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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

Appellate Case No. 2025-002104

RECORD ON APPEAL
(VOLUME II)

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 in Related Case,

and

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

v.

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

Offshore Group Ltd.; Hawk Bidco US Inc.; Arranco US, LLC; Sparrows Offshore, LLC; The Sparrows Group, LLC, Third-Party Defendants,

of which

Charter Consolidated Ltd.; ESAB Corporation; Central Mining & Investment Corporation Ltd; Mohed Altrad; and Altrad Investment Authority SAS, are the..... Appellants.

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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,)	
	)	Civil Action No. 2023-CP-40-01759
)	
Plaintiffs,	)	In Re:
	)	Asbestos Personal Injury Litigation
v.	)	Coordinated Docket
)	
3M COMPANY, <i>et al.</i> ,)	
)	
Defendants.)	
*****)	
)	
CAPE PLC, individually and as)	
successor in interest to CAPE)	
ASBESTOS COMPANY LIMITED,	)	MOHED ALTRAD’S MOTION TO
by and through its duly appointed	)	DISMISS THIRD-PARTY
Receiver Peter D. Protopapas,	)	COMPLAINT FOR LACK OF
	)	PERSONAL JURISDICTION AND
Third-Party Plaintiff,	)	FOR STAY OF DISCOVERY
)	
v.)	
)	
ANGLO AMERICAN PLCS, <i>et al.</i> ,)	
)	
Third-Party Defendants.)	

Third-Party Defendant, Mohed Altrad (“Mr. Altrad”), by and through the undersigned counsel, and pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure, respectfully submits this Motion to Dismiss the Receiver’s Third-Party Complaint on the grounds that the Court lacks personal jurisdiction over him. Pursuant to South Carolina Rule of Civil Procedure 26(c), Mr. Altrad also moves this Court for an order staying discovery as to him pending resolution of the Motion to Dismiss.

To the extent Mr. Altrad files any other motion or seeks any other form of relief in this action, Mr. Altrad does not waive, but instead specifically preserves, his objection to personal jurisdiction in South Carolina. Mr. Altrad specifically requests that the Court rule on the present motion to dismiss for lack of personal jurisdiction on an expedited basis and before addressing any of his arguments raised in any other motion or pleading filed in this action, all of which are asserted in the strict alternative to the personal jurisdiction objection, so as to protect Mr. Altrad from having to engage in any further litigation with respect to the claims asserted in the Third-Party Complaint in this action.

In support of the Motion, Mr. Altrad shows the Court as follows:

1. The Receiver's Third-Party Complaint acknowledges that Mr. Altrad is "an individual who resides in Montpelier, France." TPC ¶ 25.

2. In conjunction with the foregoing, and as further detailed in the Affidavit of Mohed Altrad attached hereto as **Exhibit A** and incorporated herein by reference, Mr. Altrad is clearly a non-resident of the State of South Carolina under any dictionary, legal, or common sense definition of the term.

3. "The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case." *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). "The party seeking to invoke personal jurisdiction over a non-resident defendant . . . bears the burden of establishing jurisdiction." *Power Prods. & Servs. Co., Inc. v. Kozma*, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 2008). At the pretrial stage, plaintiffs

may meet their burden of proving personal jurisdiction over a nonresident defendant by a prima facie showing of jurisdiction either (1) in the complaint or (2) in affidavits. *See Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508; *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 150, 723 S.E.2d 835, 839 (Ct. App. 2012).

4. Establishing jurisdiction requires allegations of *specific facts* to establish the contacts necessary to invoke either general or specific jurisdiction. *See Power Prods. & Servs. Co. Inc.*, 379 S.C. at 433–36, 665 S.E.2d at 665-67 (affirming trial court’s dismissal based on lack of personal jurisdiction because plaintiff did not establish facts – either through the complaint or affidavits – to confer jurisdiction). Conclusory allegations will not suffice. *Id.* at 433-35, 665 S.E.2d at 665-66.

5. Other than as captioned, the Third-Party Complaint specifically mentions Mr. Altrad four (4) times:

- a. Once in the opening paragraph listing the Third-Party Defendants;
- b. Once in Paragraph 25 to acknowledge the fact that Mr. Altrad is *not* a resident of the State of South Carolina;
- c. Once in Paragraph 118 to allege in a single, conclusory sentence that “[t]he Altrad Group – and thus Cape” is “controlled” by Mr. Altrad, based on his status as the “President and Founder” of the “Altrad Group”¹; and

¹ Third-Party Plaintiff’s reference to “Altrad’s U.S. Subsidiaries” (TPC ¶ 117) and definition of “Altrad Third-Party Defendants” (TPC ¶ 119) are factually inaccurate, including given that Sparrows Offshore Group, Ltd., and The Sparrows Group, LLC, are separate and unrelated entities, with no relation to or affiliation or other association with this Third-Party Defendant.

- d. Once in the table included as part of Paragraph 119 along with other “Altrad Ownership” entities purportedly comprising a factually inaccurate listing of “Altrad Third-Party Defendants,” as defined by Third-Party Plaintiff.

Not even the most generous interpretation of these allegations can be said to present the specific facts necessary to show that Mr. Altrad is subject to either general or specific personal jurisdiction in South Carolina; is essentially “at home” in this state; or has purposely availed himself of the benefits of something within the State of South Carolina to support imposition of personal jurisdiction. Mr. Altrad’s Affidavit establishes that he has “no connection to South Carolina whatsoever,” (Ex. A, ¶ 6) in that:

- He is a citizen of France and resides in Montpellier, France. *Id.* ¶ 2.
- He has never held or applied for United States citizenship. *Id.* ¶ 3.
- He has never resided in the United States or South Carolina as a temporary or permanent resident. *Id.* ¶ 4.
- He has never visited South Carolina for any purpose. *Id.* ¶ 5.
- He has no assets of any sort in South Carolina. *Id.* ¶ 7.
- He has never owned, leased or held interest in any real or tangible property in South Carolina. *Id.* ¶ 8.
- He has never had any accounts at any banks or other financial institutions in South Carolina. *Id.* ¶ 9.

- He has never had a mailing address, post office box, or other indicia of South Carolina residency. *Id.* ¶ 10.
- He has never owned a motorized vehicle registered in South Carolina and has never paid any automobile excise tax to any municipality or town located in South Carolina. *Id.* ¶ 11.
- He has never owned a water vessel (boat) registered in South Carolina and has never paid any boat excise tax to any municipality or town located in South Carolina. *Id.* ¶ 12.
- He has never acquired ownership, possession, or control of any asset or thing of value present within South Carolina. *Id.* ¶ 13.
- He has never sought to procure insurance for any person or property, tangible and intangible, in South Carolina. *Id.* ¶ 14.
- He has never sought licensure, accreditation or any other type of certification or authorization to conduct business in or directed toward South Carolina. *Id.* ¶ 15.
- He has never opened, conducted, engaged in, or carried on a business or business venture in South Carolina. *Id.* ¶ 16.
- He has never invested any dollars in business operations in South Carolina. *Id.* ¶ 17.
- Prior to retaining counsel for this lawsuit, he has never recruited any South Carolina residents, directly or through an intermediary located in South Carolina, for employment inside or outside of South Carolina. *Id.* ¶ 18.

- He had never owed or paid corporate, employment, or real property taxes in South Carolina. *Id.* ¶ 19.
- He had never paid sales tax to South Carolina. *Id.* ¶ 20.
- He has never had any employees deliberately working or residing in South Carolina, nor has he had any employees working incident to South Carolina. *Id.* ¶ 21.
- Prior to retaining counsel for this lawsuit, he has never entered into any contracts or ventures with any persons or entities within South Carolina, and he has executed no such contracts, by mail or otherwise, with a South Carolina resident to be performed, in whole or in part, in South Carolina. *Id.* ¶ 22.
- He had never contracted to supply services, goods, or things in South Carolina, and he had never supplied services or delivered goods or things in South Carolina. *Id.* ¶ 23.
- He has not received tax deductions as a result of contributions made to any organizations in South Carolina. *Id.* ¶ 24.
- He has never appeared in a lawsuit or other legal proceeding in South Carolina. *Id.* ¶ 25.
- He has never consented to the exercise of jurisdiction in South Carolina and has never initiated litigation in South Carolina. *Id.* ¶ 26.
- He has never committed a tortious act in whole or in part in South Carolina. *Id.* ¶ 27.

- He has never caused tortious injury or death to persons or property within South Carolina arising out of an act or omission committed outside South Carolina. *Id.* ¶ 28.

Simply put, there is no basis for this Court to exercise general or specific jurisdiction over this French citizen.

6. “When a motion to dismiss attacks the allegations of the complaint on the issue of jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction.” *Sullivan*, 397 S.C. at 150, 723 S.E.2d at 839 (quoting *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007)).

7. “Personal jurisdiction is exercised as either ‘general jurisdiction’ or ‘specific jurisdiction.’” *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478. “General jurisdiction is the State’s right to exercise personal jurisdiction over a defendant even though the suit does not arise out of or relate to the defendant’s contacts with the forum . . . ; general jurisdiction is determined under S.C. Code Ann. § 36-2-802....” *Id.*; see also *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 ‘paradi[m] . . . bases for general jurisdiction.’” (quotation omitted)). “Specific jurisdiction is the State’s right to exercise personal jurisdiction because the cause of action arises specifically from a defendant’s contacts with the forum . . . ; specific jurisdiction is determined under S.C. Code Ann. § 36-2-803....” *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478. The exercise of personal jurisdiction under either statute must comport

with due process requirements and must not offend traditional notions of fair play and substantial justice. *Id.* Due process requires some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state. *Id.*

8. Further, due process mandates that the defendant possess sufficient minimum contacts with the forum state so that it could reasonably anticipate being haled into court there. *Cockrell*, 363 S.C. at 491-492, 611 S.E.2d at 508 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)). Without minimum contacts, the Court does not have the “power” to adjudicate the action. *Cockrell*, 363 S.C. at 492, 611 S.E.2d at 508. Finally, the Court must also find that the exercise of jurisdiction is “reasonable” or “fair.” *Id.*

9. The Court must assess individually each defendant’s contacts with South Carolina. *Cockrell*, 363 S.C. at 492, 611 S.E.2d at 508 (citing *Rush v. Savchuk*, 444 U.S. 320 (1980)). The focus of the Court’s analysis must center on the contacts generated by the defendant, not on the unilateral actions of some other entity. *Cockrell*, 363 S.C. at 492, 611 S.E.2d at 508-509 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (holding “unilateral activity of another party or a third person is not an appropriate consideration”)). The foreseeability that is critical to due process analysis is not the mere likelihood that a product could find its way into the forum state. Rather, it is that the defendant’s own conduct and connections with the forum state are such that the defendant should reasonably

anticipate being haled into court there. *Cockrell*, 363 S.C. at 492, 611 S.E.2d at 509 (citing *World-Wide Volkswagen Corp.*, 444 U.S. at 297).

10. The determination of whether a court may exercise personal jurisdiction over a non-resident defendant has traditionally involved a two-step analysis; first, the court must determine if the long-arm statute applies, and second, the court must determine whether the nonresident's contacts with this State are sufficient to satisfy due process requirements. *Power Prods. & Servs. Co., Inc.*, 379 S.C. at 431,665 S.E.2d at 664. However, “[b]ecause South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process.” *Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508 (citing *Moosally v. WW Norton & Co.*, 358 S.C. 320, 329, 594 S.E.2d 878, 883 (Ct. App. 2004)); *see also Power Prods. & Servs. Co., Inc.*, 379 S.C. at 431,665 S.E.2d at 664.

11. The Third-Party Complaint contains **zero** allegations of any connections Mr. Altrad (as individually named or as included as part of Third-Party Plaintiff's self-serving and factually inaccurate “Altrad Third-Party Defendants” definition) has with the State of South Carolina – it does not even make any generic or conclusory ones. The Third-Party Complaint makes a grand total of **three** factual allegations about Mr. Altrad, none of which have anything to do with South Carolina. First, Paragraph 25 alleges that Mr. Altrad is a resident of France. Second, Paragraph 118 claims in one conclusory sentence that “Cape” — a foreign entity² — is “controlled” by

² The Third-Party Complaint alleges in Paragraph 40 that “Cape” is “a private company organized and existing under the laws of the United Kingdom, with its principal place of business in England.”

Mr. Altrad. Third, Paragraph 118 makes an irrelevant and *ad hominem* attack on Mr. Altrad by inaccurately characterizing an alleged “corruption conviction” in France regarding a rugby team. The absolute absence of any allegation linking Mr. Altrad to South Carolina prevents this Court’s exercise of jurisdiction over a French citizen and compels dismissal of the Third-Party Complaint as to Mr. Altrad. *See Sullivan*, 397 S.C. at 150-51, 723 S.E.2d at 839 (affirming dismissal for lack of personal jurisdiction where the plaintiff merely recited the elements of the long-arm statute and failed to allege facts showing the defendant’s conduct subjected it to jurisdiction). *See also Power Prods. & Servs. Co., Inc.*, 379 S.C. at 433-36, 665 S.E.2d at 665-67 (affirming trial court’s dismissal based on lack of personal jurisdiction because plaintiff did not establish facts-either through the complaint or affidavits-to confer jurisdiction).

12. But the Court need not stop there. The Court can and should look to the facts as attested in Mr. Altrad’s Affidavit attached hereto and made a part hereof, which unquestionably demonstrates that Mr. Altrad is not subject to either general or specific personal jurisdiction in South Carolina; is not essentially “at home” in this state; and has not purposely availed himself of the benefits of something within the State of South Carolina to support imposition of personal jurisdiction. On this record, dismissal of the Third-Party Complaint is not only mandated; the failure to dismiss the claims would work a grave injustice over this non-resident Third-Party Defendant – a “75-year-old French citizen with no connection to South Carolina whatsoever.” *Mohed Altrad Aff.* ¶ 6. The idea that the Receiver could force Mr. Altrad

to appear and defend claims simply based on four (4) mentions of its name in a 65 page, 145 paragraph Third-Party Complaint more than offends all legitimate notions of due process, it obliterates them entirely.

13. Due process requires that there exist sufficient minimum contacts with the forum state such that the exercise of jurisdiction does not “offend traditional notions of fair play and substantial justice” and that the defendant can “reasonably anticipate being haled into court in the forum.” *E.g., Cockrell*, 363 S.C. at 491-492, 611 S.E.2d at 508 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Atlantic Soft Drink Co. v. South Carolina Nat’l Bank*, 287 S.C. 228, 336 S.E.2d 876 (1985)).

14. “A minimum contacts analysis requires a court to find the defendant directed its activities to a resident of this State and that the cause of action arises out of or relates to those activities.” *S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 131 (1992). *See also Bristol-Meyers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S.Ct. 1773, 1780 (2017); *World-Wide Volkswagen Corp.*, 444 U.S. at 296-297; *Hanson v. Denckla*, 257 U.S. 235, 251, 253 (1958). The minimum contacts analysis must focus on the defendant’s own actions, not the “unilateral actions of some other entity.” *Cockrell*, 363 S.C. at 492, 611 S.E.2d at 508-09 (“The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant’s conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.”); *Coggeshall*, 376 S.C. at 16, 655

S.E.2d at 478 (“Due process requires some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state.”). If the Court finds minimum contacts exist, it must further determine whether the exercise of jurisdiction is “reasonable” or “fair” by considering “(1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident’s acts; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State’s interest in exercising jurisdiction.” *Id.* at 492, 611 S.E.2d at 508.

15. As a substantive matter, given the nature of Mr. Altrad’s activities and the complete absence of any connection between Mr. Altrad and South Carolina, there are not sufficient minimum contacts with South Carolina to render this Court’s exercise of personal jurisdiction over Mr. Altrad permissible under the due process clause. *See* Mohed Altrad Affidavit.

16. The Third-Party Complaint makes no effort to show that Mr. Altrad had any connection with or has engaged in any conduct toward South Carolina. At most, the Third-Party Complaint alleges that many decades ago, in one or more foreign countries, some other entity allegedly sold asbestos fibers and then some other persons or entities restructured that company, stopped doing business within the United States, restructured the company some more, and then sold assets of that company to another entity. These allegations are clearly the type of unilateral activity of some other entity that the Court found insufficient to confer jurisdiction in *Cockrell, supra*. Mr. Altrad never had any personal involvement, in any capacity, in

the milling, mining, or sale of asbestos anywhere in the world, nor has he ever had any personal involvement in the production, manufacture, or distribution of asbestos or asbestos-containing products for use in any state of the United States, including South Carolina. Mohed Altrad Aff. ¶¶ 29-30.

17. Similarly, the Third-Party Complaint makes no effort to establish general personal jurisdiction through a corporate veil-piercing, alter ego, or any related theory. It is legally insufficient to establish personal jurisdiction by including only a generic allegation, devoid of any factual support (*see* TPC ¶ 140), that each and every one of the thirty-three (33) currently named “Third-Party Defendants” – inclusive of Mr. Altrad and named but wholly unrelated and irrelevant entities (e.g., The Sparrows Group, LLC and Sparrows Offshore Group Ltd.) – failed to follow corporate formalities. *See, e.g., ScanSource, Inc. v. Mitel Networks Corp.*, 2011 WL 2550719, at *6 (D.S.C. June 24, 2011) (dismissing claims for lack of personal jurisdiction on veil-piercing and alter ego theories as plaintiff “failed to support its allegation that [parent company’s] subsidiaries are merely façades for [its] operations”).

18. Moreover, a corporate veil-piercing theory cannot establish personal jurisdiction over Mr. Altrad – a French citizen – based merely on his status as a corporate officer and indirect shareholder of Altrad Investment Authority SAS (“AIA”) – a French parent company. Mohed Altrad Aff. ¶ 32-22.³ The Receiver’s one-

³ Third-Party Plaintiff’s fatal pleading deficiencies are compounded by the reality that no legally sufficient facts are pled in the Third-Party Complaint to even establish this Court’s jurisdiction over Cape PLC.

word allegation that “Cape” is “controlled” by Mr. Altrad by virtue of his status as a shareholder and corporate officer of AIA is conclusory, and it is also irrelevant to veil piercing or alter ego because Mr. Altrad’s alleged “control” started decades after the conduct at issue – in 2017.

19. Before 2017, Mr. Altrad had no affiliation or connection with Third-Party Plaintiff Cape PLC, Cape Intermediate Holdings Limited, any direct or indirect subsidiary of Cape PLC, any direct or indirect subsidiary of Cape Intermediate Holdings Limited, or any predecessor or successor to those entities. *Mohed Altrad Aff.* ¶ 31. Cape PLC was a publicly traded company on the London Stock Exchange through 2017, and its shares were owned by the general public. *Id.* ¶ 34. In 2017, Altrad UK Limited, a wholly-owned subsidiary of AIA, acquired Cape PLC through a public tender offer to purchase all shares of Cape PLC, except the IDC Scheme Share, which resulted in Cape PLC becoming a wholly-owned subsidiary of Altrad UK Limited. *Id.* ¶ 35. This timing is important because the alleged asbestos exposure that is the basis of the *Tibbs* Complaint, and the alleged “liability-avoidance scheme” that is the basis of the Third-Party Complaint, occurred decades earlier. Thus, Mr. Altrad could not have exerted any “control” over “Cape” during the relevant time period, so there is no basis for personal jurisdiction over him.

20. Even after 2017, Mr. Altrad never had any direct or indirect influence or control, or sought to directly or indirectly influence or control, any corporate entity, in a manner that prevents that organization from maintaining its independent existence and corporate structure, observing all corporate formalities, having duly

appointed and functioning corporate management and executive officers, maintaining separate corporate records, maintaining appropriate corporate controls and accounting for all financial distributions and payments, being adequately capitalized to meet its ongoing operational and financial obligations, and in all ways operating in a manner consistent with its corporate existence as an independent entity. *Mohed Altrad Aff.* ¶ 36. Because Mr. Altrad has never used the corporate form of any entity for any improper or fraudulent purpose to cause harm to anyone, there is no basis for the Court to exercise personal jurisdiction over him on an alter ego theory. *Id.* ¶ 37. As explained above, the Third-Party Complaint is completely devoid of any factual allegations *specific* to Mr. Altrad that would support the exercise of jurisdiction over this French citizen.

21. Finally, the Third-Party Complaint does not establish personal jurisdiction through a corporate veil-piercing, alter ego, or any related theory because Mr. Altrad has maintained his personal bank accounts separate and apart from business entities in which he has a direct or indirect ownership interest, and he has not commingled personal and corporate assets or funds. *Mohed Altrad Aff.* ¶ 38. Furthermore, Mr. Altrad has never agreed to accept the imposition of personal liability for the acts or debts of any corporate entity named in this lawsuit. *Id.* ¶ 39. As such, the Court cannot exercise personal jurisdiction over Mr. Altrad based on a veil piercing or alter ego theory.

22. This Motion is further based upon, and may be supplemented with, applicable pleadings, affidavits, exhibits, memoranda, controlling law, and such other and further material as may be presented to the Court.

WHEREFORE, Mr. Altrad having shown this Court that the Receiver has not, and cannot, show that it had the minimum contacts with South Carolina necessary for the exercise of personal jurisdiction to meet the requirements of due process, the claims against this Third-Party Defendant must be dismissed.

Respectfully submitted this 1st day of September, 2023

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*Attorneys for Third-Party Defendant Mohed
Altrad*

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,)	
	)	Civil Action No. 2023-CP-40-01759
Plaintiffs,)	
	)	In Re:
v.	)	Asbestos Personal Injury Litigation
	)	Coordinated Docket
3M COMPANY, <i>et al.</i> ,)	
)	
Defendants.)	
)	
*****)	
)	
CAPE PLC, individually and as successor in)	
interest to CAPE ASBESTOS COMPANY	)	AFFIDAVIT OF MOHED ALTRAD
LIMITED, by and through its duly appointed	)	IN SUPPORT OF MOTION TO
Receiver Peter D. Protopapas,	)	DISMISS THIRD-PARTY
	)	COMPLAINT FOR LACK OF
Third-Party Plaintiff,	)	PERSONAL JURISDICTION
)	
v.)	
)	
ANGLO AMERICAN PLCS, <i>et al.</i> ,)	
)	
Third-Party Defendants.)	

MOHED ALTRAD, being first sworn under oath states as follows:¹

1. I am over the age of eighteen (18) years old. I have personal knowledge of the matters set forth herein. I am competent to give this Affidavit.
2. I am a citizen of France and reside in Montpellier, France.
3. I have never held or applied for United States citizenship.
4. I have never resided in the United States or South Carolina as a temporary or permanent resident.
5. I have never visited South Carolina for any purpose.
6. I am a 75-year-old French citizen with no connection to South Carolina whatsoever.

¹ References to "I" (e.g., "I have...") refer to Mr. Altrad in his personal capacity only (unless otherwise specified).

7. I have no assets of any sort in South Carolina.
8. I have never owned, leased or held interest in any real or tangible property in South Carolina.
9. I have never had any accounts at any banks or other financial institutions in South Carolina.
10. I have never had a mailing address, post office box, or other indicia of South Carolina residency.
11. I have never owned a motorized vehicle registered in South Carolina and have never paid any automobile excise tax to any municipality or town located in South Carolina.
12. I have never owned a water vessel (boat) registered in South Carolina and have never paid any boat excise tax to any municipality or town located in South Carolina.
13. I have never acquired ownership, possession, or control of any asset or thing of value present within South Carolina.
14. I have not sought to procure insurance for any person or property, tangible and intangible, in South Carolina.
15. I have never sought licensure, accreditation or any other type of certification or authorization to conduct business in or directed toward South Carolina.
16. I have never opened, conducted, engaged in, or carried on a business or business venture in South Carolina.
17. I have never invested any dollars in business operations in South Carolina.
18. Prior to retaining counsel for this lawsuit, I have never recruited any South Carolina residents, directly or through an intermediary located in South Carolina, for employment inside or outside of South Carolina.
19. I have never owed or paid corporate, employment, or real property taxes in South Carolina.
20. I have never paid sales tax to South Carolina.
21. I have never had any employees deliberately working or residing in South Carolina, nor have I had any employees working incident to South Carolina.
22. Prior to retaining counsel for this lawsuit, I have never entered into any contracts or ventures with any persons or entities within South Carolina, and I have executed no such contracts, by mail or otherwise, with a South Carolina resident to be performed, in whole or in part, in South Carolina.
23. I have never contracted to supply services, goods, or things in South Carolina, and I have never supplied services or delivered goods or things in South Carolina.

24. I have not received tax deductions as a result of contributions made to any organizations in South Carolina.
25. I have never appeared in a lawsuit or other legal proceeding in South Carolina.
26. I have never consented to the exercise of jurisdiction over it in South Carolina and have never initiated litigation in South Carolina.
27. I have never committed a tortious act in whole or in part in South Carolina.
28. I have never caused tortious injury or death to persons or property within South Carolina arising out of an act or omission committed outside South Carolina.
29. I have never had any personal involvement, in any capacity, in the milling, mining, or sale of asbestos anywhere in the world, nor have I ever had any personal involvement in the production, manufacture, or distribution of asbestos or asbestos-containing products for use in any state of the United States, including South Carolina.
30. I have never had any direct or indirect ownership interest, or any form of control, over North American Asbestos Corporation (“NAAC”), or any other direct or indirect subsidiary of NAAC.
31. Prior to 2017, I had no affiliation or connection with Third-Party Plaintiff Cape PLC, Cape Intermediate Holdings Limited, any direct or indirect subsidiary of Cape PLC, any direct or indirect subsidiary of Cape Intermediate Holdings Limited, or any predecessor or successor to those entities.
32. I am the President of Altrad Investment Authority SAS (“AIA”).
33. I have an indirect ownership interest in AIA because I am the 100% shareholder of a separate entity that is a shareholder of AIA.
34. Prior to 2017, Cape PLC was a publicly traded company on the London Stock Exchange, and its shares were owned by the general public.
35. In 2017, Altrad UK Limited, a wholly-owned subsidiary of AIA, acquired Cape PLC through a public tender offer to purchase all shares of Cape PLC, except the IDC Scheme Share, which resulted in Cape PLC becoming a wholly-owned subsidiary of Altrad UK Limited.
36. I have never had any direct or indirect influence or control, or sought to directly or indirectly influence or control, any corporate entity, in a manner that prevents that organization from maintaining its independent existence and corporate structure, observing all corporate formalities, having duly appointed and functioning corporate management and executive officers, maintaining separate corporate records, maintaining appropriate corporate controls and accounting for all financial distributions and payments, being adequately capitalized to meet its ongoing operational and financial obligations, and in all ways operating in a manner consistent with its corporate existence as an independent entity.

- 37. I have never used the corporate form of any entity for any improper or fraudulent purpose to cause harm to anyone.
- 38. I have maintained my personal bank accounts separate and apart from business entities in which I have a direct or indirect ownership interest, and I have not commingled personal and corporate assets or funds.
- 39. I have never agreed to accept the imposition of personal liability for the acts or debts of any corporate entity named as a defendant or third-party defendant in this South Carolina lawsuit.

Dated this 29 day of August, 2023.



 MOHED ALTRAD

SWORN TO AND SUBSCRIBED BEFORE ME,
ON THIS THE ____ DAY OF AUGUST, 2023

Notary Public for _____

Commission Expires: _____

Print Name: _____

[SEAL]



Vu pour certification matérielle
de la signature de Mohed ALTRAD
M^e Alexis Foucart
Le 29/8/23 -

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,	)	Civil Action No. 2023-CP-40-01759
)	
Plaintiffs,	)	In Re:
	)	Asbestos Personal Injury Litigation
v.	)	Coordinated Docket
)	
3M COMPANY, <i>et al.</i> ,)	
)	
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,	)	ALTRAD INVESTMENT AUTHORITY SAS'S MOTION TO DISMISS THIRD-PARTY COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND FOR STAY OF DISCOVERY
)	
v.)	
)	
ANGLO AMERICAN PLCS, <i>et al.</i> ,)	
)	
Third-Party Defendants.)	

Third-Party Defendant, Altrad Investment Authority SAS (“AIA”), by and through the undersigned counsel, and pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure, respectfully submits this Motion to Dismiss the Receiver’s Third-Party Complaint on the grounds that the Court lacks personal jurisdiction over AIA. Pursuant to South Carolina Rule of Civil Procedure 26(c), AIA also moves this Court for an order staying discovery as to AIA pending resolution of the Motion to Dismiss.

To the extent AIA files any other motion or seeks any other form of relief in this action, AIA does not waive, but instead specifically preserves, its objection to personal jurisdiction in South Carolina. AIA specifically requests that the Court rule on the present motion to dismiss for lack of personal jurisdiction on an expedited basis and before addressing any of its arguments raised in any other motion or pleading filed in this action, all of which are asserted in the strict alternative to the personal jurisdiction objection, so as to protect AIA from having to engage in any further litigation with respect to the claims asserted in the Third-Party Complaint in this action.

In support of the Motion, AIA shows the Court as follows:

1. The Receiver's Third-Party Complaint acknowledges that AIA is "a corporation organized under the laws of France, with its principal place of business in Florensac, France." TPC ¶ 29.

2. In conjunction with the foregoing, and as further detailed in the Affidavit of Richard M. Alcock attached hereto as **Exhibit A** and incorporated herein by reference, AIA is clearly a non-resident of the State of South Carolina under any dictionary, legal, or common sense definition of the term.

3. "The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case." *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). "The party seeking to invoke personal jurisdiction over a non-resident defendant . . . bears the burden of establishing jurisdiction." *Power Prods. & Servs. Co., Inc. v. Kozma*, 379

S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 2008). At the pretrial stage, plaintiffs may meet their burden of proving personal jurisdiction over a nonresident defendant by a prima facie showing of jurisdiction either (1) in the complaint or (2) in affidavits. *See Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508; *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 150, 723 S.E.2d 835, 839 (Ct. App. 2012).

4. Establishing jurisdiction requires allegations of *specific facts* to establish the contacts necessary to invoke either general or specific jurisdiction. *See Power Prods. & Servs. Co. Inc.*, 379 S.C. at 433–36, 665 S.E.2d at 665–67 (affirming trial court’s dismissal based on lack of personal jurisdiction because plaintiff did not establish facts – either through the complaint or affidavits – to confer jurisdiction). Conclusory allegations will not suffice. *Id.* at 433-35, 665 S.E.2d at 665-66.

5. Other than as captioned, the Third-Party Complaint specifically mentions AIA four (4) times:

- a. Once in the opening paragraph listing the Third-Party Defendants;
- b. Once in Paragraph 29 to acknowledge the fact that AIA is *not* a resident of the State of South Carolina;
- c. Once in Paragraph 116 to allege that a separate subsidiary of AIA “acquired and has since controlled Cape” as of October 9, 2017¹; and

¹ Third-Party Plaintiff’s reference to “Altrad’s U.S. Subsidiaries” (TPC ¶ 117) and definition of “Altrad Third-Party Defendants” (TPC ¶ 119) are factually inaccurate, including given that Sparrows Offshore Group, Ltd., and The Sparrows Group, LLC, are separate and unrelated entities, with no relation to or affiliation or other association with this Third-Party Defendant.

- d. Once in the table included as part of Paragraph 119 along with other “Altrad Ownership” entities purportedly comprising a factually inaccurate listing of “Altrad Third-Party Defendants,” as defined by Third-Party Plaintiff.

Not even the most generous interpretation of these allegations can be said to present the specific facts necessary to show that AIA is subject to either general or specific personal jurisdiction in South Carolina; is essentially “at home” in this state; or has purposely availed itself of the benefits of something within the State of South Carolina to support imposition of personal jurisdiction. Mr. Alcock’s Affidavit establishes that AIA has no connection to South Carolina in that:

- On December 23, 2010, AIA was organized under the laws of France (registered number 529222879) as a French SAS (Société par Actions Simplifiée) and has always been organized under the laws of France. Alcock Aff. ¶ 3.
- AIA conducts no operations and does not have, and never has had, its principal place of business in South Carolina. AIA’s head office is located at 16, Avenue de la Gardie, 34510 Florensac, France. AIA’s administrative headquarters and effective place of business is located at 150 rue Le Pérugin, 34000 Montpellier, France. *Id.* ¶ 4.
- AIA has never been registered as a foreign company authorized to transact business or otherwise licensed in South Carolina, and AIA has never transacted any business in South Carolina. *Id.* ¶ 7.

- AIA has never had any members, managers, officers, or directors residing in or with a principal place of business in South Carolina, and the members, managers, officers, and directors of AIA have never held any member, manager, officer, or board meeting in South Carolina. *Id.* ¶ 8.
- AIA has never had a registered agent in South Carolina. *Id.* ¶ 9.
- AIA has never owned or operated any manufacturing, sales, distribution, or other facilities in South Carolina, and AIA has never had an office or agency in South Carolina. *Id.* ¶ 10.
- AIA has never owned, leased, or held an interest in or possession of any real or tangible property within South Carolina and has no offices in South Carolina. *Id.* ¶ 11.
- AIA has never had any employees deliberately working or residing in South Carolina, nor has AIA had any employees working incident to South Carolina. *Id.* ¶ 12.
- Prior to retaining counsel for this lawsuit, AIA has never recruited any South Carolina residents, directly or through an intermediary located in South Carolina, for employment inside or outside of South Carolina. *Id.* ¶ 13.
- AIA has never had a mailing address, post office box, bank account, or other account with any financial institution in South Carolina, and has no other indicia of residence within South Carolina. *Id.* ¶ 14.
- AIA has never owed or paid corporate, employment, or real property taxes in South Carolina. *Id.* ¶ 15.

- AIA has never paid sales tax to South Carolina. *Id.* ¶ 16.
- AIA has never had insurance policies that afford coverage of any kind for specific entities located in South Carolina, and AIA has not sought to procure insurance for any person or property, tangible and intangible, in South Carolina. *Id.* ¶ 17.
- AIA has never invested any dollars in business operations in South Carolina. *Id.* ¶ 18.
- Prior to retaining counsel for this lawsuit, AIA has never entered into any contracts or ventures with any persons or entities within South Carolina, and AIA has had no such contracts, by mail or otherwise, with a South Carolina resident to be performed, in whole or in part, in South Carolina. *Id.* ¶ 19.
- AIA has never contracted to supply services, goods, or things in South Carolina, and AIA has never supplied services or delivered goods or things in South Carolina. *Id.* ¶ 20.
- AIA has never marketed or advertised, or engaged in solicitation with respect to, its goods, services, or general business in South Carolina. *Id.* ¶ 21.
- AIA has not received tax deductions as a result of contributions made to any organizations in South Carolina. *Id.* ¶ 22.
- AIA has never received any business incentives or tax credit from South Carolina to conduct business in South Carolina. *Id.* ¶ 23.
- AIA has never appeared in a lawsuit or other legal proceeding in South Carolina. *Id.* ¶ 24.

- AIA has never consented to the exercise of jurisdiction over it in South Carolina and has never initiated litigation in South Carolina. *Id.* ¶ 25.
- AIA has never owned, used, possessed, or held a mortgage or other lien on any real property in South Carolina. *Id.* ¶ 26.
- AIA has never owned a motorized vehicle registered in South Carolina and has never paid any automobile excise tax to any municipality or town located in South Carolina. *Id.* ¶ 27.
- AIA has never owned a water vessel (boat) registered in South Carolina and has never paid any boat excise tax to any municipality or town located in South Carolina. *Id.* ¶ 28.
- AIA has never acquired ownership, possession, or control of any asset or thing of value present within South Carolina. *Id.* ¶ 29.
- AIA has never had any subsidiaries incorporated in South Carolina or with their principal place of business in South Carolina. *Id.* ¶ 30.
- AIA has never entered into any franchise agreements between it and any entities licensed to do business in South Carolina. *Id.* ¶ 31.
- AIA has never opened, conducted, engaged in, or carried on a business or business venture in South Carolina. *Id.* ¶ 32.
- AIA has never committed a tortious act in whole or in part in South Carolina. *Id.* ¶ 33.

- AIA has never caused tortious injury or death to persons or property within South Carolina arising out of an act or omission committed outside South Carolina. *Id.* ¶ 34.
- AIA has never produced, manufactured, or distributed goods with the reasonable expectation that those goods are to be used or consumed in South Carolina, and are so used or consumed. *Id.* ¶ 35.

Simply put, there is no basis for this Court to exercise general or specific jurisdiction over this French company.

6. “When a motion to dismiss attacks the allegations of the complaint on the issue of jurisdiction, the court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction.” *Sullivan*, 397 S.C. at 150, 723 S.E.2d at 839 (quoting *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007)).

7. “Personal jurisdiction is exercised as either ‘general jurisdiction’ or ‘specific jurisdiction.’” *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478. “General jurisdiction is the State’s right to exercise personal jurisdiction over a defendant even though the suit does not arise out of or relate to the defendant’s contacts with the forum . . . ; general jurisdiction is determined under S.C. Code Ann. § 36-2-802....” *Id.*; see also *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 ‘paradi[m] . . . bases for general jurisdiction.’” (quotation omitted)). “Specific jurisdiction is the State’s right to exercise personal jurisdiction because the cause of action arises

specifically from a defendant's contacts with the forum . . . ; specific jurisdiction is determined under S.C. Code Ann. § 36-2-803....” *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478. The exercise of personal jurisdiction under either statute must comport with due process requirements and must not offend traditional notions of fair play and substantial justice. *Id.* Due process requires some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state. *Id.*

8. Further, due process mandates that the defendant possess sufficient minimum contacts with the forum state so that it could reasonably anticipate being haled into court there. *Cockrell*, 363 S.C. at 491-492, 611 S.E.2d at 508 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)). Without minimum contacts, the Court does not have the “power” to adjudicate the action. *Cockrell*, 363 S.C. at 492, 611 S.E.2d at 508. Finally, the Court must also find that the exercise of jurisdiction is “reasonable” or “fair.” *Id.*

9. The Court must assess individually each defendant's contacts with South Carolina. *Cockrell*, 363 S.C. at 492, 611 S.E.2d at 508 (citing *Rush v. Savchuk*, 444 U.S. 320 (1980)). The focus of the Court's analysis must center on the contacts generated by the defendant, not on the unilateral actions of some other entity. *Cockrell*, 363 S.C. at 492, 611 S.E.2d at 508-509 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (holding “unilateral activity of another party or a third person is not an appropriate consideration”)). The foreseeability that is critical to due process analysis is not the mere likelihood that a product could find

its way into the forum state. Rather, it is that the defendant's own conduct and connections with the forum state are such that the defendant should reasonably anticipate being haled into court there. *Cockrell*, 363 S.C. at 492, 611 S.E.2d at 509 (citing *World-Wide Volkswagen Corp.*, 444 U.S. at 297).

10. The determination of whether a court may exercise personal jurisdiction over a non-resident defendant has traditionally involved a two-step analysis; first, the court must determine if the long-arm statute applies, and second, the court must determine whether the nonresident's contacts with this State are sufficient to satisfy due process requirements. *Power Prods. & Servs. Co., Inc.*, 379 S.C. at 431,665 S.E.2d at 664. However, "[b]ecause South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process." *Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508 (citing *Moosally v. WW Norton & Co.*, 358 S.C. 320, 329, 594 S.E.2d 878, 883 (Ct. App. 2004)); *see also Power Prods. & Servs. Co., Inc.*, 379 S.C. at 431,665 S.E.2d at 664.

11. The Third-Party Complaint contains zero allegations of any connections AIA (as individually named or as included as part of Third-Party Plaintiff's self-serving and factually inaccurate "Altrad Third-Party Defendants" definition) has with the State of South Carolina – it does not even make any generic or conclusory ones. The Third-Party Complaint makes a grand total of *two* factual allegations about AIA, none of which have anything to do with South Carolina. First, Paragraph 29 alleges that AIA is a French company. Second, Paragraph 116 alleges that a wholly-

owned subsidiary of AIA “acquired” Cape in an undefined manner “[o]n or around October 9, 2017.” The absolute absence of any allegations linking AIA to South Carolina prevents this Court’s exercise of jurisdiction over a French company and compels dismissal of the Third-Party Complaint as to AIA. *See Sullivan*, 397 S.C. at 150-51, 723 S.E.2d at 839 (affirming dismissal for lack of personal jurisdiction where the plaintiff merely recited the elements of the long-arm statute and failed to allege facts showing the defendant’s conduct subjected it to jurisdiction). *See also Power Prods. & Servs. Co., Inc.*, 379 S.C. at 433-36, 665 S.E.2d at 665-67 (affirming trial court’s dismissal based on lack of personal jurisdiction because plaintiff did not establish facts – either through the complaint or affidavits – to confer jurisdiction).

12. But the Court need not stop there. The Court can and should look to the facts as attested in Mr. Alcock’s Affidavit attached hereto and made a part hereof, which unquestionably demonstrates that AIA is not subject to either general or specific personal jurisdiction in South Carolina; is not essentially “at home” in this state; and has not purposely availed itself of the benefits of something within the State of South Carolina to support imposition of personal jurisdiction. On this record, dismissal of the Third-Party Complaint is not only mandated; the failure to dismiss the claims would work a grave injustice over this non-resident Third-Party Defendant. The idea that the Receiver could force AIA to appear and defend claims simply based on four (4) mentions of its name in a 65 page, 145 paragraph Third-Party Complaint more than offends all legitimate notions of due process, it obliterates them entirely.

13. Due process requires that there exist sufficient minimum contacts with the forum state such that the exercise of jurisdiction does not “offend traditional notions of fair play and substantial justice” and that the defendant can “reasonably anticipate being haled into court in the forum.” *E.g.*, *Cockrell*, 363 S.C. at 491-492, 611 S.E.2d at 508 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Atlantic Soft Drink Co. v. South Carolina Nat’l Bank*, 287 S.C. 228, 336 S.E.2d 876 (1985)).

14. “A minimum contacts analysis requires a court to find the defendant directed its activities to a resident of this State and that the cause of action arises out of or relates to those activities.” *S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 131 (1992). *See also Bristol-Meyers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S.Ct. 1773, 1780 (2017); *World-Wide Volkswagen Corp.*, 444 U.S. at 296-297; *Hanson v. Denckla*, 257 U.S. 235, 251, 253 (1958). The minimum contacts analysis must focus on the defendant’s own actions, not the “unilateral actions of some other entity.” *Cockrell*, 363 S.C. at 492, 611 S.E.2d at 508-09 (“The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant’s conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.”); *Coggeshall*, 376 S.C. at 16, 655 S.E.2d at 478 (“Due process requires some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state.”). If the Court finds minimum contacts exist, it must further determine whether the exercise

of jurisdiction is “reasonable” or “fair” by considering “(1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident’s acts; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State’s interest in exercising jurisdiction.” *Id.* at 492, 611 S.E.2d at 508.

15. As a substantive matter, given the nature of AIA’s business operations and activities, there are not sufficient minimum contacts with South Carolina to render this Court’s exercise of personal jurisdiction over this Third-Party Defendant permissible under the due process clause. *See Alcock Affidavit.*

16. The Third-Party Complaint makes no effort to show that AIA had any connection with or has engaged in any conduct toward South Carolina. At most, the Third-Party Complaint alleges that many decades ago, in one or more foreign countries, some other entity allegedly sold asbestos fibers and then some other persons or entities restructured that company, stopped doing business within the United States, restructured the company some more, and then sold assets of that company to another entity, all of which are alleged to have occurred outside the State of South Carolina. These allegations are clearly the type of unilateral activity of some other entity that the Court found insufficient to confer jurisdiction in *Cockrell, supra*. AIA has never milled, mined, or sold asbestos anywhere (and has never done so in South Carolina), and has never produced, manufactured, or distributed asbestos or asbestos-containing products for use in any state, including South Carolina. *Alcock Aff.* ¶ 6.

17. Similarly, the Third-Party Complaint makes no effort to establish general personal jurisdiction through a corporate veil-piercing, alter ego, or any related theory. It is legally insufficient to establish personal jurisdiction by including only a generic allegation, devoid of any factual support (*see* TPC ¶ 140), that each and every one of the thirty-three (33) currently named “Third-Party Defendants” – inclusive of AIA and named but wholly unrelated and irrelevant entities (e.g., The Sparrows Group, LLC and Sparrows Offshore Group Ltd.) – failed to follow corporate formalities. *See, e.g., ScanSource, Inc. v. Mitel Networks Corp.*, 2011 WL 2550719, at *6 (D.S.C. June 24, 2011) (dismissing claims for lack of personal jurisdiction on veil-piercing and alter ego theories as plaintiff “failed to support its allegation that [parent company’s] subsidiaries are merely façades for [its] operations”).

18. In cases where a parent and subsidiary “are separate legal entities operating under separate boards of directors with separate employees, assets, and places of business,” the “mere acquisition and control of a domestic subsidiary’s capital stock does not subject the foreign parent to the jurisdiction of that State’s courts.” *Builder Mart of Am., Inc. v. First Union Corp.*, 349 S.C. 500, 508, 563 S.E.2d 352, 356 (Ct. App. 2002); *see also Yarborough & Co. v. Schoolfield Furniture Indus., Inc.*, 275 S.C. 151, 153, 268 S.E.2d 42, 44 (1980) (same). Here, the only allegation in the Third-Party Complaint with respect to AIA is that its wholly-owned subsidiary, Altrad UK Limited, acquired the stock of “Cape” in 2017. TPC ¶ 116. Under *Builder Mart*, there is no personal jurisdiction over AIA in South Carolina because: (1) the Court has no personal jurisdiction over the foreign subsidiary, Cape, and (2) even

assuming contrary to fact that the Court did have personal jurisdiction over the foreign subsidiary (it does not), the acquisition of Cape's publicly traded shares by an AIA foreign subsidiary through a public tender offer in 2017 does not subject AIA, the foreign parent, to the jurisdiction of South Carolina's courts. The Receiver's allegation that AIA "acquired and has since controlled Cape" is conclusory, and it is also irrelevant to veil piercing or alter ego because AIA's alleged "control" started decades after the conduct at issue – in 2017.

19. Before 2017, AIA had no affiliation or connection with Third-Party Plaintiff Cape PLC, Cape Intermediate Holdings Limited, any direct or indirect subsidiary of Cape PLC, any direct or indirect subsidiary of Cape Intermediate Holdings Limited, or any predecessor or successor to those entities. *Alcock Aff.* ¶ 39. Cape PLC was a publicly traded company on the London Stock Exchange through 2017, and its shares were owned by the general public. *Id.* ¶ 40. In 2017, Altrad UK Limited, a wholly-owned subsidiary of AIA, acquired Cape PLC through a public tender offer to purchase all shares of Cape PLC, except the IDC Scheme Share, which resulted in Cape PLC becoming a wholly-owned subsidiary of Altrad UK Limited. *Id.* ¶ 41. At no time has Cape PLC or any of its direct or indirect subsidiaries been combined with, merged into, or transferred their liabilities to AIA or any of AIA's other direct or indirect subsidiaries, including in connection with the Cape PLC Acquisition. *Id.* ¶ 42. This timing is important because the alleged asbestos exposure that is the basis of the *Tibbs* Complaint, and the alleged "liability-avoidance scheme" that is the basis of the Third-Party Complaint, occurred decades earlier. Thus, AIA

could not have exerted any “control” over “Cape” during the relevant time period, so there is no basis for personal jurisdiction over AIA.² Moreover, the Receiver’s conclusory allegation of “control,” unsupported by any factual averments, does not allege the “total domination” and “misuse of control” that would be necessary to support personal jurisdiction on an alter ego theory. *Peoples Fed. Sav. & Loan Ass’n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 148, 425 S.E.2d 764, 774 (Ct. App. 1992).

20. Even after 2017, AIA and all of its direct and indirect subsidiaries, including Cape PLC, have maintained their own separate corporate structures, observed corporate formalities, have duly appointed and functioning corporate management and executive officers, have maintained separate corporate records, have maintained appropriate corporate controls and accounting for all financial distributions and payments, have been adequately capitalized to meet their ongoing operational and financial obligations, if any, and in all ways have operated in a manner consistent with their existence as separate corporate entities. *Id.* ¶ 43. Furthermore, AIA and all of its direct and indirect subsidiaries, including Cape PLC, have maintained separate bank accounts from each other, have not commingled assets or funds with each other, have maintained separate books and records from each other, and have maintained appropriate corporate controls and accounting for all financial distributions and payments. *Id.* ¶ 44. As explained above, the Third-

² Third-Party Plaintiff’s fatal pleading deficiencies are compounded by the reality that no legally sufficient facts are pled in the Third-Party Complaint to even establish this Court’s jurisdiction over Cape PLC.

Party Complaint is completely devoid of any factual allegations specific to AIA that would support the exercise of jurisdiction over this French citizen. The sole allegation that AIA's wholly-owned subsidiary acquired the publicly traded stock of Cape is insufficient to obtain personal jurisdiction over AIA under an alter ego theory.

21. Finally, the Third-Party Complaint does not establish personal jurisdiction through a corporate veil-piercing, alter ego, or any related theory because AIA has never had any direct or indirect influence or control, or sought to directly or indirectly influence or control, any corporate entity in a manner that prevents that organization from maintaining its independent existence and corporate structure, observing all corporate formalities, having duly appointed and functioning corporate management and executive officers, maintaining separate corporate records, maintaining appropriate corporate controls and accounting for all financial distributions and payments, being adequately capitalized to meet its ongoing operational and financial obligations, and in all ways operating in a manner consistent with its corporate existence as an independent entity. *Alcock Aff.* ¶ 46. Thus, Cape PLC and its direct and indirect subsidiaries are distinct business entities with separate corporate structures, separate corporate formalities, and separate financials from its direct and indirect parent companies, including Altrad UK Limited and AIA. *Id.* ¶ 45. As such, the Court cannot exercise personal jurisdiction over AIA based on a veil piercing or alter ego theory, because AIA and Cape have observed corporate formalities and maintained their separate corporate existence. *Alcock Aff.* ¶¶ 43-49; *see also Mid-South Mgmt. Co. v. Sherwood Dev. Corp.*, 374 S.C. 588, 599,

649 S.E.2d 135, 141 (Ct. App. 2007) (refusing to pierce corporate veil because parent and subsidiary observed corporate formalities).

22. This Motion is further based upon, and may be supplemented with, applicable pleadings, affidavits, exhibits, memoranda, controlling law, and such other and further material as may be presented to the Court.

WHEREFORE, AIA having shown this Court that the Receiver has not, and cannot, show that it had the minimum contacts with South Carolina necessary for the exercise of personal jurisdiction to meet the requirements of due process, the claims against this Third-Party Defendant must be dismissed.

Respectfully submitted this 1st day of September, 2023

WOMBLE BOND DICKINSON (US) LLP

/s/ M. Elizabeth O'Neill

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*Attorneys for Third-Party Defendant Altrad
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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,)	
	)	Civil Action No. 2023-CP-40-01759
Plaintiffs,)	
	)	In Re:
v.	)	Asbestos Personal Injury Litigation
	)	Coordinated Docket
3M COMPANY, <i>et al.</i> ,)	
)	
Defendants.)	
)	
*****)	
)	
CAPE PLC, individually and as successor in)	
interest to CAPE ASBESTOS COMPANY)	
LIMITED, by and through its duly appointed)	
Receiver Peter D. Protopapas,)	
	)	AFFIDAVIT OF ALTRAD
Third-Party Plaintiff,	)	INVESTMENT AUTHORITY SAS
	)	IN SUPPORT OF MOTION TO
v.	)	DISMISS THIRD-PARTY
	)	COMPLAINT FOR LACK OF
	)	PERSONAL JURISDICTION
ANGLO AMERICAN PLCS, <i>et al.</i> ,)	
)	
Third-Party Defendants.)	
)	

RICHARD MICHAEL ALCOCK, being first sworn under oath states as follows:

1. I am over the age of eighteen (18) years old. I am a resident of the United Kingdom. I have personal knowledge of the matters set forth herein. I am competent to give this Affidavit.
2. I am a director of Altrad Investment Authority SAS (“AIA”). I make the following statements based upon my own personal knowledge and belief.
3. On December 23, 2010, AIA was organized under the laws of France (registered number 529222879) as a French SAS (Société par Actions Simplifiée) and has always been organized under the laws of France.
4. AIA conducts no operations and does not have, and never has had, its principal place of business in South Carolina. AIA’s head office is located at 16, Avenue de la Gardie, 34510 Florensac, France. AIA’s administrative headquarters and effective place of business is located at 150 rue Le Pérugin, 34000 Montpellier, France.

5. AIA is a holding company for a group of companies which provide industrial services (principally for the oil and gas, energy, power generation, process, environment and construction sectors) and also the manufacturing and distribution of equipment dedicated to the construction and building market.
6. AIA has never milled, mined, or sold asbestos anywhere (and has never done so in South Carolina), and has never produced, manufactured, or distributed asbestos or asbestos-containing products for use in any state, including South Carolina.
7. AIA has never been registered as a foreign company authorized to transact business or otherwise licensed in South Carolina, and AIA has never transacted any business in South Carolina.
8. AIA has never had any members, managers, officers, or directors residing in or with a principal place of business in South Carolina, and the members, managers, officers, and directors of AIA have never held any member, manager, officer, or board meeting in South Carolina.
9. AIA has never had a registered agent in South Carolina.
10. AIA has never owned or operated any manufacturing, sales, distribution, or other facilities in South Carolina, and AIA has never had an office or agency in South Carolina.
11. AIA has never owned, leased, or held an interest in or possession of any real or tangible property within South Carolina and has no offices in South Carolina.
12. AIA has never had any employees deliberately working or residing in South Carolina, nor has AIA had any employees working incident to South Carolina.
13. Prior to retaining counsel for this lawsuit, AIA has never recruited any South Carolina residents, directly or through an intermediary located in South Carolina, for employment inside or outside of South Carolina.
14. AIA has never had a mailing address, post office box, bank account, or other account with any financial institution in South Carolina, and has no other indicia of residence within South Carolina.
15. AIA has never owed or paid corporate, employment, or real property taxes in South Carolina.
16. AIA has never paid sales tax to South Carolina.
17. AIA has never had insurance policies that afford coverage of any kind for specific entities located in South Carolina, and AIA has not sought to procure insurance for any person or property, tangible and intangible, in South Carolina.
18. AIA has never invested any dollars in business operations in South Carolina.

19. Prior to retaining counsel for this lawsuit, AIA has never entered into any contracts or ventures with any persons or entities within South Carolina, and AIA has had no such contracts, by mail or otherwise, with a South Carolina resident to be performed, in whole or in part, in South Carolina.
20. AIA has never contracted to supply services, goods, or things in South Carolina, and AIA has never supplied services or delivered goods or things in South Carolina.
21. AIA has never marketed or advertised, or engaged in solicitation with respect to, its goods, services, or general business in South Carolina.
22. AIA has not received tax deductions as a result of contributions made to any organizations in South Carolina.
23. AIA has never received any business incentives or tax credit from South Carolina to conduct business in South Carolina.
24. AIA has never appeared in a lawsuit or other legal proceeding in South Carolina.
25. AIA has never consented to the exercise of jurisdiction over it in South Carolina and has never initiated litigation in South Carolina.
26. AIA has never owned, used, possessed, or held a mortgage or other lien on any real property in South Carolina.
27. AIA has never owned a motorized vehicle registered in South Carolina and has never paid any automobile excise tax to any municipality or town located in South Carolina.
28. AIA has never owned a water vessel (boat) registered in South Carolina and has never paid any boat excise tax to any municipality or town located in South Carolina.
29. AIA has never acquired ownership, possession, or control of any asset or thing of value present within South Carolina.
30. AIA has never had any subsidiaries incorporated in South Carolina or with their principal place of business in South Carolina.
31. AIA has never entered into any franchise agreements between it and any entities licensed to do business in South Carolina.
32. AIA has never opened, conducted, engaged in, or carried on a business or business venture in South Carolina.
33. AIA has never committed a tortious act in whole or in part in South Carolina.
34. AIA has never caused tortious injury or death to persons or property within South Carolina arising out of an act or omission committed outside South Carolina.

35. AIA has never produced, manufactured, or distributed goods with the reasonable expectation that those goods are to be used or consumed in South Carolina, and are so used or consumed.
36. AIA has never had any direct or indirect ownership interest, or any form of control, over North American Asbestos Corporation (“NAAC”), or any other direct or indirect subsidiary of NAAC.
37. Prior to 2017, AIA had no direct or indirect ownership interest, or any form of economic interest, in Third-Party Plaintiff Cape PLC, Cape Intermediate Holdings Limited, any direct or indirect subsidiary of Cape PLC, any direct or indirect subsidiary of Cape Intermediate Holdings Limited, or any predecessor or successor to those entities.
38. Prior to 2017, AIA exerted no direct or indirect influence or control, and never sought to directly or indirectly influence or control, over Third-Party Plaintiff Cape PLC, Cape Intermediate Holdings Limited, any direct or indirect subsidiary of Cape PLC, any direct or indirect subsidiary of Cape Intermediate Holdings Limited, or any predecessor or successor to those entities.
39. Prior to 2017, AIA had no affiliation or connection with Third-Party Plaintiff Cape PLC, Cape Intermediate Holdings Limited, any direct or indirect subsidiary of Cape PLC, any direct or indirect subsidiary of Cape Intermediate Holdings Limited, or any predecessor or successor to those entities.
40. Prior to 2017, Cape PLC was a publicly traded company on the London Stock Exchange, and its shares were owned by the general public.
41. In 2017, Altrad UK Limited, a wholly-owned subsidiary of AIA, acquired Cape PLC through a public tender offer to purchase all shares of Cape PLC, except the IDC Scheme Share, which resulted in Cape PLC becoming a wholly-owned subsidiary of Altrad UK Limited (“Cape PLC Acquisition”).
42. At no time has Cape PLC or any of its direct or indirect subsidiaries been combined with, merged into, or transferred their liabilities to AIA or any of AIA’s other direct or indirect subsidiaries, including in connection with the Cape PLC Acquisition.
43. Before and after the Cape Acquisition, AIA and all of its direct and indirect subsidiaries, including Cape PLC, have maintained their own separate corporate structures, observed corporate formalities, have duly appointed and functioning corporate management and executive officers, have maintained separate corporate records, have maintained appropriate corporate controls and accounting for all financial distributions and payments, have been adequately capitalized to meet their ongoing operational and financial obligations, if any, and in all ways have operated in a manner consistent with their existence as separate corporate entities.
44. Before and after the Cape Acquisition, AIA and all of its direct and indirect subsidiaries, including Cape PLC, have maintained separate bank accounts from each other, have not

commingled assets or funds with each other, have maintained separate books and records from each other, and have maintained appropriate corporate controls and accounting for all financial distributions and payments.

45. Cape PLC and its direct and indirect subsidiaries are distinct business entities with separate corporate structures, separate corporate formalities, and separate financials from its direct and indirect parent companies, including Altrad UK Limited and AIA.
46. AIA has never had any direct or indirect influence or control, or sought to directly or indirectly influence or control, any corporate entity, in a manner that prevents that organization from maintaining its independent existence and corporate structure, observing all corporate formalities, having duly appointed and functioning corporate management and executive officers, maintaining separate corporate records, maintaining appropriate corporate controls and accounting for all financial distributions and payments, being adequately capitalized to meet its ongoing operational and financial obligations, and in all ways operating in a manner consistent with its corporate existence as an independent entity.
47. Since the time of its organization, AIA has maintained its own separate corporate structure, observed all corporate formalities, has duly appointed and functioning corporate management and executive officers, has maintained corporate records, is adequately capitalized to meet its ongoing operational and financial obligations, maintained appropriate corporate controls and accounting for all financial distributions and payments, and in all ways has operated in a manner consistent with its corporate existence as an entity separate and apart from any other corporate entity, including its parent entities.
48. Since the time of its organization, AIA has maintained separate bank accounts from all other entities, has not commingled assets or funds with any other entity, has maintained separate books and records from all other entities, and has maintained appropriate corporate controls and accounting for all financial distributions and payments.

[Continued on next page]

49. AIA is a distinct business entity with a separate corporate structure, separate corporate formalities, and a separate existence from Third-Party Plaintiff Cape PLC and its predecessor or subsidiary companies.

Dated this 29th day of August, 2023.

Richard M Alcock
RICHARD MICHAEL ALCOCK

SWORN TO AND SUBSCRIBED BEFORE ME,
ON THIS THE 29th DAY OF AUGUST, 2023

R B Houlker Notary Public
Notary Public for England and Wales United Kingdom
Commission Expires: On my death
Print Name: Roger Brierley Houlker



Roger Brierley Houlker
Brookhouse Farm Sandy Lane
Swettenham Congleton CW12 2LN
01477 571256

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,

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

Plaintiffs,

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

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 DEFENDANT ESAB
CORPORATION’S MOTION TO
DISMISS THE THIRD-PARTY
COMPLAINT**

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.

COMES NOW, Third-Party Defendant ESAB Corporation (“ESAB”), by and through its undersigned counsel, and moves for an order granting dismissal, pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure, of all counts, claims, and causes of action asserted in the Third-Party Complaint filed by Third Party Plaintiff Cape plc (“Cape”), by and through its Receiver Peter D. Protopapas (the “Receiver”), on the grounds that the Court lacks personal jurisdiction over ESAB. ESAB also moves this Court for an order staying discovery as to ESAB

pending resolution of its motion to dismiss pursuant to Rule 26(c) of the South Carolina Rules of Civil Procedure.

In the alternative, without waiving but instead specifically preserving all of its objections to personal jurisdiction, ESAB moves for an order granting dismissal pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure of all counts, claims, and causes of action asserted in the Third-Party Complaint.

In the second alternative, without waiving but instead specifically preserving all of its objections to personal jurisdiction, ESAB moves for an order striking, severing, and/or staying the Third-Party Complaint.

PRELIMINARY STATEMENT

The Third-Party Complaint should be dismissed because it fails to allege any facts sufficient to support personal jurisdiction over ESAB, a corporation organized under the laws of the Delaware with its principal place of business in Bethesda, Maryland, and without any ties to South Carolina. The Third-Party Complaint should also be dismissed because:

- The Third-Party Complaint impermissibly seeks an advisory opinion from the Court;
- The Receiver (which is separate and distinct from Cape) is not a party to this lawsuit and has taken no action to join it, thereby rendering the Third-Party Complaint procedurally defective;
- The Receiver's attempts to marshal assets located outside South Carolina exceed the scope of its authority;
- The general and conclusory nature of the Third-Party Complaint's causes of action as alleged against ESAB fail to state a claim against it; and

- The Third-Party Complaint fails to state a claim because it does not plead requisite elements of the claims asserted therein.

Finally, an order staying discovery pending resolution of this motion to dismiss is appropriate because good cause exists under Rule 26(c).¹

FACTUAL BACKGROUND

This is an asbestos personal injury action. On April 5, 2023, John A. Tibbs and Margaret B. Tibbs (“Plaintiffs”) filed a Complaint against numerous defendants, including Cape (the “Tibbs Suit”).² Plaintiffs allege that Mr. Tibbs developed lung cancer as a result of his exposure to asbestos during the course of his and his father’s employments with Duke Power Company at various jobsites in South Carolina and North Carolina.³ Plaintiffs allege that Cape “is liable for damages stemming from its own tortious conduct or the tortious conduct of . . . CAPE INDUSTRIES LTD., CAPE ASBESTOS COMPANY LTD., and its subsidiaries and global affiliates.”⁴

On March 17, 2023 in a separate, unrelated asbestos personal injury action, this Court appointed the Receiver over Cape.⁵ The order appointing the Receiver acknowledged the separate

¹ For the alternative relief requested herein, and to the extent ESAB files any other motion or seeks any other form of relief in this action, ESAB does not waive, but instead specifically preserves, its objection to personal jurisdiction in South Carolina. ESAB specifically requests that the Court rule on the present motion to dismiss for lack of personal jurisdiction on an expedited basis and before addressing any of its arguments raised in any other motion or pleading filed in this action, all of which are asserted in the strict alternative to the personal jurisdiction objection, so as to protect ESAB from having to engage in any further litigation with respect to the claims asserted in the Third-Party Complaint in this action.

² Compl. at ¶ 113, *Tibbs v. 3M Co., et al.*, Case No. 2023-CP-40-01759 (Ct. Com. Pl. Apr. 5, 2023).

³ *Id.* at ¶¶ 106-109.

⁴ *Id.* at ¶ 14.

⁵ Order, *Park v. Armstrong Int’l, Inc.*, Case No. 2021-CP-40-02727 (Ct. Com. Pl. Mar. 17, 2023).

status of Cape and the Receiver.⁶ And on June 30, 2023, the Receiver (which itself is not a party to this lawsuit and has taken no action to join it) filed a third-party complaint (the “Third-Party Complaint”) against numerous entities (the “Third-Party Defendants”), including ESAB, alleging that each one is liable to Cape and the Receiver for alleged torts beyond the allegations asserted by Plaintiffs in the underlying action—that Third-Party Defendants “are responsible for the sale and use of asbestos or asbestos-containing products throughout the United States . . . 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. . . . The funds that they or their predecessors in interest have wrongfully diverted should have remained available to bodily-injury claimants in the United States . . . providing additional resources to meet Cape’s obligations to the tens of thousands of individuals harmed.”⁷

The Third-Party Complaint asserts four causes of action that are unrelated to the allegations asserted by Plaintiffs: unjust enrichment, constructive trust, alter ego and veil-piercing liability, and accounting.⁸ The Third-Party Complaint, based on acts that allegedly occurred outside of this country by and between foreign corporations, seeks the following relief:

- “The proper and appropriate remedy under the circumstances here is for the Court to exercise its equitable power and authority to require . . . each . . . Third-Party Defendant[] to return funds that have been wrongfully diverted from meeting

⁶ *Id.* (“The Court further orders that, as the Receiver Court, that the Receiver or Cape may not be sued outside this Court without obtaining the Receiver’s consent or an order of this Court prior to doing so.”)

⁷ Third-Party Compl. at Intro. Stat. and ¶ 134, *Tibbs v. 3M Co., et al.*, Case No. 2023-CP-40-01759 (Ct. Com. Pl. June 30, 2023).

⁸ *Id.* at ¶¶ 125-146.

obligations and responsibilities in the United States, in an amount to be proven at trial”;⁹

- “[T]he proper and appropriate remedy under the circumstances here is for the Court to declare that the Third-Party Defendants are alter egos of Third-Party Plaintiff and thereby liable to Third-Party Plaintiff and/or the Receiver for Asbestos Suits”;¹⁰ and
- “[A] full accounting of each of the Third-Party Defendants.”¹¹

The Third-Party Complaint alleges this Court has jurisdiction over each of the Third-Party Defendants, including ESAB, pursuant to South Carolina’s long-arm statute.¹²

ESAB, however, is not subject to jurisdiction in this Court. ESAB is a corporation organized under the laws of the Delaware with its principal place of business in Bethesda, Maryland.¹³ ESAB has no assets in South Carolina.¹⁴ It does not own, lease, or have any interest whatsoever in any real property in South Carolina; nor does it maintain any bank accounts in South Carolina.¹⁵

Moreover, ESAB currently does not, and has not historically, mined, milled, or sold asbestos in South Carolina.¹⁶ ESAB also currently does not, and has not historically, produced,

⁹ *Id.* at ¶ 130.

¹⁰ *Id.* at ¶ 141.

¹¹ *Id.* at ¶ 145.

¹² *Id.* at ¶¶ 37, 140.

¹³ Affidavit of Rita J. Herring (“Herring Aff.”) at ¶ 4.

¹⁴ *Id.* at ¶ 6.

¹⁵ *Id.* at ¶¶ 7-8.

¹⁶ *Id.* at ¶ 9.

manufactured, or distributed asbestos or asbestos-containing products for use in South Carolina.¹⁷ Furthermore, Cape, is not a subsidiary of ESAB.¹⁸

STANDARD OF REVIEW

When a defendant challenges a trial court’s jurisdiction over it, the plaintiff bears the burden of establishing that personal jurisdiction exists.¹⁹ “The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case.”²⁰ “At the pretrial stage, the burden of proving personal jurisdiction over a nonresident defendant is met by a prima facie showing of jurisdiction either in the complaint or in affidavits.”²¹ Subject matter jurisdiction is a court’s “power to hear and determine cases of the general class to which the proceedings in question belong.”²² When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the plaintiff bears the burden of proving subject-matter jurisdiction.²³ The court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction.²⁴ Here, therefore, the Receiver must present, by affidavit or otherwise, facts showing that this Court has jurisdiction over ESAB and the subject matter with regard to its claims.

In deciding a motion to dismiss for failure to state a claim, the question is whether the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with

¹⁷ *Id.* at ¶ 10.

¹⁸ *Id.* at ¶ 5.

¹⁹ *Moosally v. W. W. Norton & Co.*, 594 S.E.2d 878, 882 (S.C. Ct. App. 2004).

²⁰ *Cockrell v. Hillerich & Bradsby Co.*, 611 S.E.2d 505, 508 (S.C. 2005).

²¹ *Id.*

²² *Simmons v. Simmons*, 634 S.E.2d 1, 3 (S.C. Ct. App. 2006).

²³ *Elridge v. City of Greenwood*, 503 S.E.2d 191, 197 (S.C. Ct. App. 1998).

²⁴ *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 655 S.E.2d 476, 478 (2007).

the court.²⁵ Generally, the trial court must base its ruling solely upon allegations set forth on the face of the complaint.²⁶ Here, viewing the allegations in the light most favorable to the Receiver, the Third-Party Complaint fails to state a claim for relief.

ARGUMENT

The Third-Party Complaint should be dismissed pursuant to Rule (12)(b)(2) or, in the alternative, pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure for the reasons set forth herein.²⁷

MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

First, this Court lacks general personal jurisdiction over ESAB because it is not “essentially at home” in South Carolina. “A state court may exercise general jurisdiction only when a [corporate] defendant is ‘essentially at home’ in the State.”²⁸ A corporate defendant is essentially at home, in turn, in “its place of incorporation and [where it has] a principal place of business.”²⁹ ESAB is not a South Carolina corporation, nor does it maintain a principal place of business in South Carolina. Instead, it is a corporation organized under the laws of Delaware, with its principal

²⁵ *Williams v. Condon*, 553 S.E.2d 496 (S.C. Ct. App. 2001).

²⁶ *Doe v. Marion*, 605 S.E.2d 556, 559 (S.C. Ct. App. 2004), *aff'd* 645 S.E.2d 245 (S.C. 2007).

²⁷ ESAB hereby incorporates by reference and adopts the arguments advanced in the motions to dismiss the Third-Party Complaint filed by other Third-Party Defendants, including but not limited to, the arguments made therein, any memoranda in support, and arguments made orally on the record.

²⁸ *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)); *see also* S.C. Code § 36-2-802 (“A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, doing business, or maintaining his or its principal place of business in, this State as to any cause of action.”).

²⁹ *Id.*

place of business in Bethesda, Maryland.³⁰ Accordingly, ESAB is not “essentially at home” in South Carolina, and this Court therefore lacks general personal jurisdiction over ESAB.

Second, this Court lacks specific personal jurisdiction over ESAB because the claims in the Third-Party Complaint do not arise out of or relate to conduct by ESAB in South Carolina. A court may exercise personal jurisdiction over a corporation as to a cause of action arising from a defendant’s contacts with the state pursuant to the long-arm statute.³¹ “South Carolina’s long-arm statute, which includes the power to exercise personal jurisdiction over causes of action arising from tortious injuries in South Carolina, has been construed to extend to the outer limits of the due process clause.”³² “Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question [with respect to specific personal jurisdiction] becomes whether the exercise of personal jurisdiction would violate due process.”³³ And that inquiry, in turn, asks whether “[t]he plaintiff’s claims . . . arise out of or relate to the defendant’s contacts with the forum.”³⁴

Here, nothing in the Third-Party Complaint plausibly suggests the claims asserted against ESAB arise out of or relate to conduct by ESAB anywhere, let alone in South Carolina. Rather, the claims asserted against ESAB arise out of or relate to conduct by Cape. Cape, however, is an entirely separate and distinct entity from ESAB and is not a subsidiary of ESAB.³⁵ Moreover,

³⁰ Herring Aff. at ¶ 4.

³¹ S.C. Code § 36-2-803(1).

³² *Cockrell v. Hillerich & Bradsby Co.*, 611 S.E.2d 505, 508 (S.C. 2005).

³³ *Id.*

³⁴ *Ford Motor Co.*, 141 S. Ct. at 1025 (internal quotations omitted); *see also* S.C. Code § 36-2-803(2) (permitting a court to exercise personal jurisdiction over a defendant “*only* [with respect to] a cause of action *arising* from [the defendant’s] acts” in or directed to South Carolina) (emphasis added).

³⁵ Herring Aff. at ¶ 5.

ESAB does not currently, and has not historically, mined, milled, sold, or supplied asbestos in South Carolina.³⁶ Likewise, ESAB does not currently, and has not historically, produced, manufactured, or distributed asbestos or asbestos-containing products for use in South Carolina.³⁷ Finally, ESAB has no assets in South Carolina, including no interest in real property in South Carolina, so that cannot provide a basis for the exercise of specific personal jurisdiction in this forum.³⁸ Under these circumstances, the unsupported allegations in the Third-Party Complaint that each of the Third-Party Defendants is subject to this Court’s jurisdiction under the state’s long-arm statute is simply insufficient to establish specific personal jurisdiction.³⁹

ALTERNATIVE GROUNDS FOR DISMISSAL

First, the Third-Party Complaint should be dismissed because it seeks an impermissible, expansive advisory opinion beyond the scope of South Carolina third-party practice. “It is elementary that the courts of this State have no jurisdiction to issue advisory opinions.”⁴⁰ The Third-Party Complaint seeks damages from Third-Party Defendants, including ESAB, despite the

³⁶ *Id.* at ¶ 9.

³⁷ *Id.* at ¶ 10.

³⁸ *Id.* at ¶¶ 6-7.

³⁹ To the extent that the Third-Party Complaint can be interpreted to assert personal jurisdiction over ESAB under a theory that ESAB is the alter ego of Cape—even though the Complaint’s jurisdictional paragraph fails to mention alter ego or corporate veil piercing as a basis for personal jurisdiction (*see* Third-Party Compl. at ¶ 37)—the Court should reject that theory because the Receiver did not plead any facts demonstrating that ESAB failed to follow the appropriate corporate formalities as to Cape. *See ScanSource, Inc. v. Mitel Networks Corp.*, 11-00382, 2011 WL 2550719, at *4 (D.S.C. June 24, 2011) (dismissing claims for lack of personal jurisdiction on alter ego and veil piercing theories as plaintiff “failed to support its allegation that [parent company’s] subsidiaries are merely facades for [its] operations). The Receiver further fails to even allege facts sufficient to establish personal jurisdiction over Cape.

⁴⁰ *Booth v. Grissom*, 217 S.E.2d 223, 224 (S.C. 1975).

absence of any ruling that Cape owes any damages. In the process, it asks this Court to issue mere “guidance” and an improper advisory opinion.⁴¹

Second, the Receiver is exceeding its authority because it seeks to marshal assets of ESAB located outside South Carolina. Under South Carolina law, a Receiver may only seek to marshal an entity’s assets located within South Carolina.⁴² ESAB, however, has no assets in South Carolina.⁴³ Thus, any assets the Receiver might marshal are outside the scope of its authority.

Third, the Receiver is not a party to this action and has taken no action to join it, rendering its purported efforts with respect to the Third-Party Complaint procedurally defective. The Receiver is separate and distinct from Cape.⁴⁴ As a result, the Receiver’s attempt to bring the Third-Party Complaint on behalf of Cape is improper.

Fourth, the Third-Party Complaint contains no allegations specific to ESAB to support the causes of action asserted in the Third-Party Complaint and, accordingly, should be dismissed for failure to state a claim. The allegations in the Third-Party Complaint are general and conclusory, thus failing to satisfy South Carolina’s pleading standards for any of the asserted causes of action and warranting dismissal.⁴⁵

⁴¹ *Richland Cty. Sch. Dist. 2 v. Lucas*, 862 S.E.2d 920, 924 (S.C. 2021).

⁴² S.C. Code § 15-65-10 (4).

⁴³ *Herring Aff.* at ¶ 6.

⁴⁴ *Order, Park v. Armstrong Int’l, Inc.*, Case No. 2021-CP-40-02727 (Ct. Com. Pl. Mar. 17, 2023) (“The Court further orders that, as the Receiver Court, that the Receiver or Cape may not be sued outside this Court without obtaining the Receiver’s consent or an order of this Court prior to doing so.”).

⁴⁵ *See David v. McCleod Regional Med. Ctr.*, 626 S.E.2d 1, 3 (S.C. 2006) (requiring more than “generic allegations and conjecture” to sustain malpractice claim); *Paradis v. Charleston Cty. Sch. Dist.*, 819 S.E.2d 147, 153 (S.C. Ct. App. 2018) (confirming that code pleading is required in South Carolina and that code pleading is not as “lenient” as federal notice pleading); *see also* J. F. Flanagan, S.C. Civ. P. § 8.B. (“[T]he pleader must describe each element of the cause of action in terms of the facts of the case.”).

Fifth, the Third-Party Complaint should be dismissed for failure to state a claim because it does not plead requisite elements of the claims asserted therein. It does not identify any benefit or enrichment received by ESAB from Cape, as needed to support an unjust enrichment claim, nor does it allege that ESAB received money from Cape (inequitably or otherwise) or had a fiduciary duty to Cape as required for a constructive trust claim. Additionally, the Third-Party Complaint fails to state a claim for veil-piercing or alter ego because the facts alleged, even if true, are insufficient to show the requisite domination and control of Cape by ESAB needed to sustain an alter ego or veil piercing claim.⁴⁶

Sixth, the South Carolina Door Closing Statute bars all claims asserted against ESAB because neither Cape nor ESAB is a South Carolina resident, the causes of action asserted in the Third-Party Complaint did not arise within South Carolina, and the subject of the action is not situated within South Carolina.⁴⁷

ALTERNATIVE REQUESTS FOR RELIEF

Alternatively, and to the extent that this Court does not dismiss the Third-Party Complaint as to ESAB, this Court should strike or sever the Third-Party Complaint because the claims

⁴⁶ See *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 152 (3d Cir. 1988) (after trial on the merits directly addressing alter ego allegations, and relying on the same facts alleged in the Third-Party Complaint, determining that the Charter entity through which ESAB is purported to be liable was not the alter ego of Cape because there was “no evidence” that “Charter’s intrusion into Cape’s affairs [was] even constant or day-to-day. Moreover, and significantly, the district court found that ‘[t]he two corporate groups each maintained separate books, records, bank accounts, offices and staff; each consulted their own financial advisors, accountants and stockbrokers.’”); see also *In re Charter Defs.*, 1989 U.S. Dist. LEXIS 15591 (E.D. Pa. May 18, 1989) (dismissing all claims, cross-claims, and third-party claims asserted against Charter in all cases pending in the Eastern District of Pennsylvania because Charter is not the alter ego of Cape); *Culbreth v. Amosa, Ltd.*, 898 F.2d 13 (3d Cir. 1990) (affirming summary judgment dismissal because Charter is not the alter ego of Cape); *Simmons v. AC&S, Inc.*, No. 84-1170 (W.D. Ark. June 4, 1985) (granting motion to dismiss for lack of personal jurisdiction because Charter is not the alter ego of Cape).

⁴⁷ See S.C. Code Ann. § 15-5-150.

asserted are unrelated to Plaintiffs' claims. A third-party complaint "must be derivative of the plaintiff's claim because [d]erivative liability is central to the operation of Rule 14. It is not sufficient that the third-party claim is a related claim; *the claim must be derivatively based on the original plaintiff's claim.*"⁴⁸ Because none of the causes of action asserted in the Third-Party Complaint seeks a determination that ESAB is liable for indemnification or any other claim that is alleged to be dependent on the outcome of Plaintiffs' claims against Cape in the Tibbs Suit, the Third-Party Complaint should be stricken or severed into a separate action.⁴⁹

Under these circumstances, an order staying the third-party action against ESAB, including all discovery, pending resolution of this motion is appropriate because "good cause" exists under Rule 26(c) of the South Carolina Rules of Civil Procedure. This motion presents issues that are potentially dispositive of this entire action. Under these circumstances, requiring ESAB to respond to discovery requests "would be unduly burdensome," thus warranting a stay.⁵⁰

⁴⁸ *Johnson v. M.I. Windows & Doors, Inc.*, 11- 0167, 2012 WL 1015798 at *2 (D.S.C. Mar. 23, 2012) (emphasis in original) (internal citations and quotations omitted); *Laughlin v. Dell. Fin. Servs., L.P.*, 465 F. Supp. 2d 563, 566 (D.S.C. 2006); *CNH Indust. Capital Am. LLC v. Able Contracting, Inc.*, No. 9:16-cv-2520-RMG, 2017 WL 512453, at *1 (D.S.C. Feb. 7, 2017) (holding a third-party complaint "must involve an attempt to pass on to the third party all or part of the liability asserted against the defendant. . . . An impleader claim may not be used to assert any and all rights to recovery arising from the same transaction or occurrence as the underlying action") (internal quotations omitted).

⁴⁹ Even if the claims against ESAB satisfied the requirements of Rule 14, the Third-Party Complaint's joinder of such claims with the claims against other Third-Party Defendants and other parties would be improper under Rule 20. The claims against these parties are not all alleged to arise out of the same transaction, occurrence, or series of transactions or occurrences. *See Thomas v. Tramaine-Frost*, 16-1266, 2017 WL 9287004, at *2 (D.S.C. Jan. 12, 2017); *Todd v. Cary's Lake Homeowners Assoc.*, 315 F.R.D. 453, 457-58 (D.S.C. 2016); *Cramer v. Walley*, 14-03857, 2015 WL 3968155, at *4-5 (D.S.C. June 30, 2015).

⁵⁰ *Cuyler v. Dep't of Army*, 08-3261, 2009 WL 1749604, at *2 (D.S.C. June 22, 2009); *see also Petrus v. Bowen*, 833 F.2d 581 (5th Cir. 1987) ("A trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined.").

Furthermore, if the claims against ESAB are not dismissed or stricken, ESAB asks that the Court stay the third-party action until the claims by Plaintiffs against Cape are resolved. It would be inefficient and a waste of judicial resources to litigate issues dependent on the outcome of the Plaintiffs' claims in the Tibbs Suit before that action is resolved. To conduct this litigation in the most efficient manner, this Court should at a minimum stay the Third-Party Complaint and/or the claims against ESAB until the Plaintiffs' claims are resolved.⁵¹

CONCLUSION

For the reasons stated above, ESAB respectfully requests the Court dismiss the Third-Party Complaint over ESAB pursuant to Rule 12(b)(1), Rule 12(b)(2), and Rule 12(b)(6) of the South Carolina Rules of Civil Procedure and issue an order staying discovery pending resolution of its motion pursuant to Rule 26(c) of the South Carolina Rules of Civil Procedure.

This motion is based upon the attached affidavit, the memorandum of support to be filed later, the statutes and case law of the State of South Carolina and other jurisdictions, the pleadings filed in this matter, and such other material as may be properly received by the Court in connection therewith.

⁵¹ Courts have broad discretion to stay proceedings as part of their inherent power to control their dockets and the order of the Court's business to safeguard the rights of litigants. *See Williams v. Bordon's, Inc.*, 274 S.C. 275, 279 (1980).

Dated: September 1, 2023

GORDON REES SCULLY MANSUKHANI, LLP

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A. Victor Rawl, Jr. (SC 09261)
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*Counsel for Third-Party Defendant ESAB
Corporation*

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,

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

Plaintiffs,

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

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,

**AFFIDAVIT IN SUPPORT OF
THIRD-PARTY DEFENDANT'S
MOTION TO DISMISS THE THIRD-
PARTY COMPLAINT**

Third-Party Plaintiff,

v.

ESAB CORPORATION, et al.,

Third-Party Defendants.

**Personally appeared before me Rita J. Herring, who being duly sworn, deposes and
says:**

1. My name is Rita J. Herring. I am a resident of Illinois. I am over twenty-one (21) years old, of sound mind, and fully competent to make this affidavit.

2. I am a Senior Corporate Paralegal and International Compliance Analyst with The ESAB Group Inc. I have personal and firsthand knowledge of the matters set forth in this affidavit and believe them to be true and accurate. If called upon to testify, I could competently do so.

3. ESAB Corporation is a publicly traded, world-class manufacturing technology company.

4. ESAB Corporation is a corporation organized under the laws of the State of Delaware and has its principal place of business in Bethesda, Maryland.
5. Cape plc is not a subsidiary of ESAB Corporation.
6. ESAB Corporation has no assets in the State of South Carolina.
7. ESAB Corporation does not own, lease, or have any interest whatsoever in any real property in the State of South Carolina.
8. ESAB Corporation does not maintain any bank accounts in the State of South Carolina.
9. ESAB Corporation has never mined, milled, or sold asbestos in the State of South Carolina.
10. ESAB Corporation has never produced, manufactured, or distributed asbestos or asbestos-containing products for use in the State of South Carolina.
11. I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted on this 31st day of August 2023.



AFFIANT SIGNATURE

Rita J. Herring

PRINTED NAME

On Behalf of ESAB Corporation

Senior Corporate Paralegal and International
Compliance Analyst, The ESAB Group Inc.

The foregoing instrument was acknowledged before me this 31st day of August 2023 by _____, of
The ESAB Group Inc. on behalf of ESAB Corporation.

Diana L. Trunnell

(Signature of Person Taking Acknowledgment)

Notary

(Title or Rank)

(Serial Number, if any)



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,

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

Plaintiffs,

In Re:
Asbestos Personal Injury Litigation
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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 DEFENDANT
CENTRAL MINING AND
INVESTMENT CORPORATION
LTD.’S MOTION TO DISMISS THE
THIRD-PARTY COMPLAINT**

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.

COMES NOW, Third-Party Defendant Central Mining and Investment Corporation Ltd. (“Central Mining”), by and through its undersigned counsel, and moves for an order granting dismissal, pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure, of all counts, claims, and causes of action asserted in the Third-Party Complaint filed by Third Party Plaintiff Cape plc (“Cape”), by and through its Receiver Peter D. Protopapas (the “Receiver”), on the grounds that the Court lacks personal jurisdiction over Central Mining. Central Mining also moves

this Court for an order staying discovery as to Central Mining pending resolution of its motion to dismiss pursuant to Rule 26(c) of the South Carolina Rules of Civil Procedure.

In the alternative, without waiving but instead specifically preserving all of its objections to personal jurisdiction, Central Mining moves for an order granting dismissal pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure of all counts, claims, and causes of action asserted in the Third-Party Complaint.

In the second alternative, without waiving but instead specifically preserving all of its objections to personal jurisdiction, Central Mining moves for an order striking, severing, and/or staying the Third-Party Complaint.

PRELIMINARY STATEMENT

The Third-Party Complaint should be dismissed because it fails to allege any facts sufficient to support personal jurisdiction over Central Mining, a corporation organized under the laws of the United Kingdom with its principal place of business in Essex, England, and without any ties to South Carolina. The Third-Party Complaint should also be dismissed because:

- The Third-Party Complaint impermissibly seeks an advisory opinion from the Court;
- The Receiver (which is separate and distinct from Cape) is not a party to this lawsuit and has taken no action to join it, thereby rendering the Third-Party Complaint procedurally defective;
- The Receiver's attempts to marshal assets located outside South Carolina exceed the scope of its authority;
- The general and conclusory nature of the Third-Party Complaint's causes of action as alleged against Central Mining fail to state a claim against it; and

- The Third-Party Complaint fails to state a claim because it does not plead requisite elements of the claims asserted therein.

Finally, an order staying discovery pending resolution of this motion to dismiss is appropriate because good cause exists under Rule 26(c).¹

FACTUAL BACKGROUND

This is an asbestos personal injury action. On April 5, 2023, John A. Tibbs and Margaret B. Tibbs (“Plaintiffs”) filed a Complaint against numerous defendants, including Cape (the “Tibbs Suit”).² Plaintiffs allege that Mr. Tibbs developed lung cancer as a result of his exposure to asbestos during the course of his and his father’s employments with Duke Power Company at various jobsites in South Carolina and North Carolina.³ Plaintiffs allege that Cape “is liable for damages stemming from its own tortious conduct or the tortious conduct of . . . CAPE INDUSTRIES LTD., CAPE ASBESTOS COMPANY LTD., and its subsidiaries and global affiliates.”⁴

On March 17, 2023 in a separate, unrelated asbestos personal injury action, this Court appointed the Receiver over Cape.⁵ The order appointing the Receiver acknowledged the separate

¹ For the alternative relief requested herein, and to the extent Central Mining files any other motion or seeks any other form of relief in this action, Central Mining does not waive, but instead specifically preserves, its objection to personal jurisdiction in South Carolina. Central Mining specifically requests that the Court rule on the present motion to dismiss for lack of personal jurisdiction on an expedited basis and before addressing any of its arguments raised in any other motion or pleading filed in this action, all of which are asserted in the strict alternative to the personal jurisdiction objection, so as to protect Central Mining from having to engage in any further litigation with respect to the claims asserted in the Third-Party Complaint in this action.

² Compl. at ¶ 113, *Tibbs v. 3M Co., et al.*, Case No. 2023-CP-40-01759 (Ct. Com. Pl. Apr. 5, 2023).

³ *Id.* at ¶¶ 106-109.

⁴ *Id.* at ¶ 14.

⁵ Order, *Park v. Armstrong Int’l, Inc.*, Case No. 2021-CP-40-02727 (Ct. Com. Pl. Mar. 17, 2023).

status of Cape and the Receiver.⁶ And on June 30, 2023, the Receiver (which itself is not a party to this lawsuit and has taken no action to join it) filed a third-party complaint (the “Third-Party Complaint”) against numerous entities (the “Third-Party Defendants”), including Central Mining, alleging that each one is liable to Cape and the Receiver for alleged torts beyond the allegations asserted by Plaintiffs in the underlying action—that Third-Party Defendants “are responsible for the sale and use of asbestos or asbestos-containing products throughout the United States . . . 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. . . . The funds that they or their predecessors in interest have wrongfully diverted should have remained available to bodily-injury claimants in the United States . . . providing additional resources to meet Cape’s obligations to the tens of thousands of individuals harmed.”⁷

The Third-Party Complaint asserts four causes of action that are unrelated to the allegations asserted by Plaintiffs: unjust enrichment, constructive trust, alter ego and veil-piercing liability, and accounting.⁸ The Third-Party Complaint, based on acts that allegedly occurred outside of this country by and between foreign corporations, seeks the following relief:

- “The proper and appropriate remedy under the circumstances here is for the Court to exercise its equitable power and authority to require . . . each . . . Third-Party Defendant[] to return funds that have been wrongfully diverted from meeting

⁶ *Id.* (“The Court further orders that, as the Receiver Court, that the Receiver or Cape may not be sued outside this Court without obtaining the Receiver’s consent or an order of this Court prior to doing so.”)

⁷ Third-Party Compl. at Intro. Statement and ¶ 134, *Tibbs v. 3M Co., et al.*, Case No. 2023-CP-40-01759 (Ct. Com. Pl. June 30, 2023).

⁸ *Id.* at ¶¶ 125-146.

obligations and responsibilities in the United States, in an amount to be proven at trial”;⁹

- “[T]he proper and appropriate remedy under the circumstances here is for the Court to declare that the Third-Party Defendants are alter egos of Third-Party Plaintiff and thereby liable to Third-Party Plaintiff and/or the Receiver for Asbestos Suits”;¹⁰ and
- “[A] full accounting of each of the Third-Party Defendants.”¹¹

The Third-Party Complaint alleges this Court has jurisdiction over each of the Third-Party Defendants, including Central Mining, pursuant to South Carolina’s long-arm statute.¹²

Central Mining, however, is not subject to jurisdiction in this Court. Central Mining is a corporation organized under the laws of the United Kingdom with its principal place of business in Essex.¹³ Central Mining has no assets in South Carolina.¹⁴ It does not own, lease, or have any interest whatsoever in any real property in South Carolina; nor does it maintain any bank accounts in South Carolina.¹⁵

Moreover, Central Mining currently does not, and has not historically, mined, milled, or sold asbestos in South Carolina.¹⁶ Central Mining also currently does not, and has not historically,

⁹ *Id.* at ¶ 130.

¹⁰ *Id.* at ¶ 141.

¹¹ *Id.* at ¶ 145.

¹² *Id.* at ¶¶ 37, 140.

¹³ Affidavit of Rita J. Herring (“Herring Aff.”) at ¶ 5.

¹⁴ *Id.* at ¶ 6.

¹⁵ *Id.* at ¶¶ 7-8.

¹⁶ *Id.* at ¶ 9.

produced, manufactured, or distributed asbestos or asbestos-containing products for use in South Carolina.¹⁷ Furthermore, Cape, is not a subsidiary of Central Mining.¹⁸

STANDARD OF REVIEW

When a defendant challenges a trial court’s jurisdiction over it, the plaintiff bears the burden of establishing that personal jurisdiction exists.¹⁹ “The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case.”²⁰ “At the pretrial stage, the burden of proving personal jurisdiction over a nonresident defendant is met by a prima facie showing of jurisdiction either in the complaint or in affidavits.”²¹ Subject matter jurisdiction is a court’s “power to hear and determine cases of the general class to which the proceedings in question belong.”²² When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the plaintiff bears the burden of proving subject-matter jurisdiction.²³ The court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction.²⁴ Here, therefore, the Receiver must present, by affidavit or otherwise, facts showing that this Court has jurisdiction over Central Mining and the subject matter with regard to its claims.

In deciding a motion to dismiss for failure to state a claim, the question is whether the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with

¹⁷ *Id.* at ¶ 10.

¹⁸ *Id.* at ¶ 4.

¹⁹ *Moosally v. W. W. Norton & Co.*, 594 S.E.2d 878, 882 (S.C. Ct. App. 2004).

²⁰ *Cockrell v. Hillerich & Bradsby Co.*, 611 S.E.2d 505, 508 (S.C. 2005).

²¹ *Id.*

²² *Simmons v. Simmons*, 634 S.E.2d 1, 3 (S.C. Ct. App. 2006).

²³ *Elridge v. City of Greenwood*, 503 S.E.2d 191, 197 (S.C. Ct. App. 1998).

²⁴ *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 655 S.E.2d 476, 478 (2007).

the court.²⁵ Generally, the trial court must base its ruling solely upon allegations set forth on the face of the complaint.²⁶ Here, viewing the allegations in the light most favorable to the Receiver, the Third-Party Complaint fails to state a claim for relief.

ARGUMENT

The Third-Party Complaint should be dismissed pursuant to Rule (12)(b)(2) or, in the alternative, pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure for the reasons set forth herein.²⁷

MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

First, this Court lacks general personal jurisdiction over Central Mining because it is not “essentially at home” in South Carolina. “A state court may exercise general jurisdiction only when a [corporate] defendant is ‘essentially at home’ in the State.”²⁸ A corporate defendant is essentially at home, in turn, in “its place of incorporation and [where it has] a principal place of business.”²⁹ Central Mining is not a South Carolina corporation, nor does it maintain a principal place of business in South Carolina. Instead, it is a corporation organized under the laws of England, United Kingdom, with its principal place of business in Essex, England, United

²⁵ *Williams v. Condon*, 553 S.E.2d 496 (S.C. Ct. App. 2001).

²⁶ *Doe v. Marion*, 605 S.E.2d 556, 559 (S.C. Ct. App. 2004), *aff’d* 645 S.E.2d 245 (S.C. 2007).

²⁷ Central Mining hereby incorporates by reference and adopts the arguments advanced in the motions to dismiss the Third-Party Complaint filed by other Third-Party Defendants, including but not limited to, the arguments made therein, any memoranda in support, and arguments made orally on the record.

²⁸ *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)); *see also* S.C. Code § 36-2-802 (“A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, doing business, or maintaining his or its principal place of business in, this State as to any cause of action.”).

²⁹ *Id.*

Kingdom.³⁰ Accordingly, Central Mining is not “essentially at home” in South Carolina, and this Court therefore lacks general personal jurisdiction over Central Mining.

Second, this Court lacks specific personal jurisdiction over Central Mining because the claims in the Third-Party Complaint do not arise out of or relate to conduct by Central Mining in South Carolina. A court may exercise personal jurisdiction over a corporation as to a cause of action arising from a defendant’s contacts with the state pursuant to the long-arm statute.³¹ “South Carolina’s long-arm statute, which includes the power to exercise personal jurisdiction over causes of action arising from tortious injuries in South Carolina, has been construed to extend to the outer limits of the due process clause.”³² “Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question [with respect to specific personal jurisdiction] becomes whether the exercise of personal jurisdiction would violate due process.”³³ And that inquiry, in turn, asks whether “[t]he plaintiff’s claims . . . arise out of or relate to the defendant’s contacts with the forum.”³⁴

Here, nothing in the Third-Party Complaint plausibly suggests the claims asserted against Central Mining arise out of or relate to conduct by Central Mining anywhere, let alone in South Carolina. Rather, the claims asserted against Central Mining arise out of or relate to conduct by Cape. Cape, however, is an entirely separate and distinct entity from Central Mining and is not a

³⁰ Herring Aff. at ¶ 5.

³¹ S.C. Code § 36-2-803(1).

³² *Cockrell v. Hillerich & Bradsby Co.*, 611 S.E.2d 505, 508 (S.C. 2005).

³³ *Id.*

³⁴ *Ford Motor Co.*, 141 S. Ct. at 1025 (internal quotations omitted); *see also* S.C. Code § 36-2-803(2) (permitting a court to exercise personal jurisdiction over a defendant “*only* [with respect to] a cause of action *arising* from [the defendant’s] acts” in or directed to South Carolina) (emphasis added).

subsidiary of Central Mining.³⁵ Moreover, Central Mining does not currently, and has not historically, mined, milled, sold, or supplied asbestos in South Carolina.³⁶ Likewise, Central Mining does not currently, and has not historically, produced, manufactured, or distributed asbestos or asbestos-containing products for use in South Carolina.³⁷ Finally, Central Mining has no assets in South Carolina, including no interest in real property in South Carolina, so that cannot provide a basis for the exercise of specific personal jurisdiction in this forum.³⁸ Under these circumstances, the unsupported allegations in the Third-Party Complaint that each of the Third-Party Defendants is subject to this Court’s jurisdiction under the state’s long-arm statute is simply insufficient to establish specific personal jurisdiction.³⁹

³⁵ Herring Aff. at ¶ 4.

³⁶ *Id.* at ¶ 9.

³⁷ *Id.* at ¶ 10.

³⁸ *Id.* at ¶¶ 6-7.

³⁹ To the extent that the Third-Party Complaint can be interpreted to assert personal jurisdiction over Central Mining under a theory that Central Mining is the alter ego of Cape—even though the Complaint’s jurisdictional paragraph fails to mention alter ego or corporate veil piercing as a basis for personal jurisdiction (*see* Third-Party Compl. at ¶ 37)—the Court should reject that theory because the Receiver did not plead any facts demonstrating that Central Mining failed to follow the appropriate corporate formalities as to Cape. *See ScanSource, Inc. v. Mitel Networks Corp.*, 11-00382, 2011 WL 2550719, at *4 (D.S.C. June 24, 2011) (dismissing claims for lack of personal jurisdiction on alter ego and veil piercing theories as plaintiff “failed to support its allegation that [parent company’s] subsidiaries are merely facades for [its] operations). The Receiver further fails to even allege facts sufficient to establish personal jurisdiction over Cape.

ALTERNATIVE GROUNDS FOR DISMISSAL

First, the Third-Party Complaint should be dismissed because it seeks an impermissible, expansive advisory opinion beyond the scope of South Carolina third-party practice. “It is elementary that the courts of this State have no jurisdiction to issue advisory opinions.”⁴⁰ The Third-Party Complaint seeks damages from Third-Party Defendants, including Central Mining, despite the absence of any ruling that Cape owes any damages. In the process, it asks this Court to issue mere “guidance” and an improper advisory opinion.⁴¹

Second, the Receiver is exceeding its authority because it seeks to marshal assets of Central Mining located outside South Carolina. Under South Carolina law, a Receiver may only seek to marshal an entity’s assets located within South Carolina.⁴² Central Mining, however, has no assets in South Carolina.⁴³ Thus, any assets the Receiver might marshal are outside the scope of its authority.

Third, the Receiver is not a party to this action and has taken no action to join it, rendering its purported efforts with respect to the Third-Party Complaint procedurally defective. The Receiver is separate and distinct from Cape.⁴⁴ As a result, the Receiver’s attempt to bring the Third-Party Complaint on behalf of Cape is improper.

⁴⁰ *Booth v. Grissom*, 217 S.E.2d 223, 224 (S.C. 1975).

⁴¹ *Richland Cty. Sch. Dist. 2 v. Lucas*, 862 S.E.2d 920, 924 (S.C. 2021).

⁴² S.C. Code § 15-65-10 (4).

⁴³ Herring Aff. at ¶ 6.

⁴⁴ Order, *Park v. Armstrong Int’l, Inc.*, Case No. 2021-CP-40-02727 (Ct. Com. Pl. Mar. 17, 2023) (“The Court further orders that, as the Receiver Court, that the Receiver or Cape may not be sued outside this Court without obtaining the Receiver’s consent or an order of this Court prior to doing so.”).

Fourth, the Third-Party Complaint contains no allegations specific to Central Mining to support the causes of action asserted in the Third-Party Complaint and, accordingly, should be dismissed for failure to state a claim. The allegations in the Third-Party Complaint are general and conclusory, thus failing to satisfy South Carolina's pleading standards for any of the asserted causes of action and warranting dismissal.⁴⁵

Fifth, the Third-Party Complaint should be dismissed for failure to state a claim because it does not plead requisite elements of the claims asserted therein. It does not identify any benefit or enrichment received by Central Mining from Cape, as needed to support an unjust enrichment claim, nor does it allege that Central Mining received money from Cape (inequitably or otherwise) or had a fiduciary duty to Cape as required for a constructive trust claim. Additionally, the Third-Party Complaint fails to state a claim for veil-piercing or alter ego because the facts alleged, even if true, are insufficient to show the requisite domination and control of Cape by Central Mining needed to sustain an alter ego or veil piercing claim.⁴⁶

⁴⁵ See *David v. McCleod Regional Med. Ctr.*, 626 S.E.2d 1, 3 (S.C. 2006) (requiring more than “generic allegations and conjecture” to sustain malpractice claim); *Paradis v. Charleston Cty. Sch. Dist.*, 819 S.E.2d 147, 153 (S.C. Ct. App. 2018) (confirming that code pleading is required in South Carolina and that code pleading is not as “lenient” as federal notice pleading); see also J. F. Flanagan, S.C. Civ. P. § 8.B. (“[T]he pleader must describe each element of the cause of action in terms of the facts of the case.”).

⁴⁶ See *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 152 (3d Cir. 1988) (after trial on the merits directly addressing alter ego allegations, and relying on the same facts alleged in the Third-Party Complaint, determining that the Charter entity through which Central Mining is purported to be liable was not the alter ego of Cape because there was “no evidence” that “Charter’s intrusion into Cape’s affairs [was] even constant or day-to-day. Moreover, and significantly, the district court found that ‘[t]he two corporate groups each maintained separate books, records, bank accounts, offices and staff; each consulted their own financial advisors, accountants and stockbrokers.’”); see also *In re Charter Defs.*, 1989 U.S. Dist. LEXIS 15591 (E.D. Pa. May 18, 1989) (dismissing all claims, cross-claims, and third-party claims asserted against Charter in all cases pending in the Eastern District of Pennsylvania because Charter is not the alter ego of Cape); *Culbreth v. Aмоса, Ltd.*, 898 F.2d 13 (3d Cir. 1990) (affirming summary judgment dismissal because Charter is not the alter ego of Cape); *Simmons v. AC&S, Inc.*, No. 84-1170 (W.D. Ark.

Sixth, the South Carolina Door Closing Statute bars all claims asserted against Central Mining because neither Cape nor Central Mining is a South Carolina resident, the causes of action asserted in the Third-Party Complaint did not arise within South Carolina, and the subject of the action is not situated within South Carolina.⁴⁷

ALTERNATIVE REQUESTS FOR RELIEF

Alternatively, and to the extent that this Court does not dismiss the Third-Party Complaint as to Central Mining, this Court should strike or sever the Third-Party Complaint because the claims asserted are unrelated to Plaintiffs' claims. A third-party complaint "must be derivative of the plaintiff's claim because [d]erivative liability is central to the operation of Rule 14. It is not sufficient that the third-party claim is a related claim; *the claim must be derivatively based on the original plaintiff's claim.*"⁴⁸ Because none of the causes of action asserted in the Third-Party Complaint seeks a determination that Central Mining is liable for indemnification or any other claim that is alleged to be dependent on the outcome of Plaintiffs' claims against Cape in the Tibbs Suit, the Third-Party Complaint should be stricken or severed into a separate action.⁴⁹

June 4, 1985) (granting motion to dismiss for lack of personal jurisdiction because Charter is not the alter ego of Cape).

⁴⁷ See S.C. Code Ann. § 15-5-150.

⁴⁸ *Johnson v. M.I. Windows & Doors, Inc.*, 11- 0167, 2012 WL 1015798 at *2 (D.S.C. Mar. 23, 2012) (emphasis in original) (internal citations and quotations omitted); *Laughlin v. Dell. Fin. Servs., L.P.*, 465 F. Supp. 2d 563, 566 (D.S.C. 2006); *CNH Indust. Capital Am. LLC v. Able Contracting, Inc.*, No. 9:16-cv-2520-RMG, 2017 WL 512453, at *1 (D.S.C. Feb. 7, 2017) (holding a third-party complaint "must involve an attempt to pass on to the third party all or part of the liability asserted against the defendant. . . . An impleader claim may not be used to assert any and all rights to recovery arising from the same transaction or occurrence as the underlying action") (internal quotations omitted).

⁴⁹ Even if the claims against Central Mining satisfied the requirements of Rule 14, the Third-Party Complaint's joinder of such claims with the claims against other Third-Party Defendants and other parties would be improper under Rule 20. The claims against these parties are not all alleged to arise out of the same transaction, occurrence, or series of transactions or occurrences. See *Thomas v. Tramaine-Frost*, 16-1266, 2017 WL 9287004, at *2 (D.S.C. Jan. 12, 2017); *Todd v. Cary's Lake*

Under these circumstances, an order staying the third-party action against Central Mining, including all discovery, pending resolution of this motion is appropriate because “good cause” exists under Rule 26(c) of the South Carolina Rules of Civil Procedure. This motion presents issues that are potentially dispositive of this entire action. Under these circumstances, requiring Central Mining to respond to discovery requests “would be unduly burdensome,” thus warranting a stay.⁵⁰

Furthermore, if the claims against Central Mining are not dismissed or stricken, Central Mining asks that the Court stay the third-party action until the claims by Plaintiffs against Cape are resolved. It would be inefficient and a waste of judicial resources to litigate issues dependent on the outcome of the Plaintiffs’ claims in the Tibbs Suit before that action is resolved. To conduct this litigation in the most efficient manner, this Court should at a minimum stay the Third-Party Complaint and/or the claims against Central Mining until the Plaintiffs’ claims are resolved.⁵¹

Homeowners Assoc., 315 F.R.D. 453, 457-58 (D.S.C. 2016); *Cramer v. Walley*, 14-03857, 2015 WL 3968155, at *4-5 (D.S.C. June 30, 2015).

⁵⁰ *Cuyler v. Dep’t of Army*, 08-3261, 2009 WL 1749604, at *2 (D.S.C. June 22, 2009); *see also Petrus v. Bowen*, 833 F.2d 581 (5th Cir. 1987) (“A trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined.”).

⁵¹ Courts have broad discretion to stay proceedings as part of their inherent power to control their dockets and the order of the Court’s business to safeguard the rights of litigants. *See Williams v. Bordon's, Inc.*, 274 S.C. 275, 279 (1980).

CONCLUSION

For the reasons stated above, Central Mining respectfully requests the Court dismiss the Third-Party Complaint over Central Mining pursuant to Rule 12(b)(1), Rule 12(b)(2), and Rule 12(b)(6) of the South Carolina Rules of Civil Procedure and issue an order staying discovery pending resolution of its motion pursuant to Rule 26(c) of the South Carolina Rules of Civil Procedure.

This motion is based upon the attached affidavit, the memorandum of support to be filed later, the statutes and case law of the State of South Carolina and other jurisdictions, the pleadings filed in this matter, and such other material as may be properly received by the Court in connection therewith.

Dated: September 1, 2023

GORDON REES SCULLY MANSUKHANI, LLP

BY: s/ A. Victor Rawl, Jr.
A. Victor Rawl, Jr. (SC 09261)
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*Counsel for Third-Party Defendant
Central Mining and Investment
Corporation Ltd.*

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,

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

Plaintiffs,

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

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,

**AFFIDAVIT IN SUPPORT OF
THIRD-PARTY DEFENDANT'S
MOTION TO DISMISS THE THIRD-
PARTY COMPLAINT**

Third-Party Plaintiff,

v.

CENTRAL MINING AND INVESTMENT
CORPORATION LTD., et al.,

Third-Party Defendants.

**Personally appeared before me Rita J. Herring, who being duly sworn, deposes and
says:**

1. My name is Rita J. Herring. I am a resident of Illinois. I am over twenty-one (21) years old, of sound mind, and fully competent to make this affidavit.
2. I am a Senior Corporate Paralegal and International Compliance Analyst with The ESAB Group Inc. I have personal and firsthand knowledge of the matters set forth in this affidavit and believe them to be true and accurate. If called upon to testify, I could competently do so.

3. Central Mining and Investment Corporation Ltd. is an indirectly wholly-owned subsidiary of ESAB Corporation.

4. Cape plc is not a subsidiary of Central Mining and Investment Corporation Ltd.

5. Central Mining and Investment Corporation Ltd. is a corporation organized under the laws of England, United Kingdom, with its principal place of business in Essex, England, United Kingdom.

6. Central Mining and Investment Corporation Ltd. has no assets in the State of South Carolina

7. Central Mining and Investment Corporation Ltd. does not own, lease, or have any interest whatsoever in any real property in the State of South Carolina.

8. Central Mining and Investment Corporation Ltd. does not maintain any bank accounts in the State of South Carolina.

9. Central Mining and Investment Corporation Ltd. has never mined, milled, or sold asbestos in the State of South Carolina.

10. Central Mining and Investment Corporation Ltd. has never produced, manufactured, or distributed asbestos or asbestos-containing products for use in the State of South Carolina.

11. I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted on this 31st day of August 2023.



AFFIANT SIGNATURE

Rita J. Herring

PRINTED NAME

On Behalf of Central Mining and Investment Corporation Ltd.

Senior Corporate Paralegal and International Compliance Analyst, The ESAB Group Inc.

The foregoing instrument was acknowledged before me this 31st day of August 2023 by _____, of The ESAB Group Inc. on behalf of Central Mining and Investment Corporation Ltd.

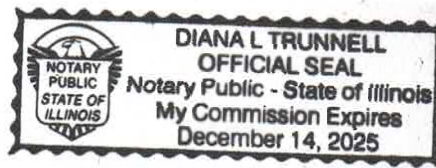
Diana L. Trunnell

(Signature of Person Taking Acknowledgment)

Notary

(Title or Rank)

(Serial Number, if any)



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,

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

Plaintiffs,

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

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 DEFENDANT
CHARTER CONSOLIDATED
LTD.’S MOTION TO DISMISS THE
THIRD-PARTY COMPLAINT**

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.

COMES NOW, Third-Party Defendant Charter Consolidated Ltd. (“Charter Consolidated”), by and through its undersigned counsel, and moves for an order granting dismissal, pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure, of all counts, claims, and causes of action asserted in the Third-Party Complaint filed by Third Party Plaintiff Cape plc (“Cape”), by and through its Receiver Peter D. Protopapas (the “Receiver”), on the grounds that the Court lacks personal jurisdiction over Charter Consolidated. Charter Consolidated

also moves this Court for an order staying discovery as to Charter Consolidated pending resolution of its motion to dismiss pursuant to Rule 26(c) of the South Carolina Rules of Civil Procedure.

In the alternative, without waiving but instead specifically preserving all of its objections to personal jurisdiction, Charter Consolidated moves for an order granting dismissal pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure of all counts, claims, and causes of action asserted in the Third-Party Complaint.

In the second alternative, without waiving but instead specifically preserving all of its objections to personal jurisdiction, Charter Consolidated moves for an order striking, severing, and/or staying the Third-Party Complaint.

PRELIMINARY STATEMENT

The Third-Party Complaint should be dismissed because it fails to allege any facts sufficient to support personal jurisdiction over Charter Consolidated, a corporation organized under the laws of the United Kingdom with its principal place of business in Essex, England, and without any ties to South Carolina. The Third-Party Complaint should also be dismissed because:

- The Third-Party Complaint impermissibly seeks an advisory opinion from the Court;
- The Receiver (which is separate and distinct from Cape) is not a party to this lawsuit and has taken no action to join it, thereby rendering the Third-Party Complaint procedurally defective;
- The Receiver's attempts to marshal assets located outside South Carolina exceed the scope of its authority;
- The general and conclusory nature of the Third-Party Complaint's causes of action as alleged against Charter Consolidated fail to state a claim against it; and

- The Third-Party Complaint fails to state a claim because it does not plead requisite elements of the claims asserted therein.

Finally, an order staying discovery pending resolution of this motion to dismiss is appropriate because good cause exists under Rule 26(c).¹

FACTUAL BACKGROUND

This is an asbestos personal injury action. On April 5, 2023, John A. Tibbs and Margaret B. Tibbs (“Plaintiffs”) filed a Complaint against numerous defendants, including Cape (the “Tibbs Suit”).² Plaintiffs allege that Mr. Tibbs developed lung cancer as a result of his exposure to asbestos during the course of his and his father’s employments with Duke Power Company at various jobsites in South Carolina and North Carolina.³ Plaintiffs allege that Cape “is liable for damages stemming from its own tortious conduct or the tortious conduct of . . . CAPE INDUSTRIES LTD., CAPE ASBESTOS COMPANY LTD., and its subsidiaries and global affiliates.”⁴

On March 17, 2023 in a separate, unrelated asbestos personal injury action, this Court appointed the Receiver over Cape.⁵ The order appointing the Receiver acknowledged the separate

¹ For the alternative relief requested herein, and to the extent Charter Consolidated files any other motion or seeks any other form of relief in this action, Charter Consolidated does not waive, but instead specifically preserves, its objection to personal jurisdiction in South Carolina. Charter Consolidated specifically requests that the Court rule on the present motion to dismiss for lack of personal jurisdiction on an expedited basis and before addressing any of its arguments raised in any other motion or pleading filed in this action, all of which are asserted in the strict alternative to the personal jurisdiction objection, so as to protect Charter Consolidated from having to engage in any further litigation with respect to the claims asserted in the Third-Party Complaint in this action.

² Compl. at ¶ 113, *Tibbs v. 3M Co., et al.*, Case No. 2023-CP-40-01759 (Ct. Com. Pl. Apr. 5, 2023).

³ *Id.* at ¶¶ 106-109.

⁴ *Id.* at ¶ 14.

⁵ Order, *Park v. Armstrong Int’l, Inc.*, Case No. 2021-CP-40-02727 (Ct. Com. Pl. Mar. 17, 2023).

status of Cape and the Receiver.⁶ And on June 30, 2023, the Receiver (which itself is not a party to this lawsuit and has taken no action to join it) filed a third-party complaint (the “Third-Party Complaint”) against numerous entities (the “Third-Party Defendants”), including Charter Consolidated, alleging that each one is liable to Cape and the Receiver for alleged torts beyond the allegations asserted by Plaintiffs in the underlying action—that Third-Party Defendants “are responsible for the sale and use of asbestos or asbestos-containing products throughout the United States . . . 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. . . . The funds that they or their predecessors in interest have wrongfully diverted should have remained available to bodily-injury claimants in the United States . . . providing additional resources to meet Cape’s obligations to the tens of thousands of individuals harmed.”⁷

The Third-Party Complaint asserts four causes of action that are unrelated to the allegations asserted by Plaintiffs: unjust enrichment, constructive trust, alter ego and veil-piercing liability, and accounting.⁸ The Third-Party Complaint, based on acts that allegedly occurred outside of this country by and between foreign corporations, seeks the following relief:

- “The proper and appropriate remedy under the circumstances here is for the Court to exercise its equitable power and authority to require . . . each . . . Third-Party Defendant[] to return funds that have been wrongfully diverted from meeting

⁶ *Id.* (“The Court further orders that, as the Receiver Court, that the Receiver or Cape may not be sued outside this Court without obtaining the Receiver’s consent or an order of this Court prior to doing so.”)

⁷ Third-Party Compl. at Intro. Stat. and ¶ 134, *Tibbs v. 3M Co., et al.*, Case No. 2023-CP-40-01759 (Ct. Com. Pl. June 30, 2023).

⁸ *Id.* at ¶¶ 125-146.

obligations and responsibilities in the United States, in an amount to be proven at trial”;⁹

- “[T]he proper and appropriate remedy under the circumstances here is for the Court to declare that the Third-Party Defendants are alter egos of Third-Party Plaintiff and thereby liable to Third-Party Plaintiff and/or the Receiver for Asbestos Suits”;¹⁰ and
- “[A] full accounting of each of the Third-Party Defendants.”¹¹

The Third-Party Complaint alleges this Court has jurisdiction over each of the Third-Party Defendants, including Charter Consolidated, pursuant to South Carolina’s long-arm statute.¹²

Charter Consolidated, however, is not subject to jurisdiction in this Court. Charter Consolidated is a corporation organized under the laws of the United Kingdom with its principal place of business in Essex.¹³ Charter Consolidated has no assets in South Carolina.¹⁴ It does not own, lease, or have any interest whatsoever in any real property in South Carolina; nor does it maintain any bank accounts in South Carolina.¹⁵

Moreover, Charter Consolidated currently does not, and has not historically, mined, milled, or sold asbestos in South Carolina.¹⁶ Charter Consolidated also currently does not, and has not

⁹ *Id.* at ¶ 130.

¹⁰ *Id.* at ¶ 141.

¹¹ *Id.* at ¶ 145.

¹² *Id.* at ¶¶ 37, 140.

¹³ Affidavit of Rita J. Herring (“Herring Aff.”) at ¶ 5.

¹⁴ *Id.* at ¶ 6.

¹⁵ *Id.* at ¶¶ 7-8.

¹⁶ *Id.* at ¶ 9.

historically, produced, manufactured, or distributed asbestos or asbestos-containing products for use in South Carolina.¹⁷ Furthermore, Cape, is not a subsidiary of Charter Consolidated.¹⁸

STANDARD OF REVIEW

When a defendant challenges a trial court’s jurisdiction over it, the plaintiff bears the burden of establishing that personal jurisdiction exists.¹⁹ “The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case.”²⁰ “At the pretrial stage, the burden of proving personal jurisdiction over a nonresident defendant is met by a prima facie showing of jurisdiction either in the complaint or in affidavits.”²¹ Subject matter jurisdiction is a court’s “power to hear and determine cases of the general class to which the proceedings in question belong.”²² When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, the plaintiff bears the burden of proving subject-matter jurisdiction.²³ The court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction.²⁴ Here, therefore, the Receiver must present, by affidavit or otherwise, facts showing that this Court has jurisdiction over Charter Consolidated and the subject matter with regard to its claims.

In deciding a motion to dismiss for failure to state a claim, the question is whether the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with

¹⁷ *Id.* at ¶ 10.

¹⁸ *Id.* at ¶ 4.

¹⁹ *Moosally v. W. W. Norton & Co.*, 594 S.E.2d 878, 882 (S.C. Ct. App. 2004).

²⁰ *Cockrell v. Hillerich & Bradsby Co.*, 611 S.E.2d 505, 508 (S.C. 2005).

²¹ *Id.*

²² *Simmons v. Simmons*, 634 S.E.2d 1, 3 (S.C. Ct. App. 2006).

²³ *Elridge v. City of Greenwood*, 503 S.E.2d 191, 197 (S.C. Ct. App. 1998).

²⁴ *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 655 S.E.2d 476, 478 (2007).

the court.²⁵ Generally, the trial court must base its ruling solely upon allegations set forth on the face of the complaint.²⁶ Here, viewing the allegations in the light most favorable to the Receiver, the Third-Party Complaint fails to state a claim for relief.

ARGUMENT

The Third-Party Complaint should be dismissed pursuant to Rule (12)(b)(2) or, in the alternative, pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure for the reasons set forth herein.²⁷

MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

First, this Court lacks general personal jurisdiction over Charter Consolidated because it is not “essentially at home” in South Carolina. “A state court may exercise general jurisdiction only when a [corporate] defendant is ‘essentially at home’ in the State.”²⁸ A corporate defendant is essentially at home, in turn, in “its place of incorporation and [where it has] a principal place of business.”²⁹ Charter Consolidated is not a South Carolina corporation, nor does it maintain a principal place of business in South Carolina. Instead, it is a corporation organized under the laws of England, United Kingdom, with its principal place of business in Essex, England, United

²⁵ *Williams v. Condon*, 553 S.E.2d 496 (S.C. Ct. App. 2001).

²⁶ *Doe v. Marion*, 605 S.E.2d 556, 559 (S.C. Ct. App. 2004), *aff’d* 645 S.E.2d 245 (S.C. 2007).

²⁷ Charter Consolidated hereby incorporates by reference and adopts the arguments advanced in the motions to dismiss the Third-Party Complaint filed by other Third-Party Defendants, including but not limited to, the arguments made therein, any memoranda in support, and arguments made orally on the record.

²⁸ *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)); *see also* S.C. Code § 36-2-802 (“A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, doing business, or maintaining his or its principal place of business in, this State as to any cause of action.”).

²⁹ *Id.*

Kingdom.³⁰ Accordingly, Charter Consolidated is not “essentially at home” in South Carolina, and this Court therefore lacks general personal jurisdiction over Charter Consolidated.

Second, this Court lacks specific personal jurisdiction over Charter Consolidated because the claims in the Third-Party Complaint do not arise out of or relate to conduct by Charter Consolidated in South Carolina. A court may exercise personal jurisdiction over a corporation as to a cause of action arising from a defendant’s contacts with the state pursuant to the long-arm statute.³¹ “South Carolina’s long-arm statute, which includes the power to exercise personal jurisdiction over causes of action arising from tortious injuries in South Carolina, has been construed to extend to the outer limits of the due process clause.”³² “Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question [with respect to specific personal jurisdiction] becomes whether the exercise of personal jurisdiction would violate due process.”³³ And that inquiry, in turn, asks whether “[t]he plaintiff’s claims . . . arise out of or relate to the defendant’s contacts with the forum.”³⁴

Here, nothing in the Third-Party Complaint plausibly suggests the claims asserted against Charter Consolidated arise out of or relate to conduct by Charter Consolidated anywhere, let alone in South Carolina. Rather, the claims asserted against Charter Consolidated arise out of or relate to conduct by Cape. Cape, however, is an entirely separate and distinct entity from Charter

³⁰ Herring Aff. at ¶ 5.

³¹ S.C. Code § 36-2-803(1).

³² *Cockrell v. Hillerich & Bradsby Co.*, 611 S.E.2d 505, 508 (S.C. 2005).

³³ *Id.*

³⁴ *Ford Motor Co.*, 141 S. Ct. at 1025 (internal quotations omitted); *see also* S.C. Code § 36-2-803(2) (permitting a court to exercise personal jurisdiction over a defendant “*only* [with respect to] a cause of action *arising* from [the defendant’s] acts” in or directed to South Carolina) (emphasis added).

Consolidated and is not a subsidiary of Charter Consolidated.³⁵ Moreover, Charter Consolidated does not currently, and has not historically, mined, milled, sold, or supplied asbestos in South Carolina.³⁶ Likewise, Charter Consolidated does not currently, and has not historically, produced, manufactured, or distributed asbestos or asbestos-containing products for use in South Carolina.³⁷ Finally, Charter Consolidated has no assets in South Carolina, including no interest in real property in South Carolina, so that cannot provide a basis for the exercise of specific personal jurisdiction in this forum.³⁸ Under these circumstances, the unsupported allegations in the Third-Party Complaint that each of the Third-Party Defendants is subject to this Court’s jurisdiction under the state’s long-arm statute is simply insufficient to establish specific personal jurisdiction.³⁹

³⁵ Herring Aff. at ¶ 4.

³⁶ *Id.* at ¶ 9.

³⁷ *Id.* at ¶ 10.

³⁸ *Id.* at ¶ 7.

³⁹ To the extent that the Third-Party Complaint can be interpreted to assert personal jurisdiction over Charter Consolidated under a theory that Charter Consolidated is the alter ego of Cape—even though the Complaint’s jurisdictional paragraph fails to mention alter ego or corporate veil piercing as a basis for personal jurisdiction (*see* Third-Party Compl. at ¶ 37)—the Court should reject that theory because the Receiver did not plead sufficient facts demonstrating that Charter Consolidated failed to follow the appropriate corporate formalities as to Cape. *See ScanSource, Inc. v. Mitel Networks Corp.*, 11-00382, 2011 WL 2550719, at *4 (D.S.C. June 24, 2011) (dismissing claims for lack of personal jurisdiction on alter ego and veil piercing theories as plaintiff “failed to support its allegation that [parent company’s] subsidiaries are merely facades for [its] operations). The Receiver further fails to even allege facts sufficient to establish personal jurisdiction over Cape.

ALTERNATIVE GROUNDS FOR DISMISSAL

First, the Third-Party Complaint should be dismissed because it seeks an impermissible, expansive advisory opinion beyond the scope of South Carolina third-party practice. “It is elementary that the courts of this State have no jurisdiction to issue advisory opinions.”⁴⁰ The Third-Party Complaint seeks damages from Third-Party Defendants, including Charter Consolidated, despite the absence of any ruling that Cape owes any damages. In the process, it asks this Court to issue mere “guidance” and an improper advisory opinion.⁴¹

Second, the Receiver is exceeding its authority because it seeks to marshal assets of Charter Consolidated located outside South Carolina. Under South Carolina law, a Receiver may only seek to marshal an entity’s assets located within South Carolina.⁴² Charter Consolidated, however, has no assets in South Carolina.⁴³ Thus, any assets the Receiver might marshal are outside the scope of its authority.

Third, the Receiver is not a party to this action and has taken no action to join it, rendering its purported efforts with respect to the Third-Party Complaint procedurally defective. The Receiver is separate and distinct from Cape.⁴⁴ As a result, the Receiver’s attempt to bring the Third-Party Complaint on behalf of Cape is improper.

⁴⁰ *Booth v. Grissom*, 217 S.E.2d 223, 224 (S.C. 1975).

⁴¹ *Richland Cty. Sch. Dist. 2 v. Lucas*, 862 S.E.2d 920, 924 (S.C. 2021).

⁴² S.C. Code § 15-65-10 (4).

⁴³ *Herring Aff.* at ¶ 6.

⁴⁴ Order, *Park v. Armstrong Int’l, Inc.*, Case No. 2021-CP-40-02727 (Ct. Com. Pl. Mar. 17, 2023) (“The Court further orders that, as the Receiver Court, that the Receiver or Cape may not be sued outside this Court without obtaining the Receiver’s consent or an order of this Court prior to doing so.”).

Fourth, the Third-Party Complaint contains no allegations specific to Charter Consolidated to support the causes of action asserted in the Third-Party Complaint and, accordingly, should be dismissed for failure to state a claim. The allegations in the Third-Party Complaint are general and conclusory, thus failing to satisfy South Carolina's pleading standards for any of the asserted causes of action and warranting dismissal.⁴⁵

Fifth, the Third-Party Complaint should be dismissed for failure to state a claim because it does not plead requisite elements of the claims asserted therein. It does not identify any benefit or enrichment received by Charter Consolidated from Cape, as needed to support an unjust enrichment claim, nor does it allege that Charter Consolidated received money from Cape (inequitably or otherwise) or had a fiduciary duty to Cape as required for a constructive trust claim. Additionally, the Third-Party Complaint fails to state a claim for veil-piercing or alter ego because the facts alleged, even if true, are insufficient to show the requisite domination and control of Cape by Charter Consolidated needed to sustain an alter ego or veil piercing claim.⁴⁶

⁴⁵ See *David v. McCleod Regional Med. Ctr.*, 626 S.E.2d 1, 3 (S.C. 2006) (requiring more than “generic allegations and conjecture” to sustain malpractice claim); *Paradis v. Charleston Cty. Sch. Dist.*, 819 S.E.2d 147, 153 (S.C. Ct. App. 2018) (confirming that code pleading is required in South Carolina and that code pleading is not as “lenient” as federal notice pleading); see also J. F. Flanagan, S.C. Civ. P. § 8.B. (“[T]he pleader must describe each element of the cause of action in terms of the facts of the case.”).

⁴⁶ See *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 152 (3d Cir. 1988) (after trial on the merits directly addressing alter ego allegations, and relying on the same facts alleged in the Third-Party Complaint, determining that the Charter was not the alter ego of Cape because there was “no evidence” that “Charter’s intrusion into Cape’s affairs [was] even constant or day-to-day. Moreover, and significantly, the district court found that ‘[t]he two corporate groups each maintained separate books, records, bank accounts, offices and staff; each consulted their own financial advisors, accountants and stockbrokers.”); see also *In re Charter Defs.*, 1989 U.S. Dist. LEXIS 15591 (E.D. Pa. May 18, 1989) (dismissing all claims, cross-claims, and third-party claims asserted against Charter in all cases pending in the Eastern District of Pennsylvania because Charter is not the alter ego of Cape); *Culbreth v. Aмоса, Ltd.*, 898 F.2d 13 (3d Cir. 1990) (affirming summary judgment dismissal because Charter is not the alter ego of Cape); *Simmons v. AC&S, Inc.*, No. 84-1170 (W.D. Ark. June 4, 1985) (granting motion to dismiss for lack of personal jurisdiction because Charter is not the alter ego of Cape).

Sixth, the South Carolina Door Closing Statute bars all claims asserted against Charter Consolidated because neither Cape nor Charter Consolidated is a South Carolina resident, the causes of action asserted in the Third-Party Complaint did not arise within South Carolina, and the subject of the action is not situated within South Carolina.⁴⁷

ALTERNATIVE REQUESTS FOR RELIEF

Alternatively, and to the extent that this Court does not dismiss the Third-Party Complaint as to Charter Consolidated, this Court should strike or sever the Third-Party Complaint because the claims asserted are unrelated to Plaintiffs' claims. A third-party complaint "must be derivative of the plaintiff's claim because [d]erivative liability is central to the operation of Rule 14. It is not sufficient that the third-party claim is a related claim; *the claim must be derivatively based on the original plaintiff's claim.*"⁴⁸ Because none of the causes of action asserted in the Third-Party Complaint seeks a determination that Charter Consolidated is liable for indemnification or any other claim that is alleged to be dependent on the outcome of Plaintiffs' claims against Cape in the Tibbs Suit, the Third-Party Complaint should be stricken or severed into a separate action.⁴⁹

⁴⁷ See S.C. Code Ann. § 15-5-150.

⁴⁸ *Johnson v. M.I. Windows & Doors, Inc.*, 11- 0167, 2012 WL 1015798 at *2 (D.S.C. Mar. 23, 2012) (emphasis in original) (internal citations and quotations omitted); *Laughlin v. Dell. Fin. Servs., L.P.*, 465 F. Supp. 2d 563, 566 (D.S.C. 2006); *CNH Indust. Capital Am. LLC v. Able Contracting, Inc.*, No. 9:16-cv-2520-RMG, 2017 WL 512453, at *1 (D.S.C. Feb. 7, 2017) (holding a third-party complaint "must involve an attempt to pass on to the third party all or part of the liability asserted against the defendant. . . . An impleader claim may not be used to assert any and all rights to recovery arising from the same transaction or occurrence as the underlying action") (internal quotations omitted).

⁴⁹ Even if the claims against Charter Consolidated satisfied the requirements of Rule 14, the Third-Party Complaint's joinder of such claims with the claims against other Third-Party Defendants and other parties would be improper under Rule 20. The claims against these parties are not all alleged to arise out of the same transaction, occurrence, or series of transactions or occurrences. See *Thomas v. Tramaine-Frost*, 16-1266, 2017 WL 9287004, at *2 (D.S.C. Jan. 12, 2017); *Todd v. Cary's Lake Homeowners Assoc.*, 315 F.R.D. 453, 457-58 (D.S.C. 2016); *Cramer v. Walley*, 14-03857, 2015 WL 3968155, at *4-5 (D.S.C. June 30, 2015).

Under these circumstances, an order staying the third-party action against Charter Consolidated, including all discovery, pending resolution of this motion is appropriate because “good cause” exists under Rule 26(c) of the South Carolina Rules of Civil Procedure. This motion presents issues that are potentially dispositive of this entire action. Under these circumstances, requiring Charter Consolidated to respond to discovery requests “would be unduly burdensome,” thus warranting a stay.⁵⁰

Furthermore, if the claims against Charter Consolidated are not dismissed or stricken, Charter Consolidated asks that the Court stay the third-party action until the claims by Plaintiffs against Cape are resolved. It would be inefficient and a waste of judicial resources to litigate issues dependent on the outcome of the Plaintiffs’ claims in the Tibbs Suit before that action is resolved. To conduct this litigation in the most efficient manner, this Court should at a minimum stay the Third-Party Complaint and/or the claims against Charter Consolidated until the Plaintiffs’ claims are resolved.⁵¹

⁵⁰ *Cuyler v. Dep’t of Army*, 08-3261, 2009 WL 1749604, at *2 (D.S.C. June 22, 2009); *see also Petrus v. Bowen*, 833 F.2d 581 (5th Cir. 1987) (“A trial court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined.”).

⁵¹ Courts have broad discretion to stay proceedings as part of their inherent power to control their dockets and the order of the Court’s business to safeguard the rights of litigants. *See Williams v. Bordon's, Inc.*, 274 S.C. 275, 279 (1980).

CONCLUSION

For the reasons stated above, Charter Consolidated respectfully requests the Court dismiss the Third-Party Complaint over Charter Consolidated pursuant to Rule 12(b)(1), Rule 12(b)(2), and Rule 12(b)(6) of the South Carolina Rules of Civil Procedure and issue an order staying discovery pending resolution of its motion pursuant to Rule 26(c) of the South Carolina Rules of Civil Procedure.

This motion is based upon the attached affidavit, the memorandum of support to be filed later, the statutes and case law of the State of South Carolina and other jurisdictions, the pleadings filed in this matter, and such other material as may be properly received by the Court in connection therewith.

Dated: September 1, 2023

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*Counsel for Third-Party Defendant
Charter Consolidated Ltd.*

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.

CHARTER CONSOLIDATED LTD., 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

**AFFIDAVIT IN SUPPORT OF
THIRD-PARTY DEFENDANT'S
MOTION TO DISMISS THE THIRD-
PARTY COMPLAINT**

Personally appeared before me Rita J. Herring, who being duly sworn, deposes and

says:

1. My name is Rita J. Herring. I am a resident of Illinois. I am over twenty-one (21) years old, of sound mind, and fully competent to make this affidavit.
2. I am a Senior Corporate Paralegal and International Compliance Analyst with The ESAB Group Inc. I have personal and firsthand knowledge of the matters set forth in this affidavit and believe them to be true and accurate. If called upon to testify, I could competently do so.
3. Charter Consolidated Ltd. is an indirectly wholly-owned subsidiary of ESAB Corporation.

4. Cape plc is not a subsidiary of Charter Consolidated Ltd.
5. Charter Consolidated Ltd. is a corporation organized under the laws of England, United Kingdom, with its principal place of business in Essex, England, United Kingdom.
6. Charter Consolidated Ltd. has no assets in the State of South Carolina.
7. Charter Consolidated Ltd. does not own, lease, or have any interest whatsoever in any real property in the State of South Carolina.
8. Charter Consolidated Ltd. does not maintain any bank accounts in the State of South Carolina.
9. Charter Consolidated Ltd. has never mined, milled, or sold asbestos in the State of South Carolina.
10. Charter Consolidated Ltd. has never produced, manufactured, or distributed asbestos or asbestos-containing products for use in the State of South Carolina.
11. I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted on this 31st day of August 2023.



AFFIANT SIGNATURE

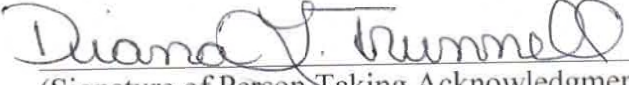
Rita J. Herring

PRINTED NAME

On Behalf of Charter Consolidated Ltd.

Senior Corporate Paralegal and International
Compliance Analyst, The ESAB Group Inc.

The foregoing instrument was acknowledged before me this 31st day of August 2023 by _____,
_____ of The ESAB Group Inc. on behalf of Charter Consolidated Ltd.



(Signature of Person Taking Acknowledgment)

Notary

(Title or Rank)

(Serial Number, if any)



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