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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 IV)

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; Third-Party
Sparrows Offshore, LLC; The Sparrows Group, LLC, ... 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
COUNTY OF RICHLAND

JOHN A. TIBBS and MARGARET B. TIBBS,

Plaintiffs,

v.

3M COMPANY, et al.,

Defendants.

CAPE plc, individually and as successor in interest
to CAPE ASBESTOS COMPANY LIMITED, by
and through its duly appointed Receiver Peter D.
Protopapas,

Third-Party Plaintiff,

v.

ANGLO AMERICAN PLC, individually and as
successor in interest to ANGLO AMERICAN
CORPORATION OF SOUTH AFRICA LTD., 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

**THIRD-PARTY DEFENDANT ESAB
CORPORATION'S MOTION FOR
PROTECTIVE ORDER AND TO
DISSOLVE RECEIVERSHIP**

COMES NOW, Third-Party Defendant ESAB Corporation ("ESAB"), by and through its undersigned counsel, without waiving but instead specifically preserving all of its objections to personal jurisdiction in South Carolina, as set forth in the Rule 12(b)(2) motion filed on September 1, 2023, respectfully moves: (i) for a protective order striking the Interrogatories and Requests for Production directed to ESAB (collectively, the "Discovery Requests") by Third Party Plaintiff Cape plc ("Cape"), by and through its Receiver Peter D. Protopapas (the "Receiver") (ii) for a

protective order quashing and denying the Rule 30(b)(6), SCRCP, Deposition Notice issued to ESAB (the “30(b)(6) Notice”) by the Receiver; and (iii) to dissolve the Cape PLC receivership.

On September 1, 2023, ESAB filed a Motion to Dismiss The Third-Party Complaint and requested an order granting dismissal, pursuant to Rule 12(b)(2), SCRCP, of all counts, claims, and causes of action asserted in the Third-Party Complaint filed by the Receiver (the “Third Party Complaint”), on the grounds that the Court lacks personal jurisdiction over ESAB; an order granting dismissal of the Third Party Complaint on other grounds; and an order staying discovery as to ESAB pending resolution of its motion to dismiss. This motion set forth evidence showing not just the lack of personal jurisdiction over ESAB, but also the lack of subject matter jurisdiction for the entire third-party proceeding.

ESAB hereby joins in, incorporates, and adopts, as if fully set forth herein, all motions for protective order and motions to dissolve the Cape PLC receivership, including briefs, replies, or responses filed or to be filed by all other Third-Party Defendants in the above captioned matter, to the extent such arguments are not adverse to ESAB. This includes motions to dissolve filed by any Third-Party Defendant that is no longer in the case or that may not be in the case at the time of trial.

Grounds for dissolution of the Cape PLC Receivership include, but are not limited to, the following:

- The order purporting to appoint the Receiver (“Receivership Order”) was filed on March 17, 2023, in *Park v. Armstrong International, Inc.*, Case No. 2021-CP-40-02727 (“Park Lawsuit”), and was procured by “Keith Park, individually and as the Personal Representative of the Estate of Isabella Park” (“Moving

Party”) nine months after the trial date and after that matter was reported to be “fully resolved.”

- Moving Party does not allege that he is a judgment creditor or any other type of creditor of Cape PLC, nor does the motion to appoint the Receiver (“Park Receiver Motion”) identify any creditors of Cape PLC.
- The Receivership Order purports to appoint the Receiver “because Cape PLC as the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.) (“Cape Asbestos”) and its subsidiaries and global affiliates (collectively, “Cape” or the “Company”) have dissolved and Cape, a foreign corporation, has forfeited its charter and has further failed to answer in this case.” Each of these facts was asserted in the Park Receiver Motion and are demonstrably incorrect. Cape PLC, a Jersey company formed in 2011, has not dissolved or forfeited its charter and is not the “successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.). There was no evidence submitted in the Park Lawsuit (in the record) showing that Cape PLC (or any Cape entity) was properly served with the operative Summons, Second Amended Complaint, or Motion for Appointment of Receiver.
- There was no evidence submitted in the Park Lawsuit demonstrating that notice of the Park Receiver Motion was provided to Cape PLC, alleged Cape PLC affiliates or to Third-Party Defendants as required by SC Code Ann. 15-65-20 and 15-65-30. Likewise there is no evidence that the Receivership Order was provided to Cape PLC, alleged Cape PLC affiliates or to certain Third-Party Defendants as required by SC Code Ann. 15-65-20 and 15-65-30. ESAB was

not provided with notice of the Park Receiver Motion prior to the entry of the Receivership Order.

- Neither the Park Receiver Motion nor the Receivership Order identify any specific “property within this State” or even generally the existence of any “property within this State” of Cape PLC, alleged Cape PLC affiliates or to any Third-Party Defendants as required by SC Code Ann. 15-65-10(4).
- The Receivership Order violates basic tenets of due process and constitutional law because it purports to give a South Carolina receiver authority over property that is not located in and has no relationship to South Carolina and because no impacted parties were given prior notice of the Park Receiver Motion. The Park Receiver Motion neither identified the property sought to be placed in the hands of a receiver nor provided any evidence regarding the value of the property so sought to be placed in the hands of a receiver. The Receivership Order does not include “a clause fixing the value of the property” sought to be placed in the hands of a receiver as required by SC Code Ann. 15-65-60 (“Whenever the court or judge before whom such application [to appoint receiver] is made shall appoint a receiver before final judgment in the cause there shall be inserted in the order of appointment a clause fixing the value of the property for which the bond may be given, as prescribed in Section 15-65-50.”).
- The Receiver’s Third-Party Complaint seeks not to protect the interests of the company over which he has purportedly been given authority, but to generate liability for that company and obtain an impermissible advisory opinion on alter ego and veil piercing liability against the Third-Party Defendants when no

asbestos exposure liability against any Cape entity has been adjudicated in any South Carolina court.

Grounds for protective order include, but are not limited to, the following:

- Because the Receiver was improperly appointed and does not have standing to bring its third-party claims, it has no authority to take discovery from ESAB or any other party or non-party in any form or mechanism.
- Rule 26(c), SCRCP allows the Court to issue an order “that the discovery not be had...”¹
- Discovery is improper given the lack of personal jurisdiction over ESAB and the lack of subject matter jurisdiction for the entire third-party proceeding.
- Outstanding discovery requests to ESAB should be quashed and discovery should be stayed until the issues raised in ESAB’s motion to dismiss and in this motion to dissolve the receivership have been fully resolved.

For the reasons set forth above, ESAB respectfully requests the Court enter an order: (1) dissolving the Cape PLC Receivership; (2) dismissing ESAB from this case; (3) striking the Discovery Requests; (4) quashing the 30(b)(6) Notice; and (5) ruling that ESAB has no obligation to respond to the Discovery Requests or to the 30(b)(6) Notice.²

¹ The filing and service of this motion relieves ESAB from any obligation to respond to the challenged Discovery Requests or the 30(b)(6) Notice until this motion has been finally resolved. *Baughman v. AT&T Co.*, 306 S.C. 101, 109, 410 S.E.2d 537, 542 (1991). ESAB specifically preserves all, and does not waive any, objections to the Discovery Requests or to the 30(b)(6) Notice, in whole and/or in part, including, but not limited to, based on: the attorney–client, attorney work product, common interest, and any and all other applicable privileges and protections; relevancy; scope and the vague, duplicative and unduly burdensome nature of the discovery sought.

² Undersigned counsel certifies that consultation in an attempt to resolve this matter would serve no useful purpose.

This motion is based upon any memorandum of support 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: October 6, 2023

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

JOHN A. TIBBS and MARGARET B. TIBBS,

Plaintiffs,

v.

3M COMPANY, et al.,

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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.

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

**THIRD-PARTY DEFENDANT
CENTRAL MINING AND
INVESTMENT CORP. LTD.'S
MOTION FOR PROTECTIVE
ORDER AND TO DISSOLVE
RECEIVERSHIP**

COMES NOW, Third-Party Defendant Central Mining and Investment Corp. Ltd. ("Central Mining"), by and through its undersigned counsel, without waiving but instead specifically preserving all of its objections to personal jurisdiction in South Carolina, as set forth in the Rule 12(b)(2) motion filed on September 1, 2023, respectfully moves: (i) for a protective order striking the Interrogatories and Requests for Production directed to Central Mining (collectively, the "Discovery Requests") by Third Party Plaintiff Cape plc ("Cape"), by and through its Receiver Peter D. Protopapas (the "Receiver") (ii) for a protective order quashing and

denying the Rule 30(b)(6), SCRCF, Deposition Notice issued to Central Mining (the “30(b)(6) Notice”) by the Receiver; and (iii) to dissolve the Cape PLC receivership.

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Central Mining hereby joins in, incorporates, and adopts, as if fully set forth herein, all motions for protective order and motions to dissolve the Cape PLC receivership, including briefs, replies, or responses filed or to be filed by all other Third-Party Defendants in the above captioned matter, to the extent such arguments are not adverse to Central Mining. This includes motions to dissolve filed by any Third-Party Defendant that is no longer in the case or that may not be in the case at the time of trial.

Grounds for dissolution of the Cape PLC Receivership include, but are not limited to, the following:

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Party”) nine months after the trial date and after that matter was reported to be “fully resolved.”

- Moving Party does not allege that he is a judgment creditor or any other type of creditor of Cape PLC, nor does the motion to appoint the Receiver (“Park Receiver Motion”) identify any creditors of Cape PLC.
- The Receivership Order purports to appoint the Receiver “because Cape PLC as the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.) (“Cape Asbestos”) and its subsidiaries and global affiliates (collectively, “Cape” or the “Company”) have dissolved and Cape, a foreign corporation, has forfeited its charter and has further failed to answer in this case.” Each of these facts was asserted in the Park Receiver Motion and are demonstrably incorrect. Cape PLC, a Jersey company formed in 2011, has not dissolved or forfeited its charter and is not the “successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.). There was no evidence submitted in the Park Lawsuit (in the record) showing that Cape PLC (or any Cape entity) was properly served with the operative Summons, Second Amended Complaint, or Motion for Appointment of Receiver.
- There was no evidence submitted in the Park Lawsuit demonstrating that notice of the Park Receiver Motion was provided to Cape PLC, alleged Cape PLC affiliates or to Third-Party Defendants as required by SC Code Ann. 15-65-20 and 15-65-30. Likewise there is no evidence that the Receivership Order was provided to Cape PLC, alleged Cape PLC affiliates or to certain Third-Party Defendants as required by SC Code Ann. 15-65-20 and 15-65-30. Central

Mining was not provided with notice of the Park Receiver Motion prior to the entry of the Receivership Order.

- Neither the Park Receiver Motion nor the Receivership Order identify any specific “property within this State” or even generally the existence of any “property within this State” of Cape PLC, alleged Cape PLC affiliates or to any Third-Party Defendants as required by SC Code Ann. 15-65-10(4).
- The Receivership Order violates basic tenets of due process and constitutional law because it purports to give a South Carolina receiver authority over property that is not located in and has no relationship to South Carolina and because no impacted parties were given prior notice of the Park Receiver Motion. The Park Receiver Motion neither identified the property sought to be placed in the hands of a receiver nor provided any evidence regarding the value of the property so sought to be placed in the hands of a receiver. The Receivership Order does not include “a clause fixing the value of the property” sought to be placed in the hands of a receiver as required by SC Code Ann. 15-65-60 (“Whenever the court or judge before whom such application [to appoint receiver] is made shall appoint a receiver before final judgment in the cause there shall be inserted in the order of appointment a clause fixing the value of the property for which the bond may be given, as prescribed in Section 15-65-50.”).
- The Receiver’s Third-Party Complaint seeks not to protect the interests of the company over which he has purportedly been given authority, but to generate liability for that company and obtain an impermissible advisory opinion on alter ego and veil piercing liability against the Third-Party Defendants when no

asbestos exposure liability against any Cape entity has been adjudicated in any South Carolina court.

Grounds for protective order include, but are not limited to, the following:

- Because the Receiver was improperly appointed and does not have standing to bring its third-party claims, it has no authority to take discovery from Central Mining or any other party or non-party in any form or mechanism.
- Rule 26(c), SCRCP allows the Court to issue an order “that the discovery not be had...”¹
- Discovery is improper given the lack of personal jurisdiction over Central Mining and the lack of subject matter jurisdiction for the entire third-party proceeding.
- Outstanding discovery requests to Central Mining should be quashed and discovery should be stayed until the issues raised in Central Mining’s motion to dismiss and in this motion to dissolve the receivership have been fully resolved.

For the reasons set forth above, Central Mining respectfully requests the Court enter an order: (1) dissolving the Cape PLC Receivership; (2) dismissing Central Mining from this case;

¹ The filing and service of this motion relieves Central Mining from any obligation to respond to the challenged Discovery Requests or the 30(b)(6) Notice until this motion has been finally resolved. *Baughman v. AT&T Co.*, 306 S.C. 101, 109, 410 S.E.2d 537, 542 (1991). Central Mining specifically preserves all, and does not waive any, objections to the Discovery Requests or to the 30(b)(6) Notice, in whole and/or in part, including, but not limited to, based on: the attorney–client, attorney work product, common interest, and any and all other applicable privileges and protections; relevancy; scope and the vague, duplicative and unduly burdensome nature of the discovery sought.

(3) striking the Discovery Requests; (4) quashing the 30(b)(6) Notice; and (5) ruling that Central Mining has no obligation to respond to the Discovery Requests or to the 30(b)(6) Notice.²

This motion is based upon any memorandum of support 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: October 6, 2023

GORDON REES SCULLY MANSUKHANI, LLP

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² Undersigned counsel certifies that consultation in an attempt to resolve this matter would serve no useful purpose.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

JOHN A. TIBBS and MARGARET B. TIBBS,

Plaintiffs,

v.

3M COMPANY, et al.,

Defendants.

CAPE plc, individually and as successor in interest
to CAPE ASBESTOS COMPANY LIMITED, by
and through its duly appointed Receiver Peter D.
Protopapas,

Third-Party Plaintiff,

v.

ANGLO AMERICAN PLC, individually and as
successor in interest to ANGLO AMERICAN
CORPORATION OF SOUTH AFRICA LTD., 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

**THIRD-PARTY DEFENDANT
CHARTER CONSOLIDATED
LTD.'S MOTION FOR
PROTECTIVE ORDER AND TO
DISSOLVE RECEIVERSHIP**

COMES NOW, Third-Party Defendant Charter Consolidated Ltd. (“Charter Consolidated”), by and through its undersigned counsel, without waiving but instead specifically preserving all of its objections to personal jurisdiction in South Carolina, as set forth in the Rule 12(b)(2) motion filed on September 1, 2023, respectfully moves: (i) for a protective order striking the Interrogatories and Requests for Production directed to Charter Consolidated (collectively, the “Discovery Requests”) by Third Party Plaintiff Cape plc (“Cape”), by and through its Receiver Peter D. Protopapas (the “Receiver”) (ii) for a protective order quashing and denying the Rule

30(b)(6), SCRCP, Deposition Notice issued to Charter Consolidated (the “30(b)(6) Notice”) by the Receiver; and (iii) to dissolve the Cape PLC receivership.

On September 1, 2023, Charter Consolidated filed a Motion to Dismiss The Third-Party Complaint and requested an order granting dismissal, pursuant to Rule 12(b)(2), SCRCP, of all counts, claims, and causes of action asserted in the Third-Party Complaint filed by the Receiver (the “Third Party Complaint”), on the grounds that the Court lacks personal jurisdiction over Charter Consolidated; an order granting dismissal of the Third Party Complaint on other grounds; and an order staying discovery as to Charter Consolidated pending resolution of its motion to dismiss. This motion set forth evidence showing not just the lack of personal jurisdiction over Charter Consolidated, but also the lack of subject matter jurisdiction for the entire third-party proceeding.

Charter Consolidated hereby joins in, incorporates, and adopts, as if fully set forth herein, all motions for protective order and motions to dissolve the Cape PLC receivership, including briefs, replies, or responses filed or to be filed by all other Third-Party Defendants in the above captioned matter, to the extent such arguments are not adverse to Charter Consolidated. This includes motions to dissolve filed by any Third-Party Defendant that is no longer in the case or that may not be in the case at the time of trial.

Grounds for dissolution of the Cape PLC Receivership include, but are not limited to, the following:

- The order purporting to appoint the Receiver (“Receivership Order”) was filed on March 17, 2023, in *Park v. Armstrong International, Inc.*, Case No. 2021-CP-40-02727 (“Park Lawsuit”), and was procured by “Keith Park, individually and as the Personal Representative of the Estate of Isabella Park” (“Moving

Party”) nine months after the trial date and after that matter was reported to be “fully resolved.”

- Moving Party does not allege that he is a judgment creditor or any other type of creditor of Cape PLC, nor does the motion to appoint the Receiver (“Park Receiver Motion”) identify any creditors of Cape PLC.
- The Receivership Order purports to appoint the Receiver “because Cape PLC as the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.) (“Cape Asbestos”) and its subsidiaries and global affiliates (collectively, “Cape” or the “Company”) have dissolved and Cape, a foreign corporation, has forfeited its charter and has further failed to answer in this case.” Each of these facts was asserted in the Park Receiver Motion and are demonstrably incorrect. Cape PLC, a Jersey company formed in 2011, has not dissolved or forfeited its charter and is not the “successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.). There was no evidence submitted in the Park Lawsuit (in the record) showing that Cape PLC (or any Cape entity) was properly served with the operative Summons, Second Amended Complaint, or Motion for Appointment of Receiver.
- There was no evidence submitted in the Park Lawsuit demonstrating that notice of the Park Receiver Motion was provided to Cape PLC, alleged Cape PLC affiliates or to Third-Party Defendants as required by SC Code Ann. 15-65-20 and 15-65-30. Likewise there is no evidence that the Receivership Order was provided to Cape PLC, alleged Cape PLC affiliates or to certain Third-Party Defendants as required by SC Code Ann. 15-65-20 and 15-65-30. Charter

Consolidated was not provided with notice of the Park Receiver Motion prior to the entry of the Receivership Order.

- Neither the Park Receiver Motion nor the Receivership Order identify any specific “property within this State” or even generally the existence of any “property within this State” of Cape PLC, alleged Cape PLC affiliates or to any Third-Party Defendants as required by SC Code Ann. 15-65-10(4).
- The Receivership Order violates basic tenets of due process and constitutional law because it purports to give a South Carolina receiver authority over property that is not located in and has no relationship to South Carolina and because no impacted parties were given prior notice of the Park Receiver Motion. The Park Receiver Motion neither identified the property sought to be placed in the hands of a receiver nor provided any evidence regarding the value of the property so sought to be placed in the hands of a receiver. The Receivership Order does not include “a clause fixing the value of the property” sought to be placed in the hands of a receiver as required by SC Code Ann. 15-65-60 (“Whenever the court or judge before whom such application [to appoint receiver] is made shall appoint a receiver before final judgment in the cause there shall be inserted in the order of appointment a clause fixing the value of the property for which the bond may be given, as prescribed in Section 15-65-50.”).
- The Receiver’s Third-Party Complaint seeks not to protect the interests of the company over which he has purportedly been given authority, but to generate liability for that company and obtain an impermissible advisory opinion on alter ego and veil piercing liability against the Third-Party Defendants when no

asbestos exposure liability against any Cape entity has been adjudicated in any South Carolina court.

Grounds for protective order include, but are not limited to, the following:

- Because the Receiver was improperly appointed and does not have standing to bring its third-party claims, it has no authority to take discovery from Charter Consolidated or any other party or non-party in any form or mechanism.
- Rule 26(c), SCRCF allows the Court to issue an order “that the discovery not be had...”¹
- Discovery is improper given the lack of personal jurisdiction over Charter Consolidated and the lack of subject matter jurisdiction for the entire third-party proceeding.
- Outstanding discovery requests to Charter Consolidated should be quashed and discovery should be stayed until the issues raised in Charter Consolidated’s motion to dismiss and in this motion to dissolve the receivership have been fully resolved.

For the reasons set forth above, Charter Consolidated respectfully requests the Court enter an order: (1) dissolving the Cape PLC Receivership; (2) dismissing Charter Consolidated from this case; (3) striking the Discovery Requests; (4) quashing the 30(b)(6) Notice; and (5) ruling that

¹ The filing and service of this motion relieves Charter Consolidated from any obligation to respond to the challenged Discovery Requests or the 30(b)(6) Notice until this motion has been finally resolved. *Baughman v. AT&T Co.*, 306 S.C. 101, 109, 410 S.E.2d 537, 542 (1991). Charter Consolidated specifically preserves all, and does not waive any, objections to the Discovery Requests or to the 30(b)(6) Notice, in whole and/or in part, including, but not limited to, based on: the attorney–client, attorney work product, common interest, and any and all other applicable privileges and protections; relevancy; scope and the vague, duplicative and unduly burdensome nature of the discovery sought.

Charter Consolidated has no obligation to respond to the Discovery Requests or to the 30(b)(6) Notice.²

This motion is based upon any memorandum of support 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: October 6, 2023

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² Undersigned counsel certifies that consultation in an attempt to resolve this matter would serve no useful purpose.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

JOHN A. TIBBS and MARGARET B. TIBBS,

Plaintiffs,

v.

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

3M COMPANY *et al.*,

Defendants.

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

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,

**THIRD-PARTY PLAINTIFF'S
OMNIBUS OPPOSITION TO MOTIONS
TO DISSOLVE BY RESPONDING
ALTRAD THIRD-PARTY DEFENDANTS
AND CHARTER THIRD-PARTY
DEFENDANTS**

v.

ANGLO AMERICAN PLC, individually and as successor in interest to ANGLO AMERICAN CORPORATION OF SOUTH AFRICA LTD.; DE BEERS PLC, individually and as successor in interest to DE BEERS S.A.; DE BEERS CENTENARY AG; DE BEERS CONSOLIDATED MINES LTD., n/k/a DE BEERS CONSOLIDATED MINES PROPRIETARY LTD.; DE BEERS UK LTD.; DE BEERS JEWELLERS LTD.; DE BEERS JEWELLERS US, INC.; ANGLO AMERICAN US HOLDINGS INC.; ELEMENT SIX US CORP.; ELEMENT SIX TECHNOLOGIES US CORP.; ELEMENT SIX TECHNOLOGIES (OR) CORP.; FIRST MODE HOLDINGS, INC.; PLATINUM GUILD INTERNATIONAL (U.S.A.) JEWELRY INC.; LIGHTBOX JEWELRY INC.; FOREVERMARK US INC.; ANGLO AMERICAN CROP NUTRIENTS (U.S.A.), LLC; CHARTER CONSOLIDATED LTD.; ESAB CORPORATION; CENTRAL MINING & INVESTMENT CORPORATION

LTD.; CAPE HOLDCO LTD.; THE LAW
DEBENTURE CORPORATION PLC; CAPE
INDUSTRIAL SERVICES GROUP LTD.;
MOHED ALTRAD; ALTRAD UK LTD.; CAPE
UK HOLDINGS NEWCO LTD.; ALTRAD
SERVICES LTD., f/k/a CAPE INDUSTRIAL
SERVICES LTD.; ALTRAD INVESTMENT
AUTHORITY S.A.S.; SPARROWS
OFFSHORE GROUP LTD.; HAWK BIDCO US
INC.; ARRANCO US, LLC; SPARROWS
OFFSHORE, LLC; THE SPARROWS GROUP,
LLC,

Third-Party Defendants.

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Third-Party Plaintiff Peter D. Protopapas, as duly appointed receiver for Cape PLC (the “Receiver” or “Receivership”), by and through undersigned counsel, hereby submits this omnibus response in opposition to the requests to dissolve the Receivership contained in various motions filed by Mohed Altrad, Altrad Investment Authority S.A.S., Hawk BidCo US Inc., Arranco US, LLC, and Sparrows Offshore, LLC (collectively, the “Responding Altrad Third-Party Defendants,” inclusive of what have been identified in the motions as “the Sparrows Defendants”), as well as by Charter Consolidated Ltd. (“Charter”), Central Mining & Investment Corporation Ltd. (“Central Mining”), and ESAB Corporation (collectively, the “Charter Third-Party Defendants”). Because the Receiver has been properly appointed and has stated viable claims for relief, and because this case is properly pending before this Court, these motions should be denied.

INTRODUCTION

This case involves an ongoing scheme perpetuated by or inuring to the benefit of Third-Party Defendants that is many decades old, and that continues to deprive South Carolina citizens of critical assets and financial resources to redress the scourge of asbestos-related disease caused by Third-Party Defendants. In addition to filing serial motions to dismiss and to stay discovery, certain Third-Party Defendants ask the Court to unwind the receivership and preclude this third-party action from proceeding.

Specifically, appearing to advocate on behalf of Cape, the Responding Altrad Third-Party Defendants have filed multiple motions to dissolve the Receivership, with (i) certain U.S. subsidiaries of the Sparrows Group (n/k/a “Altrad Sparrows”) filing motions on August 21 and September 5, with the latter motion also requesting a protective order from discovery, and (ii) Mohed Altrad and the Altrad Investment Authority S.A.S. filing a “Motion to Dissolve the Cape PLC ‘Receivership’” (“Altrad Mot.”) on September 1, and also requesting dissolution of the

receivership in a protective-order motion filed on September 20. In addition, on October 6, each of the Charter Third-Party Defendants filed a virtually identical piggyback motion to dissolve and for a protective order (collectively, “Charter Mot.”), which “joins in, incorporates, and adopts . . . all motions for protective order and motions to dissolve the Cape PLC receivership” and purports to identify (in less than three pages) seven “[g]rounds for dissolution,” by restating arguments from the Altrad Motion. Those motions have been filed on several grounds including that (i) “Cape PLC” was not properly served, (ii) the process for appointing a Cape receivership was defective, and (iii) the third-party action violates the Appointment Order itself and other applicable law.

As explained below, those arguments lack merit, and the motions should be denied.¹

FACTUAL AND PROCEDURAL BACKGROUND

I. In 2021, the Park Lawsuit Was Filed, Amended, and Served on Cape in England.

On June 4, 2021, Isabella Park initiated an asbestos personal-injury lawsuit (“Park Lawsuit”) against certain defendants, including Cape PLC, individually and as successor in interest to Cape Asbestos Company Ltd. *See* Compl., *Park v. Armstrong Int’l, Inc. et al.*, No. 2021-CP-4002727 (June 4, 2021) (“Original Compl.”), at 1, 7. Ms. Park sought relief after being “diagnosed with mesothelioma caused by exposure to asbestos dust and fibers” unintentionally “brought home” for years “as a result of her husband’s work with and around asbestos-containing products.”

Id. at ¶ 4.

¹ For the Court’s convenience, the Receiver submits a single omnibus brief in response to all of these dissolution requests in an effort to streamline the number of filings before the Court. Because the September 1 motion repeats arguments from the August 21 motion, while also addressing the filing of proof of service in the Park Lawsuit on August 28 (unintentionally omitted from the motion to appoint a receiver), citations in this omnibus opposition refer only to the September 1 motion (“Altrad Mot.”), except as specifically stated otherwise.

On June 9, 2021, less than five months from her diagnosis, and only five days after filing her lawsuit, Ms. Park passed away. Her son Keith then amended the complaint, individually and as personal representative to Ms. Park’s estate (the “Park Plaintiffs”), to assert a wrongful-death action on November 17, 2021. *See* First Amended Compl., *Park et al. v. Armstrong Int’l, Inc. et al.*, No. 2021-CP-4002727 (Nov. 17, 2021). In so doing, the amended complaint added Cape Intermediate Holdings Limited (f/k/a Cape Intermediate Holdings PLC) as a defendant, apart from Cape PLC (which had already been made a defendant in the original complaint), with both defendants (together, “Cape”) identified as successors in interest to Cape Asbestos Company Ltd. *Id.* at 9; *see also id.* at ¶¶ 26–27 (describing Cape’s business).

In December 2021, the Park Plaintiffs served Cape. Specifically, as reflected in an affidavit signed March 8, 2022, an English process server mailed² a copy of the complaint and summons to Cape PLC and Cape Intermediate Holdings Ltd.—identifying both “individually and as successors to Cape Asbestos Company Limited.” Ex. A to Notice of Filing of Ommitted [sic.] Exhibit, *Park et al. v. Armstrong Int’l, Inc. et al.*, No. 2021-CP-4002727 (Aug. 28, 2023) (“Cape POS Exhibit”), at 1–6, 12–13. As the affidavit explains, “Cape PLC” was the name of the company between August 1, 1989 and June 27, 2011, while “Cape Intermediate Holdings Ltd.” is the company’s current name. *Id.* at 2. The English process server (the affiant) swore that on December 14, 2021, he served “copies of the First Amended Summons in this action on Cape PLC and Cape Intermediate Holdings Limited” at their registered address, with cover letters explaining that the claims were brought against them as successors in interest to Cape Asbestos Company Limited. *Id.* at 2, 5–6. Pursuant to procedural rules in England, the “proceedings [were] deemed to have

² The affidavit indicates that the service copies were contained in an oversize envelope, with a large-letter stamp.

been served” two days after mailing, *i.e.*, on December 16, 2021. *Id.* at 3. The process server also indicated that he emailed materials to an official address designated for the receipt of asbestos-related claims against Cape (elclaimsaltraduk@altrad.com). *See id.* at 5–6.



One week later, on December 23, 2021, Plaintiffs filed a Second Amended Complaint, adding allegations and defendants **unrelated to Cape**. *See* Second Amended Compl., *Park et al. v. Armstrong Int’l, Inc. et al.*, No. 2021-CP-4002727 (Dec. 23, 2021). Plaintiffs did not serve that specific pleading on Cape, ostensibly because Cape had already been served with an operative summons and complaint identifying the facts relevant to Cape and the claims asserted against Cape, and no such facts or claims were added in the Second Amended Complaint.

II. In 2022, the Park Lawsuit Was Resolved with Certain Defendants—But Not Cape.

On June 3, 2022, as part of an update to the Court on various proceedings, counsel for the Park Plaintiffs sent a short email with various updates, including that “the Park and Garren cases have both fully resolved.” Altrad Mot. Ex. 8. Specifically, it appears the Park Lawsuit was “fully resolved” regarding defendants who had appeared in the litigation and were scheduled for trial. Moreover, for months after, through February 2023, the docket reflects that Plaintiffs filed

stipulations of dismissal for those appearing defendants to effectuate their resolutions. **But Plaintiffs never dismissed Cape, and the lawsuit remains active.**

III. In 2023, the Court Appointed a Receiver Because of Cape’s Pattern of Avoiding Creditors.

On March 6, 2023, Plaintiffs filed a motion for “this Court to appoint a receiver over Cape PLC and its subsidiaries, affiliates, successors, and assigns.” Motion to Appoint Receiver, *Park et al. v. Armstrong Int’l, Inc. et al.*, No. 2021-CP-4002727 (Mar. 6, 2023) (“Appointment Mot.”), at 1. The motion was made pursuant to S.C. Code §§ 15-65-10(4) and (5), on the basis that a named defendant, Cape PLC, “is the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.)” and, with “its subsidiaries and global affiliates[,] . . . were and are private companies organized and existing under the laws of the United Kingdom, with its principal place of business in England.” *Id.* at 1. Consistent with Cape’s failure to respond to the Park Lawsuit, the Appointment Motion described Cape’s litigation-avoidance strategy—starting nearly 50 years earlier in the late 1970s and continuing—by which Cape “decided to simply accept default judgments in asbestos lawsuits [that] could not be enforced.” *Id.* at 2. Plaintiffs provided notice of the Appointment Motion to Cape by “plac[ing] into hands of DHL, an international carrier, a copy of this motion and its exhibits, for delivery to the same address at which service was perfected.” *Id.* at 8 n.13.

On March 17, 2023, under S.C. Code §§ 15-65-10(4) and (5), the Court granted a request for an expedited ruling on the Appointment Motion and appointed a receiver for Cape PLC, as successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.). *See* Order, *Park et al. v. Armstrong Int’l, Inc. et al.*, No. 2021-CP-4002727 (Mar. 17, 2023) (“Appointment Order”), at 1. Pursuant to that Appointment Order, and “pursuant to the South Carolina Law,” the Receiver has “power and authority fully administer all assets of Cape, accept service on behalf of Cape,

engage counsel on behalf of Cape and take any and all steps necessary to protect the interests of Cape”—in proper satisfaction of claims against Cape—“whatever they may be.” *Id.*

The Appointment Order also authorized “rights, authority and powers with respect to” Cape’s property, including to “obtain from any . . . third party, any financial records belonging to or pertaining to” Cape, including potential insurance coverage related to Cape. *Id.* at 2.

IV. The Receiver Properly Asserted a Third-Party Lawsuit.

Among other efforts to marshal assets, the Receiver investigated Cape’s historical and current ownership and control. From that, the Receiver identified three groups of entities (and one individual) that were responsible for and/or benefited from Cape’s litigation-avoidance strategy. Thus, on June 30, 2023, the Receiver filed a Third-Party Complaint in this proceeding, *John and Margaret Tibbs v. 3M Company et al.*, No. 2023-CP-4001759 (“Tibbs Lawsuit”), in which Cape PLC (already in receivership) had been named a defendant in April 2023. That pleading asserted third-party equitable claims for unjust enrichment, constructive trust, alter ego and veil-piercing liability, and accounting.

Among the Third-Party Defendants are certain current owners or affiliates of Cape (collectively, “Altrad Third-Party Defendants”),³ and among that group, two subgroups have emerged: (i) five Responding Altrad Third Party Defendants, which have filed the motions to dissolve at issue, and (ii) seven “Non-Responding Altrad Third-Party Defendants,” which failed to respond to the Third-Party Complaint, despite being served pursuant to Article 10 of the Hague

³ The Receiver originally named The Law Debenture Corporation PLC (“Law Debenture”) as an Altrad Third-Party Defendant, based on public information suggesting that it was a “Person with Significant Control” of Cape as of 2016. *See* Third-Party Compl. ¶ 113. After receiving additional information from Law Debenture’s counsel regarding the nature of its “control,” which was based on representing the interests of certain persons in the United Kingdom also injured by Cape asbestos, the Receiver dismissed Law Debenture on August 21, 2023, without prejudice.

Convention, including Altrad UK Ltd.; Cape Industrial Services Ltd., n/k/a Altrad Services Ltd. (since June 1, 2021); Cape Holdco Ltd.; Cape Industrial Services Group Ltd.; Cape UK Holdings Newco Ltd.; Sparrows Offshore Group Ltd.; and The Sparrows Group LLC. Due to those failures to appear, the Receiver filed default motions against those seven entities, with supporting proof of service, from August 18 through 29, 2023.

ALTRAD AND CAPE-AFFILIATED ENTITIES ("ALTRAD THIRD-PARTY DEFENDANTS" OR "ALTRAD")	
<u>Non-Responding (Defaulting) Altrad:</u> • Altrad UK Ltd. • Altrad Servs. Ltd. (f/k/a Cape Indus. Servs. Ltd.) • Cape Holdco Ltd. • Cape UK Holdings NewCo Ltd. • Cape Indus. Servs. Grp. Ltd. • Sparrows Offshore Grp. Ltd. • The Sparrows Grp., LLC	<u>Responding (Non-Defaulting) Altrad:</u> • Mr. Mohed Altrad • Altrad Inv. Auth. S.A.S. • Hawk Bidco US Inc. • Arranco US, LLC • Sparrows Offshore, LLC

Of the seven Non-Responding Altrad Third-Party Defendants, five of them (*i.e.*, all except two defaulting “Sparrows” entities⁴) share the same registered office address as Cape PLC, n/k/a Cape Intermediate Holdings Ltd., in Warrington, England at 6-7 Lyncastle Way Barleycastle Lane,

⁴ Without explanation, Responding Altrad Third-Party Defendants have asserted in filings with this Court that none of the Responding Altrad Third-Party Defendants has “affiliation or association” with the Sparrows Offshore Group, Ltd. (based in Aberdeen, Scotland) or The Sparrows Group LLC (a Delaware LLC created in March 2023). That contention conflicts with public materials regarding their affiliations, in which Altrad has touted its recent acquisition of the Sparrows Group, which on information and belief includes these two entities. *See, e.g.*, Altrad Press Release, *Altrad Group Agrees to Acquire Sparrows Group* (Mar. 2, 2022), <https://www.altrad.com/en/newsreader/altrad-agrees-to-acquire-sparrows-group.html>. Also notably, (i) within **two weeks** of being served the Third-Party Complaint on July 14, 2023, Sparrows Offshore Group Ltd. passed a resolution to liquidate on July 27, 2023 (while other Sparrows entities continue to operate at the same registered address, including Sparrows Offshore International Group Ltd.), and (ii) after these motions to dissolve were filed, the “Sparrows Group” has been rebranded “Altrad Sparrows.”

Appleton Thorn Trading Estate. *See* Ex. 1, AD01 Change of Registered Office Address for Cape Intermediate Holdings Ltd. (June 13, 2023) (showing change of address, from where the Park Lawsuit was served, around June 13). Thus, Cape has been served and put on notice *many times* now about the nature of the underlying asbestos suit filed against it (including by the Tibbs Plaintiffs), along with the South Carolina receivership over it.⁵

Likewise, the Receiver named three entities associated with historical ownership and control of Cape, including when the liability-avoidance scheme was implemented in the 1970s, identified as the “Charter Third-Party Defendants,” including Charter, Central Mining, and ESAB Corporation, which were properly served with a copy of the Third-Party Complaint. *See, e.g.*, Third-Party Compl. ¶ 124 (“On information and belief, ESAB Corporation is currently the parent company of, as well as a successor in interest to, Charter Consolidated Ltd., along with Charter’s subsidiary Central Mining & Investment Corporation Ltd. . . .”); *see also id.* ¶¶ 45–69, 77–105 (detailing the relationship between Charter, Central Mining, and Cape, among other Third-Party Defendants associated with Cape’s historical ownership and control).

Appearing to advocate on behalf of Cape, the Responding Altrad Third-Party Defendants and the Charter Third-Party Defendants have filed multiple motions to dissolve the Receivership. As explained below, those motions lack merit and should be denied.

⁵ Counsel for Mr. Altrad and Altrad Investment Authority S.A.S. stated via email on August 18 and 19, 2023, as well as in other communications, that they also represent one of the defaulting Altrad Third-Party Defendants with the same registered address as Cape, *i.e.*, Altrad UK Ltd. This fact, which further supports the Receiver’s claims against the Altrad Third-Party Defendants, is detailed further in a separately filed omnibus opposition to motions to dismiss under Rules 12(b)(1) and 12(b)(6) filed by certain Third-Party Defendants.

ARGUMENT

I. Cape Was Properly Served in the Park Lawsuit and Failed to Respond.

Cape was properly served in the Park Lawsuit, as the First Amended Complaint pleaded claims against an English entity existing since 1893, Cape PLC, n/k/a Cape Intermediate Holdings Ltd., for the wrongful death allegedly caused by the company’s historical asbestos business. *See* Cape POS Exhibit. Instead of responding, Cape chose to continue its decades-long practice of ignoring asbestos lawsuits filed against it in the United States—simply accepting defaults ostensibly because it believes defaults entered by this Court cannot be enforced. *See* Third-Party Compl. ¶¶ 89–105. Indeed, Cape’s own disclosures make clear that it **never** intends to respond to U.S. litigation in the future, because that would purportedly “have a materially adverse effect on the financial status of the Group and almost certainly result in insolvency proceedings.” Ex. 2, *Proposals for a Scheme of Arrangement Between Cape PLC et al.* (Mar. 15, 2006), at 65.

A. The proof of service confirms that the relevant Cape entity was properly served.

Rather than acknowledge the proper service of Cape, and its longstanding, publicly disclosed practice of refusing to respond to U.S. litigation, Altrad now suggests that the incorrect Cape entity has been served. Specifically, Altrad notes that a recently formed entity, Cape PLC, as organized under the laws of the Bailiwick of Jersey in 2011, was not served, and that is the only entity currently existing and going by the name “Cape PLC.” *See* Altrad Mot. at 2–3, 21 (points #1 and #2). But as Cape’s own materials make clear, that Jersey entity was formed recently to act as a “holding company of the Cape Group” for tax purposes, with the new entity being a “Singapore and Jersey tax resident.” Ex. 3, *Cape PLC Recommended Proposals to Establish a New Jersey-Incorporated Holding Company of the Cape Group* (May 9, 2011), at 9, 11, 16. Against a backdrop of decades of ignoring all forms of American pleadings as part of a publicly disclosed

strategy, the notion that a different, recently formed Cape entity in the Bailiwick of Jersey somehow would have treated these service documents differently strains credulity.

To be clear, in both the underlying Park and Tibbs Lawsuits, and in this third-party action, there has been **no** reference to the Jersey entity until Altrad raised it as a defense. And from a basic assessment of relevant filings and pending discovery, it is unambiguous that the conduct of the 130-year-old Cape entity in England (and not the recently formed holding company in the Bailiwick of Jersey) is at issue:

- **Park Lawsuit’s Asbestos Allegations.** While still alive, Ms. Park identified Cape PLC in the caption as a defendant, individually and as successor in interest to Cape Asbestos Company Ltd. *See* Original Compl., at 1, 7. After dying of mesothelioma, amended versions of the complaint were filed to include a wrongful-death claim against Cape Intermediate Holdings Limited (f/k/a Cape Intermediate Holdings PLC) and Cape PLC, with both defendants sued as successors in interest to Cape Asbestos Company Ltd. and alleged to be organized under English law. *See, e.g.,* First Amended Compl., at 9. As the First Amended Complaint made clear, the liability alleged against both Cape PLC and Cape Intermediate Holdings Limited was based on Cape’s historical asbestos business, in existence long before the company’s adoption of either name in 1989 and 2013, respectively. *See id.* ¶¶ 26–27.⁶
- **Appointment Motion.** The motion to appoint a receiver also referenced only Cape PLC as “the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.)”

⁶ As in the Park Lawsuit, the complaint filed by Plaintiffs John A. Tibbs and Margaret B. Tibbs names Cape PLC as a defendant. *See* Compl., *Tibbs et al. v. 3M Company et al.*, No. 2023-CP-4001759 (Apr. 5, 2023), at 2, 11, 23 (identifying U.K.-based “**CAPE PLC** individually and as successor-in-interest to **CAPE INDUSTRIES LTD.** f/k/a **CAPE ASBESTOS COMPANY LTD.** and its subsidiaries and global affiliates”).

that is “organized and existing under the laws of the United Kingdom, with its principal place of business in England.” Appointment Mot. at 1.

- **Third-Party Complaint.** The Third-Party Complaint against Altrad (including its various Cape-affiliated subsidiaries) likewise makes clear that “Cape” refers to the entity formed in 1893 in England, and even describes the various nominal changes to Cape’s name over the past half century (*i.e.*, after it began to be sued in the United States for asbestos-related injuries). *See* Third-Party Compl. ¶ 113 (detailing name changes to Cape Asbestos Company Ltd., including operating as Cape PLC from 1989 to 2011 and “re-registering as a private company to become Cape Intermediate Holdings Ltd. in 2013”).
- **Discovery Requests.** Finally, the Receiver served discovery on certain Responding Altrad Third-Party Defendants as early as July 18, 2023—more than one month before the first motion to dissolve was filed—which left no doubt that “Cape PLC” refers to the longstanding English entity, not the recently formed Bailiwick of Jersey entity:

2. “Cape PLC” means the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.) and its subsidiaries and affiliated Entities, with any other predecessor or successor in interest, including Cape Industries PLC, Cape Intermediate Holdings PLC, and Cape Intermediate Holdings Ltd.

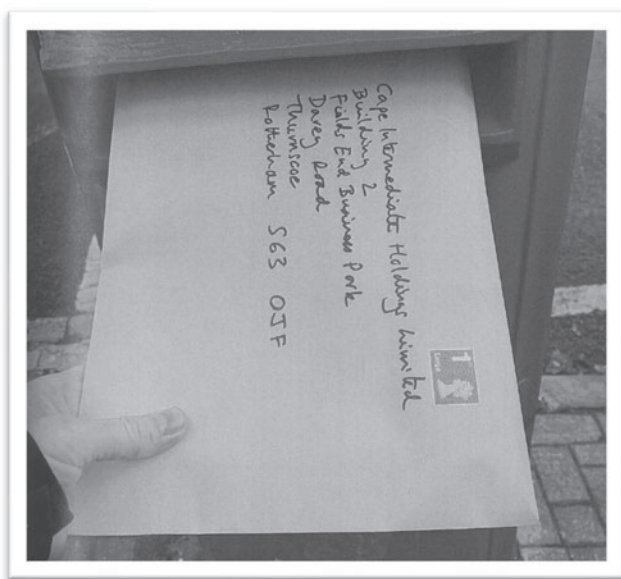
B. Both the complaint and summons were served on Cape.

Altrad also argues that service was defective because only a summons, and not a copy of the complaint itself, was served—which it argues is contrary to Rule 4(d)’s requirement that the “summons and complaint must be served together.” *See* Altrad Mot. at 3, 22 (point #5). That contention, however, is erroneously based on what is quite obviously a mere shorthand description

of the document that was served as the “First Amended Summons.” The suggestion that perhaps *only* the summons was served is fanciful.

In the Park Lawsuit, the “First Amended Summons” and “First Amended Complaint” refer to two parts of the same document that was filed on November 17, 2021. The summons consists of the filing’s first 4 pages, and the complaint consists of the filing’s remaining 66 pages.

Pursuant to Rule 4(d)’s obligations, counsel for the Park Plaintiffs would have provided the entire filing—rather than only the first four pages—and directed the process server to mail the entire document. And ostensibly, the process server followed that directive—mailing the entire 70-page filing (not just 4 pages), doing so in an oversize envelope with a large-letter stamp, as photographs in the Cape proof of service show.



Cape POS Exhibit, at 12–13. Accordingly, this argument is equally baseless.⁷

⁷ The process server’s cover letter indicates that a copy of the complaint and summons were also emailed to elclaimsaltraduk@altrad.com. See Cape POS Exhibit, at 5–6. If the summons was sent without the complaint, then Altrad should have that email to prove what was received.

C. The amendment of the complaint does not render service defective.

Altrad argues that even if the proper entity and address were served with an operative complaint, service was still defective—and thus the receivership appointment is invalid—because one week later (on December 23, 2021), Plaintiffs filed a Second Amended Complaint. Specifically, Altrad appears to contend that any entry of default (which Altrad contends is necessary for this Receivership) for Cape’s failure to respond to the First Amended Complaint would not be possible, because that complaint was superseded before a default could technically occur. Thus, according to Altrad, that amendment of the complaint effectively voided the notice provided to Cape. *See* Altrad Mot. at 6, 22 (point #12). But that technical, formalistic argument (i) is legally incorrect, and (ii) does not negate that Cape was properly served notice of this proceeding.⁸

First, the argument ignores that because Cape became a “part[y] in default for failure to appear,” and because no “new or additional claims for relief [were asserted] against” Cape in the Second Amended Complaint: the rules **did not require** Cape to be served again. Rule 5(a), SCRCP.

Second, the argument incorrectly characterizes the filing of the Second Amended Complaint (which asserted no new claims against Cape) as automatically negating the effect of service on Cape of the First Amended Complaint—necessitating a second round of service. In

⁸ The authorities cited by Altrad as supporting its argument that service of the First Amended Complaint was negated by the filing of a subsequent complaint—in reality—offer no such support. *See, e.g., Schein v. Lamar*, 284 S.C. 252, 255, 325 S.E.2d 573, 574 (Ct. App. 1985) (finding “questions as to the sufficiency of the First Amended Complaint are now moot,” given the complaint had been superseded—having no bearing on issues around proper service); *Fawzy v. Wauquiez Boats SNC*, 873 F.3d 451, 455 (4th Cir. 2017) (appeal from Maryland federal court, finding lack of jurisdiction to consider appeal when dismissal order concerned only a superseded complaint and did not address an amended complaint filed the same day).

South Carolina, “courts have long held that in order to establish that service has been properly effected, the plaintiff need only show compliance with the civil rules on service of process.” *McClurg v. Deaton*, 380 S.C. 563, 579, 671 S.E.2d 87, 96 (Ct. App. 2008). In contrast, negating service based on an amendment (especially one in which no new claims are asserted against Cape) would not serve the “principal object of service of process,” *i.e.*, “to give notice to the defendant corporation of the proceedings against it” and to allow the Court to exercise jurisdiction. *Mull v. Ridgeland Realty, LLC*, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (Ct. App. 2010) (emphasis added) (finding service complied with the law, despite allegations of a technical defect). When, as here, rules on service of process “are followed, there is a presumption of proper service.” *McClurg*, 380 S.C. at 579, 671 S.E.2d at 96. Moreover, as numerous authorities recognize amending a complaint after service does not render original service defective. *See, e.g., Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174, 1180 (C.D. Cal. 1998) (denying a motion to dismiss for “insufficiency of service of process,” when an operative complaint rather than an amended complaint was served, because “[a]n original complaint is only superseded . . . when the amended complaint is properly served, not when it is filed” (citing *Int’l Controls Corp. v. Vesco*, 556 F.2d 665, 669 (2d Cir. 1977))).⁹

Third, the Receiver acknowledges that the Appointment Motion contained errors regarding the date of service, as it (i) conflated the date of the supporting affidavit (March 8, 2022) with the

⁹ *See also Thompson v. Victoria Fire & Cas. Co.*, 32 F. Supp. 2d 847, 848 (D.S.C. 1999) (assessing the originally served complaint for purpose of removal, rather than an amended complaint that was not served); *Opus Grp., LLC v. Enomatic Srl*, 2012 WL 13134613, at *3 (S.D. Fla. Oct. 24, 2012) (denying motion to dismiss based on service of a first amended complaint, after the second amended complaint was filed, given lack of prejudice to the defendant “considering the timing and the [insignificant] differences between the two complaints”); *Crane v. Battelle*, 127 F.R.D. 174, 177–78 (S.D. Cal. 1989) (denying motion to quash service in light of defendant not being able to “seriously contend that there was prejudice to some substantial right of defendant,” when the complaint caption reflected an erroneous name, because the mistake was innocent and there was substantial compliance with procedural rules of service).

effective date of service (December 16, 2021), and (ii) referenced the Second Amended Complaint rather than the First Amended Complaint as what was served. *See* Altrad Mot. at 4–5 (points #7, 9). These technical defects, however, do not negate the operative facts at issue in connection with this motion: namely, that **the proper Cape entity was served** with notice of the Park Lawsuit, and **Cape chose not to respond**, consistent with its longstanding, publicly disclosed avoidance strategy. Indeed, **Cape still has not responded**.

Ultimately, the law does not require this Court to exalt technical form over substance, as Altrad suggests.¹⁰ Accordingly, none of Altrad’s arguments regarding allegedly defective service on its subsidiary, Cape, is valid, and none supports dissolution of the Receivership.¹¹

II. The Court Appointed the Receiver for Cape with Proper Process and Authority.

A. Proper notice of the Appointment Motion was provided to Cape.

Using international carrier DHL, the Park Plaintiffs effected delivery of the Appointment Motion at the same registered address in England where service of the First Amended Complaint was previously perfected. *See* Appointment Mot. at 8. There is no basis for Altrad’s argument that Plaintiffs were required to do anything else—including serving the motion pursuant to the Hague Convention. *See* Altrad Mot. at 3, 5, 12, 19–20 (points #4, #10, #31).

¹⁰ *See, e.g., Jackson v. Beech*, 636 F.2d 831, 835 (D.C. Cir. 1980) (“modern procedural reforms were aimed at eliminating technicalities that preclude the substantive resolution of dispute”); *Dennis v. Escarcega*, 2008 WL 11409449, at *3 (W.D. Tenn. Oct. 7, 2008) (rejecting arguments based on alleged “technical deficiencies” in denoting a pleading as a complaint, given it contained “sufficient information to place the Defendant on notice of the claims being brought against him”).

¹¹ This argument also relies on the legal premise that a technical default and default judgment are required to appoint a receiver (and that the purportedly necessary default was avoided by the filing of the Second Amended Complaint). But that argument is also wrong, as discussed *infra* Argument § II.B.

While Rule 4.1, SCRCF, requires service of the summons and complaint through certain processes for “service of process in foreign countries,” appointment of a receiver is **not** subject to those particularized guidelines. Instead, the law only requires “**notice** of the application,” S.C. Code §§ 15-65-20, 15-65-30 (emphasis added), which undisputedly was provided here. In turn, Altrad fails to explain how a DHL mailing would not provide sufficient notice—but serving pleadings (for a second time) pursuant to the Hague Convention would. Indeed, given Cape’s consistent pattern of not responding to asbestos litigation in the United States—including in this third-party action—such service would have been futile. *See, e.g.*, Rule 1, SCRCF (providing that South Carolina procedural rules “shall be construed to secure the just, speedy, and inexpensive determination of every action”).¹²

Accordingly, the Court should validate as adequate the notice provided to Cape regarding the Appointment Motion.

B. The Court followed all necessary steps to appoint a receiver for Cape.

Altrad also asserts that, even if Cape was properly served and notified of the Appointment Motion, the Court failed because it:

did not perform any of the steps legally necessary to appoint a receiver over Cape PLC for purposes of the Park Lawsuit, including by [i] confirming lawful service of process in the Park Lawsuit, [ii] entering default against Cape PLC, [iii] granting a default judgment against Cape PLC, and [iv] entering judgment against Cape PLC purporting to reflect a liquidated sum of damages due to the Park plaintiffs based on a sufficient factual showing.

¹² There is also no merit to the Charter Third-Party Defendants’ argument for dissolution because they were “not provided with notice of the [Appointment] Motion prior to the entry of the [Appointment] Order.” (Charter Mot. at 3–4.) Sections 15-65-20 and 15-65-30 did not require that they receive such notice. And once they became implicated by this Receivership, because claims have been asserted against them in the Third-Party Complaint, each of the Charter Third-Party Defendants was promptly served and has been given an opportunity to respond.

Altrad Mot. at 6 (point #11). This argument misconstrues what is required for appointment of a receivership under South Carolina law, especially in the context of a company like Cape, for which a receiver was appointed under two parts of S.C. Code § 15-65-10 that have **no** such prerequisites.

First, under subsection (4) of S.C. Code § 15-65-10, this Court has authority to appoint a receiver “either in or out of court . . . [w]hen a corporation has been dissolved, is insolvent or in imminent danger of insolvency or **has forfeited its corporate rights**, and, in like cases, of the property within this State of foreign corporations.” (Emphasis added.) In turn, the Appointment Order was properly made under this subsection because Cape had forfeited its corporate rights based on “its complex scheme and 1978 liquidation of its American subsidiary, NAAC, by which it intentionally fled the United States to avoid its liabilities and obligations to its creditors”—amounting to a “crime, breach of obligation, or neglect of duty” that caused forfeiture of its corporate rights. *See* Appointment Mot. at 6 (quoting Black’s Law Dictionary (11th ed. 2019) to define *forfeiture*).¹³

Second, under subsection (5) of S.C. Code § 15-65-10, this Court has authority to appoint a receiver “either in or out of court . . . [i]n such other cases as are provided by law or **may be in accordance with the existing practice**, except as otherwise provided in this Code.” (Emphasis added.) In turn, the Appointment Order was properly made under this subsection based on Cape’s long-running, intentional scheme to defraud its tort creditors by refusing to appear in the United States, including in South Carolina. *See* Appointment Mot. at 7–8. This subsection, reflecting an “old practice” of equity and “important principle of law” to correct injustice, was particularly

¹³ Although the Appointment Order described Cape as dissolved, even though Cape in England is still a going concern, that does not impact the legality of the Receivership. *See* Altrad Mot. at 7, 10, 18–19 (points #13, #24). The Court can simply amend the Appointment Order to clarify that statement, if the Court finds that appropriate. *See* S.C. Code § 33-14-320(c).

applicable to Cape, given its efforts “to defeat [its] creditors by an act or course of conduct which indicates moral fraud—a conscious intent to defeat, delay, or hinder his creditors in the collection of their debts.” *Virginia-Carolina Chem. Co. v. Hunter*, 84 S.C. 214, 66 S.E. 177, 179 (1909) (citing *Miller v. Hughes*, 33 S.C. 530, 12 S.E. 419 (1890)). Because Cape set its numerous tort creditors, including the Park Plaintiffs, “at arm’s length by refusing . . . to take any interest in the satisfaction of their claims,” there was a “prima facie case . . . warranting the appointment of a receiver.” *Id.* at 180.

Likewise, although Altrad asserts certain procedural defects (such as with respect to there being no entry of a default against Cape PLC or a judgment reflecting a liquidated sum due to the Park Plaintiffs), those processes are irrelevant to the grounds on which the Receiver for Cape was appointed. *Compare* Altrad Mot. at 6 (point #11) with S.C. Code §§ 15-65-10(2), (3) (providing for appointment of receiver in certain situations “[a]fter judgment”).

Finally, given that Cape’s default in the Park Lawsuit was part of a longstanding practice by the company (and not a “single purported default,” as Altrad argues), the Appointment Order easily meets the strictures of South Carolina law and provides a compelling need for a receivership. *See* Altrad Mot. at 8 (point #16) (describing the Appointment Order of an Altrad subsidiary/affiliate as “harsh and drastic”); *see also Penn Mut. Life Ins. Co. v. Cudd*, 172 S.C. 88, 172 S.E. 787 (1934) (distinguishable precedent cited by Altrad, based on the improper appointment of an individual to be *his own* receiver). Indeed, any contention that Cape lacks assets in South Carolina (apart from its insurance and legal claims) is part of Cape’s scheme to defeat tort

creditors—*demonstrating* the necessity of this Receivership and for allowing this third-party action to continue. *See* Third-Party Compl. ¶¶ 41, 43, 65, 79–80, 89–105.¹⁴

C. The Court appointed a receiver for the proper Cape entity.

Despite Altrad’s arguments to the contrary, this Court has appointed a receivership over the correct Cape entity: Cape PLC, n/k/a Cape Intermediate Holdings Ltd., f/k/a Cape Asbestos Company Ltd. at its founding in 1893. (*See supra* Argument § I.A.) It does not matter that the entity—which has continued its liability-avoidance scheme for decades—changed its name from “Cape PLC” in 2011. Indeed, Altrad cannot reasonably argue that Cape lacked proper notice of the proceeding, or was confused by the company at issue, given the allegations in the motion itself.

The South Carolina rules of procedure, including for service of process, “do not turn on parsing strict technicalities or debating murky legal abstractions.” *McCall v. IKON*, 363 S.C. 646, 651, 611 S.E.2d 315, 317 (Ct. App. 2005). When a party is identified “in such terms that every intelligent person understands who is meant, as is the case here, [process] has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.” *Griffin v. Capital Cash*, 310 S.C. 288, 292, 423 S.E.2d 143, 146 (Ct. App. 1992) (citation omitted).

At best, as to the appointment of a receiver for “Cape PLC” rather than “Cape Intermediate Holdings Ltd.,” Altrad has raised a “misnomer of a corporation,” which is “immaterial” because

¹⁴ Relatedly, there is no merit to the Charter Third-Party Defendants’ challenge to the Appointment Order as not “includ[ing] ‘a clause fixing the value of the property’ sought to be placed in the hands of a receiver,” as purportedly required by S.C. Code § 15-65-60. (Charter Mot. at 4.) No such requirement, which is related to posting bonds by a party claiming rights to property, applied to the Cape Appointment Order, including because any bond requirement would necessarily not apply here and would be futile, when the liabilities at issue and amount of assets that may be available, including through uneroded insurance, could not be valued. Moreover, Cape has made no effort to post a bond for the return of property.

“it appears [Cape] could not have been, or was not, misled” or otherwise prejudiced. *Id.* Accordingly, this technicality provides no basis to dissolve the Receivership.¹⁵

D. Personal jurisdiction exists for a Cape receivership.

Altrad also challenges the Appointment Order as unlawful because the Court did not make an explicit finding that it has personal jurisdiction over Cape PLC. No such finding was needed. Indeed, personal jurisdiction is self-evident, given Cape’s large-scale export of asbestos to the United States over decades, knowing it would injure tens of thousands of people, including in South Carolina. *See, e.g.,* Third-Party Compl. ¶ 75 (noting nationwide distribution of certain asbestos, over which Cape had a monopoly, and prior personal jurisdiction ruling in South Carolina with respect to a Cape entity).

The applicable long-arm statute is easily met by the conduct alleged in the Appointment Motion. Specifically, this Court has jurisdiction over Cape as “a person who act[ed] directly or by an agent as to a cause of action arising from” Cape’s (1) “causing tortious injury or death in this State by an act or omission outside this State,” and by “regularly . . . engag[ing] in [a] persistent course of conduct, or deriv[ing] substantial revenue from goods used or consumed or services rendered in this State,” and/or (2) “production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.” S.C. Code §§ 36-2-803(4), (8).¹⁶

Accordingly, personal jurisdiction clearly exists for purposes of this Receivership.

¹⁵ The Receiver would have no objection to the Court’s amendment of the Appointment Order to identify Cape Intermediate Holdings Ltd., if the Court finds that appropriate. *See, e.g., Griffin*, 310 S.C. at 292, 423 S.E.2d at 146 (“If it later appears that the true name of the corporation is different . . . , the misnomer is properly a subject of amendment.”); S.C. Code § 33-14-320(c) (permitting amendment of appointment order).

¹⁶ Concurrently with this motion, the Receiver is separately filing two omnibus oppositions to the motions to dismiss filed by each of the Third-Party Defendants.

E. There is a justiciable controversy.

The Park Lawsuit (leading to the Cape Receivership) and this third-party action (asserting equitable claims) both present justiciable controversies for the Court’s resolution, as each reveals a “real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute.” *Pee Dee Elec. Co-op., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983). Altrad’s arguments to the contrary are factually and legally incorrect.

First, Altrad quotes a single email (presenting the email in isolation) by Plaintiffs’ counsel to argue that the lawsuit had been “completely resolved” months before the Appointment Motion was filed, and no judgment was entered against Cape, so there was no basis to appoint a receiver. *See* Altrad Mot. at 8 (point #17). This overly simplistic recitation of the record does not acknowledge that the Park Lawsuit was resolved only as to **responding defendants**, and not as to Cape, which did not respond; trial had been scheduled but no longer was needed as all responding defendants had agreed to settle the claims against them. Indeed, after updating the Court of the tentative resolution of the claims against responding defendants, it took several more months—through February 2023—to file numerous stipulations of dismissal. During that period, Cape still filed no appearance, and Plaintiffs made no indication that they would dismiss their claims against Cape. Once those stipulations were filed, Plaintiffs filed the Appointment Motion in March 2023, pursuant to subsections (4) and (5) of S.C. Code § 15-65-10, which do not require entry of default or a default judgment (as Altrad incorrectly suggests).

Second, Altrad makes a conclusory (and confused) assertion that the Receiver appointed in the Park Lawsuit does not and cannot purport to seek relief on behalf of the Park Plaintiffs. Altrad fails to support this contention factually or legally. And to the extent Altrad means to argue that

the Receiver may not seek third-party relief in the Tibbs Lawsuit, and instead is limited to seeking relief for the Park Lawsuit (*i.e.*, in the action in which the Appointment Motion was filed), that contention would have no basis in the Appointment Order or law. Indeed, as the Appointment Order makes clear, and consistent with other receiverships ordered by this Court, the Receiver acts to marshal assets on behalf of all such creditors against Cape.

Finally, Altrad argues that counsel for the Park Plaintiffs filed the Appointment Motion to advance the positions of plaintiffs in unrelated asbestos cases rather than advance interests of clients in the Park Lawsuit. But that argument is illogical. The Park and Tibbs Lawsuits are similar because those plaintiffs—like tens of thousands of Americans, including citizens of South Carolina—have been harmed by Cape’s decades-long asbestos business and liability-avoidance scheme. In addition, the Receiver’s ability to successfully marshal assets will directly inure to the benefit of the Park Plaintiffs, which allege uncompensated harm from Cape’s conduct.

F. The omission of proof of service from the Appointment Motion has been corrected.

Altrad argues for dissolution because of a clerical error whereby proof of service was inadvertently not included as an exhibit to the Appointment Motion (even though counsel for the Park Plaintiffs as officers of this Court represented that service had been made and that they intended to include that documentation). That omission, however, was corrected with a notice of filing of the omitted exhibit on August 28, 2023, and does not negate that Cape was properly served. The unintentional “[f]ailure to make proof of service does not affect the validity of the service.” Rule 4.1(c)(2), SCRCP (emphases added).

III. The Appointment Order and the Law Allow This Third-Party Action.

Altrad next challenges the assertion of claims against Altrad in the Third-Party Complaint as violating the Appointment Order or the law generally. These arguments lack merit.

A. The Appointment Order authorizes this third-party action.

Altrad misreads the Appointment Order in asserting that pursuant to its “plain language,” as well as South Carolina law, the Receivership’s authority is limited to seeking derivative relief and liability connected to the Park Lawsuit—and **not** the Tibbs Lawsuit—and that the Receivership improperly goes beyond the territorial jurisdiction of South Carolina.

As required by S.C. Code § 33-14-320(c), the Appointment Order explicitly “describe[s] the powers and duties of the receiver or custodian in its appointing order,” such as “su[ing] and defend[ing] in his own name as receiver of the corporation in all courts of this State.” In turn, the Receiver was broadly granted “pursuant to the South Carolina Law with the power and authority fully administer all assets of Cape, accept service on behalf of Cape, engage counsel on behalf of Cape and take any and all steps necessary to protect the interests of Cape whatever they may be.” Appointment Order, at 1. Elaborating on those rights further, the Appointment Order states that the Receiver’s rights are “inclusive of, but not limited to, the right and obligation to administer . . . any claims related to the actions or failure to act of Cape’s insurance carriers,” to “obtain from any . . . third party, any financial records belonging to or pertaining to” Cape, and to “hire any person or company necessary to accomplish any right or power under this Order.” *Id.* at 1–2. Pursuant to those powers, the Receiver filed the Third-Party Complaint against Altrad to exercise his duly appointed authority and achieve the objectives of the Appointment Order.

Apart from the Appointment Order, the law authorizes the Receiver to bring the Third-Party Complaint against Altrad. Indeed, “[t]he right to have a receiver appointed is an ancient one,” *Pelzer v. Hughes*, 27 S.C. 408, 3 S.E. 781, 785 (1887), with courts sitting in equity appointing receivers to ensure a fair result, *First Carolinas Joint Stock Land Bank of Columbia v. Knotts*, 191 S.C. 384, 1 S.E.2d 797 (1939). The central function of a receivership is to marshal assets for the

purposes of satisfying creditors, including tort claimants. Indeed, the Supreme Court of the United States recognizes that a “state court, upon . . . hearing or information, . . . may permit its receiver to sue . . . upon any controverted claim,” including the ability to assert “all . . . rights of action.” *Porter v. Sabin*, 149 U.S. 473, 480 (1893). Here, the Receiver has pleaded viable claims to hold Third-Party Defendants accountable for Cape and its liability-avoidance scheme.

In addition, Rule 66, SCRCF, concerns the “Powers of Receiver” and provides that “[i]n addition to the powers conferred by law, every receiver of the property and effects of a debtor shall, unless restricted by order of the court, have general power and authority to sue for and collect the debts, demands and rents belonging to the debtor, and . . . may also sue . . . in the name of the debtor where it is necessary or proper for him to do so.” There is no jurisdictional limit on that authority.

Accordingly, South Carolina law and the Appointment Order authorize the Receiver to bring this third-party action, and there is no basis for its dismissal.

B. The third-party action does not violate principles of international comity.

Altrad also argues that the Appointment Order is unlawful as violating principles of international comity, purportedly because it interferes with what it describes as the “exclusive jurisdiction” of the United Kingdom and the Bailiwick of Jersey to manage Cape and claims against Cape. Specifically, Altrad appears to suggest that the United Kingdom has exclusive jurisdiction to address asbestos-related claims against Cape, and that the Bailiwick of Jersey has the exclusive right to exercise oversight of the internal affairs of the Cape entity organized in the

Bailiwick of Jersey. *See* Altrad Mot. at 13 (points #34, #35). This argument is unsupported by facts or law.

As to the purported deference owed to the United Kingdom, Cape vaguely references a “Scheme of Arrangement summarized in Note 32 of Cape PLC’s Annual Report 2022,” which purportedly involved “pre-existing exclusive jurisdiction of the [United Kingdom] courts, which previously exercised jurisdiction over [Cape’s] assets” in 2006. Altrad Mot. at 13 (points #34, #35). Altrad, however, does not elaborate on that purported “exclusive jurisdiction,” or even provide a copy of or link to the report, or a copy or link to the referenced scheme of the arrangement, which—in fact—would refute Altrad’s claim of exclusive jurisdiction. *See, e.g.*, Ex. 2, Proposals for a Scheme of Arrangement Between Cape PLC *et al.* (Mar. 15, 2006), at 65 (“The Scheme *only applies* to UK asbestos-related claims as described in this document. . . . It is possible that the Group may in the future receive such ‘non-UK claims’ and such claims would not be Scheme Claims.” (emphasis added)).

In sum, Altrad provides **no** legal or factual basis to find that a United Kingdom court can completely override this Court because the former somehow has exclusive jurisdiction over Cape’s “massive unpaid responsibility for the death and illness caused by its asbestos products in South Carolina and elsewhere in the United States”—for which “Cape has done nothing.” *See* Third-Party Compl. ¶ 114 (emphasis omitted) (referencing 2006 scheme of arrangement with former employees “compensat[ing] for illness and death resulting overseas”).

In turn, as to the purported deference owed to the Bailiwick of Jersey, the argument fails on its face. No filing has ever referenced the Jersey-formed Cape holding company, until Altrad first raised that red herring as an argument to dissolve the Receivership. In fact, even if claims had been made against that entity, Altrad provides no legal or factual foundation for its argument that

the Receivership “interfere[s] with the pre-existing exclusive jurisdiction of the Jersey courts to exercise oversight and management over the internal affairs of a Jersey company.” Altrad Mot. at 13. The creation of a holding company in the Bailiwick of Jersey in 2011 did not (and could not) somehow absolve Cape of liability to people injured by Cape asbestos in the United States over many decades, including in South Carolina; nor did it deprive this Court of authority to create a receivership for the purpose of addressing that unanswered liability in the United States.

C. The third-party action does not violate the U.S. Constitution.

Altrad also vaguely asserts that this Receivership violates the U.S. Constitution, including that the Appointment Order “violates *inter alia* the Dormant Commerce Clause, the Foreign Commerce Clause, the Taking Clause, the Due Process Clause, the Excessive Fines Clause, the Equal Protection Clause, and the Supremacy Clause of the U.S. Constitution.” Altrad Mot. at 14, 24–26. Primarily, however, the constitutional challenge is based on the Receivership purportedly having an unlawful “extraterritorial effect.” *Id.* Altrad makes that argument based on misstatements of the facts and the law (including erroneously asserting that Cape had “nothing to do with South Carolina”), which ignores the widespread harm caused by Cape’s products in South Carolina (and elsewhere in the United States) and the power of the Receivership to marshal assets such as by asserting valuable claims for the benefit of creditors. (*See supra* Argument § III.A.)¹⁷

These constitutional arguments have no merit.

¹⁷ The authorities cited by Altrad do not support its argument that the Receivership has an unconstitutional extraterritorial effect or “attempt[s] to displace federal receivership law with a South Carolina statute.” *See, e.g.*, 28 U.S.C. §§ 754, 3103 (federal receivership statutes applicable to receiverships appointed in *federal* court); *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 490 (4th Cir. 2007) (rejecting interpretation of South Carolina statute to prohibit sales of automobiles to South Carolinians outside of the state).

D. Accusations of “bad faith” and “outrageous conduct” are baseless.

Altrad argues that the Receivership is (i) seeking to have “manufactured liabilities” passed on to third parties, (ii) acting beyond its authority, with incurable conflicts of interest, and (iii) violating the Appointment Order by not taking “any and all steps necessary to protect the interests of Cape.” Altrad Mot. at 9, 13–14. According to Altrad, on these bases, the Receiver’s filing of the Third-Party Complaint constitutes “bad faith” and “outrageous conduct,” and thus the Receivership should be dissolved. *Id.* at 26–28.

Altrad’s argument tries to turn reality on its head: If Cape had responded to the Park Lawsuit, then it could have offered its own defense and contested liability for the disease and death of Ms. Park. But it did not. Nor did it respond in that action after receiving notice of the motion to appoint a receiver over it. Nor has Cape responded after the Receiver filed the Third-Party Complaint against Cape’s current and historical owners and affiliated entities. Indeed, **five** of the Non-Responding Altrad Third-Party Defendants share—and were served at—**the same registered address of Cape PLC**, n/k/a Cape Intermediate Holdings Ltd. But still: **no response from Cape.**

As has been thoroughly pleaded, the Altrad Third-Party Defendants are alter egos of Cape itself and liable for directing, allowing, facilitating, or benefiting from Cape’s longstanding liability-avoidance scheme. *See* Third-Party Compl. ¶¶ 113–19, 125–41. It is that scheme, with Cape’s decades-long profitmaking, while knowing and hiding the health risks of asbestos, which is **truly** “outrageous.” *See, e.g., id.* ¶¶ 51–105 (describing Cape’s knowledge of asbestos-related disease endemic among its employees, substantial profitmaking, and efforts to influence public, governmental, and industry opinions about the safety of asbestos); *see also id.* ¶¶ 81–82 (describing Cape’s widespread abuse of South African child laborers during Apartheid). Rather

than pursue “manufactured liabilities,” the Receiver seeks basic accountability for Cape’s conduct—a reckoning that is long overdue.

CONCLUSION

For the foregoing reasons, the Court should deny the Responding Altrad Third-Party Defendants’ and the Charter Third-Party Defendants’ motions to dissolve.

Dated: October 18, 2023
Columbia, South Carolina

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

JOHN A. TIBBS and MARGARET B. TIBBS,

Plaintiffs,

v.

3M COMPANY, et al.,

Defendants.

CAPE plc, individually and as successor in
interest to CAPE ASBESTOS COMPANY
LIMITED, by and through its duly appointed
Receiver Peter D. Protopapas,

Third-Party Plaintiff,

v.

ANGLO AMERICAN PLC, individually and as
successor in interest to ANGLO AMERICAN
CORPORATION OF SOUTH AFRICA LTD., 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

**ESAB CORPORATION'S MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS THE THIRD-PARTY COMPLAINT**

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Third-Party Defendant ESAB Corporation (“ESAB”), by and through its undersigned counsel, submits this memorandum in support of its Motion to Dismiss the Third-Party Complaint (the “Memorandum”) filed by Third Party Plaintiff Cape PLC (“Cape”), by and through its Receiver Peter D. Protopapas (the “Receiver”), pursuant to Rule 12(b)(1), 12(b)(2), and 12(b)(6) of the South Carolina Rules of Civil Procedure, or alternatively to stay or sever the Third-Party Complaint pursuant to Rule 14(a), which was filed with the Court on September 1, 2023 (the “Motion”), as well as in response to the Receiver’s October 18, 2023 Omnibus Opposition to Third-Party Defendants’ Motions to Dismiss for Lack of Personal Jurisdiction (the “Jurisdiction Opposition”) and Omnibus Opposition to Certain Third-Party Defendants’ Motions to Dismiss Under Rules 12(b)(1) and 12(b)(6) and, Alternatively, For More Definite Statement and to Strike or Sever Under Rules 12(e) and 14 (the “12(b) Opposition”).¹

I. PRELIMINARY STATEMENT

The Third-Party Complaint should be dismissed because it fails to allege facts sufficient to support personal jurisdiction over ESAB. As a corporation organized under the laws of Delaware, with its principal place of business in Bethesda, Maryland, ESAB is not “at home” in South Carolina and thus, there is no general jurisdiction over it in this forum—an argument that the Receiver does not appear to contest. The Receiver, instead, seeks to justify specific jurisdiction over ESAB because it is the purported alter ego of Cape. However, despite the Third-Party Complaint’s heated rhetoric, it fails to sufficiently allege any *facts* demonstrating that ESAB (as opposed to other Third-Party Defendants) had the requisite dominion and control

¹ Without waiving any specific argument presented in its Motion to Dismiss, ESAB has focused this Memorandum on certain arguments only and 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.

over Cape to justify specific jurisdiction based on alter ego or veil piercing. Nor could it ever make these allegations, as the Receiver acknowledges that ESAB did not become the current corporate parent of Charter Consolidated Ltd. (“Charter Consolidated”) and Central Mining and Investment Corporation Ltd. (“Central Mining”) until more than twenty-five years after Charter Consolidated and Central Mining ceased having a legal interest in Cape.² Moreover, given that Third-Party Plaintiff’s claims are not premised on any activity by ESAB in South Carolina, there are no contacts by ESAB that could give rise to specific jurisdiction in South Carolina. For these reasons alone, the Complaint should be dismissed for lack of personal jurisdiction pursuant to Rule 12(b)(2).

Even if this Court were to find personal jurisdiction—it should not—the Third-Party Complaint should still be dismissed because it fails to state a claim against ESAB. All of the claims against ESAB are based on its purported domination and control of Cape. However, just as with respect to personal jurisdiction, the Third-Party Complaint fails to actually allege facts that demonstrate any control of Cape whatsoever by ESAB, much less the high level of control necessary to pierce the corporate veil or hold it liable as the alter ego of Cape.

This is unsurprising given that the Receiver’s argument fails without a finding that Charter Consolidated or Central Mining are the alter egos of Cape, an issue that was considered on the merits and rejected by the United States Court of Appeals for the Third Circuit more than 30 years ago. In that case, after a full trial specifically on the alter ego / veil-piercing issue, the Third Circuit determined, as a matter of law, that Charter Consolidated and Central Mining were not responsible for Cape’s liabilities in personal injury asbestos actions on alter ego or corporate veil-piercing theories because they simply did not exercise sufficient control over Cape.

² See Third-Party Compl., at ¶¶ 123 – 124.

Nevertheless, relying on the same facts as the Third Circuit relied on to reject veil piercing and alter ego, the Receiver seeks to litigate the issue all over again, potentially in tens of thousands of cases across South Carolina. Based on well-trod principles of res judicata and collateral estoppel, this Court can and should find that the Receiver is bound by these previous decisions. Therefore, without the base finding that ESAB's subsidiaries controlled Cape, which is a prerequisite before the Court could even consider piercing the corporate veil between ESAB and its subsidiaries as relates to Cape, the Court must dismiss any claims against ESAB.

Furthermore, the Court should dismiss the Third-Party Complaint as against ESAB because, pursuant to South Carolina's Door Closing Statute, the Third-Party Plaintiff, a non-resident entity that is legally distinct from the Receiver, lacks the capacity to sue ESAB, also a non-resident, for claims arising outside of South Carolina.

Alternatively, to the extent that the Court does not dismiss the Third-Party Complaint, the Court should strike or sever the Third-Party Complaint in its entirety under Rule 14(a) because the Third-Party Plaintiff's claims are not derivative of Plaintiffs' claims.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Current Action.

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").³ 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.⁴ Plaintiffs allege that Cape "is liable for

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

⁴ *Id.* at ¶¶ 106-109.

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.”⁵

On March 17, 2023 in a separate, unrelated asbestos personal injury action, this Court appointed the Receiver over Cape (the “Receivership Order”).⁶ The Receivership Order purported to appoint the Receiver on behalf of Cape because Cape, as the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.) and its subsidiaries and global affiliates, had “forfeited its charter and further failed to answer this case.” The Receivership Order appointing the Receiver, however, acknowledged the separate status of Cape and the Receiver.⁷

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 as a general, wholesale matter “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

⁵ *Id.* at ¶ 14.

⁶ Order, *Park v. Armstrong Int’l, Inc.*, Case No. 2021-CP-40-02727 (Ct. Com. Pl. Mar. 17, 2023). As set forth more fully in ESAB’s October 6, 2023 Motion for Protective Order and to Dissolve Receivership, ESAB respectfully asserts that certain defects in the appointment process warrant dissolution of the receivership.

⁷ *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.”)

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.”⁸

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.⁹ The Third-Party Complaint, based on acts that allegedly occurred outside of this country by and between foreign corporations wholly unrelated to the Plaintiffs in the Tibbs Suit, 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 obligations and responsibilities in the United States, in an amount to be proven at trial”;¹⁰
- “[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”;¹¹ and
- “[A] full accounting of each of the Third-Party Defendants.”¹²

⁸ 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).

⁹ *Id.* at ¶¶ 125-146.

¹⁰ *Id.* at ¶ 130.

¹¹ *Id.* at ¶ 141.

¹² *Id.* at ¶ 145.

B. Corporate History Of Cape And Charter.

Cape Industries, P.L.C. (“Cape”) was an industrial holding company incorporated in 1893.¹³ Through its wholly owned subsidiaries, Cape primarily “engaged in mining, industrial contracting, manufacturing of auto parts (friction materials) and building supplies including insulation. [And, u]ntil 1979 it mined and sold asbestos fiber from South Africa through such subsidiaries.”¹⁴ In 1979, Cape sold all of its asbestos mining and marketing subsidiaries to an unrelated company.¹⁵ According to Cape’s Receiver, in 1989, Cape Industries, P.L.C. shorted its name to Cape PLC before again changing its name in 2011 to Cape Intermediate Holdings PLC. The company then re-registered as a private company to become Cape Intermediate Holdings Ltd. in 2013.¹⁶

Charter Consolidated, P.L.C. (“Charter”) is a holding company that incorporated in 1964 as a mining finance company.¹⁷ In 1965, Charter became public “through a share exchange between the British South Africa Co., Central Mining and Investment Corp. Ltd. and Consolidated Mines Selection Ltd.” As part of that share exchange, Charter acquired a 16.8% interest in Cape, which gradually increased to Charter holding all of Cape’s preferred stock and

¹³ See Third-Party Complaint, at ¶ 45; *Craig v. Johns-Manville Corp.*, 1987 WL 10191, at *2 (E.D. Pa. Apr. 23, 1987), rev’d sub nom. *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145 (3d Cir. 1988). Cape was re-registered as a public company and changed its name from Cape Industries Ltd. f/k/a Cape Asbestos Company Ltd. to Cape Industries P.L.C. in 1981. See Third-Party Complaint, at ¶ 113.

¹⁴ *Craig*, 1987 WL 10191, at *2; see also Third-Party Complaint, at ¶ 102.

¹⁵ See Third-Party Complaint, at ¶ 102; *Craig*, 1987 WL 10191, at *3; *Craig*, 843 F.2d at 147.

¹⁶ See Third-Party Complaint, at ¶ 113.

¹⁷ See *Craig*, 1987 WL 10191, at *2.

62.5% of Cape's common stock by May 1969.¹⁸ In 1996, Charter sold all of its remaining interest in Cape.¹⁹

Charter has also undergone several name changes prior to being sold to Colfax Corporation ("Colfax") in 2012. For example, in 1993, Charter re-registered as a public company and became Charter PLC.²⁰ In 2008, a holding company called Charter International PLC took over Charter PLC.²¹ Colfax then subsequently spun off Charter as a subsidiary of ESAB in spring 2022. Today, ESAB is a publicly traded, world-class manufacturing technology company and remains Charter's corporate parent, as well as the parent of Charter's subsidiary Central Mining & Investment Corporation Ltd.²²

C. Historical Litigation Over Charter's Liability For Cape's Torts.

In the mid-1980s, plaintiffs across the country began naming Charter (and its subsidiaries) as a defendant in asbestos litigation, alleging that Charter was liable for Cape's torts under an alter ego or corporate veil-piercing theory.²³ "Between 1985 and 1987, the issue was tried in several matters, each of which was resolved in [Charter's] favour either at trial or on appeal."²⁴

For example, in 1986, the District Court for the Eastern District of Pennsylvania presided over a two-day trial on the sole issue of whether Charter was liable under New Jersey law for

¹⁸ See *Craig*, 1987 WL 10191, at *2; Third-Party Complaint, at ¶¶ 54-55.

¹⁹ See Third-Party Complaint, at ¶ 123.

²⁰ See Third-Party Complaint, at ¶ 123.

²¹ *Id.*

²² ESAB Corporation, *The History of ESAB Corporation.*, <https://esabcorporation.com/our-story/history/> (last visited Aug. 8, 2023).

²³ sec.gov/Archives/edgar/data/1420800/000114420411070464/v242942_defm14a.html.

²⁴ *Id.*

Cape's torts under an alter ego or corporate veil-piercing theory.²⁵ The trial included live and deposition testimony from numerous witnesses. The trial judge initially concluded that Charter was the alter ego of Cape and held Charter responsible for a portion of plaintiff's damages.²⁶ On appeal, however, the Third Circuit, exercising plenary review, reversed and remanded "for entry of judgment in favor of Charter."²⁷ It held that Charter's "involvement in Cape's financial and managerial affairs fail[ed] to rise to the high standard of domination necessary to pierce the corporate veil."²⁸ Importantly, the Third Circuit found, as a matter of law, that "there is no evidence that Charter's intrusion into Cape's affairs is even 'constant' or day-to-day." The Third Circuit also found it particularly significant that Charter and Cape "each maintained separate books, records, bank accounts, offices and staff; each consulted their own financial advisors, accountants and stockbrokers."²⁹ Although the court found that Charter had the "power to control" Cape, "potential control is not enough."³⁰

The very next year, the Eastern District of Pennsylvania again considered the issue of whether Charter was the alter ego of Cape, this time under both New Jersey and Pennsylvania law, in dozens of asbestos cases pending in the Eastern District of Pennsylvania.³¹ Relying on

²⁵ See *Craig*, 1987 WL 10191; *Craig*, 843 F.2d 145. The Court included the following entities in its definition of Charter: "Charter Consolidated Investments, P.L.C., Central Mining Finance, Ltd., Charter Consolidated Services, Ltd., British South Africa Company and Consolidated Mines Selection." *Id.* at *1.

²⁶ *Id.* at *18.

²⁷ *Craig*, 843 F.2d at 152.

²⁸ *Id.*

²⁹ *Id.* at *152.

³⁰ *Id.* (citing *Scalise v. Beech Aircraft Corp.*, 276 F. Supp. 58, 62 (E.D. Pa. 1967) ("although stock ownership and identity of officers and directors naturally subject the subsidiary to a measure of control, the issue . . . is how such control is exercised").

³¹ See *In re Charter Defendants' Motion for Summary Judgment in all Cases Pending in the Eastern District of Pennsylvania in Which They are Parties*, Misc. No. 86-0457, 1989 U.S. Dist.

the Third Circuit's decision in *Craig*, and rejecting plaintiffs' arguments that there was "new" evidence not considered by the Third Circuit, this Court again held that Charter was not liable under an alter ego or piercing the corporate veil theory for Cape's asbestos torts. The Eastern District of Pennsylvania further pointed out that many other courts had considered the exact same issue and resolved it the exact same way.³²

D. The Receiver's Attempts To Relitigate Charter's Liability For Cape's Torts.

The Third-Party Complaint describes Cape, from its founding in 1893, as "deeply involved in all elements of the global asbestos industry," including mining asbestos in South Africa and then selling it to manufacturers of asbestos-containing products in the United States, including South Carolina.³³ After overviewing Cape's role in the asbestos industry, the Third-Party Complaint outlines Charter's alleged control or domination over Cape. First, it recounts Charter's purported takeover of Cape and resulting majority ownership in its shares in 1969.³⁴ Second, it describes Cape as "Charter's 'largest industrial subsidiary company,' . . . with Charter even seconding and compensating key personnel for Cape's management."³⁵

LEXIS 15591 (E.D. Pa. May 18, 1989). In these cases, the Charter defendants, including Charter Consolidated P.L.C., Charter Consolidated Investments Limited, Charter Consolidated Services Limited, Central Mining Finance Limited, The Consolidated Mines Selection Company Limited, and the British South Africa Company, were named as both defendants and third-party defendants. *Id.* at *1.

³² See *id.* at *5-*6 (citing *Bednar v. Carey Canada, Inc.*, No. 88-3707 (D.N.J. Feb. 7, 1989); *Lee/McDaniels v. Carey Canada, Inc.*, Nos. 83-1412, 83-1413 (D.N.J. Dec. 1, 1988); *McCracken v. Lac D'Amiante du Quebec, Ltee.*, No. 84-0128 (E.D. Pa. Sept. 9, 1988); *Kessinger v. Grefco, Inc.*, No. 85-3092 (C.D. Ill. May 2, 1986); *Newhouse/Sparta v. Lac D'Amiante du Quebec, Ltee.*, Nos. 83-2932, 83-2933 (D.N.J. July 19, 1988); *Simmons v. AC&S, Inc.*, No. 84-1170 (W.D. Ark. June 4, 1985); *In re Asbestos Litig. Venued in Middlesex Cty.: Manville Plantworker Cases Only*, No. L-37243-79 (N.J. Super Ct. Law Div. July 10, 1987)).

³³ See Third-Party Complaint, at ¶ 40.

³⁴ *Id.*, at ¶ 55.

³⁵ *Id.*, at ¶ 61.

The Third-Party Complaint rehashes most of the same facts and documents relied on by the courts in *Craig* and *In re Charter Defendants* and ultimately asks for the same relief those courts denied—mainly, holding Charter liable for Cape’s asbestos liability. Tellingly, although the 12(b) Opposition acknowledges the Third Circuit’s holding in *Craig*, it does not even attempt to distinguish it from the present situation, instead simply suggesting that the Third Circuit’s findings after its extensive review of a full evidentiary trial record should be discarded as “myopic.”³⁶

E. ESAB Lacks Jurisdictional Ties To South Carolina.

The Third-Party Complaint also alleges this Court has jurisdiction over each of the Third-Party Defendants, including ESAB, pursuant to South Carolina’s long-arm statute.³⁷ ESAB, however, is not subject to jurisdiction in this Court. ESAB is a corporation organized under the laws of Delaware, with its principal place of business in Bethesda, Maryland.³⁸ ESAB has no assets in South Carolina.³⁹ 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.⁴⁰

Moreover, ESAB currently does not, and has not historically, mined, milled, or sold asbestos in South Carolina.⁴¹ ESAB also currently does not, and has not historically, produced, manufactured, or distributed asbestos or asbestos-containing products for use in South Carolina.⁴² Furthermore, Cape is not a subsidiary of ESAB.⁴³

³⁶ See 12(b) Opposition, at p. 5-6.

³⁷ *Id.* at ¶¶ 37, 140.

³⁸ Affidavit of Rita J. Herring (“Herring Aff.”) at ¶ 5.

³⁹ *Id.* at ¶ 6.

⁴⁰ *Id.* at ¶¶ 7-8.

⁴¹ *Id.* at ¶ 9.

⁴² *Id.* at ¶ 10.

III. LEGAL STANDARD

When a defendant challenges a trial court's jurisdiction over it, the plaintiff bears the burden of establishing that personal jurisdiction exists.⁴⁴ "The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case."⁴⁵ "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."⁴⁶ Subject matter jurisdiction is a court's "power to hear and determine cases of the general class to which the proceedings in question belong."⁴⁷ When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, however, the plaintiff bears the burden of proving subject-matter jurisdiction.⁴⁸ The court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction.⁴⁹ 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 the court.⁵⁰ Generally, the trial court must base its ruling solely upon allegations set forth on

⁴³ *Id.* at ¶ 4.

⁴⁴ *Moosally v. W. W. Norton & Co.*, 594 S.E.2d 878, 882 (S.C. Ct. App. 2004).

⁴⁵ *Cockrell v. Hillerich & Bradsby Co.*, 611 S.E.2d 505, 508 (S.C. 2005).

⁴⁶ *Id.*

⁴⁷ *Simmons v. Simmons*, 634 S.E.2d 1, 3 (S.C. Ct. App. 2006).

⁴⁸ *Elridge v. City of Greenwood*, 503 S.E.2d 191, 197 (S.C. Ct. App. 1998).

⁴⁹ *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 655 S.E.2d 476, 478 (2007).

⁵⁰ *Williams v. Condon*, 553 S.E.2d 496 (S.C. Ct. App. 2001).

the face of the complaint.⁵¹ However, a plaintiff must do more than state general and conclusory allegations that do not satisfy South Carolina's pleading standards.⁵² Here, viewing the allegations in the light most favorable to the Receiver, the Third-Party Complaint fails to state a claim for relief.

IV. 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. Alternatively, if the Court does not dismiss the Third-Party Complaint, the Court should strike or sever the claims pursuant to Rule 14(a).

A. The Court Lacks Personal Jurisdiction Over ESAB.

The Third-Party Complaint against ESAB must be dismissed because the Court lacks jurisdiction over ESAB.⁵³ Indeed, the Receiver has not alleged facts, as opposed to conclusory allegations, that are sufficient to support jurisdiction over ESAB in the State of South Carolina.

To determine whether personal jurisdiction exists over a non-domiciliary corporation such as ESAB, courts engage in a two-pronged analysis: (1) a plaintiff must demonstrate that granting jurisdiction under the statute would not violate the Fourteenth Amendment of the United States Constitution;⁵⁴ and (2) a plaintiff must show that defendant's conduct falls within

⁵¹ *Doe v. Marion*, 605 S.E.2d 556, 559 (S.C. Ct. App. 2004), *aff'd* 645 S.E.2d 245 (S.C. 2007).

⁵² *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.").

⁵³ *See* Rule 12(b)(2).

⁵⁴ *See Moosally*, 594 S.E.2d at 886; *Abdulla v. S. Bank*, 439 S.C. 391, 400, 887 S.E.2d 138, 143 (Ct. App. 2023).

South Carolina’s long-arm statute, S.C. Code Ann. § 36-2-803. Both prongs must be satisfied for jurisdiction to exist. Here, the Receiver cannot establish either.

1. ESAB is not subject to general jurisdiction in South Carolina.

This Court lacks general personal jurisdiction over ESAB because it is not “essentially at home” in South Carolina—a fact that the Receiver does not appear to contest. “A state court may exercise general jurisdiction only when a [corporate] defendant is ‘essentially at home’ in the State.”⁵⁵ A corporate defendant is essentially at home, in turn, in “its place of incorporation and [where it has] a principal place of business.”⁵⁶ 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 place of business in Bethesda, Maryland.⁵⁷ Accordingly, ESAB is not “essentially at home” in South Carolina, and this Court therefore lacks general personal jurisdiction over ESAB.

2. ESAB is not subject to specific jurisdiction in South Carolina through its own contacts, or lack thereof, with South Carolina.

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.⁵⁸ “South Carolina’s long-arm statute, which includes the power to exercise personal jurisdiction over causes of action

⁵⁵ *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 Ann. § 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.”).

⁵⁶ *Id.*

⁵⁷ *Herring Aff.*, at ¶ 5.

⁵⁸ S.C. Code § 36-2-803(1).

arising from tortious injuries in South Carolina, has been construed to extend to the outer limits of the due process clause.”⁵⁹ “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.”⁶⁰ 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.”⁶¹

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. In fact, there are no allegations whatsoever in the Complaint about any conduct by ESAB. The only two paragraphs that even mention ESAB describe ESAB’s citizenship⁶² and state that, in 2022, ESAB became the parent company of Charter and Central Mining.⁶³

For the first time in its Jurisdiction Opposition, the Receiver appears to argue in a footnote that ESAB is subject to specific jurisdiction because it is a “world leader in welding and cutting equipment and consumables, with dozens of dealers and repair centers selling ESAB products through South Carolina.”⁶⁴ The Receiver completely ignores, however, that specific jurisdiction requires that the causes of action must “arise out of or relate to” ESAB’s contacts

⁵⁹ *Cockrell*, 611 S.E.2d at 508.

⁶⁰ *Id.*

⁶¹ *Ford Motor Co.*, 141 S. Ct. at 1025 (internal quotations omitted); *see also* S.C. Code Ann. § 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).

⁶² *See* Third-Party Compl., at ¶ 20.

⁶³ *Id.*, at ¶ 124.

⁶⁴ Jurisdiction Opposition, at p. 33.

with South Carolina.⁶⁵ Under no interpretation of the Third-Party Complaint (or the Tibbs Suit) do any claims by any party arise out of or relate to sales by ESAB of welding and cutting equipment in South Carolina. Rather, the claims asserted against ESAB arise out of or relate to conduct by Cape. Cape, however, is and always has been an entirely separate and distinct corporate entity from ESAB and is not a subsidiary of ESAB⁶⁶—in fact, the Receiver takes great pains to describe in its Jurisdiction Opposition that, at all relevant times as to ESAB, Cape was owned and controlled by Third-Party Defendants completely unrelated to ESAB.⁶⁷

Moreover, ESAB does not currently, and has not historically, mined, milled, sold, or supplied asbestos in South Carolina.⁶⁸ Likewise, ESAB does not currently, and has not historically, produced, manufactured, or distributed asbestos or asbestos-containing products for use in South Carolina.⁶⁹ 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.⁷⁰ 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.⁷¹

⁶⁵ See *Ford Motor Co.*, 141 S. Ct. at 1025.

⁶⁶ Herring Aff. at ¶ 4.

⁶⁷ See Jurisdiction Opposition, at p. 22–26.

⁶⁸ *Id.* at ¶ 9.

⁶⁹ *Id.* at ¶ 10.

⁷⁰ *Id.* at ¶ 7.

⁷¹ The Receiver's argument that, absent a finding of specific jurisdiction, South Carolinian asbestos plaintiffs will be without redress is wholly unsupported and has been rejected by numerous courts as plaintiffs always have the option of bringing suit in a location where a defendant like ESAB is subject to general jurisdiction. See e.g., *Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cnty.*, 582 U.S. 255, 268 (2017) (“Our straightforward

3. ESAB is not subject to specific jurisdiction through a veil piercing or alter ego theory.

The Court should further reject the Receiver's argument, in its Jurisdiction Opposition, that the Court has specific jurisdiction over ESAB solely based on Cape's purported jurisdictional contacts in South Carolina through an alter ego, veil piercing theory, or single business enterprise theory.⁷² Despite the Receiver's bald protestations to the contrary, the Third-Party Complaint does not (and could not) allege any facts related to ESAB's control over Cape. Instead, the Receiver devotes great portions of the Third-Party Complaint and the Jurisdiction Opposition to focusing on facts about other entities' control over each other, none of which has any relevance to ESAB, let alone the analysis of whether ESAB exercised sufficient control over Cape (an entity that it had no connection to at all) to pierce the corporate veil.⁷³ Conclusory allegations that ESAB controlled Cape because ESAB's recently acquired subsidiaries previously had a majority ownership of Cape and had common directors or employees decades prior to ESAB's acquisition are woefully insufficient.⁷⁴ First, it is well settled law in South Carolina that majority ownership and common officers or directors, standing alone, simply do not "support the conclusion the subsidiary is its parent's alter ego or agent for the transaction of

application in this case of settled principles of personal jurisdiction will not result in the parade of horrors that respondents conjure up. . . . Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over [Petitioner].").

⁷² 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").

⁷³ See *e.g.*, Third-Party Compl., at ¶¶ 57–59; Jurisdiction Opposition, at p. 32–33.

⁷⁴ See *e.g.*, Third-Party Compl., at ¶¶ 140–141; Jurisdiction Opposition, at p. 32–33.

its business.”⁷⁵ Second, even if Charter Consolidated and Central Mining controlled Cape (they did not for the reasons discussed further below), the Third-Party Complaint still must allege sufficient facts to pierce the corporate veil between ESAB and Charter Consolidated/Central Mining, which the Third-Party Complaint does not even attempt to do.

Even under a single business enterprise theory, the Third-Party Complaint still fails to allege facts sufficient to establish specific jurisdiction over ESAB. Similar to an alter ego or veil piercing theory, a plaintiff must still appropriately allege that defendants had dominion and control such that the entities acted as unified operations (the primary difference being that a single business enterprise theory can encompass “sister” organizations, not just parent/subsidiaries like alter ego and veil piercing).⁷⁶ As discussed throughout this Memorandum, the allegations related to control over Cape are wholly inadequate, especially as to ESAB who could not have acted through any “unified operations” with Cape because Cape was owned and controlled by unrelated Third-Party Defendants by the time ESAB acquired Charter Consolidated and Central Mining.

However, even if the Court found that the single business enterprise theory is applicable—it should not—that only means that Cape’s purported jurisdictional contacts with South Carolina are imputed to ESAB. It does not automatically mean that jurisdiction attaches.⁷⁷

⁷⁵ *Yarborough & Co. v. Schoolfield Furniture Indus., Inc.*, 275 S.C. 151, 153–54, 268 S.E.2d 42, 44 (1980); *Jones ex rel. Jones v. Enter. Leasing Co.-Se.*, 383 S.C. 259, 267, 678 S.E.2d 819, 823–24 (Ct. App. 2009).

⁷⁶ See *Pertuis v. Front Roe Rests., Inc.*, 423 S.C. 640, 817 S.E.2d 273 (2018) (citations omitted) (“We formally recognize today this single business enterprise theory, and in doing so, we acknowledge that corporations are often formed for the purpose of shielding shareholders from individual liability; there is nothing remotely nefarious in doing that.”).

⁷⁷ See *Duong v. N. Am. Transportation Servs. LLC*, 2019 WL 13109647, at *13 (D.S.C. Sept. 25, 2019) (holding that, even if the single business enterprise theory applied, plaintiff failed to allege jurisdictional facts necessary to establish personal jurisdiction).

Here, Cape's purported contacts with South Carolina, even if imputed to ESAB, are insufficient to establish specific jurisdiction. The only contact with South Carolina that the Third-Party Complaint mentions is that Cape sold asbestos in the United States, including in South Carolina.⁷⁸ Importantly, however, the claims asserted against ESAB do not arise out of any asbestos sold in South Carolina (nor does the Third-Party Complaint make such an assertion). For that matter, there are not even any allegations in Plaintiffs' Complaint or the Third-Party Complaint that Tibbs was exposed to amosite asbestos sold or mined by Cape.⁷⁹

Although specific jurisdiction can certainly be established by an entity's contacts with South Carolina, the critical distinction between general and specific jurisdiction is that, for specific jurisdiction, the claims must actually arise from the contacts with the state.⁸⁰ The Third-Party Complaint asserts four causes of action: unjust enrichment, constructive trust, alter ego or piercing the corporate veil liability, and accounting. None of these claims arise out of Cape's purported sales of asbestos to any particular entity or person in South Carolina (or even arise from the use of asbestos in South Carolina) and, instead, arise out of purported conduct in South Africa, the United Kingdom, and other places outside of South Carolina. Unless the claims actually arise from Cape's contacts in South Carolina, the mere fact that Cape's jurisdictional

⁷⁸ See *e.g.*, Third-Party Compl., at ¶¶ 75–76; Jurisdiction Opposition, at p. 20-21. Technically, the Receiver does not even allege that Cape directly sold asbestos in South Carolina, but instead seeks to first impute NAAC's contacts in South Carolina to Cape, before trying to impute NAAC's contacts to ESAB.

⁷⁹ See generally Third-Party Compl.

⁸⁰ See *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 655 S.E.2d 476 (2007).

contacts may be imputed to ESAB (they should not) is insufficient for this Court to assert personal jurisdiction over ESAB.⁸¹

B. The Court Should Dismiss The Third-Party Complaint Because, As A Matter Of Law, There Was Insufficient Domination Of Cape To Pierce The Corporate Veil—An Issue Previously Litigated and Decided Decades Ago.

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.⁸² The Third-Party Complaint does not allege any facts about domination or control between ESAB and its subsidiaries (the only entities with alleged contact with Cape). Furthermore, this issue of whether ESAB's independent subsidiaries were alter egos of Cape has already been actually decided by multiple courts across the country and the Receiver is barred from relitigating these issues under either collateral estoppel or res judicata.

⁸¹ See *Outpost Cap. Mgmt., LLC v. Prioleau*, 2017 WL 5514513, at *7 (D.S.C. Nov. 16, 2017) (finding that even an entities' contacts could be imputed to defendant through an alter ego theory, the court still did not have specific jurisdiction over defendant because the claims against defendant did not arise from the entities' contacts with South Carolina).

⁸² See *Craig*, 843 F.2d at 152 (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 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 (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*, 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).

1. The facts alleged do not show the required domination over Cape.

Even taking the allegations alleged in the Third-Party Complaint as true, as a matter of law, ESAB's actions do not rise to the level of domination and control required to pierce the corporate veil or hold it responsible as an alter ego of Cape.

In South Carolina, to hold a party responsible under an alter ego theory, a plaintiff must show both “(1) total domination and control of one entity by another and (2) inequitable consequences caused thereby.”⁸³ Importantly, the level of control must be such that the “subservient entity manifests no separate interest of its own and functions solely to achieve the goals of the dominant entity.”⁸⁴

Similarly, in order to pierce the corporate veil, courts employ a two-prong test, looking first at an eight-factor analysis to determine if corporate formalities were sufficiently observed and then second on the element of injustice or unfairness.⁸⁵ The eight factors are: “(1) whether the corporation was grossly undercapitalized; (2) failure to observe corporate formalities; (3) non-payment of dividends; (4) insolvency of the debtor corporation at the time; (5) siphoning of funds of the corporation by the dominant stockholder; (6) non-functioning of other officers or directors; (7) absence of corporate records; and (8) the fact that the corporation was merely a façade for the operations of the dominant stockholder” (the “*Sturkie* Factors”).⁸⁶

⁸³ *Oskin v. Johnson*, 400 S.C. 390, 400, 735 S.E.2d 459, 465 (2012).

⁸⁴ *Id.*; *Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty.*, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006).

⁸⁵ *See Sturkie v. Sifly*, 280 S.C. 453, 456–57, 313 S.E.2d 316, 318 (Ct. App. 1984).

⁸⁶ *Mid-S. Mgt. Co. Inc. v. Sherwood Dev. Corp.*, 374 S.C. 588, 598, 649 S.E.2d 135, 141 (Ct. App. 2007); *Sturkie*, 280 S.C. at 456–57, 313 S.E.2d at 318. For purposes of this Motion, ESAB does not address the fraud or injustice prongs of either test as the Third-Party Complaint fails, as a matter of law, to allege facts showing sufficient domination and control over Cape.

Here, the Third-Party Complaint does not include facts specific to how ESAB controlled Cape (nor could it do so) and certainly does not allege facts sufficient to even remotely demonstrate that ESAB had “total domination and control” over Cape such that Cape “manifest[ed] no separate interest of its own.”⁸⁷ The sole connection alleged between ESAB and Cape is through its independent subsidiaries Charter Consolidated and Central Mining. Yet, even if the Court were to find that Charter or Central Mining were the alter ego of Cape—it should not—none of that has any bearing on whether ESAB is the alter ego of Cape. The Third-Party Complaint does not allege a single fact that connects ESAB and Cape other than that, decades after Charter no longer held any interest in Cape, Charter Consolidated and Central Mining were purchased by another entity that was then spun off into ESAB.⁸⁸ The Third-Party Complaint (and the Jurisdiction and 12(b) Oppositions) are devoid of any allegations or discussions of the *Sturkie* Factors related to ESAB’s relationship with Charter Consolidated and Central Mining, and fails to allege whatsoever that, since 2022, ESAB failed to follow corporate formalities with respect to Charter and Central Mining.

Although the Third-Party Complaint contains some allegations of control and domination between various entities, there are absolutely no allegations of control specifically between ESAB and Cape, or between ESAB and Central Mining/Charter Consolidated. Nor could there be any such allegations of control by ESAB over Cape as the Receiver acknowledges Cape was sold by Charter in 1996, decades before Charter was spun off to ESAB in 2022.⁸⁹ For that matter, the *only* specific allegations as to control even between Charter Consolidated or Central Mining

⁸⁷ *Oskin*, 400 S.C. at 400, 735 S.E.2d at 465; *Colleton Cnty. Taxpayers Ass’n.*, 371 S.C. at 237, 638 S.E.2d a 692.

⁸⁸ See Third-Party Compl., at ¶ 124.

⁸⁹ See Third-Party Compl., at ¶¶ 123–124.

and Cape are that: (1) Central Mining was initially organized to take over the assets and business interests of a third-party organization that held “interests” in Cape Asbestos;⁹⁰ (2) Charter Consolidated and Central Mining were the majority owners of Cape at different times prior to 1996;⁹¹ (3) Charter Consolidated and Central Mining “second[ed] and compensate[ed] key personnel for Cape’s management”;⁹² (4) Charter Consolidated used its “influence” in South Africa to allow Cape to profit from mining and exporting asbestos;⁹³ (5) Central Mining used its expertise to “improve” Cape’s performance;⁹⁴ and (6) Cape’s chairman was also a director for Charter Consolidated.⁹⁵ These allegations are insufficient as a matter of law.⁹⁶

Having an overlap in directors and paying for certain personnel does not rise to the level of Charter Consolidated or Central Mining having “constant” or day to day control over Cape required to pierce the corporate veil. This is especially true given that South Carolina courts have repeatedly held that “[c]ommon officers and/or directors and public identification of one corporation as the other’s subsidiary do not, without more, support the conclusion the subsidiary is its parent’s alter ego or agent for the transaction of its business.”⁹⁷ Furthermore, the Third-Party Complaint’s generic allegations, such as a “failure to follow corporate formalities” and

⁹⁰ Third-Party Compl., at ¶ 48.

⁹¹ See Third-Party Compl., at ¶¶ 50, 55.

⁹² See Third-Party Compl., at ¶¶ 50, 61.

⁹³ *Id.* at ¶ 61.

⁹⁴ *Id.*, at ¶ 52.

⁹⁵ *Id.* at ¶ 78.

⁹⁶ *Yarborough & Co.*, 275 S.C. at 153–54, 268 S.E.2d at 44; *Jones ex rel. Jones*, 383 S.C. at 267, 678 S.E.2d at 823–24.

⁹⁷ *Yarborough & Co.*, 275 S.C. at 153–54, 268 S.E.2d at 44; *Jones ex rel. Jones*, 383 S.C. at 267, 678 S.E.2d at 823–24.

“domination and control . . . over Cape’s . . . executive personnel and board of directors,”⁹⁸ which are merely a rewording of the *Sturkie* Factors, are insufficient as a matter of law.⁹⁹

The Third-Party Complaint’s lack of specific factual allegations related to Charter Consolidated’s and Central Mining’s purported control over Cape makes perfect sense when juxtaposed against the previous court decisions evaluating this exact issue.¹⁰⁰ In one such case, for example, the trial court held a two-day trial solely on this alter ego issue, and found the following facts (which the Receiver could have included in the Third-Party Complaint, but chose not to): (1) after Charter Consolidated obtained majority ownership over Cape, it maintained only three directors on Cape’s Board, which consisted of between ten and fourteen directors; (2) at least two directors on Cape’s Board were not connected with Charter; (3) Charter Consolidated and Cape maintained separate books and records; (4) Charter Consolidated and Cape had different bank accounts; (5) Charter Consolidated and Cape had different staff and different offices; and (6) Charter Consolidated and Cape consulted their own financial advisors, accountants, and stockbrokers.¹⁰¹ Unsurprisingly, the Third Circuit Court of Appeals used these critical facts to determine that, even though Charter Consolidated’s (including Central Mining’s)

⁹⁸ See Third-Party Compl., at ¶ 140.

⁹⁹ See *David*, 626 S.E.2d at 3 (requiring more than “generic allegations and conjecture” to sustain malpractice claim); *Paradis*, 819 S.E.2d at 153 (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.”); *Mincey v. World Savings Bank FSB*, 614 F. Supp. 2d 610 (D.S.C. 2008) (rejecting plaintiffs’ attempt to allege veil-piercing or alter ego based on conclusory allegations with no specific facts); *Pro Slab, Inc. v. Argos USA Corp.*, 2018 WL 6985008, at *5 (D.S.C. June 28, 2018), *reconsideration granted on other grounds*, 2018 WL 6985010 (D.S.C. Dec. 3, 2018) (granting defendants’ motions to dismiss where the “amended complaint contains no factual allegations to support [the] legal conclusion” that certain affiliated corporate entities were alter egos of one another).

¹⁰⁰ See e.g., *Craig*, 843 F.2d at 152; *In re Charter Defs.*, 1989 U.S. Dist. LEXIS 15591; *Culbreth*, 898 F.2d 13; *Simmons*, No. 84-1170.

¹⁰¹ *Craig*, 843 F.2d at 151-152.

“majority share of stock ownership gave it an ‘omnipresence in the minds of the Cape Board members,’” Charter Consolidated’s “involvement in Cape’s financial and managerial affairs fails to rise to the high standard of domination necessary to pierce the corporate veil.”¹⁰²

Given that the Receiver has failed to allege sufficient facts to show sufficient dominion and control by Charter Consolidated and Central Mining, the Receiver does not allege—because he cannot do so—sufficient facts to show that ESAB dominated and controlled Cape such that the Court should pierce the corporate veil.¹⁰³ Given all of the claims arise from this basic premise (i.e. control of Cape by ESAB), the Court should dismiss the Third-Party Complaint as to ESAB in its entirety.

2. The Receiver is bound by previous decisions holding Charter Consolidated and Central Mining were not the alter egos of Cape.

In South Carolina, a party is barred from relitigating in a second action an issue or claim that has been previously litigated and decided in a prior action.¹⁰⁴ Res judicata may be applied if (1) the identities of the parties are the same as in the prior litigation, (2) the subject matter is the same as in the prior litigation, and (3) there was a prior adjudication of the issue by a court of competent jurisdiction.¹⁰⁵ Similarly, collateral estoppel applies if the “issue in the present lawsuit

¹⁰² *Craig*, 843 F.2d at 152.

¹⁰³ See e.g., *In re Joseph Walker & Co., Inc.*, 522 B.R. 165, 193 (Bankr. D.S.C. 2014) (refusing to find alter ego liability where company “maintained separate bank accounts, obtained credit lines based solely upon its own assets and liabilities, obtained and possessed its own federal tax identification number and accordingly paid taxes when they became due” and employed separate legal counsel and accounting firms).

¹⁰⁴ See *S.C. Prop. & Cas. Ins. Guaranty Ass’n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991) (“Collateral estoppel occurs when a party in a second action seeks to preclude a party from relitigating an issue which was decided in a previous action.”); *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (“Under the doctrine of res judicata, ‘[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.’”).

¹⁰⁵ *Johnson v. Greenwood Mills, Inc.*, 317 S.C. 248, 250–51, 452 S.E.2d 832, 833 (1994).

was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.”¹⁰⁶

Here, the Receiver should be barred from attempting to hold ESAB responsible for Cape’s asbestos liability by relitigating the veil piercing and alter ego claims against Charter Consolidated and Central Mining because the issue was already decided by multiple courts and the Receiver is in privity with the plaintiffs asserting the same causes of action in those claims.

a. *Whether Charter and Central Mining are the alter egos of Cape was previously litigated and decided.*

The claims against Charter Consolidated and Central Mining are all grounded in the same issue that was decided by the District Court for the Eastern District of Pennsylvania and the Third Circuit decades ago, mainly that Charter Consolidated and its wholly owned subsidiaries (including Central Mining) were *not* alter egos of Cape. In *Craig*, the Third Circuit reversed a district court decision, made after a two-day trial on the merits, and found as a matter of law that Charter Consolidated did not exercise a great enough degree of domination over Cape to hold Charter responsible for Cape’s asbestos liability.¹⁰⁷ In *In re Charter Defendants*, the Eastern District of Pennsylvania granted summary judgment and dismissed with prejudice all claims asserted against Charter Consolidated and Central Mining (among others) in every asbestos action pending in the Eastern District of Pennsylvania on the basis that the Court was bound by the Third Circuit’s *Craig* decision finding that Charter was not the alter ego of Cape.¹⁰⁸

¹⁰⁶ *Carolina Renewal, Inc. v. S.C. Dep’t of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009).

¹⁰⁷ *Craig*, 843 F.2d at 152.

¹⁰⁸ *In re Charter Defendants*, 1989 U.S. Dist. LEXIS 15591, at *1-3.

Despite the alter ego issue being resolved by the Eastern District of Pennsylvania and the Third Circuit (as well as many other courts¹⁰⁹), the Receiver in the *Tibbs* Suit has now asserted claims against ESAB based on the exact same alter ego issue and grounded in the very same facts that the *Craig* and *In re Charter Defendants* courts analyzed to reject the alter ego theory. A comparison between the facts and legal issues decided in *Craig* and *In re Charter Defendants* with the facts and legal questions asserted here shows the clear duplication between the matters. For example, the Third-Party Complaint includes allegations regarding Charter's and Central Mining's majority ownership in Cape shares to suggest purported dominance or control;¹¹⁰ however, the Third Circuit found that fact unpersuasive.¹¹¹ Likewise, the Third-Party Complaint includes allegations regarding Charter's and Central Mining's decision "seconding and compensating key personnel for Cape's management,"¹¹² but the Third Circuit found that fact similarly unpersuasive.¹¹³ The Third-Party Complaint offers nothing new that the Eastern District of Pennsylvania and the Third Circuit did not already consider and reject as a basis for finding alter ego liability—nor could the Receiver offer any "new" relevant facts as to Charter's control over Cape because Cape sold its asbestos business more than seven years before the trial in

¹⁰⁹ See, e.g., *id.* at *5-*6 (citing *Bednar*, No. 88-3707; *Lee/McDaniels*, Nos. 83-1412, 83-1413; *McCracken*, No. 84-0128; *Kessinger*, No. 85-3092; *Newhouse/Sparta*, Nos. 83-2932, 83-2933; *Simmons*, No. 84-1170; *In re Asbestos Litig. Vened in Middlesex Cty.: Manville Plantworker Cases Only*, No. L-37243-79).

¹¹⁰ See Third-Party Compl., at ¶ 55.

¹¹¹ See *Craig*, 843 F.2d at 151 ("It is to be expected that a corporation seeking to acquire majority ownership of another will seek to achieve control.").

¹¹² Third-Party Compl., at ¶ 61; see also *id.*, at ¶ 59 ("The Oppenheims consistently sat on Charter's board of directors after its founding.").

¹¹³ See *Craig*, 843 F.2d at 151 (deciding issue in Charter's favor despite "presence of three Charter nominees on Cape's Board").

Craig.¹¹⁴ As such, the Receiver improperly seeks to relitigate the same issues now that have been previously decided by multiple other courts, suggesting that this Court should ignore *Craig* as a near-sighted aberration.¹¹⁵

Although the Eastern District of Pennsylvania's decision and the Third Circuit's decision rejecting the alter ego arguments were made under New Jersey and Pennsylvania law,¹¹⁶ there is no substantive difference between the law in those states and the law in South Carolina regarding alter ego and veil piercing.¹¹⁷ The Eastern District of Pennsylvania in the *In re Charter Defendants* decision and the Third Circuit in the *Craig* decision relied on the same standard courts in South Carolina apply:¹¹⁸ "Courts in both jurisdictions[, New Jersey and Pennsylvania,]

¹¹⁴ See Third-Party Compl., at ¶ 102.

¹¹⁵ See *Philadelphia National Bank v. McGuckin*, 90-2862, 1990 WL 201496, at *2 (E.D. Pa. Dec. 7, 1990) (applying relitigation exception where there was "no additional evidence to be discovered, no new issues that will develop, and nothing that will change the legal positions of the parties").

¹¹⁶ See *Culbreth v. Amosa Ltd.*, 898 F.2d 13, 15 (3d Cir. 1990) ("[B]oth Pennsylvania and New Jersey require a threshold showing that the controlled corporation acted robot-or puppet-like in mechanical response to the controller's tugs on its strings or pressure on its buttons. In *Craig*, we held that Charter did not so dominate Cape. Since Pennsylvania law does not differ from New Jersey law in requiring a showing of such pervasive domination, Culbreth failed to establish the threshold to a finding that Cape was Charter's alter-ego.").

¹¹⁷ See e.g., *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 154 (2015) ("[m]inor variations in the application of what is in essence the same legal standard do not defeat preclusion").

¹¹⁸ See Section IV(B)(1), *supra*, for a discussion of the alter ego and piercing the corporate veil standards in South Carolina. See also *Oskin*, 400 S.C. at 400; *Colleton County Taxpayers*, 371 S.C. at 237; *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 686-87 (4th Cir. 1976) (applying South Carolina law and considering multiple factors in determining whether control is sufficient to pierce the corporate veil: "failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders."); *Jones ex rel. Jones*, 383 S.C. at 267, 678 S.E.2d at 823 ("Control required for liability under an alter ego doctrine amounts to total domination of the subsidiary to the extent the subsidiary manifested no separate corporate interests and functioned solely to achieve the purpose of the dominant corporation.").

apply the traditional control test set forth by Fletcher and require evidence of ‘such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own, and is but a conduit for its principal.’”¹¹⁹

Applying this standard, the Third Circuit found that 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.’”¹²⁰ The Eastern District of Pennsylvania agreed with and applied the Third Circuit’s decision that there was “no evidence that would satisfy the control element of the corporate veil ‘piercing’ test to conclude that Charter controlled Cape.”¹²¹

b. The Receiver is in privity with the plaintiffs in the Pennsylvania cases.

Although the Receiver was not a direct party at the time the judgments were entered in either *Craig* or *In Re Charter Defendants*, the Court should still apply the holding from those cases because the plaintiffs in those cases were so “identified in interest with [the Receiver] that the plaintiffs] represent[ed] the same legal right.”¹²² In the earlier cases here, there were two types of parties pursuing alter ego liability against Charter: (1) asbestos plaintiffs; and (2) co-defendants seeking to hold Charter responsible for a portion of the asbestos plaintiffs’ damages. For both types of parties, the interests of the party seeking to hold Charter liable and the interests

¹¹⁹ *In re Charter Defendants*, 1989 U.S. Dist. LEXIS 15591, at *9.

¹²⁰ *Craig*, 843 F.2d at 152.

¹²¹ *In re Charter Defendants*, 1989 U.S. Dist. LEXIS 15591, at *8.

¹²² *First Nat. Bank of Greenville v. U. S. Fid. & Guar. Co.*, 207 S.C. 15, 27, 35 S.E.2d 47, 58 (1945); *Richburg v. Baughman*, 290 S.C. 431, 351 S.E.2d 164 (1986) (“The term ‘privity’ when applied to a judgment or decree means one so identified in interest with another that he represents the same legal rights. . . . ‘Privity’ as used in the context of res judicata or collateral estoppel, does not embrace relationships between persons or entities, but rather it deals with a person's relationship to the subject matter of the litigation.”).

of the Receiver are squarely aligned. Even the Receiver, in the Third-Party Complaint, claims an alignment with the same set of plaintiffs from *Craig* and *In Re Charter Defendants*.¹²³

When a receiver attempts to pierce its own corporate veil through an alter ego theory, it is doing so not for the benefit of the corporation, but for the benefit of its creditors.¹²⁴ Otherwise, such a claim would be disallowed.¹²⁵ Accordingly, the Receiver in this case is bringing its claims against the Third-Party Defendants not for its own benefit, but for the benefit and interest of past, present, and future plaintiffs in South Carolina asbestos actions (and generally on behalf of “tens of thousands of individuals in the United States”).¹²⁶ In other words, the Receiver has the exact same interest as the asbestos plaintiffs in the Pennsylvania cases.¹²⁷

Because the Receiver is representing “precisely the same right” with respect to whether Charter Consolidated is the alter ego of Cape as the parties to the earlier actions, the Receiver is bound by the decisions in *Craig* and *In re Charter Defendants* and the Court should dismiss the Receiver’s veil piercing and alter ego claim.

¹²³ See e.g., Third-Party Compl., at ¶¶ 43–44.

¹²⁴ See *Corcoran v. Frank B. Hall & Co.*, 149 A.D.2d 165, 174–75, 545 N.Y.S.2d 278, 283 (1989) (“Where, however, the corporate entity is in receivership or insolvent, the receiver’s suit is for the benefit of the company’s creditors and not its shareholders.”); see also *Fed. Nat. Mortg. Ass’n v. Olympia Mortg. Corp.*, 2006 WL 2802092, at *14 (E.D.N.Y. Sept. 28, 2006) (“In general, as a matter of New York law, a corporation cannot pierce its own veil; however, where the corporate entity is in receivership or insolvent, the receiver or trustee may bring a veil-piercing suit for the benefit of the corporation’s creditors.”).

¹²⁵ See *Corcoran*, 149 A.D.2d at 174 (“When a functioning corporation sues on its own behalf, it is in essence suing for the benefit of its shareholders. Thus, a suit by a viable corporate entity seeking to pierce its own veil is the equivalent of a suit by a corporation for the benefit of its shareholders brought against its shareholders, an absurdity. This is the clear and compelling rationale why courts have failed to recognize such an action.”).

¹²⁶ See e.g., Third-Party Compl., at ¶¶ 140(i), 136 (“The proper and appropriate remedy under the circumstances here is for the Court to exercise its equitable power and authority to require . . . the Charter Third-Party Defendants . . . to return funds that have been wrongfully diverted from meeting Cape’s obligations and responsibilities in the United States.”).

¹²⁷ *In re Charter Defendants*, 1989 U.S. Dist. LEXIS 15591, at *6.

C. South Carolina's Door Closing Statute Bars All Claims Against ESAB.

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.¹²⁸ South Carolina's Door Closing Statute prohibits a suit against a “foreign corporation created by or under the laws any other state,” such as ESAB, by a nonresident of South Carolina unless “the cause of action shall have arisen or the subject of the action shall be situated within this State.”¹²⁹ The Door Closing Statute “does not involve subject matter jurisdiction but rather determines the capacity of a party to sue.”¹³⁰

Here, as the Receivership Order acknowledges, Cape is a “foreign corporation,”¹³¹ as is ESAB.¹³² The Receiver argues, however, that he is a South Carolina resident, and that he (and not Cape) is the party bringing the claims against ESAB. While the Receiver is the actual party, he stands in the shoes of Cape for purposes of what claims he has standing to assert.¹³³

¹²⁸ See S.C. Code Ann. § 15-5-150.

¹²⁹ *Id.*

¹³⁰ *Farmer v. Monsanto Corp.*, 579 S.E.2d 325, 327 (S.C. 2003).

¹³¹ Receivership Order, at 1. Although the Receiver attempts to avoid the effect of the Door Closing Statute by arguing that he is the one bringing the suit, not Cape, his citizenship is irrelevant to the analysis. See 12(b) Opposition. As the Third-Party Complaint makes clear, the “Plaintiff” in that action is Cape Asbestos Company Ltd., not the Receiver. See Third-Party Compl., at p. 9.

¹³² See Section II(E), *supra*; Third-Party Compl., at ¶ 19.

¹³³ See *Wuliger v. Manufacturers Life Ins. Co.*, 567 F.3d 787 (6th Cir. 2009) (“Because they stand in the shoes of the entity in receivership, receivers have been found to lack standing to bring suit unless the receivership entity could have brought the same action.”); *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995) (“Like a trustee in bankruptcy or for that matter the plaintiff in a derivative suit, an equity receiver may sue only to redress injuries to the entity in receivership, corresponding to the debtor in bankruptcy and the corporation of which the plaintiffs are shareholders in the derivative suit.”).

Furthermore, the Receiver does not and cannot show that any cause of action against ESAB arose in South Carolina or that the subject matter of the action is situated in this state.¹³⁴ This is especially true considering ESAB has no assets in South Carolina¹³⁵ and there are no allegations that Cape has any assets in South Carolina. The only connection to South Carolina relates to Plaintiffs' causes of action, which do not even include a cause of action against the Receiver. Accordingly, even if the Third-Party Complaint stated a cause of action (it does not), no cause of action asserted by Third-Party Plaintiff arose from any activity in South Carolina. Therefore, the Third-Party Plaintiff's claims against ESAB should be dismissed.

D. Alternatively, The Court Should Strike Or Sever The Third-Party Complaint Pursuant To Rule 14(a).

To the extent that the Court does not dismiss the Third-Party Complaint, the Court should strike or sever the Third-Party Complaint (not just against ESAB, but all Third-Party Defendants). Rule 14 provides that a third-party action may be brought by "a defending party" in the original action. Rule 14(a) further provides that "a defending party" may commence a third-party complaint against a party "who is or may be liable to [defendant] for all or part of the plaintiff's claim."¹³⁶ The Rule further provides that "[a]ny party may move to strike the third-party claim, or for its severance or separate trial."¹³⁷

Initially, as the Receiver confirms, the Receiver is the party bringing the suit (and not Cape). The Receiver – Mr. Peter Protopapas – is not "a defending party" in the Tibbs Suit and,

¹³⁴ Even if Cape brought the action directly, it could not demonstrate that any cause of action it has against ESAB arose in South Carolina or that the subject matter of the action is situated in this state.

¹³⁵ *Id.* at ¶ 7.

¹³⁶ S.C. RULE OF CIV. PROC. 14(a).

¹³⁷ *Id.* The Note to Rule 14 indicates that it was drafted to be "substantially the same as the Federal Rule" 14, so federal law is cited whenever squarely applicable.

thus, may not bring a third-party complaint without first seeking leave to intervene in the Tibbs Suit, which he did not do.¹³⁸ The Third-Party Complaint should also be dismissed and or stricken because the Receiver is not a defendant in the Tibbs Suit.¹³⁹

Additionally, 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.*”¹⁴⁰ Stated another way, 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.”¹⁴¹

In this action, the Receiver improperly attempts to pierce Cape’s corporate veil and litigate issues unrelated to Plaintiffs’ claims by means of a third-party complaint under Rule 14. However, as noted above, this rule only permits impleader against a party “who is or may be liable to [defendant] for all or part of the plaintiff’s claim.” To be proper, a third-party complaint must allege that the liability of the third-party defendant on the claim against it “is in some way

¹³⁸ Had the Receiver sought leave to intervene, the parties to the Tibbs Suit would have had the opportunity to object and or oppose the request.

¹³⁹ S.C. RULE OF CIV. PROC. 14(a). Even if Cape is the party bringing the suit, Cape needed to seek leave to file the Third-Party Complaint prior to filing. *Id.* Neither Mr. Protopapas nor Cape sought leave to file a third-party complaint, and accordingly the Third-Party Complaint should be stricken.

¹⁴⁰ *Johnson v. M.I. Windows and Doors, Inc.*, No. 2:11-CV-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).

¹⁴¹ *CNH Indust. Capital Am. LLC v. Able Contracting, Inc.*, No. 9:16-cv-2520-RMG, 2017 U.S. Dist. LEXIS 16988, at *4 (D.S.C. Feb. 7, 2017) (internal quotations omitted) (dismissing third-party complaint because claims were not derivative); *Johnson*, 2012 WL 1015798, at *2 (severing third-party complaint because claims were not derivative).

dependent upon the outcome of the main claim.”¹⁴² Rule 14 does not allow the defendant to assert a separate and independent claim, even if the claim arises out of the same general set of facts as the main claim.¹⁴³

Here, the Third-Party Complaint does not seek any recovery or declaration specific to Tibbs or any of the other purported underlying “suits.” Instead, the relief is sought by the Receiver “to meet Cape’s obligations to the tens of thousands of individuals harmed.” Furthermore, none of the causes of action seek a determination that ESAB (or any other Third-Party Defendant) is liable for indemnification or any other claim that is alleged to be dependent on the outcome of the Tibbs Suit. The Receiver’s claims therefore are not properly asserted under Rule 14.¹⁴⁴

Furthermore, even in instances where the requirements of Rule 14 are satisfied (which they are not here), third-party complaints may still be stricken or severed when the third-party lawsuit “will serve to complicate the litigation unduly or will prejudice the other parties in any substantial way.”¹⁴⁵ Here, the Third-Party Complaint clearly complicates this litigation by adding four new causes of action, adding 33 additional third-party defendants, and asking this Court to analyze more than 100 years of foreign transactions. These additional claims and third-party

¹⁴² *Laughlin*, 465 F. Supp. 2d at 566.

¹⁴³ *Id.*

¹⁴⁴ See *Cruz v. Weber-Stephen Prods., LLC*, 2018 U.S. Dist. LEXIS 1243, at *6 (N.D. Tex. Jan. 4, 2018) (quoting *Majors v. Am. Nat’l Bank of Huntsville*, 426 F.2d 566, 568 (5th Cir. 1970)) (Rule 14 “is not designed as a vehicle for the trying together of separate and distinct causes of action, or for the introduction, into the main action, of several parallel, but independent, actions, or separate and independent claims.”).

¹⁴⁵ *Beach v. Hudson*, 380 S.E.2d 869, 871 (S.C. App. 1989); see *Ballard v. S. Cotton Oil Co.*, 145 F. Supp. 886, 887 (E.D.S.C. 1956) (applying South Carolina law and refusing to permit the interpleader because injecting insurance into a trial would be prejudicial to the insurer).

defendants “would all but submerge the plaintiffs’ claim” and should be stricken.¹⁴⁶ Under South Carolina law, prejudice arises when the third-party complaint “introduce[s] unrelated issues and unduly complicate[s] the original suit.”¹⁴⁷

Under these circumstances, the Third-Party Complaint and the claims against ESAB (and all Third-Party Defendants) in the Third-Party Complaint should be stricken or, in the alternative, severed into a separate action.¹⁴⁸

V. 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.

Dated: October 23, 2023

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¹⁴⁶ *Beach*, 380 S.E.2d at 871 (striking third-party complaint because court deemed that adding additional parties and causes of action would unduly complicate the litigation).

¹⁴⁷ *Id.*

¹⁴⁸ 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*, No. 4:16-CV-1266-TLW-TER, 2017 WL 9287004, at **2-4 (D.S.C. Jan. 12, 2017), report and recommendation adopted, No. 4:16-CV-1266-TLW, 2017 WL 781071 (D.S.C. Feb. 28, 2017); *Todd v. Cary’s Lake Homeowners Ass’n*, 315 F.R.D. 453, 457-58 (D.S.C. 2016); *Cramer v. Walley*, 2015 WL 3968155, at *5 (D.S.C. June 30, 2015).

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

JOHN A. TIBBS and MARGARET B. TIBBS,

Plaintiffs,

v.

3M COMPANY, et al.,

Defendants.

CAPE plc, individually and as successor in interest
to CAPE ASBESTOS COMPANY LIMITED, by
and through its duly appointed Receiver Peter D.
Protopapas,

Third-Party Plaintiff,

v.

ANGLO AMERICAN PLC, individually and as
successor in interest to ANGLO AMERICAN
CORPORATION OF SOUTH AFRICA LTD., 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

**CENTRAL MINING AND INVESTMENT CORP. LTD.'S MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS THE THIRD-PARTY COMPLAINT**

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Third-Party Defendant Central Mining and Investment Corp. Ltd. (“Central Mining”), by and through its undersigned counsel, submits this memorandum in support of its Motion to Dismiss the Third-Party Complaint (the “Memorandum”) filed by Third Party Plaintiff Cape plc (“Cape”), by and through its Receiver Peter D. Protopapas (the “Receiver”), pursuant to Rule 12(b)(1), 12(b)(2), and 12(b)(6) of the South Carolina Rules of Civil Procedure, or alternatively to stay or sever the Third-Party Complaint pursuant to Rule 14(a), which was filed with the Court on September 1, 2023 (the “Motion”), as well as in response to the Receiver’s October 18, 2023 Omnibus Opposition to Third-Party Defendants’ Motions to Dismiss for Lack of Personal Jurisdiction (the “Jurisdiction Opposition”) and Omnibus Opposition to Certain Third-Party Defendants’ Motions to Dismiss Under Rules 12(b)(1) and 12(b)(6) and, Alternatively, For More Definite Statement and to Strike or Sever Under Rules 12(e) and 14 (the “12(b) Opposition”).¹

I. PRELIMINARY STATEMENT

The Third-Party Complaint should be dismissed because it fails to allege facts sufficient to support personal jurisdiction over Central Mining. As a corporation organized under the laws of the United Kingdom with its principal place of business in Essex, England, Central Mining is not “at home” in South Carolina and thus, there is no general jurisdiction over it in this forum—an argument that the Receiver does not appear to contest. The Receiver, instead, seeks to justify specific jurisdiction over Central Mining because it is the purported alter ego of Cape. However, despite the Third-Party Complaint’s heated rhetoric, it fails to sufficiently allege *facts* demonstrating that Central Mining (as opposed to other Third-Party Defendants) had the requisite

¹ Without waiving any specific argument presented in its Motion to Dismiss, Central Mining has focused this Memorandum on certain arguments only and 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.

dominion and control over Cape to justify specific jurisdiction based on alter ego or veil piercing. Moreover, given that Third-Party Plaintiff's claims are not premised on any activity by Central Mining in South Carolina, there are no contacts by Central Mining that could give rise to specific jurisdiction in South Carolina. For these reasons alone, the Complaint should be dismissed for lack of personal jurisdiction pursuant to Rule 12(b)(2).

Even if this Court were to find personal jurisdiction—it should not—the Third-Party Complaint should still be dismissed because it fails to state a claim against Central Mining. All of the claims against Central Mining are based on its purported domination and control of Cape. However, just as with respect to personal jurisdiction, the Third-Party Complaint fails to actually allege facts that demonstrate a high enough level of control by Central Mining necessary to pierce the corporate veil or hold it liable as the alter ego of Cape.

This is unsurprising given that the Receiver's argument was considered on the merits and rejected by the United States Court of Appeals for the Third Circuit more than 30 years ago. In that case, after a full trial specifically on the alter ego / veil-piercing issue, the Third Circuit determined, as a matter of law, that Charter Consolidated and Central Mining were not responsible for Cape's liabilities in personal injury asbestos actions on alter ego or corporate veil-piercing theories because they simply did not exercise sufficient control over Cape. Nevertheless, relying on the same facts as the Third Circuit relied on to reject veil piercing and alter ego, the Receiver seeks to litigate the issue all over again, potentially in tens of thousands of cases across South Carolina. Based on well-trod principles of res judicata and collateral estoppel, this Court can and should find that the Receiver is bound by these previous decisions and dismiss any claims against Central Mining.

Furthermore, the Court should dismiss the Third-Party Complaint as against Central Mining because, pursuant to South Carolina’s Door Closing Statute, the Third-Party Plaintiff, a non-resident entity that is legally distinct from the Receiver, lacks the capacity to sue Central Mining, also a non-resident, for claims arising outside of South Carolina.

Alternatively, to the extent that the Court does not dismiss the Third-Party Complaint, the Court should strike or sever the Third-Party Complaint in its entirety under Rule 14(a) because the Third-Party Plaintiff’s claims are not derivative of Plaintiffs’ claims.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Current Action.

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 (the “Receivership Order”).⁵ The Receivership Order purported

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). As set forth more fully in Central Mining’s October 6, 2023 Motion for Protective Order and to Dissolve Receivership, Central Mining respectfully asserts that certain defects in the appointment process warrant dissolution of the receivership.

to appoint the Receiver on behalf of Cape because Cape, as the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.) and its subsidiaries and global affiliates, had “forfeited its charter and further failed to answer this case.” The Receivership Order appointing the Receiver, however, acknowledged the separate status of Cape and the Receiver.⁶

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 as a general, wholesale matter “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

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.

country by and between foreign corporations wholly unrelated to the Plaintiffs in the Tibbs Suit, 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 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

B. Corporate History Of Cape And Charter.

Cape Industries, P.L.C. (“Cape”) was an industrial holding company incorporated in 1893.¹² Through its wholly owned subsidiaries, Cape primarily “engaged in mining, industrial contracting, manufacturing of auto parts (friction materials) and building supplies including insulation. [And, u]ntil 1979 it mined and sold asbestos fiber from South Africa through such

⁹ *Id.* at ¶ 130.

¹⁰ *Id.* at ¶ 141.

¹¹ *Id.* at ¶ 145.

¹² See Third-Party Complaint, at ¶ 45; *Craig v. Johns-Manville Corp.*, 1987 WL 10191, at *2 (E.D. Pa. Apr. 23, 1987), rev'd sub nom. *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145 (3d Cir. 1988). Cape was re-registered as a public company and changed its name from Cape Industries Ltd. f/k/a Cape Asbestos Company Ltd. to Cape Industries P.L.C. in 1981. See Third-Party Complaint, at ¶ 113.

subsidiaries.”¹³ In 1979, Cape sold all of its asbestos mining and marketing subsidiaries to an unrelated company.¹⁴ According to Cape’s Receiver, in 1989, Cape Industries, P.L.C. shorted its name to Cape PLC before again changing its name in 2011 to Cape Intermediate Holdings PLC. The company then re-registered as a private company to become Cape Intermediate Holdings Ltd. in 2013.¹⁵

Charter Consolidated, P.L.C. (“Charter”) is a holding company that incorporated in 1964 as a mining finance company.¹⁶ In 1965, Charter became public “through a share exchange between the British South Africa Co., Central Mining and Investment Corp. Ltd. and Consolidated Mines Selection Ltd.” As part of that share exchange, Charter acquired a 16.8% interest in Cape, which gradually increased to Charter holding all of Cape’s preferred stock and 62.5% of Cape’s common stock by May 1969.¹⁷ In 1996, Charter sold all of its remaining interest in Cape.¹⁸

Charter has also undergone several name changes prior to being sold to Colfax Corporation (“Colfax”) in 2012. For example, in 1993, Charter re-registered as a public company and became Charter PLC.¹⁹ In 2008, a holding company called Charter International PLC took over Charter PLC.²⁰ Colfax then subsequently spun off Charter as a subsidiary of ESAB in spring 2022. Today, ESAB is a publicly traded, world-class manufacturing technology company and remains Charter’s

¹³ *Craig*, 1987 WL 10191, at *2; *see also* Third-Party Complaint, at ¶ 102.

¹⁴ *See* Third-Party Complaint, at ¶ 102; *Craig*, 1987 WL 10191, at *3; *Craig*, 843 F.2d at 147.

¹⁵ *See* Third-Party Complaint, at ¶ 113.

¹⁶ *See Craig*, 1987 WL 10191, at *2.

¹⁷ *See Craig*, 1987 WL 10191, at *2; Third-Party Complaint, at ¶¶ 54-55.

¹⁸ *See* Third-Party Complaint, at ¶ 123.

¹⁹ *See* Third-Party Complaint, at ¶ 123.

²⁰ *Id.*

corporate parent, as well as the parent of Charter's subsidiary Central Mining & Investment Corporation Ltd.²¹

C. Historical Litigation Over Charter's and Central Mining's Liability For Cape's Torts.

In the mid-1980s, plaintiffs across the country began naming Charter (and its subsidiaries, like Central Mining) as a defendant in asbestos litigation, alleging that Charter was liable for Cape's torts under an alter ego or corporate veil-piercing theory.²² "Between 1985 and 1987, the issue was tried in several matters, each of which was resolved in [Charter's] favour either at trial or on appeal."²³

For example, in 1986, the District Court for the Eastern District of Pennsylvania presided over a two-day trial on the sole issue of whether Charter and its purported related entities (including Central Mining) were liable under New Jersey law for Cape's torts under an alter ego or corporate veil-piercing theory.²⁴ The trial included live and deposition testimony from numerous witnesses. The trial judge initially concluded that Charter was the alter ego of Cape and held Charter responsible for a portion of plaintiff's damages.²⁵ On appeal, however, the Third Circuit, exercising plenary review, reversed and remanded "for entry of judgment in favor of Charter."²⁶ It held that Charter's "involvement in Cape's financial and managerial affairs fail[ed] to rise to the

²¹ ESAB Corporation, *The History of ESAB Corporation.*, <https://esabcorporation.com/our-story/history/> (last visited Aug. 8, 2023).

²² [sec.gov/Archives/edgar/data/1420800/000114420411070464/v242942_defm14a.html](https://www.sec.gov/Archives/edgar/data/1420800/000114420411070464/v242942_defm14a.html).

²³ *Id.*

²⁴ See *Craig*, 1987 WL 10191; *Craig*, 843 F.2d 145. The Court included the following entities in its definition of Charter: "Charter Consolidated Investments, P.L.C., Central Mining Finance, Ltd., Charter Consolidated Services, Ltd., British South Africa Company and Consolidated Mines Selection." *Id.* at *1.

²⁵ *Id.* at *18.

²⁶ *Craig*, 843 F.2d at 152.

high standard of domination necessary to pierce the corporate veil.”²⁷ Importantly, the Third Circuit found, as a matter of law, that “there is no evidence that Charter’s intrusion into Cape’s affairs is even ‘constant’ or day-to-day.” The Third Circuit also found it particularly significant that Charter and Cape “each maintained separate books, records, bank accounts, offices and staff; each consulted their own financial advisors, accountants and stockbrokers.”²⁸ Although the court found that Charter had the “power to control” Cape, “potential control is not enough.”²⁹

The very next year, the Eastern District of Pennsylvania again considered the issue of whether Charter and Central Mining were alter egos of Cape, this time under both New Jersey and Pennsylvania law, in dozens of asbestos cases pending in the Eastern District of Pennsylvania.³⁰ Relying on the Third Circuit’s decision in *Craig*, and rejecting plaintiffs’ arguments that there was “new” evidence not considered by the Third Circuit, this Court again held that Charter and Central Mining were not liable under an alter ego or piercing the corporate veil theory for Cape’s asbestos torts. The Eastern District of Pennsylvania further pointed out that many other courts had considered the exact same issue and resolved it the exact same way.³¹

²⁷ *Id.*

²⁸ *Id.* at *152.

²⁹ *Id.* (citing *Scalise v. Beech Aircraft Corp.*, 276 F. Supp. 58, 62 (E.D. Pa. 1967) (“although stock ownership and identity of officers and directors naturally subject the subsidiary to a measure of control, the issue . . . is how such control is exercised”).

³⁰ See *In re Charter Defendants’ Motion for Summary Judgment in all Cases Pending in the Eastern District of Pennsylvania in Which They are Parties*, Misc. No. 86-0457, 1989 U.S. Dist. LEXIS 15591 (E.D. Pa. May 18, 1989). In these cases, the Charter defendants, including Charter Consolidated P.L.C., Charter Consolidated Investments Limited, Charter Consolidated Services Limited, Central Mining Finance Limited, The Consolidated Mines Selection Company Limited, and the British South Africa Company, were named as both defendants and third-party defendants. *Id.* at *1.

³¹ See *id.* at *5-*6 (citing *Bednar v. Carey Canada, Inc.*, No. 88-3707 (D.N.J. Feb. 7, 1989); *Lee/McDaniels v. Carey Canada, Inc.*, Nos. 83-1412, 83-1413 (D.N.J. Dec. 1, 1988); *McCracken v. Lac D’Amiante du Quebec, Ltee.*, No. 84-0128 (E.D. Pa. Sept. 9, 1988); *Kessinger v. Grefco, Inc.*, No. 85-3092 (C.D. Ill. May 2, 1986); *Newhouse/Sparta v. Lac D’Amiante du Quebec, Ltee.*,

D. The Receiver's Attempts To Relitigate Central Mining's Liability For Cape's Torts.

The Third-Party Complaint describes Cape, from its founding in 1893, as “deeply involved in all elements of the global asbestos industry,” including mining asbestos in South Africa and then selling it to manufacturers of asbestos-containing products in the United States, including South Carolina.³² After overviewing Cape’s role in the asbestos industry, the Third-Party Complaint outlines Central Mining’s alleged control or domination over Cape. First, it discusses Central Mining’s general interest in Cape dating back to the 1930s.³³ Second, it describes Central Mining’s majority position on Cape’s board of directors and decision to second employees to Cape. And third, it describes the “‘association [of Cape] with Charter through one of its forerunners,’ *i.e.*, Central Mining.”³⁴

The Third-Party Complaint rehashes most of the same facts and documents relied on by the courts in *Craig* and *In re Charter Defendants* and ultimately asks for the same relief those courts denied—mainly, holding Central Mining liable for Cape’s asbestos liability. Tellingly, although the 12(b) Opposition acknowledges the Third Circuit’s holding in *Craig*, it does not even attempt to distinguish it from the present situation, instead simply suggesting that the Third Circuit’s findings after its extensive review of a full evidentiary trial record should be discarded as “myopic.”³⁵

Nos. 83-2932, 83-2933 (D.N.J. July 19, 1988); *Simmons v. AC&S, Inc.*, No. 84-1170 (W.D. Ark. June 4, 1985); *In re Asbestos Litig. Venued in Middlesex Cty.: Manville Plantworker Cases Only*, No. L-37243-79 (N.J. Super Ct. Law Div. July 10, 1987)).

³² See Third-Party Complaint, at ¶ 40.

³³ *Id.*, at ¶ 50.

³⁴ *Id.* at ¶ 56 n.9.

³⁵ See 12(b) Opposition, at p. 5-6.

E. Central Mining Lacks Jurisdictional Ties To South Carolina.

The Third-Party Complaint also alleges this Court has jurisdiction over each of the Third-Party Defendants, including Central Mining, pursuant to South Carolina’s long-arm statute.³⁶ 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.³⁷ Central Mining has no assets in South Carolina.³⁸ 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.³⁹

Moreover, Central Mining currently does not, and has not historically, mined, milled, or sold asbestos in South Carolina.⁴⁰ Central Mining also currently does not, and has not historically, produced, manufactured, or distributed asbestos or asbestos-containing products for use in South Carolina.⁴¹ Furthermore, Cape is not a subsidiary of Central Mining.⁴²

III. LEGAL STANDARD

When a defendant challenges a trial court’s jurisdiction over it, the plaintiff bears the burden of establishing that personal jurisdiction exists.⁴³ “The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular

³⁶ *Id.* at ¶¶ 37, 140.

³⁷ Affidavit of Rita J. Herring (“Herring Aff.”) at ¶ 5.

³⁸ *Id.* at ¶ 6.

³⁹ *Id.* at ¶¶ 7-8.

⁴⁰ *Id.* at ¶ 9.

⁴¹ *Id.* at ¶ 10.

⁴² *Id.* at ¶ 4.

⁴³ *Moosally v. W. W. Norton & Co.*, 594 S.E.2d 878, 882 (S.C. Ct. App. 2004).

case.”⁴⁴ “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.”⁴⁵ Subject matter jurisdiction is a court’s “power to hear and determine cases of the general class to which the proceedings in question belong.”⁴⁶ When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, however, the plaintiff bears the burden of proving subject-matter jurisdiction.⁴⁷ The court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction.⁴⁸ 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 the court.⁴⁹ Generally, the trial court must base its ruling solely upon allegations set forth on the face of the complaint.⁵⁰ However, a plaintiff must do more than state general and conclusory allegations that do not satisfy South Carolina’s pleading standards.⁵¹ Here, viewing the allegations

⁴⁴ *Cockrell v. Hillerich & Bradsby Co.*, 611 S.E.2d 505, 508 (S.C. 2005).

⁴⁵ *Id.*

⁴⁶ *Simmons v. Simmons*, 634 S.E.2d 1, 3 (S.C. Ct. App. 2006).

⁴⁷ *Elridge v. City of Greenwood*, 503 S.E.2d 191, 197 (S.C. Ct. App. 1998).

⁴⁸ *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 655 S.E.2d 476, 478 (2007).

⁴⁹ *Williams v. Condon*, 553 S.E.2d 496 (S.C. Ct. App. 2001).

⁵⁰ *Doe v. Marion*, 605 S.E.2d 556, 559 (S.C. Ct. App. 2004), *aff’d* 645 S.E.2d 245 (S.C. 2007).

⁵¹ *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.”).

in the light most favorable to the Receiver, the Third-Party Complaint fails to state a claim for relief.

IV. 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. Alternatively, if the Court does not dismiss the Third-Party Complaint, the Court should strike or sever the claims pursuant to Rule 14(a).

A. The Court Lacks Personal Jurisdiction Over Central Mining.

The Third-Party Complaint against Central Mining must be dismissed because the Court lacks jurisdiction over Central Mining.⁵² Indeed, the Receiver has not alleged facts, as opposed to conclusory allegations, that are sufficient to support jurisdiction over Central Mining in the State of South Carolina.

To determine whether personal jurisdiction exists over a non-domiciliary corporation such as Central Mining, courts engage in a two-pronged analysis: (1) a plaintiff must demonstrate that granting jurisdiction under the statute would not violate the Fourteenth Amendment of the United States Constitution;⁵³ and (2) a plaintiff must show that defendant's conduct falls within South Carolina's long-arm statute, S.C. Code Ann. § 36-2-803. Both prongs must be satisfied for jurisdiction to exist. Here, the Receiver cannot establish either.

1. **Central Mining is not subject to general jurisdiction in South Carolina.**

This Court lacks general personal jurisdiction over Central Mining because it is not “essentially at home” in South Carolina—a fact that the Receiver does not appear to contest. “A

⁵² See Rule 12(b)(2).

⁵³ See *Moosally*, 594 S.E.2d at 886; *Abdulla v. S. Bank*, 439 S.C. 391, 400, 887 S.E.2d 138, 143 (Ct. App. 2023).

state court may exercise general jurisdiction only when a [corporate] defendant is ‘essentially at home’ in the State.”⁵⁴ A corporate defendant is essentially at home, in turn, in “its place of incorporation and [where it has] a principal place of business.”⁵⁵ 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 Kingdom.⁵⁶ Accordingly, Central Mining is not “essentially at home” in South Carolina, and this Court therefore lacks general personal jurisdiction over Central Mining.

2. Central Mining is not subject to specific jurisdiction in South Carolina through its own contacts, or lack thereof, with South Carolina.

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.⁵⁷ “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.”⁵⁸ “Because South Carolina treats its long-arm statute as

⁵⁴ *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 Ann. § 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.”).

⁵⁵ *Id.*

⁵⁶ *Herring Aff.*, at ¶ 5.

⁵⁷ S.C. Code § 36-2-803(1).

⁵⁸ *Cockrell*, 611 S.E.2d at 508.

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.”⁵⁹ 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.”⁶⁰

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 and always has been an entirely separate and distinct corporate entity from Central Mining and is not a subsidiary of Central Mining.⁶¹ Moreover, Central Mining does not currently, and has not historically, mined, milled, sold, or supplied asbestos in South Carolina.⁶² Likewise, Central Mining does not currently, and has not historically, produced, manufactured, or distributed asbestos or asbestos-containing products for use in South Carolina.⁶³ 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.⁶⁴ Under these circumstances, the unsupported allegations in the Third-Party Complaint

⁵⁹ *Id.*

⁶⁰ *Ford Motor Co.*, 141 S. Ct. at 1025 (internal quotations omitted); *see also* S.C. Code Ann. § 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).

⁶¹ Herring Aff. at ¶ 4.

⁶² *Id.* at ¶ 9.

⁶³ *Id.* at ¶ 10.

⁶⁴ *Id.* at ¶ 7.

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.⁶⁵

3. Central Mining is not subject to specific jurisdiction through a veil piercing or alter ego theory.

The Court should reject the Receiver's argument, in its Jurisdiction Opposition, that the Court has specific jurisdiction over Central Mining solely based on Cape's purported jurisdictional contacts in South Carolina through an alter ego, veil piercing theory, or single business enterprise theory.⁶⁶ Despite the Receiver's bald protestations to the contrary, the Third-Party Complaint does not allege sufficient facts related to Central Mining's control over Cape. Instead, the Receiver spends a great portion of the Third-Party Complaint and the Jurisdiction Opposition focusing on facts about others' control over Central Mining, which is wholly irrelevant to the analysis of whether Central Mining exercised sufficient control over Cape to pierce the corporate veil.⁶⁷ Conclusory allegations that Central Mining controlled Cape because it was the majority owner of Cape and had common directors or employees (or was acting as a "corporate buffer" with another entity) are woefully insufficient.⁶⁸ It is well settled law in South Carolina that majority ownership

⁶⁵ The Receiver's argument that, absent a finding of specific jurisdiction, South Carolinian asbestos plaintiffs will be without redress is wholly unsupported and has been rejected by numerous courts as plaintiffs always have the option of bringing suit in a location where a defendant like Central Mining is subject to general jurisdiction. *See e.g., Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cnty.*, 582 U.S. 255, 268 (2017) ("Our straightforward application in this case of settled principles of personal jurisdiction will not result in the parade of horrors that respondents conjure up. . . . Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over [Petitioner].").

⁶⁶ *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").

⁶⁷ *See e.g., Third-Party Compl.*, at ¶¶ 57–59; Jurisdiction Opposition, at p. 32–33.

⁶⁸ *See e.g., Third-Party Compl.*, at ¶¶ 140–141; Jurisdiction Opposition, at p. 32–33.

and common officers or directors, standing alone, simply do not “support the conclusion the subsidiary is its parent’s alter ego or agent for the transaction of its business.”⁶⁹

Even under a single business enterprise theory, the Third-Party Complaint still fails to allege facts sufficient to establish specific jurisdiction over Central Mining. Similar to an alter ego or veil piercing theory, a plaintiff must still appropriately allege that defendants had dominion and control such that the entities acted as unified operations (the primary difference being that a single business enterprise theory can encompass “sister” organizations, not just parent/subsidiaries like alter ego and veil piercing).⁷⁰ As discussed throughout this Memorandum, the allegations related to control over Cape are wholly inadequate.

However, even if the Court found that the single business enterprise theory is applicable—it should not—that only means that Cape’s purported jurisdictional contacts with South Carolina are imputed to Central Mining. It does not automatically mean that jurisdiction attaches.⁷¹ Here, Cape’s purported contacts with South Carolina, even if imputed to Central Mining, are insufficient to establish specific jurisdiction. The only contact with South Carolina that the Third-Party Complaint mentions is that Cape sold asbestos in the United States, including in South Carolina.⁷²

⁶⁹ *Yarborough & Co. v. Schoolfield Furniture Indus., Inc.*, 275 S.C. 151, 153–54, 268 S.E.2d 42, 44 (1980); *Jones ex rel. Jones v. Enter. Leasing Co.-Se.*, 383 S.C. 259, 267, 678 S.E.2d 819, 823–24 (Ct. App. 2009).

⁷⁰ See *Pertuis v. Front Roe Rests., Inc.*, 423 S.C. 640, 817 S.E.2d 273 (2018) (citations omitted) (“We formally recognize today this single business enterprise theory, and in doing so, we acknowledge that corporations are often formed for the purpose of shielding shareholders from individual liability; there is nothing remotely nefarious in doing that.”).

⁷¹ See *Duong v. N. Am. Transportation Servs. LLC*, 2019 WL 13109647, at *13 (D.S.C. Sept. 25, 2019) (holding that, even if the single business enterprise theory applied, plaintiff failed to allege jurisdictional facts necessary to establish personal jurisdiction).

⁷² See e.g., Third-Party Compl., at ¶¶ 75–76; Jurisdiction Opposition, at p. 20-21. Technically, the Receiver does not even allege that Cape directly sold asbestos in South Carolina, but instead seeks to first impute NAAC’s contacts in South Carolina to Cape, before trying to impute NAAC’s contacts to Central Mining.

Importantly, however, the claims asserted against Central Mining do not arise out of any asbestos sold in South Carolina (nor does the Third-Party Complaint make such an assertion). For that matter, there are not even any allegations in Plaintiffs' Complaint or the Third-Party Complaint that Tibbs was exposed to amosite asbestos sold or mined by Cape.⁷³

Although specific jurisdiction can certainly be established by an entity's contacts with South Carolina, the critical distinction between general and specific jurisdiction is that, for specific jurisdiction, the claims must actually arise from the contacts with the state.⁷⁴ The Third-Party Complaint asserts four causes of action: unjust enrichment, constructive trust, alter ego or piercing the corporate veil liability, and accounting. None of these claims arise out of Cape's purported sales of asbestos to any particular entity or person in South Carolina (or even arise from the use of asbestos in South Carolina) and, instead, arise out of purported conduct in South Africa, the United Kingdom, and other places outside of South Carolina. Unless the claims actually arise from Cape's contacts in South Carolina, the mere fact that Cape's jurisdictional contacts may be imputed to Central Mining (they should not) is insufficient for this Court to assert personal jurisdiction over Central Mining.⁷⁵

B. The Court Should Dismiss The Third-Party Complaint Because, As A Matter Of Law, There Was Insufficient Domination Of Cape To Pierce The Corporate Veil—An Issue Previously Litigated and Decided Decades Ago.

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

⁷³ See generally Third-Party Compl.

⁷⁴ See *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 655 S.E.2d 476 (2007).

⁷⁵ See *Outpost Cap. Mgmt., LLC v. Prioleau*, 2017 WL 5514513, at *7 (D.S.C. Nov. 16, 2017) (finding that even an entities' contacts could be imputed to defendant through an alter ego theory, the court still did not have specific jurisdiction over defendant because the claims against defendant did not arise from the entities' contacts with South Carolina).

Central Mining needed to sustain an alter ego or veil piercing claim.⁷⁶ Furthermore, this issue has already been actually decided by multiple courts across the country and the Receiver is barred from relitigating these issues under either collateral estoppel or res judicata.

1. The facts alleged do not show the required domination over Cape.

Even taking the allegations alleged in the Third-Party Complaint as true, as a matter of law, Central Mining's actions do not rise to the level of domination and control required to pierce the corporate veil or hold it responsible as an alter ego of Cape.

In South Carolina, to hold a party responsible under an alter ego theory, a plaintiff must show both “(1) total domination and control of one entity by another and (2) inequitable consequences caused thereby.”⁷⁷ Importantly, the level of control must be such that the “subservient entity manifests no separate interest of its own and functions solely to achieve the goals of the dominant entity.”⁷⁸

Similarly, in order to pierce the corporate veil, courts employ a two-prong test, looking first at an eight-factor analysis to determine if corporate formalities were sufficiently observed and

⁷⁶ See *Craig*, 843 F.2d at 152 (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 and Central Mining purported to be liable were not the alter egos 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 (dismissing all claims, cross-claims, and third-party claims asserted against Charter and Central Mining 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*, 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).

⁷⁷ *Oskin v. Johnson*, 400 S.C. 390, 400, 735 S.E.2d 459, 465 (2012).

⁷⁸ *Id.*; *Colleton Cnty. Taxpayers Ass’n v. Sch. Dist. of Colleton Cnty.*, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006).

then second on the element of injustice or unfairness.⁷⁹ The eight factors are: “(1) whether the corporation was grossly undercapitalized; (2) failure to observe corporate formalities; (3) non-payment of dividends; (4) insolvency of the debtor corporation at the time; (5) siphoning of funds of the corporation by the dominant stockholder; (6) non-functioning of other officers or directors; (7) absence of corporate records; and (8) the fact that the corporation was merely a façade for the operations of the dominant stockholder” (the “*Sturkie* Factors”).⁸⁰

Here, the Third-Party Complaint does not include facts specific to how Central Mining controlled Cape and certainly does not allege facts sufficient to even remotely demonstrate that Central Mining had “total domination and control” over Cape such that Cape “manifest[ed] no separate interest of its own.”⁸¹ Although the Third-Party Complaint contains some allegations of control and domination between Central Mining and various entities, there are almost no allegations of control specifically between Central Mining and Cape. In fact, the *only* specific allegations as to control between Central Mining and Cape are that: (1) Central Mining was initially organized to take over the assets and business interests of a third-party organization that held “interests” in Cape Asbestos;⁸² (2) Central Mining was a major shareholder in Cape in the mid-1900s;⁸³ (3) Central Mining “second[ed] employees to Cape”;⁸⁴ and (4) Central Mining used

⁷⁹ See *Sturkie v. Sifly*, 280 S.C. 453, 456–57, 313 S.E.2d 316, 318 (Ct. App. 1984).

⁸⁰ *Mid-S. Mgt. Co. Inc. v. Sherwood Dev. Corp.*, 374 S.C. 588, 598, 649 S.E.2d 135, 141 (Ct. App. 2007); *Sturkie*, 280 S.C. at 456–57, 313 S.E.2d at 318. For purposes of this Motion, Central Mining does not address the fraud or injustice prongs of either test as the Third-Party Complaint fails, as a matter of law, to allege facts showing sufficient domination and control over Cape.

⁸¹ *Oskin*, 400 S.C. at 400, 735 S.E.2d at 465; *Colleton Cnty. Taxpayers Ass’n.*, 371 S.C. at 237, 638 S.E.2d a 692.

⁸² Third-Party Compl., at ¶ 48.

⁸³ *Id.*, at ¶ 50.

⁸⁴ *Id.*, at ¶ 50.

its expertise to “improve” Cape’s performance.⁸⁵ These allegations are insufficient as a matter of law.⁸⁶

Having an overlap in interests and paying for certain personnel does not rise to the level of Central Mining having “constant” or day to day control over Cape required to pierce the corporate veil. This is especially true given that South Carolina courts have repeatedly held that “[c]ommon officers and/or directors and public identification of one corporation as the other’s subsidiary do not, without more, support the conclusion the subsidiary is its parent’s alter ego or agent for the transaction of its business.”⁸⁷ Furthermore, the Third-Party Complaint’s generic allegations, such as a “failure to follow corporate formalities” and “domination and control . . . over Cape’s . . . executive personnel and board of directors,”⁸⁸ which are merely a rewording of the *Sturkie* Factors, are insufficient as a matter of law.⁸⁹

The Third-Party Complaint’s lack of specific factual allegations related to Central Mining’s purported control over Cape is hardly surprising given the previous court decisions finding for

⁸⁵ *Id.*, at ¶ 52.

⁸⁶ *Yarborough & Co.*, 275 S.C. at 153–54, 268 S.E.2d at 44; *Jones ex rel. Jones*, 383 S.C. at 267, 678 S.E.2d at 823–24.

⁸⁷ *Yarborough & Co.*, 275 S.C. at 153–54, 268 S.E.2d at 44; *Jones ex rel. Jones*, 383 S.C. at 267, 678 S.E.2d at 823–24.

⁸⁸ See Third-Party Compl., at ¶ 140.

⁸⁹ See *David*, 626 S.E.2d at 3 (requiring more than “generic allegations and conjecture” to sustain malpractice claim); *Paradis*, 819 S.E.2d at 153 (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.”); *Mincey v. World Savings Bank FSB*, 614 F. Supp. 2d 610 (D.S.C. 2008) (rejecting plaintiffs’ attempt to allege veil-piercing or alter ego based on conclusory allegations with no specific facts); *Pro Slab, Inc. v. Argos USA Corp.*, 2018 WL 6985008, at *5 (D.S.C. June 28, 2018), *reconsideration granted on other grounds*, 2018 WL 6985010 (D.S.C. Dec. 3, 2018) (granting defendants’ motions to dismiss where the “amended complaint contains no factual allegations to support [the] legal conclusion” that certain affiliated corporate entities were alter egos of one another).

Central Mining on this issue.⁹⁰ Indeed, the Third Circuit Court of Appeals, reviewing factual findings after a two-day trial on this issue, refused to pierce the corporate veil despite evidence of control over Cape, including the “involvement in Cape’s financial and managerial affairs”; the presence of employees on Cape’s board; and the ownership of a majority of Cape’s stock.⁹¹

The Receiver does not allege—because he cannot do so—sufficient facts to show that Central Mining dominated and controlled Cape such that the Court should pierce the corporate veil.⁹² Given all of the claims arise from this basic premise (i.e. control of Cape by Central Mining), the Court should dismiss the Third-Party Complaint as to Central Mining in its entirety.

2. The Receiver is bound by previous decisions holding Central Mining was not the alter ego of Cape.

In South Carolina, a party is barred from relitigating in a second action an issue or claim that has been previously litigated and decided in a prior action.⁹³ Res judicata may be applied if (1) the identities of the parties are the same as in the prior litigation, (2) the subject matter is the same as in the prior litigation, and (3) there was a prior adjudication of the issue by a court of

⁹⁰ See e.g., *Craig*, 843 F.2d at 152; *In re Charter Defs.*, 1989 U.S. Dist. LEXIS 15591; *Culbreth*, 898 F.2d 13; *Simmons*, No. 84-1170.

⁹¹ *Craig*, 843 F.2d at 152.

⁹² See e.g., *In re Joseph Walker & Co., Inc.*, 522 B.R. 165, 193 (Bankr. D.S.C. 2014) (refusing to find alter ego liability where company “maintained separate bank accounts, obtained credit lines based solely upon its own assets and liabilities, obtained and possessed its own federal tax identification number and accordingly paid taxes when they became due” and employed separate legal counsel and accounting firms).

⁹³ See *S.C. Prop. & Cas. Ins. Guaranty Ass’n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991) (“Collateral estoppel occurs when a party in a second action seeks to preclude a party from relitigating an issue which was decided in a previous action.”); *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (“Under the doctrine of res judicata, ‘[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.’”).

competent jurisdiction.⁹⁴ Similarly, collateral estoppel applies if the “issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.”⁹⁵

Here, the Receiver is barred from relitigating the veil piercing and alter ego claims against Central Mining because the issue was already decided by multiple courts and the Receiver is in privity with the plaintiffs asserting the same causes of action in those claims.

a. Whether Central Mining is the alter ego of Cape was previously litigated and decided.

The claims against Central Mining are all grounded in the same issue that was decided by the District Court for the Eastern District of Pennsylvania and the Third Circuit decades ago, mainly that Central Mining and its parent (Charter Consolidated) were *not* alter egos of Cape. In *Craig*, the Third Circuit reversed a district court decision, made after a two-day trial on the merits, and found as a matter of law that Charter Consolidated and Central Mining did not exercise a great enough degree of domination over Cape to hold them responsible for Cape’s asbestos liability.⁹⁶ In *In re Charter Defendants*, the Eastern District of Pennsylvania granted summary judgment and dismissed with prejudice all claims asserted against Charter Consolidated and Central Mining (among others) in every asbestos action pending in the Eastern District of Pennsylvania on the basis that the Court was bound by the Third Circuit’s *Craig* decision finding that Charter and Central Mining were not alter egos of Cape.⁹⁷

⁹⁴ *Johnson v. Greenwood Mills, Inc.*, 317 S.C. 248, 250–51, 452 S.E.2d 832, 833 (1994).

⁹⁵ *Carolina Renewal, Inc. v. S.C. Dep’t of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009).

⁹⁶ *Craig*, 843 F.2d at 152.

⁹⁷ *In re Charter Defendants*, 1989 U.S. Dist. LEXIS 15591, at *1-3.

Despite the alter ego issue being resolved by the Eastern District of Pennsylvania and the Third Circuit (as well as many other courts⁹⁸), the Receiver in the *Tibbs* Suit has now asserted claims against Central Mining based on the exact same alter ego issue and grounded in the very same facts that the *Craig* and *In re Charter Defendants* courts analyzed to reject the alter ego theory. A comparison between the facts and legal issues decided in *Craig* and *In re Charter Defendants* with the facts and legal questions asserted here shows the clear duplication between the matters. For example, the Third-Party Complaint includes allegations regarding Central Mining's majority position on Cape's board of directors to suggest purported dominance or control;⁹⁹ however, the Third Circuit found that fact unpersuasive.¹⁰⁰ Likewise, the Third-Party Complaint includes allegations regarding Central Mining's "seconding employees to Cape,"¹⁰¹ but the Third Circuit found that fact similarly unpersuasive.¹⁰² The Third-Party Complaint offers nothing new that the Eastern District of Pennsylvania and the Third Circuit did not already consider and reject as a basis for finding alter ego liability—nor could the Receiver offer any "new" relevant facts as to Charter's control over Cape because Cape sold its asbestos business more than seven years before the trial in *Craig*.¹⁰³ As such, the Receiver improperly seeks to relitigate the same

⁹⁸ See, e.g., *id.* at *5-*6 (citing *Bednar*, No. 88-3707; *Lee/McDaniels*, Nos. 83-1412, 83-1413; *McCracken*, No. 84-0128; *Kessinger*, No. 85-3092; *Newhouse/Sparta*, Nos. 83-2932, 83-2933; *Simmons*, No. 84-1170; *In re Asbestos Litig. Venued in Middlesex Cty.: Manville Plantworker Cases Only*, No. L-37243-79).

⁹⁹ See Third-Party Compl., at ¶ 50.

¹⁰⁰ See *Craig*, 843 F.2d at 151 ("It is to be expected that a corporation seeking to acquire majority ownership of another will seek to achieve control.").

¹⁰¹ Third-Party Compl., at ¶ 52; see also *id.*, at ¶ 59 ("The Oppenheims consistently sat on Charter's board of directors after its founding.").

¹⁰² See *Craig*, 843 F.2d at 151 (deciding issue in Charter's favor despite "presence of three Charter nominees on Cape's Board").

¹⁰³ See Third-Party Compl., at ¶ 102.

issues now that have been previously decided by multiple other courts, suggesting that this Court should ignore *Craig* as a near-sighted aberration.¹⁰⁴

Although the Eastern District of Pennsylvania's decision and the Third Circuit's decision rejecting the alter ego arguments were made under New Jersey and Pennsylvania law,¹⁰⁵ there is no substantive difference between the law in those states and the law in South Carolina regarding alter ego and veil piercing.¹⁰⁶ The Eastern District of Pennsylvania in the *In re Charter Defendants* decision and the Third Circuit in the *Craig* decision relied on the same standard courts in South Carolina apply:¹⁰⁷ "Courts in both jurisdictions[, New Jersey and Pennsylvania,] apply the traditional control test set forth by Fletcher and require evidence of 'such domination of finances,

¹⁰⁴ See *Philadelphia National Bank v. McGuckin*, 90-2862, 1990 WL 201496, at *2 (E.D. Pa. Dec. 7, 1990) (applying relitigation exception where there was "no additional evidence to be discovered, no new issues that will develop, and nothing that will change the legal positions of the parties").

¹⁰⁵ See *Culbreth v. Amosa Ltd.*, 898 F.2d 13, 15 (3d Cir. 1990) ("[B]oth Pennsylvania and New Jersey require a threshold showing that the controlled corporation acted robot-or puppet-like in mechanical response to the controller's tugs on its strings or pressure on its buttons. In *Craig*, we held that Charter did not so dominate Cape. Since Pennsylvania law does not differ from New Jersey law in requiring a showing of such pervasive domination, Culbreth failed to establish the threshold to a finding that Cape was Charter's alter-ego.").

¹⁰⁶ See e.g., *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 154 (2015) ("[m]inor variations in the application of what is in essence the same legal standard do not defeat preclusion").

¹⁰⁷ See Section IV(B)(1), *supra*, for a discussion of the alter ego and piercing the corporate veil standards in South Carolina. See also *Oskin*, 400 S.C. at 400; *Colleton County Taxpayers*, 371 S.C. at 237; *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 686-87 (4th Cir. 1976) (applying South Carolina law and considering multiple factors in determining whether control is sufficient to pierce the corporate veil: "failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders."); *Jones ex rel. Jones*, 383 S.C. at 267, 678 S.E.2d at 823 ("Control required for liability under an alter ego doctrine amounts to total domination of the subsidiary to the extent the subsidiary manifested no separate corporate interests and functioned solely to achieve the purpose of the dominant corporation.").

policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own, and is but a conduit for its principal.”¹⁰⁸

Applying this standard, the Third Circuit found that 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.”¹⁰⁹ The Eastern District of Pennsylvania agreed with and applied the Third Circuit’s decision that there was “no evidence that would satisfy the control element of the corporate veil ‘piercing’ test to conclude that Charter controlled Cape.”¹¹⁰

b. The Receiver is in privity with the plaintiffs in the Pennsylvania cases.

Although the Receiver was not a direct party at the time the judgments were entered in either *Craig* or *In Re Charter Defendants*, the Court should still apply the holding from those cases because the plaintiffs in those cases were so “identified in interest with [the Receiver] that the plaintiffs] represent[ed] the same legal right.”¹¹¹ In the earlier cases here, there were two types of parties pursuing alter ego liability against Central Mining: (1) asbestos plaintiffs; and (2) co-defendants seeking to hold Central Mining responsible for a portion of the asbestos plaintiffs’ damages. For both types of parties, the interests of the party seeking to hold Central Mining liable

¹⁰⁸ *In re Charter Defendants*, 1989 U.S. Dist. LEXIS 15591, at *9.

¹⁰⁹ *Craig*, 843 F.2d at 152.

¹¹⁰ *In re Charter Defendants*, 1989 U.S. Dist. LEXIS 15591, at *8.

¹¹¹ *First Nat. Bank of Greenville v. U. S. Fid. & Guar. Co.*, 207 S.C. 15, 27, 35 S.E.2d 47, 58 (1945); *Richburg v. Baughman*, 290 S.C. 431, 351 S.E.2d 164 (1986) (“The term ‘privity’ when applied to a judgment or decree means one so identified in interest with another that he represents the same legal rights. . . . ‘Privity’ as used in the context of res judicata or collateral estoppel, does not embrace relationships between persons or entities, but rather it deals with a person’s relationship to the subject matter of the litigation.”).

and the interests of the Receiver are squarely aligned. Even the Receiver, in the Third-Party Complaint, claims an alignment with the same set of plaintiffs from *Craig* and *In Re Charter Defendants*.¹¹²

When a receiver attempts to pierce its own corporate veil through an alter ego theory, it is doing so not for the benefit of the corporation, but for the benefit of its creditors.¹¹³ Otherwise, such a claim would be disallowed.¹¹⁴ Accordingly, the Receiver in this case is bringing its claims against the Third-Party Defendants not for its own benefit, but for the benefit and interest of past, present, and future plaintiffs in South Carolina asbestos actions (and generally on behalf of “tens of thousands of individuals in the United States”).¹¹⁵ In other words, the Receiver has the exact same interest as the asbestos plaintiffs in the Pennsylvania cases.¹¹⁶

Because the Receiver is representing “precisely the same right” with respect to whether Central Mining is the alter ego of Cape as the parties to the earlier actions, the Receiver is bound

¹¹² See *e.g.*, Third-Party Compl., at ¶¶ 43–44.

¹¹³ See *Corcoran v. Frank B. Hall & Co.*, 149 A.D.2d 165, 174–75, 545 N.Y.S.2d 278, 283 (1989) (“Where, however, the corporate entity is in receivership or insolvent, the receiver's suit is for the benefit of the company’s creditors and not its shareholders.”); see also *Fed. Nat. Mortg. Ass’n v. Olympia Mortg. Corp.*, 2006 WL 2802092, at *14 (E.D.N.Y. Sept. 28, 2006) (“In general, as a matter of New York law, a corporation cannot pierce its own veil; however, where the corporate entity is in receivership or insolvent, the receiver or trustee may bring a veil-piercing suit for the benefit of the corporation’s creditors.”).

¹¹⁴ See *Corcoran*, 149 A.D.2d at 174 (“When a functioning corporation sues on its own behalf, it is in essence suing for the benefit of its shareholders. Thus, a suit by a viable corporate entity seeking to pierce its own veil is the equivalent of a suit by a corporation for the benefit of its shareholders brought against its shareholders, an absurdity. This is the clear and compelling rationale why courts have failed to recognize such an action.”).

¹¹⁵ See *e.g.*, Third-Party Compl., at ¶¶ 140(i), 136 (“The proper and appropriate remedy under the circumstances here is for the Court to exercise its equitable power and authority to require . . . the Charter Third-Party Defendants . . . to return funds that have been wrongfully diverted from meeting Cape’s obligations and responsibilities in the United States.”).

¹¹⁶ *In re Charter Defendants*, 1989 U.S. Dist. LEXIS 15591, at *6.

by the decisions in *Craig* and *In re Charter Defendants* and the Court should dismiss the Receiver's veil piercing and alter ego claim.

C. South Carolina's Door Closing Statute Bars All Claims Against Central Mining.

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.¹¹⁷ South Carolina's Door Closing Statute prohibits a suit against a “foreign corporation created by or under the laws any other state,” such as Central Mining, by a nonresident of South Carolina unless “the cause of action shall have arisen or the subject of the action shall be situated within this State.”¹¹⁸ The Door Closing Statute “does not involve subject matter jurisdiction but rather determines the capacity of a party to sue.”¹¹⁹

Here, as the Receivership Order acknowledges, Cape is a “foreign corporation,”¹²⁰ as is Central Mining.¹²¹ The Receiver argues, however, that he is a South Carolina resident, and that he (and not Cape) is the party bringing the claims against Central Mining. While the Receiver is the actual party, he stands in the shoes of Cape for purposes of what claims he has standing to assert.¹²²

¹¹⁷ See S.C. Code Ann. § 15-5-150.

¹¹⁸ *Id.*

¹¹⁹ *Farmer v. Monsanto Corp.*, 579 S.E.2d 325, 327 (S.C. 2003).

¹²⁰ Receivership Order, at 1. Although the Receiver attempts to avoid the effect of the Door Closing Statute by arguing that he is the one bringing the suit, not Cape, his citizenship is irrelevant to the analysis. See 12(b) Opposition. As the Third-Party Complaint makes clear, the “Plaintiff” in that action is Cape Asbestos Company Ltd., not the Receiver. See Third-Party Compl., at p. 9.

¹²¹ See Section II(E), *supra*; Third-Party Compl., at ¶ 19.

¹²² See *Wuliger v. Manufacturers Life Ins. Co.*, 567 F.3d 787 (6th Cir. 2009) (“Because they stand in the shoes of the entity in receivership, receivers have been found to lack standing to bring suit unless the receivership entity could have brought the same action.”); *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995) (“Like a trustee in bankruptcy or for that matter the plaintiff in a derivative suit, an equity receiver may sue only to redress injuries to the entity in receivership, corresponding

Furthermore, the Receiver does not and cannot show that any cause of action against Central Mining arose in South Carolina or that the subject matter of the action is situated in this state.¹²³ This is especially true considering Central Mining has no assets in South Carolina¹²⁴ and there are no allegations that Cape has any assets in South Carolina. The only connection to South Carolina relates to Plaintiffs' causes of action, which do not even include a cause of action against the Receiver. Accordingly, even if the Third-Party Complaint stated a cause of action (it does not), no cause of action asserted by Third-Party Plaintiff arose from any activity in South Carolina. Therefore, the Third-Party Plaintiff's claims against Central Mining should be dismissed.

D. Alternatively, The Court Should Strike Or Sever The Third-Party Complaint Pursuant To Rule 14(a).

To the extent that the Court does not dismiss the Third-Party Complaint, the Court should strike or sever the Third-Party Complaint (not just against Central Mining, but all Third-Party Defendants). Rule 14 provides that a third-party action may be brought by "a defending party" in the original action. Rule 14(a) further provides that "a defending party" may commence a third-party complaint against a party "who is or may be liable to [defendant] for all or part of the plaintiff's claim."¹²⁵ The Rule further provides that "[a]ny party may move to strike the third-party claim, or for its severance or separate trial."¹²⁶

to the debtor in bankruptcy and the corporation of which the plaintiffs are shareholders in the derivative suit.").

¹²³ Even if Cape brought the action directly, it could not demonstrate that any cause of action it has against Central Mining arose in South Carolina or that the subject matter of the action is situated in this state.

¹²⁴ *Id.* at ¶ 7.

¹²⁵ S.C. RULE OF CIV. PROC. 14(a).

¹²⁶ *Id.* The Note to Rule 14 indicates that it was drafted to be "substantially the same as the Federal Rule" 14, so federal law is cited whenever squarely applicable.

Initially, as the Receiver confirms, the Receiver is the party bringing the suit (and not Cape). The Receiver – Mr. Peter Protopapas – is not “a defending party” in the Tibbs Suit and, thus, may not bring a third-party complaint without first seeking leave to intervene in the Tibbs Suit, which he did not do.¹²⁷ The Third-Party Complaint should also be dismissed and or stricken because the Receiver is not a defendant in the Tibbs Suit.¹²⁸

Additionally, 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.*”¹²⁹ Stated another way, 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.”¹³⁰

In this action, the Receiver improperly attempts to pierce Cape’s corporate veil and litigate issues unrelated to Plaintiffs’ claims by means of a third-party complaint under Rule 14. However, as noted above, this rule only permits impleader against a party “who is or may be liable to [defendant] for all or part of the plaintiff’s claim.” To be proper, a third-party complaint must

¹²⁷ Had the Receiver sought leave to intervene, the parties to the Tibbs Suit would have had the opportunity to object and or oppose the request.

¹²⁸ S.C. RULE OF CIV. PROC. 14(a). Even if Cape is the party bringing the suit, Cape needed to seek leave to file the Third-Party Complaint prior to filing. *Id.* Neither Mr. Protopapas nor Cape sought leave to file a third-party complaint, and accordingly the Third-Party Complaint should be stricken.

¹²⁹ *Johnson v. M.I. Windows and Doors, Inc.*, No. 2:11-CV-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).

¹³⁰ *CNH Indust. Capital Am. LLC v. Able Contracting, Inc.*, No. 9:16-cv-2520-RMG, 2017 U.S. Dist. LEXIS 16988, at *4 (D.S.C. Feb. 7, 2017) (internal quotations omitted) (dismissing third-party complaint because claims were not derivative); *Johnson*, 2012 WL 1015798, at *2 (severing third-party complaint because claims were not derivative).

allege that the liability of the third-party defendant on the claim against it “is in some way dependent upon the outcome of the main claim.”¹³¹ Rule 14 does not allow the defendant to assert a separate and independent claim, even if the claim arises out of the same general set of facts as the main claim.¹³²

Here, the Third-Party Complaint does not seek any recovery or declaration specific to Tibbs or any of the other purported underlying “suits.” Instead, the relief is sought by the Receiver “to meet Cape’s obligations to the tens of thousands of individuals harmed.” Furthermore, none of the causes of action seek a determination that Central Mining (or any other Third-Party Defendant) is liable for indemnification or any other claim that is alleged to be dependent on the outcome of the Tibbs Suit. The Receiver’s claims therefore are not properly asserted under Rule 14.¹³³

Furthermore, even in instances where the requirements of Rule 14 are satisfied (which they are not here), third-party complaints may still be stricken or severed when the third-party lawsuit “will serve to complicate the litigation unduly or will prejudice the other parties in any substantial way.”¹³⁴ Here, the Third-Party Complaint clearly complicates this litigation by adding four new causes of action, adding 33 additional third-party defendants, and asking this Court to analyze more than 100 years of foreign transactions. These additional claims and third-party defendants

¹³¹ *Laughlin*, 465 F. Supp. 2d at 566.

¹³² *Id.*

¹³³ *See Cruz v. Weber-Stephen Prods., LLC*, 2018 U.S. Dist. LEXIS 1243, at *6 (N.D. Tex. Jan. 4, 2018) (quoting *Majors v. Am. Nat’l Bank of Huntsville*, 426 F.2d 566, 568 (5th Cir. 1970)) (Rule 14 “is not designed as a vehicle for the trying together of separate and distinct causes of action, or for the introduction, into the main action, of several parallel, but independent, actions, or separate and independent claims.”).

¹³⁴ *Beach v. Hudson*, 380 S.E.2d 869, 871 (S.C. App. 1989); *see Ballard v. S. Cotton Oil Co.*, 145 F. Supp. 886, 887 (E.D.S.C. 1956) (applying South Carolina law and refusing to permit the interpleader because injecting insurance into a trial would be prejudicial to the insurer).

“would all but submerge the plaintiffs’ claim” and should be stricken.¹³⁵ Under South Carolina law, prejudice arises when the third-party complaint “introduce[s] unrelated issues and unduly complicate[s] the original suit.”¹³⁶

Under these circumstances, the Third-Party Complaint and the claims against Central Mining (and all Third-Party Defendants) in the Third-Party Complaint should be stricken or, in the alternative, severed into a separate action.¹³⁷

V. 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.

Dated: October 23, 2023

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¹³⁵ *Beach*, 380 S.E.2d at 871 (striking third-party complaint because court deemed that adding additional parties and causes of action would unduly complicate the litigation).

¹³⁶ *Id.*

¹³⁷ 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*, No. 4:16-CV-1266-TLW-TER, 2017 WL 9287004, at **2-4 (D.S.C. Jan. 12, 2017), report and recommendation adopted, No. 4:16-CV-1266-TLW, 2017 WL 781071 (D.S.C. Feb. 28, 2017); *Todd v. Cary’s Lake Homeowners Ass’n*, 315 F.R.D. 453, 457-58 (D.S.C. 2016); *Cramer v. Walley*, 2015 WL 3968155, at *5 (D.S.C. June 30, 2015).

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

JOHN A. TIBBS and MARGARET B. TIBBS,

Plaintiffs,

v.

3M COMPANY, et al.,

Defendants.

CAPE plc, individually and as successor in
interest to CAPE ASBESTOS COMPANY
LIMITED, by and through its duly appointed
Receiver Peter D. Protopapas,

Third-Party Plaintiff,

v.

ANGLO AMERICAN PLC, individually and as
successor in interest to ANGLO AMERICAN
CORPORATION OF SOUTH AFRICA LTD., 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

**CHARTER CONSOLIDATED LTD.'S MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS THE THIRD-PARTY COMPLAINT**

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Third-Party Defendant Charter Consolidated Ltd. (“Charter Consolidated”), by and through its undersigned counsel, submits this memorandum in support of its Motion to Dismiss the Third-Party Complaint (the “Memorandum”) filed by Third Party Plaintiff Cape plc (“Cape”), by and through its Receiver Peter D. Protopapas (the “Receiver”), pursuant to Rule 12(b)(1), 12(b)(2), and 12(b)(6) of the South Carolina Rules of Civil Procedure, or alternatively to stay or sever the Third-Party Complaint pursuant to Rule 14(a), which was filed with the Court on September 1, 2023 (the “Motion”), as well as in response to the Receiver’s October 18, 2023 Omnibus Opposition to Third-Party Defendants’ Motions to Dismiss for Lack of Personal Jurisdiction (the “Jurisdiction Opposition”) and Omnibus Opposition to Certain Third-Party Defendants’ Motions to Dismiss Under Rules 12(b)(1) and 12(b)(6) and, Alternatively, For More Definite Statement and to Strike or Sever Under Rules 12(e) and 14 (the “12(b) Opposition”).¹

I. PRELIMINARY STATEMENT

The Third-Party Complaint should be dismissed because it fails to allege facts sufficient to support personal jurisdiction over Charter Consolidated. As a corporation organized under the laws of the United Kingdom with its principal place of business in Essex, England, Charter Consolidated is not “at home” in South Carolina and thus, there is no general jurisdiction over it in this forum—an argument that the Receiver does not appear to contest. The Receiver, instead, seeks to justify specific jurisdiction over Charter Consolidated because it is the purported alter ego of Cape. However, despite the Third-Party Complaint’s heated rhetoric, it fails to sufficiently allege *facts* demonstrating that Charter Consolidated (as opposed to other Third-Party

¹ Without waiving any specific argument presented in its Motion to Dismiss, Charter Consolidated has focused this Memorandum on certain arguments only and 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.

Defendants) had the requisite dominion and control over Cape to justify specific jurisdiction based on alter ego or veil piercing. Moreover, given that Third-Party Plaintiff's claims are not premised on any activity by Charter Consolidated in South Carolina, there are no contacts by Charter Consolidated that could give rise to specific jurisdiction in South Carolina. For these reasons alone, the Complaint should be dismissed for lack of personal jurisdiction pursuant to Rule 12(b)(2).

Even if this Court were to find personal jurisdiction—it should not—the Third-Party Complaint should still be dismissed because it fails to state a claim against Charter Consolidated. All of the claims against Charter Consolidated are based on its purported domination and control of Cape. However, just as with respect to personal jurisdiction, the Third-Party Complaint fails to actually allege facts that demonstrate a high enough level of control by Charter Consolidated necessary to pierce the corporate veil or hold it liable as the alter ego of Cape.

This is unsurprising given that the Receiver's argument was considered on the merits and rejected by the United States Court of Appeals for the Third Circuit more than 30 years ago. In that case, after a full trial specifically on the alter ego / veil-piercing issue, the Third Circuit determined, as a matter of law, that Charter Consolidated was not responsible for Cape's liabilities in personal injury asbestos actions on alter ego or corporate veil-piercing theories because Charter simply did not exercise sufficient control over Cape. Nevertheless, relying on the same facts as the Third Circuit relied on to reject veil piercing and alter ego, the Receiver seeks to litigate the issue all over again, potentially in tens of thousands of cases across South Carolina. Based on well-trod principles of res judicata and collateral estoppel, this Court can and should find that the Receiver is bound by these previous decisions and dismiss any claims against Charter Consolidated.

Furthermore, the Court should dismiss the Third-Party Complaint as against Charter Consolidated because, pursuant to South Carolina’s Door Closing Statute, the Third-Party Plaintiff, a non-resident entity that is legally distinct from the Receiver, lacks the capacity to sue Charter Consolidated, also a non-resident, for claims arising outside of South Carolina.

Alternatively, to the extent that the Court does not dismiss the Third-Party Complaint, the Court should strike or sever the Third-Party Complaint in its entirety under Rule 14(a) because the Third-Party Plaintiff’s claims are not derivative of Plaintiffs’ claims.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Current Action.

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 (the “Receivership Order”).⁵ The Receivership Order

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). As set forth more fully in Charter Consolidated’s October 6, 2023 Motion for Protective

purported to appoint the Receiver on behalf of Cape because Cape, as the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.) and its subsidiaries and global affiliates, had “forfeited its charter and further failed to answer this case.” The Receivership Order appointing the Receiver, however, acknowledged the separate status of Cape and the Receiver.⁶

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 as a general, wholesale matter “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-

Order and to Dissolve Receivership, Charter Consolidated respectfully asserts that certain defects in the appointment process warrant dissolution of the receivership.

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).

piercing liability, and accounting.⁸ The Third-Party Complaint, based on acts that allegedly occurred outside of this country by and between foreign corporations wholly unrelated to the Plaintiffs in the Tibbs Suit, 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 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

B. Corporate History Of Cape And Charter.

Cape Industries, P.L.C. (“Cape”) was an industrial holding company incorporated in 1893.¹² Through its wholly owned subsidiaries, Cape primarily “engaged in mining, industrial contracting, manufacturing of auto parts (friction materials) and building supplies including

⁸ *Id.* at ¶¶ 125-146.

⁹ *Id.* at ¶ 130.

¹⁰ *Id.* at ¶ 141.

¹¹ *Id.* at ¶ 145.

¹² See Third-Party Complaint, at ¶ 45; *Craig v. Johns-Manville Corp.*, 1987 WL 10191, at *2 (E.D. Pa. Apr. 23, 1987), rev'd sub nom. *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145 (3d Cir. 1988). Cape was re-registered as a public company and changed its name from Cape Industries Ltd. f/k/a Cape Asbestos Company Ltd. to Cape Industries P.L.C. in 1981. See Third-Party Complaint, at ¶ 113.

insulation. [And, u]ntil 1979 it mined and sold asbestos fiber from South Africa through such subsidiaries.”¹³ In 1979, Cape sold all of its asbestos mining and marketing subsidiaries to an unrelated company.¹⁴ According to Cape’s Receiver, in 1989, Cape Industries, P.L.C. shorted its name to Cape PLC before again changing its name in 2011 to Cape Intermediate Holdings PLC. The company then re-registered as a private company to become Cape Intermediate Holdings Ltd. in 2013.¹⁵

Charter Consolidated, P.L.C. (“Charter”) is a holding company that incorporated in 1964 as a mining finance company.¹⁶ In 1965, Charter became public “through a share exchange between the British South Africa Co., Central Mining and Investment Corp. Ltd. and Consolidated Mines Selection Ltd.” As part of that share exchange, Charter acquired a 16.8% interest in Cape, which gradually increased to Charter holding all of Cape’s preferred stock and 62.5% of Cape’s common stock by May 1969.¹⁷ In 1996, Charter sold all of its remaining interest in Cape.¹⁸

Charter has also undergone several name changes prior to being sold to Colfax Corporation (“Colfax”) in 2012. For example, in 1993, Charter re-registered as a public company and became Charter PLC.¹⁹ In 2008, a holding company called Charter International PLC took over Charter PLC.²⁰ Colfax then subsequently spun off Charter as a subsidiary of

¹³ *Craig*, 1987 WL 10191, at *2; *see also* Third-Party Complaint, at ¶ 102.

¹⁴ *See* Third-Party Complaint, at ¶ 102; *Craig*, 1987 WL 10191, at *3; *Craig*, 843 F.2d at 147.

¹⁵ *See* Third-Party Complaint, at ¶ 113.

¹⁶ *See Craig*, 1987 WL 10191, at *2.

¹⁷ *See Craig*, 1987 WL 10191, at *2; Third-Party Complaint, at ¶¶ 54-55.

¹⁸ *See* Third-Party Complaint, at ¶ 123.

¹⁹ *See* Third-Party Complaint, at ¶ 123.

²⁰ *Id.*

ESAB in spring 2022. Today, ESAB is a publicly traded, world-class manufacturing technology company and remains Charter's corporate parent, as well as the parent of Charter's subsidiary Central Mining & Investment Corporation Ltd.²¹

C. Historical Litigation Over Charter's Liability For Cape's Torts.

In the mid-1980s, plaintiffs across the country began naming Charter (and its subsidiaries) as a defendant in asbestos litigation, alleging that Charter was liable for Cape's torts under an alter ego or corporate veil-piercing theory.²² "Between 1985 and 1987, the issue was tried in several matters, each of which was resolved in [Charter's] favour either at trial or on appeal."²³

For example, in 1986, the District Court for the Eastern District of Pennsylvania presided over a two-day trial on the sole issue of whether Charter was liable under New Jersey law for Cape's torts under an alter ego or corporate veil-piercing theory.²⁴ The trial included live and deposition testimony from numerous witnesses. The trial judge initially concluded that Charter was the alter ego of Cape and held Charter responsible for a portion of plaintiff's damages.²⁵ On appeal, however, the Third Circuit, exercising plenary review, reversed and remanded "for entry of judgment in favor of Charter."²⁶ It held that Charter's "involvement in Cape's financial and managerial affairs fail[ed] to rise to the high standard of domination necessary to pierce the

²¹ ESAB Corporation, *The History of ESAB Corporation.*, <https://esabcorporation.com/our-story/history/> (last visited Aug. 8, 2023).

²² [sec.gov/Archives/edgar/data/1420800/000114420411070464/v242942_defm14a.html](https://www.sec.gov/Archives/edgar/data/1420800/000114420411070464/v242942_defm14a.html).

²³ *Id.*

²⁴ See *Craig*, 1987 WL 10191; *Craig*, 843 F.2d 145. The Court included the following entities in its definition of Charter: "Charter Consolidated Investments, P.L.C., Central Mining Finance, Ltd., Charter Consolidated Services, Ltd., British South Africa Company and Consolidated Mines Selection." *Id.* at *1.

²⁵ *Id.* at *18.

²⁶ *Craig*, 843 F.2d at 152.

corporate veil.”²⁷ Importantly, the Third Circuit found, as a matter of law, that “there is no evidence that Charter’s intrusion into Cape’s affairs is even ‘constant’ or day-to-day.” The Third Circuit also found it particularly significant that Charter and Cape “each maintained separate books, records, bank accounts, offices and staff; each consulted their own financial advisors, accountants and stockbrokers.”²⁸ Although the court found that Charter had the “power to control” Cape, “potential control is not enough.”²⁹

The very next year, the Eastern District of Pennsylvania again considered the issue of whether Charter was the alter ego of Cape, this time under both New Jersey and Pennsylvania law, in dozens of asbestos cases pending in the Eastern District of Pennsylvania.³⁰ Relying on the Third Circuit’s decision in *Craig*, and rejecting plaintiffs’ arguments that there was “new” evidence not considered by the Third Circuit, this Court again held that Charter was not liable under an alter ego or piercing the corporate veil theory for Cape’s asbestos torts. The Eastern District of Pennsylvania further pointed out that many other courts had considered the exact same issue and resolved it the exact same way.³¹

²⁷ *Id.*

²⁸ *Id.* at *152.

²⁹ *Id.* (citing *Scalise v. Beech Aircraft Corp.*, 276 F. Supp. 58, 62 (E.D. Pa. 1967) (“although stock ownership and identity of officers and directors naturally subject the subsidiary to a measure of control, the issue . . . is how such control is exercised”).

³⁰ See *In re Charter Defendants’ Motion for Summary Judgment in all Cases Pending in the Eastern District of Pennsylvania in Which They are Parties*, Misc. No. 86-0457, 1989 U.S. Dist. LEXIS 15591 (E.D. Pa. May 18, 1989). In these cases, the Charter defendants, including Charter Consolidated P.L.C., Charter Consolidated Investments Limited, Charter Consolidated Services Limited, Central Mining Finance Limited, The Consolidated Mines Selection Company Limited, and the British South Africa Company, were named as both defendants and third-party defendants. *Id.* at *1.

³¹ See *id.* at *5-*6 (citing *Bednar v. Carey Canada, Inc.*, No. 88-3707 (D.N.J. Feb. 7, 1989); *Lee/McDaniels v. Carey Canada, Inc.*, Nos. 83-1412, 83-1413 (D.N.J. Dec. 1, 1988); *McCracken v. Lac D’Amiante du Quebec, Ltee.*, No. 84-0128 (E.D. Pa. Sept. 9, 1988); *Kessinger v. Grefco, Inc.*, No. 85-3092 (C.D. Ill. May 2, 1986); *Newhouse/Sparta v. Lac D’Amiante du*

D. The Receiver's Attempts To Relitigate Charter's Liability For Cape's Torts.

The Third-Party Complaint describes Cape, from its founding in 1893, as “deeply involved in all elements of the global asbestos industry,” including mining asbestos in South Africa and then selling it to manufacturers of asbestos-containing products in the United States, including South Carolina.³² After overviewing Cape’s role in the asbestos industry, the Third-Party Complaint outlines Charter’s alleged control or domination over Cape. First, it recounts Charter’s purported takeover of Cape and resulting majority ownership in its shares in 1969.³³ Second, it describes Cape as “Charter’s ‘largest industrial subsidiary company,’ . . . with Charter even seconding and compensating key personnel for Cape’s management.”³⁴

The Third-Party Complaint rehashes most of the same facts and documents relied on by the courts in *Craig* and *In re Charter Defendants* and ultimately asks for the same relief those courts denied—mainly, holding Charter liable for Cape’s asbestos liability. Tellingly, although the 12(b) Opposition acknowledges the Third Circuit’s holding in *Craig*, it does not even attempt to distinguish it from the present situation, instead simply suggesting that the Third Circuit’s findings after its extensive review of a full evidentiary trial record should be discarded as “myopic.”³⁵

E. Charter Consolidated Lacks Jurisdictional Ties To South Carolina.

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

Quebec, Ltee., Nos. 83-2932, 83-2933 (D.N.J. July 19, 1988); *Simmons v. AC&S, Inc.*, No. 84-1170 (W.D. Ark. June 4, 1985); *In re Asbestos Litig. Venued in Middlesex Cty.: Manville Plantworker Cases Only*, No. L-37243-79 (N.J. Super Ct. Law Div. July 10, 1987)).

³² See Third-Party Complaint, at ¶ 40.

³³ *Id.*, at ¶ 55.

³⁴ *Id.*, at ¶ 61.

³⁵ See 12(b) Opposition, at p. 5-6.

statute.³⁶ 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.³⁷ Charter Consolidated has no assets in South Carolina.³⁸ 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.³⁹

Moreover, Charter Consolidated currently does not, and has not historically, mined, milled, or sold asbestos in South Carolina.⁴⁰ Charter Consolidated also currently does not, and has not historically, produced, manufactured, or distributed asbestos or asbestos-containing products for use in South Carolina.⁴¹ Furthermore, Cape is not a subsidiary of Charter Consolidated.⁴²

III. LEGAL STANDARD

When a defendant challenges a trial court's jurisdiction over it, the plaintiff bears the burden of establishing that personal jurisdiction exists.⁴³ "The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case."⁴⁴ "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

³⁶ *Id.* at ¶¶ 37, 140.

³⁷ Affidavit of Rita J. Herring ("Herring Aff.") at ¶ 5.

³⁸ *Id.* at ¶ 6.

³⁹ *Id.* at ¶¶ 7-8.

⁴⁰ *Id.* at ¶ 9.

⁴¹ *Id.* at ¶ 10.

⁴² *Id.* at ¶ 4.

⁴³ *Moosally v. W. W. Norton & Co.*, 594 S.E.2d 878, 882 (S.C. Ct. App. 2004).

⁴⁴ *Cockrell v. Hillerich & Bradsby Co.*, 611 S.E.2d 505, 508 (S.C. 2005).

affidavits.”⁴⁵ Subject matter jurisdiction is a court’s “power to hear and determine cases of the general class to which the proceedings in question belong.”⁴⁶ When a nonresident defendant attacks the allegations of a complaint based on jurisdiction, however, the plaintiff bears the burden of proving subject-matter jurisdiction.⁴⁷ The court is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction.⁴⁸ 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 the court.⁴⁹ Generally, the trial court must base its ruling solely upon allegations set forth on the face of the complaint.⁵⁰ However, a plaintiff must do more than state general and conclusory allegations that do not satisfy South Carolina’s pleading standards.⁵¹ Here, viewing the allegations in the light most favorable to the Receiver, the Third-Party Complaint fails to state a claim for relief.

⁴⁵ *Id.*

⁴⁶ *Simmons v. Simmons*, 634 S.E.2d 1, 3 (S.C. Ct. App. 2006).

⁴⁷ *Elridge v. City of Greenwood*, 503 S.E.2d 191, 197 (S.C. Ct. App. 1998).

⁴⁸ *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 655 S.E.2d 476, 478 (2007).

⁴⁹ *Williams v. Condon*, 553 S.E.2d 496 (S.C. Ct. App. 2001).

⁵⁰ *Doe v. Marion*, 605 S.E.2d 556, 559 (S.C. Ct. App. 2004), *aff’d* 645 S.E.2d 245 (S.C. 2007).

⁵¹ *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.”).

IV. 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. Alternatively, if the Court does not dismiss the Third-Party Complaint, the Court should strike or sever the claims pursuant to Rule 14(a).

A. The Court Lacks Personal Jurisdiction Over Charter Consolidated.

The Third-Party Complaint against Charter Consolidated must be dismissed because the Court lacks jurisdiction over Charter Consolidated.⁵² Indeed, the Receiver has not alleged facts, as opposed to conclusory allegations, that are sufficient to support jurisdiction over Charter Consolidated in the State of South Carolina.

To determine whether personal jurisdiction exists over a non-domiciliary corporation such as Charter Consolidated, courts engage in a two-pronged analysis: (1) a plaintiff must demonstrate that granting jurisdiction under the statute would not violate the Fourteenth Amendment of the United States Constitution;⁵³ and (2) a plaintiff must show that defendant's conduct falls within South Carolina's long-arm statute, S.C. Code Ann. § 36-2-803. Both prongs must be satisfied for jurisdiction to exist. Here, the Receiver cannot establish either.

1. **Charter Consolidated is not subject to general jurisdiction in South Carolina.**

This Court lacks general personal jurisdiction over Charter Consolidated because it is not “essentially at home” in South Carolina—a fact that the Receiver does not appear to contest. “A state court may exercise general jurisdiction only when a [corporate] defendant is ‘essentially at

⁵² See Rule 12(b)(2).

⁵³ See *Moosally*, 594 S.E.2d at 886; *Abdulla v. S. Bank*, 439 S.C. 391, 400, 887 S.E.2d 138, 143 (Ct. App. 2023).

home’ in the State.”⁵⁴ A corporate defendant is essentially at home, in turn, in “its place of incorporation and [where it has] a principal place of business.”⁵⁵ 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 Kingdom.⁵⁶ Accordingly, Charter Consolidated is not “essentially at home” in South Carolina, and this Court therefore lacks general personal jurisdiction over Charter Consolidated.

2. Charter Consolidated is not subject to specific jurisdiction in South Carolina through its own contacts, or lack thereof, with South Carolina.

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.⁵⁷ “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.”⁵⁸ “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

⁵⁴ *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 Ann. § 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.”).

⁵⁵ *Id.*

⁵⁶ *Herring Aff.*, at ¶ 5.

⁵⁷ S.C. Code § 36-2-803(1).

⁵⁸ *Cockrell*, 611 S.E.2d at 508.

would violate due process.”⁵⁹ 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.”⁶⁰

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 and always has been an entirely separate and distinct corporate entity from Charter Consolidated and is not a subsidiary of Charter Consolidated.⁶¹ Moreover, Charter Consolidated does not currently, and has not historically, mined, milled, sold, or supplied asbestos in South Carolina.⁶² Likewise, Charter Consolidated does not currently, and has not historically, produced, manufactured, or distributed asbestos or asbestos-containing products for use in South Carolina.⁶³ 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.⁶⁴ 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.⁶⁵

⁵⁹ *Id.*

⁶⁰ *Ford Motor Co.*, 141 S. Ct. at 1025 (internal quotations omitted); *see also* S.C. Code Ann. § 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).

⁶¹ Herring Aff. at ¶ 4.

⁶² *Id.* at ¶ 9.

⁶³ *Id.* at ¶ 10.

⁶⁴ *Id.* at ¶ 7.

⁶⁵ The Receiver’s argument that, absent a finding of specific jurisdiction, South Carolinian asbestos plaintiffs will be without redress is wholly unsupported and has been rejected by

3. Charter Consolidated is not subject to specific jurisdiction through a veil piercing or alter ego theory.

The Court should reject the Receiver's argument, in its Jurisdiction Opposition, that the Court has specific jurisdiction over Charter Consolidated solely based on Cape's purported jurisdictional contacts in South Carolina through an alter ego, veil piercing theory, or single business enterprise theory.⁶⁶ Despite the Receiver's bald protestations to the contrary, the Third-Party Complaint does not allege sufficient facts related to Charter Consolidated's control over Cape. Instead, the Receiver spends a great portion of the Third-Party Complaint and the Jurisdiction Opposition focusing on facts about others' control over Charter Consolidated, which is wholly irrelevant to the analysis of whether Charter Consolidated exercised sufficient control over Cape to pierce the corporate veil.⁶⁷ Conclusory allegations that Charter Consolidated controlled Cape because it was the majority owner of Cape and had common directors or employees (or was acting as a "corporate buffer" with another entity) are woefully insufficient.⁶⁸ It is well settled law in South Carolina that majority ownership and common officers or directors,

numerous courts as plaintiffs always have the option of bringing suit in a location where a defendant like Charter Consolidated is subject to general jurisdiction. *See e.g., Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cnty.*, 582 U.S. 255, 268 (2017) ("Our straightforward application in this case of settled principles of personal jurisdiction will not result in the parade of horrors that respondents conjure up. . . . Our decision does not prevent the California and out-of-state plaintiffs from joining together in a consolidated action in the States that have general jurisdiction over [Petitioner].").

⁶⁶ *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").

⁶⁷ *See e.g., Third-Party Compl.*, at ¶¶ 57–59; Jurisdiction Opposition, at p. 32–33.

⁶⁸ *See e.g., Third-Party Compl.*, at ¶¶ 140–141; Jurisdiction Opposition, at p. 32–33.

standing alone, simply do not “support the conclusion the subsidiary is its parent’s alter ego or agent for the transaction of its business.”⁶⁹

Even under a single business enterprise theory, the Third-Party Complaint still fails to allege facts sufficient to establish specific jurisdiction over Charter Consolidated. Similar to an alter ego or veil piercing theory, a plaintiff must still appropriately allege that defendants had dominion and control such that the entities acted as unified operations (the primary difference being that a single business enterprise theory can encompass “sister” organizations, not just parent/subsidiaries like alter ego and veil piercing).⁷⁰ As discussed throughout this Memorandum, the allegations related to control over Cape are wholly inadequate.

However, even if the Court found that the single business enterprise theory is applicable—it should not—that only means that Cape’s purported jurisdictional contacts with South Carolina are imputed to Charter Consolidated. It does not automatically mean that jurisdiction attaches.⁷¹ Here, Cape’s purported contacts with South Carolina, even if imputed to Charter Consolidated, are insufficient to establish specific jurisdiction. The only contact with South Carolina that the Third-Party Complaint mentions is that Cape sold asbestos in the United States, including in South Carolina.⁷² Importantly, however, the claims asserted against Charter

⁶⁹ *Yarborough & Co. v. Schoolfield Furniture Indus., Inc.*, 275 S.C. 151, 153–54, 268 S.E.2d 42, 44 (1980); *Jones ex rel. Jones v. Enter. Leasing Co.-Se.*, 383 S.C. 259, 267, 678 S.E.2d 819, 823–24 (Ct. App. 2009).

⁷⁰ See *Pertuis v. Front Roe Rests., Inc.*, 423 S.C. 640, 817 S.E.2d 273 (2018) (citations omitted) (“We formally recognize today this single business enterprise theory, and in doing so, we acknowledge that corporations are often formed for the purpose of shielding shareholders from individual liability; there is nothing remotely nefarious in doing that.”).

⁷¹ See *Duong v. N. Am. Transportation Servs. LLC*, 2019 WL 13109647, at *13 (D.S.C. Sept. 25, 2019) (holding that, even if the single business enterprise theory applied, plaintiff failed to allege jurisdictional facts necessary to establish personal jurisdiction).

⁷² See *e.g.*, Third-Party Compl., at ¶¶ 75–76; Jurisdiction Opposition, at p. 20-21. Technically, the Receiver does not even allege that Cape directly sold asbestos in South Carolina, but instead

Consolidated do not arise out of any asbestos sold in South Carolina (nor does the Third-Party Complaint make such an assertion). For that matter, there are not even any allegations in Plaintiffs' Complaint or the Third-Party Complaint that Tibbs was exposed to amosite asbestos sold or mined by Cape.⁷³

Although specific jurisdiction can certainly be established by an entity's contacts with South Carolina, the critical distinction between general and specific jurisdiction is that, for specific jurisdiction, the claims must actually arise from the contacts with the state.⁷⁴ The Third-Party Complaint asserts four causes of action: unjust enrichment, constructive trust, alter ego or piercing the corporate veil liability, and accounting. None of these claims arise out of Cape's purported sales of asbestos to any particular entity or person in South Carolina (or even arise from the use of asbestos in South Carolina) and, instead, arise out of purported conduct in South Africa, the United Kingdom, and other places outside of South Carolina. Unless the claims actually arise from Cape's contacts in South Carolina, the mere fact that Cape's jurisdictional contacts may be imputed to Charter Consolidated (they should not) is insufficient for this Court to assert personal jurisdiction over Charter Consolidated.⁷⁵

seeks to first impute NAAC's contacts in South Carolina to Cape, before trying to impute NAAC's contacts to Charter Consolidated.

⁷³ See generally Third-Party Compl.

⁷⁴ See *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 655 S.E.2d 476 (2007).

⁷⁵ See *Outpost Cap. Mgmt., LLC v. Prioleau*, 2017 WL 5514513, at *7 (D.S.C. Nov. 16, 2017) (finding that even an entities' contacts could be imputed to defendant through an alter ego theory, the court still did not have specific jurisdiction over defendant because the claims against defendant did not arise from the entities' contacts with South Carolina).

B. The Court Should Dismiss The Third-Party Complaint Because, As A Matter Of Law, There Was Insufficient Domination Of Cape To Pierce The Corporate Veil—An Issue Previously Litigated and Decided Decades Ago.

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.⁷⁶ Furthermore, this issue has already been actually decided by multiple courts across the country and the Receiver is barred from relitigating these issues under either collateral estoppel or res judicata.

1. The facts alleged do not show the required domination over Cape.

Even taking the allegations alleged in the Third-Party Complaint as true, as a matter of law, Charter Consolidated's actions do not rise to the level of domination and control required to pierce the corporate veil or hold it responsible as an alter ego of Cape.

In South Carolina, to hold a party responsible under an alter ego theory, a plaintiff must show both “(1) total domination and control of one entity by another and (2) inequitable consequences caused thereby.”⁷⁷ Importantly, the level of control must be such that the

⁷⁶ See *Craig*, 843 F.2d at 152 (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 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 (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*, 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).

⁷⁷ *Oskin v. Johnson*, 400 S.C. 390, 400, 735 S.E.2d 459, 465 (2012).

“subservient entity manifests no separate interest of its own and functions solely to achieve the goals of the dominant entity.”⁷⁸

Similarly, in order to pierce the corporate veil, courts employ a two-prong test, looking first at an eight-factor analysis to determine if corporate formalities were sufficiently observed and then second on the element of injustice or unfairness.⁷⁹ The eight factors are: “(1) whether the corporation was grossly undercapitalized; (2) failure to observe corporate formalities; (3) non-payment of dividends; (4) insolvency of the debtor corporation at the time; (5) siphoning of funds of the corporation by the dominant stockholder; (6) non-functioning of other officers or directors; (7) absence of corporate records; and (8) the fact that the corporation was merely a façade for the operations of the dominant stockholder” (the “*Sturkie* Factors”).⁸⁰

Here, the Third-Party Complaint does not include facts specific to how Charter Consolidated controlled Cape and certainly does not allege facts sufficient to even remotely demonstrate that Charter Consolidated had “total domination and control” over Cape such that Cape “manifest[ed] no separate interest of its own.”⁸¹ Although the Third-Party Complaint contains some allegations of control and domination between Charter and various entities, there are almost no allegations of control specifically between Charter Consolidated and Cape. In fact, the *only* specific allegations as to control between Charter Consolidated and Cape are that: (1)

⁷⁸ *Id.*; *Colleton Cnty. Taxpayers Ass’n v. Sch. Dist. of Colleton Cnty.*, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006).

⁷⁹ *See Sturkie v. Sifly*, 280 S.C. 453, 456–57, 313 S.E.2d 316, 318 (Ct. App. 1984).

⁸⁰ *Mid-S. Mgt. Co. Inc. v. Sherwood Dev. Corp.*, 374 S.C. 588, 598, 649 S.E.2d 135, 141 (Ct. App. 2007); *Sturkie*, 280 S.C. at 456–57, 313 S.E.2d at 318. For purposes of this Motion, Charter Consolidated does not address the fraud or injustice prongs of either test as the Third-Party Complaint fails, as a matter of law, to allege facts showing sufficient domination and control over Cape.

⁸¹ *Oskin*, 400 S.C. at 400, 735 S.E.2d at 465; *Colleton Cnty. Taxpayers Ass’n.*, 371 S.C. at 237, 638 S.E.2d at 692.

Charter Consolidated was the majority owner of Cape starting in 1969;⁸² (2) Charter Consolidated “second[ed] and compensate[ed] key personnel for Cape’s management”;⁸³ (3) Charter Consolidated used its “influence” in South Africa to allow Cape to profit from mining and exporting asbestos;⁸⁴ and (4) Cape’s chairman was also a director for Charter Consolidated.⁸⁵ These allegations are insufficient as a matter of law.⁸⁶

Having an overlap in directors and paying for certain personnel does not rise to the level of Charter Consolidated having “constant” or day to day control over Cape required to pierce the corporate veil. This is especially true given that South Carolina courts have repeatedly held that “[c]ommon officers and/or directors and public identification of one corporation as the other’s subsidiary do not, without more, support the conclusion the subsidiary is its parent’s alter ego or agent for the transaction of its business.”⁸⁷ Furthermore, the Third-Party Complaint’s generic allegations, such as a “failure to follow corporate formalities” and “domination and control . . . over Cape’s . . . executive personnel and board of directors,”⁸⁸ which are merely a rewording of the *Sturkie* Factors, are insufficient as a matter of law.⁸⁹

⁸² See Third-Party Compl., at ¶ 55.

⁸³ See Third-Party Compl., at ¶ 61.

⁸⁴ *Id.* at ¶ 61.

⁸⁵ *Id.* at ¶ 78.

⁸⁶ *Yarborough & Co.*, 275 S.C. at 153–54, 268 S.E.2d at 44; *Jones ex rel. Jones*, 383 S.C. at 267, 678 S.E.2d at 823–24.

⁸⁷ *Yarborough & Co.*, 275 S.C. at 153–54, 268 S.E.2d at 44; *Jones ex rel. Jones*, 383 S.C. at 267, 678 S.E.2d at 823–24.

⁸⁸ See Third-Party Compl., at ¶ 140.

⁸⁹ See *David*, 626 S.E.2d at 3 (requiring more than “generic allegations and conjecture” to sustain malpractice claim); *Paradis*, 819 S.E.2d at 153 (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.”); *Mincey v. World Savings Bank FSB*, 614 F. Supp. 2d

The Third-Party Complaint's lack of specific factual allegations related to Charter Consolidated's purported control over Cape makes perfect sense when juxtaposed against the previous court decisions evaluating this exact issue.⁹⁰ In one such case, for example, the trial court held a two-day trial solely on this alter ego issue, and found the following facts (which the Receiver could have included in the Third-Party Complaint, but chose not to): (1) after Charter Consolidated obtained majority ownership over Cape, it maintained only three directors on Cape's Board, which consisted of between ten and fourteen directors; (2) at least two directors on Cape's Board were not connected with Charter; (3) Charter Consolidated and Cape maintained separate books and records; (4) Charter Consolidated and Cape had different bank accounts; (5) Charter Consolidated and Cape had different staff and different offices; and (6) Charter Consolidated and Cape consulted their own financial advisors, accountants, and stockbrokers.⁹¹ Unsurprisingly, the Third Circuit Court of Appeals used these critical facts to determine that, even though Charter Consolidated's "majority share of stock ownership gave it an 'omnipresence in the minds of the Cape Board members,'" Charter Consolidated's "involvement in Cape's financial and managerial affairs fails to rise to the high standard of domination necessary to pierce the corporate veil."⁹²

610 (D.S.C. 2008) (rejecting plaintiffs' attempt to allege veil-piercing or alter ego based on conclusory allegations with no specific facts); *Pro Slab, Inc. v. Argos USA Corp.*, 2018 WL 6985008, at *5 (D.S.C. June 28, 2018), *reconsideration granted on other grounds*, 2018 WL 6985010 (D.S.C. Dec. 3, 2018) (granting defendants' motions to dismiss where the "amended complaint contains no factual allegations to support [the] legal conclusion" that certain affiliated corporate entities were alter egos of one another).

⁹⁰ See e.g., *Craig*, 843 F.2d at 152; *In re Charter Defs.*, 1989 U.S. Dist. LEXIS 15591; *Culbreth*, 898 F.2d 13; *Simmons*, No. 84-1170.

⁹¹ *Craig*, 843 F.2d at 151-152.

⁹² *Craig*, 843 F.2d at 152.

The Receiver does not allege—because he cannot do so—sufficient facts to show that Charter Consolidated dominated and controlled Cape such that the Court should pierce the corporate veil.⁹³ Given all of the claims arise from this basic premise (i.e. control of Cape by Charter Consolidated), the Court should dismiss the Third-Party Complaint as to Charter Consolidated in its entirety.

2. The Receiver is bound by previous decisions holding Charter Consolidated was not the alter ego of Cape.

In South Carolina, a party is barred from relitigating in a second action an issue or claim that has been previously litigated and decided in a prior action.⁹⁴ Res judicata may be applied if (1) the identities of the parties are the same as in the prior litigation, (2) the subject matter is the same as in the prior litigation, and (3) there was a prior adjudication of the issue by a court of competent jurisdiction.⁹⁵ Similarly, collateral estoppel applies if the “issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.”⁹⁶

⁹³ See *e.g.*, *In re Joseph Walker & Co., Inc.*, 522 B.R. 165, 193 (Bankr. D.S.C. 2014) (refusing to find alter ego liability where company “maintained separate bank accounts, obtained credit lines based solely upon its own assets and liabilities, obtained and possessed its own federal tax identification number and accordingly paid taxes when they became due” and employed separate legal counsel and accounting firms).

⁹⁴ See *S.C. Prop. & Cas. Ins. Guaranty Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991) (“Collateral estoppel occurs when a party in a second action seeks to preclude a party from relitigating an issue which was decided in a previous action.”); *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (“Under the doctrine of res judicata, ‘[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.’”).

⁹⁵ *Johnson v. Greenwood Mills, Inc.*, 317 S.C. 248, 250–51, 452 S.E.2d 832, 833 (1994).

⁹⁶ *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009).

Here, the Receiver is barred from relitigating the veil piercing and alter ego claims against Charter Consolidated because the issue was already decided by multiple courts and the Receiver is in privity with the plaintiffs asserting the same causes of action in those claims.

a. Whether Charter is the alter ego of Cape was previously litigated and decided.

The claims against Charter Consolidated are all grounded in the same issue that was decided by the District Court for the Eastern District of Pennsylvania and the Third Circuit decades ago, mainly that Charter Consolidated and its wholly owned subsidiaries were *not* alter egos of Cape. In *Craig*, the Third Circuit reversed a district court decision, made after a two-day trial on the merits, and found as a matter of law that Charter Consolidated did not exercise a great enough degree of domination over Cape to hold Charter responsible for Cape's asbestos liability.⁹⁷ In *In re Charter Defendants*, the Eastern District of Pennsylvania granted summary judgment and dismissed with prejudice all claims asserted against Charter Consolidated and Central Mining (among others) in every asbestos action pending in the Eastern District of Pennsylvania on the basis that the Court was bound by the Third Circuit's *Craig* decision finding that Charter was not the alter ego of Cape.⁹⁸

Despite the alter ego issue being resolved by the Eastern District of Pennsylvania and the Third Circuit (as well as many other courts⁹⁹), the Receiver in the *Tibbs* Suit has now asserted claims against Charter Consolidated based on the exact same alter ego issue and grounded in the very same facts that the *Craig* and *In re Charter Defendants* courts analyzed to reject the alter

⁹⁷ *Craig*, 843 F.2d at 152.

⁹⁸ *In re Charter Defendants*, 1989 U.S. Dist. LEXIS 15591, at *1-3.

⁹⁹ See, e.g., *id.* at *5-*6 (citing *Bednar*, No. 88-3707; *Lee/McDaniels*, Nos. 83-1412, 83-1413; *McCracken*, No. 84-0128; *Kessinger*, No. 85-3092; *Newhouse/Sparta*, Nos. 83-2932, 83-2933; *Simmons*, No. 84-1170; *In re Asbestos Litig. Venued in Middlesex Cty.: Manville Plantworker Cases Only*, No. L-37243-79).

ego theory. A comparison between the facts and legal issues decided in *Craig* and *In re Charter Defendants* with the facts and legal questions asserted here shows the clear duplication between the matters. For example, the Third-Party Complaint includes allegations regarding Charter's majority ownership in Cape shares to suggest purported dominance or control;¹⁰⁰ however, the Third Circuit found that fact unpersuasive.¹⁰¹ Likewise, the Third-Party Complaint includes allegations regarding Charter's decision "seconding and compensating key personnel for Cape's management,"¹⁰² but the Third Circuit found that fact similarly unpersuasive.¹⁰³ The Third-Party Complaint offers nothing new that the Eastern District of Pennsylvania and the Third Circuit did not already consider and reject as a basis for finding alter ego liability—nor could the Receiver offer any "new" relevant facts as to Charter's control over Cape because Cape sold its asbestos business more than seven years before the trial in *Craig*.¹⁰⁴ As such, the Receiver improperly seeks to relitigate the same issues now that have been previously decided by multiple other courts, suggesting that this Court should ignore *Craig* as a near-sighted aberration.¹⁰⁵

¹⁰⁰ See Third-Party Compl., at ¶ 55.

¹⁰¹ See *Craig*, 843 F.2d at 151 ("It is to be expected that a corporation seeking to acquire majority ownership of another will seek to achieve control.").

¹⁰² Third-Party Compl., at ¶ 61; see also *id.*, at ¶ 59 ("The Oppenheims consistently sat on Charter's board of directors after its founding.").

¹⁰³ See *Craig*, 843 F.2d at 151 (deciding issue in Charter's favor despite "presence of three Charter nominees on Cape's Board").

¹⁰⁴ See Third-Party Compl., at ¶ 102.

¹⁰⁵ See *Philadelphia National Bank v. McGuckin*, 90-2862, 1990 WL 201496, at *2 (E.D. Pa. Dec. 7, 1990) (applying relitigation exception where there was "no additional evidence to be discovered, no new issues that will develop, and nothing that will change the legal positions of the parties").

Although the Eastern District of Pennsylvania's decision and the Third Circuit's decision rejecting the alter ego arguments were made under New Jersey and Pennsylvania law,¹⁰⁶ there is no substantive difference between the law in those states and the law in South Carolina regarding alter ego and veil piercing.¹⁰⁷ The Eastern District of Pennsylvania in the *In re Charter Defendants* decision and the Third Circuit in the *Craig* decision relied on the same standard courts in South Carolina apply:¹⁰⁸ "Courts in both jurisdictions[, New Jersey and Pennsylvania,] apply the traditional control test set forth by Fletcher and require evidence of 'such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own, and is but a conduit for its principal.'" ¹⁰⁹

Applying this standard, the Third Circuit found that there was "no evidence" that "Charter's intrusion into Cape's affairs [was] even constant or day-to-day. Moreover, and

¹⁰⁶ See *Culbreth v. Amosa Ltd.*, 898 F.2d 13, 15 (3d Cir. 1990) ("[B]oth Pennsylvania and New Jersey require a threshold showing that the controlled corporation acted robot-or puppet-like in mechanical response to the controller's tugs on its strings or pressure on its buttons. In *Craig*, we held that Charter did not so dominate Cape. Since Pennsylvania law does not differ from New Jersey law in requiring a showing of such pervasive domination, Culbreth failed to establish the threshold to a finding that Cape was Charter's alter-ego.").

¹⁰⁷ See e.g., *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 154 (2015) ("[m]inor variations in the application of what is in essence the same legal standard do not defeat preclusion").

¹⁰⁸ See Section IV(B)(1), *supra*, for a discussion of the alter ego and piercing the corporate veil standards in South Carolina. See also *Oskin*, 400 S.C. at 400; *Colleton County Taxpayers*, 371 S.C. at 237; *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 686-87 (4th Cir. 1976) (applying South Carolina law and considering multiple factors in determining whether control is sufficient to pierce the corporate veil: "failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders."); *Jones ex rel. Jones*, 383 S.C. at 267, 678 S.E.2d at 823 ("Control required for liability under an alter ego doctrine amounts to total domination of the subsidiary to the extent the subsidiary manifested no separate corporate interests and functioned solely to achieve the purpose of the dominant corporation.").

¹⁰⁹ *In re Charter Defendants*, 1989 U.S. Dist. LEXIS 15591, at *9.

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.”¹¹⁰ The Eastern District of Pennsylvania agreed with and applied the Third Circuit’s decision that there was “no evidence that would satisfy the control element of the corporate veil ‘piercing’ test to conclude that Charter controlled Cape.”¹¹¹

b. The Receiver is in privity with the plaintiffs in the Pennsylvania cases.

Although the Receiver was not a direct party at the time the judgments were entered in either *Craig* or *In Re Charter Defendants*, the Court should still apply the holding from those cases because the plaintiffs in those cases were so “identified in interest with [the Receiver] that the plaintiffs] represent[ed] the same legal right.”¹¹² In the earlier cases here, there were two types of parties pursuing alter ego liability against Charter: (1) asbestos plaintiffs; and (2) co-defendants seeking to hold Charter responsible for a portion of the asbestos plaintiffs’ damages. For both types of parties, the interests of the party seeking to hold Charter liable and the interests of the Receiver are squarely aligned. Even the Receiver, in the Third-Party Complaint, claims an alignment with the same set of plaintiffs from *Craig* and *In Re Charter Defendants*.¹¹³

¹¹⁰ *Craig*, 843 F.2d at 152.

¹¹¹ *In re Charter Defendants*, 1989 U.S. Dist. LEXIS 15591, at *8.

¹¹² *First Nat. Bank of Greenville v. U. S. Fid. & Guar. Co.*, 207 S.C. 15, 27, 35 S.E.2d 47, 58 (1945); *Richburg v. Baughman*, 290 S.C. 431, 351 S.E.2d 164 (1986) (“The term ‘privity’ when applied to a judgment or decree means one so identified in interest with another that he represents the same legal rights. . . . ‘Privity’ as used in the context of res judicata or collateral estoppel, does not embrace relationships between persons or entities, but rather it deals with a person's relationship to the subject matter of the litigation.”).

¹¹³ See *e.g.*, Third-Party Compl., at ¶¶ 43–44.

When a receiver attempts to pierce its own corporate veil through an alter ego theory, it is doing so not for the benefit of the corporation, but for the benefit of its creditors.¹¹⁴ Otherwise, such a claim would be disallowed.¹¹⁵ Accordingly, the Receiver in this case is bringing its claims against the Third-Party Defendants not for its own benefit, but for the benefit and interest of past, present, and future plaintiffs in South Carolina asbestos actions (and generally on behalf of “tens of thousands of individuals in the United States”).¹¹⁶ In other words, the Receiver has the exact same interest as the asbestos plaintiffs in the Pennsylvania cases.¹¹⁷

Because the Receiver is representing “precisely the same right” with respect to whether Charter Consolidated is the alter ego of Cape as the parties to the earlier actions, the Receiver is bound by the decisions in *Craig* and *In re Charter Defendants* and the Court should dismiss the Receiver’s veil piercing and alter ego claim.

¹¹⁴ See *Corcoran v. Frank B. Hall & Co.*, 149 A.D.2d 165, 174–75, 545 N.Y.S.2d 278, 283 (1989) (“Where, however, the corporate entity is in receivership or insolvent, the receiver's suit is for the benefit of the company’s creditors and not its shareholders.”); see also *Fed. Nat. Mortg. Ass’n v. Olympia Mortg. Corp.*, 2006 WL 2802092, at *14 (E.D.N.Y. Sept. 28, 2006) (“In general, as a matter of New York law, a corporation cannot pierce its own veil; however, where the corporate entity is in receivership or insolvent, the receiver or trustee may bring a veil-piercing suit for the benefit of the corporation’s creditors.”).

¹¹⁵ See *Corcoran*, 149 A.D.2d at 174 (“When a functioning corporation sues on its own behalf, it is in essence suing for the benefit of its shareholders. Thus, a suit by a viable corporate entity seeking to pierce its own veil is the equivalent of a suit by a corporation for the benefit of its shareholders brought against its shareholders, an absurdity. This is the clear and compelling rationale why courts have failed to recognize such an action.”).

¹¹⁶ See e.g., Third-Party Compl., at ¶¶ 140(i), 136 (“The proper and appropriate remedy under the circumstances here is for the Court to exercise its equitable power and authority to require . . . the Charter Third-Party Defendants . . . to return funds that have been wrongfully diverted from meeting Cape’s obligations and responsibilities in the United States.”).

¹¹⁷ *In re Charter Defendants*, 1989 U.S. Dist. LEXIS 15591, at *6.

C. South Carolina's Door Closing Statute Bars All Claims Against Charter Consolidated.

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.¹¹⁸ South Carolina's Door Closing Statute prohibits a suit against a “foreign corporation created by or under the laws any other state,” such as Charter Consolidated, by a nonresident of South Carolina unless “the cause of action shall have arisen or the subject of the action shall be situated within this State.”¹¹⁹ The Door Closing Statute “does not involve subject matter jurisdiction but rather determines the capacity of a party to sue.”¹²⁰

Here, as the Receivership Order acknowledges, Cape is a “foreign corporation,”¹²¹ as is Charter Consolidated.¹²² The Receiver argues, however, that he is a South Carolina resident, and that he (and not Cape) is the party bringing the claims against Charter Consolidated. While the Receiver is the actual party, he stands in the shoes of Cape for purposes of what claims he has standing to assert.¹²³

¹¹⁸ See S.C. Code Ann. § 15-5-150.

¹¹⁹ *Id.*

¹²⁰ *Farmer v. Monsanto Corp.*, 579 S.E.2d 325, 327 (S.C. 2003).

¹²¹ Receivership Order, at 1. Although the Receiver attempts to avoid the effect of the Door Closing Statute by arguing that he is the one bringing the suit, not Cape, his citizenship is irrelevant to the analysis. See 12(b) Opposition. As the Third-Party Complaint makes clear, the “Plaintiff” in that action is Cape Asbestos Company Ltd., not the Receiver. See Third-Party Compl., at p. 9.

¹²² See Section II(E), *supra*; Third-Party Compl., at ¶ 19.

¹²³ See *Wuliger v. Manufacturers Life Ins. Co.*, 567 F.3d 787 (6th Cir. 2009) (“Because they stand in the shoes of the entity in receivership, receivers have been found to lack standing to bring suit unless the receivership entity could have brought the same action.”); *Scholes v.*

Furthermore, the Receiver does not and cannot show that any cause of action against Charter Consolidated arose in South Carolina or that the subject matter of the action is situated in this state.¹²⁴ This is especially true considering Charter Consolidated has no assets in South Carolina¹²⁵ and there are no allegations that Cape has any assets in South Carolina. The only connection to South Carolina relates to Plaintiffs' causes of action, which do not even include a cause of action against the Receiver. Accordingly, even if the Third-Party Complaint stated a cause of action (it does not), no cause of action asserted by Third-Party Plaintiff arose from any activity in South Carolina. Therefore, the Third-Party Plaintiff's claims against Charter Consolidated should be dismissed.

D. Alternatively, The Court Should Strike Or Sever The Third-Party Complaint Pursuant To Rule 14(a).

To the extent that the Court does not dismiss the Third-Party Complaint, the Court should strike or sever the Third-Party Complaint (not just against Charter Consolidated, but all Third-Party Defendants). Rule 14 provides that a third-party action may be brought by "a defending party" in the original action. Rule 14(a) further provides that "a defending party" may commence a third-party complaint against a party "who is or may be liable to [defendant] for all or part of the plaintiff's claim."¹²⁶ The Rule further provides that "[a]ny party may move to strike

Lehmann, 56 F.3d 750, 753 (7th Cir. 1995) ("Like a trustee in bankruptcy or for that matter the plaintiff in a derivative suit, an equity receiver may sue only to redress injuries to the entity in receivership, corresponding to the debtor in bankruptcy and the corporation of which the plaintiffs are shareholders in the derivative suit.").

¹²⁴ Even if Cape brought the action directly, it could not demonstrate that any cause of action it has against Charter Consolidated arose in South Carolina or that the subject matter of the action is situated in this state.

¹²⁵ *Id.* at ¶ 7.

¹²⁶ S.C. RULE OF CIV. PROC. 14(a).

the third-party claim, or for its severance or separate trial.”¹²⁷

Initially, as the Receiver confirms, the Receiver is the party bringing the suit (and not Cape). The Receiver – Mr. Peter Protopapas – is not “a defending party” in the Tibbs Suit and, thus, may not bring a third-party complaint without first seeking leave to intervene in the Tibbs Suit, which he did not do.¹²⁸ The Third-Party Complaint should also be dismissed and or stricken because the Receiver is not a defendant in the Tibbs Suit.¹²⁹

Additionally, 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.*”¹³⁰ Stated another way, 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.”¹³¹

In this action, the Receiver improperly attempts to pierce Cape’s corporate veil and

¹²⁷ *Id.* The Note to Rule 14 indicates that it was drafted to be “substantially the same as the Federal Rule” 14, so federal law is cited whenever squarely applicable.

¹²⁸ Had the Receiver sought leave to intervene, the parties to the Tibbs Suit would have had the opportunity to object and or oppose the request.

¹²⁹ S.C. RULE OF CIV. PROC. 14(a). Even if Cape is the party bringing the suit, Cape needed to seek leave to file the Third-Party Complaint prior to filing. *Id.* Neither Mr. Protopapas nor Cape sought leave to file a third-party complaint, and accordingly the Third-Party Complaint should be stricken.

¹³⁰ *Johnson v. M.I. Windows and Doors, Inc.*, No. 2:11-CV-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).

¹³¹ *CNH Indust. Capital Am. LLC v. Able Contracting, Inc.*, No. 9:16-cv-2520-RMG, 2017 U.S. Dist. LEXIS 16988, at *4 (D.S.C. Feb. 7, 2017) (internal quotations omitted) (dismissing third-party complaint because claims were not derivative); *Johnson*, 2012 WL 1015798, at *2 (severing third-party complaint because claims were not derivative).

litigate issues unrelated to Plaintiffs' claims by means of a third-party complaint under Rule 14. However, as noted above, this rule only permits impleader against a party "who is or may be liable to [defendant] for all or part of the plaintiff's claim." To be proper, a third-party complaint must allege that the liability of the third-party defendant on the claim against it "is in some way dependent upon the outcome of the main claim."¹³² Rule 14 does not allow the defendant to assert a separate and independent claim, even if the claim arises out of the same general set of facts as the main claim.¹³³

Here, the Third-Party Complaint does not seek any recovery or declaration specific to Tibbs or any of the other purported underlying "suits." Instead, the relief is sought by the Receiver "to meet Cape's obligations to the tens of thousands of individuals harmed." Furthermore, none of the causes of action seek a determination that Charter Consolidated (or any other Third-Party Defendant) is liable for indemnification or any other claim that is alleged to be dependent on the outcome of the Tibbs Suit. The Receiver's claims therefore are not properly asserted under Rule 14.¹³⁴

Furthermore, even in instances where the requirements of Rule 14 are satisfied (which they are not here), third-party complaints may still be stricken or severed when the third-party lawsuit "will serve to complicate the litigation unduly or will prejudice the other parties in any

¹³² *Laughlin*, 465 F. Supp. 2d at 566.

¹³³ *Id.*

¹³⁴ See *Cruz v. Weber-Stephen Prods., LLC*, 2018 U.S. Dist. LEXIS 1243, at *6 (N.D. Tex. Jan. 4, 2018) (quoting *Majors v. Am. Nat'l Bank of Huntsville*, 426 F.2d 566, 568 (5th Cir. 1970)) (Rule 14 "is not designed as a vehicle for the trying together of separate and distinct causes of action, or for the introduction, into the main action, of several parallel, but independent, actions, or separate and independent claims.").

substantial way.”¹³⁵ Here, the Third-Party Complaint clearly complicates this litigation by adding four new causes of action, adding 33 additional third-party defendants, and asking this Court to analyze more than 100 years of foreign transactions. These additional claims and third-party defendants “would all but submerge the plaintiffs’ claim” and should be stricken.¹³⁶ Under South Carolina law, prejudice arises when the third-party complaint “introduce[s] unrelated issues and unduly complicate[s] the original suit.”¹³⁷

Under these circumstances, the Third-Party Complaint and the claims against Charter Consolidated (and all Third-Party Defendants) in the Third-Party Complaint should be stricken or, in the alternative, severed into a separate action.¹³⁸

V. 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.

¹³⁵ *Beach v. Hudson*, 380 S.E.2d 869, 871 (S.C. App. 1989); see *Ballard v. S. Cotton Oil Co.*, 145 F. Supp. 886, 887 (E.D.S.C. 1956) (applying South Carolina law and refusing to permit the interpleader because injecting insurance into a trial would be prejudicial to the insurer).

¹³⁶ *Beach*, 380 S.E.2d at 871 (striking third-party complaint because court deemed that adding additional parties and causes of action would unduly complicate the litigation).

¹³⁷ *Id.*

¹³⁸ 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*, No. 4:16-CV-1266-TLW-TER, 2017 WL 9287004, at **2-4 (D.S.C. Jan. 12, 2017), report and recommendation adopted, No. 4:16-CV-1266-TLW, 2017 WL 781071 (D.S.C. Feb. 28, 2017); *Todd v. Cary’s Lake Homeowners Ass’n*, 315 F.R.D. 453, 457-58 (D.S.C. 2016); *Cramer v. Walley*, 2015 WL 3968155, at *5 (D.S.C. June 30, 2015).

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