4. This Court has personal jurisdiction over CAPE PLC and its alter egos/successors in interest because CAPE PLC is deemed to have its principle place of business is located in South Carolina. In addition, Plaintiffs' claims arise from Defendants' conduct in:

(a) Transacting business in this State, including the sale, supply, purchase, and/or use of asbestos and/or asbestos-containing products, within this State; and/or

(b) Contracting to supply services or things in the State; and/or

(c) Commission of a tortious act in whole or in part in this State; and/or

(d) Having an interest in, using, or possessing real property in this State; and/or

(e) Entering into a contract to be performed in whole or in part by either party in this State; and/or

(f) Exposing Decedent to asbestos dust, fibers and/or particles generated from the ordinary and foreseeable use of the asbestos-containing products it sold, supplied, distributed, incorporated, and/or otherwise placed in the stream of commerce in the State of South Carolina; and/or

(g) Cape, PLC is in receivership, the order of appointment which encompasses the subsidiaries of the Defendants, including specifically, but not limited to North American Asbestos Company located in the State of South Carolina.

5. Upon information and belief, each of the Defendants is subject to this Court's jurisdiction because, among other things, this action arises from the acts of each Defendant, and/or their agents, co-conspirators, predecessors in interest, and/or amalgamated corporate parents: (i) transacting business in the State; (ii) contracting to supply services or things in the State; (iii) committing a litany of tortious acts in whole or in part in the State; (iv) causing injuries and deaths in the State by acts or omissions outside the State, while regularly conducting or soliciting

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business, engaging in a persistent course of conduct, or deriving substantial revenue from goods used or consumed or services rendered in the State; (v) having an interest in, using, or possessing real property in the State; (vi) entering into a contract to be performed in whole or in part by either party in the State; and/or (vii) producing, manufacturing, or distributing goods with the reasonable expectation (or in this case, the actual knowledge) that those goods are to be used or consumed in the State and were so used or consumed. *See* S.C. Code §§ 36-2-803(A)(1)–(5), (7)–(8).

6. Plaintiffs' cumulative exposure to asbestos as a result of acts and omissions of Defendants and their defective products/actions, individually and together, was a substantial factor in causing Plaintiffs' asbestos related diseases and other related injuries and therefore under South Carolina law, is the legal cause of Plaintiffs' injuries and damages.

7. Plaintiffs, nor their family members, were aware at the time of exposure that asbestos or asbestos-containing products presented any risk of injury and/or disease or the hazards associated with bringing home asbestos fibers on one's clothing and person.

8. Plaintiffs and/or their family members, worked with, or in close proximity to others who worked with, asbestos-containing materials including but not limited to asbestos-containing products and other asbestos-containing materials manufactured and/or sold by Defendants identified above.

9. Defendants are liable for damages stemming from their own tortious conduct or the tortious conduct of an "alternate entity" as hereinafter defined. Defendants are liable for the acts of their "alternate entity" and each of them, in that there has been a corporate name change, Defendants are the successor by merger, by successor in interest, or by other acquisition or operation of law including, but not limited to theories of alter-ego or amalgamation of interests, resulting in a virtual destruction of Plaintiffs' remedy against each such "alternate entity";

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Defendants, have acquired the assets, product line, or a portion thereof, of each such "alternate entity"; such "alternate entities" have acquired the assets, product line, or a portion thereof of each such Defendants; Defendants caused the destruction of Plaintiffs' remedy against each such "alternate entity"; each such Defendants has the ability to assume the risk-spreading role of each such "alternate entity;" and that each such Defendants enjoys the goodwill originally attached to each "alternate entity."

DEFENDANT	ALTERNATE ENTITY
CAPE PLC	Successor-in-interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.) ("CAPE PLC" or "Cape"); Anglo American PLC (individually and as successor-in-interest to Anglo American Corporation of South Africa Ltd.), De Beers PLC, De Beers Centenary AG, De Beers Consolidated Mines Ltd., De Beers S.A., De Beers UK Ltd., De Beers Jewellers Ltd., De Beers Jewellers US, Inc., Anglo American US Holdings Inc., Element Six US Corp., Element Six Technologies US Corp., Element Six Technologies (OR) Corp., First Mode Holdings, Inc., Platinum Guild International (U.S.A.) Jewelry Inc., Lightbox Jewelry Inc., Forevermark US Inc., Anglo American Crop Nutrients (U.S.A.), LLC, Charter Consolidated Ltd., ESAB Corporation, Central Mining & Investment Corporation Ltd., Cape Holdco Ltd., The Law Debenture Corporation PLC, Cape Industrial Services Group Ltd., Mohed Altrad, Altrad UK Ltd., Cape UK Holdings NewCo Ltd., Altrad Services Ltd. (f/k/a Cape Industrial Services Ltd.), and Altrad Investment Authority S.A.S.

10. Plaintiffs have been informed and believe, and thereon allege, that at all times herein mentioned, Defendants or their "alternate entities" were or are corporations, partnerships, unincorporated associations, sole proprietorships and/or other business entities organized and existing under and by virtue of the laws of the State of South Carolina, or the laws of some other

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state or foreign jurisdiction, and that said Defendants were and/or are authorized to do business in the State of South Carolina, and that said Defendants have regularly conducted business in the State of South Carolina.

11. Plaintiffs have been informed and believe, and thereon allege, that progressive lung disease, mesothelioma and other serious diseases are caused by inhalation of asbestos fibers without perceptible trauma and that said disease results from exposure to asbestos and asbestos-containing products over a period of time.

12. As a direct and proximate result of the conduct as alleged within, Plaintiffs suffered permanent injuries, including, but not limited to, mesothelioma and other lung damage, as well as the mental and emotional distress attendant thereto, from the effect of exposure to asbestos fibers, all to his damage in the sum of the amount as the trier of fact determines is proper.

13. As a direct and proximate result of the conduct as hereinafter alleged, Plaintiffs incurred liability for physicians, surgeons, nurses, hospital care, medicine, hospices, x-rays and other medical treatment, the true and exact amount thereof being unknown to Plaintiff at this time. Plaintiff requests leave to supplement this Court and all parties accordingly when the true and exact cost of Plaintiffs' medical treatment is ascertained.

14. As a further direct and proximate result of the conduct as hereinafter alleged, Plaintiffs incurred, and will incur, loss of profits and commissions, a diminishment of earning potential, and other pecuniary losses, the full nature and extent of which are not yet known to Plaintiffs. Plaintiffs pray leave to supplement this Court and all parties accordingly to conform to proof at the time of trial.

15. Plaintiffs hereby disclaim each and every claim or cause of action which does or may arise from any United States Military service or on any federal enclave. This disclaimer is

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not related solely to actions taken by or at the direction of a federal officer, but is, rather broader. Plaintiffs are not making any claims and are not alleging any causes of action against any entity for any asbestos exposure of any kind which occurred as a result of and military service of the injured parties herein named. Moreover, Plaintiffs further disclaim each and every claim or cause of action arising from any exposure to asbestos as a result of Plaintiffs' presence on or at any federal enclave. Plaintiffs further disclaim each and every claim or cause of action arising under the United States Constitution and under any Federal Law or Regulation. Finally, Plaintiffs disclaim each and every claim or cause of action which may be asserted under federal admiralty or maritime law. Courts across the Country have found that such disclaimers are proper and within the province of the Plaintiffs to disclaim. Any removal by any Defendants on the basis of the disclaimed claims will result in a motion for sanctions and seeking attorneys' fees.

THE PARTIES

16. Plaintiffs are identified above and on Exhibit A, hereto. Exhibit A details the injured party name, Personal Representative (if applicable), disease, date of diagnosis, date of death (if applicable) and relevant years of exposure and details of alleged exposure to asbestos attributable to Defendants.

17. Defendants, **CAPE PLC**, as successor-in-interest to CAPE INDUSTRIES LTD. (f/k/a CAPE ASBESTOS COMPANY LTD.) and its subsidiaries and global affiliates, was and is a United Kingdom public limited company with its principal place of business in England. At all times material hereto, CAPE PLC was authorized to do business in the State of South Carolina while engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos and/or asbestos-containing products, materials, or

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equipment, including, but not limited to, raw asbestos fibers and products resulting from use of the fiber. CAPE PLC is sued as a Product Defendants. Furthermore, this Defendants has done and does substantial business in the State of South Carolina, including the sale and distribution of its dangerous and/or defective products and services. The exposures to this Defendant's products, actions, inactions, and/or other activities, which caused or contributed to cause Plaintiffs' disease and injury, occurred in South Carolina. Plaintiffs' claims against CAPE PLC arise out of this Defendant's business activities in the State of South Carolina. CAPE PLC may be served through its court appointed Receiver who maintains his principle place of business in Richland County South Carolina. *See* CAPE PLC Receivership Order.

18. Plaintiffs are informed and believe that Defendant **Anglo American PLC** (individually and as successor-in-interest to Anglo American Corporation of South Africa Ltd.) is a corporation organized under the laws of England, United Kingdom, with its principal place of business located in London, England, United Kingdom.

19. Plaintiffs are informed and believe that Defendant **De Beers PLC** is a corporation organized under the laws of the Bailiwick of Jersey, with its principal place of business located in St. Helier, Jersey.

20. Plaintiffs are informed and believe that Defendant **De Beers Centenary AG** is a corporation organized under the laws of Switzerland, with its principal place of business in Emmenbrücke, Switzerland.

21. Plaintiffs are informed and believe that Defendant **De Beers Consolidated Mines Ltd.** is a corporation organized under the laws of the Republic of South Africa, with its principal place of business in Kimberly, Northern Cape, South Africa.

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22. Plaintiffs are informed and believe that Defendant **De Beers S.A**. is a corporation organized under the laws of the Grand Duchy of Luxembourg, with its principal place of business in the Grand Duchy of Luxembourg.

23. Plaintiffs are informed and believe that Defendant **De Beers UK Ltd**. is a corporation organized under the laws of England, United Kingdom, with its principal place of business in London, England, United Kingdom.

24. Plaintiffs are informed and believe that Defendant **De Beers Jewellers Ltd**. is a corporation organized under the laws of England, United Kingdom, with its principal place of business in London, England, United Kingdom.

25. Plaintiffs are informed and believe that Defendant **De Beers Jewellers US, Inc.** is a corporation organized under the laws of the State of Delaware, with its principal place of business in Fairfield County, Connecticut.

26. Plaintiffs are informed and believe that Defendant **Anglo American US Holdings Inc.** is a corporation organized under the laws of the State of Delaware, with its principal place of business in New Castle County, Delaware.

27. Plaintiffs are informed and believes that Defendant **Element Six US Corp.** is a corporation organized under the laws of the State of New York, with its principal place of business in Harris County, Texas.

28. Plaintiffs are informed and believe that Defendant **Element Six Technologies US Corp**. is a corporation organized under the laws of the State of Delaware, with its principal place of business in Santa Clara County, California.

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29. Plaintiffs are informed and believes that Defendant **Element Six Technologies (OR) Corp.** is a corporation organized under the laws of the State of Delaware, with its principal place of business in Multnomah County, Oregon.

30. Plaintiffs are informed and believe that Defendant **First Mode Holdings, Inc.** is a corporation organized under the laws of the State of Delaware, with its principal place of business in King County, Washington.

31. Plaintiffs are informed and believe that Defendant **Platinum Guild International (U.S.A.) Jewelry Inc.** is a corporation organized under the laws of the State of New York, with its principal place of business in New York County, New York.

32. Plaintiffs are informed and believe that Defendant **Lightbox Jewelry Inc.** is a corporation organized under the laws of the State of Delaware, with its principal place of business in Kent County, Delaware.

33. Plaintiffs are informed and believe that Defendant **Forevermark US Inc.** is a corporation organized under the laws of the State of Delaware, with its principal place of business in Fairfield County, Connecticut.

34. Plaintiffs are informed and believe that Defendant **Anglo American Crop Nutrients (U.S.A.), LLC** is a corporation organized under the laws of the State of Colorado, with its principal place of business in Burleigh County, North Dakota.

35. Plaintiffs are informed and believe that Defendant **Charter Consolidated Ltd.** is a corporation organized under the laws of England, United Kingdom, with its principal place of business located in Essex, England, United Kingdom.

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36. Plaintiffs are informed and believe that Defendant **ESAB Corporation** is a corporation organized under the laws of the State of Delaware, with its principal place of business in Montgomery County, Maryland.

37. Plaintiffs are informed and believe that Defendant **Central Mining & Investment Corporation Ltd.** is a corporation organized under the laws of England, United Kingdom, with its principal place of business located in Essex, England, United Kingdom.

38. Plaintiffs are informed and believe that Defendant **Cape Holdco Ltd.** is a corporation organized under the laws of England, United Kingdom, with its principal place of business in Warrington, England, United Kingdom.

39. Plaintiffs are informed and believe that Defendant **The Law Debenture Corporation PLC** is a corporation organized under the laws of England, United Kingdom, with its principal place of business in London, England, United Kingdom.

40. Plaintiffs are informed and believes that Defendant **Cape Industrial Services Group Ltd**. is a corporation organized under the laws of England, United Kingdom, with its principal place of business in Warrington, England, United Kingdom.

41. Plaintiffs are informed and believe that Defendant **Mohed Altrad** is an individual who resides in Montpelier, France.

42. Plaintiffs are informed and believe that Defendant **Altrad UK Ltd.** is a corporation organized under the laws of England, United Kingdom, with its principal place of business in Warrington, England, United Kingdom.

43. Plaintiffs are informed and believe that Defendant **Cape UK Holdings NewCo Ltd.** is a corporation organized under the laws of England, United Kingdom, with its principal place of business in Warrington, England, United Kingdom.

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44. Plaintiffs are informed and believe that Defendant **Altrad Services Ltd.** (f/k/a Cape Industrial Services Ltd.) is a corporation organized under the laws of England, United Kingdom, with its principal place of business in Warrington, England, United Kingdom.

45. Plaintiffs are informed and believe that Defendant **Altrad Investment Authority S.A.S.** is a corporation organized under the laws of France, with its principal place of business in Florensac, France.

46. Plaintiffs believe that one or more additional companies were likewise involved in the alleged acts described herein and are liable for the same alleged harms under the same or similar theories of liability ("Additional Defendants"). Those Additional Defendants may include one or more companies operated or managed by organizations located in the United States, United Kingdom, South Africa, Luxembourg, Lichtenstein, Switzerland, or other jurisdictions, which have been used to obfuscate responsibilities with and control over Cape PLC during the relevant period alleged herein, which were or are alter ego entities of Cape PLC, or which otherwise facilitated, took part in, or benefited from the liability-avoidance scheme described herein. When the identities of these Additional Defendants become known to Plaintiffs, this Complaint may be amended *nunc pro tunc* to state the identities of such Additional Defendants.

VENUE

47. Venue is proper in this Court as it is the Receiver Court which appointed the Receiver for CAPE, PLC and pursuant to the *Barton* Doctrine, all claims against the Receiver must be filed in the receiver court. Further, on March 3, 2019, pursuant to the Order of the Supreme Court of South Carolina, Order Number 2017-03-03-01, the Honorable Jean H. Toal was appointed to have jurisdiction in all circuits in the State to dispose of all pretrial matters and motions, as well

as trials, arising out of asbestos and asbestos litigation filed within the state court system. Thus, the Honorable Jean H. Toal will have jurisdiction over this matter.

BACKGROUND FACTS

48. Although this complaint arises out of events commencing many decades ago and continuing for decades, those events led to and resulted in asbestos-related disease that continues to be diagnosed in and suffered by residents of South Carolina, all across the United States and around the world, to this day. As described in detail below, Defendants (including their predecessors in interest) are directly responsible for injuries caused by these events, especially by the sale and use of asbestos or asbestos-containing products throughout the United States, including in South Carolina.

49. Cape PLC is the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.) and its subsidiaries and global affiliates (collectively, "Cape"), which was and is a private company organized and existing under the laws of the United Kingdom, with its principal place of business in England. At all times relevant, Cape was deeply involved in all elements of the global asbestos industry, mining hundreds of thousands of tons of raw asbestos in Apartheid-era South Africa and then selling asbestos fiber to scores of manufacturers of asbestos-containing products in the United States—substantial quantities of which were used in South Carolina.

50. Cape's historic operations involved a complex scheme to sell millions and millions of dollars of asbestos—knowing with certainty that it would kill and maim tens of thousands of Americans—while, at the same time, developing and executing on a ploy to escape any legal or financial responsibility to the people harmed by intentionally depleting its U.S.-based subsidiary of attachable assets. It is sadly unsurprising that Cape, acting with various other foreign entities, concocted this scheme, because Cape boldly admitted that it had **no** "moral responsibility" to the

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people injured or killed by Cape's asbestos products. CAPE000486. Executing on that scheme, Cape allowed default judgments against it in asbestos lawsuits across the United States, and simply absconded, leaving no assets for recovery. Ultimately, as averred below, Cape and its affiliated domestic and foreign entities got extraordinarily wealthy off the suffering and deaths of tens of thousands, and then cheated the system to escape responsibility for its and their tortious misconduct.

51. How does a company like Cape pull off such a scheme? Because Cape was part of a South African mining empire that enjoyed unparalleled political power, resource wealth, commercial and legal deviousness, and wholesale antipathy towards ethical business practices and any decent concept of responsibility. More specifically, Cape was the industrial gem of the Anglo and De Beers mining houses, which were controlled by the powerful Oppenheimer family of Johannesburg. *See, e.g.*, Laurie Flynn, *Studded with Diamonds and Paved with Gold: Miners, Mining Companies and Human Rights in Southern Africa* 180 (1992) [hereinafter, "Flynn (1992)"] ("Cape Industries, a British-registered part of Harry Oppenheimer's Anglo American empire . . . [was] among the biggest asbestos producers from the beginning").

52. As averred herein, those Defendants are responsible for a scheme that included, without limitation, the following acts:

(a) Failing to follow corporate formalities among affiliated entities, with a select few entities and individuals dominating the management and operations of Cape and its parent company, Charter Consolidated Ltd.;

(b) Leveraging that common ownership and control of numerous mining and other investment entities to effectively dominate the South African economy and global market for certain forms of asbestos;

(c) Creating and operating a byzantine web of entities with the deliberate purpose of avoiding public scrutiny and escaping the liabilities of the affiliated companies and their shareholders;

(d) Siphoning funds from entities within that web, including Cape's sole American subsidiary, to maximize the financial return to Cape's overseas owners, eliminate liabilities, and escape responsibility by neutralizing the risk of asset attachment by tort creditors; and

(e) Destroying corporate records and publicly misrepresenting the nature of Cape's business and liability-avoidance scheme in the United States, all designed to avoid responsibility to the tens of thousands of people injured by Cape asbestos.

53. Each of the named Defendants facilitated and caused Cape's U.S.-based sales and liability-avoidance scheme, or otherwise acted as successors in interest to or beneficiaries of entities involved in that scheme, and, thus, are responsible for the alleged bodily injury underlying the claims against Cape PLC across the United States, including specifically in South Carolina.

I. Cape was established as part of a South African mining empire.

54. Cape: A De Beers-Affiliated Project. From its beginning, Cape was formed to act in coordination with powerful mining interests in South Africa. Specifically, in 1891, Francis Oats— a director and eventual chairman of De Beers Consolidated Mines Ltd. (collectively with its affiliates and successors in interest, as named as Third-Party Defendants herein, "De Beers")— formed the Cape Mineral Syndicate to exploit asbestos reserves that had been recently re-discovered in the Orange River Valley in South Africa. Two years later, on December 28, 1893, the Cape Asbestos Company Ltd. was organized in the United Kingdom for the express purpose of: (i) taking over the Cape Mineral Syndicate's mining operations, and (ii) manufacturing asbestos products in England. As a De Beers-affiliated company, Cape was co-founded by Oats and his close business associate, Ludwig Breitmeyer (also a future De Beers director), while another De Beers director, Rudolf Hinrichsen, was installed as Cape's first chairman. Jock McCulloch, *African Issues: Asbestos Blues: Labour, Capital, Physicians & the State in South Africa* 43

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(Indiana Univ. Press 2002) [hereinafter, "McCulloch (2002)"]. Thus, from its founding, Cape's operations and ownership were integrated with the interests of De Beers.

55. Wernher, Beit & Co. In the 1890s, Breitmeyer was "a partner in the London [mining finance] firm of Wernher, Beit & Co.," which—with its branch in South Africa, *i.e.*, Hermann, Eckstein & Co.—"became famous as the Corner House" Group. *Cape Asbestos (1893–1953): The Story of The Cape Asbestos Company Limited* 16 (1953) [hereinafter, "Cape Diamond Jubilee"]; Sir J. Percy Fitzpatrick, *South African Memories* 14 (1932). The Corner House Group was the most powerful mining finance house in South Africa at the time and was founded by London- based "Randlords" Alfred Beit and Julius Wernher. *See* Martin Meredith, *Diamonds, Gold and War: The British, the Boers, and the Making of South Africa* 187 (2007) [hereinafter "Meredith (2007)"] ("At first, Eckstein's office in Johannesburg was called 'Beit's building'; but it later became known as Eckstein's Corner and then as the Corner House; and what it represented was the most powerful group of financiers in southern Africa."); *id.* at 294 (noting that "foreign mining magnates" such as Wernher and Beit "were dubbed by the British press" as "the Randlords," who "indulge[d] in luxury lifestyles in Britain" from their fortunes made in Africa).[1]

56. Role at De Beers and Cape. The members of the Corner House Group, particularly Alfred Beit, were fundamental to the amalgamation of diamond-mining interests that occurred with the formation of De Beers Consolidated Mines Ltd. in 1888. *See id.* at 247 ("The mastermind behind the amalgamation of the diamond mines in Kimberly was not [Cecil] Rhodes but . . . Alfred Beit – 'Little Alfred' – to whom he invariably turned for solutions.").[2] In turn, Ludwig Breitmeyer

[1] *See also, e.g.*, Sir J. Percy Fitzpatrick, *South African Memories* 157 (1932) ("In few countries . . . did any single business firm bulk as big [as] . . . Wernher, Beit & Co. Their great wealth and power on the diamond fields, where . . . they were the real backers of [Cecil] Rhodes in his great work [*e.g.*, the amalgamation of interests at De Beers], and on the Witwatersrand gold fields, where under the name of H. Eckstein & Co., their position, power and influence were overwhelmingly predominant, made them of necessity a very great factor in [South Africa].").

[2] *See also, e.g.*, Sir J. Percy Fitzpatrick, *South African Memories* 27, 33, 90 (1932) ("Alfred Beit has been very generally regarded as the ablest businessman South Africa has ever known. He was very much more than just a financier

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served as alternate director on the De Beers board for Alfred Beit, while being intimately involved in Cape's founding and becoming Cape's first long term Chairman (from 1894 until his death in 1930). *See* Cape Diamond Jubilee (1953) at 6, 16 (noting Breitmeyer became Cape's Chairman after the first one died). In that role, Breitmeyer managed Cape in the company's infancy, while it was funded and controlled by members of the Corner House Group (*i.e.*, the key members of De Beers). *See id.* at 12, 16.

57. Breitmeyer's Personal Rise. While acting as Cape's Chairman, Breitmeyer was part of the Corner House Group's continued dominance over mining in South Africa into the 1920s (until that role was overtaken by a relative newcomer, *see infra* ¶ 49). For example, in 1905, on information and belief, Breitmeyer was involved in the organization of the Central Mining & Investment Corp. Ltd. ("Central Mining") to take over the assets and business interests of Wernher, Beit & Co., which included interests in Cape Asbestos. *See, e.g.*, Duncan Innes, *Anglo American and the Rise of Modern South Africa* 55 (1984) [hereinafter "Innes (1984)"] ("[T]he House of Wernher Beit expanded considerably at this time, changing its name to Central Mining in 1905[.]").[3] In 1912, moreover, Breitmeyer became a full-time De Beers director. *See* Hedley A. Chilvers, *The Story of De Beers* 307 (1939) ("BREITMEYER, L. Director from December 5, 1912, to the date of his death, March 13, 1930. Was alternate to A. Beit from May 14, 1888, to June 25, 1889, and from May 18, 1891, to February 6, 1896."); De Beers 1930 Annual Report, at 3 (Oct. 13, 1930) (Sir Ernest Oppenheimer, as the new De Beers Chairman, reporting "regret to record

… There can be no doubt whatever that Beit was Rhodes's financial genius, and without him the great creations which are credited to Rhodes would not have been accomplished. … When the big amalgamation was completed and the De Beers Consolidated created, Rhodes, Beit and Wernher were made life-governors with a share in ultimate profits, which … proved of enormous value afterwards.").

[3] *See also Archives Hub: Papers of the Central Mining and Investment Corporation*, https://archiveshub.jisc.ac.uk/search/archives/780f1a0a-48ec-3e42-8e82-53503070110e; *Company Information: Central Mining & Investment Corporation Limited (The)*, https://find-and- update.company-information.service.gov.uk/company/00084511.

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the death . . . of [a] valued friend and colleague, Mr. L. Breitmeyer, who had been a Director of the Company for the past 18 years").

58. The Oppenheimer–Anglo Takeover of De Beers. In or around 1925, at a critical juncture in South African mining history, Breitmeyer sought to take control of De Beers, but was thwarted by Sir Ernest Oppenheimer—who, soon after, became De Beers' chairman. *See* Hedley A. Chilvers, *The Story of De Beers* 227 (1939) ("Offers for the purchase of the Company's diamonds were received in 1925 from L. Breitmeyer and friends and from Sir Ernest Oppenheimer and friends for a period of five years from January 1, 1926. The offer of the latter was accepted"); De Beers 1930 Annual Report, at 3 (Oct. 13, 1930) (noting leadership of Oppenheimer). Critical to his success as the new De Beers chairman, Ernest Oppenheimer also controlled the Anglo American Corporation of South Africa Ltd. (collectively with its affiliates and successors in interest, including Anglo American PLC, "Anglo"), which Oppenheimer formed in September 1917 to bring about an "amalgamation between" various mines and other business interests. *See* David Pallister et al., *South Africa Inc.: The Oppenheimer Empire (Revised & Updated Ed.)* 54–55 (Yale Univ. Press 1988) [hereinafter, "Pallister (1988)"].

59. Anglo's Interest in Cape. In the aftermath of the Oppenheimer-led takeover of De Beers, Breitmeyer maintained his directorship at De Beers and his Chairmanship at Cape. *See, e.g.*, De Beers 1930 Annual Report, at 3 (Oct. 13, 1930) (noting long, continued role as De Beers director); Cape Diamond Jubilee (1953) at 6 (chronology of Cape's initial leadership). However, Breitmeyer died soon after (in 1930), with Central Mining or other affiliates of the Corner House Group continuing to control Cape.[4] On information and belief, however, soon after the

[4] *See, e.g.*, McCulloch (2002) at 8 (observing that by 1944, "the major shareholders [in Cape] were the Central Mining and Investment Corporation of London and the estate of the late Alfred Beit," who had died nearly four decades prior in 1906); Cape Diamond Jubilee (1953) at 35, 48, 61 (referencing Central Mining and other affiliates of the Corner House Group involved with leadership and operations at Cape).

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Oppenheimer-led takeover of De Beers, Anglo and its affiliated entities developed direct and indirect ties (including by assuming contracts and liabilities) in various businesses affiliated with the Corner House Group, including Central Mining and Cape. *See cf.* Hedley A. Chilvers, *The Story of De Beers* 227 (1939) ("The new (Oppenheimer) Syndicate took over in October the stock of diamonds of the old (Breitmeyer) Syndicate and all contracts and liabilities."). And at minimum, Anglo's "involvement in Cape Asbestos grew during the Second World War," because by then, Central Mining had become affiliated as an "Oppenheimer company" and was also Cape's "majority shareholder." Geoffrey Tweedale & Laurie Flynn, *Piercing the Corporate Veil: Cape Industries and Multinational Corporate Liability for a Toxic Hazard, 1950–2004*, 8 Enterprise & Society 268, 274 (2007) [hereinafter, "Tweedale & Flynn (2007)"]. Moreover, by 1949, "Central [Mining] had a majority on the board of directors of Cape," *id.*, and by 1958 (at the latest), Anglo had executed a "take over [of] Central Mining," Pallister (1988) at 120.

60. Cape as Part of an Empire. In other words, by the middle of the twentieth century, Cape was the asbestos-mining leg of an amalgamated mining empire based out of South Africa that included the De Beers diamond monopoly and mining powerhouse of Anglo associated with the Oppenheimer business dynasty.[5]

61. Benefits of Anglo Affiliation. Cape's affiliations—especially with Anglo—were key to Cape's success, because Anglo (i) acted as "South Africa's largest and most influential corporation," (ii) dominated the mining industry, and (iii) "ma[de] up the core of the country's economy." Pallister (1988) at 25 ("The old adage that what is good for General Motors in the United States is far more apposite to Anglo and South Africa. Certainly Anglo

[5] While started by Sir Ernest Oppenheimer, leadership at Anglo was passed down to his son, Harry Oppenheimer, who is now succeeded by the founder's grandson, Nicholas ("Nicky") Oppenheimer, reportedly the third wealthiest man in Africa. *See* Rob LaFranco *The Forbes Billionaires List: Africa's Billionaires* (Jan. 30, 2023), https://www.forbes.com/lists/africa- billionaires/?sh=5a12a2a724d5.

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controls a far greater proportion of the South African economy than [GM] could ever hope to achieve in the USA."). For example, Central Mining (as controlled by Anglo) leveraged its expertise and methods in gold mining to improve the performance at Cape mines by seconding employees to Cape in South Africa—but with Anglo, not Cape, paying their compensation. *See* McCulloch (2002) at 51–52 (detailing "claims that seconded staff kept their original medical aid and pension entitlements [of Central Mining], and their salaries were paid by the parent company Anglo American").[6]

62. The Deviousness of Its Business Structure. Exhibiting extraordinary business and legal deviousness, the Oppenheimer family (along with their close associates) structured and coordinated "a web of secret companies" to avoid financial liabilities, including tax liabilities. Pallister (1988) at 25; *see also* Stefan Kanfer, *The Last Empire: De Beers, Diamonds, and the World* 292, 316–17 (1995) [hereinafter, "Kanfer (1995)"] (noting that the Anglo businesses were often investigated for "illegally doing business in the [United] States"). Outwardly, however, the Oppenheimer family and its associates did not acknowledge the true extent of cross-associations between their various companies—which in the aggregate allowed the Oppenheimer family to dominate the South African economy. *See, e.g.*, A.J.W. Owston Tr. 31–32 (Aug. 22, 1984) (Charter executive director and Anglo employee claiming not to know who controls Anglo or De Beers, but admitting the greater group enjoyed having "inside South Africa dozens of subsidiaries in all kinds of activities").[7]

[6] In turn, in later years (*see infra* ¶ 54), Charter could "call on the comprehensive technical services of Anglo," which Charter acknowledged "contributed greatly to the examination and evaluation of the many mining and prospecting projects initiated by or brought to" Charter. *See* Charter 1966 Annual Report, at 24 (May 31, 1966).

[7] *See also* Pallister (1988) at 25 ("Technically there are simply two major South African publicly quoted companies, the Anglo American Corporation of South Africa . . . and De Beers Consolidated Mines, with an admitted close working relationship and various cross-holdings with other companies. Because the boards of [Anglo] and De Beers present their companies as independent entities on stock exchanges and to business partners and governments around the world, they can never formally admit that the two operate as inseparable twins.").

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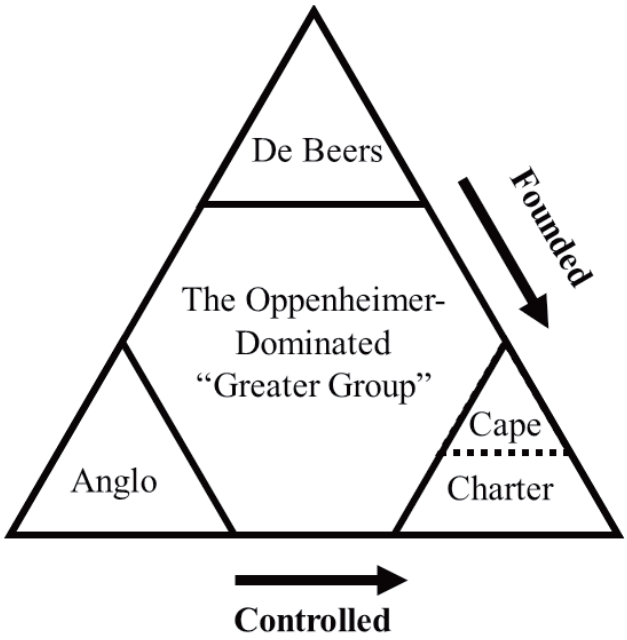
63. The Creation of Charter. After World War II, the Oppenheimer family sought to extend its business holdings internationally, including by consolidating companies with ownership and control of Cape. Thus, in 1965, Central Mining merged with two other mining and investment companies (The British South Africa Company and The Consolidated Mines Selection Company Ltd.) to form Charter Consolidated Ltd. ("Charter"). Anglo created Charter to serve as Anglo's "international investment arm," Pallister (1988) at 345, thereby creating an Oppenheimer-controlled corporate triumvirate—with Charter being the third of "three essential companies" of what insiders called "the greater group," *i.e.*, Anglo, De Beers, and Charter. *See* A.J.W. Owston Tr. 31–32, 66 (Aug. 22, 1984); J.A.B. Nichols Tr. 10, 61(Aug. 29, 1984). [8]



64. Charter's 1969 "Takeover" of Cape. Although Charter had both direct and indirect interests in Cape from its founding, it purported to only have a minority interest initially, before quickly accumulating shares and acquiring majority ownership by 1969. *See* Charter 1965 Annual

[8] *See also, e.g., Charter Website: History* (Dec. 12, 2008), https://web.archive.org/web/20081212114613/http://www.charter.ie/chtr_int/about/history/; (noting that "[v]arious companies within the Anglo American Corporation of South Africa have held an interest in Charter Consolidated shares").

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Report, at 5 (May 19, 1965) (listing Cape as a "principal interest[]" of Charter at its founding); Charter 1968 Annual Report, at 34 (May 28, 1968) (reporting 19.5% interest in Cape and the "mining and manufacture of asbestos"); Charter 1969 Annual Report, at 7, 25, 31 (June 3, 1969) (reporting 25.3% interest in Cape and efforts to obtain majority ownership through takeover offers to other unidentified Cape shareholders). On information and belief, in 1969 and prior years, Charter or other Anglo-affiliated entities purchased Cape shares from other companies associated (previously) with the Corner House Group, including, without limitation, Rand Mines Ltd., Rand Mines Holdings Ltd., or their affiliates, in which Charter and Anglo also held large ownership interests. *See* Charter 1969 Annual Report, at 28, 32 (June 3, 1969) (noting 15.9% interest in Rand Mines Ltd. and 23.6% interest in Transvaal Consolidated Land & Exploration Company Ltd.). Indeed, at its founding, Charter touted its close relationship with these and other members of the Corner House Group. *See, e.g.*, Charter 1965 Annual Report, at 7 (May 19, 1965) (noting shared interests involving Charter, Central Mining, and Rand Mines Ltd. under section of report titled "CORNER HOUSE GROUP"); Innes (1984) at 212–13 (stating that "as part of the Corner House Group, Rand Mines had become one of the country's leading mining houses," but eventually fell under the control of Anglo by the early 1960s); *see also* Meredith (2007) at 302 (detailing the founding of Rand Mines in 1893, which was formed by the contribution of mining claims and "five existing companies" by H. Eckstein & Co., with "the partners in Eckstein, including Beit and Wernher in London," receiving shares in the new entity).

65. Charter: A Shell Game. In the end, Charter's purported "takeover" of Cape was nothing more than a continuation of other Oppenheimer-affiliated entities' control of Cape over the prior decades,[9] and serves as only one example of the many corporate shell games used by the

[9] *See, e.g.*, Charter 1966 Annual Report, at 7 (May 31, 1966) (noting Central Mining "acquired interests in . . . asbestos, . . . besides a number of industrial interests in the United Kingdom"); Charter 1970 Annual Report, at 16 (June 18,

Oppenheimer business empire to obscure their financial interests globally.

66. One Main Office for One Enterprise. Similarly, the corporate separation between Charter and Anglo was superficial. By way of example only, Charter and Anglo shared common office space at 40 Holborn Viaduct in London, employed personnel who routinely switched roles between the entities, and each had boards that were dominated by the Oppenheimer family and their business associates/servants. *See, e.g.*, E.G. Rudland Tr. 7–8, 21–22 (Apr. 7, 1981) (describing overlapping personnel and directorships); House of Commons, Expenditure Comm., Session 1973–74, *Fifth Report: Wages and Conditions of African Workers Employed by British Firms in South Africa* 22–23 (Jan. 22, 1974) [hereinafter, "House of Commons Rep."] (noting that Charter "even allow[s] Anglo American to supply directors for Charter representation on boards"); Peter Schmeisser, *Harry Oppenheimer's Empire: Going for Gold*, N.Y. Times, Mar. 19, 1989 [hereinafter, "Schmeisser Article"] (noting common office space of De Beers, Anglo, and Charter in London, as well as overlapping directors among the Oppenheimer companies); Charter 1965 Annual Report, at 10 (May 19, 1965) (as part of the Charter merger, there was an "[i]ntegration of the London staffs" of the three merged companies, with the new organization located at 40 Holborn Viaduct); Charter 1966 Annual Report, at 24 (May 31, 1966) (noting merged companies were also combined "with the London staffs of Anglo . . . and Consolidated Share Registrars Limited" to create a "wholly owned subsidiary, Charter Consolidated Services Limited," which also took over the office lease and "provide[d] staff and services in London, not only for all companies in the Charter . . . group, but also for the Anglo . . . , De Beers and Corner House groups").

67. Charter's Role in the Empire. Consistent with this scheme, Charter operated such that its "every move was made in the interests of De Beers and Anglo"—furthering the

1970) (noting that "there has long been a close association [of Cape] with Charter through one of its forerunners," *i.e.*, Central Mining).

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amalgamated Oppenheimer empire's effort "to extend [its] grasp to North America," while allowing it to "unobtrusively buy, spawn or control" varied and sizeable business interests around the world through a "series of . . . cross-holdings." Kanfer (1995) at 291–92, 315 (describing Charter as one side of a "pyramid" of global business interests).[10]

68. Domination of Charter. The Oppenheimers consistently sat on Charter's board of directors after its founding,[11] while at the same time dominating Charter's share ownership.[12] Indeed, Charter's management was a long continuation of Randlord-style business, in which the "real proprietors" and "owners" of a business (such as the Oppenheimer family) participate primarily in profits, while local affiliated entities (such as Charter and Cape) profit by the grace of the Randlords—with an "unwritten obligation of honour to respect [Randlord] wishes and position." Sir J. Percy Fitzpatrick, *South African Memories* 90–91 (1932) (Corner House Group representative in Johannesburg detailing this norm between De Beers and Corner House Group members). Thus, it was clear to all, including Members of Parliament, that "[w]here Anglo American lead, Charter Consolidated are prepared to follow." House of Commons Rep. at 23.

69. Charter's Investment in South Africa. By the early 1970s, Charter became the largest English corporate investor in South Africa—albeit, one investing primarily in Anglo-affiliated entities, including its own parent Anglo (in which Charter had a 10% equity stake). *Id.*

[10] *See also, e.g.*, Schmeisser Article ("The structure of Oppenheimer's empire is dizzyingly complex and nearly impenetrable to outsiders. He wields his power indirectly, through pyramided holding companies, interlocking shareholdings and a myriad of cross-directorships. As a result of this operating strategy, few people are aware that in the last two decades scores of businesses in the United States [and elsewhere] have been founded or purchased with Oppenheimer capital and are managed by Oppenheimer loyalists while maintaining no legal ties to South Africa.").
[11] *See, e.g.*, Charter 1967 Annual Report, at 4 (June 9, 1967) (noting Oppenheimer's role as chairman, beginning a two-year term in that role); Charter 1971 Annual Report, at 3 (June 1, 1971) (noting Sir Philip Oppenheimer's role as Deputy Chairman and a member of the executive committee).
[12] *See, e.g.*, Anglo 1979 Annual Report, at 69 (June 22, 1979) (indicating that both Harry and Nicky Oppenheimer had 18,333,268 beneficial shares in Anglo, with the next highest directorship holding being 30,000 shares); Charter 1968 Annual Report, at 10 (May 28, 1968) (indicating that Harry Oppenheimer dominated ownership of Charter with 5,004,600 shares).

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at 22. Uniquely, in contrast to other corporate investors who sought majority ownership (and thus control) over their South African businesses, Charter had a minority stake (usually around 10%) in most of its South African investments, with one notable exception: its majority ownership of Cape. *Id.* at 22 & n.1.

70. Charter's Interest in Cape. Charter's "largest industrial subsidiary company" was Cape, with Charter even seconding and compensating key personnel for Cape's management. J.N. Clarke Tr. 14, 17–18 (Apr. 21, 1983); *see also, e.g.*, G.A. Higham Tr. 7–9, 28, 87 (Oct. 3, 1984) (Cape Chairman admitting that Charter had been paying his compensation for years and that he acts as Chairman for "a number of Charter's [other] industrial subsidiaries" as well). In other words, although most of Charter's assets were tied up in minority investment interests—effectively operating as a holding company—Cape was Charter's primary operating company and "principal industrial subsidiary." *See* Charter 1972 Annual Report, at 15 (May 30, 1972) (also emphasizing Cape's profitability). In turn, Charter used its "close association" with other South African companies, namely Anglo, to "exercise . . . influence" in Apartheid-era South Africa, *see* House of Commons Rep. at 22—thereby allowing Cape to profitably mine and export asbestos to the United States for decades.

71. Clear Takeaway, Despite Complexity. Ultimately, although the facts are complex, it is clear that through an "Anglo holding company" (*i.e.*, Charter), Cape and its subsidiaries were part of the "Anglo American Group of Companies"[13] that dominated the

[13] As explained by Anglo, the "term 'group' has a wider meaning in the South African mining industry than its statutory definition of a parent company and its subsidiaries . . . . The mining finance houses in South Africa have traditionally operated 'the group system', whereby the parent house not only administers companies that are not necessarily subsidiaries, but provides them with a full range of administrative and technical services and is able, by virtue of its financial strength and standing, to assure them of capital for expansion and development. Thus the Anglo American Corporation Group comprises a large number of companies that are closely linked to [Anglo] but which are not generally subsidiaries or controlled companies as defined in the statutes." Anglo 1974 Annual Report, at 3 (Apr. 28, 1975).

South African mining economy during the twentieth century. Innes (1984) at 271, 283 (listing Cape among other Anglo subsidiaries in a published history about Anglo and its importance in South Africa); *see also, e.g.*, Schmeisser Article (reporting that the Oppenheimer family "has dominated the South African economy for nearly half of [the twentieth] century" and that "Anglo American, which accounts for more than 50 percent of the stocks traded on the Johannesburg stock exchange, permeates every conceivable corner of the South African marketplace").

72. A Profitable Mid-Century Business. In turn, Cape reflected the Oppenheimer empire's shared commercial interest[14] in the high-growth, highly profitable asbestos industry after World War II. *See, e.g.*, Jock McCulloch & Geoffrey Tweedale, *Defending the Indefensible: The Global Asbestos Industry and Its Fight for Survival* 37 (Oxford Univ. Press 2008) [hereinafter, "McCulloch & Tweedale (2008)"] (observing that "the major [asbestos] companies derived the bulk of their profits from" asbestos mines); Charter 1970 Annual Report, at 12, 16 (June 18, 1970) (reporting a "substantial jump in trading profits for the year . . . due to the inclusion of earnings from Cape Asbestos").[15]

73. Goal of Corporate Complexity. Although the precise "connection between Cape, Charter, Central Mining and Anglo American is complex," McCulloch (2002) at 51–52, that complexity reflects an intentional scheme to obfuscate corporate relationships and ownership interests while minimizing the amalgamated business empire's liability risks, including for

[14] *See, e.g.*, Anglo 1976 Annual Report, at 7 (Mar 25, 1977) (reporting that Anglo had "important interests in the production of . . . asbestos" through Charter); De Beers 1978 Annual Report, at 48– 49, 52 (Mar. 30, 1979) (referencing "strengthening [of] De Beers' earnings base," which through Anglo and Charter, "the London-based mining finance house," included interests in "asbestos . . . and other minerals, and in industrial enterprises in the United Kingdom"); Charter 1972 Annual Report, at 39 (May 30, 1972) ("In mining, the Anglo American Corporation group and its close associate De Beers Consolidated Mines Limited have important interests in the production of . . . asbestos.").

[15] *See also, e.g.*, Charter 1970 Annual Report, at 31 (June 18, 1970) (reporting that the sale of asbestos fibre contributed the most to the company's trading profit); Charter 1972 Annual Report, at 3 (May 30, 1972) (noting among top "[f]eatures of the year" that Cape's "profits increased from £2,528,000 to £3,098,000"); Charter 1977 Annual Report, at 47 (June 9, 1977) (noting £9,831,000 pre-tax trading profit from mining and sale of asbestos fibre and 28.2% profit margin from the same, *i.e.*, the highest among Charter's manufacturing subsidiaries).

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asbestos (as well as taxes).[16]

74. The Point of Charter. Specifically, Charter was designed to serve as a corporate cushion—a products-liability patsy—for Anglo that could (i) promptly purge itself of substantial cash (through dividends based on new profits, or by otherwise reallocating assets among holding companies through more complex transactions) to Oppenheimer-affiliated entities, and (ii) add a "formal" degree of separation between Anglo and Cape, *i.e.*, a profitable asbestos business, but one they knew would injure tens of thousands and thus created a substantial risk of liability in the future. *See infra* ¶¶ 81–88 (detailing working conditions and known disease in South Africa and England); *see also cf.* Jock McCulloch & Pavla Miller, *Mining Gold and Manufacturing Innocence: Occupational Lung Disease and the Buying and Selling of Labour in Southern Africa* 390–91 (2023) (noting "Charter's controlling share in Cape gave Anglo American a commercial interest in the asbestos industry" and "Anglo American's board reason to monitor" alleged liabilities of Cape).

75. Infamous Recognition for Success. Through these corporate maneuvers, Cape, as "part of the great South African conglomerates of De Beers and Anglo-American Corporation, provides a classic example of . . . tactics" centered on hiding behind a corporate-veil fiction, *i.e.*, "us[ing] complex and confusing corporate structures to distance themselves from liability." McCulloch & Tweedale (2008) at 181 (also describing recognition by judicial tribunals that "Cape

[16] As described later, *infra* ¶¶ 89–105, when the victims of this scheme began to sue and win verdicts, Anglo implemented additional—but still wholly superficial—corporate changes to further distance itself from its asbestos business and mitigate its U.S. liability risk, with Cape Asbestos (i) dropping *Asbestos* from its name, (ii) ceasing to appoint Cape officials to the board of its American subsidiary (NAAC) as a "sensible precaution," (iii) interjecting another entity (Cape Industries Overseas Ltd.) between NAAC and Cape, to add yet *another* degree of superficial separation between Anglo and its U.S. asbestos business, and (iv) purporting to close NAAC and sell its South African asbestos mines, for the purpose of evading creditors, while Anglo continued to profit from the sale of asbestos through other entities.

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operated worldwide as a single economic unit" and provided "false testimony" about its organization).

76. Control as the Key to Success. The Oppenheimer "family's control [of these enterprises] and its personal wealth" was consistently the "key" to coordinating the management of their businesses, including Charter and Cape. *See* Pallister (1988) at 41 (noting that apart from Oppenheimer kin, the "powerful inner cabinet that [took] the most sensitive and important decisions" for the global empire was limited to (i) two individuals who had each served as Chairmen of Charter, and (ii) former personal assistants who were "considered to be part of the 'family'").

77. Domination of the South African Mining Economy. In the end, the amalgamated Oppenheimer empire, as effectuated by De Beers, Anglo, and Charter primarily, was astonishingly successful in its domination of the South African mining economy—making up 10% of South Africa's GDP and 30% of its exports in 1973, while controlling or producing 40% of South Africa's gold, 80% of the world's diamonds, a sixth of the world's copper, and most of South Africa's coal. Tweedale & Flynn (2007) at 274; *see also, e.g.*, Charter 1972 Annual Report, at 39 (May 30, 1972) (reporting Anglo's dominance of gold, coal, and uranium mining in South Africa).

78. Control of Asbestos Supply. In fact, Cape controlled 90% of the global supply of amosite[17] asbestos and dominated the distribution of other types of asbestos as well—effectively enjoying a monopoly over a then-highly sought industrial resource. *See Hammond v. N. Am. Asbestos Corp.*, 454 N.E. 2d 210, 217 (Ill. 1983); *see also* McCulloch & Tweedale (2008) at 28 (describing industrial preference for amosite "in the construction and repair of ships").

[17] The name for this unique form of asbestos is derived from its association with a Cape business division in South Africa—*i.e.*, AMOSA, Asbestos Mines of South Africa. Flynn (1992) at 192.

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II. Cape Created NAAC to Facilitate Its Asbestos Scheme.

79. A U.S. Subsidiary to Fuel Growth. As part of the Oppenheimer empire's global expansion, on October 14, 1953, Cape established the North American Asbestos Corporation ("NAAC") as a direct subsidiary domiciled in Illinois. *See, e.g.*, CAPE001511. Although Cape had been profitable for years, including "return[ing] a strong dividend" for shareholders (*i.e.*, Oppenheimer-affiliated interests) from 1936 to 1951, "the company's most bountiful years were the two decades until 1976"—the period when Cape operated NAAC to provide raw asbestos fiber to customers in the United States, the company's most important market. McCulloch (2002) at 68.

80. U.S. Industry Connections. Previously, Cape had already been marketing its asbestos to numerous U.S.-based customers, including having an important business relationship with, among other companies, Union Asbestos & Rubber Co. (UNARCO) since the 1930s to create "Unibestos" insulation. For the sake of continuity, and to leverage established client connections, Cape Chairman Ronald Dent selected UNARCO Vice President, Bob Cryor, to be NAAC's first President—a role that Cryor filled until his death from mesothelioma in 1970. *See, e.g.*, *Cameron v. Owens-Corning Fiberglas, Corp.*, 695 N.E.2d 572, 578 (1998).[18]

81. NAAC's Role at Cape. Cape designed NAAC to operate as Cape's wholly controlled instrumentality for the "purpose of expediting and facilitating the movement" of asbestos from South African mines into the United States (including South Carolina).[19] To facilitate this, NAAC had both marketing and distribution roles: (i) serving as Cape's sales agency in the

[18] Important to Cape, Cryor also had established relationships with executives at Johns-Manville Corp. (one of Cape's most important customers). Indeed, Johns-Manville Corp. trusted Cryor so much as to admit to him a company policy of not telling employees about their asbestos disease— out of fear that they would stop working and file claims, and instead choosing to withhold the information and let workers die to "save a lot of money." Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* 276–77 (1985).

[19] *See* CAPE000110–12 (1982 court filing describing NAAC's history); CAPE000177 (identifying NAAC as the sole U.S.-based entity of the Cape mining division); CAPE000869 (1973 letter describing NAAC as "a division of Cape Asbestos Co. Ltd., with corporate offices in London").

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United States, with sole authority to offer Cape products and responsibility for transmitting information about customer needs to Cape mines, and (ii) ensuring the proper distribution of asbestos products from Africa "all the way through to the customer's plant," including to locations in South Carolina or through South Carolina ports.[20] NAAC "effect[ively] . . . put the Mines at every U.S. port." CAPE000988–89. By 1970, NAAC was the "largest U.S. importer of Amphibole Fibres," which were "re-distributed from . . . warehouse locations in East Coast, Gulf Coast and West Coast Ports." CAPE000878–79.

82. Cape's Business in South Carolina. In coordination with, and at the direction of, the amalgamated global Cape/Oppenheimer network, NAAC sold millions and millions of dollars of asbestos mined from South Africa to numerous U.S.-based clients, which used or distributed asbestos products in South Carolina. *See, e.g.*, CAPE000994–95 (NAAC letter identifying certain clients). NAAC's own records show that Cape sold asbestos to companies in South Carolina, including to Raybestos Manhattan, Inc. in North Charleston and Westinghouse Electric Corp. in Hampton, as well as to facilities on the South Carolina–Georgia border (*e.g.*, Babcock & Wilcox in Augusta, GA and Dow Chemical in Savannah, GA). *See also, e.g.*, S. Purrington Tr. 9–10, 64 (Aug. 25, 1986) (NAAC clerical worker from 1961 to 1978 identifying Dow Chemical as one of NAAC's three primary customers).

83. The Disastrous Impact on South Carolinians. In turn, those Cape products caused individuals (including residents of South Carolina) to be exposed to asbestos and suffer bodily injury, which has resulted in myriad suits against Cape ("Asbestos Suits").

84. Goal of National Distribution. In addition, Cape and NAAC implemented a

[20] *See* CAPE000263–66 (describing intended business of NAAC); CAPE000333 (1975 Cape cover letter of NAAC director resignations); CAPE000729 (appointment announcement describing NAAC as "specialize[d] in marketing and distribution of Blue and Amosite asbestos in the United States, Canada, Mexico and the Caribbean"); CAPE000988–89 (1969 NAAC memorandum describing customer services).

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"conscious pattern of product distribution [of asbestos] nationally"—particularly, amosite, over which Cape had a monopoly. *See In re: Asbestosis Cases*, Case No. 78-CP-06-105, Order, at 3 (S.C. Common Pleas Apr. 7, 1980) [hereinafter, "S.C. 1980 Order"] (rejecting objection to the exercise of personal jurisdiction over NAAC in South Carolina); *see also* Flynn (1992) at 188 ("What Cape did [in the United States of America] is not dissimilar to the situation where someone fires a gun into a crowd of people. You may not know which of them will be killed but you know for certain that some of them will be killed.").

85. Prevalence of Cape's Asbestos. Cape's amosite (along with Cape's other types of mined asbestos) was an ingredient in the most popular and dominant asbestos products in the market, which were used in virtually every state, including products "used in [South Carolina]." *See* S.C. 1980 Order, at 3; *see also, e.g.*, Raybestos-Manhattan 1963 Annual Report, at 2 (Mar. 13, 1964) (Cape's major customer in South Carolina touting: "Whoever you are, whatever your business, a [Raybestos-Manhattan] product touches your life."); *Parker v. Bell Asbestos Mines, Ltd.*, 607 F. Supp. 1397, 1403–04 (E.D. Pa. 1985) (rejecting argument that Charter was entitled to dismissal, given possibility that plaintiff could "prove that Charter controls Cape, and that Cape has deliberately avoided liability to American plaintiffs, [such that] it will be fair to ask Charter to stay and defend Cape's position"). In short, Cape deliberately and purposefully availed itself of the entirety of the United States market for asbestos fiber, including the South Carolina market.

86. Management at NAAC. The volume of Cape's asbestos supply to the United States was breathtaking given the ostensibly small footprint of NAAC, "which was essentially a one-man operation" consisting of an operational lead supported by four office clerical personnel.[21] All key decisions, however, including with respect to the fulfillment of specific purchase orders,

[21] *See* CAPE000110–12 (describing NAAC's lean staffing); CAPE001514 ("Despite the volume of sales and profits of NAAC, our operation is a very small one, with only a total of 5 employees.").

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were closely coordinated with and directed by other Cape entities, or made by a board comprised of Cape executives and lawyers (until Cape executives resigned in 1975, in what they described at the time as a "sensible precaution" against U.S. litigation). *E.g.*, CAPE000333.[22]

87. A Pawn in the Oppenheimer Empire. In selecting directors to participate in this worldwide scheme, Cape Chairman Ronald Dent—also a director for Charter and several other Charter-owned companies, apart from NAAC and Cape—valued "the type of man who would fit into our scheme of things . . . without causing embarrassment all around." CAPE000261–62; *see also* Charter 1972 Annual Report, at 33 (May 30, 1972) (noting Dent's role as a Charter director and ownership of Cape shares, which were also directly owned by other Charter directors).

88. Domination of American Subsidiary. NAAC's operations and decision-making were wholly dominated by Cape and its owners, including Charter and other affiliated mining/investment interests in South Africa. How dominated was NAAC? The company could not "borrow one dollar without [Cape's] approval" and was routinely forced to withdraw cash to pay dividends to Cape, thereby minimizing NAAC's available assets that could be reached by American creditors.[23] Astoundingly, NAAC's then-President Bob Cryor admitted that NAAC relegated its interests to Cape as "part of a coordinated group with responsibilities to the whole" group. CAPE000931–32.

89. NAAC's Failure to Purchase Adequate Insurance. Cape's domination also influenced and controlled NAAC's risk management decision-making, including its purchase of insurance. Officially, Cape had a company-wide policy to purchase insurance "at minimum cost consistent with adequate cover." CAPE0001465. But in reality, NAAC felt "pressure from [its]

[22] *See also, e.g.*, CAPE001528 (listing six directors in 1970).
[23] *See, e.g.*, CAPE001507 (1976 letter noting borrowing limit); CAPE000816 (1976 board minutes showing payment of $250,000 dividend).

Home Office in London [that] forced [it] to seek lower rates" and choose carriers and policy terms based solely on short-term cost. *See* NAAC Letter to J. Kirk of Talbot Bird & Co. (Nov. 17, 1959). Because of Cape's domination of NAAC, and as a part of the liability-avoidance scheme, Cape directed NAAC to buy wholly inadequate insurance coverage to address its massive future products- liability exposure.

III. Cape Led Efforts in the U.S. and Internationally to Hide the Risks of Asbestos.

90. Known History of Illness in South Africa. Early in its history—even before setting up operations in the United States—Cape's management and ownership knew of the serious health hazards posed by their South African asbestos, as illness was endemic among Cape's own employees. For example, because child labor was extensively used in the South African asbestos mining industry and Cape lacked basic industrial hygiene measures, Cape was responsible for causing "radiologic asbestosis with cor pulmonale [*i.e.*, heart failure]" in Black children "before the age of 12." Dr. Gerrit Schepers, "Discussion," *Ann. N.Y. Acad. Sci.*, 132:246 (1965).[24]

91. Infamy for South African Conditions. Indeed, Cape's operations in South Africa were so infamous that they became a case study—literally—in corporate irresponsibility. *See* Patricia Werhane et al., *Case Study: South African Mining and Asbestos-Related Diseases*, Univ. of Va. Darden School of Bus., at 7 (Apr. 11, 2006) ("[L]ong after the hazards of asbestos were well known to the company as well as the mining community in general, Cape took advantage of lax labor legislation . . . [and also] benefited from cheap labor. Whole families, including children as

[24] Years later, Dr. Schepers provided a detailed account of his time at a Cape mine in Penge, South Africa, including seeing (i) "a big strong man with a sjambok whip," whose apparent job was "to hit a hessian sack on the ground below the end of a chute," and (ii) inside the battered sack, a "boy of ten or twelve," whose job was "to get inside the bag and trample down the fluffy asbestos. He was cheaper than machinery or safe sacks. He was covered from top to toe in asbestos dust so I grabbed him and took him off to the X-ray machine. The X-ray showed he was already suffering from asbestosis. I was told that Cape employed a lot more children and I gave instructions to my technician that he was to round up all the children in the village with the little Cape Asbestos copper identification bands riveted around their wrists – identification tags, just like slaves, so they couldn't run off. A number of the other children had asbestosis too. The conditions were unbelievable." Flynn (1992) at 192–93.

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young as 12 years, were involved in the mining and milling operations at Cape's facilities, and workers handled asbestos with their bare hands. Not only Cape workers, but also those who lived in the communities around Cape mines were exposed to high levels of asbestos that were sometimes 30 times higher than the legal limit in Britain. One of Cape's asbestos mills at Prieska was in the center of town, close to a church and school. One medical doctor stated that he diagnosed 900 mesothelioma victims, including his own son."). Cape allowed these "work practices" to continue because they "were profitable for employers and Cape's management readily acknowledged the importance of the mines to its success." McCulloch & Tweedale (2008) at 44–45.

92. Known History of Illness in England. Likewise, Cape's operations in England were infamous for lacking basic hygiene measures, such that a medical examination of 80 workers in 1928 "showed that nearly all had 'definite evidences' of asbestosis." Geoffrey Tweedale, *Magic Mineral to Killer Dust: Turner & Newall and the Asbestos Hazard* 20 (Oxford Univ. Press 2000) [hereinafter, "Tweedale (2000)"]; *see also, e.g.*, Flynn (1992) at 180 ("[Cape's] British factories had been shown to be so negligently run that they brought death, disease and injury to the communities around them"). Among Cape's managers and owners, the danger of asbestos exposure was well known, with scientific studies repeatedly re-establishing a link between exposure to asbestos and illness.[25]

[25] *See, e.g.*, R. Gaze Tr. 2, 111 (June 5, 1975) (Cape official admitting knowledge of asbestosis risk "since the first day [he] was employed" there in 1943); J. Christopher Wagner et al., *Diffuse Pleural Mesothelioma and Asbestos Exposure in the North Western Cape Province*, 17 Brit. J. Indus. Med. 260, 261–62 (1960) (study published by South African researchers linking mesothelioma with occupational and non-occupational exposure to Cape asbestos); Richard Doll, *Mortality from Lung Cancer in Asbestos Workers*, 12 Brit. J. Indus. Med. 81, 86 (1955) (concluding from data that "lung cancer was a specific industrial hazard of certain asbestos workers"); *see also* McCulloch & Tweedale (2008) at 8–9, 119–20 (listing various studies of, or laws concerning, asbestos disease from 1898 to 1964, and noting that "[f]ew medical authors ever expressed doubt about the relationship between malignant mesotheliomas and asbestos exposure, and by 1953, the issue seemed to be fairly well resolved").

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93. Apathy to Personal Suffering. Nevertheless, the dangers of asbestos were hidden from Cape employees (and the general public) and atrocious conditions at Cape facilities continued for decades—causing widespread disease and later becoming focal points of damning exposés on the asbestos industry. *See* Tweedale (2000) at 238, 251, 255–56 (noting various documentaries showing, among other things, a Cape manager who "always kept a black tie in his desk for funerals").

94. Lobbying and Perpetuating Misinformation in the United States. Yet, while having knowledge of these health hazards, and while peddling a toxic product throughout the United States (including in South Carolina), Cape used misinformation to influence public and corporate opinions about asbestos—working with government officials to protect South African (*i.e.*, Oppenheimer) business interests.[26] Cape acted as head cheerleader for the continuation of the asbestos trade, taking a keen interest in organizing efforts to downplay knowledge of the health hazards posed.[27]

95. Examples of U.S. Misinformation Efforts. For example, in 1954, the year after NAAC's establishment, Cape became a member of the U.S.-based Asbestos Textile Institute, which organized regular meetings to discuss developments in the asbestos industry, including the prospect of governmental regulation. Above all other companies, Cape was especially keen to suppress knowledge about the risks of asbestos. Thus, when Johns-Manville proposed labeling on bags of asbestos in 1968, Cape had a "bitter" response, suggesting that such a step should never be taken unilaterally by one producer. *Dring v. Cape: Key Points from Documents Obtained by*

[26] *See, e.g.*, CAPE000955 (official of South African mining holding company, Cape Asbestos South Africa (Pty.) Ltd., writing to NAAC as a fellow member "of the Cape Asbestos Group and the Charter Consolidated Group," and introducing as a resource the Commercial Counsellor at the South African Embassy in Washington, DC).
[27] *See, e.g.*, CAPE000130 (Cape Asbestos Fibres Limited prioritizing efforts to "organize a body of medical opinion that is prepared to stand up" to critical opinions).

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the Asbestos Victims Support Groups Forum UK, at 23 (*available at* https://asbestosforum.org.uk/cape-documents/) [hereinafter, "Dring Documents"]. And once Johns-Manville finally decided to adopt a warning label, Cape proposed use of an inaccurate warning that inhalation of only "substantial quantities" of asbestos could be harmful. *Id.* at 21.

96. Lobbying and Perpetuating Misinformation in England. In England in the 1950s and 1960s, Cape joined forces with other companies in the British asbestos industry to establish the Asbestosis Research Council and the Asbestos Information Committee, which worked to "publish several reassuring booklets on the use of asbestos." Tweedale (2000) at 174, 191. In addition, in or around 1966–68, Cape lobbied the British Occupational Hygiene Society to weaken protections for workers from a "no dust policy" to a "maximum allowable concentration approach," while continuing its misinformation campaign in the public and its strong-arm tactics designed to deter other manufacturers from introducing warning labels. Dring Documents, at 1.

97. Hiding the Truth to Profit. A linchpin of these schemes was Cape's role in providing misleading reassurances to the government and public about the dangers of asbestos, which conflicted with Cape's own internal data on the health risks of asbestos. Ultimately, when faced with a decision of shutting down the business (particularly, its South African mines) or "suppress[ing] knowledge of disease," Cape "chose[] the latter" and "worked hard to keep information about mesothelioma secret." McCulloch & Tweedale (2008) at 120.

IV. Cape Implemented a Strategy to Evade Liability in the United States

98. Initial Maneuvers to Evade Liability Risk. In the early 1970s, after the onset of asbestos- related products-liability litigation, *see, e.g.*, *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973) (successful suit by insulation worker, widely acknowledged to have precipitated a wave of asbestos litigation in the 1970s), Cape and its affiliated entities undertook

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numerous actions in a deliberate effort to escape responsibility for the harm caused by Cape asbestos products.[28] For example, Cape went through tortured machinations to make it *appear* it was reducing oversight over NAAC, but in reality, NAAC continued to operate as a controlled instrumentality under Cape's domination.[29] And these changes were the result of careful assessments by Cape officials—with the help of its lawyers and other advisors—regarding how to minimize the liability exposure of not only Cape, but Cape's parent (Charter) and its other South African affiliates. *See* CAPE000141 (NAAC counsel advising Cape on risk of judgments attaching to Charter assets).

99. Public Downplaying of Responsibility. At first, at least in their public statements, Charter and Cape "strenuously contested" their liability and concluded that "no material liability is likely to arise as a result of the actions," because "[i]n the opinion of American legal advisers, the amounts claimed are highly speculative and conjectural and have only a tenuous basis in law or in fact." Charter 1975 Annual Report, at 30 (June 3, 1975).

100. Implementing Liability-Avoidance Strategy. In parallel, and central to that claim and their plan to avoid liability, Cape directed a campaign of litigation avoidance by refusing to accept process or appear in any U.S. proceedings. That campaign continues unabated today, as

[28] *See, e.g.*, CAPE000351–56 (1975 lawyer letter referring to "attempt to limit NAAC's and Cape's exposure to future United States litigation").

[29] *See* CAPE000123 (NAAC discouraging Cape visits to the U.S. in 1978 or else negate "maneuvers" related to "continued problems with product liability litigation"); CAPE000152 (1975 letter suggesting to "disassociate the Parent Company as fully as possible from the operating companies"); CAPE000154 (1975 letter raising whether to "do something to change the identity of NAAC in order to avoid exposing the company unnecessarily," while doing "everything possible to maintain a successful selling operation in the United States"); CAPE000166–67 (1974 lawyer letter suggesting that "no one from Cape be an officer of NAAC since we want it to be as independent as possible in order to avoid any contention that it is the alter ego of Cape and that Cape is doing business in the United States"); CAPE000333 (1975 Cape Asbestos letter stating "that it would be a sensible precaution against Cape's involvement in any future proceedings for [Cape personnel] to resign from the N.A.A.C. Board," and enclosing resignation letters).

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evidenced by Cape's failure to respond to the Second Amended Summons in this action, which was served pursuant to Article 10 of the Hague Convention on March 8, 2022.[30]

101. Opinion of Moral Irresponsibility. More broadly, according to Cape executives, this strategy was warranted because they "really cannot be said to have a moral responsibility [to respond to the suits] and are simply victims of the US product liability cult." Tweedale & Flynn (2007) at 283; CAPE000486.

102. Financials Based on Immoral Opinion. In addition, despite knowing the liability risk, Cape and its affiliates—including its parent company, Charter—refused to make any provision for or reserve of cash to address that liability. *See* CAPE000781 (1971 correspondence regarding Charter's annual report). Indeed, for most of NAAC's existence under Charter, Charter refused to even acknowledge NAAC, despite listing various other Cape subsidiaries in England, South Africa, and other countries as among Cape's subsidiaries. *See, e.g.*, Charter 1970 Annual Report, at 10 (June 18, 1970) (listing Cape entities in South Africa, England, and Ireland).

103. Cape Liquidates NAAC as Part of Its Liability-Avoidance Scheme. Ultimately, to avoid liability to the tens of thousands of people injured or killed by its asbestos, Cape decided to liquidate NAAC, effective January 31, 1978 (though articles of dissolution were filed later, on or around May 19, 1978). *See, e.g.*, CAPE001035 (April 1978 letter noting liquidation and requesting, "for safety's sake," that Cape officials stop sending accounting memoranda to former NAAC officials). Existing commercial debts of NAAC were paid, with any remaining assets transferred upstream to NAAC's direct parent company at the time, Cape Industries Overseas

[30] *See* CAPE000550–51 (NAAC personnel opining in 1978 "that it is most unlikely that any plaintiff would bother to pursue collection of any default judgments against Cape"); CAPE000702 (NAAC counsel in 1979 confirming receipt of correspondence stating that "U.K. and South African lawyers confirm that any resulting judgments will not be enforceable against Cape's U.K. and South African assets" and that "the potential loss of all NAAC's outstanding assets is not material in the Cape Group context").

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Ltd.—a U.K. entity wholly owned by Cape Industries Ltd. (formed in 1975 to create the *appearance* of separation). *See* CAPE000593 (noting conveyance of assets); CAPE000149 (noting new entity).

104. Liquidation Despite Continued Profitability. The decision to liquidate NAAC occurred notwithstanding consistent years of record profits from Cape's sale of asbestos fiber in the United States. *See, e.g.*, Charter 1976 Annual Report, at 7, 38–39 (June 8, 1976) (reporting £10.2 million of operating profit "in spite of difficult trading conditions," with the "greatest increase" in improved profit "arising in the mining division, which raised total tonnage both mined and sold," even despite "substantial price increases"); Charter 1977 Annual Report, at 7, 11, 13 (June 9, 1977) (reporting another "record year" from Cape with pre-tax profit of £14.2 million, with the "mining division again perform[ing] exceptionally well").

105. NAAC's Minimal Assets at Liquidation. As part of its overall scheme, and in light of Cape's funneling of cash from NAAC to overseas entities over many years, NAAC's assets at liquidation were minimal, as an absolute matter, and especially when compared to the total wealth of Cape and the broader Oppenheimer empire.[31]

106. Accepting Defaults to Perpetuate the Liability-Avoidance Scheme. NAAC's liquidation was central to Cape's liability-avoidance strategy, and was predicated on legal advice that no British or South African court would enforce a judgment against a Cape entity if it never appeared again in the United States.[32] That strategy, more broadly, was taken right out of the

[31] *See, e.g.*, CAPE000701 (Cape counsel writing in 1979 with respect to whether the remaining assets in the NAAC liquidating trust should be written off, soon after its creation); CAPE000702 (1979 correspondence noting that NAAC's auditor "agree[d] that the potential loss of all NAAC's outstanding assets is not material in the Cape Group context" (capitalization altered)); CAPE000722 (1978 correspondence noting judgment non-enforceability and "[auditor] advice to [Cape] that the loss of NAAC's outstanding assets is not material in the Cape Group context").

[32] *See, e.g.*, CAPE000141–43 (1975 legal letter advising Cape on default-judgment risk); CAPE000566 (1978 memorandum agreeing that it would be in the "best interests of Cape companies other than NAAC" to make "no response" to litigation); CAPE000617–19 (summarizing 1984 deposition testimony regarding litigation strategy).

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Oppenheimer empire's operational playbook in the United States: (i) profit greatly from a business (including for the sale of asbestos), (ii) extract those profits from the United States to foreign entities, across an ever-changing, byzantine corporate structure, (iii) undercapitalize the United States operating entity, (iv) liquidate ownership interests when they sensed liability was imminent, while otherwise maintaining that there was no physical presence in the United States, and (v) retain overseas the massive financial fruits of their unlawful schemes, which, as to asbestos sales, were at the expense of dead and dying Americans, including South Carolinians. *See, e.g.*, Kanfer (1995) at 317–18 (describing De Beers' abrupt sale of equity in an American company to avoid antitrust liability, which had previously been hidden by "the usual thicket of [European] registrations," such that "financial facts were buried in the records of some 300 interlocking corporations").

107. Continuation of the Asbestos Business. Even before NAAC's dissolution, Cape contemplated ways to continue the flow of asbestos to U.S. customers and asbestos profits out of the United States, despite the formality of liquidating NAAC.[33]

108. Creation of New American and Foreign Entities. To facilitate this ruse, Gerry Morgan (NAAC's final President) formed Continental Products Corporation ("CPC") to act as a commission agent for the future sales of asbestos from South Africa in the United States. Conveniently, CPC used the same NAAC address in Chicago, Illinois, and received funding from Cape in London. And CPC acted with South African mines to sell through a Lichtenstein-based entity named Associated Mines Company ("AMC") associated with Cape or other Oppenheimer-affiliated business interests. *See, e.g.*, CAPE000386; CAPE000531 (announcement of CPC as "Agent to handle the North American requirements for Amosite and Crocidolite asbestos fibre").

[33] *See, e.g.,* CAPE000728 (1977 meeting memorandum involving Cape officials "to discuss liquidation of NAAC and formation of new off-shore company to service North American market").

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109. Transfer of IP Rights to New Entities. Brazenly, Cape even directed the transfer of certain intellectual property owned by NAAC for future use by CPC and AMC. *See, e.g.,* M. Meyer Tr. 14–18 (May 18, 1982) (describing the assignment of the "Noramite" trademark for certain asbestos mats and plastics).

110. Objective of New Entities. Ultimately, the "purpose of this corporate arrangement [was] to eliminate or reduce as much as possible the exposure in the United States of [South African mining companies] to lawsuits brought against it under theories of strict liability concerning products liability on the sale of asbestos in the United States." CAPE000377–79.

111. Selling Mines as Part of the Liability-Avoidance Scheme. Outside of the United States, Cape took additional steps to disassociate itself from asbestos generally, despite its long-held role "as a major world producer of asbestos fibre" and "the Cape name [being] synonymous with asbestos." Cape 1980 Review, at 2. On June 29, 1979, Cape sold "the whole of [its] asbestos mining interest in South Africa" to Transvaal Consolidated Land and Exploration Company Ltd. ("Transvaal"), *id.*, earning proceeds of £15.1 million to "finance the group's expansion in other areas of its business," Charter 1979 Annual Report, at 12 (July 4, 1979).

112. Anglo's Continued Interest in Asbestos. Although Charter asserted that "mining subsidiaries in South Africa were sold *outside* the group," *id.* at 35 (emphasis added), its own annual reports from prior years establish that Charter had previously owned the purchasing entity, Transvaal, and still had a financial interest in Transvaal, including through either another Anglo entity or Charter's interest in Barlow Rand Ltd. *See* Charter 1965 Annual Report, at 3, 5 (May 19, 1965) (listing Transvaal as a "principal interest[]," along with Rand Mines Ltd.); Charter 1972 Annual Report, at 12 (May 30, 1972) (referencing merger between Rand Mines Ltd. and Thos Barlow & Sons Ltd. in June 1971, resulting in Charter acquiring a 3.86% interest in the

merged company, Barlow Rand Ltd., in exchange for its previous 15.9% interest in Rand Mines Ltd.); Charter 1973 Annual Report, at 8 (June 21, 1973) (reporting that Charter sold its interest in Transvaal in April 1972 "to companies in the Anglo American Corporation group").[34]

113. Cape's Business Pivot. In 1982, Cape purported to cease all manufacturing of asbestos products.[35] Unfathomably, even for a collective of companies as devious as these, Cape refocused its business on—wait for it—asbestos removal. This is not fiction; it has been proudly touted by Cape.[36]

114. The Scheme Was Contemptibly Successful. Within years of executing the liability-avoidance scheme, business historians recognized that "Cape Industries"—as part of Charter, *i.e.*, Anglo's international/industrial investment arm—was "astonishingly adept at extricating itself from the [asbestos] business without paying huge compensation." Pallister (1988) at 345.

V. The Oppenheimers Implemented a Strategy to Further Evade Responsibility.

115. Empire Restructuring to Mitigate Risk. Tellingly, while Cape implemented its liability- avoidance strategy, the Oppenheimer family similarly made changes to its investments to remove power and assets from Charter and relegate it to the periphery of the empire. On information and belief, these changes were motivated because the Oppenheimers and their partners

[34] *See also, e.g.*, Joseph Lelyveld, *The Many Faces of Barlow Rand Ltd.*, N.Y. Times, Apr. 11, 1982 (noting Barlow Rand was "the second-biggest industrial and mining group in South Africa," after "the vast Anglo-American Corporation and its chairman, Harry F. Oppenheimer, whose place in the moneyed portion of [South African] society makes him a one-man aristocracy"); Flynn (1992) at 194 ("In the end the company became so worried about the extent of Anglo American's liabilities for deaths and injuries that they sold the mines, including Penge, to Barlow Rand, another company with strong connections to Harry Oppenheimer.").

[35] *Cape Website: Our History* (May 17, 2013), https://web.archive.org/web/20130517130040/http:/www.capeplc.com/about-cape/our-history.aspx.

[36] *Cape Website: Our Services, Insulation* (Oct. 20, 2012), https://web.archive.org/web/20121020173812/http://www.capeplc.com/services-and-markets/our-services/insulation.aspx.

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(i) understood that Charter, like Cape, faced substantial financial exposure for asbestos-related liabilities in the United States, and (ii) were concerned those liabilities would also attach to Anglo and De Beers. *See, e.g.*, Charter 1980 Annual Report, at 34 (June 24, 1980) (reporting that Charter had been named a defendant in U.S. asbestos litigation "in its capacity as the holding company of" Cape and had been told that certain U.S. corporations would seek to hold Charter liable for their own liability).

116. The Oppenheimers' Transfer of Shares. For example, beginning in the late 1970s, the Oppenheimer family began to substantially sell or otherwise divest their direct financial interests in Charter. *See, e.g.*, Charter 1977 Annual Report, at 47 (June 9, 1977) (indicating decrease in direct interest of Harry Oppenheimer); Charter 1983 Annual Report, at 41 (June 21, 1983) (indicating "nil" interest of the two listed Oppenheimers by April 1982).

117. Minorco's Rise. Around 1980—*i.e.*, soon after Cape's sale of asbestos mines—the Minerals and Resources Corporation ("Minorco") "over[took] Charter as the group's overseas flagship." Pallister (1988) at 122; *see also* Donald G. McNeil Jr., *A Diamond Cartel May Be Forever; The Hereditary Leader of De Beers Pursues Post-Apartheid Growth*, N.Y. Times, Jan. 12, 1999 [hereinafter, "McNeil Article"] (reporting that Minorco had been created previously to evade anti-Apartheid sanctions).[37]

118. Charter's Fall. As part of that pivot to Minorco, there was a "divestiture by Charter of its strategic holdings in Anglo American, De Beers and Anglo American Investment Trust," which was a "very major step" in reorganizing the amalgamated Oppenheimer business empire and reducing (but not eliminating) Anglo's "interference" with Charter. *See* A.J.W. Owston Tr. 67

[37] *Available at* https://www.nytimes.com/1999/01/12/business/international-business-diamond-cartel-may-be-forever-hereditary-leader-de-beers.html.

(Aug. 22, 1984). As part of this divestiture, Charter "disposed of nearly all [its] investments in South Africa and adjoining territories," which involved a "major restructuring" that Charter acknowledged "substantially changed" its "assets and business interests." Charter 1980 Annual Report, at 5, 9 (June 24, 1980). Although Charter was purported to have received "a substantial amount of cash" from that sale, proceeds were used to repay debt and acquire Minorco shares. *See id.* at 5–6.

119. Charter's Exile. Due to these restructurings, Anglo stopped acknowledging Charter as a material part of the Oppenheimer business empire—as it had been effectively replaced by Minorco. *Compare* Anglo 1977 Annual Report, at 3 (Mar. 25, 1977) (organizational chart portraying Charter on equal footing to Anglo and De Beers), *with* Anglo 1983 Annual Report, at 5 (June 28, 1983) (updated organizational chart making no reference to Charter at all). By the end of the 1980s, the Oppenheimers had stopped serving on the Charter board of directors all together, after unwinding themselves from Charter's assets and associated liabilities. *See* Charter 1989 Annual Report, at 46 (June 10, 1989) (no Oppenheimer listed for the Charter board of directors).

120. A Weakened Charter. For its part, after disposing of its South African investments, Charter touted a renewed focused on its operating subsidiaries in the United Kingdom, rather than acting primarily as a holding company for Oppenheimer business interests. *See, e.g.*, Charter 1986 Annual Report, at 2 (July 3, 1986) ("Charter has undergone a major change in recent years. The business has been extensively reshaped and much of the capital employed is now in operating companies."). However, without the backing of Anglo as a corporate patron, and with Cape no longer directly engaged with its main historical business—*i.e.,* mining and selling asbestos—both Charter and Cape were unable to achieve growth and profitability comparable to what they enjoyed in decades earlier as part of the Oppenheimer business empire.

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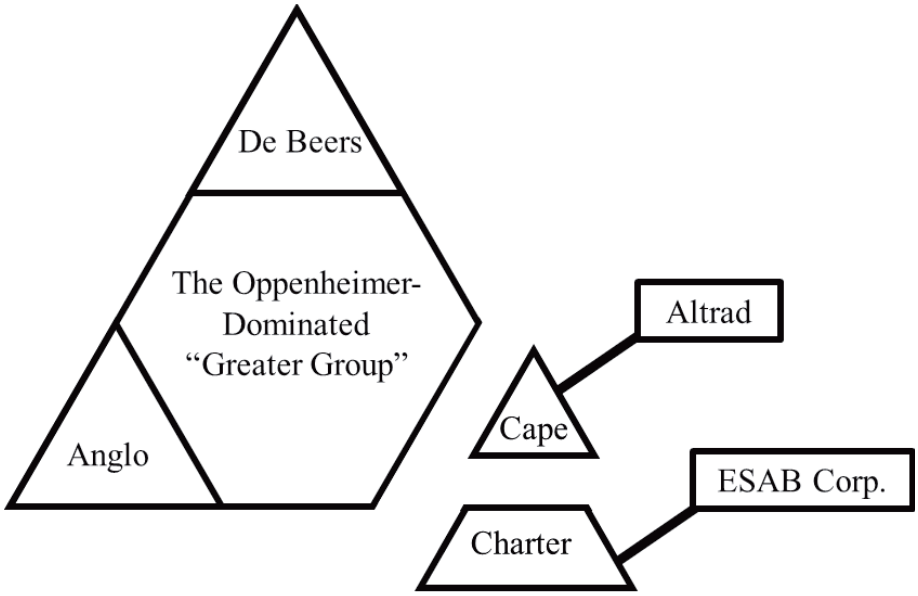
VI. In Subsequent Years, There Have Been Changes to Third-Party Defendants.

121. Changes to the Former Asbestos-Mining Empire. Following Cape's escape from the United States, it changed its name and organization, and so did its affiliated companies and other actors that were part of the Cape liability-avoidance scheme. Certain of those entities and persons are named as Third-Party Defendants in this action, including as successors in interest and beneficiaries of Cape's liability-avoidance scheme, co-responsible for Cape's tortious conduct.



122. Changes to Cape. Since the 1970s, Cape Asbestos Company Ltd. has undergone several changes to its organization, including (i) changing its name to Cape Industries Ltd. in 1974 (*i.e.*, removing "Asbestos" from its name, soon after the onset of asbestos products-liability litigation); (ii) re-registering as a public company and changing its name to Cape Industries PLC in 1981; (iii) shortening its name to Cape PLC in 1989; (iv) changing its name to Cape Intermediate Holdings PLC in 2011; and (v) re-registering as a private company to become Cape Intermediate Holdings Ltd. in 2013. And as of 2016, Cape Holdco Ltd. (controlled by Cape Industrial Services Group Ltd.) and The Law Debenture Corporation PLC were registered as Persons with Significant Control of Cape.

123. Unmet Responsibilities. Although Cape in the prior decades had entered into certain agreements to compensate for illness and death resulting overseas from its products (such as entering into a "Scheme of Arrangement" with former employees in 2006), Cape has done **nothing** about its massive unpaid responsibility for the death and illness caused by its asbestos products in South Carolina and elsewhere in the United States.

124. Altrad's Acquisition and Subsequent Ownership of Cape. On or around October 9, 2017, Altrad Investment Authority S.A.S. (a French company), through Altrad UK Ltd. (controlling Cape UK Holdings Newco Ltd.), acquired and has since controlled Cape. Those entities are owned and controlled by the multinational Altrad Group, which has renamed certain Cape entities as well, including Altrad Services Ltd. (f/k/a Cape Industrial Services Ltd.).

125. Altrad's U.S. Subsidiaries. In addition, the Altrad Group acquired Sparrows Offshore Group Ltd. in 2022, which established the Altrad Group's presence in the United States through its (i) operations in the southern United States, and (ii) ownership of U.S.-registered entities, including Hawk BidCo US Inc., Arranco US, LLC, Sparrows Offshore, LLC, and the Sparrows Group, LLC.[38]

126. Altrad's Owner. The Altrad Group—and thus Cape—is controlled by its French–Syrian President and Founder, Mohed Altrad, a/k/a the "Scaffolding King." *See* Altrad 2022 Annual Report, at 36 (Feb. 9, 2023);[39] *see also* Gaspard Sebag & Tara Patel, *Billionaire Scaffolding 'King' Guilty of Bribing Rugby Boss*, Bloomberg (Dec. 13, 2022) (reporting Mr. Altrad's recent corruption conviction, punished with an 18-month suspended jail term and €50,000 fine).[40]

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[38] *See, e.g.*, *Altrad Completes Acquisition of Engineering and Maintenance Specialist Sparrows Group*, Altrad (July 12, 2022), https://www.altrad.com/en/newsreader/altrad-completes-acquisition-of-engineering-and-maintenance-specialist-sparrows-group.html; *Sparrows Website: Global Locations*,

[39] *Available at* https://newsmanager.altrad.com/files/altrad-group/news/2023/02/09_annual- report-2022/annual-report_2022_en_double_br-min.pdf.

[40] *Available at* https://www.bloomberg.com/news/articles/2022-12-13/scaffolding-billionaire- convicted-of-corruption-over-sponsorship#xj4y7vzkg.

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127. Altrad Defendants. Ultimately, each of the entities identified herein along with Mohed Altrad, are either successors in interest to Cape and its numerous subsidiary and affiliated entities, or beneficiaries from Cape's liability-avoidance scheme, or both, and are collectively referred to as the "Altrad Defendants."

ALTRAD AND CAPE-AFFILIATED ENTITIES ("ALTRAD DEFENDANTS")	
Cape Subsidiaries / Control: • Cape Holdco Ltd. • The Law Debenture Corp. PLC • Cape UK Holdings NewCo Ltd. • Cape Indus. Servs. Grp. Ltd. • Altrad Servs. Ltd. (f/k/a Cape Indus. Servs. Ltd.)	Altrad Ownership: • Mohed Altrad • Altrad Inv. Auth. S.A.S • Altrad UK Ltd.

128. Involvement of Affiliated Oppenheimer Businesses. At all times relevant to Cape's business in the United States and its perpetuation of the liability-avoidance scheme, Cape was owned, controlled, operated by, and dominated in furtherance of and in concert with Oppenheimer business interests in South Africa, the United Kingdom, and elsewhere—to those entities' substantial financial benefit.

129. Oppenheimer Defendants. Those dominating, conspiring, facilitating, or otherwise financially benefiting entities include Anglo American Corporation of South Africa Ltd. (as predecessor in interest to Anglo American PLC) and De Beers PLC, De Beers Centenary AG, De Beers Consolidated Mines Ltd., De Beers S.A., De Beers UK Ltd., and De Beers Jewellers Ltd. Those entities currently have presence, operations, and business in the United States, including in South Carolina, through De Beers Jewellers (US), Inc., Anglo American US Holdings Inc., Element Six U.S. Corporation, Element Six Technologies US Corporation, Element Six Technologies (OR) Corp., First Mode Holdings, Inc., Platinum Guild International (U.S.A.) Jewelry, Inc., Lightbox Jewelry Inc., Forevermark US, Inc., and Anglo American Crop Nutrients (USA), LLC. All of these

companies are collectively referred to as the "Oppenheimer Defendants," with Anglo American PLC acting as ultimate parent company for each. *See, e.g.*, Anglo 2022 Annual Report, at 283 (Feb. 22, 2023).[41]

130. Increased U.S. Activities. Since closing NAAC and implementing their liability-avoidance scheme, the Oppenheimer Defendants have increased their business activities in the United States, with certain of them using courts in the United States to enforce trademarks or other valuable rights, including under the De Beers name.[42]

ANGLO AMERICAN PLC ("OPPENHEIMER DEFENDANTS")	
"De Beers Group" Subsidiaries: • De Beers PLC • De Beers Centenary AG • De Beers Consol. Mines Ltd. • De Beers S.A. • De Beers UK Ltd. • De Beers Jewellers Ltd.	United States Subsidiaries: • De Beers Jewellers (US), Inc. • Anglo Am. US Holdings Inc. • Element Six U.S. Corporation • Element Six Techs. US Corp. • Element Six Techs. (OR) Corp. • First Mode Holdings, Inc. • Platinum Guild Int'l (U.S.A.) Jewelry, Inc. • Lightbox Jewelry Inc. • Forevermark US, Inc. • Anglo Am. Crop Nutrients (USA), LLC

131. Changes to Charter. In 1993, after the broader Oppenheimer empire had demoted Charter's role in the business, Charter re-registered as a public company, becoming Charter PLC.

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[41] *Available at* https://www.angloamerican.com/~/media/Files/A/Anglo-American-Group-v5/PLC/investors/annual-reporting/2022/aa-annual-report-full-2022.pdf. In 1998, Anglo American Corporation of South Africa Ltd. moved its headquarters to London and re-registered as Anglo American PLC, which involved complex changes to its corporate structure that included absorbing Minorco and moving assets out of South Africa (thereby mitigating the risk of post- Apartheid nationalization). *See* McNeil Article. In November 2011, moreover, the Oppenheimer family sold its direct stake in the De Beers Group to Anglo American PLC for $5.1 billion, while (on information and belief) retaining indirect ownership through other entities. *See, e.g.*, Mark Scott, *Anglo American in Deal to Take Control of De Beers*, N.Y. Times, Nov. 4, 2011.

[42] *See, e.g.*, *De Beers UK Ltd. v. Adwar Casting, Co., Ltd.*, No. 4:10-cv-00843, ECF No. 3 (W.D. Mo. Sept. 15, 2010) (corporate disclosure statement of plaintiff identifying De Beers UK Ltd. as a wholly owned subsidiary of De Beers Centenary AG); *De Beers Centenary AG v. John- Robert:Hasson*, No. 1:10-cv-23024, ECF No. 1 (S.D. Fla. Aug. 23, 2010) (action initiated by De Beers entity).

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In 1996, Charter sold its interest in Cape for approximately £48 million. In 2008, a new holding company, Charter International PLC, took over Charter PLC,[43] and then, effective January 13, 2012, Colfax Corporation ("Colfax") acquired Charter at a $2.4 billion valuation, with Charter enjoying minimal debt on its balance sheet. *See* Colfax Corp. Form 8-K (Jan. 17, 2022);[44] Colfax Corp. Schedule 14A (Dec. 19, 2011).[45] In making that acquisition, Colfax disclosed Charter's exposure to asbestos-related lawsuits in the United States, but the companies (i) assessed it as not having "a material effect on Charter's financial position," (ii) dismissed any associated expenses as "negligible," and (iii) ultimately made no provision for Charter's asbestos liability. Colfax Corp. Schedule 14A (Dec. 19, 2011).

132. Charter Defendants. By 2022, Colfax sold its interests in Charter's businesses, including, on information and belief, those associated with Cape-related liabilities—namely, ESAB Corporation. *See Enovis (Formerly Colfax) Completes Spin-Off of ESAB Corporation* (Apr. 5, 2022).[46] On information and belief, ESAB Corporation is currently the parent company of, as well as a successor in interest to, Charter Consolidated Ltd., along with Charter's subsidiary Central Mining & Investment Corporation Ltd., and each is collectively referred to as "Charter Defendants."

CLAIMS OF THE PLAINTIFFS

133. Plaintiffs, collectively listed on Exhibit A, individually and as Personal Representatives of various Estates, bring this action for monetary damages because of Plaintiffs contracting an asbestos-related diseases.

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[43] *See Charter Website: History* (Dec. 12, 2008), https://web.archive.org/web/20081212114613/http://www.charter.ie/chtr_int/about/history/.
[44] *Available at* https://www.sec.gov/Archives/edgar/data/1420800/000134100412000060/cfx_8k.htm.
[45] *Available at* https://www.sec.gov/Archives/edgar/data/1420800/000114420411070464/v242942defm14a.htm.
[46] *Available at* https://ir.enovis.com/news-releases/news-release-details/enovis-formerly-colfax-completes-spin-esab-corporation.

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134. Plaintiffs were each diagnosed with asbestos related disease, including but not limited to, mesothelioma and lung cancer, and in some cases, died from these same diseases.

135. Plaintiffs' asbestos related diseases were each caused by exposure to asbestos during the course of their employment, work careers, and/or through take home exposures to asbestos as a result of their family members' work.

136. Exposures relevant to Defendants, Cape PLC, as successor-in-interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.) and as a result, to each of the entities named herein, are detailed on Exhibit A. These exposures involve direct and/or take-home exposure to airborne asbestos fibers released through activities, including but not limited to, the sale, distribution, installation, removal, manipulation, disturbance, and other activates of Defendants at jobsites where Cape PLC, as successor-in-interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.) and its subsidiaries and global affiliates, supplied, removed, installed, or contracted for the use of asbestos fibers South Carolina and throughout the United States.

137. Plaintiffs' cumulative exposure to asbestos as a result of acts and omissions of Defendants and their defective products and materials, individually and together, was a substantial factor in causing Plaintiffs' asbestos related diseases, and therefore under South Carolina law, is the legal cause of Plaintiffs' injuries and damages.

138. Plaintiffs nor their family members, were aware at the time of exposure, that asbestos or asbestos-containing products presented any risk of injury and/or disease.

139. Plaintiffs have been informed and believe, and thereon allege, that progressive lung diseases, including mesothelioma and other serious diseases, are caused by inhalation of asbestos fibers and that said diseases result from exposure to asbestos and asbestos-containing products over a period of time.

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140. As a direct and proximate result of the conduct as alleged within, Plaintiffs suffered permanent injuries, including, but not limited to, mesothelioma, lung cancer, and other lung damage, as well as the mental and emotional distress attendant thereto, from the effect of exposure to asbestos fibers, all to their damages in the sums of the amounts as the trier of fact determines are proper.

141. As a direct and proximate result of the conduct as hereinafter alleged, Plaintiffs incurred liability for physicians, surgeons, nurses, hospital care, medicine, hospices, x-rays and other medical treatment, the true and exact amount thereof being unknown to Plaintiffs at this time. Plaintiffs request leave to supplement this Court and all parties accordingly when the true and exact cost of Plaintiffs' medical treatments are ascertained.

142. As a further direct and proximate result of the conduct as hereinafter alleged, Plaintiffs incurred loss of profits and commissions, a diminishment of earning potential, and other pecuniary losses, the full nature and extent of which are not yet known to Plaintiffs. Plaintiffs request leave to supplement this Court and all parties accordingly to conform to proof at the time of trial.

FOR A FIRST CAUSE OF ACTION
(Product Liability: Negligence)

Plaintiffs Complain of Defendants for a Cause of Action for Negligence Alleging as Follows:

143. Plaintiffs incorporate herein by reference, as though fully set forth herein, each and every paragraph of the General Allegations above.

144. At all times herein mentioned, the named Defendants was an entity and/or the successor, successor in business, successor in product line or a portion thereof, assign, predecessor, predecessor in business, predecessor in product line or a portion thereof, parent, subsidiary, or division of an entity, hereinafter referred to collectively as "alternate entities," engaged in the

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business of researching, studying, manufacturing, fabricating, designing, modifying, labeling, instructing, assembling, distributing, leasing, buying, offering for sale, supplying, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, re-branding, manufacturing for others, packaging and advertising a certain product, namely asbestos, other products containing asbestos, and products manufactured for foreseeable use with asbestos products.

145. At all times herein mentioned, Defendants, and/or its "alternate entities" singularly and jointly, negligently and carelessly researched, manufactured, fabricated, designed, modified, tested or failed to test, abated or failed to abate, inadequately warned or failed to warn of the health hazards, failed to provide adequate use instructions for eliminating the health risks inherent in the use of the products, labeled, assembled, distributed, leased, bought, offered for sale, supplied, sold, inspected, serviced, installed, contracted for installation, repaired, marketed, warranted, rebranded, manufactured for others, packaged and advertised, a certain product, namely asbestos, other products containing asbestos, and products manufactured for foreseeable use with asbestos products, in that said products caused personal injuries to Plaintiffs and others similarly situated, (hereinafter collectively called "exposed persons"), while being used for their intended purpose and in a manner that was reasonably foreseeable.

146. The asbestos and asbestos-containing products were defective and unsafe for their intended purpose in that there was an alternative for asbestos that could have been used as the product or as a component instead of asbestos within a normally asbestos-containing/utilizing product. Said alternatives would have prevented Defendants' asbestos and asbestos-containing products from causing Plaintiffs' asbestos related disease and in some circumstances, subsequent death, due to an inability of any asbestos-alternative to penetrate the pleural lining of Plaintiffs'

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lungs, even if inhaled. Said alternatives came at a comparable cost to Defendants and/or its "alternate entities." Said alternatives were of comparable utility to the asbestos or asbestos-containing products of Defendants and/or its "alternate entities." The gravity of the potential harm resulting from the use of Defendants' asbestos or asbestos-containing products, and the likelihood such harm would occur to users of its products, far outweighed any additional cost or marginal loss of functionality in creating and/or utilizing an alternative design, providing adequate warning of such potential harm, and/or providing adequate use instructions for eliminating the health risks inherent in the use of their products, thereby rendering the same defective, unsafe and dangerous for use by Plaintiffs and/or their family members. Defendants and/or its "alternate entities" had a duty to exercise due care in the pursuance of the activities mentioned above and Defendants breached said duty of due care.

147. Defendants and/or its "alternate entities" knew or should have known, and intended that the aforementioned asbestos and asbestos-containing products would be transported by truck, rail, ship and other common carriers, that in the shipping process the products would break, crumble or be otherwise damaged; and/or that such products would be used for insulation, construction, plastering, fireproofing, soundproofing, automotive, aircraft and/or other applications, including, but not limited to grinding sawing, chipping, hammering, scraping, sanding, breaking, removal, "rip-out," and other manipulation, resulting in the release of airborne asbestos fibers, and that through such foreseeable use and/or handling by exposed persons, including Plaintiffs and/or their family members, would use or be in proximity to and exposed to said asbestos fibers.

148. At all times relevant, Defendants and/or its "alternate entities" were aware of its asbestos and asbestos-containing products' defect but failed to adequately warn Plaintiffs or their

family members, or others in their vicinity, as well as failed to adequately warn others of the known hazards associated with their products and/or failed to recall or retrofit its products. A reasonable manufacturer, distributor, or seller of Defendants' products would have, under the same or similar circumstances, adequately warned of the hazards associated with their products.

149. Plaintiffs, their family members, and others in their vicinity used, handled or were otherwise exposed to asbestos and asbestos-containing products referred to herein in a manner that was reasonably foreseeable. Plaintiffs' exposures to asbestos and asbestos-containing products occurred at various locations as set forth in this Complaint.

150. Plaintiffs suffer/suffered from asbestos related disease, including but not limited to mesothelioma and lung cancers which are related to exposures to asbestos and asbestos-containing products. Plaintiffs, not their exposed family members, were not aware at the time of exposure that asbestos or asbestos-containing products presented any risk of injury or disease.

151. Defendants' conduct and defective products as described in this cause of action were a direct cause of Plaintiffs' injuries, and all damages thereby sustained by Plaintiffs. Therefore, Plaintiffs seek all compensatory damages in order to make them whole, according to proof.

152. Furthermore, the conduct of Defendants and/or its "alternate entities" in continuing to market and sell products which they knew were dangerous to Plaintiffs, their family members, and the public without adequate warnings or proper use instructions was done in a conscious disregard and indifference to the safety and health of Plaintiffs and others similarly situated.

153. In researching, manufacturing, fabricating, designing, modifying, testing or failing to test, warning or failing to warn, failing to recall or retrofit, labeling, instructing, assembling, distributing, leasing, buying, offering for sale, supplying, selling, inspecting, servicing, installing,

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contracting for installation, repairing, marketing, warranting, rebranding, manufacturing for others, packaging and advertising asbestos and asbestos-containing products or products manufactured for foreseeable use with asbestos products, Defendants and/or its "alternate entities" did so with conscious disregard for the safety of "exposed persons" who came in contact with asbestos and asbestos-containing products, in that Defendants and/or its "alternate entities" had prior knowledge that there was a substantial risk of injury or death resulting from exposure to asbestos, asbestos-containing products or products manufactured for foreseeable use with asbestos products, including, but not limited to, asbestosis, mesothelioma, lung cancer, and other lung damages. This knowledge was obtained, in part, from scientific studies performed by, at the request of, or with the assistance of Defendants and/or its "alternate entities."

154. Defendants and its "alternate entities" were aware that members of the general public and other "exposed persons," who would come in contact with their asbestos and asbestos-containing products, had no knowledge or information indicating that asbestos, asbestos-containing products, or products manufactured for foreseeable use with asbestos products, could cause injury, and Defendants, and its "alternate entities," each of them, knew that members of the general public and other "exposed persons," who came in contact with asbestos and asbestos-containing products or products manufactured for foreseeable use with asbestos products, would assume, and in fact did assume, that exposure to asbestos and asbestos-containing products was safe, when in fact said exposure was extremely hazardous to health and human life.

155. The above-referenced conduct of Defendants, and its "alternate entities," was motivated by the financial interest of Defendants, its "alternate entities," and each of them, in the continuing, uninterrupted research, design, modification, manufacture, fabrication, labeling, instructing, assembly, distribution, lease, purchase, offer for sale, supply, sale, inspection,

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installation, contracting for installation, repair, marketing, warranting, rebranding, manufacturing for others, packaging and advertising of asbestos, asbestos-containing products and products manufactured for foreseeable use with asbestos products. Defendants, its "alternate entities," and each of them consciously disregarded the safety of "exposed persons" in pursuit of profit. Defendants was consciously willing and intended to permit asbestos and asbestos-containing products to cause injury to "exposed persons" without warning them of the potential hazards and further induced persons to work with and be exposed thereto, including Plaintiffs.

156. Plaintiffs and other exposed persons did not know of the substantial danger of using Defendants' asbestos, asbestos containing-products, and products manufactured for foreseeable use with asbestos products. The dangers inherent in the use of these products were not readily recognizable by Plaintiffs, their family members, or other exposed persons. Defendants and/or its "alternate entities" further failed to adequately warn of the risks to which Plaintiffs and others similarly situated were exposed.

157. Defendants and/or its "alternate entities" are liable for the fraudulent, oppressive, and malicious acts of its "alternate entities," and each Defendants' officers, directors and managing agents participated in, authorized, expressly and impliedly ratified, and had full knowledge of, or should have known of, the acts of each of its "alternate entities" as set forth herein.

158. The herein-described conduct of Defendants, and its "alternate entities," was and is willful, malicious, fraudulent, and outrageous and in conscious disregard and indifference to the safety and health of persons foreseeably exposed. Plaintiffs, for the sake of example and by way of punishing said Defendants, seek punitive damages according to proof against all defendants.

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FOR A SECOND CAUSE OF ACTION
(Product Liability: Strict Liability - S.C. Code Ann. § 15-73-10, et seq.)

As a Second and Distinct Cause of Action for Strict Liability, Plaintiffs Complain of Defendants, and Allege as Follows:

159. Plaintiffs incorporate herein by reference, as though fully set forth herein, each of the preceding paragraphs.

160. Plaintiffs suffered from asbestos related disease, including, mesothelioma and lung cancer, related to exposure to asbestos, asbestos-containing products and products manufactured for foreseeable use with asbestos products. Plaintiffs, nor their family members, were aware at the time of exposure that asbestos or asbestos-containing products presented any risk of injury and/or disease.

161. The Defendants' conduct and defective products as described above were a direct cause of Plaintiffs' injuries, and the injuries and damages thereby sustained by Plaintiffs.

162. Furthermore, the Defendants' conduct and that of its "alternate entities" in continuing to market and sell products which they knew were dangerous to Plaintiffs and the public without adequate warnings or proper use instructions, was done in a conscious disregard and indifference to the safety and health of Plaintiffs and others similarly situated.

163. Defendants and/or its "alternate entities" knew or should have known, and intended that the aforementioned asbestos and products containing asbestos would be transported by truck, rail, ship and other common carriers, that in the shipping process the products would break, crumble or be otherwise damaged; and/or that such products would be used for insulation, construction, plastering, fireproofing, soundproofing, automotive, aircraft and/or other applications, including, but not limited to grinding, sawing, chipping, hammering, scraping, sanding, breaking, removal, "rip-out," and other manipulation, resulting in the release of airborne

asbestos fibers, and that through such foreseeable use and/or handling, "exposed persons," including Plaintiffs, would use or be in proximity to and exposed to said asbestos fibers.

164. Plaintiffs, their family members, and others in their vicinity used, handled or were otherwise exposed to asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products, referred to herein in a manner that was reasonably foreseeable. Plaintiffs' exposures to asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products occurred at various locations as set forth in this Complaint.

165. Defendants and/or its "alternate entities" knew and intended that the above-referenced asbestos and asbestos-containing products would be used by the purchaser or user without inspection for defects therein or in any of their component parts and without knowledge of the hazards involved in such use.

166. The asbestos and asbestos-containing products were defective and unsafe for their intended purpose in that there was an alternative for asbestos that could have been used as the product or as a component instead of asbestos within a normally asbestos-containing/utilizing product. Said alternatives would have prevented Defendants' asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products from causing Plaintiffs' asbestos related diseases and in some circumstances, subsequent death, due to an inability of any asbestos-alternative to penetrate the pleural lining of the lung, even if inhaled. Said alternatives came at a comparable cost to each of the Defendants and/or its "alternate entities." Said alternatives were of comparable utility to the asbestos or asbestos-containing products or products manufactured for foreseeable use with asbestos products of Defendants and/or its "alternate entities." The gravity of the potential harm resulting from the use of Defendants'

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asbestos or asbestos-containing products, and the likelihood such harm would occur, far outweighed any additional cost or marginal loss of functionality in creating and/or utilizing an alternative design, providing adequate warning of such potential harm, and/or providing adequate use instructions for eliminating the health risks inherent in the use of their products, thereby rendering the same defective, unsafe and dangerous for use.

167. The defect existed in the said products at the time they left the possession of Defendants, and/or its "alternate entities," and each of them. Said products were intended to reach the ultimate consumer in the same condition as it left defendants. Said products did, in fact, cause personal injuries, including mesothelioma, asbestosis, other lung damage, and cancer to "exposed persons," including Plaintiffs herein, while being used in a reasonably foreseeable manner, thereby rendering the same defective, unsafe and dangerous for use.

168. Plaintiffs and other exposed persons did not know of the substantial danger of using Defendants' asbestos, asbestos-containing products, or products manufactured for foreseeable use with asbestos products. The dangers inherent in the use of these products were not readily recognizable by Plaintiffs or other exposed persons. Said Defendants and/or its "alternate entities" further failed to adequately warn of the risks to which Plaintiffs and others similarly situated were exposed.

169. Defendants' defective products as described above were a direct cause of Plaintiffs' injuries, and the damages thereby sustained.

170. In researching, manufacturing, fabricating, designing, modifying, testing or failing to test, warning or failing to warn, labeling, instructing, assembling, distributing, leasing, buying, offering for sale, supplying, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, rebranding, manufacturing for others, packaging and advertising

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asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products, Defendants, and/or its "alternate entities," and each of them, did so with conscious disregard for the safety of Plaintiffs and other exposed persons who came in contact with the asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products, in that Defendants and/or its "alternate entities" had prior knowledge that there was a substantial risk of injury or death resulting from exposure to asbestos or asbestos-containing products or products manufactured for foreseeable use with asbestos products, including, but not limited to, mesothelioma, asbestosis, other lung damages and cancers. This knowledge was obtained, in part, from scientific studies performed by, at the request of, or with the assistance of Defendants and/or its "alternate entities."

171. Defendants and/or its "alternate entities" were aware that members of the public and other exposed persons, who would come in contact with their asbestos and asbestos-containing products, had no knowledge or information indicating that asbestos or asbestos-containing products or products manufactured for foreseeable use with asbestos products could cause injury. Defendants and/or its "alternate entities" further knew that members of the general public and other exposed persons, who came in contact with asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products would assume, and in fact did assume, that exposure to asbestos and asbestos- containing products was safe, when in fact exposure was extremely hazardous to health and human life.

172. The above-referenced conduct of Defendants and/or its "alternate entities" motivated by the financial interest of Defendants, its "alternate entities," and each of them, in the continuing and uninterrupted research, design, modification, manufacture, fabrication, labeling, instructing, assembly, distribution, lease, purchase, offer for sale, supply, sale, inspection,

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installation, contracting for installation, repair, marketing, warranting, rebranding, manufacturing for others, packaging and advertising of asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products. Defendants and/or its "alternate entities" consciously disregarded the safety of "exposed persons" in their pursuit of profit and in fact consciously intended to cause injury to Plaintiffs and other exposed persons and induced persons to work with, be exposed to, and thereby injured by asbestos, asbestos-containing products, and products manufactured for foreseeable use with asbestos products.

173. Defendants are liable for the fraudulent, oppressive, and malicious acts of its "alternate entities," and each Defendants' officers, directors and managing agents participated in, authorized, expressly and impliedly ratified, and knew, or should have known of, the acts of each of its "alternate entities" as set forth herein.

174. The conduct of said Defendants, its "alternate entities," and each of them as set forth in this Complaint, was and is willful, malicious, fraudulent, outrageous and in conscious disregard and indifference to the safety and health of exposed persons. Plaintiffs, for the sake of example and by way of punishing said Defendants, seeks punitive damages according to proof against Defendants.

175. At all times herein mentioned, each of the named Defendants was an entity and/or the successor, successor in business, successor in product line or a portion thereof, assign, predecessor, predecessor in business, predecessor in product line or a portion thereof, parent, subsidiary, or division of an entity, hereinafter referred to collectively as "alternate entities," engaged in the business of researching, studying, manufacturing, fabricating, designing, modifying, labeling, instructing, assembling, distributing, leasing, buying, offering for sale, supplying, selling, inspecting, servicing, installing, contracting for installation, repairing,

marketing, warranting, re-branding, manufacturing for others, packaging and advertising a certain product, namely asbestos, other products containing asbestos and products manufactured for foreseeable use with asbestos products.

FOR A THIRD CAUSE OF ACTION
(Negligence *Per Se*)

As a Third Distinct Cause of Action for Negligence *Per Se*, Plaintiffs Complain of Defendants, and Allege as Follows:

176. Plaintiffs incorporate herein by reference, as though fully set forth herein, each of the preceding paragraphs.

177. The actions and/or inactions of Defendants also constituted negligence *per se*.

178. Defendants violated federal and state regulations relating to asbestos exposure. Such violations constitute negligence per se or negligence as a matter of law. Further, each such violation resulted in dangerous and unlawful exposures to asbestos for Plaintiffs. Plaintiffs are not making any claims under federal law; instead, Plaintiffs are simply using the violation of federal standards as proof of liability on state-law theories. Further, the reference to Federal regulations does not create a federal question. *See Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804 (1986). Any removal on this basis will be met with an immediate motion for remand and for sanctions.

179. The negligence per se of Defendants was a proximate cause of Plaintiffs' injuries.

FOR A FOURTH CAUSE OF ACTION
(Product Liability: Breach of Implied Warranties - S.C. Code Ann. § 36-2-314)

As a Fourth Distinct Cause of Action for Breach of Implied Warranties, Plaintiffs Complain of Defendants and Allege as Follows:

180. Plaintiffs incorporate herein by reference, as though fully set forth herein, each of the preceding paragraphs.

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181. Defendants and/or their "alternate entities" impliedly warranted that its asbestos materials or asbestos-containing products were of good and merchantable quality and fit for their intended use.

182. The implied warranty made by the Defendants and/or their "alternate entities" that the asbestos and asbestos-containing products were of good and merchantable quality and fit for the particular intended use, was breached. As a result of that breach, asbestos was given off into the atmosphere where Plaintiffs and/or their family members carried out duties and was inhaled by Plaintiffs.

183. As a direct and proximate result of the breach of the implied warranty of good and merchantable quality and fitness for the particular intended use, Plaintiffs were exposed to Defendants' asbestos, asbestos-containing products, and/or products manufactured for foreseeable use with asbestos products and consequently developed mesothelioma, causing Plaintiffs to suffer all damages attendant thereto.

FOR A FIFTH CAUSE OF ACTION
(Fraudulent Misrepresentation)

For a Fifth Distinct Cause of Action for Fraudulent Misrepresentation, Plaintiffs Complain of Defendants, and Allege as Follows:

184. Plaintiffs repeat and re-alleges the portions of the above paragraphs where relevant.

185. That during, before and after Plaintiffs' exposures to asbestos products manufactured by Defendants and/or their "alternate entities", the Defendants and/or their "alternate entities" falsely represented facts, including the dangers of asbestos exposure to Plaintiffs in the particulars alleged in the paragraphs above, while Defendants had actual knowledge of said dangers of asbestos exposure to persons such as Plaintiffs. At the same time of

these misrepresentations, Defendants knew of the falsity of its representations and/or made the representations in reckless disregard of their truth or falsity.

186. The foregoing representations were material conditions precedent to Plaintiffs' continued exposure to asbestos-containing products. Defendants and/or its "alternate entities" each intended that Plaintiffs act upon the representations by continuing his work around, and thereby exposure to, the asbestos products. Plaintiffs and their family members were ignorant of the falsity of Defendants' representations and rightfully relied upon the representations.

187. As a direct and proximate result Plaintiffs' reliance upon Defendants' false representations, Plaintiffs suffered injury and damages as described herein.

FOR A SIXTH CAUSE OF ACTION
(Loss of Consortium)

For a Sixth Distinct Cause of Action for Loss of Consortium, Plaintiffs Complain of Defendants, and Allege as Follows:

188. Plaintiffs incorporate by reference, the preceding paragraphs, where relevant.

189. Deceased Plaintiffs', as identified on Exhibit A, were married and/or otherwise left surviving spouses, family members and heirs at the time of their passing.

190. Prior to their injuries as alleged, Deceased Plaintiffs were able and did perform spousal and parental duties. As a proximate result thereof, subsequent to the injuries, Deceased Plaintiffs' were unable to perform spousal and parental duties and the work and service usually performed in the care, maintenance and management of the family home. As a proximate result thereof, Plaintiffs were deprived of the consortium of their spouses and family members including the performance of duties, all to Deceased Plaintiffs' damages, in an amount presently unknown to Plaintiffs but which will be proven at time of trial.

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191. As a direct and proximate result of the acts of Defendants and/or their "alternate entities" and the severe injuries caused to Plaintiffs as set forth herein, Deceased Plaintiffs' spouses and family members suffered loss of consortium, including but not by way of limitation, loss of services, marital relations, parental relations, society, comfort, companionship, love, and affection of their spouses, and suffered severe mental and emotional distress and general nervousness. Plaintiffs pray judgment against Defendants, their "alternate entities" and each of them, as hereinafter set forth.

FOR A SEVENTH CAUSE OF ACTION
(Wrongful Death Action, S.C. Code Ann. § 15-51-10, et seq.)

For a Seventh Distinct Cause of Action for Wrongful Death, Plaintiffs Complain of Defendants, and Allege as Follows:

192. Plaintiffs incorporate herein by reference, as though fully set forth herein, each of the preceding paragraphs, where relevant.

193. Plaintiffs bring this cause of action for Deceased Plaintiffs' wrongful death pursuant to S.C. Code Ann. § 15-51-10, for the benefit of the Estates of each Deceased Plaintiff, and on behalf of the heirs of Deceased Plaintiffs, as defined by S.C. Code § 15-51-20.

194. As a direct and proximate result of the negligence, recklessness, carelessness, and intentional actions of Defendants as described above, Deceased Plaintiffs' died on the dates indicated on Exhibit A, and their surviving spouses and/or heirs have and will endure pecuniary loss, mental shock and suffering, wounded feelings, grief, sorrow, loss of love, loss of society with the Deceased Plaintiffs, loss of guidance, loss of companionship and deprivation of the use and comfort of the Deceased Plaintiffs' experience, knowledge and judgment in managing the affairs of himself and his beneficiaries, and they have been otherwise seriously damaged. Moreover, reasonable funeral expenses were incurred, and

Plaintiffs pray for judgment against Defendants in such amount of actual and punitive damages as the trier of fact may determine.

FOR AN EIGHTH CAUSE OF ACTION
(Survival Action, S.C. Code Ann. § 15-5-90)

For an Eighth Distinct Cause of Action, known statutorily as a Survival Action, Plaintiffs Complains of Defendants, and Allege as Follows:

195. Plaintiffs incorporate herein by reference, as though fully set forth herein, each of the preceding paragraphs, where relevant.

196. Plaintiffs, as identified on Exhibit A hereto, are represented by their duly appointed Personal Representatives of the Deceased Plaintiffs' Estates, bring this survival action as allowed under S.C. Code Ann. § 15-5-90.

197. Personal Representatives of the Plaintiffs bring this cause of action for Deceased Plaintiffs' medical, surgical and hospital bills, as well as for Deceased Plaintiffs' conscious pain and suffering prior to his untimely death, as well as for the mental distress of Deceased Plaintiffs due to knowledge of their impending death from these incurable diseases.

198. As a direct and proximate result of the negligence, recklessness, carelessness, and in some cases intentional actions of Defendants as described, Deceased Plaintiffs endured conscious pain, suffering, mental anguish and distress until his untimely death, and Plaintiffs pray for judgment against Defendants in such amount of actual and punitive damages as the trier of fact may determine is just.

FOR A NINTH CAUSE OF ACTION
(Alter Ego and Veil Piercing Liability)
(Against the Altrad Defendants, Charter Defendants and Oppenheimer Defendants)

For a Ninth Distinct Cause of Action for Alter Ego and Veil Piercing Liability, Plaintiffs Complain of Altrad, Charter and Oppenheimer Defendants, and Allege as Follows:

199. Plaintiff incorporates by reference the preceding paragraphs as though fully set forth herein.

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200. South Carolina recognizes the imposition of liability under an "alter ego" theory based on a factual assessment of several factors, including: (i) common ownership; (ii) financial dependence; (iii) the degree of selection of executive personnel and failure to observe corporate formalities; and (iv) the degree of control over marketing and operational policies.

201. Likewise, under a veil-piercing theory, South Carolina recognizes attaching liability to a shareholder through a two-part test involving, first, an eight-factor analysis of the shareholder's relationship to the corporation and, second, proof of an element of injustice or fundamental unfairness if the acts of the corporation are not regarded as the acts of the equity owners. As part of the first step, the eight factors are: (i) whether the corporation was grossly undercapitalized; (ii) failure to observe corporate formalities; (iii) non-payment of dividends; (iv) insolvency of the debtor corporation at the time; (v) siphoning of funds of the corporation by the dominant stockholder; (vi) non-functioning of other officers, directors, or stockholders; (vii) absence of corporate records; and (viii) the fact that the corporation was merely a façade for the operations of the dominant stockholder. In turn, to prove fundamental unfairness, the plaintiff must establish that: (i) the defendant was aware of the plaintiff's claim against the corporation, and (ii) thereafter, the defendant acted in a self-serving manner with regard to the property of the corporation and in disregard of the plaintiff's claim in the property.

202. Numerous facts support the conclusion that, in furtherance of the ends of justice, the Court may exercise personal jurisdiction over the Altrad Defendants, the Charter Defendants and the Oppenheimer Defendants (collectively the "Alter-Ego Defendants") and impose liability on them for acts of Cape, which Alter-Ego Defendants are responsible for having dominated, controlled, facilitated, or benefited from, including, without limitation:

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(a) The sale and distribution of asbestos in the United States, including to facilities in South Carolina or in asbestos-containing products used in South Carolina;

(b) The failure to follow corporate formalities between Cape and each of the Alter-Ego Defendants;

(c) The common and intentionally obfuscated ownership interests of the Alter-Ego Defendants;

(d) The financial, marketing, and operational dependence of Cape on those Alter-Ego Defendants;

(e) The domination and control of Alter-Ego Defendants over Cape's and NAAC's executive personnel and boards of directors, which caused, among other things, NAAC to fail to safeguard the interests of personal-injury claimants by placing adequate products-liability insurance;

(f) The funneling of assets out of the United States to escape attachment by personal- injury claimants, and the resulting gross undercapitalization of NAAC in the United States;

(g) The absence of, and intentional destruction of, corporate records related to the events described herein;

(h) The establishment or use of Cape and NAAC as sham entities and a façade for the operations of Oppenheimer interests in South Africa and elsewhere, thereby misrepresenting the true origin of Cape's products (including Cape's use of child laborers), the grave health hazards associated with those products, and the ownership of Cape's business (including ownership by African oligarchs); and

(i) The self-serving actions of Alter-Ego Defendants, despite their having knowledge that Cape's asbestos and asbestos-containing products would cause bodily injury to tens of thousands of individuals in the United States, including in South Carolina, and result in claims for reimbursement.

203. The damages alleged against Cape in the Asbestos Suits resulted from the actions of Alter-Ego Defendants or their predecessors in interest, which dominated, controlled, facilitated, or benefited from Cape's successful asbestos business and liability-avoidance scheme. Accordingly, the proper and appropriate remedy under the circumstances here is for the Court to declare that

the Alter-Ego Defendants are alter egos of Cape and thereby liable to Cape and/or the Receiver for Cape for Asbestos Suits.

FOR A TENTH CAUSE OF ACTION
(Amalgamation of Interests and Single Business Enterprise Liability)
(Against the Defendants Anglo American PLC, De Beers PLC, De Beers Centenary AG, De Beers Consolidated Mines Ltd., De Beers UK Ltd., Charter Consolidated Ltd., ESAB Corporation, Central Mining & Investment Corporation Ltd., Altrad Investment Authority S.A.S.)

For a Tenth Distinct Cause of Action for Amalgamation of Interests and Single Business Enterprise Liability, Plaintiffs Complain of Defendants, and Allege as Follows:

204. Plaintiff incorporates by reference the preceding paragraphs as though fully set forth herein.

205. Cape had or has unified, integrated, and intertwined business operations and resources with Anglo American PLC, De Beers PLC, De Beers Centenary AG, De Beers Consolidated Mines Ltd., De Beers UK Ltd., Charter Consolidated Ltd., ESAB Corporation, Central Mining & Investment Corporation Ltd., and Altrad Investment Authority S.A.S.(collectively the "Amalgamation Defendants") to achieve a common business purpose.

206. In turn, Amalgamation Defendants acted or continue to act with Cape and its affiliated entities as part of an amalgamation of interests and single business enterprise, which gives rise to the claims against them, including through (i) longstanding business activities directed at the United States, including South Carolina, including with respect to the mining, marketing, and distribution of asbestos and other minerals, and/or (ii) implementing or perpetuating an ongoing scheme to evade responsibility for harm caused to South Carolinians, as well as other Americans, by Cape's asbestos, while also financially benefiting from that scheme.

207. Because the Amalgamation Defendants were or are intertwined with Cape and acting with a common business purpose, there has been bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions with Cape, including their

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continuing to benefit from Cape's historical sale of asbestos and evasion of its associated liabilities to tort victims within the United States, including South Carolina, by avoiding answering to U.S. creditors and other injured parties for their asbestos-related injuries and harm.

208. Thus, each Amalgamation Defendants (including predecessors in interest) was or is part of an amalgamated, single business enterprise with respect to the mining, production, manufacture, and distribution of asbestos fiber and/or the perpetuation of Cape's liability-avoidance scheme.

209. As a result of these relationships, persons have allegedly been harmed, with the damages alleged against Cape in the Asbestos Suits resulting from the actions of the Amalgamation Defendants (including their predecessors in interest).

210. Accordingly, the proper and appropriate remedy under the circumstances here is for the Court to declare that the Amalgamation Defendants were or are part of an amalgamation of interests and common business enterprise with Cape, and thereby liable to Cape and/or the Receiver for Asbestos Suits.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray judgment, joint and several, against Defendants and/or its "alternate entities" in an amount to be proved at trial, as follows:

1. For Plaintiffs' actual damages according to proof, including pain and suffering, mental distress, as well as medical, surgical and hospital bills;

2. For loss of income or earnings according to proof;

3. For loss of care, comfort and society;

4. For the Deceased Plaintiffs, or pecuniary loss of the beneficiaries/heirs including but not limited to funeral and burial costs, for mental shock and suffering of the beneficiaries/heirs,

for wounded feelings of the beneficiaries/heirs, for grief and sorrow of the beneficiaries/heirs, loss of his companionship and deprivation of the use and comfort of the Decedents' experience, knowledge and judgment in managing the affairs of their beneficiaries;

5. For punitive damages according to proof;

6. For Plaintiffs' cost of suit herein;

7. For damages for breach of implied warranty according to proof;

8. For damages for fraudulent misrepresentation according to proof;

9. All economic and non-economic damages allowed pursuant to the Survival and Wrongful Death Act;

10. For a declaration that the Alter-Ego Defendants are the Alter Ego of Cape;

11. For a declaration that the Amalgamation Defendants were or are part of an amalgamation of interests and common business enterprise with Cape, and thereby liable to Cape and/or the Receiver for Asbestos Suits; and

10. For such other and further relief as the Court may deem just and proper, including costs and prejudgment interest as provided by South Carolina law.

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A JURY IS RESPECTFULLY DEMANDED TO TRY THESE ISSUES.

Respectfully submitted,

/s/ Charles W. Branham, III
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ATTORNEYS FOR PLAINTIFFS

November 11, 2024
Columbia, South Carolina.

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EXHIBIT A

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF RICHLAND	)	**FOR THE FIFTH JUDICIAL CIRCUIT**
AUGUSTUS A. ADAMS, *et al.*,	)	**C/A No.:** 2024CP4006639
	)	
Plaintiffs,	)	
	)	
v.	)	**ACCEPTANCE OF SERVICE**
	)	
CAPE PLC, *etc., et al.,*	)	
	)	
Defendants.	)	

I, Peter Protopapas, as attorney for above-named Defendant CAPE PLC, do hereby accept service on their behalf of the **SUMMONS and COMPLAINT,** along with the Exhibit in the above-entitled matter, on this 12 day of November 2024.

Peter Protopapas
Rikard & Protopapas
2110 N Beltline Blvd.
Columbia SC 29204

Columbia, South Carolina.

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RICHLAND COUNTY
Court of Common Pleas
The Hon. Jean H. Toal, Acting Circuit Court Judge

Case No. _

Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies.....Petitioners,

v.

The Honorable Jean H. Toal, in her capacity as Acting Circuit Court Judge, and Peter Protopapas, in his capacity as Receiver for Asbestos Corporation Ltd. .....Respondents.

PETITION FOR WRIT OF PROHIBITION

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INTRODUCTION

Certain Underwriters at Lloyd's, London and certain London market insurance companies ("Certain London Market Insurers" or "CLMI")[1] subscribing severally (not jointly) to certain excess liability insurance policies insuring Asbestos Corporation Limited ("ACL") petition this Court to address and remedy circumstances that are, on their face, extraordinary. In contravention of well-established South Carolina law limiting courts' subject-matter jurisdiction to appoint receivers for out-of-state corporations, a South Carolina trial court has empowered a Receiver to take control of the litigation and insurance of ACL, a solvent company organized under the laws of Canada and actively managed by its own board and officers in Québec. Consistent with receivership law nationwide, South Carolina law confers jurisdiction on South Carolina courts to appoint general receivers—empowered to act on behalf of the corporation—only for *South Carolina* corporations. South Carolina law provides the trial court no power, however, to appoint general receivers for corporations organized beyond South Carolina's borders, and the United States Constitution forbids such extraterritorial receiverships.

On top of these substantive deficiencies, the trial court's order appointing a receiver for ACL is procedurally deficient because the trial court failed to comply with the provision of the South Carolina Code mandating that the court include in its order the value of the property for

[1] Certain London market insurance companies as to which the claims at issue are administered by third-party claims administrator, Resolute Management, Inc., consist of The Scottish Lion Insurance Company Ltd.; Tenecom Ltd. (as successor to Winterthur Swiss Insurance Company, formerly known as Accident & Casualty Insurance Company of Winterthur, Switzerland); Yasuda Fire and Marine Insurance Company (UK) Limited, now known as Tenecom Ltd; The Ocean Marine Insurance Company Limited (as successor to liabilities of Commercial Union Assurance Company Limited, The Edinburgh Assurance Company, The Indemnity Marine Assurance Company Limited, The Northern Assurance Company Limited, The Road Transport & General Insurance Company Limited, United Scottish Insurance Company Limited, and The Victoria Insurance Company Limited); and NRG Victory Reinsurance Limited as successor to liabilities of New London Reinsurance Company Limited.

which a bond could be posted by ACL to dissolve the receivership. Furthermore, even if the order appointing a receiver for ACL were valid, it would not apply beyond the one tort case in which it was entered and thus would not authorize the Receiver to defend, or initiate, litigation on ACL's behalf in other cases.

CLMI are directly and adversely affected by the trial court's unauthorized and unconstitutional receivership order. For decades, CLMI have reimbursed ACL for CLMI's share of ACL's defense and indemnity costs arising from personal-injury claims, paying out tens of millions of dollars to date to injured parties.[2] In the wake of the trial court's receivership order, however, both the Receiver and ACL's board—which routinely take diametrically opposed positions on litigation and insurance matters—claim to speak for ACL in its dealings with CLMI, trapping CLMI between two masters.

Under the trial court's orders, the Receiver has taken control of litigation against ACL in multiple asbestos personal-injury cases pending in multiple states; insisted that he be treated as the insured by ACL's insurers; and, purporting to act for ACL, has filed lawsuits against many of those insurers. Additionally, although the Receiver has accepted service of process on ACL's behalf in asbestos personal-injury cases nationwide, he has declined to retain counsel for ACL in several of those cases—and ACL has prohibited CLMI from retaining counsel on its behalf—opening the door to potential default judgments for hundreds of millions of dollars that plaintiffs may then seek to execute directly against CLMI.

The extraterritorial appointment of a receiver for an active company fully capable of managing its own affairs is unknown to American law. Yet the trial court, which is responsible

[2] The policies insuring ACL to which CLMI subscribed are excess policies that do not provide for a duty to defend and respond to ultimate net loss.

for overseeing all asbestos litigation in South Carolina, has appointed a receiver for a foreign corporation on multiple occasions. All told, the trial court has appointed two dozen receivers for South Carolina and foreign corporations over the past five years, including in two cases currently pending before this Court on certification: *Tibbs v. 3M Co.*, No. 2023-001461 (S.C. Sup. Ct. Oct. 3, 2024), concerning the validity of the ACL receivership, and *Welch v. Advance Auto Parts, Inc.*, No. 2024-001180 (S.C. Sup. Ct. Aug. 20, 2024), concerning the validity of another receivership that the trial court imposed on another active, solvent Canadian corporation, Atlas Turner Inc.

CLMI seek vacatur of the trial court's receivership orders by writ of prohibition because they have no other adequate appellate remedy. CLMI and ACL's other insurers were not parties to the lawsuit in which the trial court appointed a receiver for ACL. Yet the trial court has held that they are bound by that receivership order, which, as nonparties, they had no ability to appeal. In other cases in which the Receiver has purported to act on ACL's behalf against CLMI and other insurers—including in an insurance coverage action he filed against CLMI—the insurers have repeatedly moved to dissolve the receivership on the basis that the trial court lacks jurisdiction to appoint a receiver for an active, solvent Canadian corporation. Each of those attempts has been unsuccessful, and the Court of Appeals has now made clear that, under this Court's ruling in *Childers v. Davis Mechanical Contractors, Inc.*, No. 2024-000005 (S.C. Sup. Ct. Mar. 27, 2024), *reh'g denied*, Apr. 17, 2024, it lacks jurisdiction to review interlocutory rulings denying motions to dissolve a receivership. A final judgment in the Receiver's coverage action, which would be appealable by CLMI, is years away, if it occurs at all. In the meantime, the trial court continues to press ahead with (1) adjudicating asbestos personal-injury claims against ACL, where the Receiver's and ACL's conflicting actions jeopardize CLMI's rights under the policies; (2) directing CLMI to treat the Receiver as their insured, compelling CLMI to choose whether to

follow the instructions of the Receiver or the contrary instructions of ACL's duly appointed management in Canada; and (3) presiding over the third-party coverage complaints that the Receiver, purporting to act on ACL's behalf, has filed against CLMI and dozens of other insurers, raising the specter of judicial determinations in conflict with the longstanding agreement among ACL and CLMI on application of the policies.

CLMI's untenable position is a direct result of the trial court's distortion of South Carolina receivership law. South Carolina law authorizes courts to appoint a general receiver to manage a corporation's affairs only where a proceeding is brought to dissolve a *South Carolina* corporation. S.C. Code Ann. §§ 33-1-400(4), 33-14-320(a) (2005). South Carolina law also authorizes a more limited "asset receivership" to hold and preserve the "property within this State of foreign corporations" that are insolvent or in imminent danger of insolvency. *Id.* § 15-65-10(4). But South Carolina law does not authorize the type of mongrel receivership ordered here: one that empowers the Receiver to control ACL's litigation and insurance, without fully divesting ACL's Canadian board and officers of all power. And with good reason. The trial court's unauthorized receivership necessarily permits two masters to run a single corporation, creating inherently irreconcilable conflicts regarding who properly exercises ACL's powers with respect to third parties like CLMI and fomenting uncertainty about who is responsible for defending litigation against ACL. Indeed, ACL is already confronted with potential default judgments in multiple cases where neither the Receiver nor ACL has retained counsel, and just days ago, a bankrupt manufacturer of asbestos-containing insulation relied on the trial court's unauthorized receivership order to file a lawsuit against ACL in South Carolina seeking hundreds of millions of dollars in damages. Complaint, *Nat'l Serv. Indus., Inc. v. ACL*, No. 2024-CP-40-06713 (S.C. Ct. Common Pleas, 5th Cir. Nov. 14,

2024) (Exhibit 1) ("*Nat'l Serv. Indus.* Complaint"). CLMI may be left holding the bag if neither the Receiver nor ACL acts to defend ACL's interests in these cases.

This petition is CLMI's only meaningful opportunity to seek and secure relief from the often-conflicting demands of the Receiver and ACL and the other irreparable harms that CLMI are sustaining on a daily basis as a result of the trial court's unlawful exercise of jurisdiction. These harms to CLMI include exposing themselves to potential sanctions or contractual and extra-contractual liability for guessing incorrectly about whether to treat the Receiver or the Canadian management of ACL as their insured; paying to settle claims against ACL, at the Receiver's behest, in amounts well in excess of ACL's historical settlement payments and to which ACL objected; potentially paying judgments against ACL that would be voided by a subsequent appellate decision invalidating this unauthorized receivership, with no ability to recoup those payments; and the expense of defending against the Receiver's third-party coverage complaint and responding to his burdensome discovery demands (including those seeking privileged and confidential communications between CLMI and ACL). Because CLMI would not be made whole for these ongoing harms by an appellate decision vacating the receivership following a final judgment entered years in the future—and because the Court of Appeals has ruled that, under *Childers*, interlocutory relief is not available—the only mechanism for protecting CLMI from the trial court's jurisdictional overreach is a writ from this Court.

Accordingly, pursuant to S.C. Code Ann. § 14-3-310 (2017) and South Carolina Appellate Court Rule 245(b), CLMI hereby petition for a writ of prohibition to issue in the original jurisdiction of this Court, prohibiting the Honorable Jean Toal or any later designated judge from enforcing the order appointing a receiver for ACL, holding the order appointing the Receiver and all related orders void for lack of jurisdiction, and, correspondingly, prohibiting the Receiver from

taking any action (through litigation or otherwise) on behalf of ACL. The writ is warranted to prevent the trial court from continuing to transgress the limits that South Carolina law and the U.S. Constitution impose on its jurisdiction to appoint receivers and to shield CLMI from ongoing, irreparable harm inflicted on them by the unlawful ACL receivership.

CLMI respectfully request that the Court treat this petition as a companion case to *Tibbs v. 3M Co.*, No. 2023-001461 (S.C. Sup. Ct. Oct. 3, 2024), and *Welch v. Advance Auto Parts, Inc.*, No. 2024-001180 (S.C. Sup. Ct. Aug. 20, 2024), which present substantially overlapping issues, and set the cases for oral argument on the same day. Considering these matters together will ensure that this Court is able to render a decision on these important questions based on a fully developed record that encompasses all relevant arguments under both South Carolina law and the U.S. Constitution.

STATEMENT OF THE CASE

This petition arises from the trial court's decision to appoint a receiver over ACL, an active, solvent foreign corporation, as a discovery sanction. *See* Order on Plaintiffs' Motion to Appoint a Receiver, p. 2, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Common Pleas, 5th Cir. Sept. 7, 2023) ("Receivership Order") (Exhibit 2). That decision was made in one of numerous asbestos personal-injury cases pending before the trial court, which oversees all asbestos litigation in the State, and it purports to apply in all cases involving ACL.

As a result of the long history of asbestos litigation, some of the defendants in asbestos personal-injury cases are now defunct. The trial court has claimed the power to appoint a receiver for these defunct defendants to marshal any available assets to pay meritorious claims. The trial court has invariably appointed Peter Protopapas as the receiver. But the trial court has not appointed Mr. Protopapas receiver solely for defunct South Carolina corporations. Indeed, it has now appointed Mr. Protopapas receiver for *twenty-four* companies over the past five years,

including several non-South Carolina corporations. *See* Travelers' Petition for Rehearing, pp. 17–18, *Childers v. Davis Mech. Contractors, Inc.*, No. 2024-000005 (S.C. Sup. Ct. Apr. 11, 2024), *reh'g denied*, Apr. 17, 2024.

In limited circumstances, a South Carolina court is statutorily authorized to judicially dissolve a defunct South Carolina corporation and, as part of that dissolution proceeding, appoint a receiver to manage and wind up its affairs. *See* S.C. Code Ann. § 33-14-320(a) ("A court in a judicial proceeding brought to dissolve a corporation may appoint receivers to wind up and liquidate, or custodians to manage, the business and affairs of the corporation."). But ACL is not defunct. Nor is it a South Carolina corporation. It is an active corporation organized under the laws of Canada, with a principal place of business in Québec. *See* Third-Party Defendant Travelers Casualty and Surety Company's Notice of Motion and Motion to Stay or Dismiss the Third-Party Claims of the Purported Receiver for ACL and to Dissolve the Receivership, pp. 12–18, *Mitchell v. 3M Co.*, No. 2022-CP-40-02979 (S.C. Ct. Common Pleas, 5th Cir. Oct. 23, 2023) (Exhibit 3). ACL does not have any assets or property in South Carolina, and it has never conducted any business activities in South Carolina. *See* Affidavit of Richard Dufour, ¶ 2, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Common Pleas, 5th Cir. May 11, 2023) ("Dufour Aff.") (Exhibit 4).

In *Tibbs v. 3M Co.*, an asbestos personal-injury action in which ACL was named as a defendant and CLMI were not parties, ACL entered an appearance in the trial court to raise an objection to personal jurisdiction, which the trial court overruled. ACL subsequently filed an answer and responded to discovery requests to the extent it deemed consistent with its legal obligations under the Québec Business Concerns Records Act. *See generally* ACL Memorandum in Opposition to Motion for Contempt, to Strike Answer and Appoint a Receiver, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Common Pleas, 5th Cir. Aug. 28, 2023) (Exhibit 5). A week

later, the *Tibbs* plaintiffs filed a motion to hold ACL in contempt and to strike its pleadings, arguing that ACL had failed to participate in discovery, and shortly thereafter, they filed a motion to appoint a receiver.

The trial court quickly granted the plaintiffs' motions. In an order entered on September 8, 2023, it found ACL in contempt and struck its pleadings. Order Holding Atlas Asbestos in Contempt and Striking Pleadings, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Common Pleas, 5th Cir. Sept. 7, 2023) (Exhibit 6) (order also applicable to ACL). In the Receivership Order entered the same day, it found ACL in default and appointed Mr. Protopapas as Receiver for ACL. *See* Receivership Order (Exhibit 2). The Receivership Order grants the Receiver sweeping powers over ACL's litigation and insurance, including the powers (i) to "accept service on behalf of ACL"; (ii) to "engage counsel on behalf of ACL"; (iii) to "obtain from any financial institution, bank, credit union, savings and loan or title, credit bureau or any other third party, any financial records belonging to or pertaining to the insurance assets of ACL"; and (iv) to "assume control of the defense of asbestos claims made against ACL in the United States." *Id.* at 6–7. But the order did not purport to displace ACL's board and officers, which continue to control ACL's day-to-day affairs from its headquarters in Québec.

ACL timely noticed an appeal of both the order striking its pleadings and the Receivership Order, *see* Notice of Appeal, *Tibbs v. 3M Co.*, No. 2023-001461 (S.C. Ct. App. Sept. 13, 2023), and at the request of the Court of Appeals, this Court certified the appeal, Order, *Tibbs v. 3M Co.*, No. 2023-001461 (S.C. Oct. 3, 2024). Accordingly, this Court may address the validity of the ACL Receivership Order directly in the certified *Tibbs v. 3M Co.* appeal or indirectly via its forthcoming decision in *Welch v. Advance Auto Parts, Inc.*, No. 2024-001180 (S.C. Aug. 20, 2024), which presents a challenge to a receivership that the trial court imposed on Atlas Turner,

another active, solvent Canadian corporation.[3] Absent writ proceedings in this Court, however, the validity of the ACL receivership is likely to be resolved in proceedings to which CLMI are not parties.

CLMI have for decades reimbursed ACL for their share of ACL's defense and indemnity costs arising from personal-injury suits against the company, paying out tens of millions of dollars in the years prior to the Receiver's appointment. The receivership has disrupted this longstanding, orderly process for compensating injured plaintiffs. After appointment, the Receiver immediately began purporting to act on ACL's behalf across a range of matters before the trial court, including personal-injury suits and third-party actions, and to hold himself out as the insured in dealings with CLMI and other ACL insurers.

In *Link v. 4520 Corp.* and *Donaghy v. 4520 Corp.*, two asbestos personal-injury cases in which CLMI were nonparties, the trial court ordered that "[t]he Receiver for . . . ACL shall be viewed as the named insured and the representative for . . . ACL in the defense of asbestos litigation matters and the management of any insurance or insurance-related assets," and that "[t]he insurers for . . . ACL are expected to cooperate with the Receiver." Order, pp. 5–6, *Link v. 4520 Corp.*, No. 2022-CP-40-005543, *Donaghy v. 4520 Corp.*, No. 2022-CP-40-03108 (S.C. Ct. Common Pleas, 5th Cir. Feb. 23, 2024) ("*Link* Mediation Order") (Exhibit 7). But ACL, as an active, solvent company, has taken the position that the Receiver is without authority to act on ACL's behalf, including the authority to tender claims to its insurers and control ACL's litigation, *see* Brief of ACL, p. 1, *Tibbs v. 3M Co.*, No. 2023-001461 (S.C. Ct. App. May 21, 2024) (Exhibit 8), and it objected to CLMI's extending settlement authority in the *Link* and *Donaghy* cases in

[3] Atlas Turner currently shares a common corporate parent with ACL but has a different corporate history and background.

sums consistent with the Receiver's expectations. Accordingly, during the court-ordered mediation in *Link* and *Donaghy*, CLMI found itself caught between conflicting directives from the Receiver and ACL's management.

Fearing potential liability to ACL, CLMI followed its directives regarding settlement authority, and the mediation was unsuccessful. The Receiver thereafter moved in *Link* and *Donaghy* for sanctions against nonparties CLMI based on their alleged failure to meaningfully participate in the mediation. The trial court granted the Receiver's request, issuing an order imposing $50,000 a day in sanctions against CLMI (as well as their third-party claims administrator, Resolute Management Inc. ("Resolute")) for supposedly failing to "comply with th[e] Court's orders" with respect to the ACL receivership, leaving it to the Receiver to "advise the Court if and when compliance with this Court's orders is achieved." Order on Plaintiffs' and Receiver's Motion for Sanctions and Contempt, p. 7, *Link v. 4520 Corp.*, No. 2022-CP-40-05543, *Donaghy v. 4520 Corp.*, No. 2022-CP-40-03108 (S.C. Ct. Common Pleas, 5th Cir. Mar. 22, 2024) ("Sanctions Order") (Exhibit 9); *see also* Order of Supersedeas Staying Order for Daily Monetary Sanctions Contained in Its Order for Sanctions Against Resolute Management and Certain Underwriters of Lloyd's of London, *Link v. 4520 Corp.*, No. 2022-CP-40-005543, *Donaghy v. 4520 Corp.*, No. 2022-CP-40-03108 (S.C. Ct. Common Pleas, 5th Cir. Mar. 27, 2024) (Exhibit 10) (staying daily monetary sanction, but not other sanctions, pending appeal).

CLMI and Resolute appealed the Sanctions Order on multiple grounds, including the invalidity of the Receivership Order. *See* Initial Brief of Nonparty Appellants Certain Underwriters at Lloyd's, London, Certain London Market Insurance Companies, and Resolute Management Inc., *Link v. 4520 Corp.*, No. 2024-000501 (S.C. Ct. App. Apr. 18, 2024) (Exhibit 11). The plaintiffs in *Link* and *Donaghy*, however, subsequently settled and dismissed their claims

against ACL. As a result, the trial court vacated the Sanctions Order *nunc pro tunc* to the date of its issuance, *see* Order Vacating Sanctions and Contempt Order of March 22, 2024 Against Resolute Management Inc. and Certain Underwriters of Lloyd's of London, *Link v. 4520 Corp.*, No. 2022-CP-40-05543, *Donaghy v. 4520 Corp.*, No. 2022-CP-40-03108 (S.C. Ct. Common Pleas, 5th Cir. Aug. 15, 2024) (Exhibit 12), and the Court of Appeals dismissed CLMI's and Resolute's appeals, *see* Order, *Link v. 4520 Corp.*, No. 2024-000501 (S.C. Ct. App. Aug. 20, 2024) (Exhibit 13). CLMI were therefore unable to use their appeal of the Sanctions Order as a vehicle for challenging the receivership's validity.

The conflicting and burdensome demands on CLMI also extend to the discovery setting. In *McDowell v. A.O. Smith Corp.*, another asbestos personal-injury case in which CLMI were nonparties, the trial court granted the Receiver's demand for onerous third-party discovery from CLMI in an order that required them to provide the Receiver with "detailed explanation[s]" of coverage, communications, and documentation dating back decades. Order on Discovery, pp. 3–4, *McDowell v. A.O. Smith Corp.*, No. 2023-CP-40-06157 (S.C. Ct. Common Pleas, 5th Cir. Mar. 22, 2024) (Exhibit 14). The underlying subpoena issued by the Receiver demanded that CLMI produce, for example, "all general liability, product liability, and professional liability insurance policies" they issued to ACL between 1945 and the present, including "any documents referencing such policies." Subpoena Duces Tecum, ¶ 1, *McDowell v. A.O. Smith Corp.*, No. 2023-CP-40-06157 (S.C. Ct. Common Pleas, 5th Cir. Jan. 9, 2024) ("*McDowell* Subpoena") (Exhibit 15). It also demanded "underwriting files" and "claims files" for the same period and "all documents that reflect communications between [CLMI] and ACL" regarding either "the acquisition, placement, and termination of insurance coverage" or "the defense and/or indemnification of ACL," including communications with ACL's lawyers. *Id.* ¶¶ 4, 6–7, 9. In response to the trial court's order

compelling production, CLMI produced thousands of pages of documents to the Receiver, over ACL's objection. The Receiver issued similarly expansive subpoenas to CLMI in the *Tibbs* case as well as the *Link* and *Donaghy* actions. Subpoena Duces Tecum, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Common Pleas, 5th Cir. Sept. 26, 2023) ("*Tibbs* Subpoena") (Exhibit 16); Subpoena, *Link v. 4520 Corp.*, No. 2022-CP-40-005543, *Donaghy v. 4520 Corp.*, No. 2022-CP-40-03108 (S.C. Ct. Common Pleas, 5th Cir. Mar. 6, 2024) ("*Link* Subpoena") (Exhibit 17).

Purporting to act on ACL's behalf, the Receiver has also filed a third-party coverage complaint in yet another underlying personal-injury lawsuit, *Lewis v. Asbestos Corp. Ltd.*, against CLMI and scores of other insurers that potentially have coverage obligations to ACL. *See* Third-Party Complaint, No. 2024-CP-40-00458 (S.C. Ct. Common Pleas, 5th Cir. Feb. 21, 2024) (Exhibit 18). CLMI moved to dismiss the third-party complaint, raising the invalidity of the Receivership Order, among other arguments. The trial court denied the motion in a ruling that relied heavily on its prior rulings in other cases rejecting insurers' challenges to the ACL receivership. Order, pp. 8–14, *Lewis v. Asbestos Corp. Ltd.*, No. 2024-CP-40-00458 (S.C. Ct. Common Pleas, 5th Cir. May 20, 2024) ("*Lewis* MTD Order") (Exhibit 19) (citing Order, *Mitchell v. 3M Co.*, No. 2022-CP-40-02979 (S.C. Ct. Common Pleas, 5th Cir. Feb. 26, 2024)). Consequently, the Receiver is moving forward with his coverage action, compelling CLMI to incur substantial costs preparing a defense to the suit and responding to the Receiver's expansive discovery requests, and seeking findings in conflict with the longstanding agreement among ACL and CLMI on application of the policies.

In addition, as in *Link* and *Donaghy*, the Receiver is continuing to control ACL's defense in multiple asbestos personal-injury cases and conveying positions to CLMI with respect to the settlement of claims and other litigation-related matters. *See, e.g.*, Receivership Order at 6–7 (Exhibit 2). But because ACL has not been fully divested of its corporate powers and contends

the receivership is invalid, it has continued to issue its own directives to CLMI with respect to settlements and the retention of counsel. This has created a conflict between the Receiver and ACL over the defense of the pending asbestos claims, leaving CLMI in the middle attempting to navigate these irreconcilable positions. For example, after CLMI—in compliance with the Receiver's expressed preference—provided funds to the Receiver to settle five asbestos cases pending against ACL, attorneys retained by ACL's board and officers in Canada accused CLMI of materially breaching their contractual obligations to ACL.

The Receiver has also accepted service of several new complaints filed against ACL, including complaints filed outside South Carolina, but ACL disputes the validity of service upon the Receiver, does not believe it has a duty to appear in those cases, and blocked CLMI from retaining counsel on its behalf—placing CLMI in an untenable position with respect to ACL's defense. ACL is obligated to defend and resolve asbestos-related bodily-injury claims filed against it and to pay defense costs associated with those claims, seeking reimbursement from CLMI for their several shares. In fact, CLMI have been reliably reimbursing these costs—in amounts totaling tens of millions of dollars—for decades pursuant to the terms of the policies. But because ACL does not recognize service accepted by the Receiver (and asserts that its obligation to defend arises only upon proper service), it has declined to retain counsel to defend against the complaints in cases where the Receiver has accepted service. The Receiver also has not retained counsel in several of these recently filed cases, leaving ACL exposed to the risk of default judgments and exposing CLMI—which have no contractual duty to retain defense counsel under the policies—to the risk of paying those potentially substantial damages awards.

For example, seeking to avoid an imminent default judgment in a case in which ACL refused to recognize service upon the Receiver and the Receiver did not retain counsel, CLMI

recently retained counsel to act on ACL's behalf in *Arsenith v. 3M Co.*, No. 24-cv-089313 (Cal. Super. Ct. Aug. 28, 2024), an asbestos personal-injury case filed against ACL in California seeking $230 million in damages. But ACL stood in the way, sending a letter to the counsel retained by CLMI "formally advis[ing]" him "that [he] and [his] firm are not authorized to represent ACL in [the *Arsenith*] matter or any other case in the state of California." Receiver's Notice of Filing of Correspondence from ACL, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Common Pleas, 5th Cir. Oct. 23, 2024) (attaching Letter to James C. Parker, Hugo Parker, LLC, from Richard Dufour, ACL, *Re: ACL – Defense of* Arsenith *Matter* (Oct. 16, 2024) ("Parker Letter")) (Exhibit 20). Consequently, there has been no appearance for ACL in *Arsenith* and, without an appearance and response by the looming deadline to answer the complaint, there is significant risk of a default in a case seeking hundreds of millions of dollars in damages, which the plaintiff could then try to collect against CLMI.[4]

CLMI thus find themselves in an impossible situation, unable to mitigate the risk that plaintiffs will seek to execute against them on hundreds of millions of dollars in potential default judgments that may be imposed against ACL in *Arsenith* and other similar cases while CLMI await

[4] Indeed, the *Arsenith* plaintiffs have already moved once for the entry of default in the amount of $230 million against ACL. Following service on the Receiver, the responsive pleading deadline was initially set for October 16, 2024. When that date passed without response from ACL—because neither the Receiver nor ACL retained counsel, and ACL blocked CLMI from retaining counsel—the plaintiffs moved for an order of default. Plaintiffs' Request for Entry of Default, *Arsenith v. 3M Co.*, No. 24-cv-089313 (Cal. Super. Ct. Oct. 29, 2024) (Exhibit 21). The court clerk rejected the motion, however, due to technical deficiencies in service of the complaint. Clerk's Notice of Rejection Default/Judgment, *Arsenith v. 3M Co.*, No. 24-cv-089313 (Cal. Super. Ct. Oct. 30, 2024) (Exhibit 22). The plaintiffs have since purported to re-serve the Receiver, which triggered a potential new responsive pleading deadline of December 4, 2024. As noted above, ACL does not regard service upon the Receiver as proper service on ACL. To date, ACL has not appeared in the case.

the opportunity to challenge the Receivership Order on appeal from a potential final judgment in the *Lewis* declaratory judgment action.

Meanwhile, orders of the Court of Appeals and this Court have made it impossible for CLMI to appeal the trial court's rulings rejecting challenges to the Receivership Order in the absence of a final judgment. In March 2024, this Court issued an order dismissing an unrelated appeal from the trial court's denial of a motion to dissolve the receivership of a defunct Texas corporation, the Payne & Keller Company, on the ground that the ruling "is not immediately appealable." Order, *Childers v. Davis Mech. Contractors, Inc.*, No. 2024-000005 (S.C. Sup. Ct. Mar. 27, 2024), *reh'g denied*, Apr. 17, 2024. The next day, the Receiver's counsel sent a letter to counsel for several insurers, including CLMI, citing the *Childers* order and threatening to file a motion for sanctions under Rule 11, SCRCP, if the insurers declined to withdraw their appeals of various orders concerning motions to dissolve the ACL receivership. Letter from Jonathan M. Robinson to A. Victor Rawl, Jr. *et al.* (Mar. 28, 2024) ("Robinson Letter") (Exhibit 23). Then, on April 12, 2024, the Court of Appeals dismissed *sua sponte* an appeal that Travelers Casualty and Surety Company had filed in a third-party coverage action initiated by the Receiver, holding that the order denying Travelers' motion to dissolve the ACL receivership was "not immediately appealable" and citing this Court's order in *Childers*. Order, *Mitchell v. 3M Co.*, No. 2024-000341 (S.C. Ct. App. Apr. 12, 2024) (Exhibit 24).

As a result, the Receiver continues to purport to act on ACL's behalf with respect to ACL's litigation and settlements and CLMI's coverage obligations, and the trial court continues to move forward with ACL-related litigation, including the personal-injury claims against ACL and the Receiver's third-party claims against CLMI. In each instance, CLMI find themselves caught between two masters—confronted on a daily basis with possible new liability either in the form of

sanctions for noncompliance with the Receiver's demands or breach of contract for failing to follow the directives of ACL's Canadian officers and directors. And as lawsuits against ACL continue to accumulate—including the recently filed case in South Carolina trial court seeking to compel ACL to pay hundreds of millions of dollars to a bankrupt manufacturer of asbestos-containing insulation—CLMI cannot afford to wait years for a potential final judgment against them in the *Lewis* declaratory-judgment action for an opportunity to appeal. *See, e.g.*, *Nat'l Serv. Indus.* Complaint (Exhibit 1) (seeking more than $151 million against ACL, plus treble and punitive damages). In the absence of intervention by this Court, CLMI have no meaningful prospect of securing appellate review of the trial court's receivership-related rulings and will be compelled to continue to incur the irremediable burdens and legal risks inflicted on them by the ACL receivership.

JURISDICTION AND LEGAL STANDARD

This Court may issue writs of prohibition under its original jurisdiction. S.C. Const. art. V, § 5; *see also* S.C. Code Ann. § 14-3-310; *cf. State v. Price*, 441 S.C. 423, 433, 895 S.E.2d 633, 638 (2023) (pursuant to Article V, Section 5 of the South Carolina Constitution and Section 14-3-310 of the South Carolina Code, this Court "may use a common-law writ of certiorari to correct errors of law, particularly where a trial court exceeded its authority"). A writ of prohibition may issue "to prevent an . . . improper assumption of jurisdiction on the part of an inferior court or tribunal." *New S. Life Ins. Co. v. Lindsay*, 258 S.C. 198, 200, 187 S.E.2d 794, 796 (1972) (quoting *Ex parte Jones*, 160 S.C. 63, 158 S.E. 134, 137 (1931)); *State Bd. of Bank Control v. Sease*, 188 S.C. 133, 198 S.E. 602, 603 (1938) (same). The writ "is primarily a preventive process, and [it] is only incidentally remedial"; "its principal modern use . . . is to prevent the assumption and exercise of jurisdiction by an inferior court or tribunal in cases where wrong, damage, and injustice are liable to follow such action." *Jones*, 160 S.C. at 63, 158 S.E. at 137.

ARGUMENT

A writ of prohibition is warranted because the trial court has exceeded its jurisdiction in appointing a receiver for ACL. The appointment of a receiver "is a drastic remedy" to be exercised with "reluctance and caution." *Midlands Util., Inc. v. S.C. Dep't of Health & Envt'l Control*, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (1989). The trial court failed to heed that admonition when it appointed a receiver for ACL, a solvent, active Canadian corporation, imposing what amounts to the corporate death penalty as a discovery sanction. Nothing in South Carolina law or practice authorizes a court to appoint a receiver for a solvent foreign corporation with no property in the State or to appoint a receiver for any corporation—foreign or domestic—as a discovery sanction. The Receivership Order thus exceeds the trial court's authority under South Carolina law and violates the United States Constitution, which reserves to the federal government the power to regulate commerce with foreign nations and the authority to oversee foreign affairs. The Order is also procedurally infirm, failing to provide for the posting of a bond by ACL to extinguish the receivership. And, even if the Receivership Order were valid, it would apply only in the *Tibbs* case in which it was entered, not in other cases filed against ACL, and not in other cases filed by the Receiver on behalf of ACL.

Without this Court's intervention, CLMI will have no procedural avenue for meaningfully addressing the irremediable harms they are incurring on a daily basis as a direct result of the Receivership Order.

I. The Receivership Order Is Contrary to Law.

A. The Equitable Remedy of Receivership Is a Drastic and Temporary Remedy.

Receivership under S.C. Code Ann. § 15-65-10(5) (2005)—the provision invoked by the trial court in appointing the Receiver for ACL—is a temporary and provisional equitable remedy in an already pending action, appropriate only where legal remedies are inadequate and there is

clear evidence that the specific property that is the subject of the pending action is in danger of being lost, dissipated, destroyed, or removed from the jurisdiction of the court. As this Court has explained, "[t]he appointment of a receiver *pendente lite*"—*i.e.*, in the matter pending before it—is "purely a provisional remedy[] to preserve the assets of the estate." *Vasiliades v. Vasiliades*, 231 S.C. 366, 376, 98 S.E.2d 810, 815 (1957); *see also Ex parte Williams*, 17 S.C. 396, 403 (1882) ("'A receiver is an indifferent person between the parties to a cause, appointed by the Court to receive and preserve the property in litigation *pendente lite*.'"); *see also* 1 John Norton Pomeroy, Jr., *A Treatise on Equitable Remedies* § 62, at 106 (1905) ("By means of the appointment of a receiver, a court of Equity takes possession of the property which is the subject of the suit, preserves it from waste or destruction, secures and collects the proceeds or profits, and ultimately disposes of them according to the rights and priorities of those entitled.") (citation omitted).

Accordingly, "[r]eceivership is a drastic course, allowed only under pressing circumstances and granted only with reluctance and caution." *Vasiliades*, 231 S.C. at 376, 98 S.E.2d at 815; *see also Pelzer v. Hughes*, 27 S.C. 408, 415–16, 3 S.E. 781, 785 (1887) ("It is universally conceded that the power of appointment [of a receiver] is a delicate one, and is to be exercised with great circumspection.") (internal quotation marks omitted). This is so because a receivership reverses the standard sequence that requires judgment first, execution second: "Property is not taken from a party in possession, claiming in good faith the right to it, before judgment in actions at law." 1 Pomeroy, *supra*, § 67, at 113 (citation omitted). By allowing dispossession of property prior to judgment, a receivership "is a serious interference, without the verdict of a jury and without a regular hearing, with the *prima facie* rights of the citizen, and should only be granted to prevent manifest wrong." *Id.* at 114 (citations and internal quotation marks omitted).

The trial court overstepped these well-settled limitations when it appointed a receiver for ACL.

B. The Receivership Order Violates South Carolina Law.

As a sanction for alleged discovery violations, the trial court relied on S.C. Code Ann. § 15-65-10(5) to appoint a receiver for ACL, a solvent Canadian corporation that is actively managing its own affairs. *See* Receivership Order, p. 2 (Exhibit 2). That provision authorizes a court to appoint a receiver only where "provided by law" or "in accordance with the existing practice." S.C. Code Ann. § 15-65-10(5). As detailed below, the "existing practice" referred to in the statute is the practice of courts of equity prior to the enactment of the Code of Procedure in 1870. Nothing in South Carolina law or practice authorizes a court to appoint a receiver for a solvent foreign corporation with no property in the State or to appoint a receiver for any corporation—foreign or domestic—as a discovery sanction.

1. South Carolina Law Does Not Authorize the Receivership Order.

South Carolina law does not authorize the appointment of a receiver to manage a foreign corporation's affairs. That type of general receivership over a corporation is authorized only under the South Carolina Business Corporations Act of 1988 (the "Corporation Code"), S.C. Code Ann. § 33-14-320(a), which provides that a court "in a judicial proceeding brought to dissolve a corporation" may "appoint receivers to wind up and liquidate . . . the business and affairs of the corporation." But the South Carolina Corporation Code defines "[c]orporation" to encompass only a "domestic corporation" and to specifically *exclude* "a foreign corporation." S.C. Code Ann. § 33-1-400(4) (defining "[c]orporation" as "a corporation for profit, which is not a foreign corporation, incorporated pursuant or subject to the provisions of Chapters 1 through 20 of this Title"). The in-state limits on the power to appoint a general receiver are confirmed by the well-settled "principle that state statutes generally have no extra-territorial effect," which "remains a

foundation of the respect for individual sovereignty the states must share with one another." *Doctors Hosp. of Augusta, LLC v. CompTrust AGC Workers' Comp. Tr. Fund*, 371 S.C. 5, 9, 636 S.E.2d 862, 864 (2006); *see also Protopapas v. Whittaker, Clark & Daniels, Inc.*, No. 23-4151 (ZNQ), 2024 WL 2796449, at *7 n.8 (D.N.J. May 31, 2024) (holding that a South Carolina receivership did not displace the authority of the board of a New Jersey corporation to declare bankruptcy because, among other reasons, "such a position would violate the rights of other states to dispose of the property within their territories"). Accordingly, even if the *Tibbs* action were a "judicial proceeding brought to dissolve a corporation" within the meaning of Section 33-14-320(a)—which, as an asbestos personal-injury suit, it was *not*—the trial court would have lacked statutory authority to appoint a general receiver for ACL, a Canadian corporation.

The only provision of South Carolina law that authorizes appointment of a receiver in connection with a foreign corporation is found in the provisional remedies section of the Civil Procedure Code, S.C. Code Ann. § 15-65-10(4), which, under specified circumstances, authorizes a receiver for the "property within this State of foreign corporations." But the trial court has expressly disclaimed reliance on that provision to appoint Mr. Protopapas as receiver for ACL. Order on Motions for Stay, Motions to Dismiss, Motions to Strike, Motions for More Definite Statement, and Motion to Dissolve Receivership, p. 13, *Mitchell v. 3M Co.*, No. 2022-CP-40-02979 (S.C. Ct. Common Pleas, 5th Cir. Feb. 23, 2024) (Exhibit 25). In any event, Section 15-65-10(4) is wholly inapplicable to ACL because it has no property in South Carolina, *see* Dufour Aff. ¶ 2 (Exhibit 4), and it has not been "dissolved," is not "insolvent or in imminent danger of insolvency," and has not "forfeited its corporate rights," S.C. Code Ann. § 15-65-10(4); *see also Boynton v. Consol. Indem. & Ins. Co.*, 180 S.C. 279, 293, 185 S.E. 731, 737 (1936) (reversing appointment of a receiver because there was a "total failure of any proof" that the foreign company

"has property in this state"). Thus, no provision of South Carolina law authorized the trial court's appointment of a receiver for ACL.[5]

2. South Carolina Equity Practice Does Not Authorize the Receivership Order.

The appointment of the Receiver also does not "accord[] with the existing practice" of South Carolina courts within the meaning of Section 15-65-10(5).

a. The Trial Court's Prior Receivership Appointments Do Not Support the Receivership Order.

As set forth above, under South Carolina law "[t]he appointment of a receiver is a drastic remedy, and should be granted only with reluctance and caution." *Midlands Util., Inc.*, 301 S.C. at 228, 391 S.E.2d at 538; *see also Brookshire v. Farmers' All. Exch.*, 73 S.C. 131, 132, 52 S.E. 867, 867 (1905) ("A court of equity is disinclined to take the control and management of the affairs of a corporation out of the hands of its officers and directors and substitute its receiver therefor.") (internal quotation marks omitted). Here, ACL exercised its constitutional right to contest the trial court's personal jurisdiction and explained why, as a matter of Québec law, ACL believed it could not provide all of the discovery sought. *See* ACL's Memorandum in Opposition to Motion for Contempt, to Strike Answer and Appoint a Receiver, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Common Pleas, 5th Cir. Aug. 9, 2023) ("ACL Contempt Opposition") (Exhibit 27). In response, the trial court held ACL in contempt and struck its pleadings. With the pleadings struck, the court then found ACL in default and appointed the Receiver to control ACL's litigation and insurance, effectively displacing ACL's duly appointed Canadian officers and directors.

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[5] In a brief to the Court of Appeals in the *Tibbs* action, the Receiver invoked a statutory provision authorizing the appointment of a receiver "[a]fter judgment, to carry the judgment into effect." Brief of Receiver, p. 17 n.4, *Tibbs v. 3M Co.*, No. 2023-001461 (S.C. Ct. App. May 20, 2024) ("*Tibbs* Ct. App. Receiver Br.") (Exhibit 26) (quoting S.C. Code Ann. § 15-65-10(2)). But the trial court did not rely on this provision when appointing the Receiver, and it is plainly inapplicable as no judgment against ACL has been entered in the *Tibbs* case or any other South Carolina case.

These extraordinary measures find no footing in South Carolina equity practice. Indeed, courts universally recognize that a State's courts may *not* appoint a general receiver for a foreign corporation. *See Boynton*, 180 S.C. at 293–94, 185 S.E. at 737 (circuit court "was without authority to appoint a receiver" for New York corporation because it "is a foreign corporation"); *Pollock v. Carolina Interstate Bldg. & Loan Ass'n*, 48 S.C. 65, 75, 25 S.E. 977, 980 (1896) (North Carolina court's appointment of receiver for North Carolina bank had no effect in South Carolina; "Having the right to appoint a receiver in their territory alone, such appointee is a creature of the appointing power, and cannot have greater power than his creator.").[6]

The fact that the trial court has ignored these restrictions on its jurisdiction in other cases and appointed receivers over other foreign corporations does not mean that the Receivership Order is consistent with "existing practice." S.C. Code Ann. § 15-65-10(5). Rather, South Carolina law on the appointment of receivers codifies the historical practice of courts of equity, including all limitations and proscriptions recognized by those courts, prior to the State's enactment of the 1870 Code of Procedure. *See Va.-Carolina Chem. Co. v. Hunter*, 84 S.C. 214, 220, 66 S.E. 177, 179

[6] This conclusion—that a court of one State has no power to appoint a general receiver to take control over a corporation formed in another State or country—is uniformly shared by other jurisdictions. *E.g. Stafford v. Am. Mills Co.*, 13 R.I. 310, 310 (1881) (court had "no power to appoint a receiver of the estate of a foreign corporation"); *N. State Copper & Gold Mining Co. v. Field*, 20 A. 1039, 1040–41 (Md. 1885) (Maryland had no jurisdiction to control the internal affairs of a North Carolina corporation; "Our courts possess no visitorial power over [foreign corporations], and can enforce no forfeiture of charter for violation of law . . . . These powers belong only to the state which created the corporation.") (citing *Stafford*); *Republican Mountain Silver Mines v. Brown*, 58 F. 644, 648 (8th Cir. 1893) (Colorado federal court had no power in equity to appoint liquidator to wind up corporation formed in Great Britain; "It is hardly necessary to remark that if courts of equity . . . have no jurisdiction to dissolve a domestic corporation, and to wind up its affairs, much less can they exercise such powers with respect to a foreign corporation."); *Holbrook v. Ford*, 39 N.E. 1091, 1094 (Ill. 1894) ("The general rule is that a court of equity will not appoint a receiver for a foreign corporation where such corporation has no property in the state[.]"); *Frankland v. Remington Phonograph Corp.*, 119 A. 127, 127–28 (Del. Ch. 1922) (the proposition that courts can appoint general receivers for foreign corporations is "beyond doubt as not tenable").

(1909). South Carolina law therefore does not afford a general grant of authority to trial courts to appoint receivers as "equitable," including by relying on the trial court judge's own prior practice.

The appointment of a receiver is one of the oldest equitable remedies of the chancery court. *See* 65 Am. Jur. 2d, Receivers § 1 (2024) (explaining that receivers were introduced into American jurisprudence with the introduction of equity from English practice). In South Carolina, the General Assembly codified the equitable practice of receivership when it adopted the 1870 Code of Procedure, which was adapted from the New York Code of Civil Procedure of 1848–49 (frequently called the "Field Code," after its principal author, legal reformer David Dudley Field). 1870 S.C. Acts 423 *et seq.*; Kellen Funk, *Equity Without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846–76*, 36 J. Legal Hist. 152, 167 n.99 (2015) (listing South Carolina as among more than 25 States, Commonwealths, and territories that had adopted a version of the 1848 New York Code by the end of the 19th century). Chapter V of that 1870 Act, entitled "Provisional Remedies," included Section 267 on receivers and contained provisions now codified at S.C. Code Ann. § 15-65-10 *et seq.* As most relevant here, Section 267(5) provided that "[a] receiver may be appointed . . . in such . . . cases as are now provided by law, or may be in accordance with the existing practice, except as otherwise provided in this Act." Thus, this text, which now appears at S.C. Code Ann. § 15-65-10(5), is a statutory reference to the practice of courts of equity regarding appointment of receivers prior to the enactment of the 1870 Act.

As this Court has explained, this section "gives the old practice the force of a statute." *Va.-Carolina Chem.*, 84 S.C. at 220, 66 S.E. at 179. Accordingly, "[t]he first inquiry is whether the record shows a case warranting the appointment of a receiver *under the general jurisdiction and practice of the court of equity*, aside from the special provisions of the Code of Procedure." *Id.*

(emphasis added). Because Subsection 5 codified preexisting equitable practice in 1870, it is not a self-actuating license that allows a trial court to appoint a receiver in any circumstances that the trial court itself feels proper or where it has previously done so. *See Hoiles v. Watkins*, 117 Ohio St. 165, 172, 157 N.E. 557, 559 (1927) (rejecting argument that Ohio statute, adopted (like South Carolina's) from the New York Code of Civil Procedure, created general grant of authority to appoint receivers; the statute "necessitates an inquiry into the rule 'when the usages of equity' have permitted the appointment of receivers").

The trial court did not attempt to demonstrate that the Receivership Order comported with the practice of courts of equity prior to 1870. Nor could it. As decisions of the time demonstrate, equity had no power to take control and manage the affairs of a corporation absent explicit statutory authority. *See La Société Francaise d'Epargnes et de Prévoyance Mutuelle v. Dist. Ct.*, 53 Cal. 495, 550, 553 (1879) ("*French Bank*") ("there is no jurisdiction vested in Courts of Equity to appoint a Receiver of the property of a corporation in a suit prosecuted by a private party"; "there is no statute of this State . . . which undertakes to confer upon a private person, either as stockholder or creditor, the right to maintain an action to dissolve a corporation upon the ground that it is insolvent, or to obtain relief by seizing its property out of the hands of its constituted management, and placing it in the hands of a Receiver");[7] *Overton v. Memphis & Little Rock R.R. Co.*, 10 F. 866, 867-68 (E.D. Ark. 1882) ("It is not the province of a court of equity to take possession of the property, and conduct the business of corporations or individuals, except where the exercise of such extraordinary jurisdiction is indispensably necessary to save or protect some clear right of a suitor, which would otherwise be lost or greatly endangered, and which cannot be saved or

[7] The California Supreme Court's opinion in *La Société Francaise* was cited by treatise writers and other courts as the "*French Bank*" case. This Court cited it with approval in *Porter v. Brown*, 149 S.C. 151, 146 S.E. 810, 814 n.1 (1929).

protected by any other action or mode of proceeding."); *Slover v. Coal Creek Coal Co.*, 113 Tenn. 421, 82 S.W. 1131, 1137 (1904) ("We know of no authority, and have not been able to discover any, in which the power has been invoked in behalf of persons suing in tort, to the end that the property of a corporation may be held and managed by a receiver in a court of chancery to await the decision of such actions to prevent waste of the corporate property in the meantime, with a view to having it ready to turn over in satisfaction of such judgments as may be obtained in such action at law. Nor do we think, on principle, that the power of the court to appoint receivers should be or could be directed to such use.").

No South Carolina case holds otherwise, which confirms that the Receivership Order is not "in accordance with the existing practice." S.C. Code Ann. § 15-65-10(5).

b. *Virginia-Carolina Chemical* Does Not Support the Receivership Order.

The trial court pointed to no settled practice in equity of appointing receivers for solvent foreign corporations whose affairs are being actively managed by their own boards and officers. Nor did the trial court point to any settled equitable practice of appointing receivers as a discovery sanction, and none exists. The Receivership Order instead cites *Virginia-Carolina Chemical*, 84 S.C. at 220–21, 66 S.E. at 179, which the trial court described as reflecting a practice authorizing a court to "grant any relief within its jurisdiction appropriate and effective to protect creditors" from "moral fraud" of a "debtor" attempting to defeat its creditors. Receivership Order, p. 3 (Exhibit 2).

The trial court's reliance on *Virginia-Carolina Chemical* as supporting a broad grant of power to appoint receivers is unfounded. In that case, this Court concluded that a debtor's gift of the disputed assets to his sister to try to frustrate creditors constituted a "moral fraud" that justified appointment of a receiver. 84 S.C. at 221–22, 66 S.E. at 179–80. That active effort to secrete

assets from creditors may justify appointment of a receiver, but that principle has no application here, where there was no showing that ACL was attempting to hide any assets. Rather, in *Tibbs*, the trial court reasoned that ACL's assertion of "personal jurisdiction claims, exposed by decades of opinions dismissing those very assertions," along with "ACL's continued refusal to participate" in the proceedings, constituted "moral fraud" of a "debtor" that "warrant[ed] the appointment of a receiver." Receivership Order, p. 3 (Exhibit 2). The trial court's reasoning was incorrect in multiple respects.

First, ACL was not a "debtor" in the *Tibbs* case. Receivership Order, p. 3 (Exhibit 2); *Va.-Carolina Chem.*, 84 S.C. at 221, 66 S.E. at 179. When the Receiver was appointed, the plaintiffs did not hold a judgment against ACL, and they still do not. *Cf.* S.C. Code Ann. § 15-35-910(2) (2005 & Cum. Supp.) ("'Judgment debtor' means the party against whom a foreign judgment has been rendered."). *Virginia-Carolina Chemical* is therefore inapplicable on its face.

Second, ACL has not defrauded anyone. ACL has appeared and defended itself in the asbestos personal-injury cases pending against it in South Carolina, and it has endeavored to provide discovery responses to the extent it believed it could consistent with its legal obligations under the Québec Business Concerns Records Act. *See generally* ACL Contempt Opposition (Exhibit 27).

Third, ACL's assertion of a personal-jurisdiction defense—which, together with its invocation of Canadian law to oppose certain discovery demands, was the impetus for the trial court's decision to appoint a receiver—was hardly fraudulent. ACL does not have any assets or property in South Carolina, and it has never conducted any business activities in South Carolina. *See* Dufour Aff. ¶ 2 (Exhibit 4). Moreover, under South Carolina law, any insurance proceeds to which ACL might be entitled to satisfy a judgment entered against it at the end of a case do not

constitute property in South Carolina at the case's inception. *Howard v. Allen*, 254 S.C. 455, 460–61, 176 S.E.2d 127, 129 (1970) (rejecting plaintiff's efforts to "attac[h]" insurer's potential coverage obligations to defendant at inception of case because such potential obligations are not "property" of the insured, and holding that an insurer's obligations remain "inchoate, conditional, [and] contingent" unless there is a judgment imposing liability); *see also PCS Nitrogen, Inc. v. Cont'l Cas. Co.*, 436 S.C. 254, 264–65, 871 S.E.2d 590, 595–96 (2022) (examining *Howard* and reaffirming that, prior to entry of judgment, "the duty to indemnify" is not "a debt subject to attachment" as property within the State, as "the insurer owes the insured nothing until the liability of the insured and the amount thereof has been determined") (internal quotation markets omitted).

According to the trial court, *Sangamo Weston, Inc. v. National Surety Corp.*, 307 S.C. 143, 414 S.E.2d 127 (1992), establishes that "ACL's Insurance Assets" are assets within the State of South Carolina. Receivership Order, pp. 4–5 (Exhibit 2). But *Sangamo* only involved a choice-of-law issue. *See* 307 S.C. at 147, 414 S.E.2d at 129 ("it must first be determined which state's law should be applied in interpreting these insurance contracts"). It did not address when or if an insurance policy may qualify as an asset. Nor did it consider whether a policy issued by an out-of-state insurance company to an out-of-state insured ever can be considered South Carolina property if the insured is sued in South Carolina. Instead, construing S.C. Code Ann. § 38-61-10—which states that "[a]ll contracts of insurance on property, lives, or interests in this State are considered to be made in the State . . . and are subject to the laws of this State"—the Court concluded that "South Carolina substantive law govern[ed] th[e] dispute" about the scope of coverage because the insured was seeking "coverage solely for the liability it incurred due to its

operations within the State of South Carolina." *Sangamo*, 307 S.C. at 148–49, 414 S.E.2d at 130–31.[8]

The *Tibbs* plaintiffs later cited three additional cases, which they believed support the trial court's overbroad reading of *Sangamo*. Brief of Plaintiffs, pp. 22–23, *Tibbs v. 3M Co.*, No. 2023-001461 (S.C. Ct. App. May 21, 2024) ("*Tibbs* Ct. App. Pls. Br.") (Exhibit 28). But these cases, too, treat Section 38-61-10 as a choice-of-law provision. *See Hartsock v. Am. Auto. Ins. Co.*, 788 F. Supp. 2d 447, 450–52 (D.S.C. 2011) (determining "which state's law controls the validity and construction of the insurance contract at issue"); *Okatie Hotel Grp., LLC v. Amerisure Ins. Co.*, No. 04-cv-2212, 2006 WL 91577, at *2–4 (D.S.C. Jan. 13, 2006) (assessing S.C. Code Ann. § 38-61-10 to ascertain "whether Florida or South Carolina law applies"); *Heslin-Kim v. CIGNA Grp. Ins.*, 377 F. Supp. 2d 527, 531 (D.S.C. 2005) (applying *Sangamo* "to determine what law applies").[9]

ACL was therefore well within its rights to raise a personal-jurisdiction defense, which was amply supported by U.S. Supreme Court precedent defining the due-process limits on States' exercise of jurisdiction over out-of-state companies. *See Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) ("With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction.") (alterations and internal quotation marks

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[8] In *Sangamo*, the insured's facility, which allegedly contaminated groundwater, was located in Pickens County, South Carolina. The Court held "[w]hat is solely relevant is where the property, lives, or interests insured are located." 307 S.C. at 148–49, 414 S.E.2d at 130–31.

[9] Nor is it relevant that courts in other States have found that ACL has the requisite minimum contacts with those States to establish personal jurisdiction. *Tibbs* Ct. App. Pls. Br., p. 4 (Exhibit 28) (citing cases). None of those cases concerned ACL's contacts *with South Carolina*, and they thus have no bearing on whether ACL is subject to personal jurisdiction in South Carolina or on whether the insurance policies issued to a non-South Carolina company by non-South Carolina insurers are assets located in South Carolina. Each cited case also predates the U.S. Supreme Court's landmark personal-jurisdiction ruling in *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

omitted); *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 359 (2021) (to be subject to specific jurisdiction in a State, the defendant "must take some act by which it purposefully avails itself of the privilege of conducting activities within the forum State," and the "contacts must be the defendant's own choice and not random, isolated, or fortuitous") (alteration and internal quotation marks omitted).

A defendant's assertion of lack of personal jurisdiction—a requirement of due process—cannot by itself subject the defendant to judicial annihilation such that its corporate powers, including rights to insurance and ability to defend itself in litigation, become subject to a trial court's unilateral authority, through appointment of a receiver. ACL had a due-process right "to present every available defense" to the claims against it, *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks omitted)—which includes jurisdictional defenses—and it cannot be punished through the appointment of a receiver for exercising that constitutional right, *see United States v. Goodwin*, 457 U.S. 368, 372 (1982) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.") (internal quotation marks omitted).

Finally, *Virginia-Carolina Chemical* did not (and could not) authorize the trial court to issue a receivership order that exceeds its jurisdiction. Rather, the opinion emphasizes that any relief ordered must be "within [the court's] jurisdiction." 84 S.C. at 220, 66 S.E. at 179. Because ACL is a foreign corporation organized under the laws of Canada and headquartered in Québec—and the trial court's jurisdiction stops at South Carolina's borders—*Virginia-Carolina Chemical* provides no support for the trial court's appointment of a receiver over ACL. And where a receiver has been appointed, the authority of the receiver is no broader than that of the appointing court itself and is thus subject to the same territorial limits. *See Porter v. Sabin*, 149 U.S. 473, 480

(1893) ("The whole property of the corporation *within the jurisdiction of the court* which appointed the receiver . . . remains in its custody, to be administered and distributed by it.") (emphasis added); *see also Pollock*, 48 S.C. at 74, 25 S.E. at 980 ("The power of a receiver only extends to the boundaries of the territorial jurisdiction of the court appointing him.") (citation and internal quotation marks omitted).[10]

In addition to invoking *Virginia-Carolina Chemical*, the Receiver has pointed to *Philips Medical Systems International, B.V. v. Bruetman*, 982 F.2d 211 (7th Cir. 1992), to defend his appointment. *See Tibbs* Ct. App. Receiver Br., p. 16 (Exhibit 26). But that opinion is equally inapposite. There, the U.S. Court of Appeals for the Seventh Circuit affirmed a default judgment against, and the appointment of a receiver for, a defendant who failed to participate in discovery or otherwise obey court orders. *Philips*, however, involved an *in-state* individual defendant (not exclusively a foreign corporation) and therefore sheds no light on the issues here, where ACL is a foreign corporation incorporated under the laws of, and headquartered in, Canada. *See* 982 F.2d at 212 (noting that the individual defendant was "an Illinois citizen" and thus a citizen of the State in which the federal case was initiated). And the authority of a *federal* court to appoint a receiver based on discovery violations says nothing about whether a *South Carolina* court is authorized to appoint a receiver in similar circumstances—a proposition for which the trial court identified no support in South Carolina's statutes, rules, or case law.

[10] In the Receivership Order, the trial court invoked *Porter* as support for its extraterritorial appointment of a receiver, stating that, under *Porter*, "'[t]he whole property of the corporation [is] within the jurisdiction of the court which appointed the receiver.'" Receivership Order, pp. 3–4 (Exhibit 2) (quoting *Porter*, 149 U.S. at 480) (brackets added by trial court). But the trial court's bracketed addition of "is" fundamentally altered the meaning of *Porter*'s language, transforming a territorial *limit* on courts' receivership authority into a boundless *authorization* of extraterritorial powers.

In sum, the trial court's attempt to project its authority beyond the bounds of South Carolina's borders to appoint a receiver for an active, solvent Canadian corporation finds no support in the text or history of the South Carolina Code or in the more than a century of appellate precedent construing South Carolina courts' receivership powers under the Code.

C. The Receivership Order Violates the United States Constitution.

The Receivership Order is also invalid because it violates the Commerce Clause of the United States Constitution, intrudes on the federal government's foreign-affairs power, and coopts the regulatory authority reserved to the federal government under the Import-Export Clause. These constitutional limits on the territorial reach of state power are reflected in, and reinforced by, the limits on the trial court's receivership authority embodied in the South Carolina statutes and case law discussed above.

The Commerce Clause of the United States Constitution provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. The negative implication of the Commerce Clause (sometimes called the "dormant Commerce Clause"), in turn, restricts States from infringing on Congress's authority in this area by enacting laws that unduly burden, impair, or discriminate against interstate or foreign commerce. *See Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 449 (1979); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988).

In light of the constitutional limits on States' regulation of interstate and foreign commerce, a corporation's State (or country) of incorporation is the only jurisdiction that can provide laws governing the formation—and dissolution—of a corporation. *See, e.g., CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89–90 (1987) (corporations are a "product of state law . . . organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation"); *see also* 17A William Meade Fletcher *et al., Fletcher Cyclopedia of the Law*

of Corporations § 8554 ("The general rule is that neither the courts of a particular state nor the federal courts sitting in the state have power to dissolve a corporation of another state or country. . . . The same is true regarding the appointment of a general receiver for a corporation.").

Accordingly, the Constitution, through dormant Commerce Clause principles, bars a State from dissolving corporations incorporated in other States—or in other countries. Yet the Receivership Order appoints a receiver to control the litigation and insurance of ACL, effectively dissolving a solvent Canadian corporation capable of actively managing its own affairs and displacing the right of ACL's duly appointed Canadian officers and directors to control its litigation and insurance. *See Monmouth Inv. Co. v. Means*, 151 F. 159, 166 (8th Cir. 1906) ("the effect of placing a corporation in the hands of a receiver, displacing its governing board of directors, incidentally works its practical dissolution"); *French Bank*, 53 Cal. 495 at 550 (appointment of a receiver to manage the affairs of a corporation "*dissolve*[*s*] a corporation; for the power of a Receiver, when put in motion, of necessity supersedes the corporate power"). By effectively dissolving ACL, the Receivership Order intrudes on the ability of Canada to govern the affairs of a Canadian corporation and the ability of Congress to regulate ACL's cross-border commercial activities. In so doing, the Order contravenes the dormant Commerce Clause. *See Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867) (because the "Constitution deals with substance, not shadows," a state court cannot accomplish indirectly what it is forbidden to do directly).

The trial court nonetheless reasoned that "principles of comity, which deter a state court from reaching beyond a state's borders and asserting jurisdiction over . . . property located in another jurisdiction[,] . . . support a state court's authority to vest a statutory receiver to assert an insolvent corporation's rights of action." Receivership Order, p. 4 (Exhibit 2) (citing *Hirson v.*

United Stores Corp., 263 A.D. 646 (N.Y. App. Div. 1st Dep't), *aff'd*, 43 N.E.2d 712 (N.Y. 1942)). But invoking comity to justify South Carolina's interference with the affairs of a Canadian corporation gets comity exactly backward. Comity demands *respecting* Canada's right to establish a legal framework governing ACL's affairs as well as ACL's own right under Canadian law to manage its affairs—not unilaterally imposing a South Carolina receiver and South Carolina law on a Canadian corporation. *See, e.g.*, *Republican Mountain Silver Mines, Ltd.*, 58 F. at 648 (reversing order appointing receiver for British corporation because the "court had no inherent power, as a court of equity, to dissolve the company").

In any event, even if the trial court's version of comity were sound, principles of comity cannot prevail over constitutional demands. *See Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (comity interests are not "a matter of absolute obligation"). Indeed, in the *Hirson* opinion on which the trial court relied, Receivership Order, p. 4 (Exhibit 2), the New York Appellate Division (affirmed by the Court of Appeals) held that the courts of New York could *not* appoint a receiver for a Delaware corporation, in part because "local policy is not permitted to dominate rules of comity" owed to other States' laws, in part because of the demands of full faith and credit. 263 A.D. at 649–50, 34 N.Y.S.2d at 127–28. *Hirson* thus in fact *rejects* appointment of a receiver for a foreign corporation.

The Receivership Order also transgresses the federal government's exclusive authority over foreign affairs. *See* U.S. Const. art. I, § 10, cl. 1; *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875). That authority preempts state laws, rules, or orders whenever there is a "likelihood" that the State's action will "produce something more than incidental effect" on foreign affairs. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003); *cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000) (the Nation must speak "with one voice in dealing with [foreign]

governments"). Here, that threshold is plainly surpassed. The Receivership Order intrudes on the United States' foreign relations with Canada by effectively dissolving ACL, a solvent Canadian corporation whose affairs are being actively managed by its Canadian board and officers. The Order thus substantially impairs the federal government's ability to set national policies concerning international trade and to manage its diplomatic relationship with Canada, an essential trading partner and ally. *See generally Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (a State's action may not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

Finally, under the Import-Export Clause of the U.S. Constitution, "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws." U.S. Const. art. I, § 10, cl. 2. While the Clause on its face refers to taxes, substantial historical evidence indicates that it was originally intended to apply broadly to *any* state action that affects interstate or foreign trade. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 408 (2023) (Kavanaugh, J., concurring in part and dissenting in part) ("[I]f one State conditions sale of a good on the use of preferred farming, manufacturing, or production practices in another State where the good was grown or made, serious questions may arise under the Import-Export Clause."). In particular, at the time of the Founding, "not all duties were taxes: Some were imposed not for revenue but merely to regulate (or effectively prohibit) trade in particular articles." Robert G. Natelson, *What the Constitution Means by "Duties, Imposts, and Excises"—and "Taxes" (Direct or Otherwise)*, 66 Case W. Res. L. Rev. 297, 320 (2015).

By authorizing the Receiver to manage ACL's litigation and insurance, the trial court has imposed a substantial legal and practical burden on the ability of Canadian companies to distribute

products in foreign trade that might ultimately end up in South Carolina; those foreign companies now face the prospect of a South Carolina-imposed receivership as the cost of participating in international trade with the United States. Because such actions "might affect foreign relations," they cannot "be implemented by the States consistently with th[e] exclusive power" of the federal government over "commercial relations with foreign governments" and thus violate the Import-Export Clause. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976).

D. The Receivership Order Failed to Provide for a Bond.

Even if the trial court had authority to impose a receivership on an active, solvent Canadian corporation (and it plainly does not), ACL's Receiver would not have been properly appointed because the Receivership Order failed to specify the value of the property to be held in receivership or to include language authorizing ACL to dissolve the receivership by posting an appropriate bond. This error deprived ACL of an opportunity mandated by statute to avoid the disruptive effects of the receivership.

Under South Carolina law, a court appointing a receiver before final judgment "shall" insert in the order of appointment "a clause fixing the value of the property for which [a] bond may be given." S.C. Code Ann. § 15-65-60. Thereafter, if the party claiming the property "shall offer a bond, in the penalty of double the value of the property, with sufficient security, approved by the clerk of the court of common pleas of the court in which the action is brought," the receivership will be dissolved. S.C. Code Ann. § 15-65-50; *see also* 21 S.C. Jur. Receivers § 12 (2024) ("[A] receiver may not be appointed when the person in possession of the property sought to be placed in receivership offers a bond, in the penalty of double the value of the property, with sufficient security, and the bond is approved by the clerk in the court in which the action is brought."). The bond provides security for any potential judgment, making any receivership unnecessary and improper.

The trial court has itself acknowledged this requirement and its importance in the pre-judgment receivership process. In its order denying CLMI's motion to dismiss the Receiver's *Lewis* third-party coverage complaint, the trial court noted that "'a method or procedure has been provided [under South Carolina law] by which the person claiming possession of the property may retain possession thereof and prevent the appointment of a receiver before final judgment, the condition of such retention of possession and the nonappointment of a receiver being the offer of a bond in the penalty of double the value of the property, etc.'" *Lewis* MTD Order, p. 13 (Exhibit 19) (quoting *Truesdell v. Johnson*, 144 S.C. 188, 203, 142 S.E. 343, 348 (1928)). And the trial court confirmed that the requirement concerns "a bond to be obtained by the party seeking to avoid the appointment of a receiver." *Id.* (emphasis omitted). But the trial court failed to follow that statutory mandate in its own Receivership Order.

Because judgment had not been entered in the *Tibbs* action when the Receiver was appointed, the statutory scheme the trial court purported to use required the court to include in the Receivership Order the value of the property to be placed in receivership and afford ACL an opportunity to dissolve the receivership by posting the requisite bond. The trial court's order did not do so. The trial court's failure to adhere to these statutory requirements is a fatal defect in the Receivership Order.[11]

[11] Because *Tibbs* was an asbestos personal-injury case in which the plaintiffs were seeking to recover on a contingent tort claim against ACL—and did not involve, for example, a dispute over personal property or a sum certain paid by the plaintiff to the defendant—there was no "property" at issue "for which [a] bond may be given." S.C. Code Ann. § 15-65-60. That disconnect between the facts of *Tibbs* and the bonding requirement in Section 15-65-60 underscores that the imposition of a receivership on ACL was entirely inappropriate and at odds with South Carolina procedure. But to the extent that the trial court disagreed and deemed a receivership to be appropriate in the setting of an asbestos personal-injury case, it was required to comply with South Carolina procedure in appointing the Receiver, including the bonding requirement in Section 15-65-60.

E. If Valid, the Receivership Order Applies Only in the *Tibbs* Case.

Even if the Receivership Order were consistent with South Carolina law and the U.S. Constitution, it could not apply beyond the *Tibbs* case in which it was entered. Accordingly, the Receiver lacks authority to control ACL's litigation and settlements in other cases, including the *Lewis* third-party coverage action against CLMI.

South Carolina law is settled that a receivership entered in a particular case as a "provisional remedy" under S.C. Code Ann. § 15-65-10(5)—the provision on which the trial court relied in the Receivership Order—has no effect in any other case. As this Court has explained, the "sole object" of such a receivership "is to preserve the property, to answer the purposes of a decree, *as between the parties to the suit, without affecting the interest of third persons not parties*." *Clinkscales v. Pendleton Mfg. Co.*, 9 S.C. 318, 323 (1878) (emphasis added); *see also DeWalt v. Kinard*, 19 S.C. 286, 296 (1883) (McGowan, J., concurring) (noting that the appointment of a receiver for real property, the right to possession of which was disputed by the parties, "could only have the salutary effect of preserving the issues of the property pending litigation, then to be delivered *to that party* who may finally be decided to be entitled to the same") (emphasis added).

This feature distinguishes the *pendente lite* receivership established in *Tibbs* from a separate form of receivership for "the administration of the assets, considered as a trust fund in equity, not only as against parties but all making claim thereto." *Clinkscales*, 9 S.C. at 323. Under South Carolina law, these broader general receivership powers—which include the power to manage the affairs of a corporation and act in additional cases beyond the one in which the receiver was appointed—are available *only* where the receiver is appointed under S.C. Code § 33-14-320(a), a provision limited to South Carolina corporations. *See* S.C. Code Ann. § 33-1-400(4); *see also* discussion *supra* at pp. 19–21. The trial court did not invoke that provision in the Receivership Order—and could not have done so given that ACL is a Canadian corporation.

The trial court nevertheless made clear in subsequent orders that its Receivership Order in *Tibbs* was not limited to that case and instead authorized the Receiver to act on ACL's behalf in all litigation. In particular, in the *Link* and *Donaghy* actions, the trial court declared that "[t]he Receiver for . . . ACL shall be viewed as the named insured and the representative for . . . ACL in the defense of asbestos litigation matters and the management of any insurance or insurance-related assets." *Link* Mediation Order, p. 5 (Exhibit 7). It further stated that "[t]he insurers for . . . ACL are expected to cooperate with the Receiver," including in discovery matters. *Id.* Based on the trial court's orders, the Receiver has sought (and obtained) sanctions against CLMI in *Link* and *Donaghy*, initiated a third-party coverage complaint, purportedly on ACL's behalf, against CLMI in *Lewis*, and held himself out as the insured entitled to control ACL's litigation and insurance in all asbestos personal-injury cases pending against ACL in South Carolina and beyond.

The trial court's application of the *Tibbs* Receivership Order to additional proceedings involving ACL not only exceeded its authority under South Carolina law but also deprived CLMI of due process. CLMI were not provided notice of the trial court's intention to appoint a receiver in *Tibbs* or of the expansion of the Receiver's powers in *Link* and *Donaghy*—cases in which CLMI were not parties—and thus had no opportunity to contest the validity of the appointment in those proceedings. The trial court's failure to provide CLMI with an opportunity to be heard before issuing the *Tibbs* Receivership Order—which had direct and immediate legal repercussions for CLMI in other settings—contravened the fundamental requirement of due process that an opportunity to be heard "at a meaningful time and in a meaningful manner" be afforded *before* a person's rights are impaired. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *see also Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."); *accord Bundy v. Shirley*, 412 S.C. 292, 303, 772 S.E.2d 163, 169 (2015)

("'The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.'") (quoting *Kurschner v. City of Camden Plan. Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008)).

Accordingly, even if the Receivership Order were consistent with South Carolina law and the U.S. Constitution, it could not be given any force or effect outside of the *Tibbs* case.

II. CLMI Have No Effective Remedy to Vindicate Their Rights Other Than a Writ of Prohibition from this Court.

A writ of prohibition from this Court under its original jurisdiction is appropriate and necessary to prevent ongoing, irreparable harm to CLMI resulting from the trial court's legally deficient Receivership Order. It is well settled that a writ of prohibition is warranted to prevent harm to a petitioner from an improper continuation of proceedings by a lower court that lacks jurisdiction. *See New S. Life Ins. Co.*, 258 S.C. at 200–05, 187 S.E.2d at 796–99. And where, as here, alternative procedures to secure relief are unavailable, this Court's intervention is particularly appropriate.[12]

The trial court's views on the supposed validity of the ACL receivership are settled. CLMI have repeatedly challenged the validity of the receivership on the basis that the trial court lacked authority to appoint a receiver for an active, solvent Canadian corporation. Each of these attempts has been unsuccessful. In *Link* and *Donaghy*, for example, CLMI opposed the Receiver's motion for sanctions on the basis of the receivership's invalidity under South Carolina law and the United States Constitution, but the trial court failed to address most of CLMI's extensive arguments concerning the invalidity of the Receivership Order. *See* Sanctions Order, pp. 4–5 (Exhibit 9)

[12] Indeed, the South Carolina Code authorizes immediate interlocutory review of the *appointment* of receivers, S.C. Code Ann. § 14-3-330(4), making review of the appointment here by prohibition (on the petition of nonparties) consonant with principles of South Carolina appellate law.

(limiting analysis to distinguishing one case cited by CLMI). And in the *Lewis* third-party coverage action, CLMI moved to dismiss on the ground that the Receiver was not properly appointed under South Carolina law or the United States Constitution and thus lacked authority to initiate the *Lewis* action on ACL's behalf. *See, e.g.*, CLMI Motion to Dismiss, *Lewis v. Asbestos Corp. Ltd.*, No. 2024-CP-40-00458 (S.C. Ct. Common Pleas, 5th Cir. Apr. 3, 2024) (Exhibit 29). The trial court rejected those arguments because it had already "ruled repeatedly that 'existing practice' allows for the Receiver to be appointed." *Lewis* MTD Order, pp. 8–9 (Exhibit 19).

Other than this petition, there is no meaningful path for CLMI to obtain appellate review of the trial court's rulings on the validity of the receivership and its effect on CLMI. In light of the plaintiffs' settlement with ACL in *Link* and *Donaghy*, CLMI's appeal of the Sanctions Order has been dismissed and the order has been vacated. *See* discussion *supra* at pp. 10–11. Filing a motion to dissolve the receivership is not a viable route to appellate review, either, because this Court in *Childers* and the Court of Appeals in a post-*Childers* order have ruled that the Court of Appeals lacks jurisdiction over orders denying motions to dissolve a receivership. *See* discussion *supra* at p. 15. And any final judgment in *Lewis* (which would be appealable) is years away—while, in the meantime, CLMI must respond to multiple other suits against ACL and risk the irreparable harm that either ACL or the Receiver (or both) will accuse them of failing to act in conformity with their obligations. That leaves a writ of prohibition from this Court as the only meaningful avenue to challenge the trial court's Receivership Order.

In the absence of this Court's intervention, CLMI will suffer further irreparable harm from the ACL receivership. The receivership places CLMI in an impossible position where they must choose between cooperating with the Receiver or following the instructions of their insured, ACL. CLMI have certain duties to ACL in connection with the pending litigation. If the Receiver is

validly acting on ACL's behalf, then CLMI may have a duty to cooperate with the Receiver's instructions and may be subject to sanctions for violating that duty if they instead follow the instructions of ACL's Canadian officers and directors. Conversely, if the Receiver is not validly acting on ACL's behalf, CLMI may likewise risk violating their duties to ACL by following the Receiver's instructions.

For example, the Receiver has used subpoenas to compel CLMI to produce to the Receiver confidential information about coverage, settlements, and other sensitive, nonpublic matters—despite ACL's objections to several of those disclosures. Further, ACL has taken the position that CLMI should not extend authority to the Receiver to settle claims where the Receiver is controlling ACL's litigation and settlements because ACL has not authorized the settlements, creating the specter of a breach-of-contract dispute between ACL and CLMI. In fact, recent correspondence from ACL's Canadian lawyers has accused CLMI of materially breaching their contractual obligations to ACL by providing funds to the Receiver to settle claims against ACL in amounts endorsed by the Receiver, but not ACL.

CLMI have also been placed in an untenable position with respect to ACL's defense. The Receiver has accepted service of several new complaints filed against ACL in South Carolina and other jurisdictions, but ACL does not recognize this service and has declined to retain counsel to defend against the complaints. Nor has ACL permitted CLMI—which are not obligated under the policies to retain defense counsel—to secure counsel on ACL's behalf, advising counsel retained by CLMI that he was "not authorized to represent ACL in [the *Arsenith*] matter or any other case." Parker Letter (Exhibit 20). At the same time, the Receiver has not retained counsel in several of these cases. Without a means of reliably securing counsel for ACL and with potential default judgments looming, CLMI face imminent risk of execution attempts by plaintiffs holding

potentially hundreds of millions of dollars in default judgments against ACL. This is a stark illustration of CLMI's predicament: They find themselves caught between two masters—confronted with possible sanctions for noncompliance with the Receiver's demands or possible breach-of-contract liability for failing to follow the directives of ACL's Canadian management, and potentially left on the hook for default judgments when neither the Receiver nor ACL acts to defend ACL's interests.

These risks are not mere speculation. The Receiver already sought and obtained the (now-vacated) contempt order in *Link* and *Donaghy*, which sanctioned CLMI $50,000 a day for supposedly failing to participate meaningfully in a mediation where the Receiver and ACL had different views about the appropriate settlement amount. *See* Sanctions Order (Exhibit 9). And the risks confronting CLMI flow directly from the trial court's invention of a previously unknown form of receivership. Rather than appoint a general receiver to control all aspects of ACL's affairs—which the trial court would lack the authority to do for a non-South Carolina corporation, *see* S.C. Code Ann. §§ 33-1-400(4), 33-14-320(a)—or a more limited "asset receivership" over ACL's "property within this State"—which would not be possible because ACL has no South Carolina property and is not insolvent or in imminent danger of insolvency, *see id.* § 15-65-10(4)—the trial court created a Frankenstein's monster by empowering the Receiver to control ACL's litigation, settlements, acceptance of service of process, and insurance while leaving ACL's board and officers to oversee its day-to-day affairs. It is patently unjust to subject CLMI to the continued uncertainty and risk attributable to this legally unprecedented and practically unworkable receivership while they wait years for a potential final judgment in *Lewis* to challenge the receivership on appeal.

The burdens on CLMI are compounded by the fact that settlement amounts in cases in which the Receiver has controlled ACL's litigation and settlement strategies have far exceeded ACL's average payout to asbestos claimants in the decades preceding the Receiver's appointment. In fact, the five South Carolina settlements recommended by the Receiver represent more than 5% of the total amount that CLMI have paid to ACL, over multiple decades, as reimbursement for CLMI's share of ACL's indemnity and defense costs. And the average of those five South Carolina settlements for ACL was *45 times* higher than ACL's nationwide settlement average in 2023. These high-value settlements are particularly burdensome for CLMI because ACL is taking the position that the South Carolina settlements in cases controlled by the Receiver cannot erode policy limits as they were executed without ACL's consent, which means that CLMI risk bearing the cost of these settlements without any offsetting erosion of their coverage obligations to ACL.

The Receiver has also continued to threaten sanctions against insurers that have used the judicial process to challenge the validity of the ACL receivership. In March, for example, the Receiver's counsel sent a letter to counsel for several of ACL's insurers, citing the *Childers* order and threatening to file a motion for sanctions if the insurers declined to withdraw their appeals of various orders concerning the ACL receivership—even though the *Childers* order was unpublished, unreasoned, and still subject to a rehearing request at the time. *See* Robinson Letter (Exhibit 23). These actions make clear that, as long as the receivership remains in place, CLMI risk the infliction of additional punitive measures to the extent that they continue to vigorously assert their rights and question the validity of the trial court's unprecedented, extraterritorial receivership—either by pressing these arguments in the trial court or by seeking relief in the Court of Appeals.

CLMI are also continuing to bear the expense of defending themselves against the Receiver's third-party complaint in *Lewis*, where CLMI have now answered the complaint and are responding to the Receiver's expansive discovery demands. *See* Answer and Affirmative Defenses of CLMI to the Third-Party Complaint, *Lewis v. Asbestos Corp. Ltd.*, No. 2024-CP-40-00458 (S.C. Ct. Common Pleas, 5th Cir. May 10, 2024) (Exhibit 30). The expense of the *Lewis* action is on top of the costs CLMI have already incurred in complying with the Receiver's subpoenas in other cases, as well as his requests to settle personal-injury claims against ACL in amounts that may well exceed what CLMI would have been required to reimburse if ACL's officers and directors were still controlling its defense.

The Receiver's discovery demands to CLMI—including three separate third-party subpoenas—have been onerous and sweeping, far beyond typical requests issued in routine litigation. For example, in the *McDowell* action, the Receiver demanded CLMI produce "all general liability, product liability, and professional liability insurance policies" issued to or otherwise protective of ACL "during the period [from] 1945 through [the] present, and any documents referencing such policies"; associated "underwriting files," "claims files," and claims-related "documents" for the same period; "all documents that reflect communications between [CLMI] and ACL," including with ACL's lawyers, either "regarding the acquisition, placement, and termination of insurance coverage" or "relat[ing] in any way to the defense and/or indemnification of ACL"; and "all documents that reflect communications between [CLMI] and any other ACL insurer that refer or relate in any way to the defense and/or indemnification of ACL." *McDowell* Subpoena ¶¶ 1, 4, 6–9, 11 (Exhibit 15) (capitalization normalized). In *Lewis*, the Receiver has issued 120 document requests seeking, without limitation, "[a]ll communications relating to ACL" and "[a]ll documents relating to any of ACL's asbestos related claims."

Receiver's First Set of Requests for Production to Third-Party Defendant CLMI, *Lewis v. Asbestos Corp. Ltd.*, No. 2024-CP-40-00458 ¶¶ 55, 71 (S.C. Ct. Common Pleas, 5th Cir. May 10, 2024) (Exhibit 31). These requests seek an incredible volume of material, spanning decades and covering vast amounts of CLMI's confidential and sensitive communications with their insured as well as with other ACL insurers. To date, and contrary to ACL's instructions, CLMI have produced more than 8,500 pages of materials to the Receiver in *McDowell* and more than 8,700 pages in *Lewis* (with further productions forthcoming).

These ongoing, irreparable harms create precisely the type of circumstances in which this Court, and the highest courts of other States, have granted writ relief. State supreme courts regularly issue a writ of prohibition (or writs of mandamus or certiorari) in settings such as this one, where a trial court has exceeded its jurisdictional bounds, including in the appointment of a receiver. The California Supreme Court, for example, has held that, where a trial court exceeds its jurisdiction in imposing an invalid receivership, a writ of prohibition supplies the appropriate remedy. *Havemeyer v. Super. Ct. of City & Cnty. of San Francisco*, 84 Cal. 327, 380, 389, 24 P. 121, 134, 136 (1890); *see also People v. Dist. Ct. of First Jud. Dist.*, 74 Colo. 58, 60–61, 218 P. 742, 743 (1923) (following *Havemeyer*); *State ex rel. Busick v. Ewing*, 230 Ind. 188, 191–92, 102 N.E.2d 370, 372 (1951) (following *Havemeyer* and *Busick*); *French Bank*, 53 Cal. at 549–50 (in case holding that trial court had no jurisdiction to appoint a receiver under code provision similar to South Carolina's, court rejected argument that it had no original jurisdiction to issue writ of certiorari to annul receivership, as petitioner had no right to appeal); *Cronan v. Dist. Ct.*, 15 Idaho 184, 96 P. 768, 773–74 (1908) (holding writ of prohibition proper to restrain and enjoin trial court from enforcing receivership order issued without jurisdiction and holding that order to be void, in part because cost and burden to petitioner caused by delay of appeal made appeal "entirely

inadequate"); *Gilmer Oil Co. v. Ross*, 178 Okla. 125, 62 P.2d 76, 78–79 (1936) (in original action for writ of prohibition, granting writ to void trial court order commanding foreign corporation to produce books and records held outside Oklahoma as beyond Oklahoma's "visitorial powers" over corporations); *Golden State Glass Corp. v. Super. Ct.*, 13 Cal. 2d 384, 90 P.2d 75, 81 (1939) (granting writ of prohibition where trial court abused its discretion in appointing receiver for solvent corporation); *Anheuser-Busch, Inc. v. Bone*, 90 S.W.2d 992, 993 (Ark. 1936) ("It is well settled that a writ of prohibition lies to restrain the exercise of jurisdiction of an inferior court over subject-matter where it has none and over parties where it can acquire none.") (citing cases); *State ex rel. William Ranni Assocs., Inc. v. Hartenbach*, 742 S.W.2d 134, 137 (Mo. 1987) ("Prohibition is the proper remedy to prevent further action of the trial court where personal jurisdiction of the defendant is lacking.").

Accordingly, "where a writ or order of prohibition is the only available remedy against invasion of a right guaranteed by law," including the right to be free from extra-jurisdictional judicial actions, "a refusal to grant [the writ] is in effect a denial of the right." *Baltimore Mail S.S. Co. v. Fawcett*, 269 N.Y. 379, 384, 199 N.E. 628, 630 (1936); *see also* 18 Fletcher *et al.*, *supra*, § 8649 ("If a court wrongfully assumes jurisdiction over a foreign corporation, it may obtain the remedy of a writ of prohibition," as the writ "affords an expeditious and effective means of confining an inferior court to lawful exercise of its prescribed jurisdiction").

This Court has long relied on the writ of prohibition to ensure that lower courts respect jurisdictional limits. In *New South Life Insurance Co.*, 258 S.C. at 200–05, 187 S.E.2d at 796–99, for example, this Court granted the writ where the amount in controversy exceeded the jurisdictional limits of the trial court and thus deprived the trial court of power to confirm a plan of rehabilitation for an insurance company. The petitioner, who risked a loss in value of her

insurance policy from the rehabilitation plan, had moved to dismiss the action for lack of jurisdiction, but the "motion was taken under advisement by the presiding judge and the hearing of the cause was continued," *id.* at 201, 187 S.E.2d at 796. This Court issued a writ of prohibition to prevent the trial court from proceeding with the case because the case clearly exceeded its jurisdictional bounds. *Id.* at 205, 187 S.E.2d at 799.

Because the trial court lacked jurisdiction to appoint the Receiver to control ACL's litigation and insurance, this Court should take similar action here. CLMI cannot and should not be required to wait until the trial court enters a final judgment in *Lewis*—years from now, if ever—and the appeals process plays out in order to escape the serious, irreparable harm being inflicted on them on a daily basis by the trial court's and Receiver's extra-jurisdictional conduct. CLMI are entitled to relief from this "wrong, damage, and injustice," and the writ of prohibition is the appropriate procedure for vindicating that right. *Jones*, 160 S.C. at 63, 158 S.E. at 137.

CONCLUSION

For the foregoing reasons, the Court should treat this petition as a companion case to *Tibbs v. 3M Co.*, No. 2023-001461 (S.C. Sup. Ct. Oct. 3, 2024), and *Welch v. Advance Auto Parts, Inc.*, No. 2024-001180 (S.C. Sup. Ct. Aug. 20, 2024), and set the cases for oral argument on the same day. After briefing and argument, the Court should issue a writ prohibiting the trial court from enforcing the Receivership Order and, correspondingly, prohibiting the Receiver from taking any action (through litigation or otherwise) on behalf of ACL.

Respectfully submitted,

/s/ John Nichols

November 18, 2024

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