UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	)	Chapter 15
Asbestos Corporation Limited,[1]	)	Case No. 25-_____( )
Debtor in Foreign Proceeding.	)	

DECLARATION OF AYMAN CHAABAN
PURSUANT TO 28 U.S.C. § 1746

I, Ayman Chaaban, declare under penalty of perjury under the laws of the United States of America that the following is true and correct:

1. I am an individual over 21 years of age and am competent to testify and to provide this declaration (the "**Declaration**") in support of (I) the Chapter 15 Petition for Recognition of Foreign Proceeding (Official Form 401) (the "**Petition**") [ECF No. 1] and the *Verified Petition and Motion of the Foreign Representative for (A) Recognition of the CCAA Proceeding as a Foreign Main Proceeding or, in the Alternative, as a Foreign Nonmain Proceeding, and (B) Certain Related Relief* filed concurrently therewith (together with the Petition, the "**Verified Petition**"),[2] and (II) the *Motion for (i) Ex Parte Relief and (ii) Provisional Relief Pursuant to 11 U.S.C. §§ 1519, 362 and 105(a)* (the "**Motion for Provisional Relief**"), both of which are concurrently filed herewith.

2. I am a Partner of Raymond Chabot Inc. ("**RCI**"), the court-appointed monitor of the Debtor (in such capacity, the "**Monitor**") and the duly authorized foreign representative of the Debtor.

[1] The Debtor in this chapter 15 case, along with its unique identifier, is Asbestos Corporation Limited (Canadian Federal Business Number: 104903273RC0001). The Debtor has a registered and business address in Canada of 840 Boul. Ouellet, Thetford Mines, QC G6G 7A5, Canada.

[2] Except as otherwise indicated, capitalized terms used herein carry the meanings ascribed to them in the Verified Petition.

3. I have worked in the insolvency and restructuring group at RCI since 2010. I hold a BBA in Business Administration from HEC Montréal, and a Graduate Diploma in Public Accounting from HEC Montréal. Additionally, I am a member of several professional associations. I have been a member of the Order for Chartered Professional Accountants (the Québec CPA Order) since 2015. I have also been a member of the Canadian Association of Insolvency and Restructuring Professionals since 2013. Moreover, since 2015, I have been a Licensed Insolvency Trustee (LIT).

4. I make this Declaration on the basis of documentation in my possession or supplied to me and on facts and matters that are known to me or of which I have been informed by others. Where I have been informed by others, the information is true to the best of my knowledge and belief.

5. On May 5, 2025, CLMI (defined below) filed an *Application for the Issuance of a First Day Initial Order and an Amended and Restated Initial Order* (the "**Initial Application**"), a true and correct copy of which is attached hereto as **Exhibit 1**, in the Canadian Court, initiating insolvency proceedings under Canada's Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended (the "**CCAA**") for the above-captioned debtor, Asbestos Corporation Limited (the "**Debtor**" or "**ACL**"), which is currently pending before the Superior Court of Québec (the "**Canadian Proceeding**," and such court, the "**Canadian Court**").

6. Prior to submitting the Initial Application, I submitted for the Canadian Court's consideration a Pre-Filing Report, a true and correct copy of which is attached hereto as **Exhibit 2**.

7. The Canadian Court granted CLMI's requests and, by orders dated May 6, 2025 (the "**Canadian Orders**")[3] granted the Debtor certain relief under the CCAA and appointed RCI as Monitor and the "foreign representative" authorized to apply for recognition of the Canadian Proceeding as a foreign proceeding within the United States. *See* Ex. 3 ¶ 62. As part of the Canadian Orders, the Canadian Court ordered that the Debtor possess and control its present and future assets, rights, undertakings and properties of every nature and kind whatsoever, including all proceeds thereof, all bank accounts and all insurance assets, wherever they may be located, including in the United States, subject to the powers the Canadian Orders simultaneously granted to the Monitor. *See id.* at 15.

A. The Debtor's business and operations

8. ACL is a Québec corporation and it has been located in the Province of Québec, Canada, for nearly a century. ACL's. ACL was founded in 1925 and was incorporated under the laws of Canada with its principal place of business is located in the Province of Québec, Canada. *See* Ex. 1 ¶ 129; Ex. 2 ¶ 2.1. ACL is regulated under the Canada Business Corporations Act and is a reporting issuer in the provinces of Québec, Alberta, British Columbia and Ontario, with Québec being ACL's principal jurisdiction. *See* Ex. 2 ¶ 2.2. ACL is a subsidiary of Mazarin Inc. ("**Mazarin**"), which holds a majority of ACL's shares. *Id*. ¶ 2.3. Robert Tremblay and the Estate of Monette Serge are minority shareholders of ACL.

9. ACL is a publicly listed entity trading in Canada on the Toronto Stock Exchange (TSX Venture Exchange). *See* Ex. 1, ¶ 26. In addition to its operations and debt, ACL raises its funds from share capital issuances in Canada and uses such capital raises to fund its activities.

[3] True and correct copies of the Canadian Orders are attached to the Petition and also attached hereto as **Exhibit 3**,

10. ACL's board consists of 6 members. *See* Ex. 2 ¶ 7.1.3. ACL's board meetings have been held exclusively in Canada for several years.

11. The registered, head office and chief place of business of ACL and the headquarters office of ACL is in Québec, Canada. *See id.* ACL's operational and critical strategic decisions are mainly made in Québec, by senior management of ACL, also located in Québec. *See id.* ACL's books and records are located and maintained at ACL's headquarters in Québec. *See id.*

12. All directors or officers of ACL have places of residence in Canada and work in Canada. *See id*. All of ACL's bank accounts are located in Canada. *See id*. ¶ 7.1.6. ACL's current mining, real estate, and alternative energy development operations each take place exclusively in Canada. ACL's tangible assets and operations are located in Québec, Canada. *See* Ex. 1 ¶ 91, 129(j).

13. ACL currently has approximately 6 employees, all of whom are based in Canada. *See id*. ¶ 36.

14. ACL owns eight (8) mines, all of which are located in Québec. Canada is the location of ACL's primary assets, including its remaining mines, leases, and all of its equipment and other personal property. *See id*. ¶ 31.

15. For a period of sixty years, ACL operated open pit chrysotile mines for the purpose of asbestos mining in Québec. *See* Ex. 2 ¶¶ 2.6, 2.7 . Although ACL stopped mining for asbestos in the 1980s, it continues to operate the mines for purposes of extracting minerals from serpentinite, the waste material remaining after mining. *See id.* ACL also continues to manage, restore, lease and redevelop its properties, including various warehouses and other buildings, all of which are in Québec, Canada. *See id*. ¶ 2.7. ACL is also reportedly exploring the exploitation

of new energy sources, such as wind and solar power, and the potential for carbon dioxide capture and sequestration from the carbon dioxide emitted from its remaining mining operations. *See id.*

16. Aside from the operations described above, ACL's activities involve managing litigation it faces as a result of its historical asbestos mining operations. *See* Ex. 1 ¶ 33. Thousands of personal injury lawsuits have been filed against ACL by people claiming bodily injury resulting from exposure to asbestos fiber or to asbestos-containing products allegedly connected to ACL. *See id*. ¶ 3; Ex. 2 ¶ 2.46. ACL has also been named in a lawsuit asserting a $151 million indemnity claim that was filed by the Trustee of the bankruptcy trust of National Service Industries, Inc., a former participant in the asbestos market. These product liability, personal injury and indemnity lawsuits pose a significant financial and operational burden to ACL. As explained below, while ACL is party to insurance contracts that help defray the cost of liability and defense of these lawsuits, the fact that these claims are proceeding in a multitude of jurisdictions places an untenable strain and expense on the Debtor and its available insurance coverage. Further, the non-recurring nature of some of its revenue creates additional risk and uncertainty with respect to ACL's liquidity. *See* Ex. 1 ¶ 35; Ex. 2 ¶ 2.9.

17. ACL lacks a United States domicile or place of business. However, the Debtor has paid an attorney retainer fee of $300,000 to Orrick, Herrington & Sutcliffe, LLP, a New York law firm which is acting as United States Counsel to RCI in its capacity as Foreign Representative. The retainer fees are held in Orrick's client trust account at Citibank Private Bank in New York, where they shall remain pending the final billing in this proceeding.

18. By initiating the Canadian Proceeding along with the Debtor, a number of ACL's insurers that subscribed to one or more of the excess liability insurance policies under which ACL

was insured or allegedly insured (collectively, "**CLMI**")[4] sought to bring order to the process of resolving these mass tort claims against the Debtor that are multiplying across jurisdictions and threatening to drive it deeper into insolvency. Rather than allowing litigation to proceed piecemeal, the Canadian Proceeding will provide an avenue for the Debtor to channel those liabilities into a single forum where they can be equitably and efficiently resolved.

19. Through the Canadian Proceeding, ACL, in consultation with CLMI, intends to seek an order approving a claims process (the "**Claims Process**"), which will establish the procedures relating to the determination and adjudication of claims against ACL (the "**Claims Process**"). *See* Ex. 1 ¶ 21; Ex. 2 ¶¶ 3.1, 3.2. As part of this Claims Process, the parties intend to establish a creditors' committee, consisting of ACL's insurers, who will assist the Debtor and the Monitor in the review and resolution of any claims filed in the context of the Claims Process, as well as approve any settlement in connection therewith. *See.* Ex. 1 ¶ 21.

B. Assets, Liabilities and Capital Structure

20. ACL's limited employees, operating assets and operations are located in Québec, Canada. *See id*. ¶ 19.

21. ACL has one main secured creditor, its parent company, Mazarin, to which ACL owes approximately $26,729,000 in Canadian dollars, in respect of certain notes issued by ACL as reflected in the unaudited interim financial statements dated as of September 30, 2024. *See id.*

[4] The insurers that initiated the Canadian Proceeding include Certain Underwriters at Lloyd's, London, Tenecom Limited (as successor to Winterthur Swiss Insurance Company, formerly known as Accident & Casualty Insurance Company of Winterthur, Switzerland, and to Yasuda Fire and Marine Insurance Company (UK) Limited and now known as Tenecom Ltd.), The Ocean Marine Insurance Company (as successor to liabilities of Commercial Union Assurance Company Limited, The Edinburgh Assurance Company, The Indemnity Marine Assurance Company Limited, The Northern Assurance Company Limited, The Road Transport & General Insurance Company Limited, United Scottish Insurance Company Limited, and The Victoria Insurance Company Limited), NRG Victory Reinsurance Limited, as successor to liabilities of New London Reinsurance Company Limited and The Scottish Lion Insurance Company Ltd., a company having its Registered Office at Suite 1, South Inch Business Centre, Shore Road, Perth, Scotland, PH2 8BW.

¶ 41 . Like ACL, Mazarin is a publicly listed Canadian entity located in Canada and trades in Canada on the Toronto Stock Exchange. *See id.* ¶ 26.

22. The notes held by Mazarin are secured by a mortgage on certain real property located in Canada (called an "immovable hypothec" under Québec law) up to the principal amount of $70,000,000 in Canadian dollars. *See id.* ¶ 42.

23. ACL's unsecured debt consists of accounts payable and accrued liabilities with a total book value in Canadian dollars of approximately $2,381,000, of which approximately $1,849,000 consists of fees and compensation related to ongoing litigation, and $532,000 of trade payables and accrued expenses owed. *See id.* ¶ 46.

24. As of December 31, 2024, the Debtor's declared indebtedness for litigation-related liabilities had a total book value in Canadian dollars of approximately $29,413,000, consisting of approximately $3,284,000 in amounts currently owed due to the litigation in the U.S. and $26,129,000 of non-current liabilities. *See* Ex. 2 ¶ 2.46.

25. ACL offers a defined benefit plan that guarantees the payment of post-retirement benefits to some of its employees and former employees. *See* Ex. 1 ¶ 54. The defined benefit plan was closed to new members of December 2023. *Id.* ACL also offers life insurance to some of its former employees. *Id.*

C. Need for Organized Process for Resolving Asbestos Claims

26. Since ACL ceased its mining operations in the 1980s, it has faced several thousands of litigation claims related to exposure to asbestos. *See* Ex. 1 ¶ 3. ACL continues to be a defendant in thousands of currently pending asbestos personal injury lawsuits. Those cases are pending in at

least 14 states, including New York, California, Illinois, Louisiana, Washington, Indiana, Michigan, Minnesota, South Carolina, Connecticut and Delaware.[5]

27. Nearly thirty years ago, ACL, CLMI[6] and ACL former indirect majority owner, General Dynamics entered into an Interim Settlement Agreement regarding responsibility for managing the defense of asbestos-related bodily injury claims and lawsuits against ACL and payment of defense costs and settlements and judgments of those asbestos-related liabilities under the London Policies.[7] This protocol was embodied in a settlement agreement dated August 24, 1998 (the "**Interim Settlement Agreement**" or "**ISA**").[8] The ISA sets forth an arrangement among the parties thereto by which CLMI, under the London Policies in effect from 1976 to 1982, shall reimburse ACL for their shares of amounts paid by ACL for Defense Costs and Indemnity Payments attributable to Asbestos-Related Bodily Injury Claims (as such terms are defined in the ISA). The ISA also provided a mechanism for allocating defense costs and indemnity payments with respect to asbestos related bodily injury claims asserted against ACL. The effective term of

[5] A list of plaintiffs that have commenced currently litigation against ACL is attached to the Petition.

[6] Certain Underwriters at Lloyd's, London, The Scottish Lion Insurance Company Limited, Tenecom Limited (as successor to Winterthur Swiss Insurance Company, formerly known as Accident & Casualty Insurance Company of Winterthur, Switzerland, and to Yasuda Fire and Marine Insurance Company (UK) Limited and now known as Tenecom Limited), The Ocean Marine Insurance Company Limited (as successor to liabilities of Commercial Union Assurance Company Limited, The Edinburgh Assurance Company, The Indemnity Marine Assurance Company Limited, The Northern Assurance Company Limited, The Road Transport & General Insurance Company Limited, United Scottish Insurance Company Limited, and The Victoria Insurance Company Limited), and NRG Victory Reinsurance Limited, as successor to liabilities of New London Reinsurance Company Limited, (collectively, "**CLMI**") and the Debtor (together with CLMI, the "**Applicants**"), initiated the CCAA Proceeding.

[7] From 1969 through 1982 General Dynamics held an indirect ownership interest in ACL. During the period from July 1, 1969 through July 1, 1982 (the "**Policy Period**") certain general liability insurance policies were issued in favor of General Dynamics. Among those were certain excess policies (the "**London Policies**") subscribed to severally (not jointly) by CLMI. The London Policies, subject to their terms, conditions and limits of liability, provided defense cost and indemnification reimbursement coverage to General Dynamics and, commencing on April 1, 1973 of the Policy Period, to ACL. The London Policies in effect during the period in which the bodily injury took place are triggered rather than the policies in effect on the date that a claim is asserted. As ACL was an assured or alleged insured from April 1, 1973 through the end of the Policy Period of the London Policies, it remains an insured or alleged insured entity under the London Policies with respect to injuries allegedly occurring during the Policy Period even though it is no longer a subsidiary of General Dynamics.

[8] The ISA has a New York choice of law provision and a New York arbitration venue provision.

the ISA Agreement has been extended on multiple occasions, with the most recent extension making it effective for an indefinite term.

28. Thousands of claims were settled using this protocol. *See* Ex. 1 ¶ 62. However, ACL's ability to resolve claims has been complicated by the recent appointment of a receiver over ACL by the Court of Common Pleas of Richland County (the "**South Carolina Court**"). *See id.* ¶ 11. On September 8, 2023, the South Carolina Court entered an order (the "**Receivership Order**") appointing Mr. Peter D. Protopapas as receiver of ACL (the "**Receiver**"), with broad powers, including the power to engage defense counsel for asbestos suits against ACL, assume exclusive control of asbestos lawsuits against ACL pending in the United States, and administer ACL's insurance assets with respect to these asbestos lawsuits.[9] A true and correct copy of the Receivership Order is attached hereto as **Exhibit 6**. The South Carolina Court did so upon finding that ACL should be sanctioned for (a) asserting a personal jurisdiction defense in that litigation and (b) arguing that the Québec Business Concerns Records Act (the "**QBCRA**"), a "blocking statute" that prohibits Québec corporations from producing its documents outside of Québec in foreign proceedings, constrained ACL's ability to respond to discovery and deposition requests propounded in a single U.S. lawsuit (the "***Tibbs* Action**").

29. The existence of the receivership has resulted in several resource-intensive appeals and related disputes, including an appeal currently pending before the Supreme Court of South

[9] The Receivership Order is not the first of its kind. The South Carolina Court has appointed Mr. Protopapas as receiver for other entities, including foreign debtors, at least twenty four times in the last five years. *See* **Exhibit 4** hereto, Pet. for Writ of Prohibition 6, *Certain Underwriters at Lloyd's, London vs. Hon. Jean H. Toal*, Case No. 24-07284 (S.C. Sup. Ct. Dec. 17, 2024). On December 11, 2024, the High Court of Justice Business and Property Court of England and Wales (the "**UK Court**") rejected the South Carolina Court's claim of jurisdiction over a Cape Plc ("**Cape**"), whose corporate predecessor mined asbestos in South Africa and never did business in South Carolina, finding that the Receiver had no authority to act on behalf of Cape. The UK Court then ordered the South Carolina Receiver pay a penalty of $1 million British pounds, equivalent to $1.3 million USD, and indicated that it would impose criminal sanctions on the South Carolina Receiver if he continued to assert authority over Cape. The Judgment of the UK Court is attached as **Exhibit 5** hereto.

Carolina over whether Mr. Protopapas's appointment as receiver in the *Tibbs* Action was proper under South Carolina law.[10] But that appeal has not stayed the Receivership Order or ongoing and new asbestos litigation against ACL.

30. Meanwhile, since his appointment, the South Carolina Receiver has taken steps that resulted in increased liability and damages for ACL, rather than protecting ACL's interests and those of its stakeholders. The South Carolina Receiver has refused to abide by the ISA, by settling claims for excessive amounts that ACL has not consented to.[11] The Receiver has, moreover, made damaging statements that are likely in direct contravention of the Receiver's duty to protect the Debtor's interests and pose additional risk to the Debtor, as parties may seek to use them as admissions against the Debtor's interests and, if deemed admissions of the Debtor, will jeopardize and potentially void the Debtor's coverage under the London Insurance Policies.[12]

31. At the same time, ACL continues to face litigation and exposure to the risk of default judgments without regard to the merits of the plaintiffs' claims—a risk that the receivership has only exacerbated. The South Carolina Receiver has accepted service of multiple new asbestos actions purporting to act on ACL's behalf, but ACL has declined to retain counsel in such cases, as it does not recognize the South Carolina Receiver as valid. As a result of these gaps in legal representation, ACL has been exposed to the risk of default judgments, which in turn could deplete the finite insurance assets. Even apart from disputes over the retention of counsel, the South Carolina Receiver's appointment has done nothing to stop the risk of sanctions or defaults resulting

[10] *Tibbs vs.* 3M Co., Case No. 2023-001461 (S.C. Sup. Ct.).
[11] The five South Carolina settlements recommended by the Receiver represent more than 5% of the total amount that CLMI have paid to ACL, over multiple decades, as reimbursement for CLMI's share of ACL's indemnity and defense costs. And the average of those five South Carolina settlements for ACL was 45 times higher than ACL's nationwide settlement average in 2023. *See* Pet. for Writ of Prohibition 43, *Certain Underwriters at Lloyd's, London vs. Hon. Jean H. Toal*, Case No. 24-07284 (S.C. Sup. Ct. Dec. 17, 2024).
[12] *See* **Exhibit 7,** Return on Writ of Prohibition 3, 5, 18, *Certain Underwriters at Lloyd's, London vs. Hon. Jean H. Toal*, Case No. 24-07284 (S.C. Nov. 27, 2024).

from ACL's reliance on the QBCRA to resist discovery. Plaintiffs continue to file motions to compel and for sanctions against ACL even in the Receiver-defended cases in South Carolina.

32. Moreover, in *Kotzerke v. 3M Company et al.*,[13] a Washington state court struck ACL's responsive pleading and entered a default judgment against ACL as a discovery sanction, after ACL unsuccessfully invoked the QBCRA as limiting its ability to produce documents from Québec or present a corporate deponent to testify about the Québec documents. Absent a supersedeas bond, which ACL is not in a position to provide, that judgment (the "**Washington Judgment**") in the amount of USD $16,219,398.25 is presently enforceable and unstayed. A true and correct copy of the Washington Judgement is attached hereto as **Exhibit 8**. This substantial monetary judgment is not directly related to the merits of the underlying claim,[14] but rather, is related to ACL's defenses being struck as purported punishment for ACL's lack of cooperation in discovery based on its adherence to the QBCRA in Québec. Yet, the end result is that if CLMI pays this excessive judgment, it will deplete the finite resources available to current and future claimants.

33. ACL is also now in jeopardy of having its defenses struck and being held in default in a California lawsuit, in which it has already been held in contempt and sanctioned not producing documents and witnesses from Québec based on its adherence to the QBCRA.[15] As a result, ACL again is in jeopardy of being held in default and subject to an excessive judgment not based on the merits of the case, but rather on its respect of the QBCRA, the law of ACL's home jurisdiction that subjects ACL to potential civil and criminal penalties if violated.

[13] Case No. 23-2-05287-6 (Pierce County, Wa. Super. Ct.).
[14] On March 3, 2025, there was a hearing on damages, at which the ACL was precluded from disputing causation or plaintiff's alleged damages. Therefore, the results of the damages hearing were not based upon the merits, but to punish ACL for relying on the QBCRA.
[15] *Smalley v. 3M Co.*, Case No. 23STCV17189 (Los Angeles County, Cal. Sup. Ct.).

34. The Debtor requires protection from ongoing, asbestos-related litigation across multiple jurisdictions in the United States—the defense of which has now been complicated by the by the South Carolina Receiver's appointment—as well as actions brought directly against CLMI, the Debtor's insurer. *See* Ex. 1 ¶¶ 7, 11, 49. Indeed, the South Carolina Receiver has already sued CLMI in South Carolina to force CLMI to pay the South Carolina Receiver's costs and other creditors have taken action against certain of the Debtor's insurers to enforce judgments against ACL.

35. Separately and collectively, this local litigation will undermine the Debtor's restructuring efforts by diverting attention and resources away from the centralized Canadian Proceeding.

36. The finite amount of insurance proceeds available to pay claims makes the inequitable treatment of creditors even more likely in these circumstances, as any amount paid pursuant to a lawsuit directly reduces the limits available to pay other claims.

37. It is critical that the stay be extended to cover CLMI and its third party administrator Resolute in addition to the Debtor to prevent irreparable harm. If a stay is not granted, ACL's potential liability will continue to increase exponentially as litigation progresses against the Stay Parties in a growing number of different jurisdictions.

38. Without relief in the form of recognition and an automatic stay, this uncontrolled piecemeal litigation will continue to deplete ACL's available insurance assets. As ACL has recognized, all creditors and parties in interest would be better served by a collective proceeding in ACL's home jurisdiction, where it has always conducted its business, where it can lawfully produce its business records to its Canadian court appointed Monitor in full compliance with Canadian law and where the South Carolina Receiver poses no obstacle to ACL's resuming an

effective, efficient, cost-effective and transparent process of resolving claims under court supervision.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: May 6, 2025
Québec, Canada

/s/ Ayman Chaaban
Ayman Chaaban

EXHIBIT 1

INITIAL APPLICATION

CANADA

PROVINCE OF QUÉBEC
DISTRICT OF FRONTENAC

No.:

SUPERIOR COURT

Commercial Division

IN THE MATTER OF THE PLAN OF ARRANGEMENT AND COMPROMISE OF:

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, individual underwriting syndicates at Lloyd's, with Lloyd's having its principal place of business at One Lime Street, London, EC3M 7HA, United Kingdom

- and -

TENECOM LIMITED (as successor to Winterthur Swiss Insurance Company formerly known as Accident & Casualty Insurance Company of Winterthur, Switzerland), Yasuda Fire and Marine Insurance Company (UK) Limited (and now known as Tenecom Ltd.), a company having its principal place of business at 8 Fenchurch Place, 4th Floor, London, EC3M 4AJ United Kingdom

- and **-**

THE OCEAN MARINE INSURANCE COMPANY LIMITED (as successor to liabilities of Commercial Union Assurance Company Limited, The Edinburgh Assurance Company, The Indemnity Marine Assurance Company Limited, The Northern Assurance Company Limited, The Road Transport & General Insurance Company Limited, United Scottish Insurance Company Limited, and The Victoria Insurance Company Limited), a company having its Registered Office at 8 Surrey Street, Norwich, Norfolk NR1 3NG United Kingdom

- and **-**

NRG VICTORY REINSURANCE LIMITED (as successor to liabilities of New London Reinsurance Company Limited), a company having its Registered Office at 8 Fenchurch Place, 4th Floor, London EC3M 4AJ United Kingdom

- and **-**

THE SCOTTISH LION INSURANCE COMPANY LIMITED, a company having its Registered Office at Suite 1, South Inch Business Centre, Shore Road, Perth, Scotland, PH2 8BW

Applicants

- and -

ASBESTOS CORPORATION LIMITED, a corporation incorporated under the *Canada Business Corporations Ac*t, having its head office at 840 boul. Ouellet, in the city of Thetford Mines, Québec, G6G 7A5

Debtor

- and -

RAYMOND CHABOT INC., a company incorporated under the *Business Corporations Act* (Québec), having a place of business at 2000-600 rue De la Gauchetière Ouest, in the city of Montreal, Québec, H3B 4L8

Proposed Monitor

APPLICATION FOR THE ISSUANCE OF A FIRST DAY INITIAL ORDER AND AN AMENDED AND RESTATED INITIAL ORDER

(Sections 9, 11, 11.001, 11.02, 11.03, 11.2, 11.52, 11.7 and 23 of the *Companies' Creditors Arrangement Act*)

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TO THE HONOURABLE JUSTICE JEAN-FRANÇOIS ÉMOND OF THE SUPERIOR COURT, SITTING IN COMMERCIAL DIVISION, IN AND FOR THE JUDICIAL DISTRICT OF FRONTENAC, THE APPLICANTS RESPECTFULLY SUBMIT THE FOLLOWING:

1. OVERVIEW AND ORDERS SOUGHT

1. Certain Underwriters at Lloyd's, London, and Tenecom Limited (as successor to Winterthur Swiss Insurance Company, formerly known as Accident & Casualty Insurance Company of Winterthur, Switzerland, and to Yasuda Fire and Marine Insurance Company (UK) Limited and now known as Tenecom Ltd.), The Ocean Marine Insurance Company (as successor to liabilities of Commercial Union Assurance Company Limited, The Edinburgh Assurance Company, The Indemnity Marine Assurance Company Limited, The Northern Assurance Company Limited, The Road Transport & General Insurance Company Limited, United Scottish Insurance Company Limited, and The Victoria Insurance Company Limited), NRG Victory Reinsurance Limited, as successor to liabilities of New London Reinsurance Company Limited, and The Scottish Lion Insurance Company Limited (collectively, "**CLMI**" and/or the "**Applicants**"), are insurers, interested persons and/or unsecured creditors of the debtor, Asbestos Corporation Limited ("**ACL**" or the "**Debtor**"), an insolvent Quebec corporation, whose limited operations, employees and assets are all located in Thetford Mines, Quebec. CLMI subscribed to one or more of the excess liability insurance policies issued to General Dynamics Corporation ("**General Dynamics**") under which ACL, a former partially-owned indirect subsidiary of General Dynamics, was insured or allegedly insured (the "**London Policies**").

2. Until 1986, ACL operated open pit chrysotile mines in Thetford Mines, Quebec, Canada, for the purpose of mining asbestos.

3. Over the course of the past decades, ACL has been the subject of thousands of asbestos-related claims and, until recently, ACL was fully responsible for resolving these asbestos-related claims.

4. The Applicants are involved in reimbursing ACL for these same asbestos-related claims, solely in their capacity as insurers to ACL. More specifically, in accordance with the terms of the London Policies and an Interim Settlement Agreement ("**ISA**"), certain Applicants have been reimbursing defence costs incurred by ACL in relation to the claims and have also funded certain settlements agreed upon between ACL and certain claimants.

5. However, since September 8, 2023, the circumstances relating to ACL's right or ability to resolve and defend such asbestos-related claims have been dramatically compromised, when the Court of Common Pleas of Richland County, South Carolina (the "**South Carolina Court**") (docket number 23-CP-40-179) (the "***Tibbs* Action**" and, the proceeding in respect of the *Tibbs* Action, the "**South Carolina Proceeding**"), in a lawsuit involving one of the underlying asbestos-related claims, held ACL in contempt of court on the basis that ACL refused to properly engage in discovery and produce in the United States documents and witnesses located in Canada. ACL's position was, and continues to be, that the Quebec *Business Concerns Records Act,* RLRQ ch. D-12 (the "**QBCRA**") prevents it, as a Quebec corporation, from transferring documents outside of Quebec.

6. Nonetheless, the South Carolina Court sanctioned ACL, struck its pleadings (such that it was in default) and entered a Receivership Order (as defined below) that putatively stripped ACL of its right to defend itself in the United States, by appointing Mr. Peter D. Protopapas of the South Carolina law firm of Rikard & Protopapas as receiver of ACL with respect to certain powers, rights and assets, specifically, the power and right to defend asbestos suits against ACL in the United States and the power and right to deal with its insurers with respect to those suits (the "**South Carolina Receiver**").

7. In such capacity, Mr. Protopapas was granted full control of ACL's defence against the asbestos-related claims made against it in the United States, and has since filed a suit against CLMI in the South Carolina Court so as to force CLMI to pay the costs incurred by the South Carolina Receiver, with this suit pending before the South Carolina Court as of the date of this Application.

8. In February 2024, the South Carolina Court issued another order requiring ACL's insurers, including CLMI, to treat the South Carolina Receiver as their insured (ACL), and later subjected CLMI to sanctions of USD$50,000 per day until CLMI fully complied with its orders. During this time, the South Carolina Receiver (in his purported capacity as ACL) demanded CLMI settle asbestos lawsuits against ACL at excessive amounts.

9. Both ACL and the Applicants have taken the position that the Receivership Order is invalid and should be vacated, and as such, ACL filed an appeal before the South Carolina Supreme Court. However, the fact remains that asbestos-related claims continue to proceed and/or to be filed against ACL, as none of them have been stayed pending the appeal on the Receivership Order and the determination, on appeal, as to who should be responsible and take control over ACL's defence against the asbestos-related lawsuits.

10. In the meantime, and although the South Carolina Receiver is required to protect ACL's interests, he has instead maligned ACL and made gratuitous and highly damaging statements about ACL in public filings that others will surely seek to use as admissions against ACL's interests. The South Carolina Receiver's attacks on ACL stands to cause irremediable damages to ACL and, this conduct, purportedly on behalf of ACL, has jeopardized ACL's coverage under the London Policies.

11. In sum, due to the actions of the South Carolina Receiver, ACL has lost control over its defence of the asbestos-related claims for which the South Carolina Receiver has unilaterally accepted service on ACL's behalf, notwithstanding ACL’s position that the QBCRA prevents it from producing corporate documents deriving from Canada in the United States, thereby resulting in:

    (a) the South Carolina Receiver (in his purported capacity as ACL) maligning ACL with damaging statements against ACL's interests;

    (b) larger settlements negotiated by the South Carolina Receiver, on behalf of ACL;

    (c) plaintiffs filing motions for sanctions/contempt because of ACL's purported failure to produce documents and witnesses from Canada in South Carolina

Receiver controlled cases – despite the fact that the South Carolina Receiver (not ACL) is controlling the defence; and

(d) the Applicants having to pay an ever-increasing amount of litigation-related fees and settlements.

12. In essence, since his appointment, the steps taken by the South Carolina Receiver have resulted in increased liability and damages for ACL, rather than protecting its interests, and those of its stakeholders.

13. The result of this situation has been that plaintiffs throughout the United States are now exploiting ACL's current situation with the South Carolina Receiver, as well as its reliance on the QBCRA, in a "*race to the courts*" to obtain sanctions and default orders that are not based upon the merits of their claims, but rather on punishing ACL for not participating in discovery or respecting associated orders issued by US courts based on the QBCRA.

14. Furthermore, in other suits filed elsewhere in the United States, notably in Washington and California, where ACL continues to defend itself personally, ACL has been the subject of sanctions and a default judgment in connection with its refusal to submit documents and witnesses in discovery on the basis of the QBCRA. For example, on April 3, 2025, given ACL's position that the QBCRA prevented it from complying with discovery in the United States, a monetary default judgment was rendered against ACL in the amount of USD$16,219,398.25 (the "**Washington Default Judgment**"). This substantial monetary judgment is not directly related to the merits of the underlying claim, but rather, is related to ACL's defences being struck as purported punishment for ACL's lack of cooperation in discovery based on its adherence to the QBCRA in Quebec. Yet, the end result is that if the Applicants pay this excessive Washington Default Judgment, it will reduce the pot of limits available to current and future claimants.

15. ACL is also now in jeopardy of having its defences struck and being held in default in a California lawsuit, in which it has already been held in contempt and sanctioned for refusing to produce documents and witnesses from Quebec on the basis of the QBCRA, but in defiance of court orders. As a result, ACL remains in jeopardy of being held in default and subject to an excessive judgment not based on the merits of the case, but rather on its position that it must adhere to and respect the QBCRA.

16. In sum, ACL's position is now being exploited by plaintiffs' counsel, who are able to obtain sanction and default orders in their favour notwithstanding the actual merit of their asbestos-related claims. Moreover, ACL's respect of the QBCRA has resulted in the appointment of the South Carolina Receiver and ACL's loss of control over the defence of the asbestos-related claims, which has led to increased liability, as well as larger settlements and settlement demands against the Applicants.

17. ACL is insolvent not only as appears from its balance sheet, but also in terms of its ability to satisfy its obligations as they become due. This indebtedness will only increase as a result of US plaintiffs exploiting the situation with the South Carolina Receiver and ACL's respect of the QBCRA.

18. In such circumstances, CLMI, is the party with the primary economic interest in the fair adjudication and resolution of all present and future asbestos-related claims as against ACL, and remains prepared to meet its coverage obligations to ACL in order to properly and fairly assess all present and future asbestos-related claims against ACL, and, if applicable, provide coverage in respect of same. However, as currently organized and conducted, the Applicants are of the view that the current process by which ACL addresses claims should be pursued under an eventual streamlined claims process that would be approved by this Court in the context of these proceedings.

19. CLMI therefore proposes to implement a fair, orderly and efficient claims process in Quebec, where ACL has its registered office, and where its operating assets and employees are located, the purpose of which will be to establish a single forum where all asbestos-related claims against ACL will be identified and diligently reviewed in a structured and efficient manner under the supervision of the Court. CLMI will also assess, in parallel with the foregoing, the possibility of satisfying such asbestos-related claims as part of an eventual plan of compromise or arrangement which would allow *all* claimants with valid claims to maximize recovery.

20. The Applicants, in their capacity as insurers, unsecured creditors and interested parties to ACL, hereby file the present *Application for the Issuance of a First Day Initial Order and an Amended and Restated Initial Order* (the "**Application**"), and seek from this Court, with the consent and cooperation of ACL, the issuance of the following orders in respect of ACL, pursuant to the *Companies' Creditors Arrangement Act,* RSC 1985, c C-36, as amended (the "**CCAA**" and the present proceedings commenced hereunder, the "**CCAA Proceedings**"):

    (a) a first day initial order (the "**First Day Order**"), substantially in the form of the draft order communicated herewith as **Exhibit R-1**[1], which will be sought at the initial hearing to be scheduled with the Court, and which will provide for, *inter alia*, the following relief:

        (i) Application of the CCAA. A declaration that ACL is a "*debtor company*" to which the CCAA applies, and that the commencement of these CCAA Proceedings is appropriate in the circumstances;

        (ii) The Monitor. The appointment of Raymond Chabot Inc. ("**Raymond Chabot**") as the monitor of the Debtor in these CCAA Proceedings (if so appointed, the "**Monitor**"), with the powers set out in the draft First Day Order;

        (iii) Stay of Proceedings. A stay of all proceedings against the Debtor and its assets, undertakings and properties, including, without limitation, insurance assets (collectively, the "**Property**") and their respective directors and officers (collectively, the "**D&Os**"), as well as against the Applicants and their third-party claims administrator Resolute Management Inc., and General Dynamics, for an initial period of ten (10) days in accordance with the CCAA (the "**Stay Period**");

[1] A copy of a redline document comparing the proposed First Day Order to the model CCAA initial order is communicated herewith as **Exhibit R-1A**.

(iv) COMI Declaration. A declaration that Canada is the "*centre of main interest*" (the "**COMI**") of the Debtor; and

(v) Sealing Order. The granting of a sealing order in respect of certain confidential exhibits communicated as part of the Application;

(b) an amended and restated initial order (the "**Initial Order**"), substantially in the form of the draft order communicated herewith as **Exhibit R-2**[2], which will be sought at the "*comeback hearing*" to be scheduled with the Court on May 15, 2025, and which will provide for, *inter alia*, the following *additional* relief:

(i) Stay of Proceedings. The extension of the Stay Period to September 5, 2025;

(ii) Administration Charge. The establishment of a super-priority charge against the Property in an initial amount of $1.5 million (the "**Administration Charge**") to secure the fees and obligations incurred towards the undersigned counsel and Simpson Thacher & Bartlett LLP as legal advisors to the Applicants, Fasken Martineau DuMoulin LLP as legal advisors to ACL, Raymond Chabot, as Monitor of the Debtor, and Raymond Chabot's legal advisors in Canada and the United States, as well as the CRO (as defined below) (collectively, the "**Professionals**"), for work performed and to be performed in connection with these CCAA Proceedings;

(iii) Interim Financing and Interim Lender's Charge. The approval of an Interim Financing Term Sheet (the "**Interim Financing Term Sheet**") to be entered into between the Debtor and CLMI or an entity identified by it (in such capacity, the "**Interim Lender**") prior to the "*comeback hearing*", and the authorization for the Debtor to borrow from the Interim Lender under the Interim Financing Term Sheet an amount of up to $15 million (the "**Interim Facility**"), to be secured by a super-priority charge against the Property (the "**Interim Lender's Charge**");

(iv) Directors and Officers Charge. The establishment of a super-priority charge in an initial amount of $300,000 (the "**D&O Charge**") to secure the Debtor's indemnification obligations towards their respective directors, *de facto* directors, as well as certain senior officers in connection with potential liabilities that could arise as and from the issuance of the Initial Order; and

(v) Chief Restructuring Officer. The appointment of Mr. Randall Benson to act as Chief Restructuring Officer ("**CRO**") of the Debtor through services to be provided by RC Benson Consulting Inc. pursuant to the engagement letter to be entered into prior to the *comeback hearing* (the "**CRO Engagement Letter**"), and authorizing Mr. Benson to exercise and perform the powers, responsibilities and duties set out therein.

[2] A copy of a redline document comparing the proposed Initial Order to the model CCAA initial order is communicated herewith as **Exhibit R-2A**.

21. The Applicants, in consultation and with the approval of ACL and the Monitor, also intend to return to Court, in due course, in order to seek the approval of a claims process, which will establish the procedures relating to the determination and adjudication of claims against ACL (the "**Claims Process**"). As part of this Claims Process, the parties intend to establish a committee, made-up of a representative of each of the Applicants, who will assist the Debtor and the Monitor in the review and resolution of any claims filed in the context of the Claims Process, as well as approve any settlement in connection therewith.

22. The Applicants understand that Raymond Chabot, in its capacity as proposed Monitor, will be submitting to the Court, in advance of the initial hearing, a pre-filing report (the "**Pre-Filing Report**") that sets out its observations and recommendations with respect to the Applicants' request for the issuance of the First Day Order. The Applicants understand that the Pre-Filing Report will also analyze the circumstances leading up to the filing of the Application.

23. To the extent that Raymond Chabot is appointed as Monitor to the Debtor as part of the First Day Order, the Applicants understand that Raymond Chabot, this time in its capacity as Monitor, will also be submitting to the Court, in advance of the "*comeback hearing*", a second report setting out its observations and recommendations with respect to the request for the issuance of the Initial Order, and in particular, will include cash-flow forecasts and a budget for the next six (6) months as part of this second report.

24. It is respectfully submitted that authorizing the contemplated CCAA process is necessary and appropriate in the particular circumstances of this case, and that the CCAA Proceedings also constitute the best restructuring alternative available for the Debtor, as well as the Debtor's many vulnerable stakeholders, who will be able to participate in a stream-lined Claims Process in a single jurisdiction, thereby maximizing any eventual recovery.

25. Unless indicated otherwise, all references to currency in this Application are in Canadian dollars.

2. THE DEBTOR'S BUSINESS AND AFFAIRS

2.1. Corporate Structure

26. ACL is a corporation incorporated under the *Canada Business Corporations Act* and was founded in 1925, as appears from a copy of the relevant extracts of the Québec Registry of Enterprises for ACL communicated herewith as **Exhibit R-3**.

27. ACL is a reporting issuer in the provinces of Québec, Alberta, British Columbia and Ontario, with Québec being ACL's principal jurisdiction. ACL's common shares trade on the NEX Board of TSX Venture Exchange under the stock symbol AB.H.

28. ACL is a subsidiary of Mazarin Inc. ("**Mazarin**"), which holds a majority of the shares of ACL. Robert Tremblay and Hélène Paquette are minority shareholders of ACL, the whole, as appears from Exhibit R-3.

29. ACL operates its business from 840 boul. Ouellet in Thetford Mines, Québec, where its head office is located.

30. All of ACL's limited employees, operating assets and operations are in Quebec, Canada.

2.2. Overview of the Business of the Debtor

31. For a period of close to one hundred years, ACL operated open pit chrysotile mines for the purpose of asbestos mining in Québec. ACL's asbestos mining-related operations and activities produced millions of tons of serpentine tailings which contain several minerals, including the strategic minerals of magnesium and nickel (the "**Serpentine Tailings**"). Currently, Mazarin, through ACL, owns 8 mining sites located in Québec.

32. ACL has since halted its asbestos-mining activities but continues to operate. Currently, ACL describes its operations and business plan as including the following activities:

(a) the valorization and exploitation of the Serpentine Tailings to extract the minerals that are located in the Serpentine Tailings;

(b) the promotion of the sustainable development of ACL's properties, and the restoration and revitalization of all of its mining sites and buildings in agreement with various regional stakeholders, while also ensuring the exploitation of the Serpentine Tailings;

(c) the provision of warehouses and other buildings for rent; and

(d) the innovation and implementation of new energy sources, such as wind and solar power, with the potential for carbon dioxide sequestration from the carbonation of its mine tailings.

33. ACL's activities, at this stage, involve dealing with the numerous litigation claims that it is facing in the United States and elsewhere as a result of ACL's former activities relating to asbestos mining. These claims have been filed by persons claiming exposure to asbestos fiber or to asbestos-containing products, which allegedly resulted in bodily injury to such persons.

34. As will be further explained below, these claims are a significant burden upon ACL and the Applicants, particularly in light of the appointment of the South Carolina Receiver and his actions resulting in increased liability and larger settlements.

35. ACL is also exposed to certain liquidity risks due to the additional operating costs and due to the non-recurring nature of some of its revenues, which are mostly derived from mining assets, and more specifically, warehouse leasing and related royalties.

2.3. Employees

36. As at May 1, 2025, ACL has approximately six (6) employees all located in Quebec.

37. The Debtor's gross payroll obligations, including commissions, for the fiscal year 2024 amounted to approximately $1,334,000.

3. THE DEBTOR'S FINANCIAL POSITION

3.1. Assets

38. As at September 30, 2024, the Debtor had total assets with a book value of approximately $41,121,000, consisting of current assets with a book value of approximately $8,755,000, and fixed/long-term assets with a book value of approximately $32,366,000, as appears from the table below:

ASSETS	Book Value (in Canadian Dollars)
Current Assets	
Cash	**721,000**
Restricted Cash	**837,000**
Accounts receivable	**5,103,000**
Income tax recoverable	**893,000**
Prepaid expenses	**251,000**
Current portion of investments	**950,000**
Total current assets	**8,755,000**
Fixed/Long-Term Assets	
Investments	**30,200,000**
Note receivable from a company under common control, non-interest bearing and with no terms of repayment	**633,000**
Security deposits	**258,000**
Property, plant and equipment	**1,275,000**
Total non-current assets	**32,366,000**
Total Assets:	**41,121,000**

3.2. Liabilities

39. As at September 30, 2024, the Debtor had outstanding liabilities with a total book value of approximately $58,226,000, consisting of current liabilities with a book value of approximately $4,925,000, and non-current liabilities with a book value of approximately $53,301,000, as appears from the table below:

LIABILITIES	Book Value (in Canadian Dollars)
Current Liabilities	

LIABILITIES	**Book Value (in Canadian Dollars)**
Accounts payable and accrued liabilities	**2,381,000**
Income tax payable	**-**
Interest on note payable to the parent company	**1,385,000**
Current portion of litigation-related liabilities	**1,100,000**
Current portion of deferred revenue	**59,000**
Total current liabilities	**4,925,000**
Non-Current Liabilities	
Litigation-related liabilities	**25,790,000**
Deferred revenue	**162,000**
Security deposits payable	**213,000**
Notes payable to related companies	**26,729,000**
Post-employment benefit liabilities	**407,000**
Total non-current liabilities	**53,301,000**
Total Liabilities:	**58,226,000**

40. A more detailed description of the Debtor's debt structure is provided below.

A. Secured Debt

41. As at September 30, 2024, the Debtor had one main secured creditor, namely its parent company, Mazarin, to whom ACL appears to owe approximately $26,729,000, as reflected in the unaudited interim financial statements dated as at September 30, 2024, communicated herewith as **Exhibit R-4**.

42. On January 15, 1986, an immovable hypothec up to the principal amount of $70,000,000 (the "**Immovable Hypothec**") was entered into between ACL, as Issuer and Fiducie du Québec, as Trustee, and registered on the land register in the land book for the registration division of Thetford on January 28, 1986 under number 110 884, and in the land book for the registration division of Beauce on February 17, 1986 under number 368 108 (the "**Trust Deed**"), as appears from the summary report of the registrations in the *Registre de droits personnels et réels mobiliers* and the *Cadastre du Québec,* communicated herewith as **Exhibit R-5**.

43. On May 11, 2015, the Immovable Hypothec resulting from the Trust Deed was renewed and was registered, on May 15, 2015, in the land register under numbers 21 517 957, 21 524 569 and 21 533 174.

44. On November 22, 2024, following the resignation of the initial Trustee as attorney (*fondé de pouvoir*) for all present and future bondholders pursuant to the Trust Deed, Mazarin was appointed to act as successor attorney or person holding all powers for all present and future bondholders under the Trust Deed by virtue of a notice of

substitution of hypothecary representative (*fondé de pouvoir*) executed on November 22, 2022 and registered in the land register on November 24, 2022 under number 27 713 471.

B. Unsecured Debt

45. As at September 30, 2024, the Debtor had certain outstanding unsecured liabilities, which are further detailed below.

(i) Accounts Payable and Accrued Liabilities

46. As at September 30, 2024, the Debtor's indebtedness for accounts payable and accrued liabilities was approximately $2,381,000, of which approximately $1,849,000 consists of fees and compensation related to ongoing litigation, and $532,000 of trade payables and accrued expenses owed.

(ii) Litigation-related liabilities

47. As previously mentioned, ACL is the subject of litigation, as persons claiming exposure to asbestos fibre or asbestos-containing products have filed numerous actions in the United States for damages due to bodily injury allegedly caused by asbestos exposure.

48. As at September 30, 2024, the Debtor's declared indebtedness for litigation-related liabilities was approximately $26,890,000, of which approximately $1,100,000 consists of amounts currently owed due to litigation proceedings in the United States, and $25,790,000 of long-term liabilities, as appears from the interim financial statements dated as at September 30, 2024 (Exhibit R-4). Additional monetary judgments have been rendered since September 30, 2024, including the Washington Default Judgment (in the amount of USD$16,219,398.25).

49. Such liabilities continue to increase on an exponential basis as more and more individuals suffering from asbestos exposure submit claims to, and initiate litigation proceedings against, ACL and the Applicants. These claims include (i) two (2) asbestos suits filed against CLMI as direct actions in Louisiana, and (ii) a USD$151 million suit filed against ACL in which it is alleged that ACL and its insurance carriers conspired to conceal insurance information.

50. At the same time, ACL has been subject to sanctions in the United States due to its respect of the provisions of the QBCRA, including by way of the USD$16.2 million Washington Default Judgment, and increasing litigation debts owed (if coverage is not voided) towards the Applicants.

51. ACL's position that the QBCRA prevents it from producing its corporate documents from Canada in the United States in the context of the litigation taking place there, has also resulted in the appointment of the South Carolina Receiver as a discovery sanction. The South Carolina Receiver subsequently instituted multiple declaratory actions matters against various carriers, including the Applicants, before the South Carolina Court that seek the following findings:

(a) that the policies are "property" of the South Carolina Receiver;

(b) that the Applicants must defend and indemnify ACL even though the Applicants have been reimbursing ACL for defence and indemnity for at least twenty-five (25) years; and

(c) that the rules governing the payment of defence and indemnity are directly contrary to the terms of the ISA negotiated with ACL, pursuant to which the Applicants and ACL have handled claims for over twenty-five (25) years.

52. ACL's rising litigation-related debts further prejudice the Applicants' position, and the position of all stakeholders including the asbestos-related claimants, vis-à-vis ACL, as:

(a) CLMI's coverage obligations are several (not joint) and limited to their subscribed percentage share;

(b) Coverage may be jeopardized; and

(c) ACL's contractual obligations require ACL to first pay defence costs, settlements and judgments and then seek reimbursement from CLMI for CLMI's several share.

(iii) Amounts Owing to CLMI

53. As at March 7, 2025, CLMI has claimed from the Debtor an amount of approximately USD$143,666.08, which amount constitutes defence costs paid by CLMI, on behalf of ACL, to American defence counsel for work performed in respect of the various litigation proceedings pending in the United States against ACL.

(iv) Post-employment benefits

54. ACL offers a defined benefit plan that guarantees the payment of post-retirement benefits to some of its employes and former employees. The defined benefit plan was closed to new members as of December 29, 2003. ACL also offers life insurance to some of its former employees.

55. As at September 30, 2024, the Debtor's indebtedness for these post-employment benefits was approximately $407,000.

4. THE APPLICANT'S INTEREST IN THE PROPOSED RESTRUCTURING

4.1. The Applicants' Insurance Coverage of ACL

56. On August 24, 1998, the ISA (as amended from time to time) was made by and between ACL and General Dynamics (collectively, the "**Assured**") and the Applicants. The ISA sets forth an arrangement among the parties thereto by which CLMI, under the London Policies, shall reimburse ACL for their share of amounts paid by or on behalf of ACL for Defence Costs and Indemnity Payments attributable to Asbestos-Related Bodily Injury Claims (as such terms are defined in the ISA). The ISA and its addendums are communicated herewith, *under confidential seal* and *en liasse*, as **Exhibit R-6**.

57. Pursuant to the ISA, the Assured and the Applicants agreed to provide for, among other things, the apportionment of indemnity payments and defence costs attributable to certain asbestos-related bodily injury claims asserted against ACL by way of claims or lawsuits instituted against ACL.

58. At a granular level, the London Policies insure both ACL and General Dynamics, with only one set of insurance limits available. This means that payment of amounts owing pursuant to a lawsuit against ACL reduces the limits available to pay lawsuits against General Dynamics, and *vice versa*.

4.2. Claims and Litigation Proceedings against ACL

59. The Applicants are an interested person and a critical creditor and stakeholder of the Debtor in that the Applicants:

(a) ensure that individuals suffering from asbestos-related bodily injuries are able to receive compensation following ACL's resolution and treatment of their claims; and

(b) fund, in large part, ACL's defence activities related to pending litigation in the United States, including but not limited to the states of Washington, New York, California and South Carolina.

60. Despite the foregoing, ACL's adherence to the provisions of the QBCRA has resulted in multiple US courts entering orders imposing sanctions, including monetary fines, striking ACL's defences, and, in one case, imposing a default judgment against ACL for which the Applicants may ultimately be liable (if coverage is not void).

61. Additionally, ACL's respect of the QBCRA has resulted in the appointment of the South Carolina Receiver, thereby leading to ACL losing control of the litigation of asbestos-related claims in the United States for no other reason than its decision to abide by the law of Quebec. In the meantime, the South Carolina Receiver's actions have resulted in increased liability and larger settlements that ACL and/or the Applicants have been forced to pay, notably because:

(a) The South Carolina Receiver has maligned ACL and given plaintiffs' counsel alleged *admissions* that can then be used by the plaintiffs to justify ACL's alleged liability;

(b) The South Carolina Receiver has negotiated settlements that are significantly higher than those negotiated by ACL over the past 25 years;

(c) Plaintiffs continue to file motions for sanctions/contempt on the basis that ACL is not participating in discovery, including in cases where the South Carolina Receiver has been appointed (and is purportedly acting for ACL).

A. Asbestos Claims

62. With respect to asbestos-related bodily injury claims, the Applicants have, as of December 31, 2024, reimbursed their share of settlements that have compensated several thousand claims instituted against ACL, while thousands of claims have also

been dismissed, and others remain pending. The breakdown of the number of claims that are settled, dismissed and pending are included in a confidential schedule to the Pre-Filing Report, as well are the total costs of the expenses and indemnities reimbursed by ACL in relation to these claims.

63. It is undeniable that the Applicants have diligently, and in good faith, sought to expeditiously reimburse claims in the best interests of ACL's stakeholders and the claimants.

B. Litigation Proceedings in the United States

64. In addition to reimbursing their share of compensation to the asbestos-related bodily injury claimants, the Applicants have also paid the defence costs arising from certain asbestos-related litigation proceedings instituted in the United States against ACL, which the Applicants are claiming from ACL, but which have not paid (which as of this date, amounts to USD$143,666.08).

(i) South Carolina Proceeding and South Carolina Receiver

65. In the South Carolina Proceeding instituted against ACL in South Carolina, the Court appointed the South Carolina Receiver over ACL, purportedly allowing the South Carolina Receiver to assume the control of the defence of asbestos-related claims made against ACL throughout the United States.

66. By way of background, on July 19, 2023, the South Carolina Court ordered ACL to fully answer discovery in the *Tibbs* Action in South Carolina and to provide a corporate representative for deposition, failing which ACL would be held in contempt. ACL did not comply, submitting that the QBCRA prevented it from making such disclosure and from complying with discovery in the United States.

67. Subsequently, on September 8, 2023, the South Carolina Court held ACL in contempt, and sanctioned ACL by striking its pleadings such that it was in default, as appears from the contempt order of the South Carolina Court communicated herewith as **Exhibit R-7** (the "**South Carolina Contempt Order**").

68. As appears from a copy of the receivership order (the "**Receivership Order**"), communicated herewith as **Exhibit R-8**, the South Carolina Receiver was appointed as a result of the South Carolina Contempt Order, and purports to confer upon the South Carolina Receiver the rights, powers, and authority to among other things:

(a) fully administer all insurance assets of ACL and any subsidiaries;

(b) accept service of process on behalf of ACL;

(c) engage defence counsel on behalf of ACL;

(d) assume control of the defence of all asbestos bodily injury litigation matters pending in the United States against ACL; and

(e) take any and all steps necessary to protect the interests of ACL whatever they may be.

69. The rights, powers, and authority granted by the South Carolina Court to the South Carolina Receiver pursuant to the Receivership Order are not limited to the South Carolina Proceeding but purportedly extend to all asbestos bodily injury suits against ACL in the United States.

70. Both ACL and the Applicants objected to the Receivership Order and contend that it should be invalidated and vacated. On September 13, 2023, ACL appealed the Receivership Order and South Carolina Contempt Order to the South Carolina Court of Appeals, which in turn certified the appeal for direct consideration by the highest court in the state, the South Carolina Supreme Court, which appeal is currently pending. However, the appeal has not stayed the Receivership Order and actions of the South Carolina Receiver. As a result, asbestos-related bodily injury claims continue to be filed and pursued with the South Carolina Receiver accepting service of some (but not all) lawsuits, and the South Carolina Receiver taking control of the defence of some (but not all) lawsuits in the United States.

71. To this end, the South Carolina Receiver appointed in the South Carolina Proceeding has disrupted the Applicants' longstanding practice of efficiently reimbursing the compensation of claimants and has begun acting on ACL's behalf in a range of matters, including personal-injury suits and prosecuting third-party declaratory judgment actions, as appears from the Petition for Writ of Prohibition, communicated herewith as **Exhibit R-9**.

72. Moreover, given that ACL does not recognize the South Carolina Receiver, as appears from Exhibit R-9, ACL has declined to retain counsel to defend against cases where the South Carolina Receiver has accepted service of new complaints, thereby resulting in a gap in legal representation. The South Carolina Receiver also did not retain counsel in some of these new complaints for which the South Carolina Receiver accepted service, leaving ACL exposed to additional risk for default judgments being rendered given its lack of representation, which risk is borne, in large part, by the Applicants who could be forced to pay the majority of the amounts owed under any excessive default judgment, despite there being no proper review and adjudication relating to the validity of any such claims. This situation is demonstrative of the necessity to obtain the relief sought herein.

73. Moreover, on February 23, 2024, the South Carolina Court entered an order requiring the Applicants to treat the South Carolina Receiver as the named insured and representative for ACL in the defense of asbestos litigation (the "**February 23 Order**"), a copy of which is communicated herewith as **Exhibit R-10**. The order was entered in two asbestos personal injury lawsuits pending against ACL in the state of South Carolina (*Link* and *Potter*) and directed at insurance carriers of ACL, including the Applicants, despite the fact that the Applicants were not parties to either of these lawsuits.

74. Following the February 23 Order, the South Carolina Court, on March 22, 2024, entered another order sanctioning the Applicants an amount of USD$50,000 per day until the South Carolina Receiver advises the South Carolina Court of the Applicants' compliance with the February 23 Order (the "**March 22 Order**"), a copy of which is communicated herewith as **Exhibit R-11**. This order was entered again in two lawsuits (*Link* and *Potter*) where the Applicants were not parties.

75. Meanwhile, the South Carolina Receiver (acting as ACL and the Assured) is demanding that CLMI settle asbestos lawsuits against ACL at excessive amounts. Initially, the South Carolina Receiver issued a demand that CLMI pay hundreds of millions of dollars in policy limits to settle two asbestos lawsuits, and then negotiated settlements of five asbestos lawsuits for a total of USD$10 million. Although the March 22 Order providing for sanctions of USD$50,000 per day was vacated after these five settlements were concluded, settlement demands in asbestos lawsuits against ACL that are controlled by the South Carolina Receiver have dramatically increased.

76. It is highly worrisome and problematic that the South Carolina Receiver was appointed in respect of a Quebec-based company, with no activities or operations in the United States, let alone in South Carolina, and with the grounds for the Receivership Order being a discovery sanction for ACL's decision to rely upon the QBCRA – a law in effect in the province of Quebec.

77. The South Carolina Receiver (acting in his purported capacity as ACL) has made gratuitous and highly damaging statements about ACL in public filings, as appears from a copy of the Return to Petition for Writ of Prohibition filed by the South Carolina Receiver in the Supreme Court of the state of South Carolina, communicated herewith as **Exhibit R-12**. For example, the South Carolina Receiver has stated in pleadings submitted in his capacity as ACL that "ACL supplied significant amounts of raw asbestos directly to South Carolina, or to companies for us in South Carolina", that "ACL was aware of the hazards of asbestos by 1930, and ACL knew that asbestos causes cancer by 1946", and that "ACL has employed … improper tactics in asbestos litigation throughout the United States", as appears from Exhibit R-12.

78. These damaging statements are in direct contravention of his duty to protect ACL's interests and are statements that others will surely seek to use as admissions against ACL's interests. Furthermore, if deemed admissions of ACL, these statements jeopardize and potentially void coverage under the London Policies.

79. It is worth noting that the South Carolina Receiver has been previously criticized and sanctioned in another foreign jurisdiction where he has similarly been appointed as receiver by the South Carolina Court and sought to take control over foreign corporations in the context of asbestos litigation.

80. For example, a court in the United Kingdom threatened the South Carolina Receiver with jail time if he continued to claim he was the legal representative of Cape Plc ("**Cape**"), a UK company whose corporate predecessor once mined asbestos in South Africa. The UK court rejected the South Carolina Court's claim of jurisdiction over Cape and held that the South Carolina Receiver had no authority to act on behalf of Cape. Moreover, the UK court held that although the South Carolina Receiver allegedly sought to protect the interests of Cape, in reality he was "doing the opposite", has made admissions in relation to asbestos claims which are damaging to the interests of Cape, and that the South Carolina Receiver's conduct was "shocking" and was acting as an "impostor", the whole as appears from a copy of the judgment of the UK court, communicated herewith as **Exhibit R-13**.

81. The Applicants respectfully highlight the similarities between the situation with Cape and ACL as both striking and concerning in the circumstances, for the South Carolina Receiver, appointed by the South Carolina Court, is purporting to represent and

assume control over the defence of a Quebec company, but has made damaging statements against ACL's interests.

(ii) Washington Proceeding

82. Proceedings have been instituted against 40 corporate defendants, including ACL, for contributing to the death of Mr. Steven Kotzerke, as a result of asbestos exposure due to his job at paper mills and chemical plants (the "**Washington Proceeding**").

83. As part of the Washington Proceeding, ACL was requested by the plaintiff to produce ACL's corporate documents located in Canada and to present a witness that was prepared to testify regarding these Canadian documents. ACL refused to do so, arguing, similarly to the South Carolina Proceeding, that the QBCRA prevents ACL from making such disclosure.

84. Given ACL's refusal, the Washington court ordered that ACL must produce the requested Canadian documents as part of discovery and present a witness as to those documents. ACL filed an interlocutory appeal of that order to the Court of Appeals of the State of Washington and the appellate court, in a decision dated December 12, 2024, denied ACL's appeal and expressly rejected ACL's argument concerning the QBCRA (the "**Washington Appellate Decision**"), as appears from a copy of the decision of Court of Appeals of the State of Washington communicated herewith as **Exhibit R-14**.

85. Despite the Washington Appellate Decision, ACL did not comply with the Washington court's orders compelling discovery on the basis of the QBCRA. CLMI has since learned that ACL had been sanctioned, was at risk of having its defences struck, and that its interlocutory appeal was denied. This untenable situation is part and parcel of the problem with which ACL and CLMI are confronted: either ACL disclose documents in the United States in contravention of the QBCRA, subject to penalties and sanctions in Quebec, or ACL continue to respect the provisions of the QBCRA, subject to default orders and judgments in the United States.

86. ACL maintained its adherence to the QBCRA and, consequently, was held in contempt of court, with a default order having been rendered against ACL on January 29, 2025 (the "**Washington Default Order**"), as appears from a copy of the decision of the Superior Court of the State of Washington (the "**Washington Superior Court**") communicated herewith as **Exhibit R-15**.

87. In accordance with the Washington Default Order, the Washington Superior Court held that ACL is willfully disobeying the orders of the court and is flouting the rule of law in the state of Washington. As a result, ACL was held in contempt and was ordered to pay sanctions in the amount of USD$68,000 (the "**Sanction Damages**").

88. On March 3, 2025, there was a hearing on damages of the plaintiff. At the hearing, ACL was precluded from disputing causation or plaintiff's alleged damages. Therefore, the results of the damages hearing were not based upon the merits, but to punish ACL for relying on the QBCRA.

89. On March 18, 2025, following the hearing on damages, the Washington Superior Court ordered that ACL pay damages in the total amount of USD$16,219,398.25, with

the Washington Default Judgment having been entered on April, 3, 2025, as appears from the court order communicated herewith as **Exhibit R-16**.

90. As of the date of the Application, ACL has not paid the Sanction Damages, despite continuing to incur other costs in regard to the litigation (which costs are ultimately reimbursed largely in part by the Applicants), as appears from the submissions of ACL's counsel in the Washington Proceeding, dated February 25, 2025 and communicated herewith, *en liasse*, as **Exhibit R-17**.

91. While ACL is appealing the USD$16.2 million Washington Default Judgment, ACL refuses to post an appeal bond to stay enforcement of the judgment while its appeal is pending, thereby allowing the judgment to be immediately enforced against ACL or CLMI. Since ACL does not have tangible assets in the United States (and if coverage is not voided), the Applicants might be forced to pay in the near future substantial sums.

92. The risk of the USD$16.2 million Washington Default Judgment, the Sanction Damages and ongoing costs associated with the Washington Proceeding and the South Carolina Proceeding incurred as a result of ACL's litigation strategy, may ultimately fall upon the Applicants.

(iii) California Proceeding

93. ACL was also sanctioned by the Superior Court of Los Angeles County, California, in an asbestos lawsuit alleging exposure to ACL asbestos fibre that purportedly contributed to the death of Mr. Frederick H. Smalley (the "**California Proceeding**").

94. As part of the California Proceeding, ACL was (once again) requested by the plaintiff to produce documents and a witness in the context of discovery. ACL did not do so, on the basis that the QBCRA prevented such disclosures.

95. Nonetheless, the California Superior Court ordered that ACL must produce and communicate the requested documents as part of discovery, as appears from a copy of the order of the California court issued on October 30, 2024, communicated herewith as **Exhibit R-18**.

96. ACL did not comply with the California court's order and, on February 5, 2025, the California court sanctioned ACL an amount of USD$1,000 and ordered ACL to answer the complaint, but denied without prejudice the plaintiffs' motion to impose evidentiary sanctions against ACL, as appears from a copy of the order of the California court issued on February 5, 2025, communicated herewith as **Exhibit R-19**.

(iv) Suits Against General Dynamics Related to ACL

97. Although General Dynamics no longer is the parent corporation of ACL, General Dynamics has been sued by certain plaintiffs in the United States who seek to hold it liable with respect to the products of ACL, based on theories such that General Dynamics is the “alter ego” of ACL, that General Dynamics is the “successor in interest” to ACL or that the corporate separateness between ACL and General Dynamics should not be respected (the “**ACL-Related General Dynamics Claims**”).

General Dynamics may seek insurance coverage under policies covering ACL, including policies subscribed to by Applicants, with respect to the ACL-Related General Dynamics Claims, and any insurance payments made for ACL-Related General Dynamics Claims under policies also covering ACL will reduce the insurance available for asbestos claims against ACL.

5. THE APPLICANTS' PROPOSED RESTRUCTURING

98. In light of the foregoing, the Applicants believe that it has become necessary to seek relief and protection for the Debtor under the CCAA in order to protect ACL, as well as the position of the Applicants and other stakeholders, including the vulnerable individual claimants suffering from asbestos-related diseases, against the situation having befallen the Debtor in the litigation proceedings pending against it in the United States, notably with respect to the South Carolina Receiver.

5.1. CCAA Proceedings by any Interested Person

99. Canadian courts have recognized that creditors, including unsecured creditors, have standing to commence proceedings in respect of a debtor company under the CCAA and have authorized the initiation of such proceedings on numerous occasions, including where there are concerns regarding the capabilities of the debtor company or its management to effectively operate. In the case at hand, ACL is effectively restrained from managing asbestos bodily injury lawsuits where the South Carolina Receiver has taken over control.

100. The commencement of CCAA proceedings has also been regarded as a proper exercise of stakeholder rights where such proceedings are instituted with a view to benefiting the mass of the debtor company's stakeholders. In this case, the Applicants, working alongside ACL, will return to Court in order to have a comprehensive Claims Process approved, as well as an eventual plan of compromise or arrangement in order to efficiently resolve and settle outstanding litigation claims against ACL and General Dynamics, the whole in a manner that maximizes recovery for all such claimants.

101. Canadian courts have allowed interested persons to bring CCAA applications to petition a debtor company to seek protection under the CCAA, with recent cases even allowing equity investors to commence CCAA proceedings as against the debtor company for the purpose of instituting a claims process in the interests of the mass of stakeholders. Indeed, the relevant question is whether the applicant is using the CCAA in a manner that is consistent with its purposes, which is the case here in light of the foregoing:

(a) ACL has been put in the position of choosing to either comply with Quebec law (QBCRA) and violate US court discovery orders, or ostensibly, violate the QBCRA and potentially face civil and criminal penalties in Quebec. Its decision, has resulted in the appointment of a South Carolina Receiver, who does not have the best interest of ACL, CLMI or its stakeholders in mind.

(b) In fact, the South Carolina Receiver’s actions have resulted in increased liabilities and damages payable by ACL and CLMI, not on the basis of valid claims, but rather on the basis of inflated settlements and potential

sanctions/contempt that would result in default judgments. The net result is an increasing erosion of the potential insurance proceeds available to asbestos claimants with valid claims.

(c) ACL is facing important liquidity issues, and is insolvent, and in this regard, the Applicants also have significant concerns that some creditors may seek to take measures against the Debtor which would be detrimental to the value of ACL.

102. For these reasons, ACL and the Applicants are in agreement that these CCAA Proceedings are the best path forward, and will allow them to develop and implement a fair Claims Process, for the benefit of all affected stakeholders, the whole under the supervision of the proposed Monitor.

5.2. Proposed Restructuring

103. The Applicants' proposed restructuring process (the "**Restructuring Process**") contemplates:

(a) the execution of a transparent court-supervised process aimed at stabilizing ACL's operations and ensuring that sufficient liquidity is available via the Interim Facility;

(b) the eventual implementation, in due course, of the Claims Process to ensure that ACL's individual claimants are able to efficiently and judiciously settle their outstanding claims against ACL and General Dynamics;

(c) the implementation of a plan of compromise or arrangement of the asbestos-related claims following the above-mentioned Claims Process; and

(d) the preservation and maximization of the value of ACL for its various stakeholders.

104. The eventual claims process would be prepared in the best interests of all stakeholders and potential stakeholders of ACL, including, among others, the individual claimants in connection with asbestos-related injuries and claims, and the claimants in the Washington Proceeding, the South Carolina Proceeding, and the California Proceeding, in order to:

(a) preserve and maximize the value of ACL for its various stakeholders;

(b) allow for the orderly distribution of funds and compensation which will be available to any claimant or stakeholder entitled to a claim or compensation;

(c) avoid the current situation in which there is a "race to the courts" on the part of plaintiffs in the United States in order to seek individual recovery to the detriment of other claimants;

(d) adjudicate claims against ACL based on their merit, and not based on default or contempt of court, with a view to ensuring that claimants with valid claims are duly compensated in a structured and cost-effective manner; and

(e) devise a simpler, less costly, more effective and more rapid process to deal with all of the claims or potential claims than legal proceedings in Canada and the United States, the multiplicity of which is likely to contribute to the erosion of the value of ACL.

105. The proposed Monitor will occupy a central role in the Restructuring Process, as will the CRO, who will also assist ACL in the Restructuring Process.

106. The Applicants will provide significant support to the Restructuring Process by providing additional financing under the Interim Facility, thereby ensuring that the Restructuring Process is fully-funded and can be implemented in accordance with the proposed First Day Order and Initial Order and that the Debtor's liquidity needs are met during the Restructuring Process.

107. However, for the reasons detailed above, the Applicants are only willing, at this point in time, to provide additional funding in the context of the proposed restructuring.

108. The Applicants believe it is imperative that any further efforts to resolve the litigious claims against the Debtor should be done through an impartial court-supervised process, with the assistance of the proposed Monitor as well as the CRO, and ultimately culminating in the approval of a plan of compromise or a plan of arrangement by the Court.

109. The Applicants respectfully submit that the proposed Restructuring Process under the supervision of the Court, and with the assistance of the proposed Monitor and the CRO, is the best option to effectively and efficiently resolve and settle the various litigation proceedings pending against ACL in order to ensure that all claimants, current and future, are able to submit their claims against ACL in a controlled, structured and impartial process.

110. The Applicants also submit that the proposed Restructuring Process will ensure that no further prejudice is suffered by the Applicants and other stakeholders of ACL.

6. RELIEF SOUGHT UNDER THE PROPOSED ORDERS

111. The Applicants, acting in consultation and with the support of the proposed Monitor, commence these CCAA Proceedings with a view to stabilize the Debtor's activities and operations, to better exercise control over the litigation proceedings instituted against the Debtor, and to initiate the Claims Process, in due course, in order to address, resolve and settle the pending claims against the Debtor and General Dynamics, which process would culminate in the eventual approval of a plan of compromise or a plan of arrangement.

112. Should the Court grant the relief sought in the present Application, the Applicants may also take the opportunity to further restructure the Debtor's business, potentially including through the implementation of a sale process in relation to any remaining mining assets.

113. The Applicants are of the view that the structure and oversight provided by the CCAA process is necessary to implement such measures, in conjunction with managing

competing demands by various creditors and facilitating a restructuring process under the supervision of the Court.

114. In order to properly implement the Restructuring Process, the Applicants request that the following relief be ordered by the Court.

6.1. Applicability of the CCAA to the Debtor

115. As described earlier in the Application, and as will be more fully described in the proposed Monitor's Pre-Filing Report, the Debtor is insolvent given that:

(a) the Debtor is unable to meet its obligations as they generally become due within a reasonable proximity of time;

(b) the Debtor has more liabilities than assets on its balance sheet; and

(c) the aggregate amount of the Debtor's outstanding indebtedness, on a consolidated basis, is greater than the $5,000,000 threshold set out in the CCAA.

116. It is, therefore, respectfully submitted that the Debtor is a debtor company to which the CCAA applies and, as noted above, that the commencement of these CCAA Proceedings is appropriate in the circumstances.

6.2. Appointment and Powers of the Proposed Monitor

117. The Applicants request that Raymond Chabot be appointed by the Court to act as Monitor of ACL in the present CCAA Proceedings.

118. Raymond Chabot is a licensed trustee within the meaning of section 2 of the *Bankruptcy and Insolvency Act* and is not subject to any of the restrictions set out in subsection 11.7(2) of the CCAA.

119. Raymond Chabot has extensive experience in matters of this nature and is well-suited to this mandate and, as such, has confirmed that it consents and is in a position to perform its monitoring duties without any delay.

120. Given the circumstances outlined above, the draft First Day Order and the Initial Order seek the expansion of the proposed Monitor's powers in the context of these CCAA Proceedings to help implement the Restructuring Process for the benefit of the Debtor's stakeholders, working alongside ACL.

121. The Applicants understand that Raymond Chabot, in its capacity as proposed Monitor, will be filing the Pre-Filing Report with this Court in conjunction with the present Application, which will provide, *inter alia*, additional details relating to Raymond Chabot's ability to act as monitor in these CCAA Proceedings, as well as Raymond Chabot's views and recommendations in connection with the present Application and the relief set out herein.

6.3. Stay of Proceedings

122. In light of the Debtor's situation resulting from the claims and litigation proceedings instituted against it, the Applicants urgently require a stay of proceedings in order to ensure that the claims and litigation against the Debtor can be resolved, compromised or otherwise addressed in a single forum, without undue or unjust interference, in a stable and secure environment.

123. The success of the Restructuring Process and the resolution of the various claims and litigation, present and future, against the Debtor will require multi-party negotiations and discussions. The CCAA Proceedings will provide a reasonable and effective forum within which these negotiations and discussions may take place, without prejudice from the multiplicity of additional recourses and actions being instituted against the Debtor. Moreover, the CCAA Proceedings will provide one forum for dealing with all liabilities of the Debtor. Such stability is necessary to preserve the Debtor and the continuity of its activities while an eventual claims process is instituted and conducted.

124. Accordingly, the Applicants hereby request, in respect of the Debtor and the Applicants, a stay of proceedings against the Property, and in respect of the D&Os (the "**Stay of Proceedings**"), for an initial ten (10) day Stay Period.

125. At the "*comeback hearing*", the Applicants will request an extension of the Stay Period until September 5, 2025, so as to preserve the *status quo* and prevent creditors and others from taking any steps to try and better their positions in comparison to other creditors of the Debtor, as well as to allow for the implementation of the Restructuring Process.

126. The Applicants also hereby request that the Stay of Proceedings be extended in favour of General Dynamics. As previously outlined above, General Dynamics is also a signatory to the ISA and insured under the London Policies, by which ACL and General Dynamics are subject to one insurance limit amongst them for asbestos-related claims. As a result, the payment of claims or amounts paid under the London Policies against General Dynamics consequently reduces the limits payable against ACL, and *vice versa*.

127. Therefore, it is critical that the Stay of Proceedings be extended in favour of General Dynamics because failing to do so could result in parties seeking to obtain payment and recovery from General Dynamics to the overall detriment of the Debtor's mass of creditors, given that the amounts payable to stakeholders of the Debtor would decrease in such a case. To avoid such a prejudicial situation to all stakeholders, and to ensure the stability of the present CCAA Proceedings, the Stay of Proceedings must be extended to General Dynamics.

128. The cash flow projections to be attached to Raymond Chabot's report to be filed in advance of the "*comeback hearing*" project that the Debtor will have sufficient cash to fund its projected operating costs until the end of the Stay Period on September 5, 2025, subject to the availability of the Interim Facility.

6.4. COMI Declaration and Recognition of CCAA Proceedings in the US

129. The Debtor and the Applicants each attorn to the jurisdiction of this Court and confirm that the Debtor's "*centre of main interest*" (COMI) is in Québec, Canada, as set out below:

(a) the registered, head office and chief place of business of ACL and the headquarters office of ACL is in Québec, Canada;

(b) ACL's operational and critical strategic decisions are mainly made in Quebec, Canada by senior management of ACL also located in Quebec, Canada;

(c) ACL, as a publicly listed entity trading in Canada, receives all proceedings from share capital issuances and uses such proceeds to fund its activities, including those with respect to litigious claims in the United States;

(d) all material and/or long-term contracts and expenses are subject to the approval of ACL's senior management located in Québec, Canada;

(e) corporate governance and regulatory compliance for ACL is overseen by its management team located in Québec, Canada;

(f) meetings for management and senior staff of ACL are regularly held at its headquarters located in Québec, Canada;

(g) key accounting decisions and all plans, budgets and financial projections are subject to the approval of senior management located in Québec, Canada;

(h) planning, budgeting, management of tax, treasury and cash management and preparation of financial projections for the Applicants is done from Québec, Canada;

(i) all of ACL's employees are based and work in Québec, Canada;

(j) ACL's tangible assets and operations are located in Québec, Canada, including the Serpentine Tailings and the property that ACL leases out to its customers;

(k) the books and records of ACL are located and maintained at ACL's headquarters offices in Québec, Canada; and

(l) Québec is the readily ascertainable jurisdiction by ACL's creditors, considering, among other things, that a substantial amount of claims, both secured and unsecured, are owed to Canadian creditors.

130. In light of the foregoing, the Applicants request a declaration from the Court that the Debtor's COMI is located in Québec, Canada.

131. While the Court will have jurisdiction over the Debtor (subject to its decision and declaration with respect to the latter's COMI), the fact remains that the Debtor will continue to be exposed to a significant amount of lawsuits in the US, particularly with

respect to the substantial amount of asbestos-related lawsuits against ACL throughout the United States (including the Washington Proceeding, the South Carolina Proceeding, and the California Proceeding), during the pendency of these CCAA Proceedings.

132. In order to minimize disruptions and ensure adequate protection to ACL in the United States, and to obtain guidance as to the application of the present CCAA Proceedings in the United States, the Applicants intend to file, if this Application is granted, recognition proceedings in the United States of America pursuant to Chapter 15 of the US Bankruptcy Code.

133. More specifically, pursuant to such recognition proceedings, the Applicants will be seeking, among other things:

(a) recognition of these CCAA Proceedings as a main foreign proceeding pursuant to Chapter 15 of the US Bankruptcy Code;

(b) recognition and enforcement by the US bankruptcy court of the First Day Order, the Initial Order, and any subsequent orders to be rendered by this Court; and

(c) other appropriate relief, as necessary.

6.5. <u>Administration Charge</u>

134. The Professionals will be essential to the Restructuring Process to be undertaken during these CCAA Proceedings.

135. The Applicants' Canadian and US counsel, ACL's Canadian counsel, the Monitor (Raymond Chabot) and the latter's Canadian and US counsel are important contributors to the success of the proposed Restructuring Process, as will be the CRO, in the event his mandate is approved by this Court at the "*comeback hearing*", and the expertise, knowledge, and continued participation of the proposed beneficiaries of the Administration Charge during these CCAA Proceedings will be required in order to successfully undertake and complete the Restructuring Process.

136. Each of the beneficiaries of the Administration Charge will have distinct roles in the Applicant's restructuring and there will be no duplication.

137. Each of the Professionals, including the CRO, has advised that they are prepared to provide or continue to provide professional services in connection with these CCAA Proceedings, provided that they are protected by a super-priority charge over the Property that ranks ahead of all other charges and encumbrances, including all charges ordered by the Court in the context of these CCAA Proceedings.

138. Accordingly, the Applicants will request, at the "*comeback hearing*", the establishment of an Administration Charge in favour of the Professionals in an initial amount of $1.5 million, in order to secure the professional fees incurred to date in connection with the CCAA Proceedings.

139. In this context, the Applicants respectfully submit that the Administration Charge sought is necessary and appropriate, as well as reasonable, under the circumstances and that, accordingly, it should be granted by the Court at the "*comeback hearing*".

6.6. Interim Financing

140. Interim financing will be required during these CCAA Proceedings in order to, notably, conduct the contemplated Restructuring Process.

141. Over the course of the past few weeks, the Applicants together with the proposed Monitor have had several discussions regarding the Debtor's financing needs to ensure the funding of the proposed Restructuring Process, and the payment of the Debtor's post-filing working capital requirements during the pendency of these CCAA Proceedings, and expect to finalize the terms of the financing conditions, such that the parties will request the approval of the Interim Financing Term Sheet at the "*comeback hearing*".

142. In fact, the Interim Lender has confirmed that it is prepared to provide interim financing to the Debtor on the terms and conditions of the Interim Financing Term Sheet to be finalized and entered into between such parties after the initial hearing and prior to the "*comeback hearing*", such that approval of same can be sought at the "*comeback hearing*". A copy of the Interim Financing Term Sheet will be communicated as an exhibit in advance of the "*comeback hearing*" once it is finalized.

143. The Interim Facility will be used, to the extent required, to implement the proposed Restructuring Process, and this, on terms that are fair and reasonable in the circumstances. The Interim Facility will also conditional upon the approval by this Court of the Interim Lender's Charge at the "*comeback hearing*".

6.7. D&O Charge

144. In order to continue to carry on business during the CCAA Proceedings, the Debtor will require the active and committed involvement of its directors, *de facto* directors, as well as certain senior officers (i.e. the Debtor's D&Os).

145. Although the Applicants are informed by the Debtor that it intends to comply with all applicable laws and regulations, including the timely remittance of deductions at source and federal and provincial sales taxes, the Debtor's D&Os are nevertheless concerned about the potential for their personal liability in the context of the present CCAA Proceedings.

146. Given the current financial situation of the Debtor, these D&Os require the assurance that ACL will be in a position to indemnify them for all liabilities which they may incur in their capacity as D&Os (if any), after the commencement of these CCAA Proceedings.

147. Accordingly, the Applicants will request, for the benefit of the Debtor's D&Os, the establishment of a D&O Charge in favour of the D&Os in an initial amount of $300,00, in order to secure the Debtor's indemnification obligations towards them, for claims which could potentially arise during the Stay Period.

148. Absent the establishment of the D&O Charge, the Applicants and the Debtor are concerned that one or more of the Debtor's D&Os will resign from their posts, which would, in all likelihood, jeopardize the contemplated Restructuring Process, including the conduct of an eventual claims process, to the detriment of its stakeholders.

6.8. Approval of the CRO

149. The CRO will be retained to assist the Applicants with the Restructuring Process. The Applicants are seeking the approval of the appointment of the CRO in these CCAA Proceedings.

150. The Applicants intend to finalize an engagement letter with the CRO in anticipation of the comeback hearing, pursuant to which, it is anticipated that the CRO will:

(a) Work with ACL and CLMI to establish and implement a work plan for the restructuring and carry out all necessary steps to achieve a successful and timely restructuring;

(b) In consultation with ACL, CLMI and the Monitor, direct responses to information requests by the Company's various stakeholders on a timely basis;

(c) Assist in the restructuring, particularly with respect to ACL's recognition proceedings pursuant to Chapter 15 of the US Bankruptcy Code, as well as the development and implementation of the Claims Process;

(d) Report to the CCAA Court and the Chapter 15 US Court in respect of issues arising in the CCAA proceedings, including by swearing affidavits, as necessary, in the insolvency proceedings in Canada and the United States on behalf of ACL; and

(e) provide such other services as requested or directed by the Applicants or ACL, which services are not duplicative of work others are performing in the present CCAA Proceedings.

151. The CRO is highly experienced in restructuring proceedings, and the implication of the CRO in the present CCAA Proceedings will be essential to the success of the Restructuring Process, as the CRO will facilitate the conduct of the CCAA proceedings, and in particular, the limited management functions required from the company.

152. The Monitor, the Debtor and the Applicants are supportive of the appointment of the CRO.

7. CONCLUSIONS

153. For the reasons set forth above, the Applicants believe it is both appropriate and necessary that the relief being sought be granted, and that this requested relief is consistent with the remedial objectives of the CCAA.

154. The Applicants seek to implement the Restructuring Process in good faith, with regard to the stakeholders of the Debtor, namely through the implementation, in due course, of a Claims Process to efficiently and effectively settle the litigation and claims pending against ACL in a comprehensive and structured fashion, and which process would ultimately be approved by a plan of compromise or a plan of arrangement voted on by the Debtor's stakeholders.

155. All parties who may be affected by the present motion will be served with the present Application.

156. Considering the urgency of the situation, the Applicants respectfully submit that the notices given for the presentation of this Application are proper and sufficient, and the Applicants therefore respectfully submit that this Application should be granted in accordance with its conclusions.

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

GRANT the Application.

ISSUE orders substantially in the form of:

a) the draft First Day Order communicated as Exhibit R-1 at the first day hearing; and

b) the draft Initial Order communicated as Exhibit R-2 at the comeback hearing.

WITHOUT COSTS, save and except in case of contestation.

MONTRÉAL, May 5, 2025

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SWORN STATEMENT

I, the undersigned, Thomas Ryan, having my principal place of business at 125 High Street, 10th Floor, High Street Tower, Boston MA 02110, solemnly declare the following:

1. I am the President of Resolute Management Inc.; and

2. All the facts alleged in the *Application for the Issuance of a First Day Initial Order and an Amended and Restated Initial Order* are, to the best of my knowledge, true.

AND I HAVE SIGNED

Thomas Ryan

Solemnly declared before me, by technological means,
at Montreal, on the 5th day of May 2025

#167833

Commissioner for Oaths for the Province of Québec

NOTICE OF PRESENTATION

TO: Service List

TAKE NOTICE that the *Application for the Issuance of a First Day Initial Order and an Amended and Restated Initial Order* will be presented for adjudication to the Honourable Jean-François Émond, J.S.C., of the Superior Court of Québec, Commercial Division, District of Québec, at the Québec Courthouse located at 300 Jean-Lesage Blvd., on **May 6, 2025, at 9:30 AM, in room 3.37.**

DO GOVERN YOURSELVES ACCORDINGLY.

MONTRÉAL, May 5, 2025

Stikeman Elliott

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Attorneys for Applicants

S U P E R I O R C O U R T
(Commercial Division)

Nº. :

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF FRONTENAC

IN THE MATTER OF THE PLAN OR ARRANGEMENT AND COMPROMISE OF:

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON
-and-
TENECOM LIMITED
-and-
THE OCEAN AND MARINE INSURANCE COMPANY LIMITED
-and-
NRG VICTORY REINSURANCE LIMITED
-And-
THE SCOTTISH LION INSURANCE COMPANY LTD.
Applicants
-and-
ASBESTOS CORPORATION LIMITED
Debtor
-and-
RAYMOND CHABOT INC.
Proposed Monitor

BS0350 **File:** 158733-1001

APPLICATION FOR THE ISSUANCE OF A FIRST DAY INITIAL ORDER AND AN AMENDED AND RESTATED INITIAL ORDER
(Sections 9, 11, 11.001, 11.02, 11.03, 11.2, 11.52, 11.7 and 23 of the *Companies' Creditors Arrangement Act*)

ORIGINAL

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EXHIBIT 2

PRE-FILING REPORT

C A N A D A
PROVINCE OF QUEBEC
DISTRICT OF FRONTENAC
No. COURT:

S U P E R I O R C O U R T
"*Companies' Creditors Arrangement Act* (RSC 1985, c. C-36), as amended"

IN THE MATTER OF THE PLAN OF ARRANGEMENT AND COMPROMISE OF

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON

- and -

TENECOM LIMITED (as successor to Winterthur Swiss Insurance Company formerly known as Accident & Casualty Insurance Company of Winterthur, Switzerland)

- and -

THE OCEAN MARINE INSURANCE COMPANY LIMITED (as successor to liabilities of Commercial Union Assurance Company Limited, The Edinburgh Assurance Company, The Indemnity Marine Assurance Company Limited, The Northern Assurance Company Limited, The Road Transport & General Insurance Company Limited, United Scottish Insurance Company Limited, and The Victoria Insurance Company Limited)

- and -

NRG VICTORY REINSURANCE LIMITED (as successor to liabilities of New London Reinsurance Company Limited)

- and-

THE SCOTTISH LION INSURANCE COMPANY LIMITED.

Applicants

- and -

ASBESTOS CORPORATION LIMITED

Debtor

- and -

RAYMOND CHABOT INC.

Proposed Monitor

PRE-FILING REPORT BY RAYMOND CHABOT INC.
IN ITS CAPACITY AS PROPOSED MONITOR

TO THE HONOURABLE JUSTICE JEAN-FRANÇOIS ÉMOND OF THE SUPERIOR COURT SITTING IN THE COMMERCIAL DIVISION IN AND FOR THE JUDICIAL DISTRICT OF FRONTENAC:

In connection with the filing of an *Application for the Issuance of a First Day Initial Order, and an Amended and Restated Initial Order* (the "**Application**") under the *Companies' Creditors Arrangement Act* ("**CCAA**"), we respectfully submit to you the Pre-filing report of the Proposed Monitor.

Signed in Montréal, on May 5, 2025.

RAYMOND CHABOT INC.
Proposed Monitor

Jean Gagnon, CPA, CIRP, LIT

RAYMOND CHABOT INC.
Proposed Monitor

Ayman Chaaban, CPA, CIRP, LIT

1. INTRODUCTION

1.1 This report ("**Pre-filing Report**") has been prepared in connection with the filing of the Application seeking the issuance of a first day initial order (the "**First Day Order**") and an amended and restated initial order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act* (the "**CCAA**").

1.2 The main parties involved in the CCAA proceedings can be summarized as follows:

1.2.1 Asbestos Corporation Limited ("**ACL**" or the "**Debtor**"): ACL operates in the mining sector and is the debtor. Its business and affairs are further detailed in section 2 of this report. CLMI (defined below) subscribed to one or more excess liability policies that were issued to General Dynamics Corporation, certain of which provide insurance to ACL, a former subsidiary of General Dynamics Corporation. ACL's common shares trade on the NEX Board of TSX Venture Exchange under the stock symbol AB.H.

1.2.2 General Dynamics Corporation ("**GDC**"): GDC was the parent company of ACL from 1969 to 1982, during which time ACL was an insured party under certain of GDC's general liability insurance policies, which are occurrence policies. CLMI subscribed to one or more excess liability policies that were issued to GDC and provide insurance to GDC (the "**London Policies**"). The London Policies insure both ACL and GDC, with only one set of insurance limits available. This means that payment of amounts owing pursuant to a lawsuit against ACL reduces the limits available to pay lawsuits against GDC, and vice versa.

1.2.3 Mazarin Inc. ("**Mazarin**"): Mazarin is a reporting issuer and is ACL's parent company. Mazarin holds a majority of the shares of ACL. Mazarin's shares trade on the NEX Board of TSX Venture Exchange under the stock symbol MAZ.

1.2.4 Certain Underwriters at Lloyd's, London, Tenecom Limited, The Ocean Marine Insurance Company Limited, NRG Victory Reinsurance Limited and The Scottish Lion Insurance Company Limited (collectively, the "**CLMI**"): CLMI are insurers of ACL and GDC (as described above).

1.2.5 Asbestos-related claimants ("**Asbestos Claimants**"): persons alleging bodily injury from exposure to asbestos fibres produced and sold by ACL and incorporated into asbestos-containing products.[1]

1.2.6 Directors and officers of ACL ("**D&O**"): directors and officers of ACL.

1.2.7 Raymond Chabot Inc. (the "**Proposed Monitor**" or "**RCI**"): the proposed Monitor under the Debtor's CCAA proceedings.

1.2.8 RC Benson Consulting Inc. (the "**CRO**"): the proposed chief restructuring officer under the Debtor's CCAA proceedings.

1.2.9 Mr. Peter D. Protopapas (the "**South Carolina Receiver**"): South Carolina court appointed receiver. On September 8, 2023, the South Carolina

[1] The definition of claim and claimant for the purpose of the CCAA proceedings will be defined in an upcoming Claim Process Order, if granted.

Court ordered the appointment of Mr. Peter D. Protopapas of the South Carolina law firm of Rikard & Protopapas, as receiver of ACL with respect to certain powers, rights and assets, specifically, the power and right to control the defense of asbestos suits against ACL in the United States and the power and right to deal with its insurers with respect to those suits.

1.3 The report is divided into the following sections:

1.3.1 **Section 1**: Introduction

1.3.2 **Section 2:** The Debtor's business and affairs

1.3.3 **Section 3 :** Proposed Restructuring Process

1.3.4 **Section 4 :** Stay of Proceedings

1.3.5 **Section 5 :** Interim Financing

1.3.6 **Section 6:** Appointment and powers of the Proposed Monitor

1.3.7 **Section 7**: Center of main interests' declaration and recognition of CCAA proceedings in the United States

1.3.8 **Section 8**: Conclusion and recommendations

2. THE DEBTOR'S BUSINESS AND AFFAIRS

Corporate structure

2.1 ACL is a corporation incorporated under the *Canada Business Corporations Act* and was founded in 1925.

2.2 ACL is a reporting issuer in the provinces of Québec, Alberta, British Columbia and Ontario, with Québec being ACL's principal jurisdiction. ACL's common shares trade on the NEX Board of TSX Venture Exchange under the stock symbol AB.H.

2.3 ACL is a subsidiary of Mazarin, which holds a majority of the shares of ACL.

2.4 ACL operates its business at 840 Ouellet Blvd. in Thetford Mines, Québec, where its head office is located.

2.5 All of ACL's assets and operations are in Québec, Canada.

Overview of the business of the Debtor

2.6 For almost a century, ACL operated open pit chrysotile mines for the purpose of asbestos mining in Québec. ACL's asbestos mining-related operations and activities produced millions of tons of serpentine tailings which contain several minerals, including the strategic minerals of magnesium and nickel (the "**Serpentine Tailings**"). ACL currently owns 8 mining sites located in Québec.

2.7 In or around 1986, ACL halted its asbestos-mining activities but nevertheless continues to operate. Currently, ACL describes its operations and business plan as including the following activities:

- the valorization and exploitation of the Serpentine Tailings to extract the minerals that are located in the Serpentine Tailings;
- the promotion of the sustainable development of ACL's properties, and the restoration and revitalization of all of its mining sites and buildings in agreement with various regional stakeholders, while also ensuring the exploitation of the Serpentine Tailings;
- the maintenance of warehouses and other buildings available for rent; and
- the innovation and implementation of new energy sources, such as wind and solar power, with the potential for carbon dioxide sequestration from the carbonation of its mine tailings.

2.8 Presently, ACL's activities, also include, namely dealing with the numerous claims that it is facing in the United States as a result of ACL's former activities relating to asbestos mining. These claims have been filed by persons alleging bodily injury from exposure to asbestos fibers produced and sold by ACL and incorporated into various products, including namely building materials.

2.9 ACL is also exposed to certain liquidity risks due to the operating costs and to the non-recurring nature of some of its revenues. The financial situation of the Debtor is presented in more detail below.

2.10 As at April 30, 2025, ACL has approximately 11 employees which are located and employed in Québec. The employees are not unionized. As of December 2024, ACL decided to terminate its defined-benefit pension plan. The plan was closed to new members since December 2023. The plan administrator purchased annuities for all participants and beneficiaries who were receiving a pension from the plan, and whose annuities had not been previously purchased for an insurer.

2.11 The Debtor's gross payroll obligations, including commissions, for the fiscal year 2024 amounted to approximately $1,334,000 CAD.

Claims and litigation proceedings against ACL

(i) The Interim Settlement Agreement

2.12 On August 24, 1998, an interim settlement agreement was made by and between ACL and GDC (collectively, the "**Assured**") and the Applicants (as amended from time to time, the "**ISA**"). The ISA, filed confidentially under seal, sets forth an arrangement among the parties thereto by which CLMI, under the London Policies, shall reimburse ACL for their several shares of amounts paid by or on behalf of ACL for Defence Costs and Indemnity Payments attributable to Asbestos-Related Bodily Injury Claims (as such terms are defined in the ISA).

2.13 Indeed, pursuant to the ISA, the Assured and the Applicants agreed to provide for, among other things, the apportionment of indemnity payments and defence costs attributable to certain asbestos-related bodily injury claims asserted against ACL by way of claims or lawsuits instituted against ACL.

2.14 The London Policies insure both ACL and GDC, and only one set of insurance limits

is available. This means that payment of amounts owing pursuant to a lawsuit against ACL reduces the limits available to pay lawsuits against GDC, and *vice versa*.

2.15 Over the course of the past decades, ACL has been the subject of thousands of asbestos-related claims, and, until recently, ACL was fully responsible for resolving these asbestos-related claims.

2.16 The Applicants are involved in reimbursing ACL for these same asbestos-related claims, solely in their capacity as insurers of ACL. More specifically, in accordance with the terms of the ISA and of the London Policies, certain Applicants have been reimbursing defence costs incurred by ACL in relation to the claims and have also reimbursed certain settlements agreed upon between ACL and certain claimants.

(ii) South Carolina Proceeding and Receivership Order

2.17 *Tibbs v. 3M Co.* is an asbestos personal-injury action filed in South Carolina state court in which ACL was named as a defendant (the "**South Carolina Proceeding**").

2.18 On July 19, 2023, the Court of Common Pleas of Richland County (the "**South Carolina Court**"), South Carolina, ordered ACL to fully answer discovery and to provide a corporate representative for deposition, failing which ACL would be held in contempt of court.

2.19 ACL's position was that as a Québec Corporation with all of its books and records in Québec, it could not comply with the discovery order, since such compliance would place ACL in violation of the *Québec Business Concerns Record Act* ("**QBCRA**"). The QBCRA is a Québec law that prohibits the removal from Québec of documents relating to any business concern in Québec pursuant to any requirement of a judicial authority outside the province (the QBCRA is attached to this report as **Schedule A**). ACL asserted that complying with the order would have required to violate its home law and risk potential civil and criminal penalties in Québec.

2.20 On September 8, 2023, the South Carolina Court held ACL in contempt, and sanctioned ACL by striking its pleadings such that it was in default (the "**South Carolina Contempt Orde**r"). Pursuant to the South Carolina Contempt Order, the South Carolina Court appointed Mr. Peter D. Protopapas of the South Carolina law firm of Rikard & Protopapas as receiver of ACL.

2.21 As appears from a copy of the receivership order (the "**Receivership Order**"), the South Carolina Receiver is purported to be granted the rights, powers and authority to, among other things:

(a) fully administer all insurance assets of ACL and any subsidiaries;

(b) accept service of process on behalf of ACL;

(c) engage defence counsel on behalf of ACL;

(d) assume control of the defence of all asbestos bodily injury litigation matters pending in the United States against ACL; and

(e) take any and all steps necessary to protect the interests of ACL whatever they

may be.

2.22 Thus, as a sanction for ACL's decision to respect the laws of its home jurisdiction, the South Carolina Receiver has seized the right of ACL's duly appointed directors and officers to control its defence of asbestos litigation in the United States and to seek insurance coverage from its insurers, despite the fact that ACL has no activities or operations in the United States, let alone in South Carolina.

2.23 On September 13, 2023, ACL appealed the Receivership Order and the South Carolina Contempt Order to the South Carolina Court of Appeals, which in turn certified the appeal for direct consideration by the highest court in the state, the South Carolina Supreme Court, which appeal is currently pending. However, the appeal has not stayed the Receivership Order and actions of the South Carolina Receiver. As a result, asbestos-related bodily injury claims continue to be filed and pursued, with the South Carolina Receiver accepting service of some (but not all) claims. The Monitor understands that the parties are awaiting judgment.

2.24 The South Carolina Receiver has now accepted service for ACL and/or taken control of the asbestos personal injury cases against ACL in South Carolina. He has insisted that he be treated as the insured by ACL's insurers, and, purporting to act for ACL, has filed lawsuits against many of those insurers. Additionally, the South Carolina Receiver had not retained counsel for ACL in some asbestos personal injury cases, opening the door to potential default judgments for hundreds of millions of dollars that plaintiffs may then seek to execute directly against ACL and/or the Applicants.

2.25 This same South Carolina Receiver has been criticized and sanctioned in another foreign jurisdiction for similarly taking control over a foreign corporation in the context of asbestos litigation. For example, in the United Kingdom, the UK High Court ordered the South Carolina Receiver to cease claiming that he was the legal representative of Cape Plc ("**Cape**"), a UK company whose corporate predecessor once mined asbestos in South Africa. In that matter, the South Carolina Court had assigned Mr. Protopapas as Receiver over Cape. The UK court rejected the South Carolina Receiver's claim of jurisdiction over Cape, since Cape never did business in South Carolina, and held that the South Carolina Receiver had no authority to act on behalf of Cape. Moreover, the UK court held that although the South Carolina Receiver's function was allegedly to protect the interests of Cape, in reality he had done the opposite by taking steps that positively damaged Cape's interests.

(iii) Washington Proceeding

2.26 *Kotzerke v 3M Co*. is another asbestos personal-injury action in which ACL was named as a defendant (the "**Washington Proceeding**").

2.27 As part of the Washington Proceeding, the plaintiff requested that ACL to produce its corporate documents located in Québec and to present a witness to testify on these Canadian documents. ACL's position was that it could not comply, since the QBCRA prevents such disclosure.

2.28 ACL filed an interlocutory appeal of that order to the Court of Appeals of the State

of Washington and the appellate court, in a decision dated December 12, 2024, denied ACL's appeal and expressly rejected ACL's argument concerning the QBCRA (the "**Washington Appellate Decision**").

2.29 ACL did not comply with the Washington Appellate Decision on the basis of the QBCRA.

2.30 As a result, ACL was held in contempt of court in the state of Washington on January 29, 2025. A default order was rendered against them (the "**Washington Default Order**"), and monetary sanctions in the amount of USD$68,000 were issued (the "**Sanction Damages**").

2.31 On March 3, 2025, the plaintiff presented its damage claim in the Washington Proceeding. However, ACL was precluded from disputing causation or plaintiff's alleged damages. Therefore, the results of this hearing were not based upon the actual merits of the case following a contradictory debate, but rather served to punish ACL for relying on the QBCRA.

2.32 On March 18, 2025, following the hearing on damages, the Washington Superior Court ordered that ACL pay damages in the total amount of USD$16,219,398.25, with a monetary judgment subsequently entered on April 3, 2025 (the "**Washington Default Judgment**").

(iv) California Proceeding

2.33 ACL was also sanctioned by the Superior Court of Los Angeles County, California, in an asbestos lawsuit alleging exposure to ACL asbestos fiber that purportedly contributed to the death of Mr. Frederick H. Smalley (the "**California Proceeding**").

2.34 As part of the California Proceeding, ACL was (once again) requested by the plaintiff to produce documents and a witness in the context of discovery. ACL did not do so, on the basis that the QBCRA prevented such disclosures.

2.35 Nonetheless, despite the QBCRA, the California Superior Court ordered that ACL must produce and communicate the requested documents as part of discovery.

2.36 ACL did not comply with the California Superior Court's order, again on the basis of its required compliance with the QBCRA, and, on February 5, 2025, the California Superior Court sanctioned ACL an amount of USD$1,000 and ordered ACL to answer the complaint, but denied without prejudice the plaintiffs' motion to impose evidentiary sanctions against ACL.

Financial situation of the Debtor

2.37 The table below summarizes the financial statements of the Debtor for the years ending on December 31, 2021, 2022, 2023 and 2024.

2.38 The table below is a compilation of the financial statements available to the public through SEDAR+, the secure web-based system used by all market participants to file, disclose and search for information in Canada's capital market. This work does not constitute an audit or review of the financial statements in accordance

with generally accepted auditing standards established by CPA Canada or by the American Institute of Certified Public Accountants (AICPA), and consequently, we do not express any opinion on these financial statements.

2.39 Statements of Financial Position:

(In thousands of $ - audited)	2024-12-31	2023-12-31	2022-12-31	2021-12-31
Assets				
Cash and restricted cash	2 392	1 476	1 497	1 057
Accounts receivable	4 853	3 026	4 690	3 641
Income taxes recoverable	892	873	888	885
Current portion of investments	915	950	1 600	1 685
Others	153	121	920	903
Prepaid expenses	153	121	111	94
Assets held for sale	-	-	809	809
	9 205	6 446	9 595	8 171
Investments	31 674	27 702	22 155	24 416
Note receivable form a company under common control	645	598	552	516
Security deposits receivable	242	167	9	9
Property, plant and equipment	1 229	1 261	356	330
	42 995	**36 174**	**32 667**	**33 442**
Liabilities				
Accounts payable and accrued liabilities	2 409	2 266	1 856	1 885
Interest on note payable to the parent company	-	-	-	-
Current portion of litigation-related liabilties	3 284	1 956	3 329	1 852
	5 693	4 222	5 185	3 737
Litigation-related liabilities	26 129	23 507	22 671	23 804
Notes payable to related companies	28 087	26 339	24 553	25 337
Post-employment benefit liabilties	407	407	404	471
Others	715	425	38	6
	61 031	54 900	52 851	53 355
Shareholder' deficiency				
Capital stock	33 312	33 312	33 312	33 312
Deficit	(51 348)	(52 038)	(53 496)	(53 225)
	(18 036)	(18 726)	(20 184)	(19 913)
	42 995	**36 174**	**32 667**	**33 442**

2.40 A more detailed description of the Debtor's main balance sheet items is provided below.

2.41 Cash and restricted cash: As of December 31, 2024, available cash totals $780,000 and restricted cash totals $1,612,000. Restricted cash consists of highly liquid investments with original maturity of three months or less at the acquisition date and for which use is restricted to the settlement of expenses arising from Asbestos Claimants.

2.42 Accounts Receivable: As of December 31, 2024, the accounts receivable primarily comprise amounts due from insurers ($3.5 million) in connection with various litigation cases, but also from trade receivable ($1.3 million).

2.43 Investments: As at December 2024, investments evaluated at fair value are composed of shares ($12,1 million), mutual funds ($12,8 million) and governments bonds and treasury bills ($7,7 million).

As per the financial statements of ACL, the use of the investments is exclusively restricted to the settlement of expenses arising from asbestos lawsuits and for

maintaining the commercial existence of ACL, companies under common control and Mazarin.

2.44 Property, plant and equipment: consist of, among other things, land, building, plant equipment and office equipment.

2.45 Accounts payable and accrued liabilities: consist of fees and compensation related to litigation payable ($1,3 million) and trade payable ($1,1 million). Accounts payable and accrued liabilities: consist of fees and compensation related to litigation payable ($1,3 million) and trade payable ($1,1 million). In addition to those accounts payable and accrued liabilities, the debtor executed on May 4th, 2025 a promissory note in the amount of US $300,000 in favour of CLMI and other insurance companies in order to fund a retainer of counsel engaged in the United States to prosecute ancillary proceedings under Chapter 15 of the United States Bankruptcy Code.

2.46 Litigation-related liabilities:

- ACL is the subject of litigation, as persons claiming exposure to asbestos fiber or asbestos-containing products have filed numerous actions in the United States for damages due to bodily injury allegedly caused by asbestos exposure. CLMI have, as of December 31, 2024, reimbursed their share of settlements that have compensated several thousand claims instituted against ACL, while thousands of claims have also been dismissed, and others pending. The breakdown of the number of claims that are settled, dismissed and pending are attached herewith as **Schedule B (under seal)**, along with the total costs of expenses and indemnities reimbursed to ACL in relation to these claims.
- Litigation-related liabilities result from lawsuits and claims of persons alleging bodily injury attributable to their exposure to asbestos fibers. Provisions for litigation are recognized when ACL has a present legal or constructive obligation as a result of past events, when it is likely that an outflow of resources will be required to settle the obligation, and when the amount can be reliably estimated.
- As of December 31, 2024, the Debtor's declared indebtedness for litigation-related liabilities was approximately $29,413,000, of which approximately $3,284,000 consists of amounts currently owed due to litigious proceedings in the United States, and $26,129,000 of non-current liabilities. Additional monetary judgments have been rendered since December 31, 2024, including the Washington Default Judgment (in the amount of USD$16,219,398.25).
- Litigation-related liabilities include (i) two (2) asbestos suits filed against ACL in Louisiana that are also filed against CLMI as direct actions, and (ii) a USD$151 million suit filed against ACL in which it is alleged that ACL and its insurance carriers conspired to conceal insurance information.
- At the same time, ACL has been subject to sanctions in the United States due to its respect of the provisions of the QBCRA, including by way of the Washington Default Judgment, and increasing litigation debts owed (if coverage is not voided) towards the Applicants. ACL's position that the QBCRA prevents it from producing its corporate documents from Canada in

the United States in the context of the litigation taking place there, has also resulted in the appointment of the South Carolina Receiver as a discovery sanction. The South Carolina Receiver subsequently instituted multiple declaratory actions matters against various carriers, including the Applicants, before the South Carolina Court that seek the following findings:

- that the policies are "property" of the South Carolina Receiver;
- that the Applicants must defend and indemnify ACL even though the Applicants have been reimbursing ACL for defence and indemnity for at least twenty-five (25) years; and
- that the rules governing the payment of defence and indemnity are directly contrary to the terms of the ISA negotiated with ACL, and which have existed for over twenty-five (25) years.

2.47 The following excerpt from Note 19 (Contingencies) of ACL's financial statements provides additional details on asbestos related litigation contingencies:

"Asbestos lawsuits

Persons claiming exposure to asbestos fibre or to asbestos-containing products have filed numerous actions in the United States for bodily injury against various suppliers of asbestos fibre and manufacturers of asbestos-containing products, including the Corporation, which operated asbestos mines.

The Corporation cannot reasonably estimate the extent of the lawsuits related to this litigation matter due to the absence of allegations in connection with damages claimed in these proceedings, and to the inability to assess the creditworthiness of co-defendants and their insurers, to estimate the number of potential claims and to predict the development of liability theories applicable to such proceedings. In management's opinion, even if they are partially reimbursed by the insurers, settlement-related expenses and defence fees for claims relating to asbestos litigation could have a material effect on the Corporation's results of operations and financial position over the coming fiscal years.

However, according to the opinion of legal advisers consulted, even if a default judgment were rendered against the Corporation in the United States, such judgment could not be enforced against the subsidiaries prior to its verification or recognition by a competent court in the province of Quebec; this court could refuse such recognition due to certain statutory provisions of the Civil Code of Quebec."

2.48 Notes payable to related companies: As at December 31, 2024, the Debtor had one main secured creditor, namely its parent company, Mazarin, to whom ACL owes approximately $26,729,000, secured by an immovable hypothec up to the principal amount of $70,000,000 registered on the land register in the land book for the registration division of Thetford on January 28, 1986, under number 110 884, and in the land book for the registration division of Beauce on February 17, 1986, under number 368 108 (the "**Trust Deed**"). On May 11, 2015, the Immovable Hypothec resulting from the Trust Deed was renewed and was registered, on May 15, 2015, in the land register under numbers 21 517 957, 21 524 569 and 21 533 174.

2.49 The Debtor has more liabilities than assets on its balance sheet and has an

accumulated deficit of $51,35 million, without considering potential liabilities related to pending and future asbestos-related litigation.

2.50 Statements of Income (Loss):

(In thousands of $ - audited)	FY24	FY23	FY22	FY21
Revenue				
Revenue from mining properties	5 509	3 085	1 561	2 075
Investment income	4 069	1 899	(282)	3 047
Parent company's management fees	66	66	66	66
Other	89	83	20	115
	9 733	5 133	1 365	5 303
Operating expenses				
Mining properties' ownership and management expenses	3 486	1 889	1 083	986
Administrative expenses	1 248	862	825	763
Litigation management fees (recovery)	2 244	(784)	(244)	2 884
Interest on notes payable to the parent company	1 795	1 686	-	605
	8 773	3 653	1 664	5 238
Income (loss) before income taxes	**960**	**1 480**	**(299)**	**65**
Income (recovery) tax expense	291	40	38	6
Net income (loss) for the year	**669**	**1 440**	**(337)**	**59**
Post-employment benefit actuarial gains	21	18	66	46
Comprehensive income (loss) for the year	**690**	**1 458**	**(271)**	**105**

2.51 ACL's revenue streams are derived from two primary sources: the company's mining properties and its investments.

2.52 Revenue from mining properties includes:

- Building rental income;
- Earnings from a demonstration plant;
- Royalties.

2.53 Revenue from investments includes:

- Interest revenues;
- Dividends;
- Gain on sale of investments;
- Net change in fair value of investments.

As previously stated, the use of the investments is exclusively restricted to the settlement of expenses arising from asbestos lawsuits and for maintaining the commercial existence of ACL, companies under common control and Mazarin.

2.54 The main operating expenses incurred by ACL consist of:

- Mining properties operational costs, including maintenance and repair expenses, monitoring, and demonstration plant;
- Administrative expenses, mainly salaries and professional fees;
- Litigation management fees (or recovery) associated with various legal cases, including from Asbestos Claimants, representing 23% of its revenues;
- Interest payable to the Parent Company on its secured indebtedness, which

is contingent upon the cash flow generated by ACL. According to the notes in the financial statements, this interest appears to be capitalized.

2.55 ACL appears to generate little to no net cash-flow from its operations since 2021.

3. PROPOSED RESTRUCTURING PROCESS

3.1 The Applicants proposed restructuring process (the "**Restructuring Process**") contemplates:

- the execution of a transparent court-supervised process aimed at stabilizing ACL's operations and ensuring that sufficient liquidity is available via the Interim Facility (as defined below);
- the eventual implementation, in due course, of a claims process to ensure that ACL's individual Asbestos Claimants can efficiently and judiciously settle their outstanding claims against ACL, among others.

  A claims process under the CCAA will allow these claims to be channeled into a fair and efficient claims process in Canada, where the interests of both Debtor and creditors can be appropriately balanced;
- the implementation of a plan of compromise or arrangement of the asbestos-related claims following the above-mentioned claims process; and
- the preservation and maximization of the value of ACL for its various stakeholders.

3.2 The eventual claims process will be crafted taking into consideration the best interests of all stakeholders and potential stakeholders of ACL, including, among others, the Asbestos Claimants in connection with asbestos-related injuries and claims, in order to:

- preserve and maximize the value of ACL for its various stakeholders;
- allow for the orderly distribution of funds and compensation which will be available to any claimant, or stakeholder entitled to a claim or compensation;
- avoid the current situation in which there is a "race to the courts" on the part of plaintiffs in the United States in order to seek individual recovery to the detriment of other claimants;
- adjudicate claims against ACL based on their merit, and not based on default or contempt of court, with a view to ensuring that claimants with valid claims are duly compensated in a structured and cost-effective manner; and
- devise a simpler, less costly, more effective and more rapid process to deal with all the claims or potential claims than legal proceedings in Canada and the United States, the multiplicity of which is likely to contribute to the erosion of the value of ACL and recovery for the claimants.

3.3 The Proposed Monitor will occupy a central role in the Restructuring Process, as will the CRO, who will also assist in the Restructuring Process.

3.4 The proposed Restructuring Process will ensure that no further prejudice is

suffered by any and all of the stakeholders of ACL.

4. STAY OF PROCEEDINGS

4.1 A stay of proceedings is the primary tool that allows the CCAA to achieve its restructuring objective and is central to the Restructuring Process.

Debtor

4.2 Considering the Debtor's situation resulting from the claims and litigation proceedings instituted against it, the Applicants require a stay of proceedings in order to ensure that the claims and litigation against the Debtor can be resolved, compromised or otherwise addressed in a single forum, without undue or unjust interference, in a stable and secure environment.

4.3 The success of the Restructuring Process and the resolution of the various claims and litigation, present and future, against the Debtor will require multi-party negotiations and discussions. The CCAA proceedings will provide a reasonable and effective forum within which these negotiations and discussions may take place, without prejudice from the multiplicity of additional recourses and actions being instituted against the Debtor. Moreover, the CCAA proceedings will provide one forum for dealing with all liabilities of the Debtor. Such stability is necessary to enhance the success of the Restructuring Process.

4.4 Accordingly, the Monitor supports the Applicants' request for a stay of proceedings against the Debtor and its assets, undertakings and properties.

D&O

4.5 The Applicants request that the Stay of Proceedings be extended in favour of ACL's directors and officers. The directors and officers of a Debtor company play an essential role in the CCAA Restructuring Process, and their active participation is necessary to its success. Extending the Stay of Proceedings to ACL's directors and officers will serve to encourage them to remain in their positions throughout the Restructuring Process.

The Applicants

4.6 The Applicants are also requesting that the Stay of Proceedings be extended in favour of CLMI, and its third-party claims administrator Resolute Management Inc., as ACL's insurers. CLMI is a significant stakeholder in the Restructuring Process and will play an important role in negotiating a settlement. Given that some lawsuits are instituted directly against CLMI in the United States, extending the stay of proceedings to CLMI is in the interests of the fair administration of justice.

4.7 A single claims resolution process in Canada where the Debtor is headquartered, and its senior management, tangible assets and operations are located is the most efficient and equitable way to resolve the claims for all stakeholders as it will promote fairness among all claimants and avoid a rush to the courthouse in the United States and in Canada that may unfairly deplete available insurance and

other assets to the benefit of some claimants and the detriment of others, while also reducing the extraordinary expense of defending actions in multiple jurisdictions.

General Dynamic Corporation

4.8 The Applicants also request that a stay of proceedings be extended in favour of GDC. As further detailed in the Application, GDC is also subject to the Insurance Coverage Settlement Agreement, the underlying policies of which provide that ACL and GDC are subject to one insurance limit amongst them for asbestos-related claims. As a result, the payment of claims or amounts owed pursuant to the Insurance Coverage Settlement Agreement against ACL consequently reduces the limits payable against GDC, and vice versa.

4.9 Therefore, it is critical that a stay of proceedings be extended in favour of GDC because failing to do so could result in parties seeking to obtain payment and recovery from GDC to the overall detriment of the Debtor's mass of creditors, given that the amounts payable to stakeholders of the Debtor would decrease in such a case. To avoid such a situation that would be prejudicial to all stakeholders, and to ensure the stability of the present CCAA proceedings, a stay of proceedings must be extended to GDC.

5. INTERIM FINANCING

5.1 Over the course of the past few weeks, the Applicants together with the proposed Monitor have had several discussions regarding the Debtor's financing needs to ensure the funding of the proposed Restructuring Process, and the payment of the Debtor's post-filing working capital requirements during the pendency of the CCAA proceedings, and expect to finalize the terms of the financing conditions, such that the parties will request the approval of an interim financing facility, to the extent required, at the *comeback hearing*.

5.2 An interim financing facility, secured by a priority charge will, to the extent required, be sought at the *comeback hearing* to ensure the continuity of ACL's operations, to support the costs of asbestos-related litigation as well as the costs related to the CCAA proceedings and the implementation of the Restructuring Process.

6. APPOINTMENT AND POWERS OF THE PROPOSED MONITOR

6.1 The Applicants request that Raymond Chabot Inc. ("**RCI**") be appointed by the Court to act as Monitor of the Debtor in the present CCAA proceedings.

6.2 RCI is a licensed trustee within the meaning of section 2 of the *Bankruptcy and Insolvency Act* and is not subject to any of the restrictions set out in subsection 11.7(2) of the CCAA.

6.3 RCI has extensive experience in matters of this nature and is well-suited to this mandate and, as such, has confirmed that it consents and is in a position to perform its monitoring duties without any delay.

6.4 The Proposed Monitor will play a central role in the proposed Restructuring Process.

7. COMI DECLARATION AND RECOGNITION OF CCAA PROCEEDINGS IN THE UNITED STATES

COMI declaration

7.1 The Proposed Monitor and the Applicants each attorn to the jurisdiction of this Court and confirm that the Debtor's centre of main interest ("**COMI**") is in Québec, Canada, as set out below:

7.1.1 the registered head office and chief place of business and the headquarters office of ACL is in Québec, Canada;

7.1.2 ACL's operational and critical strategic decisions are mainly made in Québec, Canada by senior management of ACL also located in Québec, Canada;

7.1.3 ACL's Board of Directors is comprised of 6 persons, each of whom have their primary residence in Québec, Canada;

7.1.4 ACL's board meetings have been held exclusively in Québec, Canada;

7.1.5 All directors or officers of ACL have places of residence in Canada and work in Canada;

7.1.6 All of ACL's bank accounts are located in Canada;

7.1.7 ACL, as a publicly listed entity trading in Canada, receives proceedings from share capital issuances and uses such proceeds to fund its activities, including those with respect to litigious claims in the United States;

7.1.8 All material and/or long-term contracts and expenses are subject to the approval of ACL's senior management located in Québec, Canada;

7.1.9 Corporate governance and regulatory compliance for ACL is overseen by its management team located in Québec, Canada;

7.1.10 All of ACL's employees are based and work in Québec, Canada;

7.1.11 ACL's tangible assets and operations are located in Québec, Canada, including the Serpentine Tailings and the property that ACL leases out to its customers;

7.1.12 The books and records of ACL are located and maintained at ACL's headquarters offices in Québec, Canada.

Activities in the United States and intention to file recognition proceedings pursuant to Chapiter 15 of the US Bankruptcy Code.

7.2 Considering the foregoing, the Applicants request a declaration from the Court that the Debtor's COMI is located in Québec, Canada.

7.3 While the Court will have jurisdiction over the Debtor (subject to its decision and declaration with respect to the latter's COMI), the Debtor is, as previously noted,

subject to many litigation claims in the United States, which, if allowed to continue unabated, will exhaust resources and interfere with the contemplated plan to resolve these and other liabilities under these CCAA proceedings. To minimize disruptions and ensure adequate protection to ACL in the United States, and to obtain guidance as to the application of the present CCAA Proceedings in the United States, the Applicants intend to file, if this Application is granted, recognition proceedings in the United States pursuant to Chapter 15 of the US Bankruptcy Code.

7.4 More specifically, pursuant to such recognition proceedings, the Applicants will be seeking, among other things:

7.4.1 recognition of these CCAA proceedings as a foreign main proceeding pursuant to Chapter 15 of the US Bankruptcy Code;

7.4.2 recognition and enforcement by the US bankruptcy court of the First Day Order, the Initial Order, and any subsequent orders to be rendered by this Court;

7.4.3 other appropriate relief, as necessary.

7.5 The Proposed Monitor is of the opinion that such foreign recognition proceedings are necessary to ensure that the Stay of Proceedings will be recognized and enforced in the United States, where numerous substantial asbestos-related lawsuits are pending against the Debtor, so that the CCAA proceedings can proceed without interference.

8. CONCLUSION AND RECOMMENDATIONS

8.1 Given the Pre-Filing Report and the Application, the Proposed Monitor is of the opinion that it is in the interest of all stakeholders for an Initial Order pursuant to the CCAA to be issued in accordance with the relief sought in the Application.

8.2 In the event where this Court agrees to issue the Initial Order being sought, the Proposed Monitor will file a report ahead of the comeback hearing (as Monitor) with respect to (a) developments since the issuance of the Initial Order, and (b) the relief sought by the Applicants in the proposed Amended and Restated Initial Order.

SCHEDULE A

QUÉBEC BUSINESS CONCERNS RECORD ACT

Québec

Updated to December 1 2024
This document has official status.

chapter D-12

BUSINESS CONCERNS RECORDS ACT

TABLE OF CONTENTS

1. In this Act, the following words mean:

(a) "document" : any account, balance sheet, statement of receipts and expenditure, profit and loss statement, statement of assets and liabilities, inventory, report and any other writing or material forming part of the records or archives of a business concern;

(b) "concern" : any business concern in Québec;

(c) "requirement" : any demand, direction, order, subpoena or summons.

R. S. 1964, c. 278, s. 1.

2. Subject to section 3, no person shall, pursuant to or under any requirement issued by any legislative, judicial or administrative authority outside Québec, remove or cause to be removed, or send or cause to be sent, from any place in Québec to a place outside Québec, any document or résumé or digest of any document relating to any concern.

R. S. 1964, c. 278, s. 2.

3. The prohibition enacted in section 2 shall not apply in the case of the removal or sending of a document out of Québec

(a) by an agency, branch, legal person or firm carrying on business in Québec, to a principal, head office, affiliated legal person or firm, agency or branch situated outside Québec, in the ordinary course of their business;

(b) by or on behalf of a natural or legal person, a partnership or an association that is not a legal person carrying on business in Québec, to a territory subject to another political jurisdiction in which the sale of the securities of such person, partnership or association has been authorized;

(c) by or on behalf of any such person, partnership or association carrying on business in Québec as a broker, security issuer or salesman within the meaning of the Securities Act (chapter V-1.1), to a territory subject to another political jurisdiction in which any such person, partnership or association has been registered or is otherwise authorized to carry on business as broker, security issuer or salesman, as the case may be;

(d) whenever such removal or sending is authorized by any law of Québec or of the Parliament of Canada, in accordance with their respective jurisdictions.

R. S. 1964, c. 278, s. 3; 2009, c. 52, s. 590.

4. Whenever there is reason to believe that a requirement has been or is likely to be made for the removal or sending out of Québec of a document relating to a concern, the Attorney General may apply to a judge of the Court of Québec, in the judicial district where the concern in question is located, for an order requiring any person, whether or not designated in the requirement, to furnish an undertaking or security to ensure that such person will not remove or send out of Québec the document mentioned in the said requirement.

In case of urgency, the application may be filed and presented to the judge without prior service. The judge may however order the service thereof within such time, in such manner and on such conditions as he may consider expedient.

Every person having an interest in a concern may exercise the rights contemplated in this section.

R. S. 1964, c. 278, s. 4; 1965 (1st sess.), c. 17, s. 2; 1988, c. 21, s. 66; 1999, c. 40, s. 109; I.N. 2016-01-01 (NCCP).

5. Every person who, having received notice of an application to a judge of the Court of Québec under section 4, infringes the provisions of section 2, shall be guilty of contempt of court.

Every person who has furnished, or has received from the judge an order to furnish, an undertaking or security and who infringes the provisions of section 2 shall be guilty of contempt of court in addition to any obligation provided by the undertaking or security furnished or ordered by the judge.

R. S. 1964, c. 278, s. 5; 1965 (1st sess.), c. 17, s. 2; 1988, c. 21, s. 66; 1990, c. 4, s. 388; 1992, c. 61, s. 267; I.N. 2016-01-01 (NCCP).

6. *(This section ceased to have effect on 17 April 1987).*

1982, c. 21, s. 1; U. K., 1982, c. 11, Sch. B, Part I, s. 33.

REPEAL SCHEDULE

In accordance with section 17 of the Act respecting the consolidation of the statutes (chapter R-3), chapter 278 of the Revised Statutes, 1964, in force on 31 December 1977, is repealed effective from the coming into force of chapter D-12 of the Revised Statutes.

SCHEDULE B
(UNDER SEAL)

THE BREAKDOWN OF THE NUMBER OF ASBESTOS-RELATED BODILY INJURY CLAIMS

EXHIBIT 3

CERTIFIED COPY OF CANADIAN ORDERS

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF FRONTENAC

N°: 235-11-000008-259

DATE: May 6, 2025

PRESIDING: THE HONOURABLE JEAN-FRANÇOIS ÉMOND, J.S.C.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985, C. C-36, OF:

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON

-and-

TENECOM LIMITED

-and-

THE OCEAN MARINE INSURANCE COMPANY LIMITED

-and-

NRG VICTORY REINSURANCE LIMITED

-and-

THE SCOTTISH LION INSURANCE COMPANY LTD.

CLMI/ Co-Applicants

-and-

ASBESTOS CORPORATION LIMITED

Debtor/ Co-Applicants

-and-

RAYMOND CHABOT INC.

Proposed Monitor

INITIAL ORDER
(*On an Amended Application for the issuance of an Initial Order under CCAA*)

---

[1] **ON READING** the Amended *Application for the Issuance of a First Day Initial Order and an Amended and Restated Initial Order* dated May 6, 2025 (the

"**Application**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**"), the sworn statement and the exhibits filed in support thereof;

[2] **CONSIDERING** the notification of the Application;

[3] **CONSIDERING** the Pre-Filing Report to the Court submitted by Raymond Chabot Inc. ("**RCI**" or the "**Monitor**") in its capacity as the proposed Monitor dated May 5, 2025 (the "**Monitor's Pre-Filing Report**");

[4] **CONSIDERING** the testimony of the Proposed Monitor's representant, Mr. Jean Gagnon and the Applicant's Debtor CEO , Mr. Guy Berard;

[5] **CONSIDERING** the evidence submitted at the hearing, which reveals the following:

- Until 1986, the Debtor Co-applicant Asbestos Corporation Limited ("**ACL**") operated open pit chrysotile mines in Thetford Mines, Quebec, Canada, for the purpose of mining asbestos.
- Over the course of the past three (3) decades, ACL has been the subject of thousands of asbestos-related claims and, until recently, ACL was fully responsible for resolving these asbestos-related claims.
- The Co-Applicants Certain Underwriters at Lloyd's, London, Tenecom Limited, The Ocean Marine Insurance Company Limited, NRG Victory Reinsurance Limited and The Scottish Lion Insurance Company Limited ("**CLMI**") were and are involved in reimbursing ACL for these asbestos-related claims, solely in their capacity as insurers to ACL;
- More specifically, in accordance with the terms of the London Policies and an Interim Settlement Agreement ("**ISA**"), CLMI reimbursed defence costs incurred by ACL in relation to the claims and have also funded certain settlements agreed upon between ACL and certain claimants;
- Until September 2023, ACL and CLMI were involved, together, in the decision making to settle the asbestos related claims filed in USA;
- In September 2023, the circumstances relating to ACL's right or ability to resolve and defend such asbestos-related claims were compromised;
- More precisely, on September 8, 2023, the Court of Common Pleas of Richland County, South Carolina (the "**South Carolina Court**") in a lawsuit involving one of the underlying asbestos-related claims, held ACL in contempt of court on the basis that it refused to properly engage in discovery, and to produce in the United States, corporate documents located in Canada;

- The ACL's position was then, and continues to be, that the Quebec Business Concerns Records Act, RLRQ ch. D-12 (the "**QBCRA**") prevents a Quebec corporation from transferring such documents outside of Quebec;

- Despite ACL's position, the South Carolina Court sanctioned ACL, struck its pleadings (so that it fell in default) and entered a Receivership Order that putatively stripped ACL of its right to defend itself in the United States;

- The South Carolina Court appointed Peter D. Protopapas of the South Carolina law firm of Rikard & Protopapas as Receiver of ACL with respect to certain powers, rights and assets, specifically, the power and right to defend asbestos suits against ACL in the United States and the power and right to deal with its insurers, the Co-Applicant CLMI, with respect to those suits (the "**South Carolina Receiver**");

- In his Receiver's capacity for ACL, Protopapas was granted full control of ACL's defence against the asbestos-related claims made against it in the United States, and has since filed a suit against CLMI in the South Carolina Court in order to force CLMI to pay the costs incurred by the South Carolina Receiver with this suit pending before the South Carolina Court as of the date of this Application;

- Since the appointment of the South Carolina Receiver, matters have worsen for ACL;

- Indeed, the steps taken by the South Carolina Receiver have resulted in increased liability and damages for ACL rather than protecting its interests and those of its stakeholders;

- For instance, in two cases, one in the state of Washington and the other in the state of California, ACL's right to be heard in Court was denied and this led to a judgment rendered by default against it;

- Indeed, in the Washington case, ACL was condemned to pay by default more than 16 million dollars US in damages to the Plaintiffs;

- At the current state of the proceedings filed in USA, it appears that ACL suffers a lack of procedural fairness;

[6] **CONSIDERING** the ACL's situation resulting from the claims and litigation proceedings instituted against it, the Co-Applicants require a stay of proceedings in order to ensure that the claims and litigation against the Debtor can be resolved, compromised or otherwise addressed in a single forum, in a stable and secure environment, without undue or unjust interference;

[7] **CONSIDERING** that a stay of proceedings is the primary tool that allows the CCAA to achieve its restructuring objective and is central to a Restructuring Process;

[8] **CONSIDERING** that, in the present case, the success of the Restructuring Process, and the resolution of the various claims and litigation, present and future, will require multi-party negotiations and discussions;

[9] **CONSIDERING** the CCAA proceedings will provide a reasonable and effective forum within which these negotiations and discussions may take place without prejudice from the multiplicity of additional recourses and actions being instituted against the ACL;

[10] **CONSIDERING** the CCAA proceedings will provide a single forum for dealing with all liabilities of ACL;

[11] **CONSIDERING** that such stability is necessary to assure the success of the Restructuring Process;

[12] **CONSIDERING** the objectives of the CCAA as described by the Supreme Court of Canada in *9354-9186 Québec inc.* v. *Callidus Capital Corp.*[1]:

> [39] The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).
>
> [40] Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

[1] 2020 SCC 10 (CanLII), [2020] 1 SCR 521.

> [41] Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).
>
> [42] That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress . . . and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1 ("*Essar*"), at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70).

[13] **CONSIDERING** that ACL and CLMI, in order to reach the CCAA's objectives, will craft a claim process which will take into consideration the best interests of Co-Applicants and all stakeholders and potential stakeholders of ACL, including, among others, the Asbestos Claimants in connection with asbestos-related injuries and claims, in order to:

- Preserve and maximize the value of ACL for its various stakeholders;
- Allow for the orderly distribution of funds and compensation which will be available to any claimant, or stakeholder entitled to a claim or compensation;
- Avoid the current situation in which there is a "race to the courts" on the part of plaintiffs in the United States in order to obtain individual recovery to the detriment of other claimants;
- Adjudicate claims against ACL based on their merit, and not based on default or contempt of court, with a view to ensuring that claimants with valid claims are duly compensated in a structured and cost-effective manner; and devising

a simpler, less costly, more effective and more rapid process to deal with all the claims or potential claims than legal proceedings in Canada and the United States, the multiplicity of which is likely to contribute to the erosion of the value of ACL and recovery for the claimants;

[14] **CONSIDERING** all the claims or potential claims and legal proceedings in Canada and the United States, the multiplicity of which is likely to contribute to the erosion of the value of ACL and the recovery for the claimants;

[15] **CONSIDERING** the restructuring process proposed by Co-Applicants ACL and CLMI which contemplates:

- The execution of a transparent court-supervised process aimed at stabilizing ACL's operations and ensuring that sufficient liquidity is available *via* the Interim Facility (as defined below);
- The eventual implementation, in due course, of a claims process to ensure that ACL's individual asbestos claimants can efficiently and judiciously settle their outstanding claims against ACL, among others;
- A claims process under the CCAA , which will allow these claims to be channeled into a fair and efficient claims process in Canada, where the interests of both Debtor and creditors can be appropriately balanced;
- The implementation of a plan of compromise or arrangement of the asbestos related claims following the above-mentioned claims process; and
- The preservation and maximization of the value of ACL for its various stakeholders;

[16] **CONSIDERING** that ACL's center of main interest ("**COMI**") is located in Thetford Mines, Province of Quebec, Canada;

[17] **CONSIDERING** the submissions of the attorneys present at the hearing on the Application and the testimony of the witnesses heard;

[18] **CONSIDERING** that the Court is satisfied that the Modified Application meets the requirements of the CCAA

THE COURT HEREBY:

[19] **GRANTS** the Application.

[20] **ISSUES** an order pursuant to the CCAA (the "**Order**"), divided under the following headings:

I. Service
II. Definitions

I. SERVICE

[21] **PERMITS** the service of this Order at any time and place and by any means whatsoever.

II. DEFINITIONS

[22] **ORDERS** that all capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Application.

III. EFFECTIVE TIME

[23] **DECLARES** that this Order and all its provisions are effective as of 12:01 a.m. Montréal time, province of Québec, on May 6, 2025 (the "**Effective Time**").

IV. APPLICATION OF THE CCAA

[24] **DECLARES** that ACL is a debtor company to which the CCAA applies.

[25] Stay of Proceedings against co- CLMI and the Property

[26] **ORDERS** that, until and including May 16, 2025, or such later date as the Court may order (the "**Stay Period**"), no proceeding or enforcement process directly or indirectly concerning or related to the Debtor in any court or tribunal (each, a "**Proceeding**"), including but not limited to seizures, right to distrain, executions, writs of seizure or execution, judicial or extrajudicial right of resolution or resiliation, right of set-off or compensation of any and all claims, actions, applications, arbitration proceedings and other lawsuits against the Debtor, General Dynamics Corporation, or otherwise against the CLMI[2] , including their third-party claims administrator

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2 In accordance with the Application, "CLMI" is defined to include the following entities: Certain Underwriters at Lloyd's, London, and Tenecom Limited (as successor to Winterthur Swiss

Resolute Management Inc., in each case, in connection with or related to, directly or indirectly, the Debtor (collectively, the "**Stay Parties**", whether such Proceedings involve the Stay Parties individually or with other Persons (as defined below)), shall be commenced or continued against or in respect of the Stay Parties, or affecting any of the Stay Parties' business operations and activities (the "Business") CLMI or any of the Property (as defined herein below), including as provided in paragraph [33] herein except with leave of this Court. Any and all Proceedings currently under way against or in respect of the Stay Parties or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court, the whole subject to Section 11.1 of the CCAA. Without limiting the generality of the foregoing, Proceedings shall include all proceedings commenced or filed in Canada or in the United States of America or elsewhere or that may be commenced or filed against, *inter alia,* the Stay Parties, such as the Washington Proceedings, the South Carolina Proceedings, the California Proceedings or any other Proceedings, wherever instituted against the Stay Parties, that involve asbestos-related bodily injuries, or the marshalling or administration of insurance assets (including the London Policies) of ACL (the "**Asbestos Proceedings**").

[27] **ORDERS** that the rights of His Majesty in right of Canada and His Majesty in right of a Province are suspended in accordance with the terms and conditions of Section 11.09 of the CCAA.

V. STAY OF PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

[28] **ORDERS** that during the Stay Period and except as permitted under Subsection 11.03(2) of the CCAA, no Proceeding may be commenced, or continued against any former, present or future director or officer of the Stay Parties nor against any person deemed to be a former, present or future director or an officer of the Stay Parties under Subsection 11.03(3) of the CCAA (each, a "**Director**" or an "**Officer**", as applicable, and collectively the "**Directors and Officers**") in respect of any claim against such Director or Officer which arose prior to the Effective Time and which relates to any obligation of the Stay Parties where it is alleged that any of the Directors and Officers is under any law liable in such capacity for the payment of such obligation or which relate to the Asbestos Proceedings.

Insurance Company, formerly known as Accident & Casualty Insurance Company of Winterthur, Switzerland, and to Yasuda Fire and Marine Insurance Company (UK) Limited and now known as Tenecom Ltd.), The Ocean Marine Insurance Company (as successor to liabilities of Commercial Union Assurance Company Limited, The Edinburgh Assurance Company, The Indemnity Marine Assurance Company Limited, The Northern Assurance Company Limited, The Road Transport & General Insurance Company Limited, United Scottish Insurance Company Limited, and The Victoria Insurance Company Limited), NRG Victory Reinsurance Limited, as successor to liabilities of New London Reinsurance Company Limited, and The Scottish Lion Insurance Company Limited.

VI. POSSESSION OF PROPERTY AND OPERATIONS

[29] **ORDERS** that, subject to the powers granted to the Monitor pursuant to the Order, the Debtor shall remain in and/or take possession and control of its present and future assets, rights, undertakings and properties of every nature and kind whatsoever, and wherever situated, including all proceeds thereof and all bank accounts, (collectively the "**Property**") in each case, whether or not purportedly administered by the South Carolina Receiver, and including all insurance assets, wherever they may be located, including in the United States (the "**Insurance Assets**"), the whole in accordance with the terms and conditions of this Order. Subject to the power of the Monitor pursuant to this Order, the Debtor shall have sole power and authority to administer and control the Property, including the Insurance Assets.

[30] **ORDERS** that the Debtor shall be entitled but not be required to pay the following expenses, whether incurred prior to or after this Order, provided that such expenses are made with the prior consent of the Monitor and the CLMI:

(a) all outstanding and future wages, salaries, benefits, vacation pay, expenses and other amounts otherwise payable by the Debtor on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

(b) the fees and disbursements of any advisor or counsel retained or employed by ACL, the CLMI or by the Monitor, in connection with these proceedings, at their standard rates and charges; and

(c) the amounts due for goods and services rendered to the Debtor prior to the date of this Order by third party suppliers if, in the opinion of the Monitor, the supplier is essential to the ongoing operations of the Business or the Debtor during the CCAA Proceedings.

[31] **ORDERS** that, except as otherwise provided to the contrary herein, the Debtor shall be entitled but not required to pay all reasonable and necessary expenses incurred in carrying on the Business in the ordinary course after this Order and in carrying out this Order, provided that such expenses are made with the prior consent of the Monitor and the CLMI, which expenses may include, without limitation:

(a) all charges and capital expenditures reasonably necessary to preserve the Property or the Business of the Debtor, including, without limitation, payments for insurance, maintenance and security services; and

(b) payment for products or services rendered to the Debtor after the date of this Order or payments to obtain the delivery of products or

the rendering of services covered by a contract entered into prior to, concurrent with or after the date of this Order.

[32] **ORDERS** that, subject to the terms of the Interim Financing Term Sheet, the Debtor is authorized to remit or pay the following expenses, in accordance with legal requirements, provided that such expenses are made with the prior consent of the Monitor and the CLMI:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Québec Pension Plan, and (iv) income taxes;

(b) all goods and services, harmonized sales or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Debtor and in connection with the sale of goods and services by the Debtor, but only where such Sales Taxes are accrued after the date of this Order.

VII. NO EXERCISE OF RIGHTS OR REMEDIES

[33] **ORDERS** that during the Stay Period, and subject to, *inter alia*, Section 11.1 of the CCAA, all rights and remedies, of any individual, natural person, firm, corporation, partnership, limited liability company, trust, joint venture, association, organization, governmental body or agency, landlord or any other entity, whether based in Canada, in the US or elsewhere, acting in any capacity, (all of the foregoing, collectively being "**Persons**" and each being a "**Person**"), against or in respect of the Debtor, or otherwise against the CLMI to the extent directly or indirectly related to any rights and remedies which may directly or indirectly involve the Debtor, or affecting the Business, the Property or any part thereof, including, any contractual right of any third party to modify any of the Stay Parties' existing rights as a result of any event of default or of non-performance by the Debtor under any agreement (including any bond, surety, indemnity or other comparable agreement), including by reason of the insolvency of the Debtor, are hereby stayed and suspended except with leave of this Court.

[34] **DECLARES** that, to the extent any rights, obligations, or prescription, time or limitation periods, including, without limitation, to file grievances, relating to the Stay Parties or any of the Property or the Business may expire (other than pursuant to the terms of any contracts, agreements or arrangements of any nature whatsoever), the term of such rights, obligations, or prescription, time or limitation periods shall hereby be deemed to be extended by a period equal to the Stay Period. Without limitation to the foregoing, in the event that the Debtor become(s) bankrupt or a receiver as defined in Subsection 243(2) of the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") is appointed in respect of the Debtor, the period between the date of this Order

and the day on which the Stay Period ends shall not be calculated in respect of the Debtor in determining the 30 day periods referred to in Sections 81.1 and 81.2 of the BIA.

VIII. NO INTERFERENCE WITH RIGHTS

[35] **ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, fail to renew per the same terms and conditions, alter, interfere with, repudiate, resiliate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, except with the written consent of the Monitor, or with leave of this Court.

IX. CONTINUATION OF SERVICES

[36] **ORDERS** that during the Stay Period and subject to paragraph [38] hereof and Section 11.01 of the CCAA, all Persons having verbal or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, utility or other goods or services made available to the Debtor, are hereby restrained until further order of this Court from discontinuing, failing to renew per the same terms and conditions, altering, interfering with, terminating the supply or, where the case may be, interrupting, delaying or stopping the transit of such goods or services as may be required by the Debtor, and that the Debtor shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses, domain names or other services, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Debtor, without having to provide any security deposit or any other security, in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Debtor, as applicable, with the consent of the Monitor, or as may be ordered by this Court.

[37] **ORDERS** that, notwithstanding anything else contained herein and subject to Section 11.01 of the CCAA, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided to the Debtor on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to make further advance of money or otherwise extend any credit to the Debtor.

[38] **ORDERS** that, without limiting the generality of the foregoing and subject to Section 21 of the CCAA, if applicable, cash or cash equivalents placed on deposit by the Debtor with any Person during the Stay Period, whether in an operating account or otherwise for itself or for another entity, shall not be applied by such Person in reduction or repayment of amounts owing to such Person as of the date of the Order or due on or before the expiry of the Stay Period, or in satisfaction of any interest or charges accruing in respect thereof; however, this provision shall not prevent any financial institution from: (i) reimbursing itself for the amount of any cheques drawn

by the Debtor and properly honoured by such institution, or (ii) holding the amount of any cheques or other instruments deposited into any of the Debtor's accounts until those cheques or other instruments have been honoured by the financial institution on which they have been drawn.

X. NON-DEROGATION OF RIGHTS

[39] **ORDERS** that, notwithstanding the foregoing, any Person who provided any kind of letter of credit, guarantee or bond (the "**Issuing Party**") at the request of the Debtor shall be required to continue honouring any and all such letters, guarantees and bonds, issued on or before the Effective Time, provided that all conditions under such letters, guarantees and bonds are met save and except for defaults resulting from this Order; however, the Issuing Party shall be entitled, where applicable, to retain the bills of lading or shipping or other documents relating thereto until paid.

XI. RESTRUCTURING

[40] **DECLARES** that, to facilitate the orderly restructuring of the business and financial affairs of the Debtor (the "**Restructuring**") but subject to such requirements as are imposed by the CCAA, the Debtor shall have the right, subject to approval of the Monitor and the CLMI or further order of the Court, to:

(a) permanently or temporarily cease, downsize, or shut down any of its operations or locations as the Monitor deems appropriate and make provision for the consequences thereof in the Plan;

(b) cause any Person to turn over the Property to the Debtor;

(c) pursue all avenues to finance or refinance, market, convey, transfer assign or in any other manner, dispose of the Business or Property, in whole or part, subject to further order of the Court and sections 11.3 and 36 of the CCAA, and under reserve of subparagraph [40](d);

(d) convey, transfer, assign, lease, or in any other manner, dispose of the Property, including, without limitation, any share, participation right or other right, interest in property, equity share, stock, note, bond, debenture and certificate of deposit outside of the ordinary course of business, in whole or in part, provided that the price in each case does not exceed $50,000 individually or $100,000;

(e) give instructions to any trustee of any trust in which the Debtor has a beneficial interest, or any other interest;

(f) terminate the employment of such of its employees or temporarily or permanently lay off such of its employees as the Debtor or as the Monitor, on behalf of the Debtor, deems appropriate and, to the extent any amounts in lieu of notice, termination or severance pay or

other amounts in respect thereof are not paid in the ordinary course, make provision, on such terms as may be agreed upon between the Debtor and such employee, or failing such agreement, make provision to deal with, any consequences thereof in the Plan, as the Debtor may determine;

(g) subject to the provisions of Section 32 of the CCAA, disclaim or resiliate, any of the Debtor's agreements, contracts, or arrangements of any nature whatsoever, with such disclaimers or resiliation to be on such terms as may be agreed between the Debtor and the relevant party, or failing such agreement, to make provision for the consequences thereof in the Plan; and

(h) subject to Section 11.3 of the CCAA, assign any rights and obligations of the Debtor.

[41] **DECLARES** that, in order to facilitate the Restructuring, the Debtor, subject to the approval of the Monitor and the CLMI, or further order of the Court, is authorized and has sole authority to settle claims of creditors, customers and suppliers that are in dispute and may pursue, subject to Court approval and the approval of the CLMI, the settlement or other resolution of the claims related to the Asbestos Proceedings.

[42] **DECLARES** that, if a notice of disclaimer or resiliation is given to a landlord of the Debtor pursuant to Section 32 of the CCAA and Subsection [40](g) of this Order, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours by giving the Debtor and the Monitor 24 hours' prior written notice and (b) at the effective time of the disclaimer or resiliation, the landlord shall be entitled to take possession of any such leased premises and re-lease any such leased premises to third parties on such terms as any such landlord may determine without waiver of, or prejudice to, any claims or rights of the landlord against the Debtor, provided nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

[43] **ORDERS** that the Debtor shall provide to any relevant landlord notice of its intention to remove any fittings, fixtures, installations, or leasehold improvements at least seven (7) days in advance. If the Debtor has already vacated the leased premises, it shall not be considered to be in occupation of such location pending the resolution of any dispute between the Debtor and the landlord.

[44] **DECLARES** that, pursuant to sub-paragraph 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, the Monitor or the Debtor is permitted, in the course of these proceedings, to disclose personal information of identifiable individuals in its possession or control to stakeholders or prospective investors, financiers, buyers or strategic partners and to its advisers (individually, a "**Third Party**"), but only to the extent desirable or required to negotiate and complete the Restructuring or the preparation and implementation of the Plan or

a transaction for that purpose, provided that the Persons to whom such personal information is disclosed enter into confidentiality agreements with the Debtor binding them to maintain and protect the privacy of such information and to limit the use of such information to the extent necessary to complete the transaction or Restructuring then under negotiation. Upon the completion of the use of personal information for the limited purpose set out herein, the personal information shall be returned to the Debtor or destroyed. If a Third Party acquires personal information as part of the Restructuring or the preparation or implementation of the Plan or a transaction in furtherance thereof, such Third Party may continue to use the personal information in a manner which is in all respects identical to the prior use thereof by the Debtor.

XII. POWERS OF THE MONITOR

[45] **ORDERS** that RCI is hereby appointed to monitor the business and financial affairs of the Debtor as an officer of this Court (the "**Monitor**") and that the Monitor, in addition to the prescribed powers and obligations, referred to in Section 23 of the CCAA:

(a) shall, as soon as practicable, (i) publish online once a week for two (2) consecutive weeks or as otherwise directed by the Court, in *La Presse+* and the *Globe and Mail National Edition* and (ii) within five (5) business days after the date of this Order (A) post on the Monitor's website (the "**Website**") a notice containing the information prescribed under the CCAA, (B) make this Order publicly available in the manner prescribed under the CCAA, (C) send, in the prescribed manner, a notice to all known creditors having a claim against the Debtor of more than $1,000, advising them that this Order is publicly available, and (D) prepare a list showing the names and addresses of such creditors and the estimated amounts of their respective claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder;

(b) shall monitor the Debtor's receipts and disbursements;

(c) shall assist the Debtor, to the extent required, in dealing with its creditors and other interested Persons during the Stay Period;

(d) shall assist the Debtor, to the extent required, with the preparation of its cash flow projections and any other projections or reports and the development and implementation of the Plan;

(e) shall advise and assist the Debtor, to the extent required, to review the Debtor's business and assess opportunities for cost reduction, revenue enhancement and operating efficiencies;

(f) shall assist the Debtor, to the extent required, with the Restructuring and in its negotiations with its creditors and other interested Persons and with the holding and administering of any meetings held to consider the Plan, including, without limitation, participating, as the CLMI considers appropriate, in any discussion and negotiation with creditors, claimants or others and assisting and facilitating the settlement or other resolution of the claims related to Asbestos Proceedings;

(g) shall report to the Court on the state of the business and financial affairs of the Debtor or developments in these proceedings or any related proceedings, or the settlement or other resolution of the claims related to Asbestos Proceedings, and any other matter deemed by the Monitor to be relevant to this proceeding, within the time limits set forth in the CCAA and at such time as considered appropriate by the Monitor or as the Court may order;

(h) shall report to this Court and interested parties, including, but not limited to creditors affected by the Plan, with respect to the Monitor's assessment of, and recommendations with respect to, the Plan;

(i) may retain and employ such agents, advisers and other assistants as are reasonably necessary for the purpose of carrying out the terms of this Order, including, without limitation, one or more entities related to or affiliated with the Monitor;

(j) may engage legal counsel to the extent the Monitor considers necessary in connection with the exercise of its powers or the discharge of its obligations in these proceedings and any related proceeding, under this Order or under the CCAA;

(k) shall assist the Debtor with respect to any insolvency proceedings commenced by or with respect to the Debtor in any foreign jurisdiction (collectively, "**Foreign Proceedings**") and report to this Court, as it deems appropriate, on the Foreign Proceedings with respect to matters relating to the Debtor;

(l) shall act as a "foreign representative" of the Debtor or in any other similar capacity in any insolvency, bankruptcy or reorganization proceedings outside of Canada;

(m) may give any consent or approval as may be contemplated by the Order or the CCAA;

(n) may hold and administer funds in connection with arrangements made among the Debtor, any counterparties and the Monitor, or by Order of this Court; and

(o) may perform such other duties as are required by this Order or the CCAA or by this Court from time to time.

[46] **ORDERS** that, in addition to the powers already provided for in this Order, the Monitor shall also be authorized, but not required, to exercise the following powers for and on behalf of the Debtor and in consultation with the CLMI:

(a) provide the CLMI with any information they may require with respect to the Debtor, including its Business and Property;

(b) access, at all times, the places of business and the premises of the Debtor, the Property;

(c) apply to the Court for any orders which may be necessary or appropriate for the Restructuring; and

(d) perform such other duties or take any steps reasonably incidental to the exercise of such powers and obligations conferred upon the Monitor by this Order or any order of this Court.

[47] **ORDERS** that neither the Monitor nor any employee or agent of the Monitor shall be deemed (i) to be a director, officer or trustee of the Debtor, (ii) to assume any obligation incumbent upon the Debtor, including in environmental matters, or (iii) to assume any fiduciary duty to the Debtor or any other Person, including any creditor or shareholder of the Debtor. Additionally, nothing in this Order shall constitute or be deemed to constitute the Monitor as a receiver, assignee, liquidator or manager of the Debtor and any distribution made to creditors of the Debtor will be deemed to have been made by the Debtor.

[48] **ORDERS** that the Debtor and its employees, current and former shareholders, officers, directors, agents and representatives shall fully cooperate with the Monitor in the exercise of its powers and discharge of its duties, rights and obligations as provided and set out in this Order.

[49] **ORDERS** that, without limiting the generality of anything herein, the Debtor and its Directors, Officers, employees and agents, accountants, auditors and all other Persons having notice of this Order shall forthwith provide the Monitor with unrestricted access to all of the Business and Property of the Debtor, including, without limitation, the premises, books, records, data, including data in electronic form, and all other documents of the Debtor in connection with the Monitor's duties and responsibilities hereunder.

[50] **DECLARES** that the Monitor may provide creditors and other relevant stakeholders of the Debtor with information in response to requests made by them in writing addressed to the Monitor and copied to the counsel for the Co-Applicants. In the case of information that is confidential, proprietary or competitive, the Monitor

shall not provide such information to any person unless otherwise directed by this Court.

[51] **DECLARES** that if the Monitor, in its capacity as Monitor, is deemed to have carried on the business of the Debtor or continues the employment of the Debtor's employees, the Monitor shall benefit from the provisions of Section 11.8 of the CCAA.

[52] **DECLARES** nothing herein contained shall require the Monitor to occupy or to take control, or to otherwise manage all or any part of the Property in lieu of the Debtor. The Monitor shall not, as a result of this Order, be deemed to be in possession of any of the Property within the meaning of Environmental Legislation (as defined hereinafter).

[53] **ORDERS** and **DECLARES** that nothing herein shall impose upon the Monitor any obligation to take possession or assume control, care, charge or otherwise manage any of the Property (the "**Possession**"), including the Possession of any Property which may be polluted, which may constitute a pollutant or contaminant or which may cause the discharge, emission, the discharge or deposit of any substance contrary to any federal, provincial or other law relating to the protection, conservation, reclamation, restoration or rehabilitation of the environment or relating to the disposal of waste or any other form of contamination, including the *Canadian Environmental Protection Act*, 1999, CS 1999, c 33, the *Environment Quality Act*, RLRQ c Q-2, or the *Act respecting occupational health and safety*, RLRQ c S-2. 1, and their corresponding regulations (the "**Environmental Legislation**"). The Monitor shall not, by virtue of this Order or by reason of any action taken as a result of the exercise of its powers and duties under this Order, be deemed to have Possession of any of the Property within the meaning of any Environmental Legislation.

[54] **DECLARES** that entities related to or belonging to the same group as the Monitor shall also be entitled to the safeguards, benefits and privileges conferred upon the Monitor under this Order.

[55] **DECLARES** that Section 215 of the BIA applies *mutatis mutandis*, and no action or Proceeding shall be commenced against the Monitor relating to its appointment, its conduct as Monitor or the carrying out of the provisions of any order of this Court, except with prior leave of this Court, on at least seven (7) days' notice to the Monitor and its counsel. The entities related to or affiliated with the Monitor, including the Monitor's legal counsel, shall also be entitled to the protection, benefits and privileges afforded to the Monitor pursuant to this paragraph.

[56] **ORDERS** that the Debtor shall pay the reasonable fees and disbursements of the Monitor, the Monitor's legal counsel and the CLMI's legal counsel, related to these proceedings, any plan of compromise or arrangement to be filed in these proceedings and the Restructuring, whether incurred before or after this Order, and shall be authorized to provide each with a reasonable retainer in advance on account of such fees and disbursements, if so requested.

XIII. COMEBACK HEARING

[57] **ORDERS** that a full hearing on the orders sought in the Application shall take place on May 15, 2025 (the "**Comeback Hearing**"), at a time and in a room, including virtually, of the Montréal Courthouse to be communicated to the Service List or at any other date, time and place determined by the Court and to be communicated to the Service List.

[58] **ORDERS** that any Person wishing to object to the remainder of the reliefs sought in the Application at the Comeback Hearing must serve responding materials or a written notice stating such party's objection and the grounds for same (a "**Notice of Objection**") to the Co-Applicants and the Monitor (and their respective counsels), with a copy to all other Persons on the service list prepared for the purpose of these proceedings, no later than 5:00 p.m. on the date that is three (3) calendar days prior to the presentation of such application or motion (the "**Objection Deadline**").

[59] **ORDERS** that, if no Notice of Objection is served by the Objection Deadline, the Judge having carriage of these proceedings (the "**Presiding Judge**") the CLMI's counsel will advise the Presiding Judge of same, and the latter may determine: (a) whether such hearing will be in person, by videoconference, by telephone or by written submissions only; and (b) the parties from whom submissions are required (collectively, the "**Hearing Details**"). The CLMI's counsel shall advise all Persons on the Service List of the Hearing Details.

[60] **ORDERS** that, if a Notice of Objection is served by the Objection Deadline, all interested parties shall appear before the Presiding Judge at the Comeback Hearing, to either (i) proceed on some or all of the remainder of the relief sought by the Co-Applicants as part of the Application and/or (ii) establish a schedule for the delivery of materials and the hearing on the matters raised in the Notice of Objection, and render such other orders as the Court may deem appropriate in the circumstances.

XIV. FOREIGN PROCEEDINGS

[61] **ORDERS** that RCI, in its capacity as Monitor, is hereby authorized and empowered to act as foreign representative (in such capacity, the "**Foreign Representative**") in respect of the within proceedings for the purpose of having these proceedings recognized and approved in a jurisdiction outside of Canada.

[62] **ORDERS** that the Foreign Representative is hereby authorized to apply for foreign recognition and approval of these proceedings in the United States pursuant to chapter 15 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532.

[63] **DECLARES** that, for the purposes of any applications authorized by paragraphs [61] and [62], the Debtor's centre of main interest is located in the province of Québec, Canada.

XV. GENERAL

[64] **ORDERS** that no Person shall commence, proceed with or enforce any Proceedings against any of the Directors and Officers, employees, legal counsel or financial advisors of the Debtor, the CLMI or of the Monitor in relation to the Business or Property of the Debtor, without first obtaining leave of this Court, upon ten (10) days' written notice to the Co-Applicants' counsel, the Monitor's counsel, and to all those referred to in this paragraph whom it is proposed be named in such Proceedings.

[65] **DECLARES** that this Order and any proceeding or sworn statement leading to this Order, shall not, in and of themselves, constitute a default or failure to comply by the Debtor under any statute, regulation, licence, permit, contract, permission, covenant, agreement, undertaking or other written document or requirement.

[66] **DECLARES** that, except as otherwise specified herein, the Debtor, the CLMI and the Monitor are at liberty to serve any notice, proof of claim form, proxy, circular or other document in connection with these proceedings by forwarding copies by prepaid ordinary mail, courier, personal delivery or electronic transmission to Persons or other appropriate parties at their respective given addresses as last shown on the records of the Debtor and that any such service shall be deemed to be received on the date of delivery if by personal delivery or electronic transmission, on the following business day if delivered by courier, or three (3) business days after mailing if by ordinary mail.

[67] **DECLARES** that the Debtor, the Monitor and the CLMI and any party to the proceedings may serve any court materials in these proceedings on all represented parties electronically, by emailing an electronic copy of such materials to counsels' email addresses as provided for on the Service List.

[68] **DECLARES** that, unless otherwise provided herein, under the CCAA, or ordered by this Court, no document, order or other material need be served on any Person in respect of these proceedings, unless such Person has served a Notice of Appearance on counsel for the Co-Applicants and counsel for the Monitor and has filed such notice with this Court, or appears on the Service List, save and except when an order is sought against a Person not previously involved in these proceedings.

[69] **DECLARES** that the Debtor, the CLMI and the Monitor may, from time to time, apply to this Court for directions concerning the exercise of their respective powers, duties and rights hereunder or in respect of the proper execution of this Order on notice only to each other.

[70] **DECLARES** that any interested Person may apply to this Court to vary or rescind the Order or seek other relief upon ten (10) days' notice to the Co-Applicants, the Debtor, the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order, such application or motion

shall be filed during the Stay Period ordered by this Order, unless otherwise ordered by this Court.

[71] **DECLARES** that this Order and all other orders in these proceedings shall have full force and effect in all provinces and territories in Canada.

[72] **AUTHORIZES** the Debtor, the CLMI or the Monitor to apply as they may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America, or elsewhere, for orders which aid and complement this Order and any subsequent orders of this Court, including, without limitation to the foregoing, an order under Chapter 15 of the *U.S. Bankruptcy Code*. All courts and administrative bodies of all such jurisdictions are hereby respectively requested to make such orders and to provide such assistance to the Debtor, the CLMI, the Monitor and the Foreign Representative as may be deemed necessary or appropriate for that purpose.

[73] **REQUESTS** the aid and recognition of any Court, tribunal, regulatory or administrative body in Canada or elsewhere, to give effect to this Order and to assist the CLMI, the Debtor, the Monitor, and their respective agents in carrying out the terms of this Order. All Courts, tribunals, regulatory and administrative bodies are hereby requested to make such orders and to provide such assistance to the CLMI, the Debtor, and the Monitor as may be necessary or desirable to give effect to this Order, to assist the CLMI, the Debtor, and the Monitor, and to act in aid of and to be complementary to this Court, in carrying out the terms of this Order[3].

[74] **ORDERS** that the ISA and its addendums (Exhibit R-6 to the Application) is confidential and is filed under seal.

[75] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without security.

[76] **THE WHOLE WITHOUT COSTS.**

JEAN-FRANÇOIS ÉMOND, J.S.C.

COPIE CERTIFIÉE CONFORME
AU DOCUMENT DÉTENU PAR LA COUR
Marie Josée Côté, J.a.c.s.
Personne désignée par le greffier articles 67 C.p.c. et/ou 140 et 210 b) L.T.J / Officier autorisé L.f.i.

[3] **NTD**: To be discussed whether a cross-border protocol should be added.

EXHIBIT 4

WRIT OF PROHIBITION

RECEIVED
Nov 18 2024
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RICHLAND COUNTY
Court of Common Pleas
The Hon. Jean H. Toal, Acting Circuit Court Judge

Case No. _

Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies.....Petitioners,

v.

The Honorable Jean H. Toal, in her capacity as Acting Circuit Court Judge, and Peter Protopapas, in his capacity as Receiver for Asbestos Corporation Ltd. .....Respondents.

PETITION FOR WRIT OF PROHIBITION

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INTRODUCTION

Certain Underwriters at Lloyd's, London and certain London market insurance companies ("Certain London Market Insurers" or "CLMI")[1] subscribing severally (not jointly) to certain excess liability insurance policies insuring Asbestos Corporation Limited ("ACL") petition this Court to address and remedy circumstances that are, on their face, extraordinary. In contravention of well-established South Carolina law limiting courts' subject-matter jurisdiction to appoint receivers for out-of-state corporations, a South Carolina trial court has empowered a Receiver to take control of the litigation and insurance of ACL, a solvent company organized under the laws of Canada and actively managed by its own board and officers in Québec. Consistent with receivership law nationwide, South Carolina law confers jurisdiction on South Carolina courts to appoint general receivers—empowered to act on behalf of the corporation—only for *South Carolina* corporations. South Carolina law provides the trial court no power, however, to appoint general receivers for corporations organized beyond South Carolina's borders, and the United States Constitution forbids such extraterritorial receiverships.

On top of these substantive deficiencies, the trial court's order appointing a receiver for ACL is procedurally deficient because the trial court failed to comply with the provision of the South Carolina Code mandating that the court include in its order the value of the property for

[1] Certain London market insurance companies as to which the claims at issue are administered by third-party claims administrator, Resolute Management, Inc., consist of The Scottish Lion Insurance Company Ltd.; Tenecom Ltd. (as successor to Winterthur Swiss Insurance Company, formerly known as Accident & Casualty Insurance Company of Winterthur, Switzerland); Yasuda Fire and Marine Insurance Company (UK) Limited, now known as Tenecom Ltd; The Ocean Marine Insurance Company Limited (as successor to liabilities of Commercial Union Assurance Company Limited, The Edinburgh Assurance Company, The Indemnity Marine Assurance Company Limited, The Northern Assurance Company Limited, The Road Transport & General Insurance Company Limited, United Scottish Insurance Company Limited, and The Victoria Insurance Company Limited); and NRG Victory Reinsurance Limited as successor to liabilities of New London Reinsurance Company Limited.

which a bond could be posted by ACL to dissolve the receivership. Furthermore, even if the order appointing a receiver for ACL were valid, it would not apply beyond the one tort case in which it was entered and thus would not authorize the Receiver to defend, or initiate, litigation on ACL's behalf in other cases.

CLMI are directly and adversely affected by the trial court's unauthorized and unconstitutional receivership order. For decades, CLMI have reimbursed ACL for CLMI's share of ACL's defense and indemnity costs arising from personal-injury claims, paying out tens of millions of dollars to date to injured parties.[2] In the wake of the trial court's receivership order, however, both the Receiver and ACL's board—which routinely take diametrically opposed positions on litigation and insurance matters—claim to speak for ACL in its dealings with CLMI, trapping CLMI between two masters.

Under the trial court's orders, the Receiver has taken control of litigation against ACL in multiple asbestos personal-injury cases pending in multiple states; insisted that he be treated as the insured by ACL's insurers; and, purporting to act for ACL, has filed lawsuits against many of those insurers. Additionally, although the Receiver has accepted service of process on ACL's behalf in asbestos personal-injury cases nationwide, he has declined to retain counsel for ACL in several of those cases—and ACL has prohibited CLMI from retaining counsel on its behalf—opening the door to potential default judgments for hundreds of millions of dollars that plaintiffs may then seek to execute directly against CLMI.

The extraterritorial appointment of a receiver for an active company fully capable of managing its own affairs is unknown to American law. Yet the trial court, which is responsible

[2] The policies insuring ACL to which CLMI subscribed are excess policies that do not provide for a duty to defend and respond to ultimate net loss.

for overseeing all asbestos litigation in South Carolina, has appointed a receiver for a foreign corporation on multiple occasions. All told, the trial court has appointed two dozen receivers for South Carolina and foreign corporations over the past five years, including in two cases currently pending before this Court on certification: *Tibbs v. 3M Co.*, No. 2023-001461 (S.C. Sup. Ct. Oct. 3, 2024), concerning the validity of the ACL receivership, and *Welch v. Advance Auto Parts, Inc.*, No. 2024-001180 (S.C. Sup. Ct. Aug. 20, 2024), concerning the validity of another receivership that the trial court imposed on another active, solvent Canadian corporation, Atlas Turner Inc.

CLMI seek vacatur of the trial court's receivership orders by writ of prohibition because they have no other adequate appellate remedy. CLMI and ACL's other insurers were not parties to the lawsuit in which the trial court appointed a receiver for ACL. Yet the trial court has held that they are bound by that receivership order, which, as nonparties, they had no ability to appeal. In other cases in which the Receiver has purported to act on ACL's behalf against CLMI and other insurers—including in an insurance coverage action he filed against CLMI—the insurers have repeatedly moved to dissolve the receivership on the basis that the trial court lacks jurisdiction to appoint a receiver for an active, solvent Canadian corporation. Each of those attempts has been unsuccessful, and the Court of Appeals has now made clear that, under this Court's ruling in *Childers v. Davis Mechanical Contractors, Inc.*, No. 2024-000005 (S.C. Sup. Ct. Mar. 27, 2024), *reh'g denied*, Apr. 17, 2024, it lacks jurisdiction to review interlocutory rulings denying motions to dissolve a receivership. A final judgment in the Receiver's coverage action, which would be appealable by CLMI, is years away, if it occurs at all. In the meantime, the trial court continues to press ahead with (1) adjudicating asbestos personal-injury claims against ACL, where the Receiver's and ACL's conflicting actions jeopardize CLMI's rights under the policies; (2) directing CLMI to treat the Receiver as their insured, compelling CLMI to choose whether to

follow the instructions of the Receiver or the contrary instructions of ACL's duly appointed management in Canada; and (3) presiding over the third-party coverage complaints that the Receiver, purporting to act on ACL's behalf, has filed against CLMI and dozens of other insurers, raising the specter of judicial determinations in conflict with the longstanding agreement among ACL and CLMI on application of the policies.

CLMI's untenable position is a direct result of the trial court's distortion of South Carolina receivership law. South Carolina law authorizes courts to appoint a general receiver to manage a corporation's affairs only where a proceeding is brought to dissolve a *South Carolina* corporation. S.C. Code Ann. §§ 33-1-400(4), 33-14-320(a) (2005). South Carolina law also authorizes a more limited "asset receivership" to hold and preserve the "property within this State of foreign corporations" that are insolvent or in imminent danger of insolvency. *Id.* § 15-65-10(4). But South Carolina law does not authorize the type of mongrel receivership ordered here: one that empowers the Receiver to control ACL's litigation and insurance, without fully divesting ACL's Canadian board and officers of all power. And with good reason. The trial court's unauthorized receivership necessarily permits two masters to run a single corporation, creating inherently irreconcilable conflicts regarding who properly exercises ACL's powers with respect to third parties like CLMI and fomenting uncertainty about who is responsible for defending litigation against ACL. Indeed, ACL is already confronted with potential default judgments in multiple cases where neither the Receiver nor ACL has retained counsel, and just days ago, a bankrupt manufacturer of asbestos-containing insulation relied on the trial court's unauthorized receivership order to file a lawsuit against ACL in South Carolina seeking hundreds of millions of dollars in damages. Complaint, *Nat'l Serv. Indus., Inc. v. ACL*, No. 2024-CP-40-06713 (S.C. Ct. Common Pleas, 5th Cir. Nov. 14,

2024) (Exhibit 1) ("*Nat'l Serv. Indus.* Complaint"). CLMI may be left holding the bag if neither the Receiver nor ACL acts to defend ACL's interests in these cases.

This petition is CLMI's only meaningful opportunity to seek and secure relief from the often-conflicting demands of the Receiver and ACL and the other irreparable harms that CLMI are sustaining on a daily basis as a result of the trial court's unlawful exercise of jurisdiction. These harms to CLMI include exposing themselves to potential sanctions or contractual and extra-contractual liability for guessing incorrectly about whether to treat the Receiver or the Canadian management of ACL as their insured; paying to settle claims against ACL, at the Receiver's behest, in amounts well in excess of ACL's historical settlement payments and to which ACL objected; potentially paying judgments against ACL that would be voided by a subsequent appellate decision invalidating this unauthorized receivership, with no ability to recoup those payments; and the expense of defending against the Receiver's third-party coverage complaint and responding to his burdensome discovery demands (including those seeking privileged and confidential communications between CLMI and ACL). Because CLMI would not be made whole for these ongoing harms by an appellate decision vacating the receivership following a final judgment entered years in the future—and because the Court of Appeals has ruled that, under *Childers*, interlocutory relief is not available—the only mechanism for protecting CLMI from the trial court's jurisdictional overreach is a writ from this Court.

Accordingly, pursuant to S.C. Code Ann. § 14-3-310 (2017) and South Carolina Appellate Court Rule 245(b), CLMI hereby petition for a writ of prohibition to issue in the original jurisdiction of this Court, prohibiting the Honorable Jean Toal or any later designated judge from enforcing the order appointing a receiver for ACL, holding the order appointing the Receiver and all related orders void for lack of jurisdiction, and, correspondingly, prohibiting the Receiver from

taking any action (through litigation or otherwise) on behalf of ACL. The writ is warranted to prevent the trial court from continuing to transgress the limits that South Carolina law and the U.S. Constitution impose on its jurisdiction to appoint receivers and to shield CLMI from ongoing, irreparable harm inflicted on them by the unlawful ACL receivership.

CLMI respectfully request that the Court treat this petition as a companion case to *Tibbs v. 3M Co.*, No. 2023-001461 (S.C. Sup. Ct. Oct. 3, 2024), and *Welch v. Advance Auto Parts, Inc.*, No. 2024-001180 (S.C. Sup. Ct. Aug. 20, 2024), which present substantially overlapping issues, and set the cases for oral argument on the same day. Considering these matters together will ensure that this Court is able to render a decision on these important questions based on a fully developed record that encompasses all relevant arguments under both South Carolina law and the U.S. Constitution.

STATEMENT OF THE CASE

This petition arises from the trial court's decision to appoint a receiver over ACL, an active, solvent foreign corporation, as a discovery sanction. *See* Order on Plaintiffs' Motion to Appoint a Receiver, p. 2, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Common Pleas, 5th Cir. Sept. 7, 2023) ("Receivership Order") (Exhibit 2). That decision was made in one of numerous asbestos personal-injury cases pending before the trial court, which oversees all asbestos litigation in the State, and it purports to apply in all cases involving ACL.

As a result of the long history of asbestos litigation, some of the defendants in asbestos personal-injury cases are now defunct. The trial court has claimed the power to appoint a receiver for these defunct defendants to marshal any available assets to pay meritorious claims. The trial court has invariably appointed Peter Protopapas as the receiver. But the trial court has not appointed Mr. Protopapas receiver solely for defunct South Carolina corporations. Indeed, it has now appointed Mr. Protopapas receiver for *twenty-four* companies over the past five years,

including several non-South Carolina corporations. *See* Travelers' Petition for Rehearing, pp. 17–18, *Childers v. Davis Mech. Contractors, Inc.*, No. 2024-000005 (S.C. Sup. Ct. Apr. 11, 2024), *reh'g denied*, Apr. 17, 2024.

In limited circumstances, a South Carolina court is statutorily authorized to judicially dissolve a defunct South Carolina corporation and, as part of that dissolution proceeding, appoint a receiver to manage and wind up its affairs. *See* S.C. Code Ann. § 33-14-320(a) ("A court in a judicial proceeding brought to dissolve a corporation may appoint receivers to wind up and liquidate, or custodians to manage, the business and affairs of the corporation."). But ACL is not defunct. Nor is it a South Carolina corporation. It is an active corporation organized under the laws of Canada, with a principal place of business in Québec. *See* Third-Party Defendant Travelers Casualty and Surety Company's Notice of Motion and Motion to Stay or Dismiss the Third-Party Claims of the Purported Receiver for ACL and to Dissolve the Receivership, pp. 12–18, *Mitchell v. 3M Co.*, No. 2022-CP-40-02979 (S.C. Ct. Common Pleas, 5th Cir. Oct. 23, 2023) (Exhibit 3). ACL does not have any assets or property in South Carolina, and it has never conducted any business activities in South Carolina. *See* Affidavit of Richard Dufour, ¶ 2, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Common Pleas, 5th Cir. May 11, 2023) ("Dufour Aff.") (Exhibit 4).

In *Tibbs v. 3M Co.*, an asbestos personal-injury action in which ACL was named as a defendant and CLMI were not parties, ACL entered an appearance in the trial court to raise an objection to personal jurisdiction, which the trial court overruled. ACL subsequently filed an answer and responded to discovery requests to the extent it deemed consistent with its legal obligations under the Québec Business Concerns Records Act. *See generally* ACL Memorandum in Opposition to Motion for Contempt, to Strike Answer and Appoint a Receiver, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Common Pleas, 5th Cir. Aug. 28, 2023) (Exhibit 5). A week

later, the *Tibbs* plaintiffs filed a motion to hold ACL in contempt and to strike its pleadings, arguing that ACL had failed to participate in discovery, and shortly thereafter, they filed a motion to appoint a receiver.

The trial court quickly granted the plaintiffs' motions. In an order entered on September 8, 2023, it found ACL in contempt and struck its pleadings. Order Holding Atlas Asbestos in Contempt and Striking Pleadings, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Common Pleas, 5th Cir. Sept. 7, 2023) (Exhibit 6) (order also applicable to ACL). In the Receivership Order entered the same day, it found ACL in default and appointed Mr. Protopapas as Receiver for ACL. *See* Receivership Order (Exhibit 2). The Receivership Order grants the Receiver sweeping powers over ACL's litigation and insurance, including the powers (i) to "accept service on behalf of ACL"; (ii) to "engage counsel on behalf of ACL"; (iii) to "obtain from any financial institution, bank, credit union, savings and loan or title, credit bureau or any other third party, any financial records belonging to or pertaining to the insurance assets of ACL"; and (iv) to "assume control of the defense of asbestos claims made against ACL in the United States." *Id.* at 6–7. But the order did not purport to displace ACL's board and officers, which continue to control ACL's day-to-day affairs from its headquarters in Québec.

ACL timely noticed an appeal of both the order striking its pleadings and the Receivership Order, *see* Notice of Appeal, *Tibbs v. 3M Co.*, No. 2023-001461 (S.C. Ct. App. Sept. 13, 2023), and at the request of the Court of Appeals, this Court certified the appeal, Order, *Tibbs v. 3M Co.*, No. 2023-001461 (S.C. Oct. 3, 2024). Accordingly, this Court may address the validity of the ACL Receivership Order directly in the certified *Tibbs v. 3M Co.* appeal or indirectly via its forthcoming decision in *Welch v. Advance Auto Parts, Inc.*, No. 2024-001180 (S.C. Aug. 20, 2024), which presents a challenge to a receivership that the trial court imposed on Atlas Turner,

another active, solvent Canadian corporation.[3] Absent writ proceedings in this Court, however, the validity of the ACL receivership is likely to be resolved in proceedings to which CLMI are not parties.

CLMI have for decades reimbursed ACL for their share of ACL's defense and indemnity costs arising from personal-injury suits against the company, paying out tens of millions of dollars in the years prior to the Receiver's appointment. The receivership has disrupted this longstanding, orderly process for compensating injured plaintiffs. After appointment, the Receiver immediately began purporting to act on ACL's behalf across a range of matters before the trial court, including personal-injury suits and third-party actions, and to hold himself out as the insured in dealings with CLMI and other ACL insurers.

In *Link v. 4520 Corp.* and *Donaghy v. 4520 Corp.*, two asbestos personal-injury cases in which CLMI were nonparties, the trial court ordered that "[t]he Receiver for . . . ACL shall be viewed as the named insured and the representative for . . . ACL in the defense of asbestos litigation matters and the management of any insurance or insurance-related assets," and that "[t]he insurers for . . . ACL are expected to cooperate with the Receiver." Order, pp. 5–6, *Link v. 4520 Corp.*, No. 2022-CP-40-005543, *Donaghy v. 4520 Corp.*, No. 2022-CP-40-03108 (S.C. Ct. Common Pleas, 5th Cir. Feb. 23, 2024) ("*Link* Mediation Order") (Exhibit 7). But ACL, as an active, solvent company, has taken the position that the Receiver is without authority to act on ACL's behalf, including the authority to tender claims to its insurers and control ACL's litigation, *see* Brief of ACL, p. 1, *Tibbs v. 3M Co.*, No. 2023-001461 (S.C. Ct. App. May 21, 2024) (Exhibit 8), and it objected to CLMI's extending settlement authority in the *Link* and *Donaghy* cases in

[3] Atlas Turner currently shares a common corporate parent with ACL but has a different corporate history and background.

sums consistent with the Receiver's expectations. Accordingly, during the court-ordered mediation in *Link* and *Donaghy*, CLMI found itself caught between conflicting directives from the Receiver and ACL's management.

Fearing potential liability to ACL, CLMI followed its directives regarding settlement authority, and the mediation was unsuccessful. The Receiver thereafter moved in *Link* and *Donaghy* for sanctions against nonparties CLMI based on their alleged failure to meaningfully participate in the mediation. The trial court granted the Receiver's request, issuing an order imposing $50,000 a day in sanctions against CLMI (as well as their third-party claims administrator, Resolute Management Inc. ("Resolute")) for supposedly failing to "comply with th[e] Court's orders" with respect to the ACL receivership, leaving it to the Receiver to "advise the Court if and when compliance with this Court's orders is achieved." Order on Plaintiffs' and Receiver's Motion for Sanctions and Contempt, p. 7, *Link v. 4520 Corp.*, No. 2022-CP-40-05543, *Donaghy v. 4520 Corp.*, No. 2022-CP-40-03108 (S.C. Ct. Common Pleas, 5th Cir. Mar. 22, 2024) ("Sanctions Order") (Exhibit 9); *see also* Order of Supersedeas Staying Order for Daily Monetary Sanctions Contained in Its Order for Sanctions Against Resolute Management and Certain Underwriters of Lloyd's of London, *Link v. 4520 Corp.*, No. 2022-CP-40-005543, *Donaghy v. 4520 Corp.*, No. 2022-CP-40-03108 (S.C. Ct. Common Pleas, 5th Cir. Mar. 27, 2024) (Exhibit 10) (staying daily monetary sanction, but not other sanctions, pending appeal).

CLMI and Resolute appealed the Sanctions Order on multiple grounds, including the invalidity of the Receivership Order. *See* Initial Brief of Nonparty Appellants Certain Underwriters at Lloyd's, London, Certain London Market Insurance Companies, and Resolute Management Inc., *Link v. 4520 Corp.*, No. 2024-000501 (S.C. Ct. App. Apr. 18, 2024) (Exhibit 11). The plaintiffs in *Link* and *Donaghy*, however, subsequently settled and dismissed their claims

against ACL. As a result, the trial court vacated the Sanctions Order *nunc pro tunc* to the date of its issuance, *see* Order Vacating Sanctions and Contempt Order of March 22, 2024 Against Resolute Management Inc. and Certain Underwriters of Lloyd's of London, *Link v. 4520 Corp.*, No. 2022-CP-40-05543, *Donaghy v. 4520 Corp.*, No. 2022-CP-40-03108 (S.C. Ct. Common Pleas, 5th Cir. Aug. 15, 2024) (Exhibit 12), and the Court of Appeals dismissed CLMI's and Resolute's appeals, *see* Order, *Link v. 4520 Corp.*, No. 2024-000501 (S.C. Ct. App. Aug. 20, 2024) (Exhibit 13). CLMI were therefore unable to use their appeal of the Sanctions Order as a vehicle for challenging the receivership's validity.

The conflicting and burdensome demands on CLMI also extend to the discovery setting. In *McDowell v. A.O. Smith Corp.*, another asbestos personal-injury case in which CLMI were nonparties, the trial court granted the Receiver's demand for onerous third-party discovery from CLMI in an order that required them to provide the Receiver with "detailed explanation[s]" of coverage, communications, and documentation dating back decades. Order on Discovery, pp. 3–4, *McDowell v. A.O. Smith Corp.*, No. 2023-CP-40-06157 (S.C. Ct. Common Pleas, 5th Cir. Mar. 22, 2024) (Exhibit 14). The underlying subpoena issued by the Receiver demanded that CLMI produce, for example, "all general liability, product liability, and professional liability insurance policies" they issued to ACL between 1945 and the present, including "any documents referencing such policies." Subpoena Duces Tecum, ¶ 1, *McDowell v. A.O. Smith Corp.*, No. 2023-CP-40-06157 (S.C. Ct. Common Pleas, 5th Cir. Jan. 9, 2024) ("*McDowell* Subpoena") (Exhibit 15). It also demanded "underwriting files" and "claims files" for the same period and "all documents that reflect communications between [CLMI] and ACL" regarding either "the acquisition, placement, and termination of insurance coverage" or "the defense and/or indemnification of ACL," including communications with ACL's lawyers. *Id.* ¶¶ 4, 6–7, 9. In response to the trial court's order

compelling production, CLMI produced thousands of pages of documents to the Receiver, over ACL's objection. The Receiver issued similarly expansive subpoenas to CLMI in the *Tibbs* case as well as the *Link* and *Donaghy* actions. Subpoena Duces Tecum, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Common Pleas, 5th Cir. Sept. 26, 2023) ("*Tibbs* Subpoena") (Exhibit 16); Subpoena, *Link v. 4520 Corp.*, No. 2022-CP-40-005543, *Donaghy v. 4520 Corp.*, No. 2022-CP-40-03108 (S.C. Ct. Common Pleas, 5th Cir. Mar. 6, 2024) ("*Link* Subpoena") (Exhibit 17).

Purporting to act on ACL's behalf, the Receiver has also filed a third-party coverage complaint in yet another underlying personal-injury lawsuit, *Lewis v. Asbestos Corp. Ltd.*, against CLMI and scores of other insurers that potentially have coverage obligations to ACL. *See* Third-Party Complaint, No. 2024-CP-40-00458 (S.C. Ct. Common Pleas, 5th Cir. Feb. 21, 2024) (Exhibit 18). CLMI moved to dismiss the third-party complaint, raising the invalidity of the Receivership Order, among other arguments. The trial court denied the motion in a ruling that relied heavily on its prior rulings in other cases rejecting insurers' challenges to the ACL receivership. Order, pp. 8–14, *Lewis v. Asbestos Corp. Ltd.*, No. 2024-CP-40-00458 (S.C. Ct. Common Pleas, 5th Cir. May 20, 2024) ("*Lewis* MTD Order") (Exhibit 19) (citing Order, *Mitchell v. 3M Co.*, No. 2022-CP-40-02979 (S.C. Ct. Common Pleas, 5th Cir. Feb. 26, 2024)). Consequently, the Receiver is moving forward with his coverage action, compelling CLMI to incur substantial costs preparing a defense to the suit and responding to the Receiver's expansive discovery requests, and seeking findings in conflict with the longstanding agreement among ACL and CLMI on application of the policies.

In addition, as in *Link* and *Donaghy*, the Receiver is continuing to control ACL's defense in multiple asbestos personal-injury cases and conveying positions to CLMI with respect to the settlement of claims and other litigation-related matters. *See, e.g.*, Receivership Order at 6–7 (Exhibit 2). But because ACL has not been fully divested of its corporate powers and contends

the receivership is invalid, it has continued to issue its own directives to CLMI with respect to settlements and the retention of counsel. This has created a conflict between the Receiver and ACL over the defense of the pending asbestos claims, leaving CLMI in the middle attempting to navigate these irreconcilable positions. For example, after CLMI—in compliance with the Receiver's expressed preference—provided funds to the Receiver to settle five asbestos cases pending against ACL, attorneys retained by ACL's board and officers in Canada accused CLMI of materially breaching their contractual obligations to ACL.

The Receiver has also accepted service of several new complaints filed against ACL, including complaints filed outside South Carolina, but ACL disputes the validity of service upon the Receiver, does not believe it has a duty to appear in those cases, and blocked CLMI from retaining counsel on its behalf—placing CLMI in an untenable position with respect to ACL's defense. ACL is obligated to defend and resolve asbestos-related bodily-injury claims filed against it and to pay defense costs associated with those claims, seeking reimbursement from CLMI for their several shares. In fact, CLMI have been reliably reimbursing these costs—in amounts totaling tens of millions of dollars—for decades pursuant to the terms of the policies. But because ACL does not recognize service accepted by the Receiver (and asserts that its obligation to defend arises only upon proper service), it has declined to retain counsel to defend against the complaints in cases where the Receiver has accepted service. The Receiver also has not retained counsel in several of these recently filed cases, leaving ACL exposed to the risk of default judgments and exposing CLMI—which have no contractual duty to retain defense counsel under the policies—to the risk of paying those potentially substantial damages awards.

For example, seeking to avoid an imminent default judgment in a case in which ACL refused to recognize service upon the Receiver and the Receiver did not retain counsel, CLMI

recently retained counsel to act on ACL's behalf in *Arsenith v. 3M Co.*, No. 24-cv-089313 (Cal. Super. Ct. Aug. 28, 2024), an asbestos personal-injury case filed against ACL in California seeking $230 million in damages. But ACL stood in the way, sending a letter to the counsel retained by CLMI "formally advis[ing]" him "that [he] and [his] firm are not authorized to represent ACL in [the *Arsenith*] matter or any other case in the state of California." Receiver's Notice of Filing of Correspondence from ACL, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Common Pleas, 5th Cir. Oct. 23, 2024) (attaching Letter to James C. Parker, Hugo Parker, LLC, from Richard Dufour, ACL, *Re: ACL – Defense of* Arsenith *Matter* (Oct. 16, 2024) ("Parker Letter")) (Exhibit 20). Consequently, there has been no appearance for ACL in *Arsenith* and, without an appearance and response by the looming deadline to answer the complaint, there is significant risk of a default in a case seeking hundreds of millions of dollars in damages, which the plaintiff could then try to collect against CLMI.[4]

CLMI thus find themselves in an impossible situation, unable to mitigate the risk that plaintiffs will seek to execute against them on hundreds of millions of dollars in potential default judgments that may be imposed against ACL in *Arsenith* and other similar cases while CLMI await

[4] Indeed, the *Arsenith* plaintiffs have already moved once for the entry of default in the amount of $230 million against ACL. Following service on the Receiver, the responsive pleading deadline was initially set for October 16, 2024. When that date passed without response from ACL—because neither the Receiver nor ACL retained counsel, and ACL blocked CLMI from retaining counsel—the plaintiffs moved for an order of default. Plaintiffs' Request for Entry of Default, *Arsenith v. 3M Co.*, No. 24-cv-089313 (Cal. Super. Ct. Oct. 29, 2024) (Exhibit 21). The court clerk rejected the motion, however, due to technical deficiencies in service of the complaint. Clerk's Notice of Rejection Default/Judgment, *Arsenith v. 3M Co.*, No. 24-cv-089313 (Cal. Super. Ct. Oct. 30, 2024) (Exhibit 22). The plaintiffs have since purported to re-serve the Receiver, which triggered a potential new responsive pleading deadline of December 4, 2024. As noted above, ACL does not regard service upon the Receiver as proper service on ACL. To date, ACL has not appeared in the case.

the opportunity to challenge the Receivership Order on appeal from a potential final judgment in the *Lewis* declaratory judgment action.

Meanwhile, orders of the Court of Appeals and this Court have made it impossible for CLMI to appeal the trial court's rulings rejecting challenges to the Receivership Order in the absence of a final judgment. In March 2024, this Court issued an order dismissing an unrelated appeal from the trial court's denial of a motion to dissolve the receivership of a defunct Texas corporation, the Payne & Keller Company, on the ground that the ruling "is not immediately appealable." Order, *Childers v. Davis Mech. Contractors, Inc.*, No. 2024-000005 (S.C. Sup. Ct. Mar. 27, 2024), *reh'g denied*, Apr. 17, 2024. The next day, the Receiver's counsel sent a letter to counsel for several insurers, including CLMI, citing the *Childers* order and threatening to file a motion for sanctions under Rule 11, SCRCP, if the insurers declined to withdraw their appeals of various orders concerning motions to dissolve the ACL receivership. Letter from Jonathan M. Robinson to A. Victor Rawl, Jr. *et al.* (Mar. 28, 2024) ("Robinson Letter") (Exhibit 23). Then, on April 12, 2024, the Court of Appeals dismissed *sua sponte* an appeal that Travelers Casualty and Surety Company had filed in a third-party coverage action initiated by the Receiver, holding that the order denying Travelers' motion to dissolve the ACL receivership was "not immediately appealable" and citing this Court's order in *Childers*. Order, *Mitchell v. 3M Co.*, No. 2024-000341 (S.C. Ct. App. Apr. 12, 2024) (Exhibit 24).

As a result, the Receiver continues to purport to act on ACL's behalf with respect to ACL's litigation and settlements and CLMI's coverage obligations, and the trial court continues to move forward with ACL-related litigation, including the personal-injury claims against ACL and the Receiver's third-party claims against CLMI. In each instance, CLMI find themselves caught between two masters—confronted on a daily basis with possible new liability either in the form of

sanctions for noncompliance with the Receiver's demands or breach of contract for failing to follow the directives of ACL's Canadian officers and directors. And as lawsuits against ACL continue to accumulate—including the recently filed case in South Carolina trial court seeking to compel ACL to pay hundreds of millions of dollars to a bankrupt manufacturer of asbestos-containing insulation—CLMI cannot afford to wait years for a potential final judgment against them in the *Lewis* declaratory-judgment action for an opportunity to appeal. *See, e.g.*, *Nat'l Serv. Indus.* Complaint (Exhibit 1) (seeking more than $151 million against ACL, plus treble and punitive damages). In the absence of intervention by this Court, CLMI have no meaningful prospect of securing appellate review of the trial court's receivership-related rulings and will be compelled to continue to incur the irremediable burdens and legal risks inflicted on them by the ACL receivership.

JURISDICTION AND LEGAL STANDARD

This Court may issue writs of prohibition under its original jurisdiction. S.C. Const. art. V, § 5; *see also* S.C. Code Ann. § 14-3-310; *cf. State v. Price*, 441 S.C. 423, 433, 895 S.E.2d 633, 638 (2023) (pursuant to Article V, Section 5 of the South Carolina Constitution and Section 14-3-310 of the South Carolina Code, this Court "may use a common-law writ of certiorari to correct errors of law, particularly where a trial court exceeded its authority"). A writ of prohibition may issue "to prevent an . . . improper assumption of jurisdiction on the part of an inferior court or tribunal." *New S. Life Ins. Co. v. Lindsay*, 258 S.C. 198, 200, 187 S.E.2d 794, 796 (1972) (quoting *Ex parte Jones*, 160 S.C. 63, 158 S.E. 134, 137 (1931)); *State Bd. of Bank Control v. Sease*, 188 S.C. 133, 198 S.E. 602, 603 (1938) (same). The writ "is primarily a preventive process, and [it] is only incidentally remedial"; "its principal modern use . . . is to prevent the assumption and exercise of jurisdiction by an inferior court or tribunal in cases where wrong, damage, and injustice are liable to follow such action." *Jones*, 160 S.C. at 63, 158 S.E. at 137.

ARGUMENT

A writ of prohibition is warranted because the trial court has exceeded its jurisdiction in appointing a receiver for ACL. The appointment of a receiver "is a drastic remedy" to be exercised with "reluctance and caution." *Midlands Util., Inc. v. S.C. Dep't of Health & Envt'l Control*, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (1989). The trial court failed to heed that admonition when it appointed a receiver for ACL, a solvent, active Canadian corporation, imposing what amounts to the corporate death penalty as a discovery sanction. Nothing in South Carolina law or practice authorizes a court to appoint a receiver for a solvent foreign corporation with no property in the State or to appoint a receiver for any corporation—foreign or domestic—as a discovery sanction. The Receivership Order thus exceeds the trial court's authority under South Carolina law and violates the United States Constitution, which reserves to the federal government the power to regulate commerce with foreign nations and the authority to oversee foreign affairs. The Order is also procedurally infirm, failing to provide for the posting of a bond by ACL to extinguish the receivership. And, even if the Receivership Order were valid, it would apply only in the *Tibbs* case in which it was entered, not in other cases filed against ACL, and not in other cases filed by the Receiver on behalf of ACL.

Without this Court's intervention, CLMI will have no procedural avenue for meaningfully addressing the irremediable harms they are incurring on a daily basis as a direct result of the Receivership Order.

I. The Receivership Order Is Contrary to Law.

A. The Equitable Remedy of Receivership Is a Drastic and Temporary Remedy.

Receivership under S.C. Code Ann. § 15-65-10(5) (2005)—the provision invoked by the trial court in appointing the Receiver for ACL—is a temporary and provisional equitable remedy in an already pending action, appropriate only where legal remedies are inadequate and there is

clear evidence that the specific property that is the subject of the pending action is in danger of being lost, dissipated, destroyed, or removed from the jurisdiction of the court. As this Court has explained, "[t]he appointment of a receiver *pendente lite*"—*i.e.*, in the matter pending before it—is "purely a provisional remedy[] to preserve the assets of the estate." *Vasiliades v. Vasiliades*, 231 S.C. 366, 376, 98 S.E.2d 810, 815 (1957); *see also Ex parte Williams*, 17 S.C. 396, 403 (1882) ("'A receiver is an indifferent person between the parties to a cause, appointed by the Court to receive and preserve the property in litigation *pendente lite*.'"); *see also* 1 John Norton Pomeroy, Jr., *A Treatise on Equitable Remedies* § 62, at 106 (1905) ("By means of the appointment of a receiver, a court of Equity takes possession of the property which is the subject of the suit, preserves it from waste or destruction, secures and collects the proceeds or profits, and ultimately disposes of them according to the rights and priorities of those entitled.") (citation omitted).

Accordingly, "[r]eceivership is a drastic course, allowed only under pressing circumstances and granted only with reluctance and caution." *Vasiliades*, 231 S.C. at 376, 98 S.E.2d at 815; *see also Pelzer v. Hughes*, 27 S.C. 408, 415–16, 3 S.E. 781, 785 (1887) ("It is universally conceded that the power of appointment [of a receiver] is a delicate one, and is to be exercised with great circumspection.") (internal quotation marks omitted). This is so because a receivership reverses the standard sequence that requires judgment first, execution second: "Property is not taken from a party in possession, claiming in good faith the right to it, before judgment in actions at law." 1 Pomeroy, *supra*, § 67, at 113 (citation omitted). By allowing dispossession of property prior to judgment, a receivership "is a serious interference, without the verdict of a jury and without a regular hearing, with the *prima facie* rights of the citizen, and should only be granted to prevent manifest wrong." *Id.* at 114 (citations and internal quotation marks omitted).

The trial court overstepped these well-settled limitations when it appointed a receiver for ACL.

B. The Receivership Order Violates South Carolina Law.

As a sanction for alleged discovery violations, the trial court relied on S.C. Code Ann. § 15-65-10(5) to appoint a receiver for ACL, a solvent Canadian corporation that is actively managing its own affairs. *See* Receivership Order, p. 2 (Exhibit 2). That provision authorizes a court to appoint a receiver only where "provided by law" or "in accordance with the existing practice." S.C. Code Ann. § 15-65-10(5). As detailed below, the "existing practice" referred to in the statute is the practice of courts of equity prior to the enactment of the Code of Procedure in 1870. Nothing in South Carolina law or practice authorizes a court to appoint a receiver for a solvent foreign corporation with no property in the State or to appoint a receiver for any corporation—foreign or domestic—as a discovery sanction.

1. South Carolina Law Does Not Authorize the Receivership Order.

South Carolina law does not authorize the appointment of a receiver to manage a foreign corporation's affairs. That type of general receivership over a corporation is authorized only under the South Carolina Business Corporations Act of 1988 (the "Corporation Code"), S.C. Code Ann. § 33-14-320(a), which provides that a court "in a judicial proceeding brought to dissolve a corporation" may "appoint receivers to wind up and liquidate . . . the business and affairs of the corporation." But the South Carolina Corporation Code defines "[c]orporation" to encompass only a "domestic corporation" and to specifically *exclude* "a foreign corporation." S.C. Code Ann. § 33-1-400(4) (defining "[c]orporation" as "a corporation for profit, which is not a foreign corporation, incorporated pursuant or subject to the provisions of Chapters 1 through 20 of this Title"). The in-state limits on the power to appoint a general receiver are confirmed by the well-settled "principle that state statutes generally have no extra-territorial effect," which "remains a

foundation of the respect for individual sovereignty the states must share with one another." *Doctors Hosp. of Augusta, LLC v. CompTrust AGC Workers' Comp. Tr. Fund*, 371 S.C. 5, 9, 636 S.E.2d 862, 864 (2006); *see also Protopapas v. Whittaker, Clark & Daniels, Inc.*, No. 23-4151 (ZNQ), 2024 WL 2796449, at *7 n.8 (D.N.J. May 31, 2024) (holding that a South Carolina receivership did not displace the authority of the board of a New Jersey corporation to declare bankruptcy because, among other reasons, "such a position would violate the rights of other states to dispose of the property within their territories"). Accordingly, even if the *Tibbs* action were a "judicial proceeding brought to dissolve a corporation" within the meaning of Section 33-14-320(a)—which, as an asbestos personal-injury suit, it was *not*—the trial court would have lacked statutory authority to appoint a general receiver for ACL, a Canadian corporation.

The only provision of South Carolina law that authorizes appointment of a receiver in connection with a foreign corporation is found in the provisional remedies section of the Civil Procedure Code, S.C. Code Ann. § 15-65-10(4), which, under specified circumstances, authorizes a receiver for the "property within this State of foreign corporations." But the trial court has expressly disclaimed reliance on that provision to appoint Mr. Protopapas as receiver for ACL. Order on Motions for Stay, Motions to Dismiss, Motions to Strike, Motions for More Definite Statement, and Motion to Dissolve Receivership, p. 13, *Mitchell v. 3M Co.*, No. 2022-CP-40-02979 (S.C. Ct. Common Pleas, 5th Cir. Feb. 23, 2024) (Exhibit 25). In any event, Section 15-65-10(4) is wholly inapplicable to ACL because it has no property in South Carolina, *see* Dufour Aff. ¶ 2 (Exhibit 4), and it has not been "dissolved," is not "insolvent or in imminent danger of insolvency," and has not "forfeited its corporate rights," S.C. Code Ann. § 15-65-10(4); *see also Boynton v. Consol. Indem. & Ins. Co.*, 180 S.C. 279, 293, 185 S.E. 731, 737 (1936) (reversing appointment of a receiver because there was a "total failure of any proof" that the foreign company

"has property in this state"). Thus, no provision of South Carolina law authorized the trial court's appointment of a receiver for ACL.[5]

2. South Carolina Equity Practice Does Not Authorize the Receivership Order.

The appointment of the Receiver also does not "accord[] with the existing practice" of South Carolina courts within the meaning of Section 15-65-10(5).

a. The Trial Court's Prior Receivership Appointments Do Not Support the Receivership Order.

As set forth above, under South Carolina law "[t]he appointment of a receiver is a drastic remedy, and should be granted only with reluctance and caution." *Midlands Util., Inc.*, 301 S.C. at 228, 391 S.E.2d at 538; *see also Brookshire v. Farmers' All. Exch.*, 73 S.C. 131, 132, 52 S.E. 867, 867 (1905) ("A court of equity is disinclined to take the control and management of the affairs of a corporation out of the hands of its officers and directors and substitute its receiver therefor.") (internal quotation marks omitted). Here, ACL exercised its constitutional right to contest the trial court's personal jurisdiction and explained why, as a matter of Québec law, ACL believed it could not provide all of the discovery sought. *See* ACL's Memorandum in Opposition to Motion for Contempt, to Strike Answer and Appoint a Receiver, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Common Pleas, 5th Cir. Aug. 9, 2023) ("ACL Contempt Opposition") (Exhibit 27). In response, the trial court held ACL in contempt and struck its pleadings. With the pleadings struck, the court then found ACL in default and appointed the Receiver to control ACL's litigation and insurance, effectively displacing ACL's duly appointed Canadian officers and directors.

[5] In a brief to the Court of Appeals in the *Tibbs* action, the Receiver invoked a statutory provision authorizing the appointment of a receiver "[a]fter judgment, to carry the judgment into effect." Brief of Receiver, p. 17 n.4, *Tibbs v. 3M Co.*, No. 2023-001461 (S.C. Ct. App. May 20, 2024) ("*Tibbs* Ct. App. Receiver Br.") (Exhibit 26) (quoting S.C. Code Ann. § 15-65-10(2)). But the trial court did not rely on this provision when appointing the Receiver, and it is plainly inapplicable as no judgment against ACL has been entered in the *Tibbs* case or any other South Carolina case.

These extraordinary measures find no footing in South Carolina equity practice. Indeed, courts universally recognize that a State's courts may *not* appoint a general receiver for a foreign corporation. *See Boynton*, 180 S.C. at 293–94, 185 S.E. at 737 (circuit court "was without authority to appoint a receiver" for New York corporation because it "is a foreign corporation"); *Pollock v. Carolina Interstate Bldg. & Loan Ass'n*, 48 S.C. 65, 75, 25 S.E. 977, 980 (1896) (North Carolina court's appointment of receiver for North Carolina bank had no effect in South Carolina; "Having the right to appoint a receiver in their territory alone, such appointee is a creature of the appointing power, and cannot have greater power than his creator.").[6]

The fact that the trial court has ignored these restrictions on its jurisdiction in other cases and appointed receivers over other foreign corporations does not mean that the Receivership Order is consistent with "existing practice." S.C. Code Ann. § 15-65-10(5). Rather, South Carolina law on the appointment of receivers codifies the historical practice of courts of equity, including all limitations and proscriptions recognized by those courts, prior to the State's enactment of the 1870 Code of Procedure. *See Va.-Carolina Chem. Co. v. Hunter*, 84 S.C. 214, 220, 66 S.E. 177, 179

[6] This conclusion—that a court of one State has no power to appoint a general receiver to take control over a corporation formed in another State or country—is uniformly shared by other jurisdictions. *E.g. Stafford v. Am. Mills Co.*, 13 R.I. 310, 310 (1881) (court had "no power to appoint a receiver of the estate of a foreign corporation"); *N. State Copper & Gold Mining Co. v. Field*, 20 A. 1039, 1040–41 (Md. 1885) (Maryland had no jurisdiction to control the internal affairs of a North Carolina corporation; "Our courts possess no visitorial power over [foreign corporations], and can enforce no forfeiture of charter for violation of law . . . . These powers belong only to the state which created the corporation.") (citing *Stafford*); *Republican Mountain Silver Mines v. Brown*, 58 F. 644, 648 (8th Cir. 1893) (Colorado federal court had no power in equity to appoint liquidator to wind up corporation formed in Great Britain; "It is hardly necessary to remark that if courts of equity . . . have no jurisdiction to dissolve a domestic corporation, and to wind up its affairs, much less can they exercise such powers with respect to a foreign corporation."); *Holbrook v. Ford*, 39 N.E. 1091, 1094 (Ill. 1894) ("The general rule is that a court of equity will not appoint a receiver for a foreign corporation where such corporation has no property in the state[.]"); *Frankland v. Remington Phonograph Corp.*, 119 A. 127, 127–28 (Del. Ch. 1922) (the proposition that courts can appoint general receivers for foreign corporations is "beyond doubt as not tenable").

(1909). South Carolina law therefore does not afford a general grant of authority to trial courts to appoint receivers as "equitable," including by relying on the trial court judge's own prior practice.

The appointment of a receiver is one of the oldest equitable remedies of the chancery court. *See* 65 Am. Jur. 2d, Receivers § 1 (2024) (explaining that receivers were introduced into American jurisprudence with the introduction of equity from English practice). In South Carolina, the General Assembly codified the equitable practice of receivership when it adopted the 1870 Code of Procedure, which was adapted from the New York Code of Civil Procedure of 1848–49 (frequently called the "Field Code," after its principal author, legal reformer David Dudley Field). 1870 S.C. Acts 423 *et seq.*; Kellen Funk, *Equity Without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846–76*, 36 J. Legal Hist. 152, 167 n.99 (2015) (listing South Carolina as among more than 25 States, Commonwealths, and territories that had adopted a version of the 1848 New York Code by the end of the 19th century). Chapter V of that 1870 Act, entitled "Provisional Remedies," included Section 267 on receivers and contained provisions now codified at S.C. Code Ann. § 15-65-10 *et seq.* As most relevant here, Section 267(5) provided that "[a] receiver may be appointed . . . in such . . . cases as are now provided by law, or may be in accordance with the existing practice, except as otherwise provided in this Act." Thus, this text, which now appears at S.C. Code Ann. § 15-65-10(5), is a statutory reference to the practice of courts of equity regarding appointment of receivers prior to the enactment of the 1870 Act.

As this Court has explained, this section "gives the old practice the force of a statute." *Va.-Carolina Chem.*, 84 S.C. at 220, 66 S.E. at 179. Accordingly, "[t]he first inquiry is whether the record shows a case warranting the appointment of a receiver *under the general jurisdiction and practice of the court of equity*, aside from the special provisions of the Code of Procedure." *Id.*

(emphasis added). Because Subsection 5 codified preexisting equitable practice in 1870, it is not a self-actuating license that allows a trial court to appoint a receiver in any circumstances that the trial court itself feels proper or where it has previously done so. *See Hoiles v. Watkins*, 117 Ohio St. 165, 172, 157 N.E. 557, 559 (1927) (rejecting argument that Ohio statute, adopted (like South Carolina's) from the New York Code of Civil Procedure, created general grant of authority to appoint receivers; the statute "necessitates an inquiry into the rule 'when the usages of equity' have permitted the appointment of receivers").

The trial court did not attempt to demonstrate that the Receivership Order comported with the practice of courts of equity prior to 1870. Nor could it. As decisions of the time demonstrate, equity had no power to take control and manage the affairs of a corporation absent explicit statutory authority. *See La Société Francaise d'Epargnes et de Prévoyance Mutuelle v. Dist. Ct.*, 53 Cal. 495, 550, 553 (1879) ("*French Bank*") ("there is no jurisdiction vested in Courts of Equity to appoint a Receiver of the property of a corporation in a suit prosecuted by a private party"; "there is no statute of this State . . . which undertakes to confer upon a private person, either as stockholder or creditor, the right to maintain an action to dissolve a corporation upon the ground that it is insolvent, or to obtain relief by seizing its property out of the hands of its constituted management, and placing it in the hands of a Receiver");[7] *Overton v. Memphis & Little Rock R.R. Co.*, 10 F. 866, 867-68 (E.D. Ark. 1882) ("It is not the province of a court of equity to take possession of the property, and conduct the business of corporations or individuals, except where the exercise of such extraordinary jurisdiction is indispensably necessary to save or protect some clear right of a suitor, which would otherwise be lost or greatly endangered, and which cannot be saved or

[7] The California Supreme Court's opinion in *La Société Francaise* was cited by treatise writers and other courts as the "*French Bank*" case. This Court cited it with approval in *Porter v. Brown*, 149 S.C. 151, 146 S.E. 810, 814 n.1 (1929).

protected by any other action or mode of proceeding."); *Slover v. Coal Creek Coal Co.*, 113 Tenn. 421, 82 S.W. 1131, 1137 (1904) ("We know of no authority, and have not been able to discover any, in which the power has been invoked in behalf of persons suing in tort, to the end that the property of a corporation may be held and managed by a receiver in a court of chancery to await the decision of such actions to prevent waste of the corporate property in the meantime, with a view to having it ready to turn over in satisfaction of such judgments as may be obtained in such action at law. Nor do we think, on principle, that the power of the court to appoint receivers should be or could be directed to such use.").

No South Carolina case holds otherwise, which confirms that the Receivership Order is not "in accordance with the existing practice." S.C. Code Ann. § 15-65-10(5).

b. *Virginia-Carolina Chemical* Does Not Support the Receivership Order.

The trial court pointed to no settled practice in equity of appointing receivers for solvent foreign corporations whose affairs are being actively managed by their own boards and officers. Nor did the trial court point to any settled equitable practice of appointing receivers as a discovery sanction, and none exists. The Receivership Order instead cites *Virginia-Carolina Chemical*, 84 S.C. at 220–21, 66 S.E. at 179, which the trial court described as reflecting a practice authorizing a court to "grant any relief within its jurisdiction appropriate and effective to protect creditors" from "moral fraud" of a "debtor" attempting to defeat its creditors. Receivership Order, p. 3 (Exhibit 2).

The trial court's reliance on *Virginia-Carolina Chemical* as supporting a broad grant of power to appoint receivers is unfounded. In that case, this Court concluded that a debtor's gift of the disputed assets to his sister to try to frustrate creditors constituted a "moral fraud" that justified appointment of a receiver. 84 S.C. at 221–22, 66 S.E. at 179–80. That active effort to secrete

assets from creditors may justify appointment of a receiver, but that principle has no application here, where there was no showing that ACL was attempting to hide any assets. Rather, in *Tibbs*, the trial court reasoned that ACL's assertion of "personal jurisdiction claims, exposed by decades of opinions dismissing those very assertions," along with "ACL's continued refusal to participate" in the proceedings, constituted "moral fraud" of a "debtor" that "warrant[ed] the appointment of a receiver." Receivership Order, p. 3 (Exhibit 2). The trial court's reasoning was incorrect in multiple respects.

First, ACL was not a "debtor" in the *Tibbs* case. Receivership Order, p. 3 (Exhibit 2); *Va.-Carolina Chem.*, 84 S.C. at 221, 66 S.E. at 179. When the Receiver was appointed, the plaintiffs did not hold a judgment against ACL, and they still do not. *Cf.* S.C. Code Ann. § 15-35-910(2) (2005 & Cum. Supp.) ("'Judgment debtor' means the party against whom a foreign judgment has been rendered."). *Virginia-Carolina Chemical* is therefore inapplicable on its face.

Second, ACL has not defrauded anyone. ACL has appeared and defended itself in the asbestos personal-injury cases pending against it in South Carolina, and it has endeavored to provide discovery responses to the extent it believed it could consistent with its legal obligations under the Québec Business Concerns Records Act. *See generally* ACL Contempt Opposition (Exhibit 27).

Third, ACL's assertion of a personal-jurisdiction defense—which, together with its invocation of Canadian law to oppose certain discovery demands, was the impetus for the trial court's decision to appoint a receiver—was hardly fraudulent. ACL does not have any assets or property in South Carolina, and it has never conducted any business activities in South Carolina. *See* Dufour Aff. ¶ 2 (Exhibit 4). Moreover, under South Carolina law, any insurance proceeds to which ACL might be entitled to satisfy a judgment entered against it at the end of a case do not

constitute property in South Carolina at the case's inception. *Howard v. Allen*, 254 S.C. 455, 460–61, 176 S.E.2d 127, 129 (1970) (rejecting plaintiff's efforts to "attac[h]" insurer's potential coverage obligations to defendant at inception of case because such potential obligations are not "property" of the insured, and holding that an insurer's obligations remain "inchoate, conditional, [and] contingent" unless there is a judgment imposing liability); *see also PCS Nitrogen, Inc. v. Cont'l Cas. Co.*, 436 S.C. 254, 264–65, 871 S.E.2d 590, 595–96 (2022) (examining *Howard* and reaffirming that, prior to entry of judgment, "the duty to indemnify" is not "a debt subject to attachment" as property within the State, as "the insurer owes the insured nothing until the liability of the insured and the amount thereof has been determined") (internal quotation markets omitted).

According to the trial court, *Sangamo Weston, Inc. v. National Surety Corp.*, 307 S.C. 143, 414 S.E.2d 127 (1992), establishes that "ACL's Insurance Assets" are assets within the State of South Carolina. Receivership Order, pp. 4–5 (Exhibit 2). But *Sangamo* only involved a choice-of-law issue. *See* 307 S.C. at 147, 414 S.E.2d at 129 ("it must first be determined which state's law should be applied in interpreting these insurance contracts"). It did not address when or if an insurance policy may qualify as an asset. Nor did it consider whether a policy issued by an out-of-state insurance company to an out-of-state insured ever can be considered South Carolina property if the insured is sued in South Carolina. Instead, construing S.C. Code Ann. § 38-61-10—which states that "[a]ll contracts of insurance on property, lives, or interests in this State are considered to be made in the State . . . and are subject to the laws of this State"—the Court concluded that "South Carolina substantive law govern[ed] th[e] dispute" about the scope of coverage because the insured was seeking "coverage solely for the liability it incurred due to its

operations within the State of South Carolina." *Sangamo*, 307 S.C. at 148–49, 414 S.E.2d at 130–31.[8]

The *Tibbs* plaintiffs later cited three additional cases, which they believed support the trial court's overbroad reading of *Sangamo*. Brief of Plaintiffs, pp. 22–23, *Tibbs v. 3M Co.*, No. 2023-001461 (S.C. Ct. App. May 21, 2024) ("*Tibbs* Ct. App. Pls. Br.") (Exhibit 28). But these cases, too, treat Section 38-61-10 as a choice-of-law provision. *See Hartsock v. Am. Auto. Ins. Co.*, 788 F. Supp. 2d 447, 450–52 (D.S.C. 2011) (determining "which state's law controls the validity and construction of the insurance contract at issue"); *Okatie Hotel Grp., LLC v. Amerisure Ins. Co.*, No. 04-cv-2212, 2006 WL 91577, at *2–4 (D.S.C. Jan. 13, 2006) (assessing S.C. Code Ann. § 38-61-10 to ascertain "whether Florida or South Carolina law applies"); *Heslin-Kim v. CIGNA Grp. Ins.*, 377 F. Supp. 2d 527, 531 (D.S.C. 2005) (applying *Sangamo* "to determine what law applies").[9]

ACL was therefore well within its rights to raise a personal-jurisdiction defense, which was amply supported by U.S. Supreme Court precedent defining the due-process limits on States' exercise of jurisdiction over out-of-state companies. *See Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) ("With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction.") (alterations and internal quotation marks

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[8] In *Sangamo*, the insured's facility, which allegedly contaminated groundwater, was located in Pickens County, South Carolina. The Court held "[w]hat is solely relevant is where the property, lives, or interests insured are located." 307 S.C. at 148–49, 414 S.E.2d at 130–31.

[9] Nor is it relevant that courts in other States have found that ACL has the requisite minimum contacts with those States to establish personal jurisdiction. *Tibbs* Ct. App. Pls. Br., p. 4 (Exhibit 28) (citing cases). None of those cases concerned ACL's contacts *with South Carolina*, and they thus have no bearing on whether ACL is subject to personal jurisdiction in South Carolina or on whether the insurance policies issued to a non-South Carolina company by non-South Carolina insurers are assets located in South Carolina. Each cited case also predates the U.S. Supreme Court's landmark personal-jurisdiction ruling in *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

omitted); *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 359 (2021) (to be subject to specific jurisdiction in a State, the defendant "must take some act by which it purposefully avails itself of the privilege of conducting activities within the forum State," and the "contacts must be the defendant's own choice and not random, isolated, or fortuitous") (alteration and internal quotation marks omitted).

A defendant's assertion of lack of personal jurisdiction—a requirement of due process—cannot by itself subject the defendant to judicial annihilation such that its corporate powers, including rights to insurance and ability to defend itself in litigation, become subject to a trial court's unilateral authority, through appointment of a receiver. ACL had a due-process right "to present every available defense" to the claims against it, *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks omitted)—which includes jurisdictional defenses—and it cannot be punished through the appointment of a receiver for exercising that constitutional right, *see United States v. Goodwin*, 457 U.S. 368, 372 (1982) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.") (internal quotation marks omitted).

Finally, *Virginia-Carolina Chemical* did not (and could not) authorize the trial court to issue a receivership order that exceeds its jurisdiction. Rather, the opinion emphasizes that any relief ordered must be "within [the court's] jurisdiction." 84 S.C. at 220, 66 S.E. at 179. Because ACL is a foreign corporation organized under the laws of Canada and headquartered in Québec—and the trial court's jurisdiction stops at South Carolina's borders—*Virginia-Carolina Chemical* provides no support for the trial court's appointment of a receiver over ACL. And where a receiver has been appointed, the authority of the receiver is no broader than that of the appointing court itself and is thus subject to the same territorial limits. *See Porter v. Sabin*, 149 U.S. 473, 480

(1893) ("The whole property of the corporation *within the jurisdiction of the court* which appointed the receiver . . . remains in its custody, to be administered and distributed by it.") (emphasis added); *see also Pollock*, 48 S.C. at 74, 25 S.E. at 980 ("The power of a receiver only extends to the boundaries of the territorial jurisdiction of the court appointing him.") (citation and internal quotation marks omitted).[10]

In addition to invoking *Virginia-Carolina Chemical*, the Receiver has pointed to *Philips Medical Systems International, B.V. v. Bruetman*, 982 F.2d 211 (7th Cir. 1992), to defend his appointment. *See Tibbs* Ct. App. Receiver Br., p. 16 (Exhibit 26). But that opinion is equally inapposite. There, the U.S. Court of Appeals for the Seventh Circuit affirmed a default judgment against, and the appointment of a receiver for, a defendant who failed to participate in discovery or otherwise obey court orders. *Philips*, however, involved an *in-state* individual defendant (not exclusively a foreign corporation) and therefore sheds no light on the issues here, where ACL is a foreign corporation incorporated under the laws of, and headquartered in, Canada. *See* 982 F.2d at 212 (noting that the individual defendant was "an Illinois citizen" and thus a citizen of the State in which the federal case was initiated). And the authority of a *federal* court to appoint a receiver based on discovery violations says nothing about whether a *South Carolina* court is authorized to appoint a receiver in similar circumstances—a proposition for which the trial court identified no support in South Carolina's statutes, rules, or case law.

[10] In the Receivership Order, the trial court invoked *Porter* as support for its extraterritorial appointment of a receiver, stating that, under *Porter*, "'[t]he whole property of the corporation [is] within the jurisdiction of the court which appointed the receiver.'" Receivership Order, pp. 3–4 (Exhibit 2) (quoting *Porter*, 149 U.S. at 480) (brackets added by trial court). But the trial court's bracketed addition of "is" fundamentally altered the meaning of *Porter*'s language, transforming a territorial *limit* on courts' receivership authority into a boundless *authorization* of extraterritorial powers.

In sum, the trial court's attempt to project its authority beyond the bounds of South Carolina's borders to appoint a receiver for an active, solvent Canadian corporation finds no support in the text or history of the South Carolina Code or in the more than a century of appellate precedent construing South Carolina courts' receivership powers under the Code.

C. The Receivership Order Violates the United States Constitution.

The Receivership Order is also invalid because it violates the Commerce Clause of the United States Constitution, intrudes on the federal government's foreign-affairs power, and coopts the regulatory authority reserved to the federal government under the Import-Export Clause. These constitutional limits on the territorial reach of state power are reflected in, and reinforced by, the limits on the trial court's receivership authority embodied in the South Carolina statutes and case law discussed above.

The Commerce Clause of the United States Constitution provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. The negative implication of the Commerce Clause (sometimes called the "dormant Commerce Clause"), in turn, restricts States from infringing on Congress's authority in this area by enacting laws that unduly burden, impair, or discriminate against interstate or foreign commerce. *See Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 449 (1979); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988).

In light of the constitutional limits on States' regulation of interstate and foreign commerce, a corporation's State (or country) of incorporation is the only jurisdiction that can provide laws governing the formation—and dissolution—of a corporation. *See, e.g., CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89–90 (1987) (corporations are a "product of state law . . . organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation"); *see also* 17A William Meade Fletcher *et al.*, *Fletcher Cyclopedia of the Law*

of Corporations § 8554 ("The general rule is that neither the courts of a particular state nor the federal courts sitting in the state have power to dissolve a corporation of another state or country. . . . The same is true regarding the appointment of a general receiver for a corporation.").

Accordingly, the Constitution, through dormant Commerce Clause principles, bars a State from dissolving corporations incorporated in other States—or in other countries. Yet the Receivership Order appoints a receiver to control the litigation and insurance of ACL, effectively dissolving a solvent Canadian corporation capable of actively managing its own affairs and displacing the right of ACL's duly appointed Canadian officers and directors to control its litigation and insurance. *See Monmouth Inv. Co. v. Means*, 151 F. 159, 166 (8th Cir. 1906) ("the effect of placing a corporation in the hands of a receiver, displacing its governing board of directors, incidentally works its practical dissolution"); *French Bank*, 53 Cal. 495 at 550 (appointment of a receiver to manage the affairs of a corporation "*dissolve*[*s*] a corporation; for the power of a Receiver, when put in motion, of necessity supersedes the corporate power"). By effectively dissolving ACL, the Receivership Order intrudes on the ability of Canada to govern the affairs of a Canadian corporation and the ability of Congress to regulate ACL's cross-border commercial activities. In so doing, the Order contravenes the dormant Commerce Clause. *See Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867) (because the "Constitution deals with substance, not shadows," a state court cannot accomplish indirectly what it is forbidden to do directly).

The trial court nonetheless reasoned that "principles of comity, which deter a state court from reaching beyond a state's borders and asserting jurisdiction over . . . property located in another jurisdiction[,] . . . support a state court's authority to vest a statutory receiver to assert an insolvent corporation's rights of action." Receivership Order, p. 4 (Exhibit 2) (citing *Hirson v.*

United Stores Corp., 263 A.D. 646 (N.Y. App. Div. 1st Dep't), *aff'd*, 43 N.E.2d 712 (N.Y. 1942)). But invoking comity to justify South Carolina's interference with the affairs of a Canadian corporation gets comity exactly backward. Comity demands *respecting* Canada's right to establish a legal framework governing ACL's affairs as well as ACL's own right under Canadian law to manage its affairs—not unilaterally imposing a South Carolina receiver and South Carolina law on a Canadian corporation. *See, e.g.*, *Republican Mountain Silver Mines, Ltd.*, 58 F. at 648 (reversing order appointing receiver for British corporation because the "court had no inherent power, as a court of equity, to dissolve the company").

In any event, even if the trial court's version of comity were sound, principles of comity cannot prevail over constitutional demands. *See Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (comity interests are not "a matter of absolute obligation"). Indeed, in the *Hirson* opinion on which the trial court relied, Receivership Order, p. 4 (Exhibit 2), the New York Appellate Division (affirmed by the Court of Appeals) held that the courts of New York could *not* appoint a receiver for a Delaware corporation, in part because "local policy is not permitted to dominate rules of comity" owed to other States' laws, in part because of the demands of full faith and credit. 263 A.D. at 649–50, 34 N.Y.S.2d at 127–28. *Hirson* thus in fact *rejects* appointment of a receiver for a foreign corporation.

The Receivership Order also transgresses the federal government's exclusive authority over foreign affairs. *See* U.S. Const. art. I, § 10, cl. 1; *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875). That authority preempts state laws, rules, or orders whenever there is a "likelihood" that the State's action will "produce something more than incidental effect" on foreign affairs. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003); *cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000) (the Nation must speak "with one voice in dealing with [foreign]

governments"). Here, that threshold is plainly surpassed. The Receivership Order intrudes on the United States' foreign relations with Canada by effectively dissolving ACL, a solvent Canadian corporation whose affairs are being actively managed by its Canadian board and officers. The Order thus substantially impairs the federal government's ability to set national policies concerning international trade and to manage its diplomatic relationship with Canada, an essential trading partner and ally. *See generally Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (a State's action may not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

Finally, under the Import-Export Clause of the U.S. Constitution, "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws." U.S. Const. art. I, § 10, cl. 2. While the Clause on its face refers to taxes, substantial historical evidence indicates that it was originally intended to apply broadly to *any* state action that affects interstate or foreign trade. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 408 (2023) (Kavanaugh, J., concurring in part and dissenting in part) ("[I]f one State conditions sale of a good on the use of preferred farming, manufacturing, or production practices in another State where the good was grown or made, serious questions may arise under the Import-Export Clause."). In particular, at the time of the Founding, "not all duties were taxes: Some were imposed not for revenue but merely to regulate (or effectively prohibit) trade in particular articles." Robert G. Natelson, *What the Constitution Means by "Duties, Imposts, and Excises"—and "Taxes" (Direct or Otherwise)*, 66 Case W. Res. L. Rev. 297, 320 (2015).

By authorizing the Receiver to manage ACL's litigation and insurance, the trial court has imposed a substantial legal and practical burden on the ability of Canadian companies to distribute

products in foreign trade that might ultimately end up in South Carolina; those foreign companies now face the prospect of a South Carolina-imposed receivership as the cost of participating in international trade with the United States. Because such actions "might affect foreign relations," they cannot "be implemented by the States consistently with th[e] exclusive power" of the federal government over "commercial relations with foreign governments" and thus violate the Import-Export Clause. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976).

D. The Receivership Order Failed to Provide for a Bond.

Even if the trial court had authority to impose a receivership on an active, solvent Canadian corporation (and it plainly does not), ACL's Receiver would not have been properly appointed because the Receivership Order failed to specify the value of the property to be held in receivership or to include language authorizing ACL to dissolve the receivership by posting an appropriate bond. This error deprived ACL of an opportunity mandated by statute to avoid the disruptive effects of the receivership.

Under South Carolina law, a court appointing a receiver before final judgment "shall" insert in the order of appointment "a clause fixing the value of the property for which [a] bond may be given." S.C. Code Ann. § 15-65-60. Thereafter, if the party claiming the property "shall offer a bond, in the penalty of double the value of the property, with sufficient security, approved by the clerk of the court of common pleas of the court in which the action is brought," the receivership will be dissolved. S.C. Code Ann. § 15-65-50; *see also* 21 S.C. Jur. Receivers § 12 (2024) ("[A] receiver may not be appointed when the person in possession of the property sought to be placed in receivership offers a bond, in the penalty of double the value of the property, with sufficient security, and the bond is approved by the clerk in the court in which the action is brought."). The bond provides security for any potential judgment, making any receivership unnecessary and improper.

The trial court has itself acknowledged this requirement and its importance in the pre-judgment receivership process. In its order denying CLMI's motion to dismiss the Receiver's *Lewis* third-party coverage complaint, the trial court noted that "'a method or procedure has been provided [under South Carolina law] by which the person claiming possession of the property may retain possession thereof and prevent the appointment of a receiver before final judgment, the condition of such retention of possession and the nonappointment of a receiver being the offer of a bond in the penalty of double the value of the property, etc.'" *Lewis* MTD Order, p. 13 (Exhibit 19) (quoting *Truesdell v. Johnson*, 144 S.C. 188, 203, 142 S.E. 343, 348 (1928)). And the trial court confirmed that the requirement concerns "a bond to be obtained by the party seeking to avoid the appointment of a receiver." *Id.* (emphasis omitted). But the trial court failed to follow that statutory mandate in its own Receivership Order.

Because judgment had not been entered in the *Tibbs* action when the Receiver was appointed, the statutory scheme the trial court purported to use required the court to include in the Receivership Order the value of the property to be placed in receivership and afford ACL an opportunity to dissolve the receivership by posting the requisite bond. The trial court's order did not do so. The trial court's failure to adhere to these statutory requirements is a fatal defect in the Receivership Order.[11]

[11] Because *Tibbs* was an asbestos personal-injury case in which the plaintiffs were seeking to recover on a contingent tort claim against ACL—and did not involve, for example, a dispute over personal property or a sum certain paid by the plaintiff to the defendant—there was no "property" at issue "for which [a] bond may be given." S.C. Code Ann. § 15-65-60. That disconnect between the facts of *Tibbs* and the bonding requirement in Section 15-65-60 underscores that the imposition of a receivership on ACL was entirely inappropriate and at odds with South Carolina procedure. But to the extent that the trial court disagreed and deemed a receivership to be appropriate in the setting of an asbestos personal-injury case, it was required to comply with South Carolina procedure in appointing the Receiver, including the bonding requirement in Section 15-65-60.

E. If Valid, the Receivership Order Applies Only in the *Tibbs* Case.

Even if the Receivership Order were consistent with South Carolina law and the U.S. Constitution, it could not apply beyond the *Tibbs* case in which it was entered. Accordingly, the Receiver lacks authority to control ACL's litigation and settlements in other cases, including the *Lewis* third-party coverage action against CLMI.

South Carolina law is settled that a receivership entered in a particular case as a "provisional remedy" under S.C. Code Ann. § 15-65-10(5)—the provision on which the trial court relied in the Receivership Order—has no effect in any other case. As this Court has explained, the "sole object" of such a receivership "is to preserve the property, to answer the purposes of a decree, *as between the parties to the suit, without affecting the interest of third persons not parties.*" *Clinkscales v. Pendleton Mfg. Co.*, 9 S.C. 318, 323 (1878) (emphasis added); *see also DeWalt v. Kinard*, 19 S.C. 286, 296 (1883) (McGowan, J., concurring) (noting that the appointment of a receiver for real property, the right to possession of which was disputed by the parties, "could only have the salutary effect of preserving the issues of the property pending litigation, then to be delivered *to that party* who may finally be decided to be entitled to the same") (emphasis added).

This feature distinguishes the *pendente lite* receivership established in *Tibbs* from a separate form of receivership for "the administration of the assets, considered as a trust fund in equity, not only as against parties but all making claim thereto." *Clinkscales*, 9 S.C. at 323. Under South Carolina law, these broader general receivership powers—which include the power to manage the affairs of a corporation and act in additional cases beyond the one in which the receiver was appointed—are available *only* where the receiver is appointed under S.C. Code § 33-14-320(a), a provision limited to South Carolina corporations. *See* S.C. Code Ann. § 33-1-400(4); *see also* discussion *supra* at pp. 19–21. The trial court did not invoke that provision in the Receivership Order—and could not have done so given that ACL is a Canadian corporation.

The trial court nevertheless made clear in subsequent orders that its Receivership Order in *Tibbs* was not limited to that case and instead authorized the Receiver to act on ACL's behalf in all litigation. In particular, in the *Link* and *Donaghy* actions, the trial court declared that "[t]he Receiver for . . . ACL shall be viewed as the named insured and the representative for . . . ACL in the defense of asbestos litigation matters and the management of any insurance or insurance-related assets." *Link* Mediation Order, p. 5 (Exhibit 7). It further stated that "[t]he insurers for . . . ACL are expected to cooperate with the Receiver," including in discovery matters. *Id.* Based on the trial court's orders, the Receiver has sought (and obtained) sanctions against CLMI in *Link* and *Donaghy*, initiated a third-party coverage complaint, purportedly on ACL's behalf, against CLMI in *Lewis*, and held himself out as the insured entitled to control ACL's litigation and insurance in all asbestos personal-injury cases pending against ACL in South Carolina and beyond.

The trial court's application of the *Tibbs* Receivership Order to additional proceedings involving ACL not only exceeded its authority under South Carolina law but also deprived CLMI of due process. CLMI were not provided notice of the trial court's intention to appoint a receiver in *Tibbs* or of the expansion of the Receiver's powers in *Link* and *Donaghy*—cases in which CLMI were not parties—and thus had no opportunity to contest the validity of the appointment in those proceedings. The trial court's failure to provide CLMI with an opportunity to be heard before issuing the *Tibbs* Receivership Order—which had direct and immediate legal repercussions for CLMI in other settings—contravened the fundamental requirement of due process that an opportunity to be heard "at a meaningful time and in a meaningful manner" be afforded *before* a person's rights are impaired. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *see also Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."); *accord Bundy v. Shirley*, 412 S.C. 292, 303, 772 S.E.2d 163, 169 (2015)

("'The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.'") (quoting *Kurschner v. City of Camden Plan. Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008)).

Accordingly, even if the Receivership Order were consistent with South Carolina law and the U.S. Constitution, it could not be given any force or effect outside of the *Tibbs* case.

II. CLMI Have No Effective Remedy to Vindicate Their Rights Other Than a Writ of Prohibition from this Court.

A writ of prohibition from this Court under its original jurisdiction is appropriate and necessary to prevent ongoing, irreparable harm to CLMI resulting from the trial court's legally deficient Receivership Order. It is well settled that a writ of prohibition is warranted to prevent harm to a petitioner from an improper continuation of proceedings by a lower court that lacks jurisdiction. *See New S. Life Ins. Co.*, 258 S.C. at 200–05, 187 S.E.2d at 796–99. And where, as here, alternative procedures to secure relief are unavailable, this Court's intervention is particularly appropriate.[12]

The trial court's views on the supposed validity of the ACL receivership are settled. CLMI have repeatedly challenged the validity of the receivership on the basis that the trial court lacked authority to appoint a receiver for an active, solvent Canadian corporation. Each of these attempts has been unsuccessful. In *Link* and *Donaghy*, for example, CLMI opposed the Receiver's motion for sanctions on the basis of the receivership's invalidity under South Carolina law and the United States Constitution, but the trial court failed to address most of CLMI's extensive arguments concerning the invalidity of the Receivership Order. *See* Sanctions Order, pp. 4–5 (Exhibit 9)

[12] Indeed, the South Carolina Code authorizes immediate interlocutory review of the *appointment* of receivers, S.C. Code Ann. § 14-3-330(4), making review of the appointment here by prohibition (on the petition of nonparties) consonant with principles of South Carolina appellate law.

(limiting analysis to distinguishing one case cited by CLMI). And in the *Lewis* third-party coverage action, CLMI moved to dismiss on the ground that the Receiver was not properly appointed under South Carolina law or the United States Constitution and thus lacked authority to initiate the *Lewis* action on ACL's behalf. *See, e.g.*, CLMI Motion to Dismiss, *Lewis v. Asbestos Corp. Ltd.*, No. 2024-CP-40-00458 (S.C. Ct. Common Pleas, 5th Cir. Apr. 3, 2024) (Exhibit 29). The trial court rejected those arguments because it had already "ruled repeatedly that 'existing practice' allows for the Receiver to be appointed." *Lewis* MTD Order, pp. 8–9 (Exhibit 19).

Other than this petition, there is no meaningful path for CLMI to obtain appellate review of the trial court's rulings on the validity of the receivership and its effect on CLMI. In light of the plaintiffs' settlement with ACL in *Link* and *Donaghy*, CLMI's appeal of the Sanctions Order has been dismissed and the order has been vacated. *See* discussion *supra* at pp. 10–11. Filing a motion to dissolve the receivership is not a viable route to appellate review, either, because this Court in *Childers* and the Court of Appeals in a post-*Childers* order have ruled that the Court of Appeals lacks jurisdiction over orders denying motions to dissolve a receivership. *See* discussion *supra* at p. 15. And any final judgment in *Lewis* (which would be appealable) is years away—while, in the meantime, CLMI must respond to multiple other suits against ACL and risk the irreparable harm that either ACL or the Receiver (or both) will accuse them of failing to act in conformity with their obligations. That leaves a writ of prohibition from this Court as the only meaningful avenue to challenge the trial court's Receivership Order.

In the absence of this Court's intervention, CLMI will suffer further irreparable harm from the ACL receivership. The receivership places CLMI in an impossible position where they must choose between cooperating with the Receiver or following the instructions of their insured, ACL. CLMI have certain duties to ACL in connection with the pending litigation. If the Receiver is

validly acting on ACL's behalf, then CLMI may have a duty to cooperate with the Receiver's instructions and may be subject to sanctions for violating that duty if they instead follow the instructions of ACL's Canadian officers and directors. Conversely, if the Receiver is not validly acting on ACL's behalf, CLMI may likewise risk violating their duties to ACL by following the Receiver's instructions.

For example, the Receiver has used subpoenas to compel CLMI to produce to the Receiver confidential information about coverage, settlements, and other sensitive, nonpublic matters—despite ACL's objections to several of those disclosures. Further, ACL has taken the position that CLMI should not extend authority to the Receiver to settle claims where the Receiver is controlling ACL's litigation and settlements because ACL has not authorized the settlements, creating the specter of a breach-of-contract dispute between ACL and CLMI. In fact, recent correspondence from ACL's Canadian lawyers has accused CLMI of materially breaching their contractual obligations to ACL by providing funds to the Receiver to settle claims against ACL in amounts endorsed by the Receiver, but not ACL.

CLMI have also been placed in an untenable position with respect to ACL's defense. The Receiver has accepted service of several new complaints filed against ACL in South Carolina and other jurisdictions, but ACL does not recognize this service and has declined to retain counsel to defend against the complaints. Nor has ACL permitted CLMI—which are not obligated under the policies to retain defense counsel—to secure counsel on ACL's behalf, advising counsel retained by CLMI that he was "not authorized to represent ACL in [the *Arsenith*] matter or any other case." Parker Letter (Exhibit 20). At the same time, the Receiver has not retained counsel in several of these cases. Without a means of reliably securing counsel for ACL and with potential default judgments looming, CLMI face imminent risk of execution attempts by plaintiffs holding

potentially hundreds of millions of dollars in default judgments against ACL. This is a stark illustration of CLMI's predicament: They find themselves caught between two masters—confronted with possible sanctions for noncompliance with the Receiver's demands or possible breach-of-contract liability for failing to follow the directives of ACL's Canadian management, and potentially left on the hook for default judgments when neither the Receiver nor ACL acts to defend ACL's interests.

These risks are not mere speculation. The Receiver already sought and obtained the (now-vacated) contempt order in *Link* and *Donaghy*, which sanctioned CLMI $50,000 a day for supposedly failing to participate meaningfully in a mediation where the Receiver and ACL had different views about the appropriate settlement amount. *See* Sanctions Order (Exhibit 9). And the risks confronting CLMI flow directly from the trial court's invention of a previously unknown form of receivership. Rather than appoint a general receiver to control all aspects of ACL's affairs—which the trial court would lack the authority to do for a non-South Carolina corporation, *see* S.C. Code Ann. §§ 33-1-400(4), 33-14-320(a)—or a more limited "asset receivership" over ACL's "property within this State"—which would not be possible because ACL has no South Carolina property and is not insolvent or in imminent danger of insolvency, *see id.* § 15-65-10(4)—the trial court created a Frankenstein's monster by empowering the Receiver to control ACL's litigation, settlements, acceptance of service of process, and insurance while leaving ACL's board and officers to oversee its day-to-day affairs. It is patently unjust to subject CLMI to the continued uncertainty and risk attributable to this legally unprecedented and practically unworkable receivership while they wait years for a potential final judgment in *Lewis* to challenge the receivership on appeal.

The burdens on CLMI are compounded by the fact that settlement amounts in cases in which the Receiver has controlled ACL's litigation and settlement strategies have far exceeded ACL's average payout to asbestos claimants in the decades preceding the Receiver's appointment. In fact, the five South Carolina settlements recommended by the Receiver represent more than 5% of the total amount that CLMI have paid to ACL, over multiple decades, as reimbursement for CLMI's share of ACL's indemnity and defense costs. And the average of those five South Carolina settlements for ACL was *45 times* higher than ACL's nationwide settlement average in 2023. These high-value settlements are particularly burdensome for CLMI because ACL is taking the position that the South Carolina settlements in cases controlled by the Receiver cannot erode policy limits as they were executed without ACL's consent, which means that CLMI risk bearing the cost of these settlements without any offsetting erosion of their coverage obligations to ACL.

The Receiver has also continued to threaten sanctions against insurers that have used the judicial process to challenge the validity of the ACL receivership. In March, for example, the Receiver's counsel sent a letter to counsel for several of ACL's insurers, citing the *Childers* order and threatening to file a motion for sanctions if the insurers declined to withdraw their appeals of various orders concerning the ACL receivership—even though the *Childers* order was unpublished, unreasoned, and still subject to a rehearing request at the time. *See* Robinson Letter (Exhibit 23). These actions make clear that, as long as the receivership remains in place, CLMI risk the infliction of additional punitive measures to the extent that they continue to vigorously assert their rights and question the validity of the trial court's unprecedented, extraterritorial receivership—either by pressing these arguments in the trial court or by seeking relief in the Court of Appeals.

CLMI are also continuing to bear the expense of defending themselves against the Receiver's third-party complaint in *Lewis*, where CLMI have now answered the complaint and are responding to the Receiver's expansive discovery demands. *See* Answer and Affirmative Defenses of CLMI to the Third-Party Complaint, *Lewis v. Asbestos Corp. Ltd.*, No. 2024-CP-40-00458 (S.C. Ct. Common Pleas, 5th Cir. May 10, 2024) (Exhibit 30). The expense of the *Lewis* action is on top of the costs CLMI have already incurred in complying with the Receiver's subpoenas in other cases, as well as his requests to settle personal-injury claims against ACL in amounts that may well exceed what CLMI would have been required to reimburse if ACL's officers and directors were still controlling its defense.

The Receiver's discovery demands to CLMI—including three separate third-party subpoenas—have been onerous and sweeping, far beyond typical requests issued in routine litigation. For example, in the *McDowell* action, the Receiver demanded CLMI produce "all general liability, product liability, and professional liability insurance policies" issued to or otherwise protective of ACL "during the period [from] 1945 through [the] present, and any documents referencing such policies"; associated "underwriting files," "claims files," and claims-related "documents" for the same period; "all documents that reflect communications between [CLMI] and ACL," including with ACL's lawyers, either "regarding the acquisition, placement, and termination of insurance coverage" or "relat[ing] in any way to the defense and/or indemnification of ACL"; and "all documents that reflect communications between [CLMI] and any other ACL insurer that refer or relate in any way to the defense and/or indemnification of ACL." *McDowell* Subpoena ¶¶ 1, 4, 6–9, 11 (Exhibit 15) (capitalization normalized). In *Lewis*, the Receiver has issued 120 document requests seeking, without limitation, "[a]ll communications relating to ACL" and "[a]ll documents relating to any of ACL's asbestos related claims."

Receiver's First Set of Requests for Production to Third-Party Defendant CLMI, *Lewis v. Asbestos Corp. Ltd.*, No. 2024-CP-40-00458 ¶¶ 55, 71 (S.C. Ct. Common Pleas, 5th Cir. May 10, 2024) (Exhibit 31). These requests seek an incredible volume of material, spanning decades and covering vast amounts of CLMI's confidential and sensitive communications with their insured as well as with other ACL insurers. To date, and contrary to ACL's instructions, CLMI have produced more than 8,500 pages of materials to the Receiver in *McDowell* and more than 8,700 pages in *Lewis* (with further productions forthcoming).

These ongoing, irreparable harms create precisely the type of circumstances in which this Court, and the highest courts of other States, have granted writ relief. State supreme courts regularly issue a writ of prohibition (or writs of mandamus or certiorari) in settings such as this one, where a trial court has exceeded its jurisdictional bounds, including in the appointment of a receiver. The California Supreme Court, for example, has held that, where a trial court exceeds its jurisdiction in imposing an invalid receivership, a writ of prohibition supplies the appropriate remedy. *Havemeyer v. Super. Ct. of City & Cnty. of San Francisco*, 84 Cal. 327, 380, 389, 24 P. 121, 134, 136 (1890); *see also People v. Dist. Ct. of First Jud. Dist.*, 74 Colo. 58, 60–61, 218 P. 742, 743 (1923) (following *Havemeyer*); *State ex rel. Busick v. Ewing*, 230 Ind. 188, 191–92, 102 N.E.2d 370, 372 (1951) (following *Havemeyer* and *Busick*); *French Bank*, 53 Cal. at 549–50 (in case holding that trial court had no jurisdiction to appoint a receiver under code provision similar to South Carolina's, court rejected argument that it had no original jurisdiction to issue writ of certiorari to annul receivership, as petitioner had no right to appeal); *Cronan v. Dist. Ct.*, 15 Idaho 184, 96 P. 768, 773–74 (1908) (holding writ of prohibition proper to restrain and enjoin trial court from enforcing receivership order issued without jurisdiction and holding that order to be void, in part because cost and burden to petitioner caused by delay of appeal made appeal "entirely

inadequate"); *Gilmer Oil Co. v. Ross*, 178 Okla. 125, 62 P.2d 76, 78–79 (1936) (in original action for writ of prohibition, granting writ to void trial court order commanding foreign corporation to produce books and records held outside Oklahoma as beyond Oklahoma's "visitorial powers" over corporations); *Golden State Glass Corp. v. Super. Ct.*, 13 Cal. 2d 384, 90 P.2d 75, 81 (1939) (granting writ of prohibition where trial court abused its discretion in appointing receiver for solvent corporation); *Anheuser-Busch, Inc. v. Bone*, 90 S.W.2d 992, 993 (Ark. 1936) ("It is well settled that a writ of prohibition lies to restrain the exercise of jurisdiction of an inferior court over subject-matter where it has none and over parties where it can acquire none.") (citing cases); *State ex rel. William Ranni Assocs., Inc. v. Hartenbach*, 742 S.W.2d 134, 137 (Mo. 1987) ("Prohibition is the proper remedy to prevent further action of the trial court where personal jurisdiction of the defendant is lacking.").

Accordingly, "where a writ or order of prohibition is the only available remedy against invasion of a right guaranteed by law," including the right to be free from extra-jurisdictional judicial actions, "a refusal to grant [the writ] is in effect a denial of the right." *Baltimore Mail S.S. Co. v. Fawcett*, 269 N.Y. 379, 384, 199 N.E. 628, 630 (1936); *see also* 18 Fletcher *et al.*, *supra*, § 8649 ("If a court wrongfully assumes jurisdiction over a foreign corporation, it may obtain the remedy of a writ of prohibition," as the writ "affords an expeditious and effective means of confining an inferior court to lawful exercise of its prescribed jurisdiction").

This Court has long relied on the writ of prohibition to ensure that lower courts respect jurisdictional limits. In *New South Life Insurance Co.*, 258 S.C. at 200–05, 187 S.E.2d at 796–99, for example, this Court granted the writ where the amount in controversy exceeded the jurisdictional limits of the trial court and thus deprived the trial court of power to confirm a plan of rehabilitation for an insurance company. The petitioner, who risked a loss in value of her

insurance policy from the rehabilitation plan, had moved to dismiss the action for lack of jurisdiction, but the "motion was taken under advisement by the presiding judge and the hearing of the cause was continued," *id.* at 201, 187 S.E.2d at 796. This Court issued a writ of prohibition to prevent the trial court from proceeding with the case because the case clearly exceeded its jurisdictional bounds. *Id.* at 205, 187 S.E.2d at 799.

Because the trial court lacked jurisdiction to appoint the Receiver to control ACL's litigation and insurance, this Court should take similar action here. CLMI cannot and should not be required to wait until the trial court enters a final judgment in *Lewis*—years from now, if ever—and the appeals process plays out in order to escape the serious, irreparable harm being inflicted on them on a daily basis by the trial court's and Receiver's extra-jurisdictional conduct. CLMI are entitled to relief from this "wrong, damage, and injustice," and the writ of prohibition is the appropriate procedure for vindicating that right. *Jones*, 160 S.C. at 63, 158 S.E. at 137.

CONCLUSION

For the foregoing reasons, the Court should treat this petition as a companion case to *Tibbs v. 3M Co.*, No. 2023-001461 (S.C. Sup. Ct. Oct. 3, 2024), and *Welch v. Advance Auto Parts, Inc.*, No. 2024-001180 (S.C. Sup. Ct. Aug. 20, 2024), and set the cases for oral argument on the same day. After briefing and argument, the Court should issue a writ prohibiting the trial court from enforcing the Receivership Order and, correspondingly, prohibiting the Receiver from taking any action (through litigation or otherwise) on behalf of ACL.

Respectfully submitted,

/s/ John Nichols

November 18, 2024

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EXHIBIT 5

UK COURT JUDGMENT

Neutral Citation Number: [2024] EWHC 2999 (Ch)

Case No: BL-2024-001337

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22/11/2024

Before :

MR JUSTICE MANN, SITTING IN RETIREMENT

- -

Between :

(1) CAPE INTERMEDIATE HOLDINGS LIMITED **(2) CAPE PLC (a company incorporated under the laws of Jersey)**	**Claimants**
- and -	
PETER D. PROTOPAPAS	**Defendant**

- -
- -

Mark Phillips KC, Derrick Dale KC, William Willson, Angus Groom and **Louise Merrett**
(instructed by **Signature Litigation**) for the **Claimants**
The Defendant was not present and was not represented

Hearing dates: 12th, 13th & 14th November 2024

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APPROVED JUDGMENT (subject to editorial corrections)

…….

Mr Justice Mann:

Introduction

1. This is an application for declaratory relief as to the status of a receiver, Mr Protopapas, appointed in the courts of South Carolina, USA, over (it is feared) the property and affairs of the first claimant Cape Intermediate Holdings Ltd - "CIHL" – an English company. I say "it is feared" because the proceedings in which the receiver was appointed describe the subject company differently (Cape plc), though it would seem that that is treated in the South Carolina proceedings as a misnomer for CIHL (the first claimant). There is also a claim for injunctions to restrain him from acting as agent of the company. The second claimant is, or was, joined because it has the same name as the subject company identified in South Carolina though it is incorporated in Jersey. I will call it "Cape Jersey".

2. This action was started via a Part 8 claim form issued on 9th September 2024. Permission to serve the defendant out of the jurisdiction was given by Master Brightwell in an order dated 11th September 2024 and he was duly served in accordance with that order. The matter was then put before Trower J on 9th October so that he could consider whether to order the urgent trial of this matter because of the potentially very serious effect of the appointment of the receiver on the business of the Cape group, of which the claimants form part. He duly made an order of that date, giving directions which resulted in this trial date. They included directions for the defendant to file evidence, but he did not do so and has not appeared (or acknowledged service). At this

trial the claimants seeks declaratory relief to the effect that the receiver has no powers to act on behalf of the claimants, and injunctions restraining him from purporting to act in this jurisdiction and worldwide. That is because, as will appear, it is said that the English courts will not recognise the judgment or order appointing him as a matter of jurisdiction because the claimants did not submit to the jurisdiction of the courts in South Carolina, and had no presence there which the English (and Jersey) courts will recognise as founding jurisdiction. English (and Jersey) corporate governance principles are said to leave the directors in charge of the whole of the business of the claimants. Those issues re-raise the matters that are said to have been decided as a matter of fact and law in *Adams v Cape Industries* [1990] 1 Ch 433, in which CIHL was the successful defendant under a former name. There are also questions of abuse of process which are said to arise. The Part 8 Claim form was supported by a large volume of evidence (necessarily so).

3. The judge appointing the receiver in South Carolina, and the judge who has overseen various interlocutory matters since then, is former Chief Justice Toal. I understand that she has retired from her role as Chief Justice, but the documents that I have seen demonstrate that she has retained the title of Chief Justice for judicial purposes and is still addressed in that way in the South Carolina courts, so I will adopt the same titling in this judgment.

4. Mr Mark Phillips KC led a large team of 5 counsel before me, of which Mr Derrick Dale KC also addressed me on various aspects.

The evidence in this application

5. The primary evidence in the case consisted of 2 witness statements of Mr Ran Oren, the sole director of CIHL, and a director of Cape Jersey, who told the story of this matter by reference to a large number of extensive documents and who gave evidence of the Cape group's business and of the risks that the activities of the receiver pose. There was also evidence from Mr Paul Brehony, a partner in Signature Litigation plc, solicitors for the claimants, who provided updating evidence as to the fast-moving picture presented by South Carolina proceedings. I saw no reason to doubt or to challenge anything that they said in their evidence.

6. I also received an expert's report from the Hon William W Wilkins, a retired Federal judge (former Chief Justice of the US Court of Appeals for the Fourth Circuit), who comes from South Carolina and who is qualified to express expert views on the law of that state. As will become apparent, he was almost immediately further embroiled in South Carolina when the receiver subpoenad him for a deposition and made an extensive demand for disclosure against him. The subpoena was subsequently withdrawn. Insofar as it is relevant to my findings, I accept his evidence of the effect of South Carolina law, though its relevance to the issues I have to decide is limited. As I say below, it is not part of my function to sit as some sort of appellate court from the South Carolina judge, and over-rule her decisions, so while the expert's report is occasionally helpful most of it was not particularly helpful in relation to the issues that I have to decide.

7. In addition to that material I also received, from time to time, other documents emanating from the South Carolina legal process which post-dated the formal evidence.

The corporate personalities relevant to this case

8. The Cape group is a group of companies formerly involved in asbestos mining and distribution. That particular activity has now ceased and the business of the group is described as being "the provision of critical industrial services focused on the energy and natural resources sectors". It employs 12,800 employees across 17 countries and in the year ended 31st August 2023 the group had a recorded revenue of £848.4m, and a profit of £62.6m. Cape Jersey now heads the group.

9. CIHL is an old company in the Cape group, incorporated in December 1893 under the name "The Cape Asbestos Company". It has at all times been involved in the mining and manufacture of asbestos until it started to curtail those activities when the associated health risks became more widely known. It started to close UK factories in the 1960s and 1970s. It was originally the Cape company which conducted all the business, but over time parts of its business were devolved to other companies in the group. The principal asbestos mining company in the group was Egnep Pty Ltd. In 1979 that company sold its mining operations in South Africa to a South African Company (Transvaal Consoidated Exploration Ltd), and ceased manufacturing asbestos products in the 1980s.

10. In 1961 CIHL essentially became a holding company. In May 1974 it changed its name to Cape Industries Ltd, and changed it again to Cape Industries plc when it re-registered as a public company. There was a further name change to Cape plc in July 1989, and in June 2011 it changed once more to Cape Intermediate Holdings plc. Finally it adopted its present name ("Limited" instead of "plc") on de-registration as a public company in December 2013. In this judgment I shall refer to CIHL by that acronym whatever its name might have been at any period under discussion.

11. Cape Jersey was formed in 2011. By virtue of a scheme of arrangement in that year it became the holding company of the Cape Group, and has remained so ever since. It was incorporated in Jersey but listed on the London Stock Exchange, with a tax residence in Jersey and Singapore. However, in 2017 its share capital was acquired by Altrad UK Ltd, an English company which is part of the Altrad group. That group is a very substantial group empoying over 60,000 employees worldwide. Its founder and President is Mr Mohed Altrad and its other main entity is Altrad Investment Authority SAS, incorporated in France. The business of the group is to provide industrial services principally for the energy, environment and construction sectors. It has since acquired further companies, including a group known as the Sparrows Group which provides services to off-shore installations. It is necessary to mention the Altrad group and the Sparrows companies because they have become enmeshed in the receiver's activities which lie at the heart of this case.

12. At the historical times material to this matter Cape group products were sold into the US. In October 1953 CIHL established North American Asbestos Corporation

("NAAC") as a directly and wholly owned subsidiary. It was incorporated in Illinois. That company was incorporated to assist in the marketing of asbestos in the US, to act as a liaison between Egnep (the miner referred to above) and another Cape company (Casap) on the one hand and US purchasers of asbestos on the other, and to purchase and re-sell asbestos into the US market on its own account. It is central to the claims in this action that it has been determined by an English court that the contracts for the supply of asbestos by the Cape Group were made by Egnep or Casap (another Cape company) on the Cape side and not NAAC; that NAAC was only an intermediary who would receive and pass on notifications of requirements for asbestos; that Egnep and Casap would make the shipping arrangements; and that NAAC itself would (where possible) purchase and supply and shortfalls which could not be supplied by Egnep.

13. From the early 1970s NAAC was the defendant in numerous product liability claims. It eventually ran out of insurance cover and was liquidated and then dissolved in 1978. It has never been restored. Neither CIHL nor Cape Jersey have in any sense been the successor in interest to NAAC. At this point it will be useful to note that in *Adams v Cape* it was held by the High Court (Scott J), upheld by the Court of Appeal, that the presence of NAAC and its relationship with CIHL did not give rise to the presence of CIHL in the US (with the result that default judgments obtained in the US could not be enforced here). That is one of the points lying at the heart of this application. It would not appear that it has been considered by, or even drawn to the attention of, the South Carolina court in its dealings in this matter.

Background - the Cape Compensation Scheme

14. By 2006 the Cape group was faced with the prospect of a large number of UK claims from individuals who had suffered from the effects of asbestos. Those claims were to some considerable extent latent (ie not apparent at the time) and potentially costly. There was also not sufficient insurance cover to provide for likely claims. There was a real but unquantifiable risk that they would result in insolvencies in the Cape group with claims becoming unsatisfied. In order to deal with this, and to even out the spreads of payments, the group proposed and got court sanction for a creditors' scheme of arrangement under section 425 of the Companies Act 1985. The scheme became operative and is still running. The full details do not matter. The following features of the scheme are significant for present purposes:

(a) It binds, and operates for the benefit of, persons who have a claim against Cape entities in respect of asbestos injuries sustained in the UK.

(b) It is not a cut-off scheme - that is to say it is not a scheme requiring claimants to make a claim before a certain date, after which they will be barred. There is no cut-off date for claimants under the scheme (other than limitation, where applicable).

(c) The scheme does limit claims or how or when claims can be made. They can be made and established in the usual way. What it does is limit recovery of any established claims.

(d) Recovery is not by the usual enforcement routes. Recovery has to be out of a given fund ring-fenced within a new subsidiary called Cape Claims Services Ltd (CCS).

(e) CCS was initially funded from various sources, but from 2008 there were, and continue to be, periodic reviews of the likely liabilities of the scheme and CIHL is obliged to top up the fund as a result of those reviews, subject to a limit set by reference to its cash resources which enables it, if necessary, to spread its top-up obligations.

(f) If the fund fell below a certain level then CCS would have the right to reduce payments until such time as the funds recovered.

(g) The purpose of the scheme was therefore not to reduce the liabilities to claimants, but to try to ensure that satisfaction of the liabilities was, if necessary, spread out over time so as to avoid insolvencies in the Cape group caused by large claims

having to be settled in a narrow timeframe.

(h) It was no part of the scheme to bar any creditor from claiming. Creditors within the scheme could establish their claims and recover out of the scheme funds. Creditors outside the scheme were entitled to seek to a remedy against the appropriate Cape company and then seek recovery from that company. The latter class would include US claimants claiming in respect of injuries if they thought they had a claim here. They could seek to establish their claims and, if successful, enforce in the normal way.

(i) In order to safeguard the scheme a special share was created and issued in both CCS and CIHL, with special voting rights designed to protect the scheme fund and make sure it was properly administered. Those shares were issued to Law Debenture Trust Corporation plc, who undertook that safeguarding duty.

15. The scheme was set up after a 4 day convening hearing at which Richards J heard various arguments about the operation of the scheme and its effect before deciding it was right to order meetings of creditors. It was approved by majorities which were never less than 93% in number of creditors and in value. It was overwhelmingly passed at the meetings and sanctioned by the court on 9th June 2006.

16. Since then the scheme has operated in accordance with the intended manner. CIHL has made provision of over £100m in its accounts for asbestos disease-related claims over 30 years. So far £60m of pay-outs have been made, and top-ups of about £45m have been made.

17. This description is provided because of certain misdescriptions in the receiver's court documents in South Carolina, and because of rather extraordinary joinder of Law

Debenture Trust Corporation plc to a new claim in South Carolina. I will come to these points in due course.

Adams v Cape and its relationship to this case, and the law on the recognition of foreign judgments

18. In *Adams v Cape*, CIHL under its then name of Cape Industries Ltd, was one of two defendants in an attempt by Mr Adams to enforce here a default judgment, obtained in the Federal Courts of Texas based on injuries said to have been caused by asbestos. That attempt failed because it fell foul of the principle of English private international law that the foreign court's judgment would only be recognised and enforced if the defendant is recognised, under English private international law principles, as having properly been the subject of the foreign court's jurisdiction. The principle has been summarised in *Dicey & Morris* on the Conflcits of Laws [&] edition at Rule 47:

> "RULE 47 - Subject to Rules 48 and 49, a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it was given in the following cases:
>
> First Case - if the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country. For a natural person this requires physical presence in the territory, and for a legal person it requires a fixed place of business in the territory.
>
> Second Case - If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.

> Third Case - If the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings."

19. The Second and Third cases are not relevant here. The First Case is. *Adams v Cape* considered how and to what extent CIHL was present (with the other company) in the United States in the light of that rule. Scott J considered the extensive evidence over the course of a trial which lasted for 35 days, and the matter was reconsidered by the Court of Appeal in an appeal which lasted for 18 days. Both courts came to the conclusion that CIHL was not relevantly present in the United States at the relevant time, and that CIHL did not submit to the jurisdiction, and the action was dismissed.

20. For present purposes the significance of that case is one which goes beyond its being authority for, and an instance of the application of, the principle of English private international law just stated. It is said to have an additional significance because the facts in that case, and the facts surrounding the appointment of the receiver in this case, are precisely the same and demonstrate flaws in the appointment of the receiver and what he has been doing. That is said to demonstrate that the receivership order should not recognised because CIHL was no more present in the jurisdiction at the date of the receivership order as it was at the dates relevant to *Adams v Cape*. It is also the foundation of an estoppel or abuse of process argument advanced by Mr Phillips to which I will come. The defendant, as receiver, has been launching claims in the US purportedly on behalf of CIHL which involve claims and assertions that are directly contrary to the factual case successfully advanced by CIHL in *Adams v Cape*. It is therefore necessary to consider the facts of that case and to have them in mind when

considering the acts of the receiver in South Carolina, and of those who would seem to have been prompted to make claims by what he has been doing.

21. The legal reasoning in *Adams v Cape* involves the consideration and application of how a corporate body is or is not present in the foreign territory. The issue in that case was whether a default judgment against CIHL in that case was enforceable in this jurisdiction. (I can ignore the other defendant, Capasco Ltd, for these purposes.) Scott J accepted that "a foreign court was entitled to take jurisdiction on a territorial basis" (p457G). He went on to cite The Earl of Selbourne LC in *Sirdar Gyrdyal Singh v Rajah of Faridkote* [1894] AC 679 at 683:

> "Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory; and, in questions of status or succession governed by domicil, it may exist *458 as to persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one sovereignty (e.g. under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign court ought to recognise against foreigners, who owe no allegiance or obedience to the power which so legislates."

And he went on to observe:

> "It is the territorial basis of jurisdiction that the plaintiffs invoke in asserting that Cape, through N.A.A.C. or C.P.C., was present in Illinois." (p457)

22. Scott J also acknowledged the possibility of consent to jurisdiction as well.

23. In the Court of Appeal the position was summarised as follows:

> "Two points at least are clear. First, at common law in this country foreign judgments are enforced, if at all, not through considerations of comity but upon the basis of a principle explained thus by Parke B. in *Williams v. Jones (1845) 13 M. & W. 628* , 633:
>
> > "where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced . . . "
>
> Blackburn J. stated and followed the same principle in delivering the judgment of himself and Mellor J. in *Godard v. Gray (1870) L.R. 6 Q.B. 139* , 147, and the judgment of the Court of Queen's Bench in *Schibsby v. Westenholz (1870) L.R. 6 Q.B. 155* , 159. In the latter case he said, at p. 159:
>
> > "It is unnecessary to repeat again what we have already said in *Godard v. Gray* . We think that, for the reasons there given, the true principle on which the judgments of foreign tribunals are enforced in England is that stated by Parke B. in *Russell v. Smith (1842) 9 M. & W. 810* , 819, and again repeated by him in *Williams v. Jones, 13 M. & W. 629* , 633, that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action."
>
> Secondly, however, in deciding whether the foreign court was one of competent jurisdiction, our courts will apply not the law of the foreign court itself but our own rules of private international law. As Lindley M.R. put it in *Pemberton v. Hughes [1899] 1 Ch. 781* , 791:
>
> > "There is no doubt that the courts of this country will not enforce the decisions of foreign courts which have no jurisdiction in the sense above explained - i.e., over the subject matter or over the persons brought before them . . . But the jurisdiction which alone is important in these matters is the competence of the court in an international sense - i.e., its territorial competence over the subject matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the courts of this country."

> Subsequent references in this section of this judgment to the competence of a foreign court are intended as references to its competence under our principles of private international law, which will by no means necessarily coincide with the rules applied by the foreign court itself as governing its own jurisdiction. As the decision in *Pemberton v. Hughes [1899] 1 Ch. 781* shows, our courts are generally not concerned with those rules." (pp513-514)

24. One of the issues in the case was whether CIHL was present in the US by an authorised representative (NAAC and CPC). As to that the Court of Appeal laid down the following principles and guidance at pp 530-531:

> "In relation to trading corporations, we derive the three following propositions from consideration of the many authorities cited to us relating to the "presence" of an overseas corporation.
>
> (1) The English courts will be likely to treat a trading corporation incorporated under the law of one country ("an overseas corporation") as present within the jurisdiction of the courts of another country only if either (i) it has established and maintained at its own expense (whether as owner or lessee) a fixed place of business of its own in the other country and for more than a minimal period of time has carried on its own business at or from such premises by its servants or agents (a "branch office" case), or (ii) a representative of the overseas corporation has for more than a minimal period of time been carrying on the overseas corporation's business in the other country at or from some fixed place of business.
>
> (2) In either of these two cases presence can only be established if it can fairly be said that the overseas corporation's business (whether or not together with the representative's own business) has been transacted at or from the fixed place of business. In the first case, this condition is likely to present few problems. In the second, the question whether the representative has been carrying on the overseas corporation's business or has been doing no more than carry on his own business will necessitate an investigation of the functions which he has been performing and all aspects of the relationship between him and the overseas corporation.
>
> (3) In particular, but without prejudice to the generality of the foregoing, the following questions are likely to be relevant on such investigation: (a) whether or not the fixed place of business from which the representative operates was originally acquired for the purpose of enabling him to act on behalf of the overseas corporation; (b) whether the overseas corporation has directly reimbursed him for (i) the cost of his accommodation at the fixed place of business; (ii) the cost of his staff; (c) what other contributions, if any, the overseas corporation

> makes to the financing of the business carried on by the representative; (d) whether the representative is remunerated by reference to transactions, e.g. by commission, or by fixed regular payments or in some other way; (e) what degree of control the overseas corporation exercises over the running of the business conducted by the representative; (f) whether the representative reserves (i) part of his accommodation, (ii) part of his staff for conducting business related to the overseas corporation; (g) whether the representative displays the overseas corporation's name at his premises or on his stationery, and if so, whether he does so in such a way as to indicate that he is a representative of the overseas corporation; (h) what business, if any, the representative transacts as principal exclusively on his own behalf; (i) whether the representative makes contracts with customers or other third parties in the name of the overseas corporation, or otherwise in such manner as to bind it; (j) if so, whether the representative requires specific authority in advance before binding the overseas corporation to contractual obligations.
>
> This list of questions is not exhaustive, and the answer to none of them is necessarily conclusive. If the judge, ante, p. 476B-C, was intending to say that in any case, other than a branch office case, the presence of the overseas company can never be established unless the representative has authority to contract on behalf of and bind the principal, we would regard this proposition as too widely stated. We accept Mr. Morison's submission to this effect. Every case of this character is likely to involve "a nice examination of all the facts, and inferences must be drawn from a number of facts adjusted together and contrasted:" *La Bourgogne [1899] P. 1* , 18, per Collins L.J."

25. The case of the claimant in *Adams* was that jurisdiction was established via one of three routes:

> "These three main submissions were substantially as follows: (1) Cape and Capasco were present and carrying on business in the United States *532 of America, namely, marketing and selling the Cape group's asbestos, through N.A.A.C. until May 1978, and through C.P.C. (or Associated Mineral Corporation ("A.M.C."), a Liechtenstein corporation) until June 1979 from a place of business in Illinois because N.A.A.C. and C.P.C. were the agents of Cape. (We will call this "the agency argument"). (2) Cape/Capasco and N.A.A.C. constituted a single commercial unit and for jurisdictional purposes, N.A.A.C.'s presence in Illinois therefore sufficed to constitute the presence of Cape/Capasco. Likewise, Cape/Capasco and C.P.C., which performed the same functions as those previously carried on by N.A.A.C., constituted a single economic unit, and C.P.C.'s presence in Illinois sufficed to

> constitute the presence of Cape/Capasco. (We will call this "the single economic unit argument"). (3) In relation to C.P.C./A.M.C., the corporate veil should be lifted so that C.P.C.'s and A.M.C.'s presence in the United States of America should be treated as the presence of Cape/Capasco. (We will call this argument, which does not extend to N.A.A.C., "the corporate veil" argument.)" (p532)

26. The three entities identified by their initials were entities relied on as establishing jurisdiction. I will elaborate later on in this judgment. For present purposes it should be noted that the three arguments advanced by the claimant (a) are all advanced, in various forms, by the receiver in the South Carolina proceedings (and by others who have commenced proceedings, presumably on the basis of the receiver's stance), and (b) were all comprehensively rejected by Scott J and the Court of Appeal on the facts and as a matter of law. While Mr Protopapas must have known this for some time, if not from the outset of his receivership, it is not apparent from the material available to the CIHL and Cape Jersey that this vital material has ever been drawn to the attention of Chief Justice Toal.

27. This decision is said to have a number of effects. At least one of them involves considering the extent to which the basis of the claims made in the South Carolina proceedings corresponds to the rejected case of Mr Adams in the *Adams* case, which requires a consideration of the facts of *Adams* in more depth. I shall postpone that to a separate section of this judgment. The significance of this section of this judgment is to establish clearly the basis on which English law, as a matter of private international law, will and will not recognise foreign judgments against corporations, and to foreshadow what is to come later.

28. Mr Dale, when he addressed me on this area of the law, was keen to point out that on the authorities it would seem that this court will consider an order of the foreign court made against someone who has not submitted to the jurisdiction to be a "nullity". He relied on the *Sirdar Gurdyal Singh* case, cited in *Adams* at p 516:

> "In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced in absentem by a foreign court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity."

29. I am not sure that the concept of "absolute nullity" in "international law" adds much to a consideration of this case other than a perhaps unnecessary air of contention, but the force of the point is that the courts of this country will not give effect to such a judgment. The reasoning involves a determination that the foreign court is not a "court of competent jurisdiction" so far as the particular defendant is concerned because of the lack of personal or subject matter jurisdiction.

The facts relating to NAAC, CPC and AMC

30. The status of these three entities is central to the issues in this matter, and it is necessary to appreciate the findings of Scott J and the Court of Appeal about them. It was via these companies that the plaintiff in *Adams* sought to establish presence (and his other claims to found jurisdiction), and it was the rejection of this analysis on the basis of found facts that the claim and the appeal were lost. As will appear, the receiver is seeking to revisit, and indeed set at naught, many of these findings and the ultimate

jurisdiction decision, so it is necessary to elaborate more on them so that it can be seen to what extent the receiver's claims (and the new claims of others) correspond to actual findings and rejected findings.

31. The detail of the factual findings of Scott J appear from the detail of his judgment. In the Court of Appeal the significant findings about these entities and their relationship with CIHL as relied on by that court do not appear in the actual report of the case. The report at p 512 records that the Court of Appeal listed the relevant facts, but does not set them out. The diligence of the lawyers in the application before me has unearthed a transcript of what the court listed. It is extensive, but it is important by way of a cross-reference to allegations now made in South Carolina (to which it is largely contrary). Accordingly, and since it is not generally available (an in particular it would not otherwise be available to the receiver or the South Carolina court) I attach it as Appendix 1 to this judgment.

32. The key elements of those findings can be summarised as follows:

(i) Although NAAC was a subsidiary of the Cape group, it had its own business and traded on its own account, both as an intermediary for sales by Egnep and another subsidiary, and when making its own sales of asbestos. NAAC had no authority to enter into contracts on behalf of CIHL or any other company in the group. The judgment itself says it is "clear beyond argument" that NAAC was carrying on business of its own (p546).

(ii) When NAAC was liquidated and Continental Productions Corporation ("CPC") took over from NAAC, it was an independent company with an owner who fell to be treated as independent.

(iii) Such control as CIHL had over NAAC was "no more and no less than was to be expected in a group of companies such as the Cape Group" (Para 19). There was no evidence of control over commercial activities.

(iv) Mr Morgan (vice-president and then president of NAAC, and then principal behind CPC) was in charge of the operations of those company. NAAC had its own offices for which it paid the rent, and employed 4 people. Those offices were its offices, not CIHL's.

(v) Contracts for the supply of asbestos were made between Egnep or Casap on the one hand and the purchasing customer on the other.

(vi) NAAC had a separate identity and was not the 'alter ego of Cape" (para 22).

(vii) CPC leased its own offices which were in the same building as NAAC's offices but they were different offices and on a different floor.

(viii) CPC was an independently owned company carrying on its own business (para 35).

(ix) Importantly, the corporate form of the Cape group was not "form only". See para 36.

33. None of these facts (ie the facts in the whole summary) was successfully challenged in the Court of Appeal despite an attempted challenge (see p512 of the judgment), and the court based its conclusions on them.

34. Based on the facts that had been found the Court of Appeal rejected the "single economic argument", the second of the three submissions which were identified in the passage cited above. It was submitted as follows:

> "In support of the single commercial unit argument, Mr. Morison made a number of factual submissions to the following effect: the purpose of N.A.A.C.'s creation was that it might act as a medium through which goods of the Cape group might be sold. The purpose of the liquidation of N.A.A.C. was likewise to protect Cape. Any major policy decisions concerning N.A.A.C. were taken by Cape. Cape's control over N.A.A.C.

> did not depend on corporate form. It exercised the same degree of control both before and after the removal of the Cape directors from the N.A.A.C. board. The functions of N.A.A.C.'s directors were formal only. Dr. Gaze effectively controlled its activities. Cape represented N.A.A.C. to its customers as its office in the United States of America. In broad terms, it was submitted, Cape ran a single integrated mining division with little regard to corporate formalities as between members of the group in the way in which it carried on its business."

35. These arguments were all rejected at p 538 (to which reference should be made for detail), with the Court of Appeal holding that while certain policy limits were controlled by the group, the day to day running of NAAC was left to Mr Morgan, that the financial control that was exercised was no more than a parent company would exercise over the subsidiary and that there was no discretion in the court to ignore the distinction between the members of a group as a technical point. The same applied to CPC.

36. So far as the lifting of the corporate veil is concerned, the Court of Appeal considered whether:

> "the arrangements regarding NAAC, AMC and CPC made by Cape with the intentions which we have inferred constituted a facade such as to justify lifting the corporate veil so that CPC's and AMC's presence in the United States of America should be treated as the presence of Cape/Capasco for this reason if no other." (p542A-B).

The intentions referred to were:

> "to enable sales of asbestos from the South African subsidiaries to continue to be made in the United States while (a) reducing the appearance of any involvement therein of Cape or its subsidiaries, and (b) reducing by any lawful means available to it the risk of any subsidiary or of Cape as parent company being held liable for United States taxation or subject to the jurisdiction of the United States courts, whether state or federal, and the risk of any default judgment by such a court being held to be enforceable in this country." (p541F-H)

37. The court's conclusion was that the facts did not justify the inference of a facade and the piercing of the corporate veil (p544). This was despite the intentions which they had identified as to the purpose of the change from NAAC to CPC, which they held as a matter of law still did not entitle the court to lift the corporate veil. In particular it concluded:

> "As to condition (iii), we do not accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company. Whether or not this is desirable, the right to use a corporate structure in this manner is inherent in our corporate law. Mr. Morison urged on us that the purpose of the operation was in substance that Cape would have the practical benefit of the group's asbestos trade in the United States of America without the risks of tortious liability. This may be so. However, in our judgment, Cape was in law entitled to organise the group's affairs in that manner and (save in the case of A.M.C. to which special considerations apply) to expect that the court would apply the principle of *Salomon v. A. Salomon & Co. Ltd. [1897] A.C. 22* in the ordinary way." (p544D-G)

38. Then the court turned to the agency argument, on the footing that NAAC must for all relevant purposes be regarded as a legal entity separate from CIHL (p545). It concluded that NAAC was carrying on business on its own account (p546D) and that CIHL (Cape) was not present in the US through NAAC at any material time (p547E). The same was true of CPC (p549(C).

39. There is one further important set of determinations arising out of those judgments, significant to the present case, which does not appear from the reports of the case available to the public. The Adams notice of appeal listed 25 findings of fact (some of

them multiple) which it was said Scott J should have made but did not make, and which were said to go to the main questions in the case. The Court of Appeal dealt with that part of the appellant's case in a separate Appendix to its judgment, again not published in the report. The Appendix runs to 40 pages and I will not reproduce it here. It can be appropriately summarised by saying it is a thorough consideration of each of the "facts" in question, and it either accepts them as being true but not affecting the decisions on the main points, or rejects them as being inconsistent with actual findings of Scott J of as being unsustainable on the evidence. Overall it shows the comprehensiveness of the case advanced by Mr Adams, the comprehensiveness of its consideration and the clarity and firmness of the rejection of that case. When put together with the first instance and appeal judgments, it effectively covers the same ground as the claims as to the effect of relationships and trade, made in South Carolina and firmly rejects them on the facts and the attempt to tie the claims to the US in terms of jurisdiction.

40. In the light of those clear findings of the English courts, and (just as importantly) the route to those findings, reached after very extensive hearings, it is now necessary to consider how they map on to the proceedings in South Carolina, for which purpose it is obviously necessary to consider those proceedings.

The South Carolina proceedings

41. In this and the following sections of this judgment I set out a narrative of the significant litigation steps that have been taken in South Carolina in this matter. I do not set out

every step, and I do not cover all the enormous amount of detail that arises out of that history. I confine myself to what I regard to be essential matters. Unfortunately even thus confined, the narrative is still long and fairly detailed.

The Park proceedings

42. The story starts with the issuing of a claim on 4th June 2021 by an Isabella Park ("the Park proceedings") against a large number of companies including "Cape plc" described as being sued "individually and as successor in interest to Cape Asbestos Company". She claimed to have asbestos-related injuries derived from her husband who worked with asbestos, for which the defendants are said to be liable in various ways, but the manner in which "Cape plc" is said to be liable is not stated. This document was not served on CIHL. On 17th November 2021 the claim was amended by adding (inter alia) CIHL as a party. By now the claim was being pursued by Mrs Park's son as her personal representative. It was claimed that this claim (summons) was served on CIHL. That is disputed by CIHL, but in any event CIHL did not respond to it and therefore did not submit to the jurisdiction in relation to this claim. It was further amended on 23rd December 2021 in a manner which did not involve any Cape entities. That amended version was not served in CIHL.

43. By an order of Chief Justice Toal dated 1st December 2021 this claim was listed for trial on 20th June 2022, but on 3rd June 2022 counsel sent to the court an email stating: "By way of update, the Park and Garren cases have both fully resolved." It is not apparent that CIHL knew what the resolution was, but whatever it was it did not involve CIHL. Accordingly, there was no trial and no judgment of the South Carolina court. The receiver has subsequently said that the email applied only to participating

defendants, but nothing more is known to CIHL than that. It is not known how the proceedings can be said to remain extant. No further steps were taken in relation to these proceedings, at least until the receivership application which is at the heart of this matter.

The receivership application and proceedings

44. On 6th March 2023 the plaintiff in the Park proceedings issued a receivership motion in the Park claim. Its opening words outline the basis of the application and set the tone for what happens thereafter, and I quote them in full:

> "Cape PLC is the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.1) ("Cape Asbestos") and its subsidiaries and global affiliates (collectively, "Cape" or the "Company"), which were and are private companies organized and existing under the laws of the United Kingdom, with its principal place of business in England. At all times relevant, Cape was involved in all elements of the global asbestos industry, but in particular mining many thousands of tons of raw asbestos fiber in South Africa and then selling it to the most dominant manufacturers of asbestos-containing products in the United States—substantial quantities of which were used in South Carolina. Cape also concocted a scheme to avoid its legal responsibilities to persons injured from using those end products because, startingly, Cape deemed itself as having—in its own words—no "moral responsibility" to those end users. Rather than defending its conduct in front of juries in the United States, Cape decided to simply accept default judgments in asbestos lawsuits and ultimately flee the country, knowing that nearly all the Company's assets were in jurisdictions (namely, the U.K., South Africa, and Lichtenstein) where judgments in those lawsuits could not be enforced. Although Cape stiff-armed its creditors in the United States—namely, workers exposed to asbestos mined by Cape—and absconded to London and South Africa, certain of its insurance assets presumably remain. The appointment of a receiver to marshal Cape's assets and satisfy claims is therefore the appropriate remedy, as explained below."

45. The next heading in the motion is: "Cape Establishes American Presence and Operations through NAAC". It describes NAAC's functions and describes it as "essentially a one-man operation" which sold Cape products "in coordination with the global Cape network". It goes on to say that "Cape Asbestos went through tortured machinations to make it appear it was reducing oversight over NAAC, but in reality, NAAC continued to operate as a mere division or instrumentality under Cape's domination and control." CPC's creation and appointment as "commission agent" was intended to eliminate or reduce exposure to US litigation." It ends by saying:

> "For the foregoing reasons, the appointment of a receiver for Cape for all purposes, including, but not limited to, marshaling available assets of Cape and its subsidiaries, successors, and assigns, is appropriate."

And then seeks the appointment of Mr Protopapas as receiver.

46. The jurisdiction invoked, according to the Motion, was that given by the South Carolina Code para 15-65-10(4) and (5), which state respectively:

> "A receiver may be appointed by a judge of the circuit court, either in or out of court:
>
> … (4) When 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 ….

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

47. The following should be noted at this stage:

(i) The fundamental factual basis for appointing the receiver was the fact that "Cape" was operating through NAAC and CPC in the US, without any reference to the detailed findings of the English courts.

(ii) What was sought was an order marshalling the assets of "Cape and its subsidiaries, successors and assigns" (my emphasis). It was not sought merely in relation to Cape's assets.

(iii) The Cape defendant was described thus: "Cape PLC is the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.1) ("Cape Asbestos") and its subsidiaries and global affiliates (collectively, "Cape" or the "Company"), which were and are private companies organized and existing under the laws of the United Kingdom, with its principal place of business in England." At the time "Cape plc" was Cape Jersey. This document did not describe CIHL. Cape Jersey was not served with this motion. A footnote in the Motion states that it was sent by DHL to an address in England, which was not the registered address of Cape Jersey.

48. The receivership order which was sought was made on 16th March 2023. It was made without a hearing and there is no judgment giving reasons for its being made, though the order itself records briefly the basis on which it was made and the two statutory provisions said to be applicable (the two provisions just identified). It is an order which gives extremely wide powers, which cannot fairly be summarised, and since its width is important the full terms of the order minus one short irrelevant part appear in Appendix 2 to this judgment.

49. Mr Phillips challenged the basis on which the order was made on the basis that Cape Jersey (which at this stage is the presumed target) had not forfeited its charter, had not been dissolved and had not failed to answer the Park case (it was "fully resolved" - see above). However, I do not sit as some sort of appellate court in relation to that order, and whatever its merits or demerits it stands as an order of the Court of South Carolina.

50. It is, however, right and pertinent to observe the following:

(a) It would seem to have no territorial limits, or at least no express territorial limits.

(b) The receiver has been appointed "in this case". Mr Oren questioned whether that gives authority to commence third party proceedings in another case (which is what has happened).

(c) The appointment was made "to protect the interests of Cape whatever they may be" (see the first paragraph of the order appointing him). Mr Phillips makes the point that it would seem the receiver has done exactly the opposite.

The Tibbs claim

51. The next relevant event was the commencement of proceedings by a Mr and Mrs Tibbs ("the Tibbs claim"). This was launched on 5th April 2023 and, like the Parks claim, was made against a large number of companies as an asbestosis claim including "Cape plc". CIHL was not and never has been named as a defendant. The claim alleged that each defendant had transacted business in South Carolina and was liable for damages flowing from its own tortious conduct and of the conduct of an "alternate entity". In the case of "Cape plc" that was said to be "Cape Asbestos Company Ltd, that is to say CIHL "and its subsidiaries and global affiliates". Cape plc is again described as a company incorporated in the United Kingdom, and it is said to have imported and

supplied asbestos products. The claim is said to arise out of that company's business activities in the state of South Carolina.

52. This claim was not served on Cape Jersey in Jersey or on CIHL in England. According to what was said in court in later proceedings, it has been dismissed by consent, the consents being those of the Tibbs and of Mr Protopapas as receiver of "Cape plc". This seems to have been confirmed by an email dated 8th April 2024 from counsel for the Tibbs sent to the court in which it is said that the remaining defendants are a single specified company (not a Cape company). The dismissal agreement was apparently dated 12th June 2023 but it has not been seen by CIHL. It has been said to contain an agreement to "toll" the statute of limitations, by which CIHL understands it has been agreed that limitation would not be raised in any future claim.

53. After that agreement, whatever it was, was reached, a Defence was put in in those proceedings dated 29th June 2023. It expresses itself as having been put in by "Defendant Cape plc as the successor in interest to Cape Industries Ltd (f/k/a Cape Asbestos Company Ltd) ("Cape"), by and through its Receiver Peter D Protopapas and contains a "general denial" in the following terms:

> "1. To the extent that it is not inconsistent with the allegations of the Third Party Complaint, Cape hereby denies each and every allegation contained in the Amended Complaint."

At that date (29th June) the relevant Third Party proceedings had not been launched - the relevant documents bear the next day (30th June) as their date. As will appear, the

Defence would not seem to be much of a defence at all because the Third Party proceedings propound liability- they do not deny it. It is necessary to understand the Third Party proceedings to understand that.

The Third Party proceedings

54. Despite the apparent determination of the Tibbs/Cape claim, on 30th June 2023 the receiver initiated Third Party proceedings on behalf of "Cape plc", within the Tibbs claim, against a number of companies, including a number of Cape group companies , and Anglo American plc and a number of De Beers companies. The Cape related companies included Altrad companies (the group that had acquired the Cape group in 2017), and the Sparrows entities that were brought within the group much more recently (despite its being hard to see how they can be held responsible for acts done before they were brought into the group). Mr Mohed Altrad, founder of the Altrad group, is also sued personally. In addition, and a little remarkably, Law Debenture Corporation plc is also a defendant. It will be remembered that its only connection to the Cape group or asbestos is that it holds shares in the Cape scheme company under the scheme of arrangement (CCS), and in CIHL, so that it can properly police the funding of the Cape scheme of arrangement - see above. The joinder of that company, if nothing else, demonstrates a somewhat wild approach to the selection of defendants.

55. The Cape and Altrad defendants (including the Sparrows group) are apparently sued on this basis:

> "Cape and its affiliated entities undertook numerous actions in a deliberate effort to escape responsibility for the harm caused by Cape asbestos products. For example, Cape went through tortured

> machinations to make it appear it was reducing oversight over NAAC, but in reality, NAAC continued to operate as a controlled instrumentality under Cape's domination. And these changes were the result of careful assessments by Cape officials—with the help of its lawyers and other advisors—regarding how to minimize the liability exposure of not only Cape, but Cape's parent (Charter) and its other South African affiliates. See CAPE000141 (NAAC counsel advising Cape on risk of judgments attaching to Charter assets)." (paragraph 119)

56. The relief claimed against all the third party defendants is summarised at the end of the summons as follows:

> "A. For the Court to exercise its equitable power and authority against the Third-Party Defendants as requested herein;
>
> B. For a full accounting of each of the Third-Party Defendants' records and other information related to the allegations herein, including the extent to which each of the Third-Party Defendants has financially benefited from the liability-avoidance scheme; and
>
> C. For such other and further relief as the Court may deem just and proper, including pre-judgment and post-judgment interest as provided by South Carolina law."

57. According to earlier paragraphs, the apparent purpose is to get all the defendants to disgorge an unspecified, but obviously huge, sum of money via constructive trust, unjust enrichment and corporate veil-piercing remedies. The tone is set by the opening paragraph:

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

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

58. The early parts of the summons plead some history of the the Cape group's asbestos trade from early times to modern times, seeking to demonstrate the involvement of such companies as Anglo-American the de Beers companies. I do not need to develop that. Relevantly for present purposes, at section H of that summons there is a heading entitled "Cape created NAAC to Facilitate Its Asbestos Scheme". At paragraph 72 it embarks on a description of "NAAC's Role at Cape" in terms which do not coincide with the findings in *Adams v Cape*. At paragraph 77 the management of NAAC is dealt with in simplistic, and therefore not wholly accurate, terms (especially when compared with the findings in *Adams v Cape)* and at paragraph 79 it is said that "NAAC's operations and decision-making were wholly dominated by Cape and its owners", which is seriously at odds with the English findings on all the evidence heard. It will be remembered that the finding was that the control exercised was consistent with the sort of control that a holding company would exercise over a subsidiary, and no more.

59. Section IV is headed: "Cape Implemented a Strategy to Evade Liability in the United States". It is pleaded at paragraph 89:

> "Cape and its affiliated entities undertook numerous actions in a deliberate effort to escape responsibility for the harm caused by Cape asbestos products.28 For example, Cape went through tortured

> machinations to make it appear it was reducing oversight over NAAC, but in reality, NAAC continued to operate as a controlled instrumentality under Cape's domination.29 And these changes were the result of careful assessments by Cape officials—with the help of its lawyers and other advisors—regarding how to minimize the liability exposure of not only Cape, but Cape's parent (Charter) and its other South African affiliates. See CAPE000141 (NAAC counsel advising Cape on risk of judgments attaching to Charter assets)."

60. This is quite contrary to the findings of the English court, which recognised that the overall strategy was to reduce the connection with the United States, but that that was successfully achieved in law and on the facts by the way that NAAC (and later CPC, which is described in the Third Party Complaint as a "ruse") operated. Space and time do not permit the citation of the whole of the way the case is put against "Cape", and for present purpose I can adopt as accurate the summary of the allegations appearing in Mr Oren's first witness statement:

(1) Cape's historic operations involved a complex scheme to sell millions and millions of dollars of asbestos – knowing with certainty that it would kill and maim tens of thousands of Americans – while, at the same time, developing and executing a ploy to escape any legal or financial responsibility to the people harmed by intentionally depleting its US-based subsidiary of attachable assets (paragraph 41).

(2) Cape and its affiliated domestic and foreign entities got extraordinarily wealthy off the suffering and deaths of tens of thousands, and then cheated the system to escape responsibility for its and their tortious misconduct (paragraph 41).

(3) Cape established NAAC in 1953 and designed NAAC to operate as Cape's wholly controlled instrument for the purpose of expediting and facilitating the movement of asbestos from South African mines into the US (paragraphs 70, 72).

(4) At the direction of the amalgamated Cape/Oppenheimer network, Cape and

NAAC implemented a conscious pattern of product distribution of asbestos nationally resulting in NAAC selling asbestos to customers in the US (paragraph 75).

(5) NAAC's operations and decision-making were dominated by Cape and its owners, with NAAC not permitted to borrow money without Cape's approval and being forced to pay dividends to Cape, thereby depleting the assets reachable by NAAC's creditors in the US (paragraph 79).

(6) Cape's products caused individuals (including residents of South Carolina) to be exposed to asbestos and suffer bodily injury, which has resulted in myriad suits against Cape ("Asbestos Suits") including the Tibbs Claim (paragraph 74).

(7) Because of Cape's domination of NAAC, and as part of the liability-avoidance scheme, Cape directed NAAC to buy wholly inadequate insurance coverage to address its massive future products-liability exposure (paragraph 80).

(8) Cape led efforts in the US and internationally to hide the risks of asbestos (paragraphs 81-88).

(9) Cape and its affiliated entities undertook numerous actions in a deliberate effort to escape responsibility for the harm caused by Cape's asbestos products (paragraphs 89-93)

(10) Cape liquidated NAAC, siphoning any remaining assets out of the US to Cape Industries Overseas Ltd in an effort to reduce the assets available to creditors but at the same time Cape contemplated ways to continue the flow of asbestos to US customers and asbestos profits out of the US (paragraphs 94-98).

(11) Although Cape had entered into certain agreements to address bodily harm caused, including the 2006 Scheme of Arrangement with former employees in the UK, Cape had done nothing about its massive unpaid responsibility for the death and illness caused by its asbestos products in South Carolina and elsewhere in the US (paragraph 114).

61. The following significant matters emerge from that analysis:

(a) Part of the purpose of the Third Party Complaint is to demonstrate that "Cape", which it now appears is intended to mean CIHL, retained a real presence in the United States

(b) That is sought to be achieved by demonstrating that NAAC and CPC were disguised Cape entities which were in reality closely controlled by "Cape".

(c) The case advanced is directly contrary to the case on which CIHL succeeded in Cape v Adams.

(d) As will appear, Mr Protopapas now accepts, and probably avers, that references to "Cape plc" are mistaken and that the intended company, in terms of the receivership order and Third Party Complaint (and later documents) was intended to be a reference to CIHL. Mr Phillips was apparently not minded to challenge that - certainly his application to me was not heavily based on that. That being the case, the effect of the Third Party Complaint is to advance a case on behalf of CIHL which is directly contrary to the case on which it fought and succeeded in *Cape v Adams* and which is directly contrary to CIHL's interests, because it unpicks and undoes all the matters that were established in its favour in *Cape v Adams.* The duly constituted board of Cape does not wish that to happen.

62. It is necessary to consider the interaction between those proceedings and the Defence in the Tibbs claim, referred to above. When the matters relied on in the Third Party Complaint are read against the Defence, it can be seen that the Defence is no real defence at all, because it would seem to admit all relevant matters as against CIHL (assuming that to be the relevant defendant in the Tibbs claim). It basically sells the pass on issues of liability, responsibility and presence, quite contrary to the findings in the English proceedings. As counsel for CIHL submitted, it is hard to see how a receiver charged with protecting the interests of CIHL could put in such a defence, and

that point is something prayed in aid by CIHL in making submissions as to whether this court should intervene by granting the declaratory and injunctive relief sought.

Steps taken by the Third Party defendants and matters arising

63. The Altrad (including Sparrows) defendants then launched a number of motions against those proceedings, all of which failed. They included challenges to the jurisdiction on the basis of lack of subject matter and personal jurisdiction and challenges to the appointment of the receiver. In an Opposition Memorandum the receiver vigorously resisted all challenges to his appointment and acts. At Part III Section A he said:

> "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."

In what follows he asserts his general rights to more or less anything, and although in an early paragraph he cites the part of the order which justify his "su[ing] and defend[ing] in his own name as receiver of the corporation in all courts of this State", at the end of the Section he avers:

> "There is no jurisdictional limit on that [ie his general] authority."

It would seem from that, and his robust attitude generally, that he probably takes the view that his acts are not confined to acts and assets within the state of South Carolina. That is of great and understandable concern to CIHL.

64. In the next section the document turns to deal with comity arguments, and in that context the receiver rebuts the idea that the receivership interferes with the jurisdiction of the Jersey courts over its own entities. He there says: "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." That is one of the bases for the belief that references to "Cape plc" in the earlier documents was not intended as a reference to Cape Jersey. Later in the same document the receiver avers that the appointment of the receiver was 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", and treats the references to Cape plc in the appointment as being a misnomer which is immaterial. It is more a matter for the South Carolina courts to decide whether it was a misnomer which can effectively be ignored, but if it was then it is one which has been perpetuated because later documents still use the name "Cape plc" when (presumably) CIHL should be referenced and even though the receiver apparently now knows that.

65. On 6th December 2023 Chief Justice Toal made an order which is also in the nature of a judgment (running to 74 pages) dismissing the Third Party motions to dissolve the receivership and motions to dismiss for lack of personal jurisdiction. This order was apparently drafted by the receiver's counsel at the invitation of the court, which no doubt explains the now familiar pitch of the wording.

66. The order held " Cape plc …, ie the Cape entity for which the Receiver has been appointed" was properly served with the First Amended Complaint in the Park action." The order accepts that Cape Jersey was formed too recently to be liable for the claims made and says that:

> "It therefore strains credulity for Third-Party Defendants to premise their ineffective service argument on a foundational assumption the Park Plaintiffs meant to sue a different entity, and one that had "nothing to do with" the underlying claims."

So that "red herring" argument was dismissed. This would seem to confirm that CIHL is formally treated as the target of the receivership order as far as the South Carolina court is concerned.

67. The order then goes on to confirm that the receivership order should stand. It rejected arguments to the effect that a judgment had not been obtained first, and found that Subsection 5 of the relevant part of the South Carolina code did not require such a judgment. It would therefore seem that the court affirmed the judgment on the second of the statutory bases referred to above. The court held:

> "Subsection (5) does not require entry of default or much less entry of a judgment; instead, it authorizes the Court 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." In turn, appointment of a Receiver over Cape was proper under subsection (5) based on evidence of Cape's long-running, intentional scheme to evade its tort creditors by refusing to appear in the United States, including in South Carolina. Subsection (5) reflects an "old practice" of equity and "important principle of law" to correct injustice which is particularly applicable to Cape given its efforts "to defeat [its] creditors by an act or course of conduct which indicates moral fraud—a conscious intent to defeat, delay, or hinder his creditors in the collection of their debts." … [authorities cited] ... 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. Accordingly, these so-called procedural prerequisites to which Third-Party Defendants point and then claim were violated are simply more red herrings; those processes are irrelevant to the grounds on which the Receiver for Cape was appointed."

The court went on:

> "Specifically, this Court finds it has jurisdiction over Cape as a "a person who acted directly or by an agent as to a cause of action arising from" Cape's and NAAC's (i) "causing tortious injury or death in this State by an act or omission outside this State..."

68. The appointment was also confirmed on this basis:

> "Accordingly, independent of Cape's own connection with this State (including facilitating the sale and distribution of Cape asbestos from South African mines to locations in South Carolina), the allegations regarding Cape's effective domination of NAAC, including pursuant to alter ego, veil-piercing, and/or business-enterprise doctrines, as well as the allegation that NAAC acted as Cape's agent, separately provide a proper basis to exercise personal jurisdiction over Cape".

So it is apparent that the juridical basis on which the receiver's appointment was confirmed was that which was rejected, factually and juridically, in *Cape v Adams*.

69. On 15th December Chief Justice Toal issued an order denying motions to dismiss by the Third Party defendants. I do not need to dwell on that.

70. The various Third Parties then sought to appeal, and their appeals were countered by a motion to dismiss made by the receiver. The long and the short of that particular skirmish is that the appeals were dismissed, though Mr Oren's understanding is that they were dismissed for procedural rather than substantive reasons. His understanding, as appears in his second witness statement, is that the appeals were dismissed because they were interlocutory in nature and the appellants would be entitled to a merits-based appeal once final judgment has been delivered on the trial by Chief Justice Toal. Having been shown the orders I am not sure that that is what they say, and that procedural position looks somewhat odd to English eyes because it would seem that the appeals go to something fundamental to the right of the receiver to have a trial in the first place, but that is what Mr Oren says and if that is the position in the courts of South Carolina they those courts are obviously entitled to formulate their own procedural scheme for appeals.

71. Further skirmishing took place, most of which does not matter here, but one element is worthy of note. On 3rd April 2024 the receiver filed a motion for adverse inference" and "motion for sanctions" as against the Altrad defendants. The latter was based on a complaint that those defendants (who had not submitted to the jurisdiction in South Carolina) have not participated in a discovery procedure. The Motion for sanctions asked for an order that the court should:

> "…infer as to Mohed Altrad, Altrad Investment Authority S.A.S., ArranCo US LLC, Hawk Bidco (US) Inc., and Sparrows Offshore, LLC., that each is the alter ego of Cape, or otherwise liable as a matter of veil piercing, including with respect to Cape's ongoing liability-avoidance scheme, and have been unjustly enriched due to Cape's liability-avoidance scheme".

72. Similar adverse inferences were sought as against other Third Party defendants based on corporate veil piercing and unjust enrichment. Orders as sought were granted by Chief Justice Toal on 13th May 2024. That order contained a number of inferences which would be drawn against the Third Party defendants, summarised as follows:

> "…the Court draws the adverse inference that each of the Altrad Third-Party Defendants was at relevant times the alter ego of Cape, requiring piercing of the corporate veil. Likewise, each of the Altrad Third-Party Defendants is responsible for or has benefited unjustly from Cape's liability-avoidance scheme."

73. Those inferences were said to be subject to "evidentiary challenge by [the defendants] should these recalcitrant Third-Party Defendants elect to participate in these proceedings as they are required to do by our rules and the orders of this Court".

74. As Mr Oren pointed out, those Third Party defendants are now faced with the position of having to submit to the jurisdiction to defend those inferences, or not submit and risk having judgment granted against them in respect of those inferences. Having said that, I consider that on analysis those defendants are in the same position as any person who knows of proceedings in another jurisdiction and chooses not to submit voluntarily to the jurisdiction.

75. That order was subject to various appeal processes, the last of which is still outstanding.

76. There were attempts to have this matter removed to a Federal Court. Those attempts failed and I need say no more about them. There is now an outstanding writ of certiorari in relation to those appeals. I say nothing about that either, not least because that is all that is said about it in the evidence before me.

Other acts of the receiver

77. Other litigation demonstrates the vigour with which the receiver is going about his role. On 12th April 2023 he issued a third party summons against Lord Locke LLP, a Delaware corporation who were formerly attorneys to NAAC. His summons apparently explained that he was the receiver of Cape plc "and its affiliate North American Asbestos Corporation" and was tasked with marshalling the assets of Cape and its affiliates. He claimed to control the attorney-client privilege of Cape and its affiliates and sought disclosure of NAAC files and financial records. He sought to broaden the scope of his claim by amendment on 8th August 2024 claiming a violation of Lord Locke's duties to the "Plaintiff". This is said to demonstrate the excessive lengths to which Mr Protopapas will go in pursuit of what he conceives to be his rights and duties. It does tend to demonstrate that the receiver does not regard his powers as being confined to South Carolina.

78. I will not list all the further applications that have taken place in South Carolina, and content myself with noting that at hearing on 24th September 2024 the Third Party trial was rescheduled from the beginning of December to the 3rd to 7th February 2025. As

will appear, it would seem that the receiver is now seeking to short-circuit that re-listing.

79. On 30th August 2024 a letter before action was sent to the receiver by Winston & Strawn LLP on behalf of the claimants in these proceedings. That firm is a US and English firm of solicitors. It was a perfectly proper letter before action inviting Mr Protopapas to agree to an order which provided for the declarations and injunctions which are sought in this application - making it clear that he had no authority to act for CIHL or Cape Jersey and providing for his being restrained from so acting (in short). It set out in a reasoned fashion what the basis of the claim was, as one would expect. Alternatively it invited him to accept service so that any dispute could be determined by this court.

80. The receiver responded in a letter of 5th September by denying that he was amenable to the jurisdiction here because his appointment and related matters could only be challenged in the courts of South Carolina under the "Barton doctrine" and he was obliged to carry out the functions with which he had been entrusted. His letter went beyond arguing, however. He revealed that he had issued proceedings against Winston & Strawn:

> "Your letter solicits me to violate South Carolina law and is akin to extortion. Respectfully, I refuse to allow your tortious threats to guide my legal and ethical duties imposed on me as a court-appointed receiver. As a result, I am left with no choice but to sue your firm. Attached you will find a recently filed declaratory judgement action against Winston & Strawn, LLP. I anticipate filing a Rule to Show Cause against your firm requiring your firm to explain its conduct to the Receivership

> Court. A sensible solution to this issue is for you to withdraw the Letter and undertake to not seek any relief in the English Courts or any other court than that seized of the jurisdiction in South Carolina and I will withdraw the Complaint and Rule to Show Cause."

81. The motion in the South Carolina court (dated 5th September 2023) refers to "intimidation" of the receiver as a court officer in the conduct of his duties.

82. Again, this is said, with justification, to show the aggressive propensities of the receiver. To English eyes at least, to commence proceedings against solicitors who bona fide advance a case on behalf of their client on the basis that it is "extortion" is, to put it mildly, completely misplaced. His ultimatum that the solicitors withdraw a letter sent on behalf of a client, or face being sued personally, makes a demand that the solicitors could not properly comply with because of their duties to their clients. It is surprising that a lawyer (which Mr Protopapas is) would not appreciate that. As a result of these acts those solicitors felt they had to withdraw from these proceedings and fresh solicitors (English) have been appointed to act for CIHL and Cape Jersey.

83. The receiver's attempts to see off those who act for or assist the claimants have not stopped there. As I have indicated above, the claimants filed expert evidence from Judge Wilkins. It sets out, entirely properly, what he said was the proper effect of South Carolina law on various issues said to go to the appointment and powers of a receiver appointed under South Carolina law and to estoppel. It plainly did not venture further than that, and did not relate itself to the merits of the disputes in this matter. It was served on 31st October 2024. On 5th November the receiver issued a subpoena for a deposition, and made extensive demands for disclosure on the judge. That conduct looks intimidatory. Whether or not that is right, the judge thought it right to provide

(apparently unbidden) a short further "report" saying that he did not intend to express a view as to whether and to what extent the law in his report applied to any case anywhere in the world, and that his involvement in such matters is now hereby concluded". When one reads the report properly one can see that that is plainly the case - he did not trespass into the area of saying how it should have been applied in the present matter. After he provided that supplemental report the subpoena was withdrawn. It would seem that was issued on a false premise as to what the effect and purpose of the report was; or that the receiver has achieved an intended result in bringing the role of the expert to an end..

84. Having been served with the application to expedite the present proceedings, the receiver sought to head off the trial by seeking his own form of anti-suit injunction. He applied to the South Carolina court (Chief Justice Toal again) for an order against the Altrad defendants "to terminate their improper action pending before the High Court of Justice of England and Wales seeking to enjoin the Receiver from performing his Court-ordered duties." Chief Justice Toal declined to accede to that application.

More recent developments

85. Returning to the litigation activities of the receiver in relation to the main litigation, there have been further significant developments beyond those identified above.

86. On 1st November 2024 (ie after service of these proceedings on the receiver) he filed a "Motion to Clarify the Appointment Order". It sought confirmation that all his litigation activity to date had been conducted within the scope of the receivership order. The result was an order which ended thus:

> "Recent events, including an expert report by retired jurist William W. Wilkins, warrant further clarification of the Appointment Order. This Order hereby clarifies that the Receiver's Order of Appointment entered on March 17, 2023, which is incorporated herein by reference, including all of the Receiver's duties and protections, extends to the right and obligation to administer any claims related to the actions or failure to act of any entity related to or responsible for Cape. This Order also clarifies that the Receiver's litigation activity to date has been conducted within the scope of this Court's Appointment Order."

87. On 8th November 2024, following service of Mr Oren's second updating witness statement, the receiver made an application for summary judgment against some of the Third Parties (the Altrad defendants and the "Charter" defendants) in the Third Party proceedings. This is despite the fact that he has a trial at the beginning of February - just 3 months away. Mr Dale suggested that it can be inferred that the receiver is very keen to get that summary judgment before a judgment in the present case. So far as relevant I would draw that inference. In the summons the receiver states that "And with the Charter and Altraad Third_Party Defendants' continued obstructionism, the evidence adduced by the Receiver is damning... [and] also completely un-rebutted, and further supported by the adverse inferences drawn by this Court as a result of their discovery misconduct." Mr Brehony comments that despite the 81 pages of submissions in support of the application, nowhere is there a mention of *Adams v Cape* and the findings in that case, which do indeed rebut his case.

88. Last in the catalogue of litigation in this case so far is a new set of proceedings launchedon 11th November 202 by some 80 claimants against "Cape plc, as successor-in-interest to Cape Industries Ltd (f/k/a Cape Asbestos Company Limited)" and others for damages and associated remedies against largely the same defendants as the Third Party proceedings, including Law Debenture. Mr Protopapas accepted service of these proceedings on behalf of "Cape plc" the next day. It is assumed that this is the usual "misnomer", and that the intended defendant is CIHL. That is certainly the receiver's view, because he has presumed to deal with this under his receivership. This claim came in overnight between the first and second days of the hearing of this trial. The solicitors for the claimants are the same solicitors as acted for the claimants in the Park and Tibbs claims, and indeed the Tibbs re-appear as claimants in this claim. It can be seen that significant parts of this document are literally cut-and-pasted from the Third Party summons or Complaint (see eg the paragraph and diagram at para 63 of the new claim). The whole thesis of this claim as to why CIHL is liable is the thesis of the Third Party summons, described above. If, as is to anticipated, the receiver puts in a Defence like his Defence in the Tibbs action, he will effectively be admitting these claims.

89. In addition to that new litigation, other threats have manifested themselves. On 28th October 2024 the receiver filed a letter from Motley Rice LLC, a firm of attorneys specialising in mass tort cases, explaining that they acted for Pittsburgh Corning Trust which had paid thousands of victims of asbestos-related disease from product an "extremely large percentage" of which had emanated from CIHL. It put the receiver on notice of a claim. CIHL is concerned that the receiver will admit responsibility or purport to act but fail to defend properly, setting a dangerous precedent for the Cape Group. A further claim, assumed to be substantial, seems to be on the way from National Services Industries Inc.

A comparison of the basis of Adams v Cape and the appointment and acts of the receiver

90. The opposing nature of the detailed facts *Adams v Cape* on the one hand and the case mounted against, and then on behalf of, CIHL in South Carolina on the other, should be clearly apparent by now. It was exemplified by a schedule drawn up by Mr Phillips to assist me and which contrasts, in terms, and in columnar form, the allegations of the receiver and the findings of Scott J and the Court of Appeal. At the heart of the receiver's case in his Third Party proceedings, and underpinning his appointment, is the proposition that NAAC and CPC were essentially to be treated as being one with CIHL for the purposes of founding liability and getting into the rest of the group. That encapsulation is flat contrary to the findings of the courts in *Adams v Cape* when they found that they were not effectively one entity, there was no justification for piercing the corporate veil and that CIHL did not operate through NAAC or CPC. CIHL did <u>not</u> control NAAC in any meaningful sense, and the participation of CPC was <u>not</u> a ruse or a sham. The receiver (and the applicant for the receivership, who may well have been motivated and prompted by the receiver) simply ignores this and advances the opposite case.

The law - governing law, the recognition of foreign receiverships and recognition of the South Carolina receivership in this jurisdiction

91. For these purposes I shall deal with the position of CIHL. I deal with Cape Jersey's position in this application at the end of this judgment.

92. CIHL's case centres on the South Carolina receiver having no relevant authority to bind the company, or to act for it at all, in the circumstances which have happened. That involves a consideration of the circumstances in which the English courts will recognise a foreign receiver appointed by a foreign court.

93. Mr Phillips' starting point is the proposition that the law of the country of incorporation governs the capacity of a corporation to enter into transactions and all matters relevant to the internal governance of the corporation. He is right about that. The basic position is set out in Dicey and Morris on the Conflict of Laws (15th Edn) at what it describes as Rule 187(2):

> "All matters concerning the constitution of a corporation are governed by the law of the place of incorporation."

This principle will operate to determine who has authority to bind the company. However, this straightforward Rule does not take this matter much farther forward other than setting the scene for the next question, which is rather more important, which is whether and to what extent a foreign receiver such as Mr Protopapas will be recognised here.

94. On this point *Schemmer v Property Resources Ltd* [1975[1 Ch 273 provides the necessary guidance. In that case a US receiver sought to have himself appointed receiver in this jurisdiction over the assets here of a Bahamian company, PRL. He was specifically authorised to do that by an order of the appointing court (see p285D). PRL

challenged this attempt through the medium of challenging the permission to serve it out of the jurisdiction. The challenge succeeded on the footing that, as a matter of English law, PRL did not have sufficient connection with the foreign jurisdiction (the US) to justify recognition here, nothwithstanding the specific authorisation of the appointing court. Goulding J sumarised the position on the law and on the facts by saying:

> "I shall not attempt to define the cases where an English court will either recognise directly the title of a foreign receiver to assets located here or, by its own order, will set up an auxiliary receivership in England. To do either of those things the court must previously, in my judgment, be satisfied of a sufficient connection between the defendant and the jurisdiction in which the foreign receiver was appointed to justify recognition of the foreign court's order, on English conflict principles, as having effect outside such jurisdiction. Here I can find no sufficient connection. First, PRL was not made a defendant to the American proceedings, and there is no evidence that it has ever submitted to the federal jurisdiction. In that regard it is, in my judgment, not enough that certain subsidiary companies of PRL with assets in the United States of America have unsuccessfully contested the orders of the district court on the basis that it had no personal jurisdiction against them, and on other grounds. Secondly, PRL is not incorporated in the United States of America or any state or territory thereof, so that the principle tacitly applied in *Macaulay's case, 44 T.L.R. 99* , and more fully exemplified by *North Australian Territory Co. Ltd. v. Goldsbrough, Mort & Co. Ltd. (1889) 61 L.T. 716* is of no direct relevance. Thirdly, there is no evidence that the courts of the Bahama Islands, where PRL is incorporated, would themselves recognise the American decree as affecting English assets. Fourthly, there is no evidence that PRL. itself has ever carried on business in the United States of America or that the seat of its central management and control has been located there. I express no view, one way or the other, on the materiality of those two circumstances." (my emphasis)

95. The critical part of that passage is the underlined part, though Goulding J's consideration of the factors which led him to conclude there was insufficient connection are also helpful. The fourth of those factors has parallels with the present case. It is

CIHL's case, on the footing of the lengthy consideration of the facts in *Adams v Cape*, that business was not carried on by CIHL in South Carolina at any material time.

Goulding J went on:

> "The situation relied on by the plaintiffs is that PRL is actively or passively concerned in a violation of the laws of a foreign country, and a court in that country has in consequence appointed a receiver of its assets. Under those circumstances (and in the absence of any other ground of foreign jurisdiction) the English court ought not, in my judgment, to regard the appointment as having any effect on assets outside the foreign court's territorial limits. A little imagination will show that any different rule might produce a multiplicity of claims, and confusing and unnecessary questions of competing priorities."

That passage has a resonance with the present case too. Extreme allegations have been made in South Carolina, but it is said that there is still no relevant jurisdictional link between CIHL and South Carolina. The last sentence of that passage is one of the factors that is invoked by the director of CIHL in seeking its relief.

96. The position is put thus in Lightman & Moss on The Law of Administrators & Receivers (6th Edn) :

> "30-32. The circumstances in which a receiver appointed by a foreign court may secure recognition of his powers in relation to English assets in England has not been authoritatively settled in the reported cases. However, it is clear that the principles are different from those which apply to determine the recognition of a receiver pursuant to a private appointment under foreign law. This difference arises because, in principle, when recognition of a receiver appointed by a foreign court is involved, the English court must satisfy itself that the foreign court was jurisdictionally competent to make the appointment according to the

> relevant principles of English private international law. Consequently, it becomes necessary to determine when English law will regard a foreign court as possessing such competence. Where such competence is established and there are no applicable general principles of conflict of laws precluding recognition, comity requires recognition to be afforded.
>
> 30-33. As a general principle, the foreign court will be regarded as jurisdictionally competent if there is a "sufficient connection between the company in respect of which the receiver is appointed ('the defendant') and the jurisdiction in which the foreign receiver was appointed to justify recognition of the foreign court's order" While this much may be accepted, it is not possible to state with complete certainty the circumstances in which such sufficient connection may exist."

97. Although the editors of that book suggest some uncertainty as to the principles, the general principle propounded by Goulding J in *Schemmer* should be applied, and I would in any event agree with it.

98. Applying the "sufficient connection" principle, it is quite clear that the South Carolina receivership would not, should not and could not be recognised here for all the reasons which led to the US judgment in *Adams v Cape* not being enforceable here. All the facts which led to the conclusion that CIHL did not have a presence in the US in that case mean that there is no sufficient connection for the purposes of recognition of the receivership. As a matter private international law, CIHL did not have a presence in South Carolina (or anywhere in the United States) at the time which was relevant in *Adams v Cape* and it has not had one since. Nothing in the facts alleged in any of the court documents relating to the receivership demonstrate a change in facts between then and now. They tend to ignore the facts as found at great length in *Cape v Adams*.

99. For the sake of completeness I should mention (as did Mr Phillips) that the Cross-Border Insolvency Regulation 2006 has no relevance here. There is no relevant "foreign proceeding" in South Carolina within the meaning of that Regulation, because the South Carolina proceedings are not a collective judicial or administrative proceeding within those Regulations. The receiver could no more get recognition of his office under those Regulations than he could under the general law set out above.

100. Of course, in the present case the receiver is not currently seeking recognition of his receivership in this jurisdiction, so this decision is not in the nature of an actual refusal of recognition. Rather, my is a decision at a higher level to the effect that the receivership is not capable of recognition in this jurisdiction with the consequence that the receiver's acts should not be recognised for English law purposes. This goes to the question of the relief that should be afforded to the claimant, which I deal with in a later section of this judgment. As will appear, the fact that the receiver is not seeking recognition in this jurisdiction does not mean that this judgment is pointless.

Estoppel

101. Mr Phillips sought to bolster his position by relying on the doctrine of estoppel. His argument was that a new development, or elaboration, of the law of estoppel means that the receiver should be estopped, or otherwise prevented, from adopting a contrary stance to that adopted by CIHL in *Adams v Cape*. He relied on a species of estoppel examined by the Court of Appeal in *LA Micro Group UK Ltd v LA Micro Group Inc*

[2022] 1 WLR 336. In that case the court had to consider the effect of a claimant's disavowal of an interest in a company in one set of proceedings when then that claimant asserted an interest in later proceedings. The court considered a version of estoppel by conduct which stopped short of issue estoppel (because there was no positive decision of the court on the point) and considered the application of another version. It was encapsulated in the following terms:

> "19. The possibility that an estoppel arises from the conduct of a party in litigation was recognised in *Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] AC 993* , where Viscount Radcliffe said at p 1018:
>
> > "a litigant may be shown to have acted positively in the face of the court, making an election and procuring from it an order affecting others apart from himself, in such circumstances that the court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned."
>
> …
>
> 22. The phrases used in these cases suggest that it is not every change of position by a party or a witness which will create this form of estoppel. In *Kok Hoong [1964] AC 993*, Viscount Radcliffe's formulation requires (a) that the party's stance in the earlier proceedings was the means by which he procured an order, and (b) the circumstances must be such that the court has no option but to hold him to his former stance. In *Gandy* , Cotton LJ says that the earlier decision was in favour of the husband "on the ground that" the deed provided a continuing obligation. Bowen LJ said that the husband had succeeded "on the footing" of that construction of the deed. These phrases suggest that it must be apparent from the earlier judgment that the stance taken by the party was a reason for the judgment which he obtained, and that it would in all the circumstances be unjust to allow the party to resile from the stance taken earlier."

102. Mr Phillips was keen to point out that a similar rule applies in the US, as appears from the following citation in *LA Micro*:

103. Ginsburg J, giving the judgment of a unanimous court *New Hampshire v Maine (2001) 532 US 742*], approved an earlier statement in *Davis v Wakelee (1895) 156 US 680, 689*:

> "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

104. And Mr Phillips was keen to submit that the root of the doctrine was an abuse of the process:

> "24. The purpose of the rule was said to be to protect the integrity of the judicial process, by prohibiting parties from deliberately changing positions according to the exigencies of the moment and preventing parties "from playing fast and loose with the court".

105. That point is said to be reinforced by the more recent case of *Malik v Malik* [2024] EWCA Civ 1323:

> "36 … Although Sir Christopher Floyd did not use the phrase, the form of estoppel by conduct in this issue can readily be seen as a species of abuse of process."

106. Mr Phillips seeks to invoke this principle by saying that the receiver is now seeking to adopt a different stance in relation to presence on behalf of CIHL from that which CIHL maintained (and won on) in *Adams v Cape*. That is said to contravene the above principles and to amount to an abuse of process which this court should stop.

107. Although the principle can be treated as beyond doubt, and although it would seem that the same doctrine applies in the US (this is apparent from *LA Micro* and from the report of Judge Wilkins which says that the doctrine applies in South Carolina) I do not see how this benefits CIHL in this application. It can be seen to apply in inter partes litigation where it can be invoked by the "victim" of the change of stance. It does not exist is some sort of vacuum or some generally applicable over-bearing estoppel presence. That is the same whether one regards it as a version of traditional estoppel or whether one regards it as based on abuse of process. There has to be sort of forum in which the point can be made to operate for the benefit of a party to litigation.

108. That does not apply in the present situation. CIHL is not being pursued in this litigation by a counter-party which is seeking to resile from its previous stance on which CIHL, as a litigation counterparty in that previous litigation, or the court, had previously relied. It is not seeking to depart from its own stance. It is complaining that a person <u>without authority to do so</u> is departing from its stance. That is not a question of estoppel. It is something else. Furthermore, there is no English process which is being abused by the maintenance of a stance contrary to *Adams v Cape*.

109. Mr Phillips relied very heavily on the abuse point as being one which met the point that there was no party to these proceedings who was seeking to resile from its previous stance, as though the court would somehow take the point by itself. While I would not go so far as to say that there are no circumstances in which the court would take the

point for itself in the face of a party which was not running it, it is hard to imagine them and the present case certainly does not present them.

110. One can test the matter in this way. Suppose that the receiver were contesting these proceedings and was seeking to deploy his South Carolina arguments in this jurisdiction. How would the estoppel work? CIHL would have to say that because it (not the receiver) had advanced a contrary case and won on it back in 1990, therefore the receiver is estopped from running the contrary case now. That simply does not work. There may be all sorts of other arguments to counter the receiver but this form of estoppel is not one of them. It may or may not be that the counterparties to litigation started by the receiver on the footing of his present arguments would have the benefit of a version of this estoppel, and it would be consistent with the report of Judge Wilkins that they would, but I say nothing about that. But it is clear to me that this form of estoppel does not assist Mr Phillips in this case.

Tortious claims

111. At paragraph 2-004 of the work, Bowstead on Agency 23rd Edition proposes that a person who purports to act for another without authority (to whom it attaches the somewhat tendentious label of "impostor") can be subject to an injunction to restrain him/her for so acting at the instance of the "principal". That obviously has to be right as a matter of principle. An instance of this occurring was *Business Mortgage Finance 4 plc v Hussain* [2021] EWHC 171 (Ch). The juridical basis of that remedy was not

articulated, but it is obvious that a legal wrong is committed, perhaps as a separate but as yet unarticulated tort. Mr Phillips submitted that *Brown v Boorman* (1844) 11 Cl & Finb 1; 8ER 1003 established that an agent acting in breach of duty is liable to the principal in both contract in tort, and that that is the starting point for finding a tortious duty owed by an "impostor". I am not quite convinced by that argument, because a duly appointed agent has at least assumed some duties. However, I do not think that that matters. It would be absurd to suppose that there is no remedy against Bowstead's "impostor", and the remedy must be founded on a liability in tort.

112. Because the receiver is purporting to act as agent of CIHL without authority recognised in English law, he commits this tort. Even if he does not (yet) seek to perform any acts within the jurisdiction, is conduct is causing, or will potentially cause, loss in this jurisdiction, for the reasons appearing in the next section.

The problems that the English board faces

113. CIHL submits that what has happened in relation to this receivership has caused, or is likely to cause, real problems and difficulties and that this court should grant remedies to stop that. Those problems are as follows. These points proceed on the assumption, which I have found to be correct, that the receivership would not be and should not be recognised in English law. The receiver is therefore acting without authority. They arise from the evidence of Mr Oren and I summarise the main points here.

(a) The powers of the South Carolina receiver are very extensive. There is a risk of confusion as to who has the power to do what. There are potentially two centres of

power. This is the sort of point made by Goulding J in *Schemmer* to which I have already drawn attention. Absent a determination by the court, the director may find himself in difficulties in running the company's business with the receivership in the background. He claims, understandably, to be uncertain in areas such as signing off company accounts, executing documents, selling or buying assets and other commercial transactions.

(b) The appointment of a receiver over CIHL would be an event of default under the holding company's arrangements upon which £160m of the claimants' own inter-company financing depends.

(c) The allegations made by the receiver, purportedly on behalf of CIHL, are potentially damaging to the reputation of the claimants and their group.

(d) The allegations and admissions made by the receiver may lead to substantial new liability claims inside and outside South Carolina and worldwide.

(e) The receivership order seems to be not only over CIHL but also over its "subsidiaries and global affiliates". That presents the possibility that there will be intervention in other parts of the group. While the receiver has not yet sought to take action outside South Carolina, he seems to consider his appointment is capable of having worldwide effect, and it is quite possible that he will seem to implement that. In the letter before action the solicitors said that it was understood that he could act worldwide, and his responsive letter did not rebut that or give any indication that he would be limiting the pursuit of his receivership territoriality.

(f) The receiver's conduct gives rise to a fear that he will take unpredicted and unpredictable steps which could disrupt the affairs of the group.

(g) Suppliers and others may conceive that the receivership gives rise to a risk of insolvency in the group, which would be unjustified, unfair and potentially very damaging. For example, payment terms may be changed by suppliers to guard against the risk of insolvency, with a risk to cashflow projections.

(h) As a result of the uncertainties created by the receivership and the way in which the receiver has behaved, staff recruitment and retention may be more difficult.

(i) There is a potential adverse effect on the Cape scheme of arrangement described above. If what has happened in South Carolina has an adverse financial effect on CIHL (and the group) then its ability to fund the scheme could be adversely affected and this otherwise successful scheme might collapse.

114. I accept this evidence (and the other matters which are relied on by Mr Oren in his evidence). These risks are real and not fanciful, and the consequences of their eventuating are serious. The board is justified in being concerned about them and in wishing to have them removed if possible.

The strands so far

115. At this point it will be useful to draw together the strands of the factual narrative and legal analysis.

(a) A receiver has been appointed in South Carolina whose appointment would not, as a matter of English law, be recognised in this jurisdiction and ought not to be recognised by any jurisdiction which accepts that the management and affairs of CIHL ought to be exclusively in the hands of the English board.

(b) He is a receiver who has the benefit of extensive powers which are capable of causing serious and unjustified disruption to the affairs of CIHL (and the group of which it is part).

(c) He is a receiver one of whose functions is apparently to protect the interests of

CIHL over which he has been appointed. Yet he has demonstrated that he is not fulfilling that obligation, and is indeed apparently doing the opposite. He has made admissions in relation to asbestos claims, and advanced a positive case, which are positively damaging to the interests of CIHL. He has filed a defence in the Tibbs claim which is in reality no defence at all because it incorporates all the elements of the Third Party proceedings.

(d) There is plainly a risk, if not an inevitability, that the receiver will continue to act in that manner.

(e) There is nothing wrong with an office-holder acting with vigour to protect his office, and in carrying out his functions, but his attacks, or attempted attacks, on those who would seek to support or assist a challenge to his position, to English eyes, overstep the mark. I refer to the motion against solicitors/attorneys who wrote a perfectly justified letter before action, his attempt (which failed) to get CIHL's holding companies to stop the present English action, and his steps taken against the CIHL's expert in this case. It may be that those steps are all part of litigation tactics in US litigation, and I say nothing about that, but to English eyes (which are the eyes with which I view this matter) they smack of a very aggressive approach which is surprising. They give rise to a justifiable fear of unpredictability in his future steps.

(f) The receiver's whole litigation approach on presence in South Carolina (which, as I understand it, underpins his appointment) seems to ignore and indeed contradict the careful findings of two English courts. I accept that it might be said that the South Carolina court is not necessarily bound by those findings, but they are at least relevant and, as a person apparently charged with (inter alia) protecting the interests of CIHL, one would have thought he ought to propounding that decision, not setting it at naught.

(g) There is nothing to suggest that this decision was drawn to the attention of the South Carolina court. One would have thought it would be at least relevant to its determinations. I would not presume to say whether it would have made any difference to Chief Justice Toal's decisions. That is obviously a matter for her. But at the moment the apparent failure (if that is what there was) to draw attention to it is

a matter of serious concern.

116. Drawing these strands together, I consider that this is a case in which relief ought to be granted to protect the legitimate interests of CIHL. I therefore turn to that question.

The relief sought

117. There is one particular concern which arises out of the relief, and that is the extent to which it should extend to acts done within South Carolina and the extent to which the orders sought might offend against principles of comity.

118. The precise relief sought, in declaratory and injunctive terms, is as follows (I set it out to show the great width of the relief that is claimed):

> "IT IS DECLARED THAT
>
> 1. The receivership order of the Court of Common Pleas for the Fifth Judicial Circuit of the State of South Carolina, County of Richland ("the South Carolina Court") dated 16 March 2023 appointing Mr Peter Protopapas ("Mr Protopapas") as a receiver over the Claimants ("the Receivership Order") is not recognised and has no legal effect in England and Wales and worldwide.
>
> 2. Mr Protopapas has and had no power or authority to act as a receiver in relation to the Claimants in England and Wales or worldwide and has no power to or authority in respect of the Claimants in England and Wales or worldwide to carry out the acts referred to in paragraph 5-8 below; and his acts cannot be attributed to the Claimants, and/or the Claimants are not liable to accept his mandate/authority over them (or otherwise indemnify him for their failure/refusal to do so).

3. The rights and duties of the directors of the Claimants remain unaffected by the appointment of Mr Protopapas as receiver of the Claimants pursuant to the Receivership Order.

4. Mr Protopapas has and had no power or authority to act as the receiver of the Claimants in the South Carolina Court in respect of Park Claim and the Tibbs Claim (as defined in Oren 1) and has and had no power or authority to issue third party claims in the Tibbs Claim against any of the third party defendants in those proceedings ("the 3P Complaint"), including (i) Mohed Altrad (ii) Altrad Investment Authority SAS (iii) Altrad UK Ltd (iv) Cape UK Holdings Newco Ltd (v) Cape Industrial Services Group Ltd (vi) Cape Holdco Ltd (vii) Altrad Services Ltd (viii) Hawk Bidco (US) Inc (ix) ArranCo US LL (x) Sparrows Offshore LLC.

AND IT IS ORDERED THAT:

1. Mr Protopapas be injuncted in England and Wales and worldwide from acting or purporting to act as a receiver of the Claimants pursuant to the Receivership Order.

2. Mr Protopapas be injuncted in England and Wales and worldwide from 3. appropriating, interfering with or usurping (in any way whatsoever) the lawful exercise of the rights and duties of the directors of the Claimants.

3. Mr Protopapas be injuncted from acting or purporting to act as a receiver of the Claimants in the Park Claim and the Tibbs Claim (as defined in Oren 1).

4. Mr Protopapas be injuncted from litigating as "Cape plc" or CIHL in any legal proceedings in the State of South Carolina, USA or elsewhere."

119. I am satisfied that in general terms CIHL should have the declarations sought. My attention was drawn to some of the authorities on the granting of negative declarations. The case of *BNP Paribas SA v Trattamento Rifiuti Metropolitani SpA* [2020] EWHC 2436 (Comm) (Cockerill J) contains a very useful consideration of the authorities and some guidance. The following points are relevant and helpful:

”66. The authorities certainly indicate that a court should be cautious when asked to grant negative declaratory relief because, while negative declarations can perform a positive role, they reverse the more usual roles of the parties and this can result in procedural complications and possible injustice to an unwilling defendant”.

I accept this, but it is of little weight in the striking circumstances of this case.

“68. There is however a distinction between caution (approved in the authorities) and reluctance (not approved in the modern authorities). “

I respectfully agree, and will exercise caution without reluctance.”

“78 …Overall I conclude that the interesting argument which I have heard on the authorities has been in danger of over-refining an exercise which is essentially discretionary. The overarching issues relevant to this case which can be taken away from the authorities and which I apply when coming to consider the individual declarations sought are as follows:

i) The touchstone is utility;

ii) The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose;

iii) The prime purpose is to do justice in the particular case: see *TQ Delta, LLC v ZyXEL Communications UK Limited, ZyXEL Communications A/S* [2019] EWCA Civ 1277 at [37]. “Justice” includes justice not only to the claimant, but also to the defendant: see *Fujifilm Kyowa Kirin Biologics Co., Ltd. v Abb Vie Biotechnology Limited* [2017] EWCA Civ 1; [2018] Bus LR 228 (“*Fujifilm*”) at [60];

iv) The Court must consider whether the grant of declaratory relief is the most effective way of resolving the issues raised: see *Rolls Royce v Unite the Union* at [2010] 1 WLR 318 at [120]. In answering that question, the Court should consider what other options are available

to resolve the issue;

v) This emphasis on doing justice in the particular case is reflected in the limitations which are generally applied. Thus:

a) The court will not entertain purely hypothetical questions. It will not pronounce upon legal situations which may arise, but generally upon those which have arisen: Zamir & Woolf at 4-036 & *Regina (Al Rawi) v Sec State Foreign & Commonwealth Affairs* [2008] QB 289 at 344.

b) There must in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them: *Rolls Royce* at [120].

c) If the issue in dispute is not based on concrete facts the issue can still be treated as hypothetical. This can be characterised as *"the missing element which makes a case hypothetical"*: see Zamir & Woolf at 4-59.

vi) Factors such as absence of positive evidence of utility and absence of concrete facts to ground the declarations may not be determinative; Zamir and Woolf note that the latter *"can take different forms and can be lacking to differing degrees".* However, where there is such a lack in whole or in part the court will wish to be particularly alert to the dangers of producing something which is not only not utile, but may create confusion."

120. This is a case where the law of England and Wales, where CIHL is incorporated, plainly will not recognise the receivership. It is also quite apparent that the receiver will not himself recognise that fact, and that he is pursuing his receivership vigorously and beyond what one would normally expect of a receiver. He has purported to make admissions, and to run a positive case, which is positively damaging to the legitimate interests of the company over whose assets he has been appointed, despite the fact that one of his obligations is to act in its proper interests. Instead he has been utilising his appointment as a vehicle which some of the Third Party defendants have aptly

described as a "crusade". All this is without the consent of the legitimately appointed board of CIHL and, for the reasons given above, is potentially and unjustifiably damaging to the legitimate interests of the company. The company is entitled to relief which will help protect it from the effects of that conduct, and that relief is a declaration.

121. Those factors mean that the declaration, albeit negative, will amply fulfil the first of Cockerill J's requirement, and the other factors she relies on as well. Thus:

(i) A negative declaration will definitely have utility. It will enable the board to know where it stands. Furthermore, and while declarations are usually intended to operate as between the parties and will not concern the wider world, in this case a negative declaration as to the effect (or lack of it) of the South Carolina receivership could well give public reassurance as to the ability of CIHL to continue to operate normally, and could well be useful to rebut any attempt of the receiver to operate worldwide and, in particular, to seek remedies from foreign courts. This touchstone is satisfied.

(ii) The declarations will serve a useful purpose, as just set out.

(iii) They will serve justice in acting as an appropriate restraint on the receiver in relation to the matters within its scope.

(iv) There is no other way of achieving those objectives, though (as will appear) they can usefully be granted along with injunctive relief. There is no guarantee that injunctive relief will be effective at all, or that injunctions will be as cogent so far as the outside world is concerned, though injunctions have their place.

(v) I do not see how confusion will be caused; the declarations address a real dispute between the parties and the issue behind them is certainly not hypothetical - it is very real.

122. I have not lost sight of the fact that one of the relevant factors propounded by the Court of Appeal in *Rolls Royce plc v Unite the Union* [2010] 1 WLR 318 at para 120 was:

> "(6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court."

123. The receiver is not before the court, and he has not directly put his arguments before it. However, his case appears clearly enough from the court documents that he has filed in South Carolina, and he put his case in his answer to Winston & Strawn's letter before action. He invited them to ensure that his response was put before the English court (while, ironically, achieving their removal from the fray by suing them), and that letter, and its attachments and his complaint, were indeed before me and have been read by me. I am therefore well enough aware of what his case would be in relation to the issues underpinning the claims for a declaration.

124. One of the points that he takes is that the "Barton doctrine" requires that the permission of the court be obtained before suing a receiver in respect of his acts, and that therefore no action can be taken against him without the permission of the South Carolina court. Judge Wilkins has given his opinion on the extent of the application of the this doctrine, and his report is uncertain on the extent of its application. However, assuming it does apply in South Carolina, I consider that it does not stand in the way of the present proceedings because the present proceedings are governed by English law, and the whole premise of the proceedings is that the receiver has no recognition under English law. Accordingly, it does not recognise the office which would otherwise give him protection. It is therefore not a bar to the relief claimed against him in these proceedings.

125. The one question which remains to be addressed is as to whether the declarations should be limited to reflect the fact, or possibility, that the receiver's appointment and acts are apparently valid under South Carolina law because the receivership can be treated as being lawful under South Carolina law, where it is also recognised. Putting it another way, should there be some sort of carve-out for acts within South Carolina which the South Carolina courts would treat as being lawful and done under its own orders. I will return to this when I have considered the injunctions.

126. So far as the injunctions are concerned, I am satisfied that the company should have injunctions to restrain the receiver from holding himself out as having general authority to act on behalf of CIHL. There is an appreciable risk that the receiver will seek to exercise his powers worldwide even though the terms of the order appointing him do not expressly authorise it (nor do they expressly limit the powers). That fear has been expressed by CIHL and the receiver's vigorous activities to date do not suggest any self-imposed moderation is likely. I have also pointed out that he has not disclaimed a worldwide intent in his response to the letter before action. An English company ought, where it is appropriate, to be able to get injunctive relief to restrain a person from holding himself/herself out as an agent when unauthorised (under English law) especially where there is a risk of unlawful intervention in the company's affairs in this jurisdiction. Absent that last factor the court should be careful about granting injunctions against persons who are outside the jurisdiction and who have not voluntarily submitted to it, and whose feared acts are wholly outside the jurisdiction, because there is a risk that the grant will be in vain. However, that does not necessarily apply here and an injunction should be granted in something like the terms sought, though it is necessary to give particular consideration to whether it should be expressed to operate to restrain acts in South Carolina.

127. I add one small point in relation to worldwide relief. The clear view of Judge Wilkins is that the receivership has no extra-territorial application (ie outside the state of South Carolina). If and insofar the relief sought restrains or governs his acts outside that territory, it coincides with what the position should be anyway.

The question of a South Carolina carve-out

128. The question which causes most concern in relation to relief is whether it should be truly worldwide (which would include South Carolina) or whether it should be limited in the form of some form of acknowledgment that the receiver has actually been appointed under South Carolina law by a South Carolina court, and has effectively had some of his acts approved by that court. It has to be presumed for present purposes that his appointment is lawful and effective under South Carolina law whatever the law of England and Wales may say about recognition in this jurisdiction. He is an officer of the court operating under the sanction of the court pursuant to powers given to him by the court. In those circumstances should an English court be making the wide declarations that are sought in this case, and should it ordering injunctions restraining him from acting pursuant to orders?

129. This would seem to me to be a comity question. It is recognised that in the realm of anti-suit injunctions, the grant of an injunction is to some degree an interference with the process of another court. See eg the summary of Toulson LJ in *Deutsche Bank AG v Highland Crusader Partners* [2010] 1 WLR 1023 at paragraph 50. Questions of comity therefore arise. The interference in anti-suit injunction cases is more indirect than the interference which Cape's proposed remedies in this case would bring about,

especially so far as the injunctive relief is concerned, so the question of comity is certainly engaged. What is proposed in this case is relief which goes directly to the operation of an officer appointed by a foreign court, and whose acts (or some of them) have been approved by the court as being within his powers. The caution which needs to be exercised in the anti-suit injunction cases is therefore even more applicable in the present case.

130. Cape's first submission on this is that comity does not come into it. It is said that the receiver is operating under an order made by a court which was not a court of "competent jurisdiction" (as the traditional phrase goes - the word "competent" is used in the sense "recognised as valid", and not in any other judgmental sense). Counsel leant heavily on the use of the word "nullity" in the case cited above (paragraph 28) and suggested that it be followed to its logical conclusion, which was to disregard all that has happened in the South Carolina court, with the effect that comity can be disregarded.

131. I do not regard that as an appropriate approach to this case. While acknowledging the word "nullity" was used in prior authority, I do not consider that it should be taken to mean that the order can be disregarded for all purposes as though it were never made. I would not deal with comity issues on the footing that that is what it meant. I consider it to be more a figure of speech than an a definitive ruling as to the effect of the absence of jurisdiction to be followed relentlessly for all legal purposes. Accordingly, while the receivership order, and what flowed from it, would not achieve recognition in this jurisdiction, and some relief can and should be given on that footing, it is still necessary

to consider comity if the scope of the relief sought impacts more directly on foreign processes.

132. In anti-suit injunction proceedings the court gives due regard, and due deference, to the views of a foreign court as to whether proceedings should be allowed to continue there. In assessing how far this goes what is helpful is the judgment of Hoffmann J in *Barclays Bank v Homan* 1992] BCC 757. He referred to anti-suit injunctions and briefly alluded to their development:

> "In the last 20 years, however, there has been a shift in the attitude of the English court to foreign jurisdictions, exemplified by the development of the doctrine of forum non conveniens (starting with *The Atlantic Star [1974] AC 436*). Today the normal assumption is that an English court has no superiority over a foreign court in deciding what justice between the parties requires and in particular, that both comity and common sense suggest that the foreign judge is usually the best person to decide whether in his own court he should accept or decline jurisdiction, stay proceedings or allow them to continue. The principle, as Lord Scarman said in *Laker* (at p. 95) is that:
>
> > "(The) equitable right not to be sued abroad arises only if the inequity is such that the English court must intervene to prevent injustice." (emphasis added)
>
> In other words, there must be a good reason why the decision to stop the foreign proceedings should be made here rather than there. Although the injustice which can justify an anti-suit injunction must inevitably be judged according to English notions of justice, it will usually be assumed that a similar quality of justice is available in the foreign court. So the fact that the proceedings would, if brought in England, be struck out as vexatious or oppressive in the domestic sense, will not ordinarily in itself justify the grant of an injunction to restrain their prosecution in a foreign court. The defendant will be left to avail himself of the foreign procedure for dealing with vexation or oppression: *Midland Bank plc v Laker Airways Ltd [1986] 1 QB 689* per Lawton LJ at p. 700.
>
> It is the exceptional cases in which justice requires the English court to intervene which cannot be categorised or restricted. But a theme common to certain recent decisions is that the foreign court is, judged by its own jurisprudence, likely to assert a jurisdiction so wide either as to persons or subject-matter that to English notions it appears contrary to accepted principles of international law. In such cases the English court has sometimes felt it necessary to intervene by injunction to

> protect a party from the injustice of having to litigate in a jurisdiction with which he had little, if any, connection, or in relation to subject-matter which had insufficient contact with that jurisdiction, or both. Since the foreign court is per hypothesi likely to accept jurisdiction, this is a decision which has to be made here if it is to be made at all. These are cases in which the judicial or legislative policies of England and the foreign court are so at variance that comity is overridden by the need to protect British national interests or prevent what it regards as a violation of the principles of customary international law."

133. If the case is strong enough, and if there is a sufficient connection with this jurisdiction, and there would be oppression and/or vexation in having to be the subject of foreign proceedings, then an anti-suit injunction will be granted despite the requirements of comity. Of significance is whether the lack of connection with the foreign jurisdiction is such that it would by unjust to require the applicant for the injunction to litigate there. As Toulson LJ said in *Deutsche Bank* (at para 56):

> "Hoffmann J recognised that exceptional cases cannot be categorised, but he instanced cases where a foreign court has by its own jurisprudence a long arm jurisdiction so extensive that to English notions it appears contrary to accepted principles of international law, and where the English court may feel it necessary to intervene by injunction to protect a party from the injustice of having to litigate in a jurisdiction with which he or the subject matter had little connection. There may also be cases in which the judicial or legislative policies of England and the foreign court are so at variance that comity is overridden by a need to protect British interests or to prevent what the English court regards as a violation of the principles of customary international law."

134. That was said in the context of an anti-suit injunction application, but it has underlying principles which might be said to be applicable here. The powers given to the receiver are apparently very long-arm and would be capable of being exercised worldwide, including this jurisdiction. He has not disavowed any intention so to use them. They are oppressive and have already been used to the disadvantage of CIHL. CIHL could seek to challenge them in South Carolina, but is, for very good reason, not willing to do acts which would, or might, amount to a submission to the jurisdiction when it

laboured long and hard 35 years ago to demonstrate that it was not subject to it. CIHL can be seen, as a matter of English law, to have no connection with South Carolina. Yet it has been subjected to an agency there which is being implemented in a manner which assumes a connection which does not exist based on a factual foundation which an English court has found to be false.

135. I do not consider that considerations of comity, which I fully respect, require this court to hold its hand so far as all activities outside South Carolina are concerned, and I have already indicated that I would be prepared to grant relief which has at least that effect. The much more difficult question is whether comity requires that relief stops at the border of the state, as it were. Mr Dale has urged on me that if I do not grant an injunction which covers South Carolina as well then any relief I grant would be toothless. I am not convinced it would be toothless, because the grant of declarations, and of injunctive relief operating outside South Carolina, would be likely to mitigate many of the adverse effects feared by Mr Oren. However, it would not deal with the central question of what the receiver is doing purportedly on behalf of CIHL in court proceedings. I have given the matter a great deal of careful consideration and have come to the conclusion that, at least so far as the conduct of proceedings is concerned, comity does not prevent my making an order which governs at least that activity. Under English law the receiver should not be in a position to conduct proceedings (and thereby prejudice CIHL with his admissions and claims). His continued conduct of the third party claims, with their apparent acceptance of wrongdoing on the part of CIHL and of jurisdiction over it, with the object of marshalling assets in some sort of less than complete insolvency proceedings, falls into the very limited category referred to by Hoffmann J (and echoed by Lord Goff in the House of Lords in *Airbus Industrie GIR v Patel* [1999] AC 119 at 140D) in which considerations of comity give way to the

protection of private international law and national interests. It is not possible to see how the threats posed by the receiver can otherwise be successfully dealt with.

136. I therefore consider that the relief granted should extend to relief which prevents the receiver, even in South Carolina, from acting or purporting to act for or on behalf of CIHL. The main target of that is his participation in legal proceedings purportedly brought or defended by the receiver. His other powers are rather ancillary and I have wondered whether to exempt those from any restraint (or declaration) so as to give some scope for comity, but on reflection I consider that would be illogical.

137. As I have said, I have given particularly careful consideration to how for the relief should go. The jurisdiction of the South Carolina court, is, of course, to be respected, and no disrespect is intended by the course that I have taken. I do not sit as some sort of appellate court from the decisions of Chief Justice Toal, and I would not presume to do so. She does, of course, exercise her jurisdiction in accordance with the laws of South Carolina, and is free to do so. I have not taken lightly the decision to restrain a receiver appointed by her. I fully appreciate that this decision brings about a clash between two court systems. However, it seems to me that the requirements of the law that I administer require and justify what I have decided to do.

The position of Cape Jersey

138. So far I have been considering the claim of CIHL. Cape Jersey is also a claimant. It was justified in making a similar claim because its name is the name that appeared on all the court documents, and by and large still does so. If there remained an argument for saying that the receivership order and the receivers activities were directed to, and purportedly done on behalf of, Cape Jersey then that company might well have a justifiable claim for similar relief to CIHL.

139. The position of Cape Jersey as a matter of law hardly figured in the skeleton argument of counsel, or in the evidence of Mr Oren. The skeleton invited me to proceed on the basis that Jersey law was the same as English law and to grant relief accordingly. Then shortly before finalising this judgment I received a witness statement from Mr Brehony exhibiting a short report of a Jersey lawyer addressing some of the points.

140. I have not had time to assimilate that late-advanced material properly, but consider that, at least at the moment, it is now not necessary to grant relief to Cape Jersey. The receiver has made it tolerably clear that he considers that the receivership covers CIHL and not Cape Jersey, and he has also said that Cape Jersey is not its target and he does not act for it (paragraph 64 above). The judge has also found that Cape Jersey is not the subject of the receivership – see paragraph 66 above. In those circumstances, and bearing in mind the absence of technical argument on the position of Cape Jersey, I do not think it necessary or appropriate to grant it relief, though it is understandable why it would have joined in these proceedings as a claimant in the first place. However, it will have liberty to apply should circumstances change and should it appear to be necessary for it to revive its claim for relief.

Conclusion

141. I therefore grant the declaratory and injunctive relief sought, subject to such adjustments as might fall to be made as a result of debate on the delivery of this judgment.

APPENDIX 1 – THE ADAMS v CAPE FACT SUMMARY IN THE COURT OF APPEAL

The facts on "presence" as found by Scott J.

We will now state in summary form the facts as found by the learned Judge on the "presence" issue. This summary will be taken from the judgment of Scott J. and, for the most part, in his words. Some references to pages of the transcript of the judgment and some comments and explanations will be added in brackets.

1. Cape until 1979 presided over a group of subsidiary companies engaged in the mining and marketing of asbestos. On 29th June 1979 their interest in asbestos ended when their subsidiary companies were sold by Cape to Transvaal Consolidated Exploration Co. Ltd. ("TCL"), a South African company. (J.4A).

2. The asbestos mines were in South Africa. The mining companies were South African. The most important of them was Egnep. The shares in Egnep and the other mining companies were held by Cape Asbestos South Africa (Pty) Ltd., ("Casap"), also a South African company. Prior to 2nd December 1975 the shares in Casap were held by Cape. (J.4D).

3. In 1953 Cape caused to be incorporated in Illinois the company called NAAC. (This is the company whose office in Chicago is said by the plaintiffs to have been the place of business in the USA at which, until May 1978, Cape and Capasco were present.) The shares in NAAC were held by Cape. The function of NAAC was to assist in the marketing of the asbestos in the USA upon sales by Egnep or Casap to purchasers there. (J.4F). NAAC was the marketing agent of the Cape Group in the USA.

4. NAAC did not at any time have authority to make contracts, in particular for the sale of asbestos, which would bind Cape or any other subsidiary of Cape. (J61).

5. On a date before 1960 Capasco, an English company, was incorporated. (J.4). Its shares had at all times been held by Cape. It was responsible for the supply, marketing and sales promotion throughout the world of Cape's asbestos or asbestos products but, since in 1960 NAAC was already at work, marketing in the USA was left in the main to NAAC. (J.5A).

6. In 1975 there was a change in the organisation of the Cape Group. Cape International and Overseas Ltd. ("CIOL"), an English company, was incorporated as a wholly owned subsidiary of Cape. The shares in Casap (the South African company which owned the shares in the mining subsidiaries) and the shares in NAAC (the marketing subsidiary in Illinois) were transferred to CIOL. This insertion of CIOL between Cape, on the one hand, and Casap and NAAC on the other, did not materially alter the way in which the subsidiaries carried on business and managed their affairs. The sale by Cape to TCL in June 1979 (see para 1 above) was effected by sale of the shares in CIOL. (J.5).
7. Before 1962 the Owentown factory was run by Unarco who were customers for Egnep's amosite asbestos. In 1962 PCC purchased-the factory and, until 1972 when the factory was closed, purchased asbestos supplied by Egnep and used it in the factory. (J.5).

8. When the settlement of the Tyler 1 proceedings was concluded in September 1977 Cape, as stated above, decided to take no part in the Tyler 2 proceedings. (J.16B). The further

decision was made at a Board meeting of Cape in November 1977 to reorganise the group's asbestos selling arrangements in the USA which would in future be more closely controlled from South Africa; and as part of this reorganisation, NAAC should be wound up. (J.16). Part of the reason for that decision was to counter an argument that under English law Cape's interest in NAAC's business sufficed to give the Tyler Court jurisdiction over Cape. (J.17).

9. Cape, however, did not intend to abandon the USA as a market for Cape's asbestos. To accompany the liquidation of NAAC, alternative marketing arrangements were made. Associated Mineral Corporation ("AMC"), a Lichtenstein corporation, was formed, the bearer shares in which were held by Dr. Ritter, a lawyer, on behalf of CIOL. All sales into the USA of Cape's asbestos were to be sales by AMC. (J.17).

10. A new marketing entity in the United States was on 12th December 1977 created, namely Continental Productions Corporation ("CPC"). CPC was not a subsidiary of Cape. The shares were held by Mr. Morgan, a US citizen and resident of Illinois, who had for four years been President of NAAC. By an agency agreement in writing dated 5th June 1978, between CPC and AMC (see para 28 below), CPC were to act as agent for AMC in the USA for the purpose of the sale of asbestos. CPC would be remunerated by commission but had no authority to contract on behalf of AMC or any other Cape company. CPC was to act as a link between AMC and the US purchasers in connection with shipping arrangements, insurance etc. (J.17).

11. As from 31st January 1978 NAAC ceased to act on behalf of any of the Cape companies or to carry on any business on its own account save for the purpose of liquidating its assets. (J.68E-H). (This finding is challenged by the plaintiffs. The cessation of NAAC's business occurred, it is said, on 18th May 1978. It is to be remembered that the Tyler 2 actions were commenced on dates between 19th April 1978 and 19th November 1979. If presence of Cape/Capasco could be proved through the office and actions of NAAC but not through the office and actions of CPC under the new marketing arrangements, the point could be of importance). NAAC executed articles of dissolution on 18th May 1978. (J.68).

12. Through the medium of AMC and with the assistance of CPC, Egnep's amosite asbestos continued to be sold into the US until the sale on 29th June 1979 to TCL by Cape of its interests in the subsidiaries: (J.18B) see para 1. above. In paragraphs 13 to 23 below we summarise the detailed findings of Scott J. as to the location, control and operations of NAAC as marketing agent for the Cape Group asbestos. These are to be compared with the location, control and operation of the alternative marketing arrangements provided by AMC and CPC after those arrangements came into existence on some date between 12th December 1977 when CPC was formed and 5th June 1978 when the agency agreement of that date between CPC and AMC was made. We summarise the findings of Scott J. as to the location, control and operations of CPC and AMC in paragraphs 24 to 37 below.

13. Mr. Morgan in December 1970 had been appointed Vice-President of NAAC. He was made President on 1st July 1974 and so continued until dissolution of NAAC in 1978. At all material times the Vice-President of NAAC was Mr. Meyer, an attorney and partner in the firm of Lord Bissell and Brook of Chicago. That firm acted for the Cape Group of companies as their US attorneys. NAAC had offices on the 5th Floor of 150 North Wacker Drive, Chicago. NAAC was the lessee; paid the rent; owned the office furniture and fittings;

and employed a staff of some 4 people. Mr. Morgan was in charge. (J.58). NAAC's dominant purpose was to assist and encourage sales in the US of asbestos mined by the Cape subsidiaries, of which one was Egnep. Contracts with US customers for the supply of asbestos were made by Egnep or Casap. The contracts tended to be long term without specification of the quantity. The US customer would, through NAAC, notify Casap or Egnep of the quantity required and the time for delivery. It was not clear to Scott J. whether the information went directly from NAAC to Casap and Egnep or whether it went via Capasco. Shipping arrangements and delivery date would be arranged by Casap or Egnep and passed to the US customer through NAAC. Egnep could not always provide the full amount of asbestos ordered. If that happened NAAC would, if it could, purchase asbestos from US Government stocks in order to supply it to the US customers. (J.59)

14. NAAC thus had two main forms of business which it carried on: first, as intermediary in respect of sales by Egnep to US customers in return for commission paid by Casap; and, secondly, so as to supplement sales from Egnep, sales of asbestos to US customers in which NAAC contracted as principal both in purchasing and in selling on. (J.59G).

15. In addition, NAAC also carried on business as principal on its own account in buying asbestos textiles, mainly from Japan, and selling the textiles to US customers; and, from time to time, in buying asbestos from Casap or Egnep for sale on to US customers. (J.60A). Further, for storing asbestos which it had purchased, whether from US Government stocks or from Egnep or Casap, NAAC rented in its own name and paid for warehousing facilities. (J.60C).

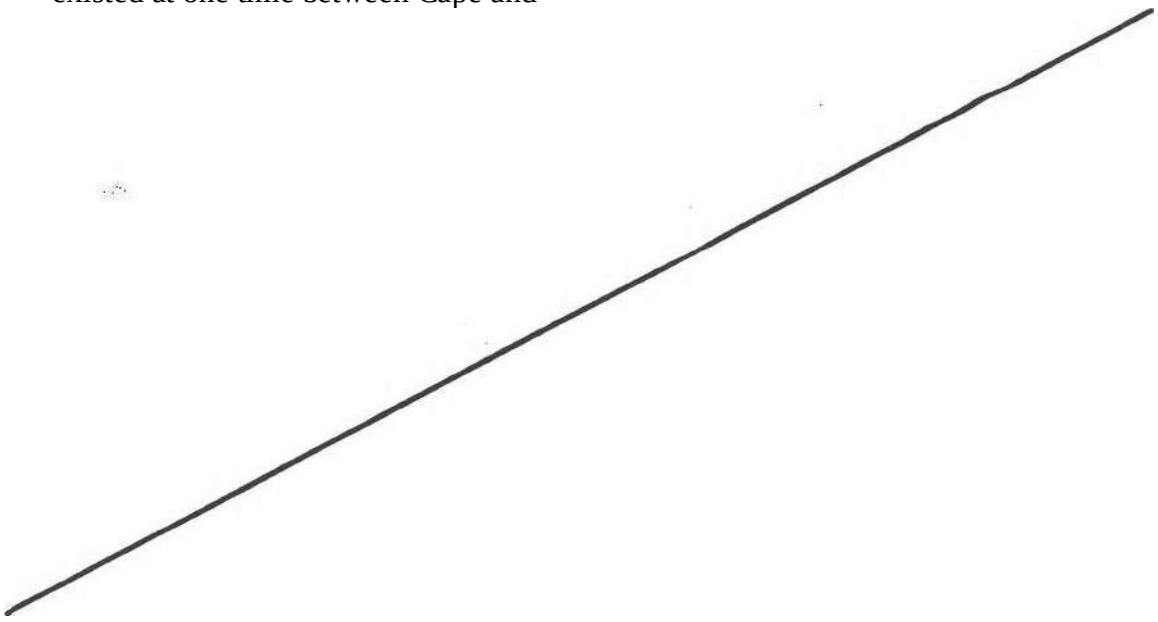
16. NAAC was the channel of communication between US customers, such as PCC, and Capasco or Casap. There was undoubtedly "a sense in which NAAC was, if the Cape Group of companies is viewed as a whole, part of the selling organisation of the group and Cape's agent in the US". (J.61C-D).

17. Directorships: prior to 11th July 1975 the Board of Directors of NAAC included two senior officers of Cape. Until 1974 Mr. Dent, Chief Executive of Cape, was Chairman of NAAC. In 1975, Mr. Higham succeeded Mr. Dent in both positions. The Other Cape director of NAAC was Dr. Gaze, Chief Scientist of the Group, Chairman of Capasco and an Executive Director of Cape. In July 1975, Mr Higham and Dr. Gaze resigned from the Board of NAAC. This change was, according to the deposition of Mr. Morgan in the Tyler 1 proceedings, attributable to the existence of the Tyler 1 proceedings and was made "to dissociate the parent company as fully as possible from the operating companies" but implied no "change whatever in the method of operation or the present responsibilities of individuals concerned."

18. As to control over corporate activities: the corporate, as opposed to commercial, activities of NAAC were controlled by Cape. Subject to compliance with Illinois law, and to some arguments or representations from Mr. Morgan, Cape directed the level of the dividend and the level of permitted borrowing. Such corporate financial control was no more and no less than was to be expected in a group of companies such as the Cape Group. (J.61).

19. As to control over commercial activities: there was no evidence that Cape or Capasco exercised such control over the commercial activities of NAAC as was exercised in respect of its corporate activities. Mr. Morgan was in executive control of its business. (J.62). (That finding is challenged by the plaintiffs). Dr. Gaze and Mr. Higham visited US customers from time to time to discuss their asbestos supply requirements and dealt with complaints. In so doing they acted as directors of Cape and Capasco and not as representatives of NAAC. (J.62). The business carried on by NAAC was its own business. (J.68). (That finding is also challenged).

20. There was no agency agreement between Cape and NAAC comparable to that which had existed at one time between Cape and



Capasco under which all of Capasco's business had been carried on by Capasco as agent for Cape so that, in effect, until termination of the agreement in the mid 1970s, Capasco's business had been Cape's business. The annual accounts of NAAC were drawn on the footing that NAAC's business was its own business and there was nothing to suggest that the accounts were drawn on a false footing: (J.79D-H).

21. NAAC had a separate identity and was not the "alter ego" of Cape. NAAC, an Illinois Corporation, carried on business in the USA; earned profits; and paid US taxes thereon. NAAC's creditor and debtors were its own and not Cape's. Cape was not taxed in the UK or in the USA on NAAC's profits. The return to Cape, as NAAC's shareholders, took the form of an annual dividend passed by a resolution of NAAC's Board of Directors. The corporate forms applicable to NAAC as a separate legal entity were observed. NAAC had its own pension scheme for its own employees. It made its own warehousing arrangements for the storage of its own asbestos. (J.62-63).

22. As to place of business, neither Cape nor Capasco had an office in Illinois. The offices at 150 North Wacker Drive were NAAC's offices. (J.68). (That finding is challenged).

23. The arrangements for the dissolution of NAAC and the formation of AMC and CPC (see paras 8 to 10 above) over the period November 1977 to February 1978 were part of one composite arrangement designed to enable Cape asbestos to continue to be sold into the USA while reducing, if not eliminating, the appearance of any involvement therein of Cape or its subsidiaries. (J.70C). This arrangement was associated with the decision to take no part in the Tyler 2 proceedings and to resist enforcement of any default judgments on the ground that the Tyler Court had no jurisdiction over Cape or its subsidiaries other than NAAC. The defence on those lines would require the trading connection between Cape and its subsidiaries on the one hand and the United States on the other to be kept to a minimum. Hence the need to liquidate NAAC, a Cape subsidiary, and to allow at least some of NAAC's trading functions to be assumed by an Illinois corporation which was not a Cape subsidiary, i.e. CPC. (J.70-71).

24. The senior management of Cape, including Mr. Penna, the Cape Group solicitor, were very anxious that Cape's connections with CPC and AMC should not become publicly known. Some of the letters and memoranda had a conspiratorial flavour to them. The question, however, whether CPC's presence in Illinois can, for purposes of jurisdiction under our law, be treated as Cape's presence must be answered by considering the nature of the arrangements implemented and not the motive behind them, and the "conspiratorial" references in the documents, although interesting, were in the Judge's view not relevant to the main question. (J.71).

25. As to the formation of AMC:- The cost of forming this Lichtenstein corporation, in which the bearer shares were held by Dr. Ritter on behalf of CIOL, was borne within the Cape Group. The intention was that all sales of Cape asbestos to US customers would be made by AMC. The exact nature of the arrangements between AMC and Egnep/Casap, whereby AMC became the owner of the asbestos so as to be able to resell it into the USA, was not disclosed in the evidence. That was not surprising since the relevant documentation had, since the sale of CIOL and Casap to TCL in 1979 been under the control of TCL but it was clear that AMC was no more than a corporate. name. It was an "invoicing company" with

no employees of its own and it probably acted through employees or officers of Casap or Egnep. (J.72A).

26. As to the formation of CPC: see pars 10 above: the lawyers who acted in the formation of CPC, in which corporation Mr. Morgan owned all the shares, were Lord Bissell and Brook, attorneys for Cape in the US. Directly or indirectly, the costs of incorporation were paid by Cape or Capasco. The shares in CPC, however, were owned independently by Mr. Morgan (J.76G) both in equity and in law. (J.72E).

27. The agency agreement of 5th June 1978 between AMC and CPC: see pare 10 above: Mr. Morgan was also a party to this agreement. By it AMC appointed CPC as its exclusive advice and consultancy bureau to assist the sale of its asbestos fibre in the territory of USA, Canada and Mexico for a period of 10 years from 1st February 1978 to 31st January 1988. There was a proviso for termination on 12 months' notice. The duties imposed on CPC were to carry out the appointment diligently and in particular
(a) to keep AMC advised... as to competitor products... and market conditions... (b) to... facilitate or expedite delivery of products contracted to be sold by AMC in the territory; (c) to seek out and promote prospective business on behalf of AMC and to forward to AMC requests for supplies of products provided always that supplies should only be at prices and upon terms and conditions determined by AMC. It was expressly provided that nothing in the agreement should be construed so as to give CPC any authority to accept any orders, to make any sales, or to conclude any contracts on behalf of AMC. CPC was left free to sell material and products other than asbestos fibre and to involve itself in other commercial activities. CPC was required to provide, maintain and operate at its own cost office accommodation and staff for running an efficient advice and consultancy bureau. Remuneration for CPC was to be by commission upon the cost of all asbestos sales by AMC in the territory. (J.72-73).

28. As to the goodwill of CPC:- the agency agreement provided in paragraph 11, under the heading "Pre-emption Rights", that in the event that Mr. Morgan should desire to cease management control of CPC, or to dispose of all of his share holding in CPC or such part as constituted majority control, or to dispose of any shares to a person, firm or company which was directly or indirectly engaged in the sale of asbestos fibre or the manufacture or sale of insulation materials; or in the event that CPC terminated this agreement for any reason or refused to agree to further renewal upon its expiry; or in the event that AMC terminated the agency agreement in the event of insolvency of either party or substantial breach of obligations; then Mr. Morgan should in such event offer all shares owned by him in CPC for sale to AMC at their net book value excluding goodwill. Beneficial ownership of the name "Continental Products Corporation" was provided to belong to AMC. (J.73G-H).

29. CPC commenced business on 1st February 1978 in order to fit in with the cesser of business of NAAC on 31st January 1978. The terms of the agency agreement were a reliable guide to the nature of the relationship between CPC and AMC and, hence, between CPC and Cape. (J.74B).

30. As to CPC's place of business:- CPC leased offices on the 12th Floor of 150 North Wacker Drive. NAAC's offices had been on the 5th Floor in the same building. Most of the furniture and fittings in NAAC's offices were removed to CPC's offices. CPC took over NAAC's telephone number: (J.74C).

31. As to the cost of CPC's commencement in business:- CPC had an immediate need for funds for rent, furniture, and payment of staff but commission under the agency agreement with AMC would not be payable immediately. The sum of $12,000 was paid by and on behalf of Cape to CPC to assist in meeting the cost of establishing itself. In addition a sum of £160,000 was paid to CPC on 4th January 1978 to enable CPC to set up in business and to perform the agency obligations expected of it: (J.74-75).

32. As to the business activities of CPC:- CPC acted as an agency in connection with sales of Cape asbestos and, in addition, it traded in asbestos textiles on its own account, buying and selling as principal. (J.75E). Like NAAC, CPC acted as "agent" for the purpose of facilitating the sale in the US of Cape's asbestos. In NAAC's time the seller was Egnep or Casap. The seller in CPC's time was, nominally, AMC but, in reality, still Egnep or Casap. Like NAAC, CPC had no authority to bind any Cape subsidiary to any contract. (J.76-77).

33. CPC's conduct of its affairs was much the same as NAAC's had been. It paid the rent for its offices and paid its employees. It received commission from AMC as well as incurring expenditure and receiving payments in connection with its independent trading activities. (J.76D-E).

34. CPC was an independently owned company (J.76G). CPC, like NAAC, carried on its own business from its own offices at 150 North Wacker Drive. (J.77B). (Both these findings are challenged).

35. Upon the evidence the corporate form of the Cape Group was not "form" only. Each corporate member of the Cape Group had its own well—defined commercial function designed to serve the overall commercial purpose of mining and marketing asbestos. (J.77F-H).

36. In August 1984, according to the evidence of Mr. Summerfield, a solicitor acting for the plaintiffs, there was at 150 North Wacker Drive a noticeboard giving the names of both CPC and AMC as the occupants of the offices on the 12th Floor. There was no evidence whether the board was there in 1979 when the sale of the subsidiaries was made by Cape to TCL: (see para 1 above). There was no evidence to suggest that AMC was an occupant of the offices at the time of the commencement of the Tyler 2 actions in the period 19th April 1978 to 19th November 1979. (J.78-79).

APPENDIX 2 – THE RECEIVERSHIP ORDER - POWERS

Plaintiffs have moved this Court to appoint a Receiver over Cape PLC, pursuant to S.C. Code §15-65-10(4)-(5). This Court finds that the application is meritorious under the applicable statute 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 this case and therefore, Plaintiffs request for an expedited ruling on this motion is appropriate and also granted. Therefore, this Court hereby appoints Peter Protopapas be and hereby is appointed Receiver in this case 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. This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Cape as well as any claims related to the actions or failure to act of Cape's insurance carriers.

In addition to the powers of the Receiver set forth herein, the Receiver shall have the following rights, authority and powers with respect to the Respondent's property, to: 1) collect all accounts receivable of Respondent and all rents due to the Respondent from any tenant; 2) to change locks to all premises at which any property is situated; 3) open any mail addressed to the defendant and addressed to any business owned by the Respondent; redirect the delivery of any mail addressed to the Respondent or any business of the Respondent, so that the mail may come directly to the receiver; 4) endorse and cash all checks and negotiable instruments payable to Respondent, except paychecks for current wages; 5) hire a real estate broker to sell any real property and mineral interest belonging to the Respondents; 6) hire any person or company to move and store the property of Respondent; 7) to insure any property belonging to the Respondents (but not the obligation); 8) obtain from any financial institution, bank, credit union, savings and loan or title company, credit bureau or any other third party, any financial records belonging to or pertaining to the Defendants; 9) obtain from any landlord, building owner or building manager where the Respondent or the Respondent's business is a tenant, copies of the Respondent's lease, lease application, credit application, payment history and copies of Respondent's checks for rent or other payments; 10) hire any person or company necessary to accomplish any right or power under this Order; and 11) take all action necessary to gain access to all storage facilities, safety-deposit boxes, real property, and leased premises wherein any property of Respondent may be situated, and to review and obtain copies of all documents related to same.

[A provision related to managing insurers - not relevant here]

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.

EXHIBIT 6

RECEIVERSHIP ORDER

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF RICHLAND	)	**FOR THE FIFTH JUDICIAL CIRCUIT**
JOHN A. TIBBS and **MARGARET B. TIBBS**	)	**C/A NO. 2023-CP-40-01759**
Plaintiff,	)	*In Re:* Asbestos Personal Injury Litigation Coordinated Docket
v.	)	
3M COMPANY, et al.	)	
Defendants.	)	

ORDER ON PLAINTIFFS' MOTION TO APPOINT A RECEIVER

This order follows the Court's order finding Asbestos Corporation Ltd. ("ACL") in contempt of court and striking ACL' pleadings. Before the Court is Plaintiffs' Motion to Appoint a Receiver over ACL's insurance assets.

BACKGROUND

For the reasons set for below, the Court grants Plaintiffs motion to appoint a receiver over the Insurance Assets[1] of ACL and to allow the Receiver to assume control of the defense of asbestos claims made against Asbestos Corporation, Ltd in the United States. Peter Protopapas is appointed as receiver over those Insurance Assets and the Court expects anyone or any entity having information or materials which are reasonably calculated to lead to the discovery of admissible evidence to cooperate with this Court's Receiver in locating and marshalling those assets. Further, Mr. Protopapas is tasked with tendering current and future claims from Plaintiffs suffering from

[1] This term is defined below.

asbestos disease brought against ACL to which those policies are responsive. Finally, Mr. Protopapas is tasked with the control of the defense of those claims for ACL.

PROCEEDURAL BACKGROUND

On July 19, 2023, this Court ordered ACL to fully answer discovery and to provide a corporate representative for deposition. The Court further held that failure to do so would result ACL being held in contempt. Subsequently, this Court held ACL in contempt and, as a sanction, struck the pleadings of ACL. The Court based its contempt order on ACL's flat refusal to comply with this Court's orders to produce documents, a witness or otherwise participate in discovery.

Now, having struck ACL's answer, ACL is in default.[2]

LAW AND ANALYSIS

A. Appointment of a Receiver is Appropriate and Warranted

The South Carolina receivership statute provides in relevant part that a receiver may be appointed in cases in accordance with "existing practice." S.C. Code Ann. 15-65-10(5).[3]

[2] The process of actually entering default judgment is merely a ministerial process. In the absence of an answer, default is nothing more than that ministerial act. *Stark Truss Co., Inc. v. Superior Const. Corp.* 360 S.C. 503 (Ct. App. 2004)

[3] A receiver is also available to carry a judgment into effect, which is the practical result of the coming default following the striking of ACL's answer.

Historically, receivers are appointed by courts sitting in equity in order to ensure a fair result. *First Carolinas Joint Stock Land Bank of Columbia v. Knotts*, 191 S.C. 384 (1939). Indeed, "[t]he right to have a receiver appointed is an ancient one . . . ." *Pelzer v. Hughes*, 27 S.C. 408 (1887) But where, as here, ACL's answer has been struck, and thus only a ministerial action being left for ACL to be in judgment, a receiver to take possession of and, to the extent necessary, litigate ACL's insurance assets as well as to assume control of the defense of asbestos claims made against ACL in the United States is exactly the type of historical circumstances, the Court's of this state have found appropriate. Specifically, where, as here, a debtor, solvent or otherwise,

> is trying to defeat his creditors by an act or course of conduct which indicates moral fraud-a conscious intent to defeat, delay or hinder creditors in the collection of debts-then a court will grant any relief within its jurisdiction appropriate and effective to protect creditors against the fraud without requiring the creditor to run the risk of losing his debt from the delay of obtaining judgment and return of nulla bona on the execution.

Virginia Carolina Chemical v. Hunter, 84 S.C. 214 (1909).

Here it is exactly the moral fraud of ACL's personal jurisdiction claims, exposed by decades of opinions dismissing those very assertions and ACL's continued refusal to participate in this that warrants the appointment of a receiver. Thus, where there is active wrongdoing and illegal refusal to comply with this Court's orders, the appointment of a receiver is appropriate.

As Plaintiffs have requested, a receiver appointed here would have the authority to administer "any insurance assets" including "any claims related to the actions or failure to act of ACL's insurance carriers." The Receiver would assume control of the defense of asbestos claims made against ACL in the United States. This Court's view of the scope of a receiver's authority is not unique. The United States Supreme Court recognized in *Porter v. Sabin*, 149 U.S. 473 (1893) that "[t]he whole property of the corporation [is] within the jurisdiction of the court which

appointed the receiver, **including all its rights of action**, except so far as already lawfully disposed of under orders of that court, [and] remains in its custody, to be administered and distributed by it." *Id*. at 480 (emphasis added).

That the South Carolina receivership references "property within this state" is not a limitation on the Receiver's authority in this case. Instead, the statutory reference is consistent with principles of comity, which deter a state court from reaching beyond a state's borders and asserting jurisdiction over such property located in another jurisdiction. These same principles of comity support a state court's authority to vest a statutory receiver to assert an insolvent corporation's rights of action. *See e.g. Hirson v. United Stores Corp.* 263 A.D. 646, 34 N.Y.S.2d 122 (App. Div. 1st Dep. 1942), *aff'd* 43 N.E.2d 712 (N.Y. App. Ct. 1942) (holding that title to choses in action held by a receiver appointed pursuant to Delaware law would be afforded "full faith and credit"). That is the authority given to be given the receiver here.

That authority includes the insurance assets of ACL, including the right to assume control of the defense of asbestos claims made against ACL in the United States and tender claims to applicable insurance policies. Even assuming ACL's interpretation of §15-65-10 is correct, to the extent they exist, ACL's Insurance Assets [2] would be intended to protect the lives, interests and property within South Carolina. The result is that the insuring assets are subject to the laws of South Carolina, including the duly appointed Receiver.

[2] For purpose of clarity, this Court defines "Insurance Assets" as any insurance policy, proceeds of insurance policies, claims relating to such insurance policies, including but not limited to, claims relating to any breaches of duty relating to those policies, information relating to those insurance policies including, but not limited to mail, files of counsel, or other information which is reasonably calculated to lead to the discovery of admissible evidence about those insurance policies or any other assets which are related to, touch or are otherwise relevant to such insurance.

S.C. Code Ann §38-61-10 states that

> [a]ll contracts of insurance on property, lives, or interests in this state are considered to be made in the State and all contracts of insurance the applications for which are taken within this State are considered to have been made within this State and are subject to the laws of this State.

In interpreting §38-61-10, the South Carolina Supreme Court held that "[i]t is immaterial where the contract was entered into. Further there is no requirement that the policyholders or insurers be citizens of South Carolina. What is solely relevant is where the property, lives, or interests insured are located." *Sangamo Weston v. Nat'l Sur. Corp.*, 307 S.C. 143, 149, 414 S.E.2d 127, 130 (1992) (Toal, C.J). The result is that "South Carolina substantive law governs [the insuring assets of ACL]" *Id.* Thus, the appointment of a receiver over those assets is appropriate.

B. Due Process has not and will not be violated

ACL continues to ignore the jurisprudence of this state which directly addresses its due process argument. Just as here, *Sangamo* argued that §38-61-10 was "unconstitutional." *Id.* at 131. The South Carolina Supreme Court there opined that

> insuring property, lives and interests in South Carolina constitutes a significant contact with this state. South Carolina has a substantial interest in who bears the liability for operations conducted in this state which result in injury to South Carolina property and citizens. Although the parties are not residents of this state, both parties availed themselves of the law of South Carolina when they respectively provided or received insurance on interests located in this state.

Id. ACL sold its products throughout the United States well knowing that it would end up in the workplaces of working men and women throughout the nation, including sales, specifically to South Carolina. Therefore, under the statutory scheme of this state and its interpreting precedent, whatever insuring assets of ACL exist and related claims are subject to the substantive law of

South Carolina and nothing about that result is violative of due process.

POWERS OF THE RECEIVER

As set forth above, the powers afforded to the receiver here are all related to the insurance assets of ACL. Therefore, this Court hereby orders that Peter Protopapas be and hereby is appointed Receiver in this case with the power and authority fully administer all insurance assets of Asbestos Corporation, Ltd. and any subsidiaries, accept service on behalf of ACL, engage counsel on behalf of ACL, to assume control of the defense of asbestos claims made against ACL in the United States, and take any and all steps necessary to protect the interests of ACL whatever they may be. This order includes the right and obligation to administer any insurance or indemnification assets of ACL as well as any claims related to the actions or failure to act of ACL insurance carriers or other entities, including, but not limited to the officers, directors and/or shareholders of ACL against which the ACL may have claims.

In addition to the powers of the Receiver set forth herein, the Receiver shall have the following rights, powers and authority, insofar as they are related to the discovery of and recovery of insurance assets, to: 1) open any mail which is reasonably believed to contain information relating to insurance assets addressed to the defendant and addressed to any business owned by the ACL; redirect the delivery of any such mail addressed to the ACL or any business of the ACL, so that such mail may come directly to the receiver; 2) endorse and cash all checks and negotiable instruments payable to ACL relating to insurance assets; 3) obtain from any financial institution, bank, credit union, savings and loan or title, credit bureau or any other third party, any financial records belonging to or pertaining to the insurance assets of ACL; 4) hire any person necessary to accomplish any right or power under this Order; 5) to assume control of the defense of asbestos claims made against ACL in the United States; and 6) take all action necessary to gain access to

all storage facilities, safety-deposit boxes, real property, and leased premises wherein any property of ACL may be situated, and to review and obtain copies of all documents related to insurance assets of ACL.

The Court expects the Receiver to investigate the existence of all insurance or indemnifications coverages or claims relating thereto which are potentially available to ACL. The Receiver will provide potential insurers or indemnifiers with lists of work sites, contractors, and insurance brokers and agents to facilitate the insurers' searches for coverage (specifically including coverage provided to any related or subsidiary companies of ACL or any entity for whom ACL did work or supplied materials or licensed products or the use thereof as an "additional insured" under coverage written to another entity). The Court expects all insurers or indemnifiers to comply with subpoenas issued by this Court and its Receiver in effectuating these thorough searches.

This Court notes that under the *Barton* doctrine, suit against the Receiver outside of this Court is expressly prohibited.

CONCLUSION

For the foregoing reasons, the appointment of a receiver for ACL to marshal all of the available insurance assets, including claims related thereto and any other property subject to this receivership of ACL and its subsidiaries, successors, and assigns, is appropriate. Moreover, the Court authorizes Mr. Protopapas to assume the control of the defense of all litigation matters pending in the United States against ACL. Peter Protopapas is hereby appointed the receiver over ACL consistent with this order.

IT IS SO ORDERED.

[JUDGE'S SIGNATURE PAGE FOLLOWS]

Richland Common Pleas

Case Caption: John A Tibbs , plaintiff, et al vs 3M Company , defendant, et al

Case Number: 2023CP4001759

Type: Order/Appointment of Receiver

So Ordered

Jean H. Toal

EXHIBIT 7

RETURN ON WRIT OF PROHIBITION

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.)

Appellate Case No. 2024-001959

Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies, Petitioners,

v.

The Honorable Jean H. Toal, in her capacity as Acting Circuit Court Judge, and Peter Protopapas, in his capacity as Receiver for Asbestos Corporation Ltd., Respondents.

RETURN TO PETITION FOR WRIT OF PROHIBITION

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INTRODUCTION

Petitioners have filed an Amicus brief, an appeal in the South Carolina Court of Appeals (voluntarily withdrawn), and now, a Petition for Writ of Prohibition, improperly seeking a third opportunity to present arguments to the appellate courts on the issues involved in this case. Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies' (collectively, "Lloyds" or "Petitioners") seek extraordinary proceedings to prevent a South Carolina trial court and its assigned duly-appointed Receiver's efforts to unravel a decades-old, unlawful litigation-avoidance strategy perpetrated by Asbestos Corporation Limited ("ACL") and its sister company Atlas Turner ("Atlas") to suppress personal injury claims in South Carolina and the United States by avoiding disclosure of, hiding, and misrepresenting its insurance program and assets from litigants.

The ongoing efforts to dismantle this receivership and discredit the trial court through what has been styled as "extraordinary proceedings" are neither extraordinary nor unique. The Petition for Writ of Prohibition is a litigation tactic employed by Petitioners' insured and now Petitioners themselves designed to attack trial judges who issue adverse rulings, create chaos in the trial and appellate courts, and "wear down" the court systems in order to obtain or avoid a particular result. By way of example, Petitioners' insured, ACL launched similar attacks against a Missouri trial judge in a Petition for Writ of Prohibition (which was denied) in the Missouri Supreme Court in *State ex. rel. Asbestos Corporation v. The Honorable Michael T. Jamison*, No. SC97144, on May 11, 2018, to stop the Missouri state trial court in an asbestos personal injury action from enforcing an order striking ACL's pleadings. Unfortunately, these tactics and similar improper tactics used by Petitioners and other stakeholders are designed to obstruct the court's administration of properly

constituted receiverships and the court-appointed receivers' ability to fulfill its obligations to the court. To be clear, the goal is to obstruct and delay at all costs and by whatever means. [1]

FACTUAL BACKGROUND

ACL, once an asbestos mining company, now exists solely as a claims administrator for the asbestos claims brought against it by plaintiffs who suffer from mesothelioma and other asbestos-related diseases as result of their exposure to raw asbestos fibers ACL supplied, or to the products into which ACL's asbestos fibers were incorporated.

ACL and Atlas instruct their defense counsel *in writing* to implement a strategy of non-disclosure of plainly discoverable facts relevant to the two companies' solvency and availability of responsive insurance assets. In South Carolina, this resulted in ACL's counsel's misrepresentation to the circuit court that the companies had no insurance coverage:

> THE COURT: ACL is going to have records from – if they have got a company who has now set up to manage these old claims and it was set up with the ability to, in 1989, go back and dig up '71 policies and settle these matters that are contained in this agreement, they have got the ability to look at those same records and find out whether there's coverage for these matters that are alleged in the Tibbs case.

[1] After years of similar improper requests, the Court is keenly aware of the ongoing and seemingly coordinated efforts by parties and counsel to obstruct South Carolina courts in asbestos-related cases through serial improper appeals, misnaming and mischaracterizing orders to circumvent appellate rules and procedures, and improper removals including an improper removal of a case involving this Receiver in *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 which was launched after the issuance of a published Fourth Circuit Opinion rejecting these types of removals. *See Protopapas v. Travelers Cas. & Sur. Co.*, 94 F.4th 351 (4th Cir. 2024). Forum shopping has not been contained to South Carolina state and federal courts but has reached into other states and most recently other countries. The collateral attacks against South Carolina jurisprudence and the American judicial system has now moved to the Receiver personally (in violation of Barton Doctrine and the appointment order), and, if not stopped, will continue to spread to anyone involved in bringing these actively concealed assets within the court's purview.

> MR. BROWN: And we have gone through and we can find and we know of and there is no coverage for us to tender against.[2]

When ACL implemented this improper litigation strategy in South Carolina, flatly refused to participate in litigation, and failed to provide necessary information as to the solvency of the company, the circuit court struck ACL's answer, and in light of the resulting default, appointed the Receiver in a limited capacity to investigate the existence of responsive insurance potentially available to ACL, to fully administer the ACL insurance assets, and to take certain steps to protect the interests of ACL.

Pursuant to the circuit court's order, the Receiver undertook a thorough investigation into ACL's historical asbestos sales, its corporate ownership over time, its participation in U.S. asbestos litigation over time, and the insurance available to ACL as a primary or additional insured. The ongoing investigation has revealed the following salient information contrary to Petitioners' assertions, including:

- ACL supplied significant amounts of raw asbestos directly to South Carolina, or to companies for use in South Carolina;
- ACL and its lawyers have perpetrated a nationwide litigation-avoidance strategy involving non-disclosure of discoverable insurance assets and a brazen refusal to participate in American asbestos litigation cases for decades; and
- ACL manages a defense and indemnity trust with over $20 million Canadian dollars and an insurance program with more than $1 billion responsive to asbestos claims in the United States, much of it with Lloyd's of London.

The complete picture of ACL's history, discovered by the Receiver's investigation, provides insight into the context of the ACL receivership.

[2] R. at 5-6, Tr. of R., Aug. 21, 2023, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Comm. Pleas Apr. 5, 2023).

1. Petitioners' Insured ACL was an asbestos mining company that sold asbestos to customers in South Carolina.

According to ACL's 1934 Catalog and Handbook, ACL organized "when properties formerly operated by nine separate companies were bought under one management."[3] By 1934, the mines were "re-grouped and six mills are now conveniently located to handle ore from all the deposits along the forty mile belt. A distinctly characteristic type of [asbestos] fibre is produced at each mill."[4] Although based in Canada, ACL supplied asbestos "to all the markets of the world and there is no country engaged in the manufacture of asbestos products to which our fibers have not been shipped."[5] ACL advertised, "[t]he service Asbestos Corporation Limited is equipped to give is strengthened and augmented by the individual attention given to customers by its sales and engineering staffs, who keep in close personal touch with manufacturers' requirements."[6]

ACL advertised in *Asbestos* magazine[7] in 1958 that the company had been "miners since 1878" in Thetford Mines, Quebec, and had representatives worldwide and within the United States, including in Baltimore, Chicago, Cleveland, Detroit, and San Francisco.[8]

ACL sold asbestos to many major U.S. asbestos product manufacturers, including National Gypsum,[9] Fibreboard,[10] Eagle-Picher Industries,[11] and H.K. Porter.[12] H.K. Porter owned a

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[3] R. at 9, ACL's 1934 Catalog and Handbook.
[4] R. at 10.
[5] R. at 11.
[6] R. at 11.
[7] *Asbestos* magazine is described by owner Clarence Jasper Stover (c1879–c1944) as a "trade paper" that began publication in June 1919.
[8] *See* R. at 15, 40 Asbestos 1 (1958).
[9] R. at 17, Resp. of Def. National Gypsum Co. to Pls.' First Set of Interrogs., Jan. 15, 1987, *In Re Asbestos Cases*, C0362 (D.S.C. Apr. 30, 1987).
[10] R. at 19, Fibreboard Corp.'s Resp. to Pl.'s Interrog., *Josias v. Keene Corp.*, No. 84-416 C(2), (E.D. Mo. Apr. 10, 1986).
[11] *Mitchell v. Asbestos Corp*., 73 Cal. Rptr. 2d 11, 13 (Cal. App. 1998) (R. at 20-30).
[12] R. at 31-32, 1978 Ernest C. Bratt Dep., No. H-75-327 (D. Conn.).

manufacturing facility in Bennettsville, South Carolina, from 1964 to 1976, where it manufactured asbestos-containing insulation products, including asbestos cloth, asbestos tape, and asbestos yarn.[13] [redacted].[15]

ACL's sister company, Atlas, sold asbestos blocks and pipe covering to Covil Corporation, an insulation contractor, for use in industrial facilities in North and South Carolina.[16]

ACL continued to advertise its asbestos in *Asbestos* magazine as late as 1981, with the slogan, "When life depends on it, you use asbestos."[17]

2. ACL was aware of the hazards of asbestos by 1930, and ACL knew that asbestos caused cancer by 1946.

Dr. Barry Castleman, a chemical engineer and researcher specializing in health issues, has spent the last several decades working with public interest groups on the control of asbestos and chemical hazards. His research into ACL demonstrates that ACL was aware that asbestos caused asbestosis by 1930: "Cooperation among asbestos mining companies in Quebec dates from 1930 or before, on the subject of asbestosis. In that year, an article on asbestosis appeared in *Asbestos*

[13] R. 34-35, 1980 Ernest C. Bratt Dep., No. H-75-327 (D. Conn.).
[14] R. at 238-41, Letter from William Davies to Richard Dufour, Oct. 25, 2001 at 4 [redacted]
[15] *See* R. at 243-44, Letter from William Davies to Richard Dufour, Dec. 5, 2001 [redacted]
[16] *See* R. at 37-67, Invoices from Atlas Asbestos Company to Covil Corp, 1970-1972.
[17] *See* R. at 68, Asbestos Magazine Excerpt (1981).

magazine amidst advertisements by . . . Asbestos Corporation Ltd., and others."[18] Further, "Canadian government officials who attended meetings of the Quebec Asbestos Producers Association in the 1930s referred to discussions of asbestosis by the industry trade association."[19]

At the same time, Metropolitan Life Insurance Company ("Met Life") conducted health surveys in Asbestos and Thetford Mines, where ACL was located, and found that of 195 surveyed miners, 42 had asbestosis, which at the time "was a compensable disease in the Province."[20] A report of the study identified ACL as one of the companies included in the survey.[21]

In 1944, Met Life conducted a second survey of ACL's King mine and mill, which included a survey of dust concentrations.[22] Despite increased knowledge of the health hazards of asbestos, Met Life reported, "No changes have been made in the mill operations since the first survey. The only effort at dust suppression consisted in covering some conveyors."[23] Even though the plant was not running at full production and the windows were open during the survey, asbestos dust "concentrations range from 11.6 to 26.6 [million particles per cubic foot] in the five operations evaluated."[24] The report, citing a report by the U.S, Public Health Service, recommended that ACL make efforts to lower asbestos dust concentration levels to at least 5 million particles per cubic foot.[25]

Dr. Castleman also reports in his book that beginning in 1943, numerous ACL employees with suspected cases of asbestosis were referred to the Saranac Laboratory, which at that time was

[18] *See* R. at 71, Barry Castleman, *Asbestos: Medical and Legal Aspects* 602 (1984).
[19] R. at 72.
[20] R. at 72.
[21] R. at 72.
[22] R. at 76.
[23] R. at 77.
[24] R. at 77
[25] R. at 77.

being funded by the asbestos industry to study the effects of asbestos.[26] He explains that by 1946, these reports included an ACL employee with extensive asbestosis and lung cancer:

> Many of these people had been seen by Dr. Cartier's Thetford Industrial Clinic, and compensation claims had been filed in at least 17 of the cases reviewed by Dr. Gardner and Dr. Vorwald between 1943 and 1957. In a 1946 case where a death claim had been filed, the asbestosis was extensive and was accompanied by lung cancer.[27]

While Dr. Castleman could not review details of most of the patient records the researchers evaluated,[28] he was able to determine that ACL's Treasurer "whose exposure consisted only of office work starting in 1920, died from pleural mesothelioma in 1949."[29]

Apart from studies of its own mines and employees, ACL also was aware of the health hazards of asbestos from industry sources. During the 1950s, the following materials were circulated to ACL:

- **December 19, 1950**: memorandum by O.C. Smith of Bell Asbestos Mines, which enclosed a "review by Dr. John Knox of [Turner & Newall] about the U.K. Factory Inspectorate's statistics linking asbestos and pulmonary cancer."[30]

- **May 7, 1952**: A.J. Vorwald's First Interim Report on Asbestosis and Pulmonary Cancer, which reported on the first 14 months of a Saranac Lab study commissioned by the Quebec Asbestos Mining Association to test Canadian chrysotile asbestos in mice by inhalation, which "showed a trend toward positive findings."[31]

- **1952-55**: ACL received periodical reports from Dr. Cartier of the Thetford Industrial Clinic related to the pathology reviews of tissues prepared at the Saranac Laboratory for

[26] R. at 78-79, Gerrit W.H. Schepers, Chronology of Asbestos Cancer Discoveries: Experimental Studies of the Saranac Laboratory, 27 American Journal of Industrial Medicine 593, 594 (1995) (describing a Saranac Laboratory study and noting that the scientist performing the study "did not publish these research findings in technical journals, for his work was performed on behalf of industrial sponsors, from whom he did not have permission to publish.").
[27] *See* R. at 77, *supra* note 17.
[28] R. at 77 (noting that "[d]etails of these cases beyond those in the Vorwald files are unavailable from the Quebec government and the mining companies in Quebec" based on the companies' assertion of the QBCRA).
[29] R. at 77.
[30] R. at 72.
[31] R. at 72, Dr. Castleman notes, "shortly thereafter funding of the study was apparently halted."

the mining companies starting in 1943, with a number of pulmonary cancer cases recorded by 1949.[32]

3. ACL changed hands multiple times starting in 1968, and is now owned by Mazarin.

General Dynamics purchased a majority share in ACL in 1969.[33]

On October 22, 1977, the Province of Quebec announced that it intended to acquire ACL as part of its program to nationalize the Canadian asbestos industry. For that purpose, Quebec created Société National de L'Amiante ("SNA") as a provincial crown corporation. At that time, General Dynamics (Canada) Limited, which was a subsidiary of General Dynamics, held 55.64% of ACL's shares." *Hurst v. General Dynamics Corp*., 583 A.2d 1334, 1335 (1990). After General Dynamics initially rejected SNA's attempt to acquire all of its ACL shares as "unrealistic and unjust," Quebec "took steps to expropriate ACL's Canadian assets."[34] From approximately 1981 to 1991, ACL remained a subsidiary of SNA, a Canadian Crown Corporation.

On September 14, 1992, Junior Societe d'Exploration Minere Mazarin ("Mazarin") announced that it planned "to spend $34.4 million to acquire the asbestos interests of [SNA]."[35]

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[32] R. at 72.

[33] *See Niemann v. McDonnell Douglas Corp*., 721 F. Supp. 1019, 1028 n.7 (S.D. Ill. 1989) In responses to written discovery requests, General Dynamics has clarified that subsidiaries of General Dynamics held the majority interest. *See* R. at 81, General Dynamics Corporations' Resp. to Pl.'s First Set of Interrogs., *Cox v. 3M Co.*, No. 2024-CP-40-00911 (S.C. Ct. Comm Pleas May 6, 2024) ("General Dynamics states that two former Canadian subsidiaries of General Dynamics, Canadair Inc. and General Dynamics Corporation (Canada) Limited ("GD Canada"), at times owned stock in ACL. Specifically, in 1968, Canadair acquired as an investment 20% of the stock of ACL, which was then a publicly traded Canadian Corporation. The following year, Canadair increased its ownership to 54.6% of ACL's stock by means of a public tender offer. In 1976, when Canadair was nationalized by the Canadian government, Canadair's interest in ACL was transferred to GD Canada. During the time Canadair and later GD Canada owned stock in ACL, the remainder of ACL's stock was publicly traded.").

[34] *Hurst*, 583 A.2d at 1335.

[35] *Mazarin to buy Quebec's stake in asbestos mines*, The Northern Miner (Sept. 14, 1992), available at https://www.northernminer.com/news/mazarin-to-buy-quebec-s-stake-in-asbestos-mines/1000132109/ (last visited Nov. 25, 2024).

Today, ACL is publicly traded, with Mazarin Inc., a publicly traded Canadian mining company, as its majority owner.[36] Mazarin, Inc. also owns another former Canadian asbestos mining company, Atlas. In addition to their common ownership, ACL and Atlas are run by the same individuals and have identical legal representation in terms of both law firms and asbestos litigation avoidance strategies in the United States and Canada.[37] Both also have historical insuring relationships with Petitioners as historical liability insurers.

4. Petitioners' insured, ACL, is now a legacy claims administration entity in Quebec using obstruction to protect its settlement fund.

[redacted]

This observation of a Lloyd's claims handler, repeated consistently through several years of "Significant Claim Reports," is consistent with ACL's own annual report and the analysis of its outside auditors at Price Waterhouse Coopers LLP ("PWC").

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[36] *See* Mazarin, Inc. website, https://mazarin.ca/en (last accessed Nov. 19, 2024) ("Mazarin Inc. is a company that owns, among other things, Asbestos Corporation Limited, which has operated chrysotile mines over a period of more than one hundred years.").

[37] [redacted] (*see* R. at 254-67, and R. at 83-106, Extracted Sample of ACL Billing Guidelines). Mr. DuFour has issued reporting to carriers on behalf of both ACL & Atlas Turner for decades, and issues affidavits in U.S. asbestos litigation on behalf of ACL (*See* R. at 107, Aff. of Richard DuFour, July 24, 2023, *Donaghy v. 4520 Corp.*, No 2023-CP-40-03108 (S.C. Ct. Comm. Pleas June 14, 2023)) and on behalf of Atlas Turner, *see* R. at 109-10, Aff. of Richard Dufour, Nov. 13, 2023, *Spayd vs. 3M Co.*, No. GD-23-010209 (PA. Allegheny C.P. Nov. 21, 2023).

[redacted] (*see* R. at 40, Atlas Turner Practices & Procedures for Asbestos Claim Litigation 2021; R. at 82-90, Asbestos Corporation Limited Practices & Procedures for Asbestos Claims 2021) and routinely makes representations on behalf of both ACL & Atlas Turner. See R. at 277, Email from Goldfein to Wes Sawyer of Murphy Grantland, June 9, 2023 [redacted]

[38] R. at 112, Resolute Significant Claim Report, Sept. 25, 2014.

PWC performed financial audits of ACL for the years 2021 and 2022 (the "PWC Reports"), the report of which was included in the ACL Annual Report for each year.[39] The PWC Reports confirm that ACL's business is the management of asbestos-related litigation and the investment of restricted monies to fund the defense and indemnity of asbestos claims.

According to the PWC 2022 Report, ACL relies on two sources of funds to pay its operating expenses: (1) a trust holding invested funds from a settlement with its insurers and (2) "revenue from mining properties, such as building rental, the sale of land (non-mining) as well as royalties."[40] As of December 31, 2022, the trust holds "investments whose fair value is $1,363,000."[41] The agreement between ACL and its insurers limits the use of trust funds for "[p]ayment of expenses incurred in asbestos lawsuits" and expenses incurred to maintain ACL's corporate status.[42] Accounting for these two sources of funds and the payment of asbestos claims, in the fiscal year ended December 31, 2022, ACL "recorded a loss of $337,000 ($-0.12 per share) compared to an income of $59,000 ($0.02 per share) last year."[43]

PWC identified asbestos liability as the "Key audit matter" for the 2022 audit – defined as "those matters that, in our professional judgment, were of most significance in the audit."[44] The Report explained:

> The Corporation is facing numerous claims arising from its past asbestos-related activities. The provisions for litigation are from individuals claiming exposure to asbestos fibre or to asbestos-containing products. In the United States, numerous actions for bodily injury have been filed against certain subsidiaries of the

[39] *See* R. at 134.
[40] *See* R. at 130, Asbestos Corporation Limited Annual Report 2022. As of December 31, 2022, ACL's revenue from mining properties amounted to $1,561,000, but the company "has to incur some expenses in order to maintain and develop the value of its mining properties," at a cost of $1,083,000 in 2022. R. at 177.
[41] R. at 125.
[42] R. at 129.
[43] R. at 175.
[44] R. at 185.

> Corporation that either operated asbestos mines or manufactured asbestos-containing products.[45]

The 2022 report confirms that ACL has assets of $32,667,000 Canadian dollars, of which at least $27,668,000 comprises of restricted assets to defend and settle asbestos liability claims.[46] Further, according to its own auditors, ACL is insolvent because it has more liability than it has assets.[47] PWC confirms that "a material uncertainty that may cast significant doubt on the ability of the Corporation and its subsidiaries to continue as a going concern."[48]

ACL's business exists to pay and manage asbestos claims based solely on *its own* assessment on which claims should be paid, and for what amounts. Tellingly, PWC explained in its 2022 Report that the company does not make provision for U.S. default judgments because they are unenforceable in Quebec, where the company is located:

> According to the opinion of legal advisers consulted, if a default judgment were to be rendered against the Corporation in the United States, such judgment could not be enforced against the Corporation prior to its verification or recognition by a competent court in the province of Quebec; therefore, no provision has been established for those lawsuits.[49]

Instead, ACL evaluates claims against it, determines whether and how much to pay for each claim, and then once the evaluation is made, accounts for the agreed claim in its ledger:

> A provision is recognized when the estimated amount is based on an analysis of each claim and of the amounts that will probably be available to settle those claims. Subsequently, when an agreement is entered into with the counterparty, the provision is cancelled, and the amount of the agreement is recorded in accounts payable and accrued liabilities.[50]

5. Petitioners' Insured, ACL, employs a litigation strategy consistent with PWC's analysis.

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[45] R. at 185.
[46] R. at 190.
[47] R. at 190. In 2022, ACL had a $20,184,000 Canadian dollar deficit.
[48] R. at 123.
[49] R. at 146.
[50] R. at 146.

a. ACL relies on the unenforceability of U.S. default judgments in Québec as a shield allowing it to act with impunity in U.S. asbestos litigation.

To maintain their ability to manage their asbestos liabilities without any supervision, ACL and its sister company, Atlas Turner, have relied upon the protection of the unenforceability of U.S. default judgments in Quebec to selectively participate in, or oftentimes to simply ignore the obligations imposed upon them in, U.S. litigation. This strategy was developed and implemented by their lawyers at Dufour Mottet. In the firm's Policies and Procedures manual for outside counsel representing Atlas Turner in U.S. asbestos cases, which appears nearly identical to the Policies and Procedures manual for ACL,[51] Dufour Mottet sets out the litigation strategy:

[redacted]

[redacted]

b. Petitioners and ACL rely on an unsupported interpretation of the Québec Records Act, which has been rejected by courts across the country, as a shield from participation in U.S. discovery.

The Québec Records Act ("QBCRA") states in part, "no person shall, pursuant to or under any requirement issued by any legislative, judicial or administrative authority outside Québec,

[51] The Atlas Turner Practices and Procedures Manual was produced in this litigation as a complete document. *See* R. at 736-742 Atlas Turner Practices & Procedures for Asbestos Claim Litigation 2024. The ACL Practices and Procedures Manual contains extensive redactions, which ACL indicates are protected by attorney client privilege. *See* R. at 219, Privilege Log Regarding ACL Defense Procedures Manual, June 28, 2024. [redacted]

[52] R. at 743-49, Atlas Turner Practices & Procedures for Asbestos Claim Litigation 2021.

remove or cause to be removed, or send or cause to be sent, from any place in Québec to a place outside Québec, any document or résumé or digest of any document relating to any concern."[53]

Based on its tortured interpretation of the QBCRA, Dufour Mottet requires ACL and Atlas Turner's American lawyers to treat information related to the companies' assets, including their insurance coverage, as confidential:

> During your representation of Atlas and Bell you may become aware of information relating to the assets of the companies, their insurance coverage, their financial situation, their officers, and the sources of payment for defense costs and settlements. The clients have determined that this information is protected by attorney-client privilege and is an essential part of the attorney client relationship. No information covered by this privilege shall be divulged without specific authorization of the client. Please advise us immediately if any procedures are instituted seeking to compel the disclosure of such information.[54]

This strategy is inconsistent with a litigant's obligations in U.S. tort litigation where, at the very least, insurance information is plainly discoverable.

Dufour Mottet relied on the QBCRA to attempt to shield production of its settlement agreement with insurer Lloyd's. In a letter to Lloyd's counsel, James Sottile, Dufour Mottet explained, [redacted][55]

When evaluating ACL's interpretation of the QBCRA, courts across the United States, including in South Carolina, have rejected ACL's position on multiple grounds, including that the

[53] Québec R.S.Q., c. 278, s. 1(b), 2.
[54] R. at 743-49, Atlas Turner Practices & Procedures for Asbestos Claim Litigation 2021.
[55] R. at 282, Letter from A. Breault to J. Sottile, June 19, 2007.

Act is not self-enforcing;[56] that Quebec lawmakers intended the QBCRA to protect original documents and not photocopies or descriptions of the content of the documents in response to interrogatories,[57] and that making documents available in Quebec would not violate the QBCRA,[58]

c. ACL has employed these improper tactics in asbestos litigation throughout the United States.

A series of decisions of state courts in various U.S. jurisdictions establish ACL's pattern of behavior. For instance, in seeking an extraordinary writ akin to the relief sought here, ACL filed an unsuccessful Writ of Prohibition in the Missouri Supreme Court in *State ex. rel. Asbestos Corporation v. The Honorable Michael T. Jamison*, No. SC97144, on May 11, 2018 to stop the Missouri state trial court from enforcing an order striking ACL's pleadings for refusing to participate appropriately in an asbestos personal injury action.[59] In support of its Writ, ACL argued

[56] The QBCRA "requires a petition by the Attorney-General ['procureur general'] to a district judge for an order requiring the documents not be sent out of the province." *American Industrial Contracting, Inc. v. Johns–Manville Corp*., 326 F.Supp. 879, 880 (W.D.Pa.1971). Without a petition by Quebec's Attorney General, the QBCRA cannot apply. *See id*.; R. S. 1964, c. 278, s. 4; *Buttitta v. Asbestos Corp*., No. A-6101-04T1, 2006 WL 2355200, at *20 (N.J. Super. Ct. App. Div. Aug. 16, 2006) ("[E]ven assuming that plaintiffs' discovery requests here fall within the ambit of section 2 of the QBCRA, defendant has not alleged the pendency of an order precluding removal of the requested documents under section 4.")

[57] *See Petruska v. Johns-Manville*, 83 F.R.D. 32, 36 (E.D. Pa. 1979) (producing copies of documents would not violate the QBCRA); *Buttitta*, 2006 WL 2355200, at *20 ("Even assuming that the statute would preclude the transfer of original documents out of Quebec, this court is not convinced that the statute would be contravened by the production of photocopies outside Quebec or by the inspection of documents within Quebec.").

[58] *See Buttitta,* 2006 WL 2355200, at *19. The QBCRA does not apply to interrogatories. *See Lyons v. Bell Asbestos Mines, Ltd.*, 119 F.R.D. 384, 387-88 (D.S.C.1988) ("defendant has also declined to answer plaintiffs' interrogatories, which would not entail the removal of documents or copies thereof from Quebec."); *Wilder v. Amatex Corp.*, No. 82 CVS 953, Slip. Op. at 1 (N.C. Super. Ct. Dec. 21, 1983) (The court "reviewed the provisions of Chapter 278, Section 2 of the Laws of Quebec . . . and . . . determined that the answer of the Interrogatories propounded by Plaintiff does not require the removal of any documents, photocopies, or other records in violation of the [QBCRA]").

[59] R. at 220-34, Relator ACL's Petition for Writ of Prohibition, *State ex. rel. Asbestos Corporation v. The Honorable Michael T. Jamison*, No. SC97144 (Mo. July 3, 2018).

that the trial court exceeded its authority by requiring ACL to permit an inspection of its records in Quebec in response to plaintiff's discovery requests, and ultimately striking its pleadings for its failure to comply with the required document inspection.[60] The Missouri Supreme Court denied the writ on July 3, 2018.[61] Petitioners here were aware of this appellate effort, and in the claim file note memorializing the writ, the Lloyd's claims handler noted, "We believe that ACL should attempt to settle this case with plaintiff's attorneys."[62]

Five years earlier, on December 17, 2013, a New Orleans jury in *Mary Morvant v. Asbestos Corporation Limited*, No. 2012-11900, found in favor of plaintiffs and against ACL in the total amount of $6,420,467.[63] ACL appealed, arguing that the trial court abused its discretion when it denied ACL's motion for protective order, granted plaintiff's motion to compel, and "struck ACL's defenses and ordered the irrebuttable presumption that Mrs. Morvant was exposed to asbestos mined, sold, or supplied by ACL."[64] A *Harris Martin* article describing the verdict described the discovery sanction as follows:

> ACL contested the diagnosis of mesothelioma. According to sources, the defendant also refused to participate in discovery or produce a corporate representative for deposition, asserting that the Quebec Business Concerns Records Act bars production of documents or information relating to ACL to places or persons outside of the Province of Quebec. The District Court, however, rejected the application of the blocking statute.

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[60] R. at 220-234.
[61] R. at 236, Order Den. Writ of Prohibition, *State ex. rel. Asbestos Corporation v. The Honorable Michael T. Jamison*, No. SC97144 (Mo. July 3, 2018).
[62] R. at 286, Letter from Richard Dufour to Brett Woodis and Giuseppe Aguanno, May 10, 2018, at 6-7 (also noting, "ACL refused to give complete answers to written interrogatories from the plaintiffs based on the Quebec Business Concerns Records Act (QBCRA). After a long delay, Judge Michael T. Jamison, from the Circuit Court, finally sanctioned ACL in March 2018 by striking their answers. Thereafter, ACL tried to get a Writ of Prohibition or Mandamus before the Missouri Court of Appeals for the Eastern District, without success. ACL will soon file a motion to get a Writ of Prohibition or Mandamus before the Supreme Court of this State.")
[63] R. at 230, Plaintiff's/Appellee's Original Brief, *Mary Morvant v. Asbestos Corporation Limited*, No. 2014-CA-0343 (La. 4th Cir. Ct. App. June 17, 2014) ("Morvant's Brief").
[64] R. at 226.

> After being given numerous opportunities to comply with the District Court's orders to participate in discovery, the court imposed a discovery sanction in the form of an irrebuttable presumption that Morvant was exposed to asbestos fiber mined, milled or sold by ACL, according to plaintiffs' counsel. ACL was barred from introducing evidence to the contrary, counsel said.[65]

ACL and Mrs. Morvant resolved their dispute before the Louisiana appellate court decided the appeal.[66]

ACL had followed a similar course of conduct a year earlier in another case in New Orleans, *Jereiana Relf v. Asbestos Corporation Limited*, Civil District Court for the Parish of Orleans Case No. 2012-5415. When ACL failed to participate in discovery in that action, Plaintiffs filed a Motion to Strike Affirmative Defenses of ACL.[67] Following a hearing, the trial court:

(1) granted plaintiff's Motion to Strike;

(2) held ACL in contempt of court and ordered that "ACL's defenses are limited to medical issues, whether ACL's conduct constitutes negligence, or whether ACL could be held liable under the principles of strict products liability;"

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[65] R. at 292, *New Orleans Woman Alleging Exposure to ACL Asbestos Awarded $6.4 Million*, Harris Martin (Dec. 18, 2013). A more detailed summary of the history of ACL's failure to participate in discovery and resulting sanctions can be found in Morvant's Brief, *supra* note 62, at 221 Nos. 2-5 (June 17, 2014). According to Plaintiffs, ACL failed to respond to plaintiff's first and second discovery requests. R. at 231. The trial court rejected ACL's discovery defenses, and ACL still failed to participate in discovery. R. at 232-33. The trial court's sanctions struck ACL's defenses except those relating to medical issues, ACL's negligence, and whether ACL's conduct qualifies for strict liability. R. at 3. Its sanctions granted an irrebuttable presumption that ACL's asbestos exposed plaintiff to asbestos "and prohibited ACL from introducing any evidence to the contrary." R. at 3. ACL continued avoiding discovery after the trial court imposed sanctions. R. at 221. ACL still failed to produce any representatives or otherwise respond to discovery. R. at 223 No. 8 (ACL failed to produce a corporate representative after the trial court imposed sanctions and granted plaintiff's motion to compel the production of a corporate representative for a deposition). ACL failed to respond to plaintiff's first and second sets of discovery requests, failed to seek appellate review of the trial court's July, 26, 2013 order compelling production, and failed to participate in discovery after the court imposed sanctions. R. at 231-33.

[66] R. at 296, Joint Mot. to Dismiss Appeal, *Mary Morvant v. Asbestos Corporation Limited*, 2014-CA-0343 (La. 4th Cir. Ct. App. June 17, 2014).

[67] R. at 301-02, Order in *Relf v. Asbestos Corporation Limited*, No. 2012-5415 (La. Dist. Ct. Dec. 16, 2013).

(3) found that Plaintiff was "entitled to an irrebuttable presumption that she has been exposed to asbestos mined, sold, or supplied by ACL and that ACL is prohibited from introducing any evidence to the contrary; and

(4) required ACL to appear "on October 22, 2013 at 10:00 a.m. and advise the Court on whether it will appear for the deposition to testify relative to the subjects identified by plaintiff's counsel in open court."[68]

Once again pursuing an appellate writ, ACL sought review of the trial court's order in a Supervisory Writ to the Louisiana Fourth Circuit Court of Appeal. On July 30, 2013, the appellate court denied the writ, finding "no error in the judgment of the trial court."[69]

Similarly, the trial court in *Borrowman v. Certainteed Corp.*, in the Circuit Court for the County of St. Louis, Missouri, No. 16SL-CC04705 likewise granted plaintiff's Motion for Sanctions against ACL, striking ACL's pleadings when ACL failed to participate in discovery despite clear instruction from the trial court to participate.[70] Just three months ago, the trial court in *Kotzerke v. 3M Co.*, in the Superior Court for Pierce County, Washington, Case No. 23-2-05287-6, denied ACL's motion for protective order precluding a 30(b)(6) deposition and required ACL to educate and prepare its 30(b)(6) witness.[71]

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[68] R. at 301-02.

[69] R. at 303, Order Den. Writ. *Relf v. Asbestos Corporation Ltd.*, No. 2013-C-0695 (La. App. 4th Cir. July 30, 2013).

[70] R. at 305-06, Order on Pls.' Mot. for Sanctions, *Borrowman v. Certainteed Corp*., No. 16SL-CC04705 (Mo. Cir. Ct. Nov. 13, 2017) ("This Court heard arguments of counsel in Chambers on November 7, 2017. During this hearing, the Court informed ACL that if it did not produce responsive document[s] and permit Plaintiffs' counsel to conduct a document inspection at Defendants' premises, the Court would grant Plaintiffs' Motion for Sanctions. The Court ordered ACL to inform the Court if it would comply with this Court's order on or before Friday, November 10, 2017. ACL made clear by filing a supplemental brief on Friday, November 10, 2017 arguing why the Court was in error, that it would not permit the inspection or produce documents.").

[71] R. at 307-09, Order Den. Def. Asbestos Corporation Limited's Am. Mot. to Reject Special Master's R. & R. re: ACL's Mot. for Protec. Order Prec. Pl. from Taking 30(B)(6) Dep. Of Corp. Rep., at 1-3, *Kotzerke v. 3M Co.*, No. 23-2-05287-6 (Wash. Super. Ct. Aug. 28, 2024) (adopting special master's report denying ACL's motion for protective order precluding a 30(B)(6) deposition); *see also* R. at 311-12, Order Den. Def. Asbestos Corporation Limited's Am. Mot. to Reject Special Master's R. & R. Re: ACL's Mot. for Protec. Order Prec. Pl. from Taking 30(B)(6) Dep. Of Corp. Rep., at 1-3, *Kotzerke v. 3M Co.*, No. 23-2-05287-6 (Wash. Super. Ct. Aug. 28,

ACL has applied its strategy of intransigence to this receivership. This fall, Plaintiffs in *Arsenith v. 3M Co.*, in the Superior Court for Alameda County, California, No. 24CV089313, served their complaint on the Receiver. On October 15, 2024, the Lloyd's claims administrator, Resolute, wrote to ACL and the Receiver to confirm it had hired Jim Parker of Hugo Parker to defend ACL's interests in the case.[72] The next day, Richard Dufour inexplicably wrote to James Parker:

[redacted][73]

Without counsel to represent it, ACL defaulted. On October 25, 2024, the *Arsenith* plaintiffs moved for a $230 million default judgment against ACL.[74]

d. ACL has employed these improper tactics in asbestos litigation in South Carolina.

[redacted]

2024) (adopting special master's report denying ACL's motion for protective order precluding a 30(B)(6) deposition).

[72] R. at 318-19, Letter from Deirdre Woytek to Peter Protopapas and Richard Dufour, Oct. 15, 2024 at 2 ("This is to inform you that CLMI have retained Jim Parker with the law firm of Hugo Parker LLP as defense counsel for ACL in *Arsenith*. CLMI will provide defense counsel with your contact information so defense counsel can keep you informed in the defense of ACL.").

[73] R. at 760, Letter from Richard Dufour to James Parker, Oct. 16, 2024.

[74] R. at 320, Req. for Entry of Default, *Arsenith v. 3M*, No. 24STCV09972 (Cal. Super. Ct. Oct. 29, 2024).

[75] R. at 722, Letter from William S. Davies to Richard Dufour, Oct. 25, 2001 [redacted]

[redacted][76]

Considering this fact, along with the facts of the underlying cases at issue and other related factors,

[redacted][77]

[redacted][78]

More recently, as of February 2024, ACL's insurers have agreed to retain and pay defense counsel on behalf of ACL, Will Early at Pierce Sloan. ACL's national counsel refuses to provide Mr. Early with any documents.[79]

6. The circuit court appointed a receiver to identify ACL's assets when the existence of those assets was not clear.

a. ACL files a Motion to Dismiss a South Carolina Asbestos Case for Lack of Personal Jurisdiction but refuses to participate in jurisdictional discovery.

The instant Writ relates to the trial court's appointment of a receiver in *Tibbs*. On April 5, 2023, plaintiffs filed their Original Complaint, naming ACL.[80] Plaintiffs filed an Amended Complaint on May 3, 2023.[81] In the Amended Complaint, Plaintiffs allege that Plaintiff John A. Tibbs was diagnosed with lung cancer.[82] Plaintiffs allege in the complaint that ACL "mined,

[76] R. at 722.
[77] R. at 723.
[78] R. at 761-62, Letter from Richard Dufour to Euguene Murphy (Nov. 9, 2001).
[79] R. at 763, E-mail from W. Early to P. Protopapas, Nov. 15, 2024 (stating in response to a request for records from ACL, [redacted]
[80] Pls.' Orig. Compl., Apr. 5, 2023, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Comm. Pleas Apr. 5, 2023).
[81] Pls. Amend. Compl., May 5, 2023, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Comm. Pleas Apr. 5, 2023).
[82] *Id.* at 8.

manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to raw asbestos fibers present at numerous job sites in South Carolina and North Carolina."[83] Plaintiffs also allege that their claims against ACL "arise out of this Defendant's business activities in the State of South Carolina."[84]

In response to Plaintiffs' Amended Complaint, ACL filed a Motion to Dismiss for Lack of Personal Jurisdiction on May 17, 2023.[85] ACL relied on an affidavit of its Canadian lawyer Richard Dufour to argue jurisdictional facts supportive of its motion.[86] This motion was nearly identical to other motions that ACL has filed and has lost in many U.S. courts over decades.[87]

The Tibbs Plaintiffs filed an opposition to the ACL Motion to Dismiss on June 22, 2023.[88] In advance of their motion, plaintiffs attempted to engage in jurisdictional discovery against ACL, including through a notice of deposition.[89] According to the opposition brief, "[o]n June 15, 2023, Plaintiffs' counsel had a phone conference with counsel for ACL during which counsel indicated they have no information to confirm ACL will present a witness in response to the notice."[90] With no responses to jurisdictional discovery, Plaintiffs relied on testimony and documents evidencing sales of ACL asbestos in South Carolina to oppose the Motion to Dismiss, including ACL

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[83] *Id.* at 21-22.
[84] *Id.* at 22.
[85] ACL's Memo. in Supp. of Mot. to Dismiss for Lack of Personal Jurisdiction, May 17, 2023, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Comm. Pleas Apr. 5, 2023).
[86] *Id.* at 2-4.
[87] *See Buttitta*, 2010 WL 1427273, at *20 (noting ACL's "defense had been rejected in nine other cases filed in federal court," not to mention state courts).
[88] Pls.' Opp, to Def. ACL's Mot. to Dismiss for Lack of Personal Jurisdiction & Mot. to Compel Dep. Testimony, June 22, 2023, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Comm. Pleas Apr. 5, 2023).
[89] Pls.' First Amend. Notice of 30(b)(6) Dep. of Def. ACL and Subpoena, June 23, 2023, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Comm. Pleas Apr. 5, 2023).
[90] *Supra* note 87, at 4.

brochures, discovery responses from major asbestos-containing products manufacturers in the United States, and testimony from a former manager of HK Porter, an asbestos-containing product manufacturer with a manufacturing facility in Bennettsville, South Carolina, who "testified HK Porter purchased chrysotile asbestos used in its products from ACL."[91]

On July 10, 2023, the Court heard ACL's Motion to Dismiss for Lack of Personal Jurisdiction. Counsel for ACL[92] argued that ACL "never purposefully availed itself to any activities in South Carolina as a Canadian corporation."[93] Because ACL shipped its products FOB from Quebec, ACL argued "that's the last action that ACL had with the raw asbestos."[94] Counsel for ACL noted, "Your Honor, I didn't think you were going to buy the argument, but I had to make it. That was the best I could come up with."[95]

In response, Plaintiffs relied primarily on their brief, but argued, "We had a tailored notice where the deposition was set. They refused to show up. Your Honor, even without any information

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[91] *Supra* note 87, at 5-6.

[92] Counsel for ACL at the hearing was Tripp Gandy of Clement Rivers, who noted, "we got involved with this client last week." R. at, Tr. of R., July 10, 2023, at 10:10-11, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Comm. Pleas Apr. 5, 2023). As previously indicated, Nelson Mullins represented ACL in South Carolina from 1976 to approximately May 2023 – when Nelson Mullins withdrew from its long-standing representation of ACL. During the pendency of *Tibbs*, ACL has had three sets of lawyers representing it. First, The Van Winkle Law Firm filed an initial Notice of Appearance and ACL's Motion to Dismiss in May 2023. On Friday, June 9, 2023, Murphy Grantland accepted representation of ACL and Atlas Turner. *See* R. at 750, E-mail from Goldfein to Wes Sawyer of Murphy Grantland, June 9, 2023 ("Atlas and ACL agree to the conditions in your letter...Welcome aboard!"); R. at 572, Consent Mot. for Substitution of Counsel, June 14, 2023, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Comm. Pleas Apr. 5, 2023). (replacing Van Winkle Law Firm with Murphy Grantland). On Thursday, June 22, 2023, Murphy Grantland withdrew its representation of ACL. *See* R. at 569, E-mail from Jay Thompson to Theile McVey, June 23, 2023 ("conflicts of interest have arisen that require our firm to withdraw as counsel for Atlas Turner, Inc. ("Atlas") and affiliated entities, including Asbestos Corporation Limited ("ACL")."). Clement Rivers replaced Murphy & Grantland.

[93] R. at 559, Tr. of R., July 10, 2023.

[94] R. at 560.

[95] R. at 562.

from Asbestos Corporation Limited, we have H.K. Porter owned the Bennettsville plant in South Carolina, and they bought raw asbestos, raw asbestos and made a product in that facility. Your Honor, [ACL]…did all kinds of brochures talking about how much asbestos they sold all over the world in every state in the country."[96]

On July 19, 2023, the trial court entered a written Order, stating in relevant part:

> ACL has refused to participate in any jurisdictional discovery. Despite ACL's refusal, Plaintiffs submitted evidence of ACL's sales of its asbestos product directly into South Carolina. Therefore, ACL's Motion to Dismiss is DENIED. ACL is ordered to answer discovery and to produce a 30(b)(6) witness by July 23, 2023. Failure to answer the Court ordered discovery and to provide a corporate representative for deposition shall result in ACL being held in contempt.[97]

b. ACL continues to ignore the order to submit to a corporate representative deposition; Plaintiffs move to hold ACL in contempt and strike its pleadings.

ACL provided responses to the Court-ordered discovery on July 24, 2023.[98] However, ACL failed to produce a witness, or to produce any documents as requested in the 30(b)(6) deposition notice. As a result, on July 26, 2023, Plaintiffs filed a Motion to Hold ACL in Contempt and to Strike ACL's Pleadings.[99]

ACL opposed the motion, arguing that the reason it did not produce a witness as the trial court ordered was that "ACL has no living employee or person who could satisfy this Court's requirements as to a Rule 30(b)(6), SCRCP witness."[100] Instead, ACL sent Plaintiffs a series of

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[96] R. at 563.
[97] Order Den. ACL's Mot. to Dismiss, July 19, 2023 *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Comm. Pleas Apr. 5, 2023).
[98] R. at 575, ACL's Answers to Pls.' First Set of Interrogs., Aug. 9, 2023, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Comm. Pleas Apr. 5, 2023).
[99] R. at 614-16, Pls.' Mot. to Hold ACL in Contempt and to Strike ACL's Pleadings, July 26, 2023, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Comm. Pleas Apr. 5, 2023).
[100] R. at 619-20, ACL's Memo. in Opp. To Mot. for Contempt, to Strike Ans. and App. Receiver, Aug. 9, 2023, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Comm. Pleas Apr. 5, 2023).

eight deposition transcripts of former ACL corporate witnesses.[101] ACL argued that it could not offer a live witness because (1) "it has no current former employees to testify to the topics listed in the Rule 30(b)(6), SCRCP Notice;" (2) "[i]t does not maintain or possess records that would be necessary to educate a witness;" and (3) under its reading of the QBCRA, any records that did exist could not be produced.[102]

In reply, Plaintiffs noted that the South Carolina rule "expressly provides that ACL shall educate [any person of its choosing] on what is available, known or knowable to the company."[103] Plaintiffs referenced a series of orders in which the trial court had similarly required corporations to produce a 30(b)(6) witness.[104]

The circuit court considered the motion in an August 21, 2023 hearing. At the hearing, ACL's attorney confirmed that ACL would not comply with the Court's discovery orders.[105]

On September 8, 2023, the circuit court entered an Order Holding ACL in Contempt.[106] The circuit court found, "ACL failed to produce a witness as ordered by the Court. ACL has also refused to identify a witness or a date on which it will produce a witness. Moreover, ACL has failed to fully answer discovery and provide documents ordered to be produced by this Court."[107]

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[101] R. at 620-21.
[102] R. at 622.
[103] R. at 634, Reply in Supp. of Pls.' Mots. To Strike ACL's Ans. and App. Receiver, Aug. 14, 2023, at 5, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Comm. Pleas Apr. 5, 2023).
[104] R. at 634 (citing *Howe v. Air & Liquid Systems, Inc. et al*, Pretrial Transcript, Mar. 9, 2018 at 54-55 and Order Regarding Covil Corporation Discovery Motions. Mar. 1, 2018).
[105] *See* R. at 2-7, Tr. of R., Aug. 21, 2023, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Comm. Pleas Apr. 5, 2023).
[106] R. at 640, Order Holding ACL in Contempt, Sept. 8, 2023, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Comm. Pleas Apr. 5, 2023).
[107] R. at 640.

"Given this intentional and willful refusal to participate in discovery, the Court hereby strikes ACL's pleadings."[108]

c. The Court appointed the Receiver on September 8, 2023.

Two days after filing the Motion to Strike, Plaintiffs filed a Motion to Appoint a Receiver over ACL on the grounds that ACL's actions made it clear that it did not intend to participate in litigation in South Carolina, and that it appeared to be refusing to tender cases to its insurers, just as its sister company, Atlas, had done: "There is no evidence which suggests that ACL currently operates in any way to do anything other than to defend and indemnify lawsuits, thus making ACL nothing more than an insurance company. Plaintiffs believe, that like ACL's sister company, Atlas, ACL is refusing to tender the defense to its insurance carriers. This pattern of conduct of both ACL and Atlas is clearly intended to leave [victims] of their conduct without any recourse against them."[109] The circuit court heard evidence on the Motion to Appoint the Receiver at the same August 21, 2023 hearing as it heard arguments on the Motion to Strike.

In a September 8, 2023 order, the circuit court granted the Receiver "the power and authority [to] fully administer all insurance assets of Asbestos Corporation, Ltd. and any subsidiaries, accept service on behalf of ACL, engage counsel on behalf of ACL, and take any and all steps necessary to protect the interests of ACL whatever they may be."[110] The Receiver's charge is to "investigate the existence of all insurance or indemnifications coverages or claims relating thereto which are potentially available to ACL."[111]

7. The Receiver's investigation showed that ACL has insurance to pay asbestos claims.

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[108] R. at 641.
[109] R. at 645-46, Pls.' Mot. for the App. of Receiver, July 28, 2023, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Comm. Pleas Apr. 5, 2023).
[110] R. at 655, Order on Pls.' Mot. to App. Receiver, Sept. 8, 2023, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Comm. Pleas Apr. 5, 2023) ("Order Appointing Receiver").
[111] R. at 656.

In connection with his appointment as receiver of ACL's sister company Atlas in June 2023, the Receiver uncovered information that both ACL and Atlas Turner had misled the Circuit Court regarding the existence and status of insurance assets. On August 18, 2023, the Receiver filed a notice regarding these misrepresentations, alerting the Court to "documents that evidence potential past liquidations of Insurance Assets"—including an agreement in which these companies may have released certain insurance rights in the 1980s. [112]

After the Receiver reported his findings to the Court, ACL provided information that conflicted with known information about its insurance. Specifically, at the August 21, 2023 hearing, counsel for Atlas and ACL, Stephen Brown of Rivers Clement, represented to the circuit court that his client did not have insurance:

> MR. BROWN: And I will answer Ms. McVey's question, which is why have we not tendered? We have no insurance to tender against. It's just

[112] R. at 659-60, Notice of Atlas Turner, Inc.'s Misleading Reps. and Filing of Evid. of Potential Ins. Liquidation, Aug. 18, 2023, at 1-2, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Comm. Pleas Apr. 5, 2023) (citing Agreement Between ACL and the Maryland Casualty Company (July 18, 1989) ("Maryland Agreement"); Memorandum of Agreement Between Bell Asbestos Mines, Ltd., Royal Insurance Company of Canada, and Atlas (Dec. 18, 1986) ("Royal Agreement")). These agreements demonstrate that ACL and its insurers took actions to liquidate insurance policies that cover U.S. asbestos liabilities, while simultaneously agreeing to hide their existence from claimants or other third parties with potential interests in the proceeds of such policies. For example, in the Maryland Agreement, ACL "agrees that it will cease and forego all efforts to locate or develop any evidence or other information that may directly or indirectly assist any Claimant in developing, asserting or litigating any Third-Party action against Maryland, and ACL further agrees that it shall refrain from assisting others in locating or developing any such evidence or information." Maryland Agreement. And in the Royal Agreement, ACL affiliate Atlas Turner "expressly represent[ed] and guarantee[d] that … [it] will not submit, voluntarily, copies of the policies to any third party and especially to anyone who would be likely to make use of them in a court of law." Royal Agreement. At the same time, these agreements create trust accounts for the express purpose of paying judgments or settlements of U.S. asbestos claims. Neither ACL nor its insurers have provided any information on the status of the insurance proceeds paid into those trust accounts—which may still be assets applicable to U.S. asbestos claims.

> that simple. I am not paid by insurance. It would make no sense to tender, Your Honor.[113]

The Receiver's investigation revealed that the invoices Mr. Brown submitted to ACL were being reimbursed by ACL's insurers.

8. After the Receiver's appointment, Lloyd's refused to produce its insurance policies and claims information to the Receiver.

Since the Receiver's appointment, the Receiver has learned that the London Market is responsible for a significant amount of the more than one billion dollars of insurance in the ACL insurance program. In the current layer of excess insurance alone, Lloyd's has over $170,811,144 worth of insurance.[114]

As part of the Receiver's effort to determine the scope of the insurance coverage Lloyd's underwriters issued protective of ACL, the Receiver issued a subpoena to the Lloyd's entity for which the South Carolina Department of Insurance is capable of accepting service – "Underwriters at Lloyd's London" – on January 9, 2024.[115] The Receiver properly served the subpoena through the South Carolina Department of Insurance.[116]

On February 6, 2024, "Certain Underwriters at Lloyd's, London," responded to the subpoena with a two-page list of objections and produced only some of their insurance policies and no documents on exhaustion, claims, underwriting, or agreements as requested in the Receiver's subpoena.[117]

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[113] R. at 4, Tr. of R., Aug. 21, 2023, *Tibbs v. 3M Co.*, No. 2023-CP-40-01759 (S.C. Ct. Comm. Pleas Apr. 5, 2023).
[114] *See* R. at 690-94, Letter from Sathima Jones to Peter Protopapas, Jan. 25, 2024.
[115] *See* R. at 695, Subpoena to Lloyd's, Feb. 21, 2024, *Mcdowell v. A.O. Smith Corp.*, No. 2023-CP-40-06157 (S.C. Ct. Comm. Pleas Nov. 17, 2023).
[116] *See* R. at 700, Letter from South Carolina Director of Insurance to Mendes & Mount, LLP, Jan. 11, 2024.
[117] *See* R. at 701-03, Letter from John Matosky to John Chandler, Feb. 6, 2024.

Following a March 13, 2024 hearing, the circuit court entered an order on March 22, 2024 requiring Lloyd's to respond to twelve areas of inquiry "under penalty of perjury and produce all documents described below by March 27, 2024, when mediation is scheduled for the cases set for trial in April."[118] The Order required Lloyd's to produce, among other things, copies of all insurance policies issued by Lloyd's or Lloyd's affiliated entities protective of ACL during the period 1961 to 1982, as well as all associated underwriting files, claims files and communications related to those policies.[119]

The same day the circuit court entered its order, Lloyd's produced 1,296 pages of previously withheld documents to the Receiver, including copies of insurance policies, underwriting files, and an Interim Agreement among ACL, General Dynamics, and Lloyd's related to the Lloyd's insurance coverage, all of which informed the Receiver's understanding of the insurance coverage available to ACL.[120]

9. Lloyd's has a duty to reimburse defense costs and indemnify ACL.

a. The policy language requires reimbursement of defense costs.

Lloyd's issued excess insurance policies protective of ACL.[121] To pay asbestos claims against it, ACL is currently [redacted].[122] The currently accessed policies are as follows: [redacted]

[118] *See* R. at 705, Order on Disc., Mar. 22, 2024 *McDowell v. A.O. Smith Corp.*, No. 2023-CP-40-06157 (S.C. Ct. Comm. Pleas Nov. 17, 2023).
[119] *Id.* at 3-5.
[120] A rolling production of materials, mostly including historical claims files, has continued since that date.
[121] The insurance policies relevant here were issued to General Dynamics Corporation, and listed ACL as an insured beginning in April 1973. *See* R. at 710, CNA Internal Memorandum, Jan. 27, 1981 ("[ACL] was acquired by General Dynamics in 1969 and [ACL] did not go on the General Dynamics coverage until April 1, 1973").
[122] *See* R. at 764, E-mail from G. Aguanno to R. Dufour, Mar. 20, 2023 (noting [redacted]

[redacted]. Each of those policies includes the following language related to the payment of legal expenses:

[redacted][123]

Section A of the Primary Home Umbrella Policy grants coverage "for damages, direct or consequential and expenses, all as more fully defined by the term "ultimate net loss" on account of – (i) Personal Injuries, including death at any time resulting therefrom."[124] The policy specifies that the term "Ultimate Net Loss" shall mean the total sum that the Insured or its insurer become obligated to pay by reason of personal injury and "shall also include . . . expenses for doctors, lawyers, nurses and investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits . . . , excluding only the salaries of the Insured's or of any underlying insurer's permanent employees."[125]

b. The Interim Settlement Agreement governing the parties requires reimbursement of defense costs.

Because the Lloyd's excess insurance coverage that ACL accesses for payment of asbestos claims is shared with General Dynamics Corporation ("General Dynamics"), in August 1998, [redacted]

[redacted] Those policies were: [redacted]

[123] R. at 767-74, Lloyd's Policy UJL0666; R. at 775-82, Lloyd's Policy UJL0667; R. at 785-89, Lloyd's Policy UKL1056 at 7; R. at 792-801, Lloyd's Policy UKL1057 at 8.
[124] R. at 711-13, Home Policy HEC 9 53 46 62 for the policy period July 1, 1977 to July 1, 1978.
[125] R. at 711-13

[redacted]

[redacted][126] The Agreement described its scope as follows:

[redacted][127]

[redacted]

[redacted]:

[redacted]

[redacted][128]

[redacted]

[redacted].[129]

On February 19, 2024, six months after the Receiver was appointed, [redacted]

[redacted][130] For the first time since 1998, the Agreement [redacted] The parties agreed

[126] R. at 802-27, Interim Settlement Agreement Between ACL, General Dynamics, and London Market Insurers, Aug. 24, 1998.
[127] R. at 805.
[128] R. at 816
[129] R. at 831-861. These addenda were entered without notice to the Receiver.
[130] R. at 851-52.

to [redacted].[131] Practically speaking, this would mean that [redacted]."[132]

In addition, Paragraph 3 to the addendum states as follows:

[redacted][133]

Addendum 8 allowed Lloyd's to maintain its decades-long agreement with ACL in Quebec without any Receiver interference.

On February 23, 2024, just four days after ACL and Lloyd's entered into Addendum 8, the circuit court issued an Order in which it repeated its warning to ACL about depleting insurance assets and ordered the ACL insurers to cooperate with the Receiver.[134] Despite the circuit court's orders, Lloyd's did not tell the Receiver about the Agreement or Addendum 8.

c. Lloyd's has paid ACL's defense costs for many years.

[131] R. at 851-52.
[132] R. at 851-52.
[133] R. at 852.
[134] R. at 714-20, Order, Feb. 23, 2024, *Donaghy v. 4520 Corp*, No. 2023-CP-40-03108 (S.C. Ct. Comm. Pleas June 14, 2023) ("2. Neither Atlas nor ACL shall take any actions to deplete the insurance assets or otherwise make them unavailable to the cases pending in this Court. . . . 5. The insurers for Atlas and ACL are expected to cooperate with the Receiver for Atlas and ACL. The Receiver for Atlas and ACL shall be viewed as the named insured and the representative for both Atlas and ACL in the defense of asbestos litigation matters and the management of an insurance or insurance-related assets.").

Lloyd's has paid defense costs for ACL asbestos claims consistently for many years. Documents produced in this litigation demonstrate, for instance, that ACL's national coordinating counsel in the U.S. litigation, Richard Goldfein of Goldfein & Joseph, PC billed Lloyd's $[redacted] for legal services between [redacted].[135]

d. Lloyd's continued to pay indemnity claims outside of South Carolina after the Receiver's appointment.

Lloyd's actively participates in ACL asbestos claims in the United States. According to information the Receiver has obtained through his efforts to discharge his Court-ordered duties, and according to a list of tendered ACL asbestos claims, the majority of which were South Carolina asbestos claims tendered by the Receiver, one of ACL's insurers notes that two claims—one filed in Oneida County, New York and one filed in Niagara County, New York—had been tendered and then settled.

ARGUMENT

I. Petitioners are not entitled to a writ of prohibition because they have effective remedies available—and are even pursuing one.

This Court issues writs of prohibition only in extraordinary circumstances. *See* S.C. Const. art. V, § 5; S.C. Code Ann. 14-3-310; Rule 245(b), SCACR. Such extraordinary writs are "aptly named," because "they are intended only for the most *extraordinary* and exceptional situations." *State v. Isaac*, 405 S.C. 177, 185, 747 S.E.2d 677, 681 (2013); *see* Rule 245(a) (stressing that the "Supreme Court will not entertain matters in its original jurisdiction when the matter can be determined in a lower court in the first instance," and that a petition invoking the Court's original jurisdiction must identify the "public interest" or "special grounds of emergency or other good reasons" justifying this Court's exercise of its original jurisdiction). "[M]ore than seven centuries"

[135] R. at 861, spreadsheet of Chubb bates information.

of the writ of prohibition's use "in the common-law system of jurisprudence" teach that the writ "should be used with forbearance and caution, and only in cases of necessity." *Ex parte Jones*, 160 S.C. 63, 158 S.E. 134 (1931). The "primarily … preventive", and "only incidentally remedial" writ of prohibition is used "to prevent the assumption and exercise of jurisdiction by an inferior court or tribunal in cases where wrong, damage, and injustice are liable to follow such action." *Id.* Importantly, when a lower court "has jurisdiction of the person and subject-matter of the controversy," this Court does not issue the writ of prohibition "to correct errors and regularities" of substance or procedure—"even in cases of encroachment, usurpation, and abuse of judicial power or the improper assumption of jurisdiction"—if the petitioner has any other "adequate and applicable remedy" available, whether "by appeal, writ of error, certiorari," or otherwise. *Id.*

The petition here falls far short of showing the "necessity, urgency," or "clear and obvious or special emergency" required for a writ of prohibition to issue. 72A C.J.S. *Prohibition* § 17. The other effective remedies available to Petitioners—including one that Petitioners are actively pursuing—preclude issuance of the writ here. Petitioners' arguments here are already before this Court in two pending cases, which may be scheduled for oral argument as soon as February 2025. *See Tibbs v. Asbestos Corporation Limited, et al.*, Appellate Case Nos. 2023-001461 and *Welch v. Atlas Turner, Inc., et al.*, Appellate Case No. 2023-001096.

This Court need not issue a writ of prohibition to address Petitioners' arguments because Petitioners have already presented the very same arguments in *Tibbs*. In that case, Petitioners filed an *amicus* brief arguing that this Court should vacate the circuit court's receivership order because (1) the equitable remedy of receivership is a drastic and temporary remedy; (2) the order violates South Carolina law; (3) the order violates the United States Constitution; and (4) allowing receiverships like the ACL Receivership will destabilize insurance markets and harm South

Carolina and its citizens. Brief of *Amici Curiae* at 6–26, *Tibbs v. Asbestos Corporation Limited, et al.*, Appellate Case No. 2023-001461 (Apr. 26, 2024). Petitioners make the exact same arguments here. The petition does raise other, additional arguments, but Petitioners' choice to make more arguments here does not make the other appellate remedy that Petitioners are already pursuing anything less than effective. Petitioners, for example, could have sought leave to amend their *amicus* brief to raise those arguments, but Petitioners did not.

Petitioners also argued that the ACL receivership was invalid in a direct appeal to the Court of Appeals, but Petitioners voluntarily withdrew that appeal on August 20, 2024. *See Link v. 4520 Corp., Inc., et al.*, Appellate Case No. 2024-000501. More specifically, Petitioners' initial brief argued that the ACL receivership order was unlawful because it violated South Carolina law and the United States Constitution. *See* Initial Brief at 12–23, *Link v. 4520 Corp., Inc., et al*., Appellate Case No. 2024-000501 (Apr. 18, 2024). But before the Court of Appeals disposed of that case, Petitioners notified that court that Petitioners "wish[ed] to withdraw the appeal" after the circuit court vacated the underlying sanctions order upon the parties' joint request based on the settlement of the underlying asbestos case. *See* Letter, *Link v. 4520 Corp., Inc., et al.*, Appellate Case No. 2024-000501 (Aug. 20, 2024). Petitioners' withdrawn appeal was one effective appellate remedy that Petitioners could have used—and for a time did use—to raise their arguments about the ACL receivership. That appeal is no longer available to Petitioners solely because of their own voluntary choice to request and then accept vacatur of the sanctions order instead—not because no adequate remedy was available.

This Court has previously considered a petition for writ of prohibition from an order instituting a receivership—and the Court denied the petition in part based on reasons that apply equally here. In *State Board of Bank Control v. Sease*, 188 S.C. 133, 198 S.E. 602, 602 (1938),

the State Board of Bank Control sought a writ of prohibition from this Court after the circuit court appointed a receiver over the Mechanics Building and Loan Association of Spartanburg in one proceeding, and in another proceeding issued a rule to show cause as to why a receiver should not be appointed over the Home Building and Loan Association of Spartanburg. This Court dismissed the petition without reaching the "broad questions" it raised. *Id.* at 603. The Court found "no justification . . . for departing from the orderly process of law," which—"especially in a case involving matters of constitutional law"—properly entails

> the proper presentation of the issues before the Circuit Court; the full argument of the issues before such Court; the disposition of such issues by that Court; and the submission of the final issues to the Supreme Court in the light of the considered judgment of the Circuit Court, and of arguments of counsel weighted with the experience obtained in the contest in the Circuit Court.

Id. at 603-04. The Court also found a writ of prohibition inappropriate given the other adequate remedies at law available to the petitioners, who could have raised the very same issues by intervening in one appeal before the circuit court (and appealing an adverse decision there if necessary) and by appealing from another circuit court decision in a case to which the petitioners were already parties. *Id.* at 604. The Court also found inappropriate the petitioners' attempt to "consolidate two wholly independent and unrelated matters into a single cause" by "asking … for an order" that "would apply equally to the liquidation of two" distinct "associations that ha[d] no connection with each other." *Id.* The Court dismissed the petition in *Sease* for these reasons.

Here, as in *Sease*, there is no "necessity," "urgency," or "emergency" to justify this Court's issuance of an emergency writ of prohibition, especially given that the Court is already considering the same issues—including in the *Tibbs* and *Welch* appeals, where Petitioners themselves raised them.

II. The court properly exercised its lawful authority to appoint the Receiver to find, collect, and administer ACL's insurance assets.

A. The court appointment of the Receiver is consistent with South Carolina law and practice.

To begin, the Circuit Court did not appoint the Receiver as a discovery sanction. The Circuit Court did appropriately sanction ACL for its refusal to comply with the Court's discovery and related orders, but the court sanctioned ACL by striking its answer, as the Receiver's primary brief in *Tibbs* explains. (Resp. Br. at 7–11, 15–18, Appellate Case No. 2023-001461), (Order Holding ACL in Contempt, *supra* note 105 ("Given [ACL's] intentional and willful refusal to participate in discovery, the Court hereby strikes ACL's pleadings.")).

Courts commonly, and appropriately, strike pleadings to sanction a party that answers a complaint but then refuses to participate in the proceedings. *See Scott v. Greenville Housing Authority*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (2003) (holding that court had the option under Rule 37(b)(2)(C), SCRCP, "to completely strike (the defendant's) pleadings … as a sanction for its failure to cooperate in discovery"); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equipment Mfg. Co., Inc.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999) ("If a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment."). Petitioners do not contest the Circuit Court's authority to sanction ACL for its refusal to comply with discovery and related orders, nor do Petitioners challenge the Circuit Court's striking of ACL's answer as an inappropriate sanction.

The Circuit Court did not appoint the Receiver to sanction ACL, but rather because ACL's conduct and its consequences—ACL's failure to comply with discovery orders and the striking of its answer—made a default judgment imminent. ACL's misconduct, from its willful refusal to comply with the Court's orders to its misrepresentations about the availability of insurance

coverage, threatened to deny South Carolina asbestos tort victims relief to which they may be entitled. The Circuit Court's appointment of a receiver in these circumstances was a proper exercise of the court's discretion, consistent with settled law.

South Carolina law allows circuit courts to appoint receivers "in a variety of situations." *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 697 n.2, 869 S.E.2d 859, 862 n.2 (Ct. App. 2022) (quoting S.C. Code Ann. § 15-65-10). The relevant statute permits a court to appoint a receiver not only in four specifically enumerated circumstances, but also "[i]n such other cases as are provided by law or may be in accordance with the existing practice…." § 15-65-10(5); *see First Carolinas Joint Stock Land Bank of Columbia v. Knotts*, 191 S.C. 384, 1 S.E.2d 797, 805–06 (1939) (receivers are historically appointed by courts sitting in equity to ensure a fair result). The Circuit Court's appointment of the Receiver here comports with both longstanding historical practice and common current practice in other asbestos cases. *See* Order Appointing Receiver, *supra* note 109.

"The right to have a receiver appointed is an ancient one," *Pelzer v. Hughes*, 3 S.E. 781, 785 (S.C. 1887), that traces back to courts of equity appointing receivers to ensure fair results *First Carolinas Joint Stock Land Bank of Columbia v. Knotts*, 1 S.E.2d 797, 805–06 (S.C. 1939). Such appointments are reserved for "exceptional circumstances," *id.* at 805, including cases where, as here, a defendant "is trying to defeat his 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." *Va. Carolina Chem. v. Hunter*, 84 S.C. 214, 66 S.E. 177, 179 (1909). A court faced with such willful misconduct "will grant any relief within its jurisdiction appropriate and effective to protect creditors against the fraud," including appointment of a receiver. *Id. at* 179; *accord Weis v. Goetter*, 72 Ala. 259, 261 (Ala. 1882) ("In cases where an estate is held by a party, under a title

obtained by fraud, actual or constructive, a receiver will be appointed." (quoting STORY'S EQ. JUR. § 834)); *see, e.g.*, *Philips Med. Sys. Int'l, B.V. v. Bruetman*, 982 F.2d 211, 212 (7th Cir. 1992) (affirming the district court's default judgment and appointment of receiver given the defendant's "utter disregard for such procedural niceties as showing up for depositions and obeying court orders to remain in the country"); *Clark v. Walter T. Bradley Coal, Lime & Cement Co.*, 6 App. D.C. 437, 443–49 (D.C. Ct. App. 1895) (similar). The Circuit Court's decision here to appoint the Receiver and grant him "powers . . . related to the insurance assets of ACL" fits squarely within the long historical tradition of this practice. *See* Order Appointing Receiver, *supra* note 109.

The appointment of a receiver here also comports with the historical use of receivers to help effectuate judgments. *See* S.C. Code Ann. § 15-65-10(2) ("A receiver may be appointed by a judge of the circuit court . . . [a]fter judgment, to carry the judgment into effect[.]"). Though judgment has yet to be entered here, a default judgment against ACL is the inevitable and "practical result of" ACL's failure to participate in the proceedings and the Circuit Court's proportionate sanction of striking ACL's answer, as that court explained. Contrary to Petitioners' claims, the Circuit Court's appointment of a receiver to aid the court in the formulation and enforcement of such a judgment comports with a long history of such appointments.

The Circuit Court's appointment of a receiver not only flows from historical practice but also makes good sense. When, as here, a debtor displays the "conscious intent to defeat, delay or hinder his creditors in the collection of debts," a court can protect the creditors—like the asbestos tort victims here—by appointing a receiver. *Va. Carolina Chem.*, 66 S.E. at 179. It is thus troubling, though not surprising, that ACL and Petitioners' approach would leave courts unable to meaningfully protect creditors in such circumstances. When—as ACL undeniably did here—a debtor refuses to comply with a court's orders and misrepresents its insurance and other assets

Court, ACL and Petitioners' approach would deprive the court of its traditional equitable mechanism to independently verify and bring before it the debtor's South Carolina assets to potentially respond to claims of South Carolina residents. South Carolina law should not and does not require that result.

Petitioners, parroting ACL, contend that ACL has merely relied on a jurisdictional defense, not engaged in the kind of "moral fraud" that warrants appointing a receiver. (Pet. Br. p. 25–26; Amicus Br. p. 12 in Appellate Case No. 2023-001461). Petitioners whitewash ACL's litigation tactics: as the Circuit Court emphasized, ACL's purported jurisdictional defense defies "decades of opinions dismissing those very assertions." *See* Order Appointing Receiver, *supra* note 109. Willfully refusing to comply with clear court orders based on arguments that this Court and many others have repeatedly rejected—indeed amounts to moral fraud, *i.e.*, a "conscious intent to defeat, delay or hinder [the asbestos tort Plaintiffs] in the collection of debts." *Va. Carolina Chem.*, 66 S.E. at 179.

ACL has only made its moral fraud even more obvious through its repeated misrepresentations to the Circuit Court about the availability of insurance to cover injuries it caused in the United States. As discussed above, the Receiver has uncovered clear evidence of insurance—and agreements with insurers to liquidate that insurance into trusts for victims— that plainly disproves ACL's representations to the Circuit Court.

Appointing a receiver here is thus "in accordance with the existing practice" of appointing receivers in appropriate situations in asbestos suits. § 15-65-10(5). The Circuit Court here is far from alone in recognizing Protopapas as a trusted receiver in insurance matters. The Delaware Court of Chancery, for example, recently appointed Mr. Protopapas to serve as a receiver in a matter before that court. *See In re Reinz Wis. Gasket, LLC*, 2022-0859 (Del. Ch. Aug. 3, 2023)

(appointing Peter D. Protopapas as receiver). The Receiver's appointment in this case thus accords with both historical practice and common present practice in the Circuit Court to deal with its asbestos docket. That appointment should be affirmed under section 15-65-10(5).

B. The Receiver was appointed to administer property within the State.

This Court should also reject the Petitioners' attacks on the Receivership Order based on the incorrect assertion that ACL is an ongoing foreign corporation with no assets in South Carolina. As an initial matter, even setting aside that ACL sold significant quantities of asbestos into South Carolina, neither this Court nor the Circuit Court need uncritically accept ACL's assertion that it has no assets in South Carolina—especially given ACL's track record of contemptuously defying court orders and misrepresenting relevant facts. Indeed, the compelling justifications for appointing a Receiver include that he may identify ACL's South Carolina assets, including any insurance assets covering ACL's South Carolina liabilities.

In fact, the Receiver has already uncovered and presented evidence in the Circuit Court showing that ACL has insurance coverage for the injuries ACL is alleged to have caused to South Carolina residents. South Carolina law deems such policies covering in-state injuries to in-state residents to be in-state assets subject to applicable South Carolina law and South Carolina courts' jurisdiction. Section 38-61-10 of the South Carolina Code states: "All contracts of insurance on property, lives, or interests in this state are considered to be made in the State and all contracts of insurance the applications for which are taken within this State are considered to have been made within this State and are subject to the laws of this State." ACL thus cannot credibly deny that insurance policies covering property, lives, or interests in South Carolina are subject to the Circuit Court's jurisdiction. *See id.*

As this Court has made clear, under Section 38-61-10, it is "immaterial where [an insurance] contract was entered into" or whether "the policyholders or insurers [are] citizens of

South Carolina." *Sangamo Weston v. Nat'l Sur. Corp.*, 307 S.C. 143, 149, 414 S.E.2d 127, 130 (1992). The sole and dispositive question under the statute is whether the insurance policies cover "property, lives, or interests" in the State. *Id.* Thus, under this provision, "South Carolina substantive law governs" ACL's insuring assets covering South Carolina property and victims—including South Carolina law involving the appointment of a receiver over those assets. *See* Order Appointing Receiver, *supra* note 109 (quoting *Sangamo*, 307 S.C. at 149).

Petitioners object based on cases holding that insurance proceeds may not be attached until after judgment has been rendered and the amount of the claim has been established, but that argument and those cases are only a distraction. (Pet. Br. at 26–29; Amicus Br. at 12–15 in Appellate Case No. 2023-001461 (citing *Howard v. Allen*, 254 S.C. 455, 460–61, 176 S.E.2d 127, 129 (1970) and *PCS Nitrogen, Inc. v. Cont'l Cas. Co.*, 436 S.C. 254, 264–65, 871 S.E.2d 590, 595 (2022)). Attachment is not at issue here. The relevant question here is whether the Circuit Court has jurisdiction over ACL's potential insurance coverage responsive to satisfy the tort claims of South Carolina residents. As explained above, because those policies insure "property, lives, or interests" in the State, they are assets in the State subject to the Circuit Court's jurisdiction. Indeed, ACL's insurance assets comprise the primary responsibility of the Receivership estate, and those insurance policies are deemed to be assets in South Carolina under Section 39-61-10. *See Protopapas v. Zurich Am. Ins. Co.*, 2023 WL 2206640, at *2 (D.S.C. Feb. 24, 2023) (Coggins, J.), appeal dismissed sub nom., *Protopapas v. Travelers Cas. & Sur. Co.*, 94 F.4th 351 (4th Cir. 2024); *Protopapas v. Travelers Casualty & Surety Co.*, 94 F.4th 351, 358 (4th Cir. 2024) ("Exercising federal jurisdiction over a suit by or against a state-appointed receiver, who functions as an 'arm' or 'executive' of the state-receivership court, would infringe on the state court's control over the receivership assets — its exclusive jurisdiction.").

ACL's status as a foreign corporation or an ongoing concern is beside the point, and that status certainly does not empower ACL to defy South Carolina law. Petitioners contend that because ACL is "a solvent, active Canadian corporation," the appointment of the Receiver amounts to a "corporate death penalty." (Pet. Br. p. 17; Amicus Br. p. 5, Appellate Case No. 2023-001461). But the Receiver was appointed only for the limited purpose of marshaling ACL's previously concealed South Carolina insurance assets. That is a core role for receivers appointed in South Carolina, especially in asbestos cases, and one that does not unduly interfere with ACL's other activities. Nor does the appointment of a receiver for this limited purpose put ACL's insurers in an untenable position concerning whether to comply with the requirements of the Receivership Court or ACL's directions. (Pet. Br. at 41–42; Amicus Br. at 23–24 in Appellate Case No. 2023-001461). Both ACL and its Insurers are lawfully subject to the Receivership Court's jurisdiction and disregard that court's lawful requirements at their peril. In any event, ACL can hardly be heard to complain about any interference with its autonomy resulting from the receiver's appointment when ACL's own litigation and related misconduct made that appointment necessary in the first place.

III. The Receivership Order does not violate the United States Constitution.

Petitioners first claim the limited receivership violates "dormant commerce clause principles." (Writ at 32). But that argument relies on two mistaken premises: (1) that the insurance policies are not assets in the State under section 38-61-10; and (2) that the receivership had the effect of dissolving ACL. Both premises fail.

First, South Carolina Code 38-61-10 states: "All contracts of insurance on property, lives, or interests in this state are considered to be made in the State and all contracts of insurance the applications for which are taken within this State are considered to have been made within this

State and are subject to the laws of this State." Insurance policies covering property, lives, or interests in South Carolina are plainly subject to the circuit court's jurisdiction. *See id.*

This State's Supreme Court has interpreted that statutory provision as establishing that it is "immaterial where [an insurance] contract was entered into" or whether "the policyholders or insurers [are] citizens of South Carolina." *Sangamo Weston v. Nat'l Sur. Corp.*, 307 S.C. 143, 149 (1992). What matters for the Court's exercise of jurisdiction is whether the insurance policies cover "property, lives, or interests" in the state. *Id.* Thus, under this provision, "South Carolina substantive law governs" ACL's insurance assets covering South Carolina property and victims. (Receiver Order at 5 (quoting *Sangamo*, 307 S.C. at 149)). That substantive law includes South Carolina law involving the appointment of a receiver over those South Carolina assets. Indeed, Petitioners make no argument that a state regulating insurance assets within the state violates the dormant Commerce Clause. Nor could they.

Second, the circuit court did not dissolve – or effectively dissolve – ACL. The receiver is appointed for the narrow purpose of administering ACL's insurance assets. (Receivership Order at 6 ("[T]he powers afforded to the receiver here are all related to the insurance assets of ACL.")). In Petitioners' cited cases, receivers were appointed over the entire company at issue – not just their historical insurance policies. (Writ at 31-32). The circuit court's limited appointment of a receiver over the ACL insurance assets here, by contrast, falls squarely within the authority of the State of South Carolina to regulate the business of insurance within its state.

Indeed, Petitioners ignore that the dormant commerce clause cannot apply where Congress has authorized states to take certain actions—such as regulating insurance assets. "'When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack' since Congress's commerce power in such instances is 'not dormant, but has been exercised

by that body.'" *Tri-M Grp., LLC v. Sharp*, 638 F.3d 406, 430 (3d Cir. 2011) (quoting *Northeast Bancorp, Inc. v. Bd. of Gov'rs of Fed. Res. Sys.*, 472 U.S. 159, 174 (1985)). As relevant here, "Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act." *Western & Southern Life Ins. Co. v. State Board of Equalization of California*, 451 U.S. 648, 653 (1981). Thus, regulation of insurance does not violate the Commerce Clause. *See* 15 U.S. Code § 1011 ("[T]he continued regulation and taxation by the several States of the business of insurance is in the public interest, and [] silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.").

Because the receivership order does not effectively dissolve ACL, but instead regulates insurance-policy assets within the state, there is no dormant commerce clause problem here.

Petitioners next invoke two vague foreign-relations arguments against the receivership order, neither of which are well-conceived. First, they argue that the order somehow oversteps the federal government's exclusive authority by impacting foreign affairs (in unexplained ways). (*See* Writ at 33-34). As an initial matter, Congress's authorization of states regulating insurance business within their state obviates any concern regarding tangential effects that regulation may have on foreign insurance companies covering property in the states. Regulation of insurance within the state plainly does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (Writ at 34).

Nor is this case anything like Petitioners' cited cases dealing with foreign affairs issues like foreign government sanctions and diplomatic relations after the Holocaust. The cases Petitioners cite relate to world events for which "the President's diplomatic discretion" was of key importance and could not be transgressed by a court's decision. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396,

423-24 (2003). *American Insurance Ass'n* involved Holocaust survivors seeking recompense, *id.*; and *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), involved sanctions on the military junta in Burma. ACL's defiance of South Carolina court orders in an asbestos case does not constitute an event of significance in the foreign affairs of the United States. Whether a South Carolina court can appoint a receiver over ACL for purposes of South Carolina insurance assets does not rise to the same level of foreign affairs. And Petitioners' own cases explain an "incidental effect" on foreign affairs is of no moment. *Am. Ins. Ass'n*, 539 U.S. at 398. Petitioners never explain what effect on foreign affairs resulting here will rise about that irrelevant level.

Second, Petitioners invoke the Import-Export Clause, which plainly does not apply. That Clause does not allow a State to impose duties or imposts on imports or exports. U.S. Const. Art. I, § 10, cl. 2. The ACL receivership order plainly does not impose a tax on ACL or on Petitioners. Nor do Petitioners mount any argument or cite any authority for the idea that in does. Instead, they cite a partial dissent from a Supreme Court opinion which simply offers a novel theory on the Import-Export theory on which Petitioners appear to rely—but which does not apply to insurance receiverships—and then notes "I do not take a position here on whether such an argument ultimately would prevail. I note only that the question warrants additional consideration in a future case." *National Pork Producers Council v. Ross*, 598 U.S. 356, 409 (2023) (Kavanaugh, J., concurring). Appointing a receiver to marshal the insurance assets that ACL refuses to marshal in no way imposes a tax on imports.

IV. The Receivership Order is valid.

Petitioners attempt to collaterally challenge the Receivership Order for the first time in this proceeding on the basis that the circuit court did not include "a clause fixing the value of the property" sought to be placed in the hands of a receiver, as purportedly required by section 15-65-60 of the South Carolina Code. No such requirement, which is related to posting bonds by a party

claiming rights to property, applied to the ACL Receivership Order when the liabilities at issue and amount of assets that may be available, including through uneroded insurance, could not be valued. This is especially true here where ACL is actively concealing the value of its insurance assets. *See* supra 25-26.

Petitioners rely on *Truesdell v. Johnson*, 144 S.C. 188, 142 S.E. 343 (1928). However, this case is not applicable here. The value of the property at the center of the *Truesdell* case—an action brought to liquidate the affairs of a partnership—was easily measurable by the court. There, the receiver took possession of the tangible property of the company, except its book and records. *Id*. at 192, 142 S.E. at 343. As such, the property received should have been inventoried and valued.

The statutory language *Truesdell* relies on requires the posting of a bond " in the penalty of double the value of the property." SC Code § 15-65-50 (2023). However, as this Court has reasoned, "[h]owever plain the ordinary meaning of the words used in a statute may be, the courts will reject the meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intent." *Kirkiakides v. United Artists Comms., Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994).

When the language of Section 15-65-50 is applied to the current circumstances its leads to an absurd result that could not have been the legislature's intent. Here, the Receiver holds title to choses in action, as referenced in the Receivership order. *See, e.g.*, *Hirson v. United Stores Corp.* 263 A.D. 646, 34 N.Y.S.2d 122 (App. Div. 1st Dep. 1942), *aff'd* 43 N.E.2d 712 (N.Y. App. Ct. 1942) (holding that title to choses in action held by a receiver appointed pursuant to Delaware law would be afforded "full faith and credit"). It is impossible to ascertain the value of choses in action for purposes of posting a bond.

Petitioners do not have standing to raise arguments related to any alleged failures of the circuit court to set a bond involving a receivership over ACL and its assets. As stated in *Ex parte Rowley*,

> The earnest contention that the appointment of the receiver should be held invalid for failure of the order to contain a fixation of the value of the property involved, in accord with subdivision (10) of Section 584 of the Code of 1932, is untenable by the appellants . . . for the reason that the requirement is for the benefit of ***him or them who is or are in possession of the property and to enable him or them to replevy it***; but the appellants mentioned were not in possession of the property and they cannot make complaint. *Truesdell v. Johnson*, 144 S.C. 188, 142 S.E. 343. Section 99, Receivers, 53 C.J., 82, is in part as follows, with citations of supporting authorities: '***Also a person who is not affected by a particular ground of objection may not present it***.'

200 S.C. 174, 20 S.E.2d 383, 387 (1942) (emphasis added). The receivership relates to ACL's property, not Petitioners' property. Petitioners do not hold title to ACL's insurance policies or any other assets accessible by the Receiver on behalf of ACL. ACL—whose property is in receivership—has made no effort to post a bond for the return of property or set forth any arguments that a bond was required.

V. The Receivership Order, consistent with South Carolina law, authorizes the Receiver's actions beyond the *Tibbs* matter.

As discussed, courts of equity for centuries have appointed receivers to ensure fair results. *See supra* at 36. The central function of a receivership is to marshal assets for the purposes of satisfying creditors, including tort claimants. Consistent with these principles and historical practice, the Supreme Court of the United States has long recognized 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). Rule 66 of the South Carolina Rules of Civil Procedure 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.

The Circuit Court broadly granted the Receiver

> the power and authority [to] fully administer all insurance assets of Asbestos Corporation, Ltd. and any subsidiaries, accept service on behalf of ACL, engage counsel on behalf of ACL, to assume control and defense of asbestos claims made against ACL in the United States, and take any and all steps necessary to protect the interests of ACL whatever they may be.

Order Appointing Receiver, *supra* note 109. The Order requires the Receiver to "investigate the existence of all insurance or indemnifications coverages or claims relating thereto which are potentially available to ACL." *Id*. at 7. Petitioners issued excess insurance policies protective of ACL, which are assets of ACL that the Receiver must investigate and marshal.

This Receivership is not limited to the single *Tibbs* action, and thus should not be limited by the provisions that contemplate a receiver appointed "before judgment" in a single action over property that is the subject of that action. As discussed above, the receivership is supported by section 15-65-60(5), which allows the appointment of a receiver "[i]n such other cases as are provided by law or may be in accordance with the existing practice." This subsection does not tie the receivership to a single action. South Carolina jurisprudence, particularly in recent years, provides widespread evidence of an "existing practice" of appointing a receiver—even in the absence of a judgment—where the court is concerned that the party at issue may move assets and avoid litigation. One such example outside of the asbestos docket is the recent appointment of co-receivers for defendant Richard Alexander Murdaugh. Here, given ACL's litigation-avoidance strategy and impending default due to its litigation misconduct, there were ample legal, equitable,

and public policy concerns to warrant the appointment of the Receiver in accordance with South Carolina law.

Petitioners' due process rights were not infringed by the Circuit Court's appointment of a Receiver over ACL. Petitioners were not entitled to notice because the receivership involves assets owned by ACL, not by Petitioners. Further, it would be untenable to require a circuit court to give notice to all insurance companies who may potentially insure a corporation before establishing a receivership whose central function is to identify those insurance assets. This is especially true here where ACL misrepresented to the circuit court that it had no insurance coverage and is actively concealing the value of its insurance assets.

CONCLUSION

For the foregoing reasons, the Court should dismiss or deny the Petition for Writ of Prohibition.

Respectfully Submitted,

s/Jonathan M. Robinson
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ATTORNEYS FOR THE RECEIVER PETER D. PROTOPAPAS

November 27, 2024

EXHIBIT 8

WASHINGTON JUDGMENT

Honorable TaTeasha Davis
Special Master Bruce W. Hilyer
Trial Date: March 3, 2025

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

JOLENE R. KOTZERKE, individually as the surviving spouse and as Executor for the Estate of STEVEN D. KOTZERKE, deceased,

Plaintiff,
v.

3M COMPANY, et al.

Defendants.

No. 23-2-05287-6

JUDGMENT ON VERDICT

JUDGMENT SUMMARY

1.	Judgment Creditors:	Jolene R. Kotzerke, Molly Dahlgren, and Breanna Gaynor
2.	Judgment Creditor's Attorneys:	Trey Branham and Leonard Sandoval of Dean, Omar, Branham & Shirley, LLP, and Brian D. Weinstein, Alexandra Caggiano, and Dylan J. Johnson of Weinstein Caggiano PLLC
3.	Judgment Debtor:	Asbestos Corporation Limited
4.	Judgment Debtor's Attorneys:	Kevin J. Craig and Trevor J. Mohr of Gordon Rees Scully Mansukhani, LLP
5.	Principal Judgment Amount:	$16,219,398.25[1]

[1] The Court previously determined Asbestos Corporation Limited is not entitled to setoffs or a comparative fault allocation. *See*, Findings of Fact and Law in the Matter of Plaintiffs Jolene Kotzerke et al. v. Asbestos Corporation Limited, attached as **Exhibit B**.

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6. Costs, expenses, attorney fees: $687.60[2]

7. Post Judgment Interest Rate: 6.5% per annum

A damages-only bench trial was conducted on March 3, 2025. On March 18, 2025, the Court entered its Findings of Fact and Conclusions of Law, returning a verdict in the amount of $16,219,398.25 against ACL. Of this amount, $14,219,398.25 was awarded to Jolene Kotzerke individually and as Executor of the Estate of Steven D. Kotzerke, $1,000.000.00 was awarded to the Kotzerkes' daughter Molly Dahlgren, and $1,000,000.00 was awarded to the Kotzerkes' daughter Breanna Gaynor. A copy of the Court's Findings of Fact and Conclusions of Law is attached as **Exhibit B**.

Accordingly, it is Ordered, Adjudged, and Decreed that Judgment on this matter, which is the final determination of the rights of the parties in this action, is entered as follows.

1. On March 3, 2025, this Court held a bench trial on the issue of damages, resulting in Findings of Fact and Conclusions of Law issued on March 18, 2025.

2. Asbestos Corporation Limited is liable to Jolene Kotzerke, individually and as Executor of the Estate of Steven D. Kotzerke, in the amount of $14,219,398.25.

3. Asbestos Corporation Limited is liable to Molly Dahlgren in the amount of $1,000.000.00.

4. Asbestos Corporation Limited is liable to Breanna Gaynor in the amount of $1,000,000.00.

5. Pursuant to CR 54(d), Plaintiff is entitled to costs in the amount of $687.60.

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[2] See accompanying **Exhibit A**, Bill of Costs.

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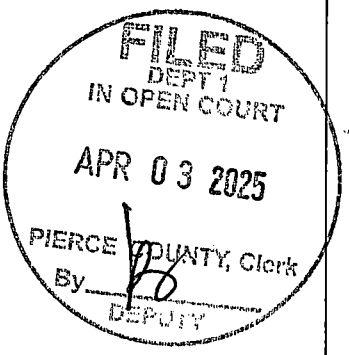
6. Post-Judgment interest shall accumulate on the Judgment, including taxable costs, attorney fees, and expenses, at the rate of 6.5% pursuant to RCW 4.56.110(3)(b).[3]

JUDGMENT ENTERED THIS 3rd day of April, 2025.

HONORABLE TATEASHA DAVIS

TaTeasha Davis

Presented by:



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And

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[3] The prime rate for both February and March, 2025 was 4.5%.

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