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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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JURISDICTION AND LEGAL STANDARD

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

ARGUMENT

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

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

I. The Receivership Order Is Contrary to Law.

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

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

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

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

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

B. The Receivership Order Violates South Carolina Law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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[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

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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 <u>on behalf of CIHL</u> 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).

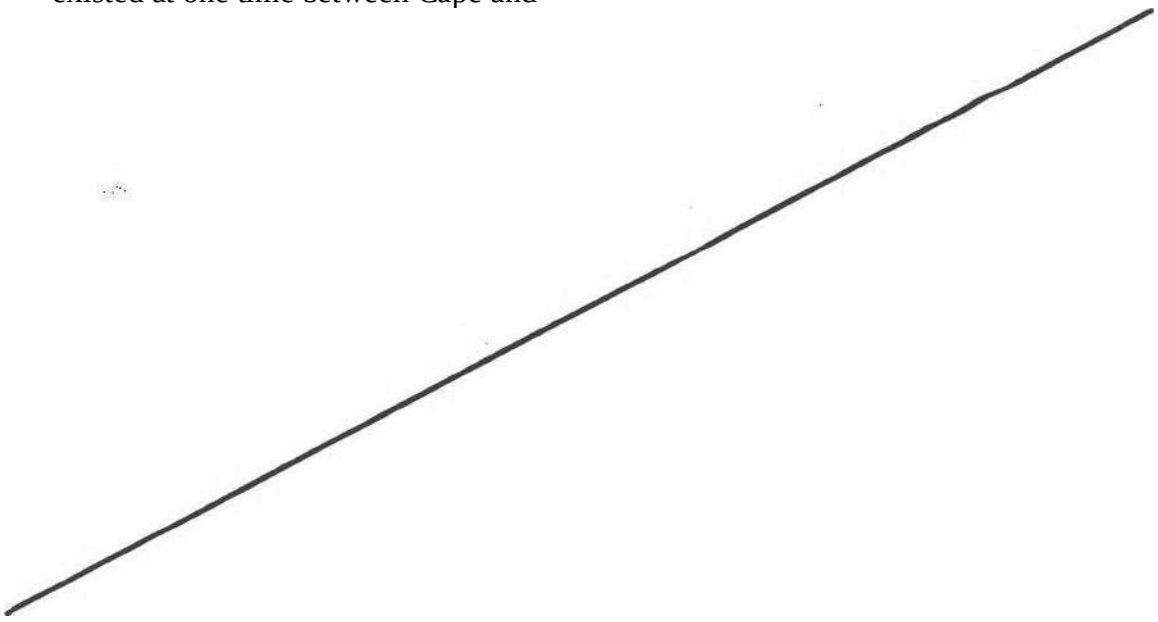
16. NAAC was the channel of communication between US customers, such as PCC, and Capasco or Casap. There was undoubtedly "a sense in which NAAC was, if the Cape Group of companies is viewed as a whole, part of the selling organisation of the group and Cape's agent in the US". (J.61C-D).

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.

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30 August 2024

FAO: Peter D. Protopapas
Rikard & Protopapas, LLC,
2110 N Beltline Blvd,
Columbia SC 29204

BY EMAIL ONLY: pdp@rplegalgroup.com

Dear Mr Protopapas

Re: Pre-Action Letter Regarding Declaratory and Injunctive Relief Contemplated Before the English court

Introduction

We are instructed by Cape Intermediate Holdings Limited ("**CIHL**") (a company incorporated in England and Wales) and Cape Plc ("**Cape plc**") (a company incorporated under the laws of Jersey) (together, "**the Claimants**").

We are writing to request that:

1. you agree to consent by 12 pm on Friday 6 September to the terms of the draft court order we propose to seek from the English Court, which is provided at Annex A ("**the Draft Order**").

2. alternatively, should you be unwilling to agree to the terms of the Draft Order, you agree to accept service of our clients' claim form and related documents on counsel you have engaged in London (Morgan, Lewis & Bockius UK LLP), or out of the jurisdiction at 2110 N Beltline Bvld, Columbia, South Carolina 29204, United States of America.

Should you decline to consent to the Draft Order, our clients intend to commence proceedings against you in the English Court pursuant to Part 8 of the CPR for an order substantially in the form set out in the Draft Order ("**the Part 8 Claim**"). Should you decline to provide your agreement to accept service, our clients will make an application for permission to serve the Claim out of the jurisdiction.

Factual background to the Part 8 Claim

CIHL is a holding company registered in England and Wales and is the successor to "Cape Asbestos Company Ltd" (which was incorporated in 1893).

Cape plc is a company incorporated in Jersey in 2011. It is the ultimate parent company of the Cape group of companies ("**the Cape Group**"). In 2017 Cape plc was acquired by Altrad UK Ltd (which is part of the Altrad group of companies – "**the Altrad Group**" – a world leader in industrial services with a turnover of £5 billion per year).

The Part 8 Claim arises in the context of (and relates to) certain legal proceedings in the US commenced against "Cape plc" and CIHL.

These proceedings ("**the USA Proceedings**") involve two separate actions in the Court of Common Pleas, State of South Carolina, County of Richland ("**the South Carolina Court**") against various defendants for the alleged exposure of the respective plaintiffs to asbestos. The two separate actions are: (1) the "**Park Claim**" (which was initiated in June 2021 by Ms Park, and subsequently taken over by her son) and (2) the "**Tibbs Claim**" (which was brought in April 2023 by Mr and Mrs Tibbs).

In the Park Claim, the Summons and Complaint names "Cape plc" as a defendant – and an Amended Summons and Complaint has added CIHL as a defendant. In the Tibbs Claim, "Cape plc" is a named defendant (but CIHL is not a named defendant).

The Part 8 Claim relates to certain of your actions in the Park Claim and the Tibbs Claim – which actions you purport to pursue in the name of and on behalf of the Claimants. Specifically, we refer to the following:

1. The Receivership Order.

    (a) This is the receivership order of Toal J dated 16 March 2023 ("**the Receivership Order**") that was granted pursuant to the Park Plaintiffs' motion dated 6 March 2023 ("**the Receivership Motion**"). (see enclosure)

    (b) The Receivership Order[1] appears to provide you with very broad powers in your capacity as receiver, including "***the power and authority [to] fully administer all assets of Cape[2]****, 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***" (emphasis added).

    (c) The Receivership Motion was based on rule 15-65-10(4) of the South Carolina Code which provides that a receivership order can be made in relation to a company where it (1) is dissolved (2) is insolvent or in imminent danger of insolvency or (3)

[1] While it is only Cape plc that is named in the Receivership Order, you have subsequently confirmed that CIHL was the only company over which the Receivership Order was intended to be made, and the Claim has been issued in the name of both the Claimants (i.e. CIHL and Cape plc) as 'belt and braces' and in order to provide maximum security/protection to those companies' respective positions.

[2] "Cape" is defined in the Receivership Order as "*Cape PLC as the successor in interest to Cape Industries Ltd. (f/k/a Cape AsbestosCompany Ltd.) ("Cape Asbestos") and its subsidiaries and global affiliates*".

has forfeited its corporate rights. Neither Cape plc or CIHL have been dissolved, nor are they insolvent, nor are they in imminent danger of insolvency.

(d) Despite the Tibbs Plaintiffs never having issued a motion seeking to appoint you as a receiver of Cape plc or CIHL in the Tibbs Claim, you have purported to act as such.

(1) The 3P Complaint.

(a) These are the third-party proceedings issued by you on 30 June 2023 in the name of and on behalf of Cape plc against a variety of defendants ("**the 3P Complaint**").

(b) The 3P Complaint was stated to be brought by "*Cape plc, individually and as successor in interest to Cape Asbestos Company Limited, by and through its duly appointed Receiver Peter D. Protopapas*" against various third party defendants ("**the Third-Party Defendants**") including, but not limited to, "Cape Holdco Ltd", "Cape Industrial Services Group Ltd", "Mohed Altrad", "Altrad UK Ltd", "Cape UK Holdings NewCo Ltd", "Altrad Services Ltd., f/k/a Cape Industrial Services Ltd", "Altrad Investment Authority S.A.S.", "Sparrows Offshore Group Limited", "Hawk Bidco US Inc", "Arranco US, LLC", "Sparrows Offshore, LLC" and "The Sparrows Group LLC".

(c) The Third-Party Defendants include, *inter alia*, both the direct subsidiaries and the immediate parent companies of the Claimants.

(d) The 3P Complaint is based on many highly contentious and wide-ranging allegations against Cape itself – and also purports to constitute admissions by Cape which are against the best interests of Cape.

(e) The claims sought in the 3P Complaint are based on unjust enrichment and/or constructive trust and/or alter-ego and veil-piercing liability and/or accounting. The claims are for an indeterminate amount.

(f) There is no express authority given to a receiver under rule 15-65-10(4) of the South Carolina Code to pursue third-party derivative claims and the Receivership Order did not expressly authorise you to initiate any third-party derivative proceedings.

(g) Despite this, you have taken the various steps in the name of Cape plc in pursuit of the 3P Complaint. Amongst other things, this has included: (i) seeking and obtaining the 3P Complaint Default Judgement against certain Third-Party Defendants including the Claimants' direct parent and subsidiaries (which include companies in the Altrad Group, and upon which the Cape Group rely for funding/financing and business cross-opportunities); (ii) making motions for disclosure, adverse inferences and sanctions for adverse inferences against certain Third-Party Defendants.

In terms of the Park Claim and the Tibbs Claim, the position is that at no stage have CIHL or Cape plc submitted to the jurisdiction of the South Carolina Court in the Park Claim or the Tibbs Claim. In this regard, CIHL and Cape plc refer to and rely upon the decision of the English Court of Appeal in Adams v Cape Industries Plc [1990] 1 Ch 433 ("**Adams v Cape**"). Nor has there been any judgment made in the Park Claim or the Tibbs Claim against CIHL or Cape plc in the State of South Carolina.

Our clients' reasons for requesting relief from the English court should you fail to agree to the terms of the Draft Order

As a matter of English private international law (which is the law governing the incorporation of CIHL) the Receivership Order has not been made by a court of competent authority, it cannot be recognised or enforced as such in England and Wales, and it provides no legitimate basis upon which you can act as the receiver of CIHL. You therefore have no authority or mandate to act on behalf of CIHL, and the directors of CIHL require you to cease and desist from purporting to do so. The same applies in respect of Jersey law and Cape plc.

In this regard:

1. CIHL is a holding company incorporated in England, which is where its management and control is based. It does not carry on any business activities in the US, or the State of South Carolina (and never has) and its management and control is not, and never has been, in the US or the State of South Carolina. It also has no, and never has had any, assets in the US or the State of South Carolina.

2. Cape plc is a holding company incorporated in Jersey, its management and control is not in the US or the State of South Carolina, it does not carry on business in the US, or the State of South Carolina and it has no, and never has had any, assets in the US or the State of South Carolina.

3. Accordingly, neither CIHL nor Cape plc have any connection with the State of South Carolina.

4. In terms of the Park Claim and the Tibbs Claim, the position is that at no stage have CIHL or Cape plc submitted to the jurisdiction of the South Carolina Court in the Park Claim or the Tibbs Claim.

5. In these circumstances, as a matter of English private international law the Receivership Order made by the South Carolina Court is not capable of recognition or enforcement by the English Court. It does not satisfy the "*sufficient connection*" threshold test for the recognition of the appointment of a foreign receiver as a matter of English private international law (in relation to which see the decision Goulding J in Re Schemmer [1975] Ch 273). As to this:

   (a) Pursuant to this test, the English Court is required to determine whether a foreign court was jurisdictionally capable to make the appointment according to the relevant principles of English private international law.

   (b) The "*sufficient connection*" test involves looking at the place of incorporation, where a company's management and control is based, whether a company is carrying on business within the jurisdiction of the foreign court and whether a company has submitted to the jurisdiction of the foreign court.

   (c) In the light of the above facts, none of those criteria are satisfied in this case.

6. In this regard, it should be noted that the only relevant American subsidiary of CIHL was North American Asbestos Corporation, which was dissolved in 1978 and has been the subject of controversy in historic American asbestos litigation. However, in Adams v Cape the English Court of Appeal specifically found that CIHL was not present in the US jurisdiction via NAAC

for the purposes of applying the common law test on the recognition of foreign judgments and that it had not otherwise submitted to the jurisdiction of the US Courts. That is the established legal position.

7. Given that, the English Court cannot recognise a final (let alone an interlocutory) US judgment against CIHL as having been made by a jurisdictionally competent foreign court it therefore follows that the English Court cannot recognise a receivership order against CIHL made on the same basis. The same applies in respect of Cape plc.

8. In this regard, the question of capacity and the constitution of the Claimants, namely, whether the acts of its directors, or others who purport to be the companies' agents, are the acts of CIHL is exclusively a question of English law, in the case of CIHL, and Jersey law in the case of Cape Plc. The law of the place of incorporation determines who are the corporation's officials authorised to act on its behalf. The appointments of the directors of CIHL are therefore governed by the law of England in the case of CIHL, and Jersey in the case of Cape plc.

9. Further, as a matter of English law, the appointment of the directors of CIHL and their competence to act on its behalf is legally unaffected by the Receivership Order made by the South Carolina Court. The same applies under Jersey law in respect of Cape plc. In this regard, any questions in relation to the governance of a company incorporated in England and Wales are plainly and properly a matter for the supervision and determination of the English Court.

10. The *de jure* directors of the Claimants (whose authority arises pursuant to the Claimants' articles of association, as well as the English Companies Act 2006 and the Jersey Companies Law 1991) remain in lawful control of the Claimants. Accordingly, the directors of both of the Claimants are entitled to seek the relief sought from the Court to be able to manage respectively CIHL and Cape plc in accordance with their best interests.

11. Accordingly, and for these reasons, and given that as a matter of English law the South Carolina Court was not jurisdictionally competent to make the Receivership Order, you have had no legitimate basis for acting and you have been acting without the Claimants' authority and/or any mandate from the Claimants.

12. The directors of CIHL and Cape plc are entitled to the relief sought against you to prevent the actual and potential harm caused by your actions. They rely *inter alia* on the following:

    a. The negative impact on directors/management. There are currently two conflicting centres of authority, which is highly prejudicial to the directors of the Claimants and the proper management of those companies (and the broader group of which they form part).

    b. The negative impact on operations/business. Customers and/or suppliers of the Cape Group (who will carry out regular credit checks and adverse media checks through their online reporting databases) will be concerned as to the extent to which authority is apparently vested in yourself as receiver and this could adversely impact their willingness to do business with the companies within the Cape Group (which are the operational subsidiaries of CIHL and Cape plc).

    c. The issues associated with your purported authority to deal with all the assets of the Claimants on a worldwide basis. In this regard, the Claimants own substantial assets

worldwide (for example, the shares that they own in the subsidiary trading companies of the Cape Group – which has a turnover of approximately £1 billion per year).

d. The negative impact on the reputation of the Claimants and the broader Cape Group. The Cape Group has a valuable brand, both in the UK and abroad, which it has sought to protect and secure.

e. The negative impact on the Scheme of Arrangement in respect of CIHL (and 12 other subsidiary companies in the Cape Group) which was sanctioned in 2006 and continues to be supervised by the English High Court.

f. The negative impact on the funding/financing arrangements of the Altrad Group (which have an indirect effect on the funding/financing of the Claimants and the broader Cape Group).

13. In addition, the issuing and pursuit of the 3P Complaint is abusive, vexatious and unconscionable. The 3P Complaint makes multiple – and highly contentious – allegations directed against the Claimants. It also purports to constitute admissions that have not been authorised by the directors of the Companies.

14. The 3P Complaint is self-evidently contrary to the Companies' best interests and the Companies are entitled to injunctions from the English Court requiring you to cease and desist pursuing such claims in their respective names.

In these circumstances, the directors of CIHL and Cape plc are entitled to the assistance of the English court as the duly appointed directors of CIHL and Cape plc in order to enable them to administer, manage and run the companies efficaciously in accordance with their legal duties and in the best interests of the companies; and to prevent and contain the manifest prejudice to both them and the wider Cape group of companies by your conduct, which is directly contrary to the interests of CIHL and Cape plc and is abusive, vexatious and unconscionable.

There is a real and present dispute as to who is in control and authorised to act on behalf of the Claimants, and it is appropriate for the Court to make the declarations sought. In addition, it is appropriate to grant the injunctive relief sought where (1) you have no legitimate authority to act on behalf of the Claimants (and, in that regard, you have harmed the rights of the Claimants) and (2) your conduct is abusive, vexatious and unconscionable.

Accordingly, CIHL and Cape plc seek your consent to the Draft Order and, if not provided, the assistance of the English Court to obtain clarification that you have no legal authority to act on behalf of our clients, that authority remains vested in the directors, and restraining you from taking any further steps in the name of Cape as set out in the Draft Order.

Requirement for you to provide consent on an urgent basis

As you will be aware, various of the Third-Party Defendants in the 3P Complaint, applied to transfer the 3P Complaint from the South Carolina Court to a Federal Court. By an order of 13 August 2024, the Federal Court remanded the case back to the South Carolina Court.

In these circumstances and given the imminent trial of the 3P Complaint on 9 December 2024 – which is not being brought with the authority of the Claimants and is plainly contrary to their interests – it is paramount that the Claim is addressed urgently.

In consideration for our clients refraining from taking action against you in the English Court, you are required to agree to the terms of the Draft Order by no later than 12pm on 6 September 2024.

Should you fail to do so, we will without further notice apply to the English Court for the relief in the form of the Draft Order.

For the avoidance of doubt, nothing in this letter should be considered as a waiver of any of our clients' rights which are, to the fullest extent, reserved.

Part 8 of the Civil Procedure Rules

In accordance with paragraph 13.3 of the Business and Property Courts of England & Wales Chancery Guide 2022, we hereby notify you that the use of Part 8 of the England & Wales Civil Procedure Rules is being contemplated to issue the intended claim against you.

We consider that Part 8 is the more appropriate route than Part 7 in the circumstances of the current dispute, for the following reasons:

1. The contemplated claim does not relate to any substantial dispute of fact. The contemplated claim is merely requesting the court's decision on a question by way of declaratory and injunctive relief.

2. A quick resolution of the contemplated claim is required given the imminent trial date of the 3P Complaint on 9 December 2024.

In accordance with paragraph 13.3 of the Chancery Guide, we have attached the Draft Order at Annex A (which we ask you to consent to).

Given that the relief sought in the Claim arises out of the application of well-established principles of English private international law to the USA Proceedings, we do not contemplate that there will a substantial factual dispute (or that disclosure will be necessary).

Agreement to Service Out of the Jurisdiction

As you are aware, on 13 July 2023 you used David Waldron of Morgan, Lewis & Bockius UK LLP to attempt to serve documents from the USA Proceedings on Altrad Services Ltd.

In accordance with the provisions of the English Civil Procedure Rules, and to the extent that you do not agree to provide the undertakings requested above, we request your agreement to accept service of the claim form and associated documents:

1. by way of service on Morgan, Lewis & Bockius UK LLP, Condor House, 5-10 St. Paul's Churchyard, London EC4M 8AL; or, in the alternative,

2. outside the jurisdiction of England and Wales at your address at 2110 N Beltline Bvld, Columbia, South Carolina 29204, United States of America

Please confirm your consent to accept service of the claim form by either (1) or (2) by 6 September 2024, so as to facilitate the efficient and timely progress of the contemplated proceedings. Should you

fail to provide your agreement to accept service, our clients will make an application for permission to serve out of the jurisdiction.

Pre-Action Protocol

This letter is being sent to you in accordance with the Practice Direction on Pre-Action Conduct and Protocols (the "**Pre-Action PD**") contained in the Civil Procedure Rules (CPR) (albeit that, as envisaged in paragraph 13 of the Pre-Action PD, the urgency of the matter means that it is not possible to give you the full time suggested for your response to this letter). We refer you to paragraphs 13 to 16 of the Pre-Action PD concerning the court's powers to impose sanctions for failing to comply with its provisions.

We enclose the key documents which we intend to rely on to substantiate our clients' claims. Ignoring this letter will lead our clients to commence proceedings against you and may increase your liability for costs.

We look forward to your response.

Yours faithfully,

Winston & Strawn London LLP

Winston & Strawn London LLP

Enc. Receivership Order

Annex A – Draft Order

Claim No. [#]

IN THE HIGH COURT OF JUSTICE **BUSINESS AND PROPERTY COURTS**

OF ENGLAND AND WALES

BUSINESS LIST (CHD)

Before [Mr]/[Mrs] Justice []

B E T W E E N:

(1) CAPE INTERMEDIATE HOLDINGS LIMITED

(2) CAPE PLC (a company incorporated under the laws of Jersey)

Claimants

- and -

PETER D. PROTOPAPAS

Defendant

[DRAFT] ORDER

UPON THE CLAIM of Cape Intermediate Holdings Limited ("**CIHL**") and Cape plc ("**the Claimants**") issued by Part 8 Claim Form on [] September 2024

AND UPON HEARING Leading Counsel for the Claimants [and Leading Counsel for the Defendant]

AND UPON READING the evidence, being the first witness statement of Ran Oren dated [] September 2024 ("**Oren 1**")

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 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.

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 the 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, 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:

5. 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.

6. Mr Protopapas be injuncted in England and Wales and worldwide from appropriating, interfering with or usurping (in any way whatsoever) the lawful exercise of the rights and duties of the directors of the Claimants.

7. 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).

8. Mr Protopapas be injuncted from litigating as “Cape plc” or CIHL in any legal proceedings in the State of South Carolina, USA or elsewhere.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
CAPE, PLC, Individually and as successor in interest to CAPE ASBESTOS COMPANY LIMITED, by and through its duly appointed Receiver Peter D. Protopapas, Plaintiff, vs. Winston & Strawn, LLP, Defendant.	In re: Asbestos Personal Injury Litigation Coordinated Docket Civil Action Number: SUMMONS

TO THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Original Complaint in this action, a copy of which is hereby served on you, and to serve a copy of your Answer to the said Complaint upon the subscribers at 1722 Main Street, Suite 200, Columbia, South Carolina 29201, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in such Complaint.

HARLING & WEST, LLC

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Attorneys for the Plaintiff

September 5, 2024

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
CAPE, PLC, Individually and as successor in interest to CAPE ASBESTOS COMPANY LIMITED, by and through its duly appointed Receiver Peter D. Protopapas, Plaintiff, vs. Winston & Strawn, LLP, Defendant.	In re: Asbestos Personal Injury Litigation Coordinated Docket Civil Action Number: COMPLAINT

COMES NOW the duly appointed South Carolina Receiver for Cape PLC, individually and as successor in interest to Cape Asbestos Company Limited ("Receiver" or "Plaintiff") complaining of the Defendant Winston & Strawn, LLP ("Defendant" or "Winston"), who through undersigned counsel respectfully shows unto the Court as follows:

This case arises out of Winston's threat to sue South Carolina attorney Peter D. Protopapas personally and related to his official acts as the court-appointed receiver for Cape PLC in the High Court of London and Wales. The *Barton* doctrine bars Winston's gambit in London, and Winston knows that. The United States Supreme Court, the United States Court of Appeals for the Fourth Circuit, and the United States District Court for the District of South Carolina have all determined that, pursuant to the *Barton* doctrine, the South Carolina receiver court appointing the receiver has exclusive jurisdiction over any action against that state court-appointed receiver.[1] Winston threatens Mr. Protopapas with litigation against him personally if he will not agree to the entry of

[1] *See, e.g., Protopapas v. Travelers Casualty & Surety Co.*, 94 F.4th 351, 358 (4th Cir. 2024) ("[e]xercising federal jurisdiction over a suit by or against a state-appointed receiver, who functions as an "arm" or "executive" of the state-receivership court, would infringe on the state court's control over the receivership assets—its exclusive jurisdiction. Thus, as a matter of comity, as well as custom, the *Barton* doctrine rests on this exclusivity of the state receivership over the assets before it as a matter of jurisdiction").

an order which on its face violates the lawful orders of the receivership court appointing him as receiver and tasking him with an array of specific duties. The Receiver seeks declarations as to the relationship between the parties, the role of the Receiver, and the nature of the Winston letter which demands violation of this Court's orders.

PARTIES

1. The Receiver is a lawyer who was appointed as Receiver for Plaintiff, by Order of The Honorable Chief Justice Jean H. Toal (ret.) on March 17, 2023, in *Keith W. Park, Individually and as Personal Representative of the Estate of Isabella Park vs. Armstrong International, Inc., et al.* (Civil Action 2021-CP-40-02727, Richland County). The Receiver maintains his residence and principal place of business in Richland County, South Carolina. The Receiver has not been to England for over 20 years.

2. Cape PLC, n/k/a Cape Intermediate Holdings Ltd., the entity in Receivership, was deeply involved in all elements of the global asbestos industry, mining raw asbestos in Apartheid-era South Africa, and then selling asbestos fiber to manufacturers of asbestos products in the United States, of which substantial quantities which were sold and used in South Carolina. Because Cape failed to answer a South Carolina asbestos personal injury case in this Court (thereby defaulting), Chief Justice Toal (ret.) appointed the Plaintiff "with the power and authority [to] 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." See Order of Appointment. Pursuant to Court Order and years of well-established jurisprudence, the Receiver acts as an arm of the Court appointing the Receiver (the "Receiver Court"). The Receiver Court maintains exclusive jurisdiction over the Receivership and lawsuits against the Receiver.

3. Plaintiff is informed and believes the Defendant, Winston & Strawn, LLP, is a limited liability partnership organized under the laws of the State of Delaware with offices in North

Carolina and lawyers licensed in the State of South Carolina, including Kobi Kennedy Brinson, Terry Brown Jr., Stacie Knight, and Alyson Traw. As lawyers licensed in the State of South Carolina, Kobi Kennedy Brinson, Terry Brown Jr., Stacie Knight, and Alyson Traw are familiar, or should be familiar, with laws governing lawyers and receiverships. On information and belief, Winston & Strawn LLP is the ultimate parent company of Winston & Strawn London LLP, and Winston & Strawn LLP holds Winston & Strawn London LLP as the London office of its international law firm, one of fifteen offices identified as part of Winston & Strawn LLP.

JURISDICTION

4. This Court has jurisdiction over the matters alleged herein pursuant to S.C. Code Ann. §§ 36-2-802 and 36-2-803, Article V of the Constitution of the State of South Carolina, and the Court's plenary powers.

VENUE

5. Venue is proper in this Court because it is the Receiver Court, and as such, all pending and new filings related to the Receivership must be filed in this Court. Further, on March 3, 2019, pursuant to the Order of the Supreme Court of South Carolina, Order Number 2017-03-03-01, the Chief Justice Toal (ret.) was appointed to have jurisdiction in all circuits in the State to dispose of all pretrial matters and motions, as well as trials, arising out of asbestos and asbestos litigation filed within the South Carolina state court system. Thus, the Honorable Jean H. Toal has jurisdiction over this matter.

FACTS

6. Once again, lawyers are attempting to assist Cape in avoiding liability for the damage its asbestos caused in the United States.

7. Defendant purports to represent Cape Intermediate Holdings Limited ("CIHL"), the successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd. and Cape PLC)

("Cape"), and a Bailiwick of Jersey entity also named Cape plc formed in 2011. Cape was considered an industrial gem of the Anglo and De Beers mining houses, which were controlled by the powerful Oppenheimer family of Johannesburg, South Africa.[2] Cape owned and operated asbestos mines in South Africa and was involved in all elements of the global asbestos industry, including the mining of raw asbestos fiber 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. From the time Cape entered the U.S. market through its wholly owned subsidiary, North American Asbestos Corporation ("NAAC"), Cape was well aware its asbestos harmed U.S. citizens but still sent this material into the United States and South Carolina.

8. By 1977, Cape and its subsidiary NAAC were named as defendants in asbestos personal injury lawsuits in the United States, and ultimately contributed $1 million to a settlement in litigation in Tyler, Texas. Rather than take further responsibility for its tortious conduct, Cape liquidated NAAC, created a new, disguised United States company to continue its American operations, and openly refused to participate in future United States tort litigation.

9. Having employed complex and fraudulent legal maneuvering to avoid liability in American asbestos litigation—in the face of the bankruptcies of scores of companies that used Cape-supplied raw asbestos fiber—a post-asbestos Cape emerged as a world leader in its industrial insulation, scaffolding, and corrosion protection activities under the name Cape Industrial Services. In 2017, Cape plc was acquired by the Altrad Group, "a world leader in industrial services with turnover of £5 billion per year."[3]

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[2] *See* Laurie Flynn, *Studded with Diamonds and Paved with Gold: Miners, Mining Companies and Human Rights in Southern Africa* 180 (1992) [hereinafter, "Flynn (1992)"] ("Cape Industries, a British-registered part of Harry Oppenheimer's Anglo American empire . . . [was] among the biggest asbestos producers from the beginning. . . .").

[3] *See* ***Exhibit 1****,* Letter from Winston & Strawn to Peter D. Protopapas, Aug. 30, 2024, at 2.

10. Cape and its successors, including Altrad Group-related entities, are now forced to reckon with their U.S. asbestos scheme after more than four decades of liability avoidance. These entities, which the Receiver named as Third-Party Defendants to an asbestos personal injury action in South Carolina state court, have gone to great lengths to avoid the merits of the litigation—serially appealing non-appealable orders, improperly removing a state court case to federal court, and now threatening the receiver personally with an extra-jurisdictional temporary restraining order in the High Court of Justice of England and Wales.

BACKGROUND OF RECEIVERSHIP

A. The Receiver was duly appointed pursuant to South Carolina law when Cape failed to appear in an asbestos personal injury action.

11. On June 4, 2021, Isabella Park filed a lawsuit in Richland County, South Carolina asserting personal injury claims arising from asbestos exposure against (among others), Cape plc, individually and as successor in interest to Cape Asbestos Company Ltd. *See Park v. Armstrong Int'l, Inc. et al.*, Summons and Complaint, No. 21-CP-40-02727 (June 4, 2021), at 1, 7. Ms. Park sought relief after being "diagnosed with mesothelioma caused by exposure to asbestos dust and fibers" unintentionally "brought home" for years "as a result of her husband's work with and around asbestos-containing products." *Id*. at ¶ 4.

12. On June 9, 2021, less than five months after her diagnosis, and within five days of filing her lawsuit, Ms. Park passed away. On November 17, 2021, Ms. Park's son, Keith, amended the complaint, appearing individually and as personal representative to Ms. Park's estate (the "*Park* Plaintiffs), to assert a wrongful death action. *See Park et al. v. Armstrong Int'l, Inc., et al.*, First Amended Simmons and Complaint, No. 21-CP40-02727 (Nov. 17, 2021). The amended complaint added Cape Intermediate Holdings Limited (f/k/a Cape Intermediate Holdings PLC) as a defendant, though both Cape Intermediate Holdings Limited and Cape PLC referred to the same

English company originally named Cape Asbestos Co. Ltd. and were identified as successors in interest to Cape Asbestos Company Ltd. *Id.* at 9; *see also id.* at ¶¶ 26–27. In December 2021, the *Park* Plaintiffs served the named Cape entity, which (as has been its practice for decades) never answered, moved, or otherwise responded to this complaint.

13. When Cape failed to answer the Park Complaint, Mr. Park moved for the appointment of a Receiver. *See Park et al. v. Armstrong Int'l, Inc., et al* March 6, 2023, Motion to Appoint Receiver, 21-CP-40-02727, Richland County). On March 17, 2023, Chief Justice Jean H. Toal (ret.) appointed Peter D. Protopapas as a receiver for an entity identified as "Cape PLC as successor in interest to Cape Industries Ltd. (f/k/a Cape Asbestos Company Ltd.)" pursuant to S.C. Code § 15-65-10(5), as well as § 15-65-10(4) in the alternative. *See Park et al. v. Armstrong Int'l, Inc., et al.*, Order Appointing Receiver, . 2021-CP-40-02727 (Mar. 17, 2023) ("Appointment Order"), at 1. Pursuant to the Appointment Order and South Carolina law, the Receiver has "power and authority [to] fully administer all assets of Cape, . . . engage counsel on behalf of Cape and take any and all steps necessary to protect the interests of Cape"—in proper satisfaction of claims against Cape—"whatever they may be." *Id*.

14. In his role as Receiver, the Plaintiff was and is charged by order of the Court to:

> (F)ully 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.

Id.

15. The South Carolina Receivership Court further Ordered, in relevant part, that it

> (E)xpects the Receiver to investigate the existence of all insurance coverages potentially available to the company in receivership.
>
> …
>
> **The Court further orders that, as the Receiver Court, 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.**

Id. (emphasis added).

B. Chief Justice Jean Hoefer Toal (ret.), a prominent and respected South Carolina jurist, appointed the Receiver.

16. Then Chief Justice of the South Carolina Supreme Court Donald W. Beatty appointed Chief Justice Jean H. Toal as the Chief Judge for Administrative Purposes over all asbestosis and asbestos litigation filed within the South Carolina state court system on May 28, 2019. As former United States Supreme Court Justice Sandra Day O'Connor wrote of Chief Justice Toal, "Jean is truly a trailblazer in her state." W. Lewis Burke, Jr. & Joan P. Assey, *Madam Chief Justice: Jean Hoefer Toal of South Carolina*(2016) at 1. Another former United States Supreme Court Justice, Ruth Bader Ginsburg, with whom Justice Toal worked on a seminal South Carolina civil rights case from 1971 to 1973, wrote of Justice Toal, "I am pleased that I was able to collaborate with Jean at the very beginning of her career and to watch with admiration as she has risen to the pinnacle of South Carolina's judicial system." *Id.* at 6.

17. The South Carolina Supreme Court's biography of Justice Toal best articulates her storied career. "Chief Justice Jean Hoefer Toal began her service as an Associate Justice on the Supreme Court of South Carolina on March 17, 1988, becoming the first woman to serve as a Justice of the South Carolina Supreme Court. She was re-elected in February of 1996 and was elected as Chief Justice of the South Carolian Supreme Court on March 23, 2000, for the balance of the term of her predecessor, which expired June 30, 2004. She was re-elected as Chief Justice in February of 2004 and again in February of 2014, each time for ten-year terms."[4]

[4] *Chief Justice Jean Hoefer Toal,* South Carolina Judicial Branch Biography, available at https://www.sccourts.org/supreme/displayJustice.cfm?judgeID=1118 (last accessed Sept. 4, 2024).

18. Prior to becoming a Justice on the South Carolina Supreme Court, Justice Toal was a practicing lawyer. "As a lawyer she appeared on a frequent basis in all levels of trial and appellate courts in South Carolina. She also had considerable experience as a litigator in United States District Court, the Fourth Circuit Court of Appeals and appeared as co-counsel before the United States Supreme Court. Her twenty years as a practicing lawyer included a balance of plaintiff and defense work, criminal trial work, and complex constitutional litigation. She wrote many trial and appellate briefs at all court levels. She also had considerable administrative law experience in litigation involving environmental matters, federal and state procurement, hospital certificates of need, employment matters and election matters."[5]

19. "In addition to practicing law, Chief Justice Toal utilized her law degree in public service. Beginning in 1975 she served in the South Carolina House of Representatives representing Richland County for 13 years. She was the first woman in South Carolina to chair a standing committee of the House of Representatives. She served as Chairman of the House Rules Committee and Chairman of the Constitutional Laws Sub-Committee of the House Judiciary Committee. Her legislative service included floor leadership of complex legislation in the fields of constitutional law, utilities regulation, criminal law, structure of local government, budgetary matters, structure of the judicial system, banking and finance legislation, corporate law, tort claims, workers' compensation, freedom of information act and environmental law."[6]

20. "During her 27 years on the Supreme Court, Justice Toal has written opinions addressing the full range of issues both criminal and civil which come before her Court. Also, she and two of her law clerks have authored a book entitled Appellate Practice in South Carolina."[7]

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[5] *Id.*
[6] *Id.*
[7] *Id.*

21. "In addition to her work on the bench, Chief Justice Toal has become chief advocate for South Carolina's Judicial Automation Project. Under her leadership, technology initiatives are being integrated into the eight levels of the South Carolina Judiciary. Some of the technology projects include high-speed network connectivity to all 46 county courthouses and an on-line, statewide case management system. Because of her efforts in promoting technology as a way to create a more efficient court system, Chief Justice Toal was recognized by Government Technology magazine as one of the 2002 "Top 25 Doers, Dreamers & Drivers" of technology in government."[8]

C. Following his appointment, the Receiver initiated a Third-Party Action against participants in and beneficiaries of Cape's liability avoidance scheme.

22. Once appointed, the Receiver quickly discovered through analysis of publicly available court records and other documentation that Cape's failure to appear in *Park* was just one example of a decades-long liability avoidance scheme concocted from the time that Cape's U.S. subsidiary NAAC was established in 1953 to facilitate Cape's sale of raw asbestos fibers to customers in the United States, and relied upon to escape U.S. liability once NAAC and Cape began facing torrents of asbestos-related litigation in the late 1970s.

23. On June 30, 2023, the Receiver filed a Third-Party Complaint against Mohed Altrad and Altrad Investment Authority S.A.S. ("Altrad Owners Third Party Defendants"); the U.S. subsidiaries of the Altrad Group, Arranco US LLC ("Arranco") Hawk Bidco (US) Inc., and Sparrows Offshore, LLC ("Altrad Sparrows Third-Party Defendants"); Central Mining & Investment Corporation Ltd, Charter Consolidated Ltd., and ESAB Corporation ("Charter Third-Party Defendants"); Anglo American PLC (individually and as successor in interest to Anglo American Corporation of South Africa Ltd.), De Beers PLC, De Beers Centenary AG, De Beers

[8] *Id.*

UK Ltd., and De Beers Consolidated Mines Pty. Ltd. ("Oppenheimer Third Party Defendants") (collectively, the "Third Party Defendants"), asserting claims for (i) unjust enrichment, (ii) constructive trust, (iii) alter ego and veil-piercing liability, and (iv) an accounting. *See Tibbs v. 3M Company, et al.*, Summons and Third Party Complaint, No. 23-CP-40-01759 (June 30, 2023). Each of the Third-Party Defendants named in the Third-Party Complaint is alleged to have facilitated, caused, or directed Cape's U.S.-based asbestos sales and liability-avoidance scheme, or otherwise acted as successors in interest to or beneficiaries of entities involved in that scheme, and are therefore responsible for the bodily injuries underlying the claims against Cape, including specifically those claims asserted by South Carolinians.

24. The 65-page Third-Party Complaint alleges a deliberate system of avoiding responsibility for the harm caused by Cape's asbestos over a period of decades. In doing so, it categorizes the Third-Party Defendants into three groups: The Altrad Third-Party Defendants (Third-Party Compl. ¶ 119); the Oppenheimer Third-Party Defendants (*id*. ¶ 122); and the Charter Third-Party Defendants (*id.* ¶ 124). The Third-Party Complaint (along with other publicly available information) comprehensively describes the alleged interconnected history of Cape and certain of these entities, their alleged dominion over the South African commodity mining industry, and their alleged role in controlling, continuing, and/or benefitting from Cape's strategic exploitation of the U.S. asbestos market as well as its accompanying alleged scheme to insulate itself, and its foreign affiliates and agents, from the resulting tort litigation exposure. *See* Third-Party Complaint.

ACTIVITIES IN CLEAR CONTRAVENTION OF THE *BARTON* DOCTRINE

25. Any claim by or against the Receiver falls squarely within the exclusive jurisdiction of the South Carolina Receivership Court under the doctrine articulated in *Barton v. Barbour*, 104 U.S. 126 (1881). Under the "*Barton* doctrine," the state court that appoints a receiver maintains exclusive jurisdiction over all claims filed by and against that receiver—subject only to the state court's own waiver of that exclusive jurisdiction. *McDaniel v. Blust*, 668 F.3d 153, 157 (4th Cir. 2012). In elaborating on the doctrine in *Porter v. Sabin*, 149 U.S. 473 (1893), the Supreme Court emphasized that federal courts *lack* jurisdiction because state receivership courts have *exclusive* jurisdiction over matters involving court-appointed receivers. The Supreme Court explained that "[w]hen a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate," and "[t]he possession of the receiver is the possession of the court." *Id.* at 479. The Receivership Court exercises exclusive *in rem* jurisdiction over all the property in its possession, including the Receiver's claims on behalf of the estate. *See Penn Gen. Cas. Co. v. Commonwealth of Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195 (1935) ("[T]he principle, applicable to both federal and state courts, is established that the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other. This is the settled rule with respect to suits in equity for the control by receivership of the assets of an insolvent corporation."). And "[i]t is for *that court*, in its discretion, to decide whether it will determine for itself all claims of or against the receiver or will allow them to be litigated elsewhere." *Porter*, 149 U.S. at 479 (emphasis added).

26. Further, the *Barton* doctrine is *not* an abstention doctrine, and no court has held that it is. Instead, it is an expression of the exclusivity of *in rem* jurisdiction. *See Penn Gen. Cas. Co.*, 294 U.S. at 195. Unlike familiar abstention doctrines, the *Barton* doctrine now also has a statutory basis as 28 U.S.C. § 959 codified the *Barton* doctrine and legislatively carved out one exception

from it. *See In re McKenzie*, 716 F.3d 404, 423 (6th Cir. 2013) (describing Section 959(a) as adding an "exception" to the *Barton* doctrine); *Satterfeld v. Malloy*, 700 F.3d 1231, 1237 (10th Cir. 2012) (same); *SEC v. Rubera*, 535 F. App'x 553, 554 (9th Cir. 2013) ("In *Barton v. Barbour*, the Supreme Court set forth the general rule—which, with a specific exception, is now embodied in 28 U.S.C. § 959(a).").

27. The United States Court of Appeals for the Fourth Circuit in *Protopapas v. Travelers Casualty & Surety Co.*, 94 F.4th 351 (4th Cir. 2024), applying *Barton*, confirmed that the state court appointing a receiver has exclusive jurisdiction over that receiver :

> Exercising federal jurisdiction over a suit by or against a state-appointed receiver, who functions as an "arm" or "executive" of the state-receivership court, would infringe on the state court's control over the receivership assets—its exclusive jurisdiction. Thus, as a matter of comity, as well as custom, the *Barton* doctrine rests on this exclusivity of the state receivership over the assets before it as a matter of jurisdiction, and indeed we have confirmed as much. *See, e.g., Conway* [*v. Smith Dev., Inc.*], 64 F.4th [540,] 545 [4th Cir. 2023] (noting that "Barton concerns subject-matter jurisdiction"); *McDaniel* [*v. Blust*], 668 F.3d [153,] 156 [4th Cir. 2012] (noting that "[t]he Supreme Court established in Barton that before another court may obtain subject-matter jurisdiction over a suit filed against a receiver for acts committed in his official capacity, the plaintiff must obtain leave of the court that appointed the receiver").

Id. at 358.

28. The United States District Court for the District of South Carolina likewise has routinely rejected attempts to remove cases involving receivers—properly remanding them back to the receivership courts that enjoy exclusive jurisdiction over them. *See, e.g.*, *Pipe & Boiler Insulation, Inc. v. Cont'l Ins. Co. et al.*, No. 3:21-cv-03033-SAL, ECF No. 153, at 4–9 (S.C. Ct. Com. Pl. Mar. 9, 2023) (remanding receivership matter because "the *Barton* doctrine prevents Defendants from removing this matter, filed *by* a Receiver, to federal court," while also considering judicial economy in light of the fact that any "settlement agreement is not final until the

Receivership Court approves the settlement"); *Protopapas v. Zurich Am. Ins. Co. et al.*, No. 3:21-cv-04086-DCC, ECF No. 180, at 4–6, 10 (S.C. Ct. Com. Pl. Feb. 24, 2023) (remanding receivership case because "*Barton*, and its subsequent application in *Porter*, act as a limitation on federal jurisdiction when a state court has previously exercised its authority by appointing a receiver," such that allowing removal "would directly interfere with the exclusive jurisdiction of the receivership court over this dispute"); *see also Southern Insulation, Inc. v. OneBeacon Ins. Grp., Ltd.*, No. 3:22-cv-01308-MGL, ECF No. 46, at 4–6 (S.C. Ct. Com. Pl. Nov. 8, 2022) (remanding receivership case on other basis).

29. Despite these clear pronouncements from the United States Supreme Court, the United States Court of Appeals for the Fourth Circuit, and the United States District Court for the District of South Carolina, Anglo American plc improperly removed the entire case from the receivership court to federal court on June 28, 2024—almost a year after the Receiver filed its third-party action against the Third-Party Defendants in *Tibbs*. Even though Altrad Investment Authority S.A.S. and Mohed Altrad have repeatedly asserted that their appeals of prior orders of the Receivership Court prevent the matter from proceeding despite orders from the South Carolina Court of Appeals to the contrary, they also consented to this belated attempt at removal to federal court, on the improper contention that this matter is "not properly characterized as a third-party action," while also incorrectly asserting that "plaintiffs had dismissed their claims against Cape."

30. On August 13, 2024, the Honorable Judge Mary G. Lewis of the United States District Court for the District of South Carolina remanded the case to the South Carolina state court. *See* August 13, 2024, Order Granting Motion to Remand, United States District Court, Columbia Division, 3:24-3771-MGL, ECF No. 75. Judge Lewis reasoned that South Carolina state court appointed the receiver "pursuant to S.C. Code Ann. § 15-65-10, 'A receiver represents the Court appointing him; he is an officer of the Court and is the agency through which the Court acts.

As he has no power other than that given him by the Order of appointment, his authority is derived solely from the Court. He is subject only to the Court's direction.'" *Id.* at 5.

31. Judge Lewis further explained,

> The Removing Defendants contend the Barton doctrine does not apply because (1) since the Removing Defendants do not have assets in South Carolina, removal does not interfere with the state court's control over in-state assets; (2) the Receiver is acting ultra vires because he cannot assert control over assets outside of South Carolina; (3) the Receiver's lawsuit violates the Commerce Clause of the United States Constitution; (4) and the Receiver's lawsuit violates South Carolina's receivership statute. Anglo American's Opp'n to Pl.'s Mot. to Remand, ECF No. 45 at 19-28. These and other questions interpreting the statutory authority of the Receiver must be raised in state court and, if necessary, appealed through the state system. **It is not for this Court to sit in judgment of the Receiver's actions taken as a representative of the court that appointed him**. *Rooker v. Fidelity Trust Co*., 263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

Id. at 7-8 (emphasis added).

SOUTH CAROLINA BARRED LAWYER EMPLOYEES OF DEFENDANT ARE AWARE OF SOUTH CAROLINA RECEIVERSHIP LAW

32. Defendant is fully aware of the exclusive jurisdiction of this Court. In its August 30, 2024, Pre-Action Letter to the Receiver, Winston & Strawn specifically notes the Third-Party Defendants' failed removal: "As you will be aware, various of the Third-Party Defendants in the 3P Complaint, applied to transfer the 3P Complaint from the South Carolina Court to a Federal Court. By an order of 13 August 2024, the Federal Court remanded the case back to the South Carolina Court." *See* **Exhibit 1**.

33. This admission was made within the context of a Pre-Action Letter in which Cape Intermediate Holdings Limited and Cape PLC threaten "to commence proceedings" against the Receiver personally if he does not consent to a one-sided, self-serving "Draft Order." *Id.* at 1. Among other items, the Order declares that "Mr. Protopapas has and had no power or authority to

act as receiver in relation to the Claimants in England and Wales ***or worldwide*** and has no power or authority in respect of the Claimants in England and Wales ***or worldwide*** to carry out the acts referred to in paragraphs 5-8 below. *Id.* at 10 (emphasis added). Further, paragraphs 7 and 8 of the Order appear to enjoin the Receiver Court in South Carolina from acting, in direct contravention of the *Barton* doctrine:

> 7. 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.)
>
> 8. Mr. Protopapas be injuncted from litigating as "Cape plc" or CIHL in any legal proceedings in the State of South Carolina, USA or elsewhere.

Id. at 10.

34. Defendant Winston & Strawn is an international law firm with multiple offices in the United States.

35. Advertising itself as a "global powerhouse in the restructuring and insolvency space," Winston & Strawn offers "a fully integrated team of attorneys across a global platform to guide clients through any distressed situation."[9] Winston & Strawn's lawyers have contributed to scholarship in the restructuring space, some of which specifically address the application of the *Barton* doctrine. For instance, JoAnn J. Brighton, identified as associated with Winston & Strawn, contributed to the 2013 American College of Bankruptcy Circuit Review of Consumer Cases.[10] Ms. Brighton contributed to a section related to the Fourth Circuit, which highlighted the Fourth Circuit opinion in *McDaniel v. Blust*, 668 F.3d 153 (4th Cir. 2012). The summary specifically referenced the Court's holding as to the *Barton* doctrine's application to bankruptcy trustees:

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[9] Restructuring & Insolvency, Winston & Strawn, available at https://www.winston.com/en/capabilities/services/restructuring-and-insolvency (last accessed Sept. 4, 2024).

[10] PDF available at https://www.americancollegeofbankruptcy.com/file.cfm/38/docs/2013-Consumer-Circuit-Review.pdf (last accessed Sept. 4, 2024).

> Principals of a chapter 7 debtor sued the chapter 7 trustee's counsel in state court for various acts of misconduct by counsel in connection with the filing of an adversary proceeding. The case was removed to federal district court, which found that the Barton doctrine applied and dismissed the suit as to trustee's counsel. On appeal the Fourth Circuit affirmed. **Under the Barton doctrine, which applies to bankruptcy trustees, a plaintiff must obtain approval from the appointing bankruptcy court prior to filing suit against the trustee for acts committed in the trustee's official capacity. Moreover, "a bankruptcy trustee 'is an officer of the court that appoints him,' and therefore that court 'has a strong interest in protecting him from unjustified personal liability for acts taken within the scope of his official duties.'"** Id. at 157. The trustee retained counsel to prosecute the adversary proceeding, and counsel's activities were within the scope of its employment even if some of its activities had not been directed by the trustee.[11]

36. Additionally, Winston & Strawn partner James T. Bentley serves on the Bankruptcy Advisory Board of Strafford, a Barbri Company.[12] Strafford currently is advertising a Bankruptcy CLE webinar on Thursday, October 24, 2024, entitled " Representing Chapter 11 Trustees in Operating Cases: Navigating 28 U.S.C. 959, Barton Doctrine, Limits of Immunity." The preview outline of the CLE includes a section on "Heightened protection under Barton doctrine and quasi judicial immunity."[13]

37. Winston & Strawn employees Kobi K. Brinson, Terry M. Brown, Stacie Knight, and Alyson G. Traw are barred in South Carolina. *See* South Carolina Bar Associations Member Directory as of August 30, 2024. Employee Brinson herself is a member of the firm's Bank Receivership Task Force, presumably meaning that she has familiarity with Receivership law including the *Barton* Doctrine.

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[11] *Id.* at 48.

[12] Representing Chapter 11 Trustees in Operating Cases: Navigating 28 U.S.C. 959, Barton Doctrine, Limits of Immunity, available at https://www.straffordpub.com/products/representing-chapter-11-trustees-in-operating-cases-navigating-28-u-s-c-959-barton-doctrine-limits-of-immunity-2024-10-24 (last accessed Sept. 4, 2024).

[13] *Id.*

38. As South Carolina lawyers, these individuals are keenly aware of this Court's exclusive jurisdiction over the Receiver under *Barton v. Barbour*, 104 U.S. 126 (1881); *Porter v. Sabin*, 149 U.S. 473 (1893); *Protopapas v. Travelers Casualty & Surety Co.*, 94 F.4th 351 (4th Cir. 2024); and the South Carolina federal district court order of August 13, 2024 in this action, 3:24-3771-MGL, ECF No. 75.

39. Against this backdrop, ignoring decisions of the United States Supreme Court, the United States Court of Appeals for the Fourth Circuit, and the United States District Court for the District of South Carolina, Defendant has threatened the Receiver personally with litigation in a foreign jurisdiction designed both to intimidate Mr. Protopapas as an individual and to seek to avoid the December 9, 2024, trial in this action.

USE OF PROCEDURAL TACTICS TO AVOID LITIGATION IN STATE COURT

40. Winston's threats against the receiver in its August 30, 2024 letter are only the latest in a series of actions designed to avoid a December 9, 2024 bench trial action in the receivership court. The Third-Party Defendants initially attempted to avoid its South Carolina asbestos liabilities as alleged in the Third-Party Complaint by moving to dissolve the Cape receivership. In an Order dated December 6, 2023, Chief Justice Toal (ret.) first denied the Third-Party Defendants' arguments that Cape was not properly served:

> The Court is disturbed by evidence in the record indicating a decades-long practice by Cape of ignoring asbestos lawsuits filed against it in the United States—simply accepting defaults ostensibly because it believes defaults entered by this Court cannot be enforced. Cape's own disclosures are before this Court, and they reveal Cape never intends to respond to litigation pending in the United States in the future, because that would purportedly "have a materially adverse effect on the financial status of the Group and almost certainly result in insolvency proceedings." It is against that backdrop that the Court examines Third-Party Defendants' arguments regarding service and ultimately rejects them as unfounded.

See Tibbs v. 3M Company, et al., Order Denying Certain Third Party Defendants' Motions to Dissolve Receivership, No. 2023-CP-40-01759 (December 6, 2023) at 16. The Third-Party Defendants attempted to inject confusion into the question of service by introducing a second Cape PLC entity that was allegedly created in the Bailiwick of Jersey in April 2011 and identified in the *Park* litigation for the first time by the Third-Party defendants in their responsive pleadings to the Receiver's Third-Party Complaint as the entity that the plaintiffs intended to sue. *Id.*at 17. The Court identified this as a "red herring argument," summarily dismissed it, and found that the *Park* Plaintiffs effectively served the 130-year old Cape entity (known as Cape PLC from 1989 to 2011) organized under the laws of the United Kingdom. *Id.* at 18-19.

41. Chief Justice Toal (ret.) also rejected the Third-Party Defendants' arguments that the Receiver was improperly appointed. *See Id.* at 23-25.

42. Finally, in the same December 6, 2023 Order, Chief Justice Toal (ret.) denied the Third-Party Defendants' respective personal jurisdiction motions. *See id.* at 26-73. Specifically, the Court found that it had jurisdiction:

> (O)ver Cape as a "person who act[ed] 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" and by "regularly . . . engag[ing] in [a] persistent course of conduct, or deriv[ing] substantial revenue from goods used or consumed or services rendered in this State," and/or (ii) "production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed." S.C. Code §§ 36-2-803(4), (8).

Id. at 36.

43. Further, in a carefully considered, nine-page analysis of personal jurisdiction as to the Altrad Third-Party Defendants, the Court found:

> The Third-Party Complaint, along with the submitted affidavits and publicly available materials presented to the Court, adequately alleges facts sufficient to support the exercise of personal jurisdiction over each of the Responding Altrad Third-Party

> Defendants—the current owners of Cape—under an alter ego, guiding light, and/or single business enterprise theory. . . . The Altrad Third-Party Defendants are alleged to be responsible, with Cape, for an ongoing scheme to evade responsibility for harm caused to South Carolinians by Cape's asbestos, while also financially benefitting from that scheme as effective alter egos of Cape. As detailed below, the Court finds that consistent with fair play and substantial justice, it can exercise jurisdiction over each of these Responding Altrad Third-Party Defendants, based on the record before the Court at this early stage.

Id. at 38.

USE OF SERIAL APPEALS IN FURTHERANCE OF LITIGATION AVOIDANCE

44. In furtherance of their attempt to avoid the impending December 9, 2024 trial date in the Receivership Court, the Third-Party defendants have filed 13 appeals in South Carolina. Most recently, on September 3, 2024, Charter Consolidated Ltd., ESAB Corporation, and Central Mining & Investment Corporation Ltd. filed a Petition for Writ of Certiorari in the South Carolina Supreme Court seeking review of the South Carolina Court of Appeals' May 9, 2024 decision dismissing the Third-Party Defendants' appeal of the December 6, 2023 Order denying the Motion to Dissolve the Receivership as not immediately appealable.

45. Further, on August 30, 2023, the multiple entities consisting of the Charter Third-Party Defendants, Altrad Owner Third-Party Defendants, and Altrad Sparrows Third-Party Defendants each filed appeals couched as "mode of trial" appeals. In each of the three mode of trial appeals, the Third-Party Defendants assert that they have been deprived of their constitutional right to a jury trial because the circuit court issued a Scheduling Order setting the Receiver's Third-Party Action in *Tibbs* for a non-jury trial on December 9, 2024. The Receiver has moved to dismiss the appeals because (1) none of the Receiver's claims are triable by a jury, (2) the scheduling order is not appealable, and (3) the Third-Party Defendants waived their ability to argue their entitlement to a jury trial because they never contested that this case would be tried in a bench trial, despite myriad opportunities to do so.

46. These mode of trial appeals are substantially similar to those employed by another defendant to an unrelated receivership action, Penn National, which successfully delayed a December 12, 2022 scheduled trial in that case for nearly a year. The Court of Appeals dismissed Penn National's appeal, and, on November 7, 2023, the South Carolina Supreme Court denied the Petition for Certiorari in *Covil Corp. v. Penn Nat'l Mut. Cas. Ins. Co.*, 2023-001079. That case was finally tried on November 27 and 28, 2023.

47. The volume of appeals of interlocutory orders—all of which are not immediately appealable under South Carolina law—has frustrated the Receiver Court and the court-appointed Receiver's ability to fulfill his duties.

48. Further, in its decision in *Childers v. Davis Mechanical Contractors*, Appellate Case No. 2023-000727 (Sep. 08, 2023), the South Carolina Court of Appeals, considering the effect of an appeal of a motion to dismiss third-party claims and dissolve the Payne & Keller receivership, stated that the Order Denying the Motion to Dismiss and Dissolve the Receivership "is not stayed during the pendency of this appeal. . . . Accordingly, the receivership action and the receiver's ability to carry out his duties are not stayed." *Id.* at 3. Directly violating the South Carolina Court of Appeals' order, many of the Third-Party Defendants, including the Altrad defendants, assert that the pendency of their appeals protects them from answering discovery—even after the trial court issued sanctions and adverse inferences against them for failure to participate in discovery.[14]

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

FLAGRANT REFUSAL TO PARTICIPATE IN THE SOUTH CAROLINA STATE COURT ACTION

49. The Receiver's Third-Party Action in *Tibbs* initially was scheduled for a bench trial set to commence April 15, 2024. The Court was forced to continue the bench trial during an April 10, 2024 pre-trial hearing "because of the Altrad and Charter Third Party Defendants' refusal to provide **any** discovery to the Receiver to prepare this case for trial." *Tibbs v. 3M Company, et al.*, Order, No. 23-CP-40-01759 (May 23, 2024) at 10-11.

50. The Altrad and Charter Third Party Defendants' failure to participate in discovery initially was the subject of a first motion to compel, which the Court granted on March 12, 2024. Pursuant to the March 12 Order, the Court directed all Third-Party Defendants "(i) to provide responsive, substantive, and complete answers to the Receiver's Discovery Requests within 14 days of entry of this Order and (ii) to begin producing documents in response to the Receiver's Requests for Production the same day," and (iii) as to Arranco and Central Mining, "to designate witnesses for . . . Rule 30(b)(6) depositions" by March 19, and "produce those witnesses" by April 2. *Tibbs v. 3M Company, et al.*, Order, No. 23-CP-40-01759 (March 12, 2024) at 13.

51. In the May 23 Order in *Tibbs*, the Court found that the "only excuses offered by these Third-Party defendants are frivolous. . . . They argue that Rule 205, SCACR, poses a jurisdictional bar preventing this third-party action from continuing, because by simply appealing [their] denied motions to dissolve the receivership, they can deprive the trial court of jurisdiction for an indeterminate time period." *See Tibbs,* Order of May 23, 2024, at 11-12. Citing a string of orders by the South Carolina Court of Appeals and the South Carolina Supreme Court in receivership actions, the Court reasoned, "Thus, the Supreme Court and Court of Appeals have

made clear that—categorically—the denial of motions to dismiss and dissolve a receivership, like discovery orders, are not immediately appealable." *Id.* at 12.

52. The Court further noted that the Altrad and Charter Third-Party Defendants "continue to refuse any effort at compliance with the Court's orders and the discovery rules of this State," and their continuation of their misconduct "[d]espite multiple warnings by this Court and directives to **proceed with discovery**." *Id.* at 15 (emphasis in original). As a result, the Court found that "this continued discovery misconduct on the part of these Third-Party Defendants amounts to bad faith, willful disobedience, and gross indifference to the rights of the Receiver and this Court's management of its docket." *Id.* Based on this discovery misconduct, the Court found "Certain adverse inferences to be warranted . . . against the Altrad and Charter Third-Party Defendants on facts and matters underlying the Receiver's claims." *Id.*

53. Given these findings, as to the Altrad Third-Party Defendants, the Court drew 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 benefitted unjustly from Cape's liability-avoidance scheme." *Id.* at 27. To reach that general inference the Court also entered 47 separate adverse inferences related to the relationship between Altrad and Cape, Altrad's responsibility for Cape, the relationship between Altrad and the Altrad Sparrows Third-Party Defendants, the common ownership between Altrad and Cape and Altrad's liability for Cape's activities, the Altrad Defendants' liability as the alter ego of Cape, and the unjust enrichment from which the Altrad Defendants have benefitted as a result of the Cape liability avoidance scheme. *Id.* at 27-31. The Court also emphasized that those inferences were rebuttable, should these Third-Party Defendants choose to start participating in the litigation and offering a viable defense. Instead of participating

in the South Carolina proceeding, Winston now threatens the South Carolina receiver with litigation in London if he does not defy the lawful court orders appointing him.

FOR A FIRST CAUSE OF ACTION

(Declaratory Judgment)

1. The foregoing allegations are realleged and reincorporated as if fully set forth herein verbatim to the extent not inconsistent herewith.
2. Defendant has threatened the Receiver personally with litigation in the High Court of England and Wales.
3. Pursuant to SC Code Ann § 15-53-10, et. seq, the Receiver seeks a declaratory judgment as follows:
    a. Plaintiff seeks a declaration of the legal relationship between Plaintiff and Defendant.
    b. That Plaintiff is the duly appointed receiver for Cape PLC;
    c. That Plaintiff is a court appointed officer of the Court;
    d. That Defendant is improperly demanding Plaintiff violate orders of the South Carolina courts;
    e. That Defendant is improperly interfering with an Officer of the Court in the conduct of his duties;
    f. That Defendant is attempting to induce Plaintiff to violate the Rules of Professional Conduct that governs lawyers in South Carolina;
    g. That Defendant's conduct has violated the Rules of Professional Conduct in South Carolina;
    h. That Defendant is attempting to intimidate and Officer of the Court in the conduct of his duties;

i. That Defendant is acting outside the scope of its representation of a client when it threatens to a Receiver in the performance of his duties;

j. That Defendant does not represent Plaintiff and therefore can take no action on his behalf;

k. That Defendant is no longer acting as attorneys when it attempts to threaten, extort, and/or intimidate a Receiver during the performance of his duties;

l. That Defendant's conduct is an attempt to obstruct justice;

m. That Defendant's conduct is in violation of the Court's order appointing Plaintiff as Receiver;

n. That Defendant's conduct is a wrongful attempt to interfere with the due administration of justice; and

o. That Defendant's conduct is a fraud on the court.

4. Plaintiff also seeks a further declaration that Plaintiff shall comply with his duly-assigned obligations as Receiver without interference from Defendant.

5. Plaintiff also seeks a further declaration that Defendant, with its South Carolina licensed lawyer employees, is not entitled or permitted to be used as an instrumentality to aid and abet Cape's decades old litigation avoidance scheme designed to insulate it from the significant tort liability arising from its history of sales of asbestos fiber across the United States market, including in South Carolina.

PRAYER FOR RELIEF

WHEREFORE, Peter D. Protopapas, as the duly-appointed Receiver for Cape PLC, demands judgment against defendants as follows:

A. For Plaintiff's costs, expenses, and attorneys' fees for bringing this action;

B. For the declaratory relief stated above;

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.

HARLING & WEST, LLC

By:s/W. Jonathan Harling
W. Jonathan Harling, Esquire
SC Bar# 16658
1722 Main Street, Suite 200
Columbia, SC 29201
Phone: 803-252-2050
Fax: 800-762-4915
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Robert T. Bonds, Esquire
RIKARD & PROTOPAPAS
SC Bar #106271
2104 N. Beltline Blvd.
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803.978.6111
rbonds@rplegalgroup.com

Attorneys for the Plaintiff

September 5, 2024

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Atlas Turner, Inc. f/k/a Atlas Asbestos Company, Ltd., By and Through Its Duly Appointed Receiver Peter D. Protopapas, Plaintiff, v. Goldfein & Joseph, P.C., Defendant.	Case No: SUMMONS (Non Jury)

TO: THE ABOVE-NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served on you, and to serve a copy of your Answer to the said Complaint upon the subscribers at 2110 N Beltline Blvd, Columbia, SC 29204, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in such Complaint.

Respectfully submitted,

s/ Brian M. Barnwell
Brian M. Barnwell, Esquire
S.C. Bar 78249
Rikard & Protopapas, LLC
2110 N Beltline Blvd
Columbia, SC 29204
Phone: 803.978.6111
Fax: 803.978.6112
bb@rplegalgroup.com

Attorney for the Receiver

This 10th Day of July, 2023

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Atlas Turner, Inc. f/k/a Atlas Asbestos Company, Ltd., By and Through Its Duly Appointed Receiver Peter D. Protopapas, Plaintiff, v. Goldfein & Joseph, P.C., Defendant.	Case No: COMPLAINT

COMES NOW Atlas Turner, Inc. f/k/a Atlas Asbestos Company, Ltd., By and Through Its Duly Appointed Receiver Peter D. Protopapas ("Plaintiff" or "Atlas"), complaining of the defendant, Goldfein & Joseph, P.C., ("Defendant" or "Goldfein"), who through undersigned counsel respectfully show unto the Court as follows:

PARTIES

1. The Receiver is a lawyer who was appointed as Receiver of the Insurance Assets of Atlas Turner, Inc. f/k/a Atlas Asbestos Company, Ltd., by Order on June 21, 2023 and who maintains his principal place of business in Richland County, South Carolina.
2. The Receiver is a court appointed officer tasked with marshaling the Insurance Assets of Atlas.
3. Pursuant to Court Order, the Receiver controls the Attorney client privilege of Atlas. **See Exhibit A, 6/21/2023 Order Appointing Receiver**.
4. Plaintiff is informed and believes the Defendant is a Professional Corporation organized under the laws of the State of Pennsylvania with its principal place of business located in the State of Pennsylvania.
5. The amount in controversy is under $75,000.

JURISDICTION

6. This Court has jurisdiction over the matters alleged herein pursuant to S.C. Code Ann. § 36-2-803, Article V of the Constitution of the State of South Carolina, and the Court's plenary powers.

7. In particular, Defendant purported to represent Atlas in litigation in the United States, including in connection with litigation pending in the State of South Carolina.

VENUE

8. Plaintiff is informed and believes that venue is proper in Richland County, South Carolina.

FACTS

9. Defendant is a law firm that represented Atlas in its asbestos litigation across the United States, including in connection with cases pending in South Carolina.

10. As part of his job as Receiver, Plaintiff wrote on numerous occasions to Defendant for Atlas' files.

11. On June 21, 2023, Plaintiff wrote to Defendant and provided him with a copy of the Order of Appointment. Plaintiff requested "Atlas files." **See Exhibit B, June 21, 2023 letter and attachment.**

12. Plaintiff followed up on his request by telephone on June 26, 2023.

13. On July 1, 3, 4, and 5 Plaintiff and/or his counsel again followed up with Defendant to obtain Atlas' files – to no avail. **See Exhibit C, D, and E July 1, 3, 4, and 5 2023 e-mails.**

14. However, Defendant ignored Plaintiff's interests by refusing to provide him with his files and thereby causing delay and increased costs.

15. Upon information and belief, it appears that Defendant is reflecting its client's penchant for ignoring the orders of this Court.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

16. The foregoing allegations are realleged and reincorporated as if fully set forth herein verbatim to the extent not inconsistent herewith.
17. Defendant is in possession of Plaintiff's legal files.
18. Defendant has delayed and impeded Plaintiff's access to Plaintiff's files.
19. Defendant claims its interests are superior to Plaintiff's interest.
20. Defendants claims it is not required to provide Plaintiff his files.
21. Pursuant to SC Code Ann § 15-53-10, et. seq, Plaintiff seeks a declaration of the legal relationship between Plaintiff and Defendant.
22. Plaintiff also seeks a further declaration that Plaintiff is entitled to Atlas' files.
23. Plaintiff further seeks a declaration that Defendant is required to cooperate with the Plaintiff in providing information regarding Defendant's past representation of Atlas.

WHEREFORE, Atlas Turner, Inc. f/k/a Atlas Asbestos Company, Ltd., by and through its duly-appointed Receiver, demands judgment against defendants as follows:

A. For Plaintiff's costs, expenses and attorneys for bringing this action;
B. For an Order requiring the Defendant to turn over to Plaintiff, Plaintiff's files in their entirety.
C. For an Order requiring Defendant to answer Plaintiff's questions regarding Defendant's past representation of Plaintiff.
D. 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.

Respectfully submitted,

s/ Brian M. Barnwell
Brian M. Barnwell, Esquire
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2110 N Beltline Blvd
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Attorney for the Receiver

This 10th Day of July, 2023

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRUIT
WHITTAKER CLARK & DANIEL, INC., by and through its Duly Appointed Receiver, Peter D. Protopapas, Plaintiff, Vs. Fox Rothschild, LLP, Stephanie Flynn, Robert Baum, McGivney Kluger Clark & Intoccia, P.C., Robert Thackson, and Lathrop GPM, Defendants.	In re Coordinated Asbestos Docket Civil Action No. SUMMONS

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served on you, and to serve a copy of your Answer to the said Complaint upon the subscribers at 2110 N. Beltline Blvd., Columbia, SC 29204, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in such Complaint.

Respectfully submitted

s/ Brian M. Barnwell
Brian M. Barnwell, Esquire
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Rikard & Protopapas, LLC
2110 N. Beltline Blvd.
Columbia, SC 29204
Phone: 803.978.6111
Fax: 803.978.6112
bb@rplegalgroup.com

This 19th Day of April, 2023

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRUIT
WHITTAKER CLARK & DANIEL, INC., by and through its Duly Appointed Receiver, Peter D. Protopapas, Plaintiff, Vs. Fox Rothschild, LLP, Stephanie Flynn, Robert Baum, McGivney Kluger Clark & Intoccia, P.C., Robert Thackston, and Lathrop GPM, Defendants.	In re Coordinated Asbestos Docket Civil Action No. COMPLAINT

COMES NOW Whittaker Clark & Daniel, Inc. (WCD) by and through its duly appointed Receiver, Peter D. Protopapas ("Plaintiff" or "WCD"), complaining of the defendants, Fox Rothschild, LLP, Stefanie Flynn, Robert Baum, McGivney Kluger Clark & Intoccia, P.C., Robert Thackston, and Lathrop GPM, (collectively "Defendants" or "Attorneys"), who would respectfully show unto the Court as follows:

PARTIES

1. The Receiver is a lawyer who was appointed as Receiver of WCD by Order on March 10, 2023 and who maintains his principal place of business in Richland County, South Carolina. A copy of the appointment order is attached hereto as Exhibit A.
2. The Receiver is a court appointed officer tasked with marshaling the assets of WCD.
3. Pursuant to Court Order, the Receiver controls the attorney-client privilege of WCD.
4. Plaintiff is informed and believes the Defendants are attorneys for WCD in (1) *Sarah J. Plant and Parker Plant v. Avon Products, Inc., et al.*; C.A. No. 2022-CP-40-01265; In the Court of Common Pleas for the Fifth Judicial District of the State of South

Carolina, County of Richland; and (2) *Kelly Payne Clark and Shannon Payne Lancaster, as Co-Executors of the Estate of Shelby Linville Payne*; C.A. No. 2022-CP-40-01281; In the Court of Common Pleas for the Fifth Judicial District of the State of South Carolina, County of Richland.

5. Upon information and belief, Defendant Flynn is a citizen and resident of South Carolina and is a partner at Fox Rothschild. https://www.foxrothschild.com/stephanie-g-flynn
6. Fox Rothschild is a law firm who is, under information and belief, organized under the laws of one of the states of the United States.
7. Upon information and belief Robert Thackston is a citizen and resident of Texas who is a partner at Lathrop GPM. https://www.lathropgpm.com/Robert-Thackston
8. Upon information and belief Lathrop GPM is a law firm organized under the laws of one of the states of the United States.
9. Upon information and belief, Robert Baum is a citizen and resident of one of the States of the United States and is a partner at McGivney Kluger Clark & Intoccia, P.C. (McGivney). www.mcgivneyandkluger.com/people/robert-baum
10. Upon information and belief, McGivney is a law firm organized under the laws of one of the states of the United States.
11. The amount in controversy is under $75,000.

JURISDICTION

12. This Court has jurisdiction over the matters alleged herein pursuant to S.C. Code Ann. § 36-2-803, Article V of the Constitution of the State of South Carolina, and the Court's plenary powers.

13. In particular, Defendants purport to represent WCD and its affiliates in matters impacting the asbestos litigation in the state of South Carolina.

14. Defendants purport to represent WCD in the Plant and Payne cases currently pending in this court .

VENUE

15. Plaintiff is informed and believes that venue is proper in Richland County, South Carolina.

FACTS

16. Defendants are lawyers and law firms that represent WCD in connection with asbestos-related matters impacting the South Carolina asbestos litigation including but not limited to *Plant* and *Payne,* cases currently pending in this Court.

17. As part of his job as Receiver, Plaintiff wrote to Defendants for the production of WCD information and files.

18. On April 18, 2023, this Court denied WCD's Motion to Reconsider appointment of Receiver.

19. Thereafter, on April 18, 2023, the Plaintiff reiterated his request for information. *See* Exhibit B.

20. To date the Defendants have failed to fully respond and cooperate with Plaintiff.

21. In doing so, defendant law firms have ignored Plaintiff -- who stands in the shoes of WCD and controls the attorney-client privilege of WCD.

22. Defendants' refusal to provide the receiver with this information is causing delay and increased costs.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

23. The foregoing allegations are realleged and reincorporated as if fully set forth herein verbatim to the extent not inconsistent herewith.
24. Defendants are in possession of Plaintiff's legal files and financial information.
25. Defendants have delayed and impeded Plaintiff's access to Plaintiff's files and financial information.
26. Defendants seem to take the position that they are not required to provide Plaintiff his files and information.
27. Pursuant to SC Code Ann § 15-53-10, et. seq, Plaintiff seeks a declaration of the legal relationship between Plaintiff and Defendants.
28. Plaintiff also seeks a further declaration that Plaintiff is entitled to WCD's files.
29. Plaintiff further seeks a declaration that Defendants are required to cooperate with the Plaintiff in providing information regarding Plaintiff.

WHEREFORE, WCD, by and through its duly-appointed Receiver, demands judgment against defendants as follows:

A. For an Order requiring the Defendants to turn over to Plaintiff, Plaintiff's files in their entirety.
B. For an Order requiring Defendants to answer Plaintiff's questions regarding Defendants' current and past representation of Plaintiff.
C. For Plaintiff's costs, expenses and attorneys' fees for bringing this action;
D. 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.

Respectfully submitted,

s/ Brian M. Barnwell
Brian M. Barnwell, Esquire
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This 19th Day of April, 2023

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
PETER D. PROTOPAPAS, as the Receiver for Payne & Keller Company, Plaintiff, Vs. Kenneth C. Baker, Esquire and Baker & Patterson, LLP, Defendants.	IN RE COORDINATED ASBESTOS DOCKET Civil Action Number: SUMMONS

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint in this action, a copy of which is hereby served on you, and to serve a copy of your Answer to the said complaint upon the subscribers at 2110 N. Beltline Blvd., Columbia, South Carolina 29204, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in such complaint.

Respectfully submitted,
/s/ Brian M. Barnwell
Brian M. Barnwell (SC Bar 78249)
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Attorneys for the Receiver

This 2nd Day of October, 2023

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
PETER D. PROTOPAPAS, as the Receiver for Payne & Keller Company, Plaintiff, Vs. Kenneth C. Baker, Esquire and Baker & Patterson, LLP, Defendants.	IN RE COORDINATED ASBESTOS DOCKET Civil Action Number: COMPLAINT FOR DECLARATORY JUDGMENT (NON-JURY)

NOW COMES the Plaintiff, Peter D. Protopapas, as the Receiver for Payne & Keller Company, ("the Receiver") Complaining of the Defendants, Kenneth C. Baker, Esq., and Baker & Patterson, LLP ("Defendants"), respectfully shows unto the Court as follows:

1. This case concerns the breach of fiduciary duty to the Plaintiff by Baker & Patterson, LLP and attorney Kenneth C. Baker ("Defendants") by failing to act in the utmost good faith, in the best interest of their client, and failing to comply with express instructions from their client.

PARTIES

2. Plaintiff, appearing by and through its duly appointed Receiver, Peter D. Protopapas, who maintains his principal place of business in Richland County, South Carolina.
3. Plaintiff is informed and believes that Defendant Kenneth C. Baker is a resident of Harris County, Texas. Based on information and belief, Baker is a practicing attorney working for Baker & Patterson, LLP.

4. Plaintiff is informed and believes that Defendant Baker & Patterson, LLP is a professional association organized and existing under the law of the State of Texas. At all times relevant hereto, Mr. Baker acted as a member, owner, employee, and/or agent of Baker & Patterson, LLP.

JURISDICTION

5. This Court has jurisdiction over the matters alleged herein pursuant to S.C. Code Ann. §§ 36-2-802 and 36-2-803, Article V of the Constitution of the State of South Carolina, and the Court's plenary powers.

VENUE

6. Plaintiff is informed and believes that venue is appropriate in this Court as the acts or omissions giving rise to Plaintiff's claim, and the damages arising therefrom occurred in Richland County, South Carolina.

FACTS

7. Peter D. Protopapas was appointed as Receiver for Payne & Keller Company on August 27, 2021. This Court appointed the Receiver to administer all assets of Payne & Keller, including, without limitation, its insurance policies. ***See*** **Exhibit A, Order of Appointment**.
8. The Receiver is further authorized to "engage counsel on behalf of Payne & Keller and take any and all steps necessary to protect the interest of Payne & Keller whatever they may be." (*Id.*)
9. Upon his appointment, the insurers for Payne & Keller (the "Insurers") selected Bowman and Brook with the approval of Plaintiff to defend cases brought against Payne & Keller. Bowman and Brook has offices in Texas and South Carolina.

10. Payne and Keller was sued in a Texas asbestos-related case styled *Daniel D. Williams, individually and as personal representative of the estate of Jimmie Lee Williams, Deceased, Sheila L. Wright and Jimmietta Williams v. The Dow Chemical Company, et. Al.*; In the District Court of Harris County, Texas; 11th Judicial District; Cause No. 2021-36960-ABS (Before the Texas Asbestos MDL Pretrial Judge) ("Texas Action").
11. Upon receipt of service, the Receiver tendered this case to Payne & Keller's Insurers on July 25, 2023. ***See* Exhibit B, Tender**.
12. Without consultation with the Receiver, one or more of Payne & Keller's historic insurers hired Defendants to represent Payne & Keller. This insurer or insurers selected Defendants rather than the approved defense firm Bowman and Brook because, unlike Bowman and Brooke, the Insurer(s) could manipulate Defendants to abrogate their duties to their client, which is the Receiver for Payne & Keller.
13. Defendants engaged in litigation on behalf of Payne & Keller without consulting their client, the Receiver for Payne & Keller.
14. On July 26, 2023, Defendants filed an answer on behalf of Payne & Keller in the Texas action. ***See* Exhibit C, Answer**.
15. In its answer, the Defendants asserted two affirmative defenses: (1) "The Court does not have jurisdiction because the Defendant is a terminated corporation. *See* Tex. Bus. Org. Code. §11.359 (formerly Tex. Bus. Corp. Act art. 7.12)" and (2) "Plaintiff cannot sustain a claim against Defendant because it is a terminated corporation. *See* Tex. Bus. Code §11.359 (formerly Tex. Bus. Corp. Act art. 7.12)." ***See* Exhibit C**.
16. Defendants never communicated their intention to file these non-approved defenses to his client before filing this answer.

17. Defendants also filed a Motion for Summary Judgment on behalf of Payne & Keller on August 4, 2023, asserting that Payne & Keller was a terminated entity and as such Texas statute bar claims after three years. ***See*** **Exhibit D, Motion for Summary Judgment**.
18. Defendants filed the Motion for Summary Judgement without communicating with their client.
19. Bowman and Brook previously communicated to the Insurers on October 21, 2021, that a similar dissolution defense was not applicable to Payne and Keller.
20. Furthermore, the Insurer(s) were aware that the Receiver was not going to assert the inapplicable defense of the Texas Bus. Corp. Act.
21. Defendants owed an obligation to communicate with their client. In Texas, "the insurer's chosen counsel owes a duty of unqualified loyalty to its insured." *Graper v. Mid-Continent Cas. Co.*, 756 F.3d 388, 392 (5th Cir. 2014).
22. On August 16, 2023, the Receiver requested Defendants provide a copy of the filing, a copy of all communications concerning the filing, and the individual who authorized the filing. ***See*** **Exhibit E, 8/16/2023 Receiver request.**
23. In response to the Receivers request for information, on August 18, 2023, the Defendants provided the Answer and Amended Answer filed on behalf of Payne & Keller along with email correspondence with the insurer(s). Not included was the Motion for Summary Judgement filed on August 4, 2023. The Receiver discovered the Motion for Summary Judgement by reading the email correspondence that was produced. *See* **Exhibit F, 8/18/2023 Baker Production with Communications with Insurer(s).**
24. On August 18, 2023, the Receiver became aware that Defendants were acting on the sole instructions of the Insurer(s).

25. After the unauthorized Motion for Summary Judgement was discovered, the Receiver requested Defendants to withdraw the motion on August 21, 2023. ***See* Exhibit G, 8/21/2023 Receiver request to withdraw.**

26. On August 22, 2023, Defendants refused to follow the Receiver's instruction to withdraw the Motion and asked for clarification as to why the Receiver wanted to have Defendants withdraw the motion. ***See* Exhibit H, 8/22/23 Email at 5:46 PM.**

27. The Receiver sent an email to Defendants on August 22, 2023, explaining the reasoning behind the request to withdraw the motion. **See Exhibit H, 8/22/23 Email String at 7:19 PM.**

28. Defendants continued to ignore their client and actively took a position that was against their client's wishes. **See Exhibit I, 8/24/2023 Email Compilation.**

29. Defendants did not communicate with their client before filing the Answer and Motion for Summary Judgement. Defendants also failed to follow the instructions made by the Receiver to withdraw the Motion for Summary Judgement.

30. Pursuant to S.C. Code § 15-36-100, if applicable, attached is an affidavit from Suzanne Westerheim who is a Texas legal ethics expert. ***See* Exhibit J, Affidavit.**

CAUSE OF ACTION
DECLARATORY JUDGMENT

31. The foregoing allegations are alleged and reincorporated as if fully set forth herein verbatim to the extent not inconsistent herewith.

32. Defendants acted as attorneys for Plaintiff and have acted in concert with the Insurers to violate the appointment order and cause damages to their client in South Carolina.

33. Pursuant to S.C. Code Ann. § 15-53-10, *et seq*., Plaintiff seeks a declaration of the legal relationship between Plaintiff and Defendants.

34. Plaintiff seeks a declaration of the following:

    a. At all times relative hereto, Defendants acted as attorneys for Plaintiff.

    b. Defendants had a fiduciary relationship with Plaintiff.

    c. Defendants owed Plaintiff a duty of the utmost good faith, loyalty, and fidelity.

    d. Defendants owed Plaintiff a duty to follow his directions.

    e. Plaintiff has incurred additional time and expense by Defendants' breach of fiduciary duty.

35. Plaintiff seeks a further declaration that Defendants violated their duties to Plaintiff by, including but not limited to: filing pleadings and motions without consultations with Plaintiff; failing to communicate with Plaintiff, and by substituting an insurer(s) direction for that of his client.

WHEREFORE, Plaintiff respectfully prays for a declaration and order that Defendants breached their fiduciary duty to the Receiver, disgorgement of any fees collected during the representation, and for reimbursement of costs the Receiver incurred having to correct Defendant's actions, all of which is not to exceed $75,000.

Respectfully submitted,

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Attorneys for the Receiver

This 2nd Day of October, 2023

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

KEITH W. PARK, INDIVIDUALLY AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF ISABELLA PARK,

Plaintiff,

vs.

ARMSTRONG INTERNATIONAL, INC. ET AL,

Defendant,

CAPE, PLC, BY AND THROUGH ITS DULY APPOINTED RECEIVER, PETER D. PROTOPAPAS,

Third-Party Plaintiff,

vs.

LOCKE LORD, LLP,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT

Docket No.: 2021CP4002727

AMENDED SUMMONS

(Non Jury)

TO: THE ABOVE-NAMED THIRD-PARTY DEFENDANT:

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, a copy of which is hereby served on you, and to serve a copy of your Answer to said Amended Complaint upon the subscribers at 1722 Main Street, Suite 200, Columbia, SC 29201, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Amended Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in such Amended Complaint.

Respectfully Submitted,

HARLING & WEST, LLC

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ATTORNEYS FOR THIRD-PARTY PLAINTIFF

Columbia, South Carolina
August 8, 2023

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND KEITH W. PARK, INDIVIDUALLY AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF ISABELLA PARK, Plaintiff, vs. ARMSTRONG INTERNATIONAL, INC. ET AL, Defendant, --- CAPE, PLC, BY AND THROUGH ITS DULY APPOINTED RECEIVER, PETER D. PROTOPAPAS, Third-Party Plaintiff, vs. LOCKE LORD, LLP, Third-Party Defendant.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Docket No.: 2021CP4002727 **AMENDED COMPLAINT** **(Non Jury)**

COMES NOW CAPE, PLC, by and through its duly appointed Receiver, Peter D. Protopapas ("Plaintiff" or "Cape"), complaint of the third-party defendant, Locke Lord, LLP, ("Defendant" or "Locke Lord"), who through undersigned counsel respectfully shows unto the Court as follows:

PARTIES

1. The Receiver is a lawyer who was appointed as Receiver of Cape, PLC, (and its affiliate, North American Asbestos Corporation), by Order on March 16, 2023, and who maintains his principal place of business in Richland County, South Carolina.
2. The Receiver is a court appointed officer tasked with marshaling the assets of Cape and its affiliates.
3. Pursuant to Court Order, the Receiver controls the Attorney client privilege of Cape and its affiliates. **See Exhibit A, 3/16/2023 Order Appointing Receiver.**
4. Defendant is a limited liability partnership organized under the laws of the State of Delaware with its principal place of business in the State of Texas.
5. The amount in controversy is under $75,000.00.

JURISDICTION

6. This Court has jurisdiction over the matters alleged herein pursuant to S.C. Code Ann. §36-2-803, Article V of the Constitution of the State of South Carolina, and the Court's plenary powers.
7. In particular, Defendant purported to represent Cape and its affiliates in matters impacting the asbestos litigation in South Carolina.

VENUE

8. Plaintiff is informed and believes that venue is proper in Richland County, South Carolina.

FACTS

9. Defendant is a law firm that represented Cape and/or its affiliates in connection with asbestos-related matters impacting the South Carolina asbestos litigation.

10. As part of his job as Receiver, Plaintiff wrote to Defendant for the production of Cape and its affiliates' files.

11. On March 20, 2023, Plaintiff wrote to Defendant and provided its Firm Chair with a copy of the Order of Appointment. Plaintiff requested "Cape and its affiliates" files (whether in hard copy or electronic format). **See Exhibit B, March 20, 2023, e-mail, and attachment.**

12. After not having heard back from Defendant, Plaintiff followed up on his request on April 11, 2023. **See Exhibit C, April 11, 2023, email.**

13. Defendant law firm claims:

> "Throughout our more than 135-year history, we've cultivated partnerships with a broad range of public and private companies, from Fortune 500 leaders to startups and emerging businesses. Our team can design strategic solutions that meet your long-term goals no matter how large or small your matter, apply our established tradition of responsive, personalized service."
>
> **See Exhibit D, Defendant website at** www.lockelord.com/about-us

14. Defendant law firm, however, ignored Plaintiff – who stands in the shoes of Defendant's former Client Cape and its affiliates and controls the attorney client privilege of Cape and its affiliates – requests causing unnecessary and costly delay.

15. Defendant also asserts that: "Corporate responsibility is also an important part of Locke Lord's mission[.]" **See Exhibit D, Defendant website at** www.lockelord.com/about-us.

16. On April 17, 2023, Defendant advised Plaintiff "we have determined that the paper files of NAAC were destroyed pursuant to our document retention policy. As a result, we have no responsive records or documents pertaining to your request." **See Exhibit E, April 17, 2023, email.**

17. On July 18, 2023, Plaintiff deposed a Rule 30(b)(6) designee of Defendant regarding Capes files and Cape's relationship with Defendant. **See Exhibit F, Notice of Rule 30(b)(6) deposition.**

18. Defendant's designee testified it was in possession of documents and information related to Cape's file.

19. Defendant's designee testified it was not providing Plaintiff with these documents and information because a lawsuit had been filed.

20. Defendant's designee testified Plaintiff would have to pursue written discovery to obtain Cape's files.

21. Defendant's designee testified it had destroyed files related to Cape in 2021 and 2022.

22. Defendant's designee testified it did not know the contents of the files that were destroyed in 2021 and 2022.

23. Defendant's designee testified Defendant is in possession of financial information regarding Cape.

24. Defendant's designee testified it is in possession of matter numbers and matter descriptions related to Cape.

25. Defendant has made no meaningful effort to locate Plaintiff's files.

26. Defendant has ignored Plaintiff's interests by refusing to provide him with his files and thereby causing delay and increased costs.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

27. The foregoing allegations are realleged and reincorporated as if fully set forth herein verbatim to the extent not inconsistent herewith.

28. Defendant is in possession of Plaintiff's legal files and other information regarding its representation of Cape.
29. Defendant has delayed and impeded, and continues to delay and impede, Plaintiff's access to Plaintiff's files.
30. Defendant has placed its interest ahead of Plaintiff's interests regarding Plaintiff's files.
31. Defendant believes it is not required to provide Plaintiff his files.
32. Defendant has destroyed Plaintiff's files without notice to or consent from Cape.
33. Pursuant to S.C. Code Ann. §15-53-10, et seq, Plaintiff seeks a declaration of the legal relationship between Plaintiff and Defendant.
34. Plaintiff also seeks a further declaration that Plaintiff is entitled to Cape and its affiliates' files and information related to these files.
35. Plaintiff seeks a declaration that Defendant is required to cooperate with the Plaintiff in providing information regarding Defendant's past representation of Cape and its affiliates.
36. Plaintiff seeks a declaration that Defendant is required to provide Plaintiff with all information in its possession regarding Cape's files.
37. Plaintiff seeks a declaration that Defendant has engaged in the spoliation of evidence.
38. Plaintiff seeks a declaration that Defendant has violated its duties to Plaintiff regarding providing Plaintiff with all information in its possession regarding Cape's files.

FOR A SECOND CAUSE OF ACTION
Accounting

39. The foregoing allegations are realleged and reincorporated as if fully set forth herein verbatim to the extent not inconsistent herewith.
40. A confidential or fiduciary relationship exists between Cape and Defendant, as Defendant has served as Cape's attorney for many years.

41. During this representation, Cape has entrusted money or property to Defendant, thereby creating a duty to account.

42. Defendant has failed to account to Cape as it has not provided Plaintiff with any financial records or files despite being requested to do so.

43. Plaintiff is without an adequate remedy at law to obtain this information from Defendant as Defendant has refused to provide it to Plaintiff.

44. Plaintiff seeks an accounting from Defendant for all money or property entrusted to Defendant during Defendant's representation of Cape.

WHEREFORE, Cape and its affiliates, by and through their duly appointed Receiver, demands judgment against Defendant as follows:

A. For Plaintiff's costs, expenses, and attorneys' fees for bringing this action;

B. For an Order requiring Defendant to turn over to Plaintiff, Plaintiff's files in their entirety;

C. For an Order requiring Defendant to answer Plaintiff's questions regarding Defendant's past representation of Plaintiff;

D. For an Order stating Defendant has engaged in the spoliation of evidence;

E. For an Order stating Defendant has violated its duties to Plaintiff regarding its files;

F. For an Order compelling Defendant to account to Plaintiff for all property and money entrusted to Defendant during the course of its representation; and

G. 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.

Respectfully submitted,

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ATTORNEYS FOR THIRD-PARTY PLAINTIFF

Columbia, South Carolina
August 8, 2023

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Ann Finch, Individually and as Executor of the Estate of Franklin Finch, Plaintiff, v. United States Fidelity and Guaranty Company et al., Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C.A. No. 2019-CP-40-03003 **RECEIVER FOR COVIL CORPORATION'S NOTICE OF MOTION AND MOTION TO COMPEL AND FOR SANCTIONS AGAINST USF&G AND ITS COUNSEL FOR IMPROPER 30(b)(6) WITNESS CONDUCT**

Please take notice that Peter D. Protopapas ("the Receiver"), as Receiver for Covil Corporation ("Covil"), by and through the undersigned counsel, will move before this Honorable Court ten (10) days after service of this Motion, or as soon thereafter as this matter may be conveniently heard, for an Order pursuant to Rules 30 and 37, SCRCP, compelling United States Fidelity and Guaranty Company ("USF&G") to produce certain materials and sanctioning USF&G and its counsel for conduct violative of the South Carolina Rules of Civil Procedure. This motion arises from the USF&G's refusal to properly participate in the deposition of its 30(b)(6) witness. For example:

- Despite having produced documents defining the term fiduciary, USF&G's 30(b)(6) witness testified he did not know what the term fiduciary means:

  A. I'm not sure what you mean by fiduciary relationship.
  Q. You're not sure what I mean by that?
  A. No.
  (Exhibit A, Day 1 Tr., 146:14 through 150:22.).

- Did not know whether USF&G had instructed Wall Templeton to file an opposition to the motion seeking the appointment of a Receiver for Covil, (*see* Exhibit B, Day 2 Tr., 118:7-25);

- Whether Covil was a "defunct" insured, (*see* Exhibit C, Day 3 Tr., 47:7 through 50:16);

- USF&G's obligation to communicate with the Receiver after his appointment, (*see* Exhibit B, Day 2 Tr., 39:9 through 49:2 (witness only testifying that "USF&G has communicated with Mr. Protopapas"); *id.* at 41:8-17 (when asked if USF&G has an obligation to communicate with the Receiver, answering "I'm not quite sure what you're asking"); *see generally id.* at 39:9-49:2);

Furthermore, USF&G unilaterally limited its 30(b)(6)'s testimony on numerous topics, testifying:

> Q. So, for example, where topic number 4 seeks information from the USF&G corporate representative about the amount of any verdict awarded to plaintiffs in other mesothelioma cases tried by USF&G insureds, you are not prepared to provide that information in this deposition, are you?
>
> A. As to other insureds and not Covil? I am not.

USF&G unilaterally placed similar limitations on other topics in the deposition. (Exhibit A, Day 1 Tr., 209:6 through 214:19.) and *infra* at p. 8–11. This Motions arises from USF&G's improper deposition conduct.

SUMMARY OF MOTION

Respectfully, the evasiveness and/or lack of knowledge of USF&G's Rule 30(b)(6), SCRCP, witness at a recent deposition requires that the following sanctions be imposed:

- Compel USF&G to produce its "Mesothelioma Tracker Database," its "annual in-depth asbestos claim review," and its most recent "quarterly asbestos reserve reviews";

- Require USF&G to provide written answers to questions that it refused to answer or answered evasively;

- Prohibit USF&G from offering testimony at the trial of this case related to the topics that it was not "willing" to testify about during its Rule 30(b)(6) deposition;

- Require USF&G to reimburse the Receiver for the attorneys' fees and costs associated with his preparations and time expended taking this deposition; and

- Admonish USF&G's counsel that further misbehavior may result in direct sanctions against them, and require USF&G's counsel practicing before this Court *pro hac vice* to certify to the Court that they have studied the South

Carolina Rules of Civil Procedure and will faithfully adhere to the Rules going forward.

INTRODUCTION

Plaintiff Ann Finch filed this lawsuit against multiple insurer defendants ("the Insurers"); law firm Wall, Templeton & Haldrup, P.A. ("Wall Templeton"); and Covil seeking declaratory judgments that the Insurers are liable to her under an alter ego theory due to their exercise of total dominion and control over Covil. Covil brought cross-claims against the Insurers for alter ego, breach of contract, bad faith failure to defend, aiding and abetting the breach of a fiduciary duty, and negligence; claims against Wall Templeton for negligence, legal malpractice, and breach of fiduciary duty; and declaratory judgment claims related to policies issued to it by the Insurers.

1. The instant dispute relates to a Rule 30(b)(6) deposition of USF&G.

Covil noticed a Rule 30(b)(6), SCRCP, deposition of USF&G and served an amended notice on July 22, 2020, that included deposition topics relating to USF&G's sixty-plus year relationship with Covil, its duties and obligations to Covil, its work with Wall Templeton, and the performance of its duties and obligations. (*See* Amended Notice of Deposition, attached hereto as Exhibit D.) USF&G served Covil with a thirty-four-page response, which contained numerous objections to the noticed topics, on July 25, 2020. (*See* Responses and Objections, attached hereto as Exhibit E.) USF&G's objections indicated it would not provide the requested testimony for fifty-six of the sixty-eight noticed topics, claiming either that it needed to meet and confer over particular topics or that it was only willing to produce a witness who could testify generally as to USF&G's contractual duties to Covil only. In other words, USF&G flatly refused to testify about how it has historically handled asbestos litigation involving its viable (non-defunct) policyholders.

USF&G did not file a motion for protective order or obtain rulings on any of its countless objections before the deposition. After three days of evasive testimony interrupted by improper

objections and limitations from USF&G's counsel, the Receiver's counsel suspended the deposition to provide the parties with an opportunity to seek the Court's guidance about the appropriate manner for the deposition to proceed.

2. USF&G has a history of improper behavior in this Court.

This Court previously noted that "[r]arely, if ever" has it "encountered such a degree of corporate dishonesty as has been on display from USF&G" in the litigation involving Covil. Order for Rule to Show Cause Hearing, *Smith v. CBS Corp.*, C.A. No. 2015-CP-46-02155, at 7–8 (S.C. Com. Pl. Jan. 8, 2020) (the "Rule to Show Cause Order").

The Court will recall that, over the course of numerous receivership hearings, USF&G withheld information related to Covil's insurance coverage. In its Rule to Show Cause Order, the Court stated it "is concerned by the Insurers' failure to fully represent facts to the Court regarding the insurance coverage issued to Covil . . . . The Court has given the Insurers ample opportunity to inform the Court of the necessary facts surrounding these coverage issues, and the Insurers have continuously refused to provide full information, misrepresented information, and attempted to prevent this Court from ruling on these issues." Rule to Show Cause Order, at 7. In failing to produce Covil's policies, this Court observed that "USF&G has not been transparent with either Covil or the court," and instead produced a so-called "certified" document that this Court described as "misleading." *Id.* at 11.

But USF&G's misbehavior extends much further, as it demonstrated when it failed to disclose that it had systematically destroyed its insureds' policies to avoid liability.

> The Court is deeply troubled by USF&G's historical behavior, including the widespread destruction of its insureds' insurance policies in an effort to evade liability under those policies. The Court is even more troubled by the fact that USF&G never mentioned, in numerous hearings on this very topic, that its policy destruction "purge" was the reason that USF&G is now unable to produce Covil's policies to the receiver. In this regard, USF&G has flagrantly defied this Court's

> orders and attempted to make a mockery of this Court's important work. . . . USF&G owes this Court a duty of candor, and should have been forthright.

Id. at 7–8.

USF&G also was not honest with the Court when it claimed it recently discovered a prior Covil receivership, despite conclusive documentary evidence to the contrary. *See* Order Denying Motions to Reconsider and Motion to Stay, *Falls v. CBS Corp.*, No. 2015-CP-46-02155, at 6 (S.C. Com. Pl. May 6, 2020).

Despite this Court's prior admonitions, USF&G has continued to flout the South Carolina Rules of Civil Procedure. USF&G's misconduct at the recent deposition on August 11–13, 2020 (as will be described below) continues to stymie the Receiver's efforts because USF&G simply refuses to comply with its obligations as a litigant in a South Carolina court.

APPLICABLE LAW AND AUTHORITIES

"The primary objective of discovery is to ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed." *In re Anonymous Member of S.C. Bar*, 346 S.C. 177, 193, 552 S.E.2d 10, 18 (2001) (quoting *In re Alford Chevrolet–Geo*, 997 S.W.2d 173, 180 (Tex.1999)).

In South Carolina,

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 26(b)(1), SCRCP.

With respect to oral depositions, "Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court or unless that counsel

intends to present a motion under Rule 30(d), SCRCP." Rule 30(j)(3), SCRCP (footnote omitted). "Violation of this rule may subject the violator to sanctions under Rule 37, SCRCP." Rule 30(j)(9), SCRCP. Additionally, "If a deponent fails to answer a question propounded . . . under Rule 30 . . . , the discovering party may move for an order compelling an answer . . . ." Rule 37(a)(2), SCRCP.

When a party raises an objection to questions during a deposition, "[e]vidence objected to shall be taken subject to the objections." Rule 30(c), SCRCP. Interpreting identical language in Rule 30(c) of the Federal Rules of Civil Procedure, the Fourth Circuit has stated:

> The Rule itself says 'Evidence objected to shall be taken subject to the objections', and Professor Wright says it means what it says, citing *Shapiro v. Freeman*, D.C.N.Y.1965, 38 F.R.D. 308, for the doctrine: 'Counsel for party had no right to impose silence or instruct witnesses not to answer and if he believed questions to be without scope of orders he should have done nothing more than state his objections.' Wright & Miller, *Federal Practice and Procedure: Civil* s 2113 at 419, n.22 (1970). We agree. If plaintiff's counsel had any objection to the questions, under Rule 30(c) he should have placed it on the record and the evidence would have been taken subject to such objection. If counsel felt that the discovery procedures were being conducted in bad faith or abused in any manner, the appropriate action was to present the matter to the court by motion under Rule 30(d).

Ralston Purina Co. v. McFarland, 550 F.2d 967, 973–74 (4th Cir. 1977); *see also Smith v. US Sprint*, 19 F.3d 12 (4th Cir. 1994) ("Furthermore, at the deposition Smith's counsel repeatedly counseled his client to not answer questions, a direct violation of *Ralston Purina Co. v. McFarland*, 550 F.2d 967, 973 (4th Cir. 1977), and Smith often gave evasive answers by stating that he could not remember many of the facts supporting his various claims."); *Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016) (providing that when "the language of [the South Carolina Rules of Civil Procedure] is substantially similar to the Federal Rules of Civil Procedure. . . . , our Court looks for guidance to cases interpreting the federal rules").

"Depositions are widely recognized as one of the 'most powerful and productive' devices used in discovery." *Anonymous Member*, 346 S.C. at 193, 552 S.E.2d at 18. "Actions taken in a

deposition designed to prevent justice, delay the process, or drive up costs are improper and warrant sanctions." *Id.* at 194, 552 S.E.2d at 18. "In South Carolina, our judges have broad discretion in addressing misbehavior during depositions." *Id.*

> In addition to their traditional contempt powers, judges may issue orders as a sanction for improper deposition conduct: (1) specifying that designated facts be taken as established for purposes of the action; (2) precluding the introduction of certain evidence at trial; (3) striking out pleadings or parts thereof; (4) staying further proceedings pending the compliance with an order that has not been followed; (5) dismissing the action in full or in part; (6) entering default judgment on some or all the claims; or (7) an award of reasonable expenses, including attorney fees.

Id.

When a representative is deposed on behalf of a corporation, the witness "shall testify as to matters known or reasonably available to the organization." Rule 30(b)(6), SCRCP.

> If a party or an officer, director or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule.

Rule 37(d), SCRCP.

> [T]he court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence; (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . . .

Rule 37(b)(2), SCRCP.

ARGUMENT REGARDING USF&G'S DEPOSITION MISCONDUCT

1. USF&G's behavior at this deposition was no accident.

USF&G's scofflaw attitude toward the South Carolina Rules of Civil Procedure was on full display, and it was no accident. The events that transpired during this deposition were carefully orchestrated by USF&G's counsel and the thoroughly coached corporate witness.

USF&G produced Craig Johnson as its designated corporate representative witness for this deposition. According to his testimony, USF&G's counsel spent an enormous amount of time preparing Mr. Johnson for this deposition. In fact, Mr. Johnson testified that he spent "well north of 100 hours" preparing for this deposition. (Exhibit A, Day 1 Tr., 27:17-18, 23-24.)

> That's a very conservative estimate. I've had dozens of hours of prep sessions, if that's probably also an understatement. Counsel and I met over the last week and a half pretty much on a daily basis in preparation of this. So I couldn't put a total number on it, but the volume of preparation for this has been massive.

Id. at 27:25-28:1; 28:14-19.

2. USF&G unilaterally limited the scope of its corporate testimony based on what is was "willing" to present a witness to discuss.

USF&G's improper conduct started with its effort to write its own rules by refusing to respond to broad categories of properly noticed topics because it was not "willing" to do so. *See* Rule 30(c) ("Evidence objected to shall be taken subject to the objections."); *Ralston Purina Co.*, 550 F.2d at 973–74 (indicating a party has "no right" to refuse to answer a question simply because the party objects to it, and pursuant to Rule 30(c), responses to such questions should be given subject to the objection). This wholesale refusal to address entire categories of topics central to this case is illustrated by the following exchange:

> Q. So, I understand from what both you and your counsel said before we took the most recent break, I understand you to say that you are limiting any testimony that you're prepared to provide today as the corporate representative in response to topic No. 3 to information related to USF&G's performance of its contractual duties to defend and indemnify Covil against asbestos-related claims under policy SMP 490049, prior to November 2, 2018, including claims involving alleged mesothelioma. Is that accurate?
>
> A. Yes.

Q. Are you similarly limiting your testimony here today as the corporate representative for USF&G in response to topic number 4?

A. Yes.

Q. So you are not prepared today, as corporate representative for USF&G to provide testimony as it relates to topic number 4, for example, as to the amount of—the amount of verdict awarded to plaintiff in mesothelioma cases tried to verdict by USF&G insureds since 1993; is that accurate?

MS. FORSHAW: Objection to form.

THE WITNESS: I don't think that's accurate. I am here and ready to testify, subject to the objection as set forth in our response and objection for the 30(b)(6).

Q. Well, you're here and ready to testify as it relates to topic number 4, only about matters that pertain to Covil, correct?

A. You're paraphrasing the objection and I would note that, but yes.

Q. So, for example, where topic number 4 seeks information from the USF&G corporate representative about the amount of any verdict awarded to plaintiffs in other mesothelioma cases tried by USF&G insureds, you are not prepared to provide that information in this deposition, are you?

A. As to other insureds and not Covil? I am not.

Q. Okay. Moving to topic number 5, you are, similarly, not prepared to provide testimony in this deposition as the corporate representative for USF&G about the percentage of cases resulting in defense verdicts among cases tried to verdict by USF&G insureds in meso cases, correct?

A. Once again, I think the response speaks for itself. I'm here—I'm happy to read the response to you, what I'm here to testify on behalf of.

Q. And that is that you're here to testify as it relates to topic number 5 only about any defense verdict that may have been received by Covil, correct?

A. I—once again, I repeat my answer. I guess I have to read it. So subject to and without waiver of the forgoing general and specific objections, USF&G will produce a deponent to testify about USF&G's performance of its contractual duties to defend and indemnify Covil against asbestos-related claims under policy SMP 490049 prior to November 2nd, 2018.

. . . .

Q. Have you done anything, Mr. Johnson, preparing for this deposition to determine the percentage of defense verdicts achieved by USF&G's insureds in mesothelioma cases that they have tried to verdict since Covil was dissolved in 1993?

A. Once again, I believe I have answered the question. I've read the objection on what I'm willing—what I'm here to testify about. I'm here to testify about the USF&G's performance to defend and indemnify Covil on asbestos-related claims under that policy, as I have previously read.

Q. All right. And you are not here to testify about the percentage of defense verdicts obtained by other USF&G insureds in mesothelioma cases, are you?

A. Correct.

Q. And you're not here to testify about the percentage of plaintiffs' verdicts received in other mesothelioma cases tried to verdict by USF&G insureds, correct? That's topic number 6.

A. Outside of those claims associated with Covil, no.

. . . .

Q. As it relates to topic number 8, are you able to provide any testimony about the amount of the average plaintiff's verdict in a mesothelioma case in each year since Covil was dissolved in 1993?

A. Once again, it's the same answer. The objection is mirrored between these. I'm happy to answer again, if you'd like me to.

. . . .

Q. Mr. Johnson, and I'm going to direct you to topic number 8, okay? Are you able to provide any testimony in this deposition about the amount of the average plaintiff's verdict in a mesothelioma case in each year since Covil was dissolved in 1993?

A. Yes, as it relates to Covil.

Q. But only as it relates to Covil, correct?

A. Correct.

Q. Mr. Johnson, I will direct your attention to topic number 9. Are you able to provide testimony in this deposition as to the percentage of mesothelioma cases tried in each year since Covil was dissolved in 1993, resulting in defense verdicts?

A. Yes, as relating to Covil.

Q. So you're limiting your testimony here as the corporate representative on that topic, also, to matters pertaining only to Covil, correct?

A. Correct.

Q. As to item 10, topic 10, it asks for each year since Covil was dissolved in 1993 through 2018, the average settlement amount of USF&G insureds as an aggregate for mesothelioma cases. Are you prepared to testify about that here in this deposition?

A. Yes, as it relates to Covil.

Q. Okay. Again, the question asks of—for the average as it relates to all USF&G insureds. So you are limiting what you're willing to testify about to just Covil, correct?

MS. FORSHAW: Objection to form.

THE WITNESS: Yes.

(Exhibit A, Day 1 Tr., 209:6 through 214:19.)

Incredibly, USF&G also admitted to handling asbestos claims for other defunct insureds like Covil; however, its witness was unable to state how many such insureds existed, and he refused to testify about them. (*See* Exhibit C, Day 3 Tr., 50:18 through 51:3).[1]

Because USF&G's witness was not "willing" to testify on certain noticed deposition topics, Covil was unable to gain critical insight and information about numerous highly relevant topics at the heart of this case. *See* Rule 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . .").

[1] Furthermore, USF&G ignored prior rulings of this Court by re-asserting privileges throughout the deposition that this Court already has overruled. (*See* Exhibit B, Day 2 Tr., 6:9 through 8:18.) Notably, USF&G's witness had not even reviewed the documents over which USF&G re-asserted those previously overruled privilege objections. (*See* Exhibit B, Day 2 Tr., 19:6 through 22:10.)

3. USF&G's corporate representative played games and provided evasive testimony.

USF&G's witness also engaged in blatant gamesmanship and provided evasive answers to many of Covil's questions. For example, he repeatedly claimed he (and, therefore, USF&G) did not understand the term "fiduciary relationship":

> Q. Okay. You understand, Mr. Johnson, that during the period of time Gallivan White & Boyd was representing Covil in connection with asbestos litigation, the law firm of Gallivan White & Boyd was in a fiduciary relationship with Covil, correct?
>
> MS. FORSHAW: Objection to form.
>
> Q. You can answer.
>
> A. I'm not sure what you mean by fiduciary relationship.
>
> Q. You're not sure what I mean by that?
>
> A. No.
>
> . . . .
>
> Q. What is your understanding of a fiduciary relationship, Mr. Johnson?
>
> MS. FORSHAW: Objection to form.
>
> THE WITNESS: As I stated before, I don't know if I have an understanding of what that term is specifically.
>
> Q. Okay. So does USF&G have an understanding of the term fiduciary relationship, Mr. Johnson?
>
> MS. FORSHAW: Objection. Can you tell me which topic this relates to?
>
> MS. PATTERSON: It relates to all of the topics concerning the law firms that have been representing Covil over the years at the behest of various insurers. So.
>
> MS. FORSHAW: Okay. Well, I'm going to go back—go ahead.
>
> MS. PATTERSON: Can you please read back my question, Madam Court Reporter?
>
> (The foregoing question was read back by the court reporter.)

MS. FORSHAW: And I reiterate my objection.

THE WITNESS: I don't know.

Q. Does USF&G have an opinion as to whether the Gallivan White & Boyd law firm had a fiduciary relationship with Covil during the time that law firm represented Covil in connection with asbestos litigation?

MS. FORSHAW: Objection.

THE WITNESS: I'm not a lawyer and I know that there are certain relationships and responsibilities that lawyers carry on behalf of their clients. You would—and that varies by jurisdiction and legal code and things of that nature. So, I know that there is a relationship between the lawyer and their client. And that Gallivan White operated at defense counsel for Covil.

MS. FORSHAW: Can I reiterate my request for a break, since it's been an hour and 45 minutes.

Q. As soon as I finish this line of questioning. Is it USF&G's opinion—strike that. Does USF&G agree, Mr. Johnson, that Gallivan White & Boyd owed fiduciary duties to Covil during the time that law firm represented Covil in connection with asbestos litigation?

MS. FORSHAW: Objection to form.

THE WITNESS: Once again, I'm not a lawyer in terms of the responsibilities that they—and what the legal code calls for in terms of their relationship and the mechanics of that relationship between counsel and their client.

Q. You just don't know?

A. That's—I mean, that's a legal standard. I don't know.

Q. And I'm going to ask you the same question with respect to Wall Templeton, so if you need to give me the same answer, I suspect you will. Does USF&G agree that Wall Templeton was in a fiduciary relationship with Covil throughout the time that law firm represented Covil in connection with asbestos cases?

MS. FORSHAW: Objection, form.

THE WITNESS: My answer would be the same as you previously mentioned.

(Exhibit A, Day 1 Tr., 146:14 through 150:22.)

USF&G's ignorance of this routine (and ubiquitous) insurance term, whether feigned or sincere, is particularly troubling given its appearance in discovery materials USF&G itself has produced, (*See A Glossary of Selected Insurance, Suretyship and Legal Terms* at 45, attached hereto as Exhibit F (defining fiduciary as "A person who occupies a position of special trust and confidence . . . .")),[2] and Mr. Johnson's contention that he spent "well north of 100 hours" preparing for the deposition. (Exhibit A, Day 1 Tr., 27:17-18, 23-24.)

USF&G's failure (or refusal) to adequately answer even such basic questions demonstrates either a severe lack of preparation or a deliberate attempt to obstruct the deposition, either of which is sanctionable. *See* Rule 30(b)(6) (providing a corporate representative witness "shall testify as to matters known or reasonably available to the organization"); Rule 30(j)(9) ("Violation of this rule may subject the violator to sanctions under Rule 37, SCRCP."); *Chapman v. HHCSC, LLC*, No. 2:14-CV-00051-RMG, 2014 WL 12615705, at *4 (D.S.C. Dec. 9, 2014) ("Producing an unprepared witness is 'tantamount to a failure to appear' under Rule 37(d)." (quoting *United States v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C.)); *accord Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 304 (3d Cir. 2000); *see also Keepers, Inc. v. City of Milford*, 807 F.3d 24, 36 (2d Cir. 2015) ("If a deponent fails to satisfy Rule 30(b)(6) by refusing to designate a witness

[2] This term also appears in over one hundred different places on the website for Travelers, which purchased USF&G in 1998. *See, e.g., Fiduciary Liability Insurance*, https://www.travelers.com/professional-liability-insurance/fiduciary-liability (last visited Aug. 20, 2020) (stating "Travelers Knows Fiduciary Liability" and containing a video entitled "Demystifying Fiduciary Liability Insurance"); *Fiduciary Liability*, https://www.travelers.com/iw-documents/professional-liability-insurance/59877-fiduciary-liability-faq.pdf (2014) (defining a fiduciary and giving examples of fiduciary functions); *Fiduciary Liability Coverage*, https://www.travelers.com/iw-documents/professional-liability-insurance/59396-fiduciary-liability-coverage-101.pdf (2014). Similarly, the term has regularly appeared in USF&G SEC filings. *See, e.g.*, USF&G Corp. 1993 Form 10-K, http://edgar.secdatabase.com/409/35439694000019/filing-main.htm.

or producing an unprepared witness, the court may order sanctions, including the preclusion of evidence.").

Although a central focus of this deposition involved information about USF&G's handling of asbestos cases for its viable policyholders (in comparison to the manner in which USF&G treated the defunct Covil before the appointment of the Receiver), and despite detailed and lengthy questioning on these topics, USF&G's witness neglected to mention that Travelers maintains a "Mesothelioma Tracking Database" and a "Trial Tracking Database" until he was confronted with Travelers documents referencing the databases. (*See* Exhibit C, Day 3 Tr., 14:5 through 16:8, 19:14 through 20:20, 155:14 through 156:21.) This type of tap dancing through testimony is not permitted in South Carolina.

USF&G also gave extraordinarily evasive testimony on a variety of other important topics, including:

- USF&G's obligation to communicate with the Receiver after his appointment, (*see* Exhibit B, Day 2 Tr., 39:9 through 49:2 (witness only testifying that "USF&G has communicated with Mr. Protopapas"); *id.* at 41:8-17 (when asked if USF&G has an obligation to communicate with the Receiver, answering "I'm not quite sure what you're asking"); *see generally id.* at 39:9-49:2);

- USF&G's position regarding whether anyone acted in Covil's interest after its dissolution and before the Receiver's appointment, (*see* Exhibit B, Day 2 Tr., 50:1through 53:19);

- Whether Covil was a "defunct" insured, (*see* Exhibit C, Day 3 Tr., 47:7 through 50:16); and

- USF&G'S position about the published recommendations for handling defunct insureds written by Zurich's counsel in a Covil case, (*see* Exhibit C, Day 3 Tr., 52:9 through 58:4).

4. After more than 100 hours of preparation, the USF&G witness was remarkably unprepared to testify when it suited his purposes

Similarly, USF&G's witness was wholly unprepared to testify about critically important

topics central to this case—for example, the USF&G corporate witness:

- Did not know whether USF&G had instructed Wall Templeton to file an opposition to the motion seeking the appointment of a Receiver for Covil, (*see* Exhibit B, Day 2 Tr., 118:7-25);

- Did not interview Danny White, Mark Wall, or Jim Covil—central figures in this litigation—in preparation for the deposition, (*see* Exhibit B, Day 2 Tr., 144:19 through 145:19);

- Did not read the depositions of Trey Branham or Jessica Dean in preparation for the deposition, (*see* Exhibit C, Day 3 Tr., 89:8 through 90:25);

- Did not know whether USF&G considered Covil to be "insolvent" at any point, (*see* Exhibit B, Day 2 Tr., 131:25 through 134:6; 135:25 through 136:10); and

- Did not know whether USF&G owes duties to the creditors of an insolvent insured, (*see* Exhibit B, Day 2 Tr., 136:12-21).

SANCTIONS REQUESTED

Because USF&G thwarted Covil's discovery in this case by refusing to comply with relevant South Carolina Rules of Civil Procedure governing depositions and discovery, USF&G should be compelled to produce the information Covil sought during the deposition in alternative formats. Specifically, USF&G should produce its "Mesothelioma Tracker Database," a copy of its "annual in-depth asbestos claim review,"[3] and a copy of its most recent "quarterly asbestos reserve reviews."[4]

As a direct result of its counsel's obstructive tactics, USF&G also should be prohibited from offering testimony at the trial of this case related to the topics that it was not "willing" to

[3] *See* The Travelers Companies, Inc. Form 10-K for the Fiscal Year Ended December 31, 2019, https://www.sec.gov/ix?doc=/Archives/edgar/data/86312/000008631220000011/trv-12312019x10k.htm (stating the review addresses "active policyholders and litigation cases for potential product and 'non-product" liability'").

[4] S*ee id.* (stating the reviews "include an analysis of exposure and claim payment patterns by policyholder category, as well as recent settlements, policyholder bankruptcies, judicial rulings[,] and legislative actions").

testify about during its Rule 30(b)(6) deposition.

USF&G also should also be required to reimburse the Receiver for the attorneys' fees and costs associated with his extensive preparations and time expended taking this deposition. *See Anonymous Member*, 346 S.C. at 193, 552 S.E.2d at 18 (providing a court may "award . . . reasonable expenses, including attorney fees" for "misbehavior during depositions").

Finally, USF&G's counsel should be admonished that further misbehavior may result in direct sanctions against them, and USF&G's counsel practicing before this Court *pro hac vice* should be required to certify to the Court that they have studied the South Carolina Rules of Civil Procedure and will faithfully adhere to the Rules going forward.

CONCLUSION

Based on the foregoing, the Receiver respectfully asks the Court for an Order compelling USF&G to produce the materials referenced above and sanctioning USF&G for its misconduct related to the recently taken deposition.

RESPECTFULLY SUBMITTED,

SMITH | ROBINSON
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August 27, 2020

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Ann Finch, Individually and as Executor of the Estate of Franklin Finch, Plaintiff, v. United States Fidelity and Guaranty Company et al., Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C.A. No. 2019-CP-40-03003 **RECEIVER FOR COVIL CORPORATION'S NOTICE OF MOTION AND MOTION TO COMPEL AND FOR SANCTIONS AGAINST ZURICH AND ITS COUNSEL FOR IMPROPER 30(b)(6) WITNESS CONDUCT**

Please take notice that Peter D. Protopapas ("the Receiver"), as Receiver for Covil Corporation ("Covil"), by and through the undersigned counsel, will move before this Honorable Court ten (10) days after service of this Motion, or as soon thereafter as this matter may be conveniently heard, for an Order pursuant to Rules 30 and 37, SCRCP, compelling Zurich American Insurance Company ("Zurich") to produce certain materials and sanctioning Zurich and its counsel for conduct violative of the South Carolina Rules of Civil Procedure. This motion arises from the Zurich's refusal to properly participate in the deposition of its 30(b)(6) witness.

As the Court may recall, on September 10, 2020 the Court heard a similar motion regarding USF&G's recent Rule 30(b)(6) deposition in this case. As the Receiver's counsel mentioned to the Court during that lengthy hearing, it was the Receiver's hope that the Court's guidance regarding the USF&G deposition would resolve the outstanding issues related to the Zurich 30(b)(6) deposition covering a number of the same topics. Unfortunately, after the hearing regarding USF&G's deposition and despite the Receiver's efforts to confer with Zurich, Zurich's counsel has declined to address any of the outstanding issues related to its Rule 30(b)(6) deposition, including where the identical outstanding issues were addressed by the Court earlier this month.

Zurich's refusal to address these issues without this Court's intervention is particularly contumacious because, on September 14, 2020, this Court warned Zurich against this exact type of repetitive misconduct:

> The Insurers frivolous pleadings and objections need to stop. Their transparent attempts to overwhelm this Court with unnecessary objections and obstructionist tactics need to stop. The Court's patience is at an end. Further needless objections, relitigating of clearly decided issues, and other obstructionist measures will not be tolerated, by any party. The parties are on notice that the Court now considers sanctions for these antics to be appropriate and will not hesitate to levy them should this behavior continue.

See Pavlish v. Covil Corporation, et al.; C/A 2019-CP-42-3968 (County of Spartanburg) September 14, 2020 Order on Plaintiffs' Motion to Overrule Zurich American Insurance Company's Objections to Plaintiffs' 30(b)(6) Deposition Notice and Plaintiffs' Motion to Compel United States Fidelity & Guaranty Company.

Respectfully, against this context and to respect the Court's request to avoid addressing similar issues repeatedly, the Receiver will provide a condensed version of Zurich's misconduct related to its recent Rule 30(b)(6) deposition.

SUMMARY OF MOTION

Respectfully, Zurich's refusal to answer questions regarding a host of directly relevant questions and its counsel's lack of underlying preparation of Zurich's Rule 30(b)(6), SCRCP, witness at a recent deposition requires that the following sanctions be imposed:

- As was the case with USF&G, Zurich refused to answer questions about its treatment of its insureds other than Covil. As the Court ruled with USF&G, under identical circumstances, compel Zurich to produce its asbestos claim tracking databases and communications systems for latent disease claims, its annual asbestos claims review and reserve calculations, and all compilations or aggregations of data used in those calculations;

- Require Zurich's current counsel to conduct an appropriate collection of its documents to remedy the improper and incomplete collection performed by Zurich's previous or out-of-state counsel;

- Zurich should produce all documents, both physical and electronic, that relate to its insured, Covil Corporation, regardless of the electronic system or physical file in which the document is located, including, but not limited to, the full contents of all electronic databases, all shared file systems, and all e-mail systems in the care, custody, or control of Zurich. This should include, but not be limited to, all Covil-related e-mails to or from Bob Koscielniak, Tad May, and Vicki Russell, as well as any other relevant custodian of Covil documents known to Zurich; and all Covil documents or information in the Zurich "Mass Litt" system.

- Require Zurich to provide sworn written answers to questions that it refused to answer or answered incompletely;

- After taking these steps, require Zurich to present its witness again for a resumption of the deposition in a meaningful fashion; and

- Admonish Zurich's counsel that further misbehavior may result in direct sanctions against them, and require Zurich's counsel practicing before this Court *pro hac vice* to certify to the Court that they have studied the South Carolina Rules of Civil Procedure and will faithfully adhere to the Rules going forward.

INTRODUCTION

Plaintiff Ann Finch filed this lawsuit against multiple insurer defendants ("the Insurers"); law firm Wall, Templeton & Haldrup, P.A. ("Wall Templeton"); and Covil seeking declaratory judgments that the Insurers are liable to her under an alter ego theory due to their exercise of total dominion and control over Covil. Covil brought cross-claims against the Insurers for alter ego, breach of contract, bad faith failure to defend, aiding and abetting the breach of a fiduciary duty, and negligence; claims against Wall Templeton for negligence, legal malpractice, and breach of fiduciary duty; and declaratory judgment claims related to policies issued to it by the Insurers.

1. The instant dispute relates to a Rule 30(b)(6) deposition of Zurich.

Covil noticed a Rule 30(b)(6), SCRCP, deposition of Zurich and served an amended notice on August 4, 2020 that included deposition topics relating to Zurich's sixty-plus year relationship with Covil, its duties and obligations to Covil, its work with Wall Templeton, and the performance of its duties and obligations. (*See* Amended Notice of Deposition, attached hereto as Exhibit A.) Zurich served Covil with a series of five responses totaling 62 pages, which contained numerous

objections to the noticed topics. (*See* Responses and Objections, attached hereto as Exhibit B.) Zurich's objections indicated it would not provide the requested testimony for nearly every noticed topic, claiming either that it needed to meet and confer over particular topics or that it was only willing to produce a witness who could testify generally as to Zurich's contractual duties to Covil only. In other words, Zurich flatly refused to testify about how it has historically handled asbestos litigation involving its viable (non-defunct) policyholders.

Zurich also filed a motion for protective order regarding this deposition notice, but it did not obtain rulings on any of its countless objections before the deposition. After three days of testimony hampered by Zurich's refusal to answer certain questions about key areas of inquiry and thwarted by the ineffective document collection underlying the witness's preparation, the Receiver's counsel suspended the deposition to provide the parties with an opportunity to seek the Court's guidance about the appropriate manner for the deposition to proceed.

APPLICABLE LAW AND AUTHORITIES

"The primary objective of discovery is to ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed." *In re Anonymous Member of S.C. Bar*, 346 S.C. 177, 193, 552 S.E.2d 10, 18 (2001) (quoting *In re Alford Chevrolet–Geo,* 997 S.W.2d 173, 180 (Tex.1999)).

In South Carolina,

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 26(b)(1), SCRCP.

With respect to oral depositions, "Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer

is protected by a privilege or a limitation on evidence directed by the court or unless that counsel intends to present a motion under Rule 30(d), SCRCP." Rule 30(j)(3), SCRCP (footnote omitted). "Violation of this rule may subject the violator to sanctions under Rule 37, SCRCP." Rule 30(j)(9), SCRCP. Additionally, "If a deponent fails to answer a question propounded . . . under Rule 30 . . . , the discovering party may move for an order compelling an answer . . . ." Rule 37(a)(2), SCRCP.

When a party raises an objection to questions during a deposition, "[e]vidence objected to shall be taken subject to the objections." Rule 30(c), SCRCP. Interpreting identical language in Rule 30(c) of the Federal Rules of Civil Procedure, the Fourth Circuit has stated:

> The Rule itself says 'Evidence objected to shall be taken subject to the objections', and Professor Wright says it means what it says, citing *Shapiro v. Freeman*, D.C.N.Y.1965, 38 F.R.D. 308, for the doctrine: 'Counsel for party had no right to impose silence or instruct witnesses not to answer and if he believed questions to be without scope of orders he should have done nothing more than state his objections.' Wright & Miller, *Federal Practice and Procedure: Civil* s 2113 at 419, n.22 (1970). We agree. If plaintiff's counsel had any objection to the questions, under Rule 30(c) he should have placed it on the record and the evidence would have been taken subject to such objection. If counsel felt that the discovery procedures were being conducted in bad faith or abused in any manner, the appropriate action was to present the matter to the court by motion under Rule 30(d).

Ralston Purina Co. v. McFarland, 550 F.2d 967, 973–74 (4th Cir. 1977); *see also Smith v. US Sprint*, 19 F.3d 12 (4th Cir. 1994) ("Furthermore, at the deposition Smith's counsel repeatedly counseled his client to not answer questions, a direct violation of *Ralston Purina Co. v. McFarland*, 550 F.2d 967, 973 (4th Cir.1977), and Smith often gave evasive answers by stating that he could not remember many of the facts supporting his various claims."); *Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016) (providing that when "the language of [the South Carolina Rules of Civil Procedure] is substantially similar to the Federal Rules of Civil Procedure. . . . , our Court looks for guidance to cases interpreting the federal rules").

"Depositions are widely recognized as one of the 'most powerful and productive' devices used in discovery." *Anonymous Member*, 346 S.C. at 193, 552 S.E.2d at 18. "Actions taken in a deposition designed to prevent justice, delay the process, or drive up costs are improper and warrant sanctions." *Id.* at 194, 552 S.E.2d at 18. "In South Carolina, our judges have broad discretion in addressing misbehavior during depositions." *Id.*

> In addition to their traditional contempt powers, judges may issue orders as a sanction for improper deposition conduct: (1) specifying that designated facts be taken as established for purposes of the action; (2) precluding the introduction of certain evidence at trial; (3) striking out pleadings or parts thereof; (4) staying further proceedings pending the compliance with an order that has not been followed; (5) dismissing the action in full or in part; (6) entering default judgment on some or all the claims; or (7) an award of reasonable expenses, including attorney fees.

Id.

When a representative is deposed on behalf of a corporation, the witness "shall testify as to matters known or reasonably available to the organization." Rule 30(b)(6), SCRCP.

> If a party or an officer, director or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule.

Rule 37(d), SCRCP.

> [T]he court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence; (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . . .

Rule 37(b)(2), SCRCP.

ARGUMENT REGARDING ZURICH'S DEPOSITION MISCONDUCT

1. Zurich unilaterally limited the scope of its corporate testimony based on what it selected to present a witness to discuss.

Zurich's improper conduct started with its effort to write its own rules by refusing to respond to broad categories of properly noticed topics because it was not willing to do so. *See* Rule 30(c) ("Evidence objected to shall be taken subject to the objections."); *Ralston Purina Co.*, 550 F.2d at 973–74 (indicating a party has "no right" to refuse to answer a question simply because the party objects to it, and pursuant to Rule 30(c), responses to such questions should be given subject to the objection). This wholesale refusal to address entire categories of topics central to this case is illustrated by the following exchange:

> Q. All right. Have you reviewed -- prior to just now, have you had an opportunity to review each of the topics listed in the Amended Deposition Notice?
>
> A. Yes. I've reviewed the topics. You're saying review the topics listed in the notice itself, correct?
>
> Q. Correct. Yes. Correct. There are 150 some odd topics. I realize some of them are duplicates. But have you had an opportunity to read through -- prior to just now, have you had an opportunity to read through those topics?
>
> A. Yes, I have.
>
> Q. All right. And are you prepared to provide sworn testimony in this deposition as the corporate representative for Zurich on each of those topics?
>
> A. Other than as John Wilkerson pointed out -- I'm sorry. I'll let you go first.
>
> MR. WILKERSON: Yes, subject to our objection and motion.
>
> BY MS. PATTERSON:
>
> Q. Subject to that, Mr. Weiss, are you prepared to provide sworn testimony in response to each and every one of the topics listed in the notice?
>
> A. Subject to that Motion for Protective Order, I believe there are a few topics that are subject to the order and that there may not be; testimony on today.

> Q. And which of those topics will there not be testimony on?
>
> A. My understanding that would be the Fluor -- anything related to the Fluor matter. And I believe that's the only topic that there wouldn't be testimony on. There may be some items with respect to Teague Campbell, which I don't know that we will have complete answers for because some of the information would appear directed to Teague Campbell and be more in their control than it would be in Zurich's control. But otherwise, I believe I should be prepared to speak on everything else today.

Exhibit C, Deposition of Zurich, Day 1, 27:23-29:15. In Zurich's refusal to fully answer questions related to Fluor or Teague Campbell, they unilaterally narrowed 38 noticed deposition topics. *See* Exhibit A at 1–2, 8–12.

Zurich's corporate witness also refused to provide answers to questions related to more than thirty other noticed topics:

- Topics 16 to 24, which request statistical information regarding the number of mesothelioma claims Zurich handled for its insureds, or the number that went to trial, or the number of plaintiff verdicts for those cases that went to trial, or average settlement amounts. *See* Exhibit D, Deposition of Zurich, Day 2, 380:13-410:3.

- Topics 63 to 86, which reference an article authored by Zurich's own coverage counsel, Bill Bulfer and Karen Dixon, entitled "The Dynamic of the Defunct Insured and Bad Faith." *See* Exhibit A at 6–8. In his refusal to respond to topics related to this subject, Weiss stated, "I'm prepared to testify on topics or specific issues related to the cases against Covil." *See* Exhibit H, Deposition of Zurich, Day 3, at 590:19-20.

Because Zurich's witness was not willing to testify on certain noticed deposition topics, Covil was unable to gain critical insight and information about numerous highly relevant topics at the heart of this case. *See* Rule 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . .").

2. Zurich's corporate representative provided evasive testimony regarding key deposition topics

Covil's investigation into other similar actions involving Zurich has revealed the existence of "shadow files" or "shadow drives," which Zurich uses to conceal discoverable information from

its insureds in insurance recovery actions, and a pattern of repeated attempts to avoid Zurich's responsibility to produce responsive documents in litigation. *See* Exhibit E, Fluor Corporation's Motion for Sanctions in *Zurich American Insurance Co. v. Fluor Corporation, et al.*, No. 4:16-CV-00429, ECF 247 (E.D. Mo. June 10, 2019); Exhibit F, Order dated September 30, 2019 in *Zurich American Insurance Co. v. Fluor Corporation, et al.*, No. 4:16-CV-00429, ECF 322 (E.D. Mo.). Zurich has repeated this pattern in this case and has used its corporate representative to evade questioning on topics related to its document production.

Two Zurich claim handlers who handled the Covil account referenced "shadow files" in an e-mail produced in this case. *See* Exhibit G, Zurich 87781. The corporate representative evaded questioning regarding the existence of the files expressly described in the e-mail:

> Q. Okay. And we talked previously about Amanu and Carol, who were each, at different points in time, the claim handlers responsible for handling Covil asbestos claims. So this is an e-mail exchange between the two of them back in -- on November the 2nd, 2018.
>
> I'll just ask you to go to the second to last page of the exhibit, which is Zurich 87782. And it's at 9:38 a.m. Amanu says, in her email to Carol Weill, "I don't have your shadow files with me, so I can't remember. Are we still waiting for counsel to provide the current list for pending actions in SC? Is the most recent list the 8/2018? That's the only one I found in your H drive."
>
> Do you see that?
>
> A. I see that, yes.
>
> Q. Do you know, Mr. Weiss, what Amanu was referring to, when she used the term "shadow file" in this e-mail?
>
> A. No, I don't. I do know that at times Carol kept -- Carol had, you know, a folder -- part of the claim folder, like part of the hard copy folder at her desk. Because if you think about something like Covil or other long-standing insureds, where there's been cases for decades, there could be parts of the claims file that are physically stored at the Zurich headquarters and then there were other documents, as you referred to earlier that, were stored off site. So Carol may have had a certain portion of the hard file at her desk. That's the only thing that I can think of with respect to a shadow file.

Q. All right. So then shadow file is not a type of file that Zurich claims handlers regularly maintained; is that your testimony?

A. I'm not familiar with the term "shadow file." And I would expect that she's referring to, you know, documents that she has at her desk related to Covil.

Q. Okay. But you don't know for sure?

A. I didn't send the e-mail and, no, I'm not sure if Amanu and Carol ever had a conversation with that terminology. That's something -- I'm not familiar with that.

Q. To your knowledge, Mr. Weiss, as Zurich's corporate representative, did Zurich ever utilize a restricted share drive to store files or documents related to Covil Corporation?

A. Again, we referred to restricted share drive earlier. I'm not familiar with the term "restricted share drive." We talked. There were a number of questions and answers given with respect to the H drive or the Environmental Claims Department H drive, which were the individual claim handlers' file folders with respect to Covil. That's what I'm familiar with.

Exhibit C, Deposition of Zurich, Day 1, at 109:16-111:21.

There is no question that Zurich maintained shadow files in another case involving another insured, Fluor Corporation. There is no question that the Zurich claim handlers who handled the Covil file discussed the shadow files for Covil in at least one known e-mail exchange. Zurich's failure (or refusal) to adequately answer even such basic questions as to known and evidenced document management systems demonstrates either a severe lack of preparation or a deliberate attempt to obstruct the deposition, either of which is sanctionable. *See* Rule 30(b)(6) (providing a corporate representative witness "shall testify as to matters known or reasonably available to the organization"); Rule 30(j)(9) ("Violation of this rule may subject the violator to sanctions under Rule 37, SCRCP."); *Chapman v. HHCSC, LLC*, No. 2:14-CV-00051-RMG, 2014 WL 12615705, at *4 (D.S.C. Dec. 9, 2014) ("Producing an unprepared witness is 'tantamount to a failure to appear' under Rule 37(d)." (quoting *United States v. Taylor*, 166 F.R.D. 356, 363

(M.D.N.C.)); *accord Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 304 (3d Cir. 2000); *see also Keepers, Inc. v. City of Milford*, 807 F.3d 24, 36 (2d Cir. 2015) ("If a deponent fails to satisfy Rule 30(b)(6) by refusing to designate a witness or producing an unprepared witness, the court may order sanctions, including the preclusion of evidence.").

Zurich also gave extraordinarily evasive testimony on a variety of other important topics, including whether Teague Campbell disclosed their prior representation of Covil to Zurich, and whether and to what extent Zurich provided specific training to claims handlers who handled asbestos claims between 1993 and the present. *See* Exhibit D, Deposition of Zurich, Day 2, 306:6-312:25, 364:18-372:7 (as to Teague Campbell); *See* Exhibit C, Deposition of Zurich, Day 1. 161:24-162:2 ("If there have been any documents in Zurich's production responses to that request, then I can review those documents ant testify with respect to the same.").

3. Zurich's corporate representative revealed the company's incomplete production of documents in this case.

Zurich's answers to questions related to the propriety of its document collection and production illustrated the company's failure to engage in a complete production of responsive documents in this case. With respect to relevant e-mail communications, the corporate representative's evasive testimony raises questions as to whether a complete production of e-mail communications related to Covil was made in this case:

> Q. Okay. And would you certainly expect to see anything in -- anything pertaining to offers of settlement or settlement demands received, reflected in the Claims Connect or eZAccess notes during that period of time, wouldn't you?
>
> A. Not necessarily. Because, again, those may be reflected in the e-mails themselves, which are part of the electronic record.
>
> Q. And when you talk about the electronic record, you've used that a couple of times now, are you talking about the H drive that we talked about yesterday?

A. No, I'm talking about the documents, the e-mail documents that are part of the file.

Q. Where are the e-mail documents maintained?

A. So the e-mail documents would be within the -- there's documents within the electronic claim file that are -- it's a system where the documents can be sent from the e-mail to e-file, which is part of the Claims Connect system.

Q. Okay. Well, that's something I don't think we talked about yesterday. There's something called -- well, what do you mean when you talk about the electronic claim file?

A. I mean, Claims Connect. That the e-mails --

Q. Okay?

A. -- go into Claims Connect.

Q. Okay. So there's a separate bucket, if you will, in Claims Connect, where e-mails are routed and filed electronically?

A. Correct.

Q. And does that happen automatically? So, for example, if a claims professional receives an e-mail about the Finch case, for example, does that automatically get filed electronically in the Claims Connect file –

A. No.

Q. -- or does the claims handler actually have to transfer it into a file in Claims Connect?

A. The claims professional would need to click a button in their e-mail and then provide the file number and description, a brief description, and then they hit -- I can't remember if it's save or submit or something, something to that effect, and it would then send it to the Claims Connect file.

Q. Okay. And it -- and what part of the Claims Connect file or database does it go to? Did you say the e-file database or e-file --

A. Yeah. Well, I think e-file is the name of the -- e-file is the button that you push to send it to the -- there's a tab called documents, and that's where it would go. A tab called documents within Claims Connect.

Exhibit D, Deposition of Zurich, Day 2, 460:2-462:25. The corporate representative further explained that "searches were made of the e-mail -- of the e-mail system for individuals who had worked on the Covil case and those were produced as well." *See id.* at 466:11-13. However, he qualified the statement, explaining, "**As far as I know**, everything that was available in terms of e-mail files has been produced with respect to Covil. It wouldn't be a search just for the Finch case, it would be for the Covil claim. And **as far as I know**, what's available has been searched and provided there or not, without communications on the basis of attorney-client privilege **or some other basis** that those have been produced." *Id.* at 466:24-467:7 (emphasis added).

The testimony leaves open the questions of on which basis other than privilege e-mail communications may have been withheld, and whether all e-mails, and all custodians, were adequately searched to comply with discovery in this case. Specifically, Covil questions whether three additional high-level decision makers at Zurich with regard to the Covil account, Bob Koscielniak, Tad May, and Vicki Russell, were included as potential custodians of relevant e-mails or other documents. The Zurich corporate representative identified Koscielniak, May, and Russell as individuals who made key strategy decisions with regard to Covil. *See* Exhibit D, Deposition of Zurich, Day 2, 296:4-297:8.

In addition to an incomplete production of e-mail communications, Zurich's corporate representative indicated in his deposition that Zurich may not have produced all of its relevant documents from its "Mass Litt" system:

> Q. Okay. Mr Weiss, can you testify unequivocally today, under oath, as Zurich's corporate representative, that there is no secret or shadow drive or electronic data regarding Covil that has not been produced in this litigation?
>
> MR. WILKERSON: Object to the form.

A. I hit the camera button instead of my mute button. Yes, I'm not aware of any shadow drive or other data source with information on Covil that hasn't been produced. As I mentioned, there is a Mass Litt system which has information, you know, regarding source documents and was an antiquated system. I believe in my review of production, I saw some -- the system -- there is not a -- there is not, to my knowledge, any shared or restricted or other information that has not been produced, with the exception of what would be outlined on a privilege log for that purpose.

Q. Okay. Well, I'm a little confused by your answer because you mentioned a Mass Litt system. And it sounds like to me -- well, let me ask this: Can you testify under oath today that everything pertaining to Covil that's contained in that Mass Litt system has been produced?

A. To my knowledge it has. Because what would be contained in that system would be -- would come from source documents within the claim file.

Q. So you think everything from the Mass Litt system has been produced because it should be somewhere else. So it would have been produced --

A. I don't know -- I don't -- what I'm saying is, I don't know if the Mass Litt -- I don't know if anything has been produced from the Mass Litt system. What I'm saying is, it would all be duplicates of what's contained in the claim file because the source information for entry into the Mass Litt system were documents in the claim file.

Q. Well, have you or anyone else, to your knowledge, Mr. Weiss, in connection with this document request in this case, gone back to determine whether or not what you just said is true? And that is that everything in the Mass Litt system related to Covil is necessarily contained in the claim file?

MR. WILKERSON: Object to the form.

A. I don't -- I don't know. I have not personally gone through the system. I don't have access to the system. I don't know what the status of access is to that system, but from my -- and I don't know whether anyone else has.

See Exhibit H, Deposition of Zurich, Day 3, 643:8-645:7.

Zurich knows what documents it produced, whether their search was complete, and whether their collection of database materials has been complete. The corporate representative's evasive testimony regarding collection, privilege analysis, and production, however, raise serious

questions as to whether Zurich has faithfully complied with its duties of production in this case. Zurich must be required to make a full production of its responsive documents to Covil.

SANCTIONS REQUESTED

Because Zurich thwarted Covil's discovery in this case by refusing to comply with relevant South Carolina Rules of Civil Procedure governing depositions and discovery, Zurich should be compelled to produce the information Covil sought during the deposition in alternative formats. Specifically, Zurich should produce all documents, both physical and electronic, that relate to its insured, Covil Corporation, regardless of the electronic system or physical file in which the document is located, including, but not limited to, the full contents of all electronic databases, all shared file systems, and all e-mail systems in the care, custody, or control of Zurich. This should include, but not be limited to, all Covil-related e-mails to or from Bob Koscielniak, Tad May, and Vicki Russell, as well as any other relevant custodian of Covil documents known to Zurich; and all Covil documents or information in the Zurich Mass Litt system.

Finally, Zurich's counsel should be admonished that further misbehavior may result in direct sanctions against them, and Zurich's counsel practicing before this Court *pro hac vice* should be required to certify to the Court that they have studied the South Carolina Rules of Civil Procedure and will faithfully adhere to the Rules going forward.

CONCLUSION

Based on the foregoing, the Receiver respectfully asks the Court for an Order compelling Zurich to produce the materials referenced above and sanctioning Zurich for its misconduct related to the recently taken deposition. The Receiver certifies consultation would serve no useful purpose and the Receiver will continue to work with Zurich in an effort to resolve this motion if possible.

RESPECTFULLY SUBMITTED,

SMITH | ROBINSON

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September 25, 2020.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Ann Finch, Individually and as Executor of the Estate of Franklin Finch, Plaintiff, v. United States Fidelity and Guaranty Company et al., Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C.A. No. 2019-CP-40-03003 **RECEIVER FOR COVIL CORPORATION'S NOTICE OF MOTION AND MOTION TO COMPEL ZURICH TO PRODUCE DOCUMENTS FROM PREVIOUSLY UNDISCLOSED WITNESSES, TO PRODUCE THESE WITNESSES FOR IMMEDIATE DEPOSITIONS, AND FOR SANCTIONS**

Please take notice that Peter D. Protopapas ("the Receiver"), as Receiver for Covil Corporation ("Covil"), by and through the undersigned counsel, will move before this Honorable Court ten (10) days after service of this Motion, or as soon thereafter as this matter may be conveniently heard, for an Order pursuant to Rules 34 and 37, SCRCP, compelling Zurich American Insurance Company ("Zurich") to search for and produce the documents and electronic information (ESI) for four previously undisclosed witnesses. Covil learned of these witnesses and their significant involvement in this dispute during John Koscielniak's October 16, 2020 deposition.

INTRODUCTION

This motion is the latest in a series of discovery motions that have been necessitated by the fact that Covil's insurers do not believe the South Carolina Rules of Civil Procedure apply to them. In this latest instance, Zurich did not disclose key witnesses and did not bother to produce their important and responsive documents.

FACTUAL BACKGROUND

A. Nature of this Lawsuit

Plaintiff Ann Finch filed this lawsuit against multiple insurer defendants ("the Insurers"); law firm Wall, Templeton & Haldrup, P.A. ("Wall Templeton"); and Covil, seeking declaratory judgments that the Insurers are liable to her under an alter ego theory due to their exercise of total dominion and control over Covil. Covil brought cross-claims against the Insurers for alter ego, breach of contract, bad faith failure to defend, aiding and abetting the breach of a fiduciary duty, and negligence; claims against Wall Templeton for negligence, legal malpractice, and breach of fiduciary duty; and declaratory judgment claims related to policies issued to it by the Insurers.

B. Robert Koscielniak's Deposition

Covil deposed Robert Koscielniak in this case on October 16, 2020. Mr. Koscielniak has worked for Zurich North American Insurance Company since 1996. Ex. 1, Koscielniak Dep. at 10:23–11:5. He has held the title of Director of Latent and Environmental Claims for five years. *Id.* at 12:13–24. Mr. Koscielniak is also a Vice President. *Id.* at 12:19–24.

Mr. Koscielniak supervised John Weiss from 2015 until November 2019—a year after the verdict in *Finch v. BASF Catalysts, LLC*, No. 16-CV-01077 (M.D.N.C. Oct. 5, 2018). Ex. 1 at 63:19–24, 64:8–11; Ex. 2, Aug. 24, 2020 Deposition of John Weiss, at 169:13–17. Mr. Weiss, in turn, supervised Carol Weill, Zurich's claim handler for Covil, from July 2017 through the October 2018 *Finch* verdict. *Id.* at 8:12–15; 168:16–23.

Mr. Koscielniak and Mr. Weiss were actively involved in the *Finch* case. Zurich's document production also shows these men were significantly involved in *Finch*: the production contains approximately 317 documents containing Mr. Koscielniak's name, and approximately 6,581 documents containing Mr. Weiss's name.

C. Zurich's Secrets Revealed by Mr. Koscielniak

In his deposition, Mr. Koscielniak testified that he reported to John Shane, Zurich's Senior Vice President, Liability Claims. Ex. 1 at 105:25–106:12. Mr. Koscielniak admitted that he reported to Shane on the *Finch* case—certainly about resolution of the *Finch* judgment—though he declined to provide any details of those communications in his deposition. *Id.* at 106:20–108:16. Curiously, Zurich only produced two documents containing Mr. Shane's name.

Although Zurich did not disclose any of these individuals, Mr. Koscielniak also testified that he communicated with Zurich's Lisa Chonarzewski and Mike Buresh about Zurich's proposed declaratory judgment action against Covil. *Id.* at 108:18–109:9. Ms. Chonarzewski's name appears in nine of Zurich's documents; Mr. Buresh, an Assistant Vice President over mass litigation, appears 26 times. *Id.* at 137:2–9. Meanwhile, Ernie ("Arnie") D'Angelo, who would have approved Zurich's declaratory judgment action, only appears in Zurich's document production once. *Id.* at 116:2–7.

Mr. Koscielniak's testimony establishes that Zurich should have disclosed these witnesses and searched for and produced documents from Mr. Shane, Ms. Chonarzewski, Mr. Buresh, and Mr. D'Angelo (together, the "Undisclosed Witnesses"). Instead, despite this Court's prior admonitions, Zurich has failed to disclose these witnesses or to produce their responsive and discoverable documents, even though these individuals made key decisions in the *Finch* case and possibly other Covil cases.

APPLICABLE LAW AND AUTHORITIES

"The primary objective of discovery is to ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed." *In re Anonymous Member of S.C. Bar*, 346 S.C. 177, 193, 552 S.E.2d 10, 18 (2001) (quoting *In re Alford Chevrolet–Geo*, 997 S.W.2d 173, 180 (Tex. 1999)).

In South Carolina,

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 26(b)(1), SCRCP. Moreover, "[a] lawyer shall not: [] unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or **conceal** a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act[.]" Rule 3.4(a), RPC, Rule 407, SCACR (emphasis added).

ARGUMENT

As this Court recognized, there has been "a continuing series of motions brought in this and other cases involving the Insurer's recalcitrance in either providing proper discovery responses to the Plaintiffs or to Covil." *Pavlish v. Covil Corp.*, C.A. No. 2019-CP-42-3968 (S.C. Com. Pl. Sept. 14, 2020) (order overruling objections to 30(b)(6) deposition notice), Ex. 3 at 1. Recently, this Court overruled both Zurich's and USF&G's claims of privilege because "(1) this Court has previously ruled on these issues and (2) the communications that the Insurers seek to protect are not privileged." *Id.* at 6. This Court found that Zurich's "obstructionist tactics need to stop." *Id.* at 8. Yet it took Mr. Koscielniak's deposition to uncover more holes in Zurich's incomplete and "obstructionist" document production.

As shown above, Zurich's John Shane, Lisa Chonarzewski, Mike Buresh, and Ernie ("Arnie") D'Angelo were all key players in the *Finch* case. They did not have an insured to consult with, so they made unilateral decisions regarding any possible resolution of the *Finch* dispute as well as Zurich's plan to protect itself through a declaratory judgment action against Covil. Zurich should have disclosed these witnesses and produced their documents. Their communications are relevant and discoverable. *See* Rule 26(b)(1), SCRCP.

Indeed, there may be a pattern and practice of bad behavior by Zurich in discovery matters where Mr. Koscelniak is involved. In *Zurich American Insurance Co. v. Fluor Corp.*, No. 16-CV-00429 (E.D. Mo. filed Mar. 29, 2016), Mr. Koscielniak supervised the *Fluor* matter for "some years ago to present." Ex. 1 at 92:16–24. The *Fluor* court dealt with "numerous discovery issues between the parties which have included motions to compel . . . ." *Fluor*, No. 16-CV-00429 (E.D. Mo. Feb. 26, 2019) (order granting sanctions), Ex. 4 at 1. There, a federal district court judge eventually "conclude[d] Zurich's failure to comply with its orders was willful conduct," noting "Zurich's conduct throughout this matter has caused significant delay in this case" and "Zurich continued to refuse to produce documents or produced the wrong documents, in the Court's judgment, to prevent Fluor from gaining access to documents damaging to Zurich's case." *Id.* at 3. When asked about Zurich's behavior in the *Fluor* case, Mr. Koscielniak claimed he was unaware of the improper conduct and that, somehow, Zurich's counsel was as well. Ex. 1 at 94:12–22.

Zurich should not be allowed to continue this type of misbehavior in South Carolina. Zurich's failure to disclose these important witnesses and to produce their documents constitutes blatant discovery abuse. Thus, Covil must once again ask for this Court's assistance in forcing Zurich to perform its obligations as a litigant.

RELIEF REQUESTED

The Receiver requests that Zurich be required to make an appropriate and thorough search for the documents for these previously undisclosed witnesses and to produce all documents within five business days.

The Receiver also requests that the Court require that these four previously undisclosed witnesses be directed to appear for depositions within ten days of the production of their documents.

The Receiver requests that the Court impose monetary sanctions against Zurich, in an amount sufficient to dissuade Zurich from further misbehavior, with the funds to be made payable to Harvest Hope Food Bank of South Carolina.

The Receiver requests that the Court order that the general counsel of Zurich be provided with a copy of any resulting order and that Zurich's general counsel certify receipt of a copy of such order to this Court.

The Receiver requests that the Court require each lawyer representing Zurich in this case to explain themselves, individually and in writing, as to why each Zurich lawyer should not also be similarly sanctioned, individually, for Zurich's ongoing mischief.

CONCLUSION

Based on the foregoing, the Receiver respectfully asks the Court for these Orders and any other relief to which he is entitled.

RESPECTFULLY SUBMITTED,

SMITH | ROBINSON
Smith Robinson Holler DuBose and Morgan, LLC

s/Jonathan M. Robinson
Jonathan M. Robinson (SC Bar # 68285)
G. Murrell Smith, Jr.
Shanon N. Peake
2530 Devine Street, 3rd Floor
Columbia, SC 29205
(803) 254-5445

October 29, 2020

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT CASE NO.: 2019-CP-40-03003
Ann Finch, Individually and as Executor of the Estate of Franklin Finch; and Peter Protopapas as Court Appointed Receiver for Covil Corporation, Plaintiffs, v. United States Fidelity & Guaranty Company; Zurich American Insurance Company; Enstar (US) Inc.; and Wall, Templeton & Haldrup, P.A., Defendants.	**RECEIVER'S MOTION TO IMPOSE SANCTIONS ON USF&G**

Pursuant to South Carolina Rule of Civil Procedure 11 and the SC Code § 15-36-10, Peter D. Protopapas, as Receiver for Covil Corporation (the "Receiver"), respectfully moves this Court for an Order imposing sanctions on United States Fidelity & Guaranty Company ("USF&G") and its counsel of record for asserting baseless and dishonest procedural arguments within its December 14, 2020 Response in Opposition to the Receiver's Motion for Partial Summary Judgment (the "Opposition"). The Receiver also seeks an order requiring USF&G to pay all costs associated with filing this motion. The grounds for this motion are as follows:

1. Under South Carolina Rule of Civil Procedure 11(a), "a party and/or the party's attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments." *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008) (citing *Runyon v. Wright,* 322 S.C. 15, 471 S.E.2d 160 (1996)). "The sanction may include an order to pay the reasonable costs and attorney fees incurred by the party or parties defending against the

frivolous action or action brought in bad faith, a reasonable fine to be paid to the court, or a directive of a nonmonetary nature designed to deter the party or the party's attorney from bringing any future frivolous action or action in bad faith." *Id*. at 437–38, 663 S.E.2d at 50.

2. South Carolina Code Annotated § 15-36-10(A)(4) (2013) also provides that an attorney participating in a civil defense may be sanctioned for filing a frivolous pleading, motion, or document. If a document is signed in violation of S.C. Code Ann. § 15-36-10, this Court "may impose upon the person in violation any sanction which the [C]ourt considers just, equitable, and proper under the circumstances." S.C. Code Ann. § 15-36-10(B)(2). "The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997) (quoting *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987)).

3. USF&G asserts two primary arguments in opposing the Receiver's motion for partial summary judgment: 1) Covil is enjoined from seeking coverage rulings in this action; and 2) Covil's declaratory judgment claim is precluded by South Carolina Rule of Civil Procedure 12(b)(8). Opposition, pp. 11–14. These arguments have no basis in law or the procedural background of this case. USF&G's knowing assertion of such frivolous arguments warrants the imposition of sanctions under Rule 11 and S.C. Code Ann. § 15-36-10(A)(4)(a)–(c).

4. Judge Hendricks' February 27, 2020 injunction order (the "Injunction Order") does not enjoin the Receiver from seeking insurance coverage rulings *in this case* because it is not an "underlying tort case" to which the Injunction Order was directed. *See* Opinion and Order at 25, *Covil Corp. v. Zurich Am. Ins. Co.*, C.A. No. 7:18-3291-BHH, (D.S.C. Feb. 27, 2020), ECF No. 105. Ann Finch filed this lawsuit as an "alter ego" case seeking to collect on a final judgment *entered previously in an "underlying tort case*." Even as to the "underlying" asbestos tort cases

at issue in the Injunction Order, the Court stated by e-mail on June 9, 2020 that "[t]he remand from Judge Hendricks also clears the way for this Court *to adjudicate matters of coverage* related to the 5 asbestos cases which include *Falls*, *Howe*, *Hopper*, *Hill*, and *Taylor*," rendering the Injunction Order moot. (emphases added). *See* Exhibit A, E-mail from Jean Toal, C.J. (Ret.), to Todd Carroll, John S. Wilkerson, et al. (June 9, 2020).

5. This Court then held in its September 15, 2020 order issued in the related case of *Protopapas v. Wall, Templeton & Haldrup, P.A.*, C.A. No. 2019-CP-40-02285 (the "*Protopapas* case") – where USF&G is also a defendant – that "Judge Hendricks remanded [the *Protopapas* case] and [this] case, both rife with coverage disputes, to this Court *despite the injunction*. Accordingly, there is *no reason to believe Judge Hendricks intended . . . this Court not [to] adjudicate the Receiver's claims*." (emphases added). This Court is indisputably within its right to issue insurance coverage rulings in this case. USF&G's mischaracterization of the Injunction Order and failure to acknowledge this Court's subsequent holding is improper.

6. A Rule 12(b)(8), SCRCP, argument that a case should be dismissed because "another action is pending between the same parties for the same claim" is supposed to be made in "the responsive pleading" or in a motion submitted to the court following service of a "claim, counterclaim, cross-claim, or third-party claim." Rule 12(b), SCRCP; *see also* Rule 12(g).

7. USF&G's re-assertion of the *identical* and meritless Rule 12(b)(8) arguments that this Court unequivocally rejected in the related *Protopapas* case lacks substantial justification. This Court held in *Protopapas* that the argument has "no basis":

> Rule 12(b)(8) provides no basis for dismissal based in Covil's pending declaratory judgment claims in the District of South Carolina . . . . There is no bar to a state court action, even though an action is already pending in federal court for the same cause of action, when the suits are in different jurisdictions. *Logan v. Atlanta & Charlotte Air Line R.R. Co.*, 82 S.C. 518, 520–21, 64 S.E. 515, 516 (1909).

> Additionally, the "state courts are foreign to the federal courts sitting in the same state." *Id.*

Protopapas v. Wall, Templeton & Haldrup, P.A., C.A. No. 2019-CP-40-02285, Order Denying USF&G's Motion to Dismiss Amended Complaint, at 12–13 (Sept. 15, 2020).

8. Based on the foregoing, the Receiver respectfully requests that the Court grant this motion, impose sanctions against USF&G and its counsel of record that the Court deems warranted, order USF&G and its counsel of record to reimburse the Receiver for all costs associated with filing this motion, and grant the Receiver all other relief at law or equity to which it is justly entitled.

SMITH | ROBINSON
Smith Robinson Holler DuBose and Morgan, LLC

s/Jonathan M. Robinson
Jonathan M. Robinson (SC Bar # 68285)
G. Murrell Smith, Jr.
Shanon N. Peake
2530 Devine Street, 3rd Floor
Columbia, SC 29205
(803) 254-5445
ATTORNEYS FOR RECEIVER

This 22nd Day of December 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

_____

APPEAL FROM RICHLAND AND YORK COUNTIES
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.)

Case Nos. 2015-CP-46-02155, 2015-CP-46-03456, 2019-CP-40-00076, 2018-CP-40-04680, and 2018-CP-40-04940

_____

Appellate Case No. 2020-000845

_____

Ex Parte: United States Fidelity and Guaranty Company, Appellant,
v.
Peter D. Protopapas, in his capacity as Receiver of Covil Corporation, Respondent,

In Re:

Roxanne Falls, Individually and as Personal Representative of the Estate of Charlotte Gaye Smith, Plaintiffs,
v.
CBS Corporation, a Delaware Corporation f/k/a Viacome, Inc., Successor by Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CNA Holdings, Inc., f/k/a Hoechst Celanese Corporations; Celanese Corporation f/k/a Hoechst Celanese Corporation (Sued Individually and as Successor-in-Interest to Fiber Industries, Inc.); Cleaver Brooks, Inc.; Covil Corporation; Daniel International Corporation; Fluor Daniel, Inc., f/k/a Daniel Construction Company, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; MP Supply, Inc. f/k/a Mill-Power Supply Co. and Mill-Power Supply Company; Resolute FP US, Inc.; Union Carbide Corporation; United States Fidelity and Guaranty Company; Uniroyal, Inc., f/k/a United States Rubber Company, Inc.; and United Conveyor Corporation, Defendants,

AND

Timothy W. Howe, Individually and as Personal Representative of the Estate of Wayne Ervin Howe, deceased and Jeanette Howe, Plaintiffs,
v.
Air & Liquid Systems Corporation, Individually and as Successor-in-Interest to Buffalo Pumps, Inc.; Airco, Inc.; Airgas USA, LLC, f/k/a National Welding Supply, Inc.; Albany International Corp.; Asten-Johnson, Inc.; Aurora Pump Company; A.W. Chesterton Company; Beloit Corporation; Black Clawson Converting Machinery, LLC, Individually and as a Subsidiary of Davis-Standard LLC; CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., Successor by Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CGR Productions, Inc., f/k/a Carolina Gasket and Rubber Company; CAN

Holdings, Inc., f/k/a Hoechst Celanese Corporation; Celanese Corporation f/k/a Hoechst Celanese Corporation (Sued Individually and as Successor-in-Interest to Fiber Industries, Inc.); Cleaver Brooks, Inc.; Covil Corporation; Crane Co.; Crown Cork & Seal Company, Inc.; Daniel International Corporation; Davis-Standard Corporation, LLC; Dezurik, Inc. d/b/a Dezurik-Apco Williamette Eagle, Inc.; Fisher-Klosterman, Inc., as Successor-in-Interest to Buell Engineering Co.; Flowserve Corporation, Individually and as Successor-in-Interest to Durco Pumps; Fluor Enterprises, Inc., f/k/a Fluor Daniel, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; The Gorman-Rupp Company; Goulds Pumps, Incorporated; Ingersoll- Rand Company; Linde, LLC f/k/a The Boc Group, Inc., f/k/a Airco, Inc.; Marsulex Environmental Technologies Corporation, Individually and as Successor-in-Interest to Buell Engineering Co.; Marsulex Environmental Technologies, LLC, as Successor-in-Interest to Buell Engineering Co.; Metropolitan Life Insurance Company, a Wholly-Owned Subsidiary of Metlife Inc.; Peerless Pump Company; Presnell Insulation, Inc.; Riley Power, Inc., Individually and as Successor-in-Interest to Babock Borsig Power, Inc., and Riley Stoker Corporation, Individually and as Successor-in-Interest to D.B. Riley; SCAPA Waycross, Inc.; Sepco Corporation; SPX Cooling Technologies, Inc., f/k/a Marley Cooling Technologies, Inc., f/k/a The Marley Cooling Tower Co.; Sterline Fluid Systems (USA) LLC; Trane U.S., Inc., f/k/a American Standard, Inc., f/k/a American Radiator & Standard Manufacturing Company; Union Carbide Corporation; Uniroyal, Inc., f/k/a United States Rubber Company, Inc.; United Conveyor Corporation; Velan Valve Corp.; Viking Pump, Inc.; Warren Pumps LLC; Yuba Heat Transfer Corporation; and Zurn Industries, Defendants.

AND

Charles T. Hopper and Rebecca Hopper, Plaintiffs,

v.

Air & Liquid Systems Corp.; 3M Company; Advance Auto Parts, Inc.; Armstrong International, Inc.; Blackmer Pump Company; BW/IP, Inc.; CBS Corporation; CNA Holdings, LLC; Carrier Corporation; Circor Instrumentation Technologies, Inc.; Continental Tire the Americas, LLC; Covil Corporation; Crane Co.; Crosby Valve, LLC; Daniel International Corporation; E.I. du Pont de Nemours and Company; Fisher Controls International, LLC; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; FMC Corporation; Ford Motor Company; Foster Wheeler Energy Corporation; Gardner Denver, Inc.; General Electric Company; Genuine Parts Company; Georgia Power Company; Goodrich Corporation; Gorman-Rupp Company; Goulds Pumps, Incorporated; Grinnell, LLC; Hobart Brothers LLC; Honeywell International, Inc.; IMO Industries, Inc.; Ingersoll-Rand Company; International Paper Company; ITT LLC; The Lincoln Electric Company; Metropolitan Life Insurance Company; Miller Electric Mfg., LLC; National Automotive Parts Association; Newco Valves, LLC; O'Reilly Auto Enterprises, LLC; O'Reilly Automotive Stores, Inc.; Resolute FP US Inc.; Shell Oil Company; South Carolina Electric & Gas Company; South Carolina Public Service Authority; Spirax Sarco, Inc.; SPX Cooling Technologies, Inc.; Southern Insulation, Inc.; Starr Davis Company, Inc.; Starr Davis Company of S.C., Inc.; Trane U.S.; Uniroyal Holding Inc.; Viking Pump, Inc.; Weir Valves & Controls USA, Inc.; The William Powell Company; Yeargin Potter Smith Construction, Inc.; Yuba Heat Transfer Corporation; and Zurn Industries, Defendants,

AND

James Michael Hill, Plaintiff,

v.

Advance Auto Parts, Inc.; 4520 Corp., Inc., Successor-in-Interest to Benjamin F. Shaw Company; Air & Liquid Systems Corporation, individually and as Successor-in-Interest to Buffalo Pumps; Alcoa, Inc., successor to Reynolds Metals Company; Aurora Pump Company; BW/IP, Inc., individually and as Successor-in-Interest to Byron Jackson Pumps; CB&I Group Inc., individually and as Successorin-Interest to The Shaw Group, successor to Benjamin F. Shaw Company; CB&I Laurens, Inc., f/k/a B.F. Shaw, Inc.; CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., Successor by Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; Celanese Corporation; CAN Holdings, LLC, f/k/a Celanese Corporation f/k/a Hoechst Celanese Corporation, sued individually and as Successor-in-Interest to Fiber Industries, Inc.; Circor Instrumentation Technologies, Inc., individually and f/k/a Hoke Inc.; Cleaver Brooks, Inc., f/k/a Aqua-Chem, Inc., d/b/a Cleaver-Brooks Division; Covil Corporation; Crane Co.; Crosby Valve, LLC; Dana Companies LLC; Daniel International Corporation; The Dow Chemical Company; Federal-Mogul Asbestos Personal Injury Trust, sued as successor to Felt-Products Manufacturing Co.; Fisher-Controls International, LLC, wholly owned subsidiary of Emerson Electric Company; Fluor Constructors International, f/k/a Fluor Corporation; Fluor Enterprises, Inc.; Foster Wheeler Energy Corporation; General Electric Company; Genuine Parts Company, d/b/a Rayloc, a/k/a NAPA; The Goodyear Tire & Rubber Company; Goulds Pumps, Inc.; Gorman-Rupp Company; Hollingsworth & Vose Company; Honeywell International, Inc., f/k/a Allied-Products Liability Signal, Inc., sued as Successor-in-Interest to Bendix Corporation; Imerys Talc America, Inc., f/k/a Luzernac America, Inc., individually and as Successor-in-Interest to United Sierra Division of Cyprus Mines, Cyprus Industrial Minerals Company and Windsor Minerals, LLC; Ingersoll-Rand Company; International Paper Company; ITT LLC, f/k/a ITT Corporation, ITT Industries, Inc., individually and as successor to ITT Fluid Products Corp., ITT Hoffman ITT Bell & Gossett Company and ITT Marlow; Johnson & Johnson; Johnson & Johnson Consumer Companies LLC, a subsidiary of Johnson & Johnson; Mallinckrodt LLC; Maremont Corporation; McDermott International, Inc., individually and as Successor-in-Interest to The Shaw Group, successor to Benjamin F. Shaw Company; McNeil (Ohio) Corporation; McNeil & NRM, Inc.; Metropolitan Life Insurance Company, a Wholly-Owned Subsidiary of Metlife Inc.; Mine Safety Appliances Company, LLC; National Automotive Parts Association; OfficeMax, Incorporated, f/k/a Boise Cascade Corporation; Pneumo Abex, LLC, individually and as Successor-in-Interest to Abex Corporation; R.J. Reynolds Tobacco Company, individually and as Successor-by-Merger to Lorillard Tobacco Company LLC, f/k/a Lorillard Tobacco Company; Resolute FP US Inc., individually and as Successor-in-Interest to Bowater, Inc.; Reynolds American, Inc., individually and as Successor-by-Merger to The American Tobacco Company; Riley Power, Inc., f/k/a Riley Stoker Corporation and D.B. Riley, Inc.; Spence Engineering Company, Inc.; Spriax Sarco, Inc.; SPX Cooling Technologies, Inc., individually and as Successor-in-Interest to Marley Cooling Towers Co.; Union Carbide Corporation; United Conveyor Corporation; The William Powell Company; and Zurn Industries, LLC, individually and as Successor-in-Interest to Zurn Industries, Inc., Defendants,

AND

Denver D. Taylor and Janice Taylor, Plaintiff's
v.
Air & Liquid Systems Corporation; Aurora Pump Company; BASF Catalyst LLC; BASF Corporation; BorgWarner Morse Tec, LLC; CBS Corporation; CAN Holdings, LLC; Cameron International Corporation; Carrier Corporation; Carver Pump Company; Caterpillar, Inc.; Celanese Corporation; Cleaver-Brooks, Inc.; Continental Tire The Americas, LLC; Covil Corporation; Crane Co.; Daniel International Corporation; Fisher Controls International, LLC; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Frito- Lay, Inc.; Gardner Denver, Inc.; General Electric Company; The Gorman-Rupp Company; Goulds Pumps, Incorporated; Grinnell, LLC; Hobart Brothers LLC; Ingersoll-Rand Company; International Paper Company; ITT LLC; John Crane, Inc.; The Lincoln Electric Company; Linde, LLC; McNeil (Ohio) Corporation; McNeil & NRM, Inc.; McWane, Inc.; Metropolitan Life Insurance Company; Resolute FP US Inc.; Riley Power, Inc.; Spriax Sarco, Inc.; SPX Cooling Technologies, Inc.; Springs Global US, Inc.; Trane US, Inc.; Viking Pump, Inc.; Warren Pumps, LLC; Weir Valves & Controls USA, Inc.; York International Corporation; and Zurn Industries, LLC, Defendants.

MOTION FOR SANCTIONS

Pursuant to section 15-36-100 of the South Carolina Code, Peter D. Protopapas, in his capacity as the Receiver for Covil Corporation ("Respondent"), by and through the undersigned counsel, respectfully requests this Court award attorney's fees and sanctions against United States Fidelity and Guaranty Company ("USF&G") and its attorneys for pursuing this frivolous appeal when it was not a party to the underlying action and never moved to intervene as a party, as clearly required by South Carolina law.

FACTUAL BACKGROUND

On June 5, 2020, USF&G filed a Notice of Appeal from the following orders of the Honorable Jean Hoefer Toal: (1) April 10, 2020 Order approving settlements between Respondent and Sentry Insurance A Mutual Company ("Sentry"); Respondent and TIG Insurance Company, as successor to Ranger Insurance Company ("TIG"); and Respondent and Hartford Accident and Indemnity Company and First State Insurance Company ("Hartford") (collectively, "Settling

Insurers") and establishing a Qualified Settlement Fund ("QSF"); and (2) May 6, 2020 Order denying USF&G's motion to reconsider and motion to stay. However, USF&G was not a party to the cases it attempted to appeal and never moved to intervene as a party. USF&G has, at all times applicable hereto, asserted its non-party status and reiterated it was not subject to the jurisdiction of the circuit court.[1] In fact, USF&G admitted and reasserted its non-party status to these cases in its Notice of Appeal. *See* June 5, 2018 Notice of Appeal ("Please take notice that non-party United States Fidelity and Guaranty Company . . . ." and "USF&G is not a party to these matters . . . .").

On June 11, 2020, Respondent filed a Motion to Dismiss the appeal because of USF&G's inability to appeal. On June 12, 2020, the Court sent the parties a letter indicating a "preliminary review of the order(s) challenged on appeal indicates it might not be appealable" and requested the parties file memoranda addressing the issue of appealability within ten days. USF&G filed a Return to the Motion to Dismiss on June 22, 2020, and submitted over 1200 pages of superfluous documents as exhibits. Respondent filed an appealability memoranda on June 22, 2020, and a Reply to USF&G's Return on June 26, 2020. On July 30, 2020, the Court issued an order dismissing the appeal due to USF&G's non-party status and failure to intervene as a party below.

APPLICABLE LAW

The South Carolina Frivolous Proceedings Sanctions Act ("the Act") governs frivolous conduct of parties and their attorneys. *See* S.C. Code Ann. § 15-36-100. The Act precludes sophisticated litigants, such as USF&G, from filing frivolous objections and motions and engaging in delay tactics for the mere sake of delay. The Act requires all motions, pleadings, and other documents to be signed by at least one attorney of record licensed to practice law in South Carolina

[1] For example, on April 20, 2020, USF&G filed "Non-Party USF&G's Motion to Stay" and "Non-Party USF&G's Motion to Reconsider, Alter, or Amend Approval Order of April 10, 2020."

or a pro se litigant. *See* S.C. Code Ann. § 15-36-10(A)(1). According to the Act, an attorney's signature on a pleading, motion, or other document certifies:

> (a) the person has read the document;
>
> (b) a reasonable attorney in the same circumstances would believe that under the facts his claim or defense may be warranted under the existing law or, if his claim or defense is not warranted under the existing law, a good faith argument exists for the extension, modification, or reversal of existing law;
>
> (c) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of a civil cause is not intended merely to harass or injure the other party; and
>
> (d) a reasonable attorney in the same circumstances would believe his claim or defense is not frivolous, interposed for delay, or brought for any purpose other than securing proper discovery,
> joinder of parties, or adjudication of the claim or defense upon which the proceedings are based.

S.C. Code Ann. § 15-36-10(A)(3).

The Act allows a party and/or an attorney to be sanctioned for (1) filing a frivolous pleading, motion, or document; (2) "making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts;" or (3) "making frivolous arguments a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for extension, modification, or reversal of existing law." S.C. Code Ann. § 15-36-10(A)(4). An attorney's act of filing a frivolous pleading, motion, or document is sanctionable if:

> (i) the person has not read the frivolous pleading, motion, or document;
>
> (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;

> (iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or
>
> (iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based[.]

Id. On its own or upon the motion of a party, the Court may award any sanction the Court "considers just, equitable, and proper under the circumstances." S.C. Code Ann. § 15-36-10(B)(2). Sanctions may include reasonable costs and attorney's fees, a reasonable fine to the Court, or a directive of nonmonetary nature. S.C. Code Ann. § 15-36-10(G). In determining whether to award sanctions pursuant to the Act, the Court should consider (1) the number of parties, (2) the complexity of the claims and defenses, (3) the length of time available to investigate, (4) information disclosed or undisclosed through discovery or investigation, (5) previous violations of the provisions of this section, (6) the response of the person alleged to have violated the Act, and (7) other factors the Court deems equitable. S.C. Code Ann. § 15-36-10(E). Thus, the Act affords this Court the opportunity to review and sanction frivolous conduct.

DISCUSSION

The Court should award sanctions because USF&G has deployed improper tactics to obstruct and delay rulings from South Carolina courts and frustrate the purpose of the Receivership, even when it means filing frivolous motions, memoranda, and appeals that a reasonable attorney would know were not supported by law.

By way of background, the Receiver and the Settling Insurers filed a Joint Motion to Establish a Qualified Settlement Fund on March 4, 2020, and joint motions to approve the three settlement agreements on March 5, 6, and 16, 2020. The circuit court set a hearing on the motions

for March 23, 2020. On March 19, 2020, counsel for USF&G sent an email correspondence to the circuit court and others notifying the circuit court, that in light of a COVID-19 Administrative Order, USF&G would "look forward to Monday's hearing being rescheduled at an appropriate time." The circuit court informed USF&G the hearing was not cancelled because the Chief Justice of the South Carolina Supreme Court, by Administrative Order, had permitted such hearings to proceed. Undaunted, on March 20, 2020 (the Friday afternoon before the Monday hearing), Counsel for USF&G filed a frivolous non-party objection to the establishment of the Qualified Settlement Fund and the approval of the three settlements which necessitated the Court to postpone the hearing to allow the Receiver and Settling Insurers time to respond to USF&G's newly raised and meritless objection. USF&G improperly filed the objection despite not being a party to the action or settlements. The circuit court denied USF&G's objection, approved the settlement agreements, and established the QSF on April 10, 2020.

Even after Respondent raised USF&G's inability to object to the settlement agreements and the April 10, 2020 Order due to its status as a non-party, and the circuit court found it lacked an ability to object due to its status as a non-party, USF&G did not attempt to intervene as a party in the action. Instead, USF&G filed a motion to reconsider the April 10, 2020 Order reasserting its status as a non-party, which was again denied by the circuit court due to USF&G's non-party status. USF&G made a conscious effort not to intervene as a party in these actions, despite the circuit court repeatedly informing USF&G it would not have the ability to raise any objections until it formally intervened in the actions. *See, e.g.*, April 10, 2020 Order, C/A No. 2015-CP-46-02155, at 11 ("[T]he Objecting Insurers repeated assertion that they are non-parties to the case (and their decision not to intervene) is fatal to their objections because they do not have standing to challenge the Motions under their own theory.") and May 6, 2020 Order, C/A No. 2015-CP-46-

02155, at 16 ("The fact remains that they are not parties, despite having had months to intervene in these proceedings.").

USF&G then proceeded to file this frivolous appeal to further disrupt the settlement agreements and delay the establishment and operation of the QSF, despite the South Carolina Appellate Court Rules and South Carolina law clearly requiring an entity to be a party in order to have the ability to appeal an order. *See* Rule 201(b), SCACR ("Only a *party* aggrieved by an order . . . may appeal." (emphasis added)). As Respondent noted in his Motion to Dismiss, the proper procedure for USF&G to object to the settlements or the circuit court's orders would have been to formally intervene as a party pursuant to Rule 24 of the South Carolina Rules of Civil Procedure and submit itself to the jurisdiction of the court. *See Condon*, 354 S.C. at 640, 583 S.E.2d at 433 (explaining Rule 24 "provides for both intervention of right and permissive intervention, and requires that . . . "a person desiring to intervene shall serve a motion to intervene upon the parties" (quoting Rule 24, SCRCP)).

As *Condon* clearly explains, "everyone" is "required . . . to formally intervene and become a named party before he can file an appeal." *Id.* at 642, 583 S.E.2d at 434. Further, as this Court noted in its Order dismissing the appeal, *Ex parte S.C. Dep't of Motor Vehicles* required dismissal of this appeal due to USF&G's failure to intervene as a party in this action. 390 S.C. 457, 458, 702 S.C.2d 568, 568 (2010) (dismissing an appeal brought by the South Carolina Department of Motor Vehicles based on its failure to intervene as a party below). The requirement that a litigant must be a party in order to appeal an order and the procedure for intervening as a party in a matter are not particularly complex, which satisfies the second factor of the Act. Further, USF&G had ample opportunity to intervene as a party in this matter, was warned by the circuit court that it should

intervene as a party in order to object to the settlement agreements, and chose not to intervene, which satisfies the third factor of the Act.

This is not the first time USF&G has attempted to take advantage of South Carolina courts when it furthers its objectives while simultaneously objecting to the jurisdiction of South Carolina courts when it may not like a decision by the courts. Unsatisfied and unwilling to abide by South Carolina law and its Rules of Civil and Appellate Procedure, this attempted appeal was another attempt by USF&G manufacture its own rules, procedures, and law to accomplish its purposes. USF&G has previously sought to avoid the established procedural rules of our State by (1) filing a Notice of Appeal from and Petition for Writ of Certiorari in this Court's original jurisdiction of Former Chief Justice Toal's September 19, 2019 interlocutory discovery order, which the Supreme Court dismissed by two orders on October 16, 2019, and (2) filing a Notice of Appeal from Chief Justice Toal's January 8, 2020 contempt order while its motion to reconsider the order was still pending, which this Court dismissed on February 13, 2020, and (3) filing a Petition for Writ of Supersedeas related to Chief Justice Toal's contempt order despite no pending appeal, which the Supreme Court dismissed on June 17, 2020.[2] *See* Orders in appellate case nos. 2019-001651, 2019-001654, 2020-000206, 2020-000207, and 2020-000791. This appeal is another attempt by

[2] Furthermore, Zurich American Insurance Company ("Zurich"), who USF&G cited throughout its Return as also having purported rights impaired by the approval of the settlement agreements despite Zurich not joining in USF&G's improper appeal from these orders, has previously joined in these concerted efforts to misuse the appellate court system in order to obstruct the administration of the asbestos docket in South Carolina. In addition to its improper joint attempt with USF&G to appeal the interlocutory discovery order and the non-final contempt order discussed above, Zurich also recently filed a Petition for Writ of Mandamus with the Supreme Court seeking an order of the Court requiring Chief Justice Toal to recuse herself in the asbestos cases pending before her. On May 22, 2020, the Supreme Court denied Zurich's Petition, finding it was "not appropriate" because a recusal decision could not be characterized as ministerial. *See* Order in appellate case no. 2020-000749.

USF&G to manipulate our legal system by choosing which procedural rules it believes should apply to them and which it believes should not.

As shown by USF&G's current and prior inappropriate appeals, USF&G has gone to great lengths to circumvent South Carolina law, rules, and procedures and continues to do so here with this frivolous appeal. USF&G's objections to the settlement agreements are a concerted effort by USF&G to thwart the settlement agreements between Respondent and other insurers who have acknowledged their contractual obligations and resolved these disputes. USF&G has attempted to obstruct and delay rulings from South Carolina state courts and has continuously attempted to divest the circuit court of jurisdiction. As shown by numerous dismissed appellate court filings, USF&G has attempted to block the circuit court's orders and rulings at every turn and continues to do so under the guise of protecting their purported rights.

As a result of USF&G's frivolous objection and attempted appeal, the $44.5 million settlement payment from Settling Insurers has been encumbered over the past four months. There are numerous cases involving Covil Corporation that are scheduled for trial later this year. As a result of USF&G's delay tactics, Respondent has been unable to attempt to settle these upcoming cases because he has been unable to utilize one of the only assets available to him. Other than the QSF, the only other assets potentially available to Covil Corporation, a company which was dissolved over twenty years ago, to help pay for upcoming litigation are the insurance policies issued by the non-settling insurers.

Accordingly, Respondent requests this Court award attorney's fees and sanctions against USF&G and its attorneys in the amount of the post-judgment interest[3] on the $44.5 million

[3] Pursuant to the Supreme Court's January 6, 2020 Order, the current post-judgment interest rate is 8.75% compounded annually.

settlement payment from May 6, 2020, when the circuit court denied USF&G's Motion for Reconsideration, and August 14, 2020, the date this case will be remitted following the dismissal of the appeal. This amount equals approximately $1,057,174.06.[4] Respondent believes this sanction is appropriate under the Act in order to discourage USF&G and others from frivolously pursuing non-party appeals which are contrary to the established law of this state in order to obstruct and delay third party settlement agreements. Instead of seeking to intervene as a party, USF&G made a strategic choice to attempt to seek the benefits of party status (filing papers and being heard by courts) while avoiding the burdens (being bound by a judgment). The Court should not permit this type of gamesmanship by USF&G or other litigants. USF&G and its attorneys ignored repeated rulings of the circuit court that it must intervene as a party in order to raise its objections and obstinately pursued this attempted appeal despite established South Carolina law stating only an aggrieved party can appeal an order. Respondent further requests any other sanctions this Court deems just and appropriate under the circumstances. *See* S.C. Code Ann. § 15-36-10(B)(2) (explaining the Court may award any sanction the Court "considers just, equitable, and proper under the circumstances").

Respectfully submitted,

s/ G. Murrell Smith, Jr.
G. Murrell Smith, Jr. (S.C. Bar # 66263)
Jonathan M. Robinson (S.C. Bar # 68285)
Shanon N. Peake (S.C. Bar #102723)
Smith Robinson Holler DuBose and Morgan, LLC
2530 Devine Street, Suite 1B
Columbia, South Carolina 29205

[4] At a rate of 8.75% compounded annually, the $44.5 million settlement amount would gain approximately $324,479.48 per month in post-judgment interest. The period of time between May 6, 2020, and the date of remittal is three months and eight days. Thus, the post-judgment interest from May 6, 2020 to August 6, 2020 would equal $973,437.50, and the post-judgment interest for the remaining eight days from August 6, 2020 to August 14, 2020 would equal approximately $83,736.56, or approximately $10,467.07 per day.

(803) 254-5445

Robert G. Rikard (S.C. Bar # 12340)
Jescelyn Tillman Spitz (S.C. Bar # 101880)
Rikard & Protopapas, LLC
1329 Blanding Street
Columbia, SC 29201
(803) 978-6111

ATTORNEYS FOR RESPONDENT

August 10, 2020.

RECEIVED
Aug 10 2020
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

_____

APPEAL FROM RICHLAND AND YORK COUNTIES
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.)

Case Nos. 2015-CP-46-02155, 2015-CP-46-03456, 2019-CP-40-00076, 2018-CP-40-04680, and 2018-CP-40-04940

_____

Appellate Case No. 2020-000845

_____

Ex Parte: United States Fidelity and Guaranty Company, Appellant,
v.
Peter D. Protopapas, in his capacity as Receiver of Covil Corporation, Respondent,

In Re:

Roxanne Falls, Individually and as Personal Representative of the Estate of Charlotte Gaye Smith, Plaintiffs,
v.
CBS Corporation, a Delaware Corporation f/k/a Viacome, Inc., Successor by Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CNA Holdings, Inc., f/k/a Hoechst Celanese Corporations; Celanese Corporation f/k/a Hoechst Celanese Corporation (Sued Individually and as Successor-in-Interest to Fiber Industries, Inc.); Cleaver Brooks, Inc.; Covil Corporation; Daniel International Corporation; Fluor Daniel, Inc., f/k/a Daniel Construction Company, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; MP Supply, Inc. f/k/a Mill-Power Supply Co. and Mill-Power Supply Company; Resolute FP US, Inc.; Union Carbide Corporation; United States Fidelity and Guaranty Company; Uniroyal, Inc., f/k/a United States Rubber Company, Inc.; and United Conveyor Corporation, Defendants,

AND

Timothy W. Howe, Individually and as Personal Representative of the Estate of Wayne Ervin Howe, deceased and Jeanette Howe, Plaintiffs,
v.
Air & Liquid Systems Corporation, Individually and as Successor-in-Interest to Buffalo Pumps, Inc.; Airco, Inc.; Airgas USA, LLC, f/k/a National Welding Supply, Inc.; Albany International Corp.; Asten-Johnson, Inc.; Aurora Pump Company; A.W. Chesterton Company; Beloit Corporation; Black Clawson Converting Machinery, LLC, Individually and as a Subsidiary of Davis-Standard LLC; CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., Successor by Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; CGR Productions, Inc., f/k/a Carolina Gasket and Rubber Company; CAN

Holdings, Inc., f/k/a Hoechst Celanese Corporation; Celanese Corporation f/k/a Hoechst Celanese Corporation (Sued Individually and as Successor-in-Interest to Fiber Industries, Inc.); Cleaver Brooks, Inc.; Covil Corporation; Crane Co.; Crown Cork & Seal Company, Inc.; Daniel International Corporation; Davis-Standard Corporation, LLC; Dezurik, Inc. d/b/a Dezurik-Apco Williamette Eagle, Inc.; Fisher-Klosterman, Inc., as Successor-in-Interest to Buell Engineering Co.; Flowserve Corporation, Individually and as Successor-in-Interest to Durco Pumps; Fluor Enterprises, Inc., f/k/a Fluor Daniel, Inc.; Fluor Daniel Services Corporation; Foster Wheeler Energy Corporation; General Electric Company; The Gorman-Rupp Company; Goulds Pumps, Incorporated; Ingersoll- Rand Company; Linde, LLC f/k/a The Boc Group, Inc., f/k/a Airco, Inc.; Marsulex Environmental Technologies Corporation, Individually and as Successor-in-Interest to Buell Engineering Co.; Marsulex Environmental Technologies, LLC, as Successor-in-Interest to Buell Engineering Co.; Metropolitan Life Insurance Company, a Wholly-Owned Subsidiary of Metlife Inc.; Peerless Pump Company; Presnell Insulation, Inc.; Riley Power, Inc., Individually and as Successor-in-Interest to Babock Borsig Power, Inc., and Riley Stoker Corporation, Individually and as Successor-in-Interest to D.B. Riley; SCAPA Waycross, Inc.; Sepco Corporation; SPX Cooling Technologies, Inc., f/k/a Marley Cooling Technologies, Inc., f/k/a The Marley Cooling Tower Co.; Sterline Fluid Systems (USA) LLC; Trane U.S., Inc., f/k/a American Standard, Inc., f/k/a American Radiator & Standard Manufacturing Company; Union Carbide Corporation; Uniroyal, Inc., f/k/a United States Rubber Company, Inc.; United Conveyor Corporation; Velan Valve Corp.; Viking Pump, Inc.; Warren Pumps LLC; Yuba Heat Transfer Corporation; and Zurn Industries, Defendants.

AND

Charles T. Hopper and Rebecca Hopper, Plaintiffs,

v.

Air & Liquid Systems Corp.; 3M Company; Advance Auto Parts, Inc.; Armstrong International, Inc.; Blackmer Pump Company; BW/IP, Inc.; CBS Corporation; CNA Holdings, LLC; Carrier Corporation; Circor Instrumentation Technologies, Inc.; Continental Tire the Americas, LLC; Covil Corporation; Crane Co.; Crosby Valve, LLC; Daniel International Corporation; E.I. du Pont de Nemours and Company; Fisher Controls International, LLC; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; FMC Corporation; Ford Motor Company; Foster Wheeler Energy Corporation; Gardner Denver, Inc.; General Electric Company; Genuine Parts Company; Georgia Power Company; Goodrich Corporation; Gorman-Rupp Company; Goulds Pumps, Incorporated; Grinnell, LLC; Hobart Brothers LLC; Honeywell International, Inc.; IMO Industries, Inc.; Ingersoll-Rand Company; International Paper Company; ITT LLC; The Lincoln Electric Company; Metropolitan Life Insurance Company; Miller Electric Mfg., LLC; National Automotive Parts Association; Newco Valves, LLC; O'Reilly Auto Enterprises, LLC; O'Reilly Automotive Stores, Inc.; Resolute FP US Inc.; Shell Oil Company; South Carolina Electric & Gas Company; South Carolina Public Service Authority; Spirax Sarco, Inc.; SPX Cooling Technologies, Inc.; Southern Insulation, Inc.; Starr Davis Company, Inc.; Starr Davis Company of S.C., Inc.; Trane U.S.; Uniroyal Holding Inc.; Viking Pump, Inc.; Weir Valves & Controls USA, Inc.; The William Powell Company; Yeargin Potter Smith Construction, Inc.; Yuba Heat Transfer Corporation; and Zurn Industries, Defendants,

AND

James Michael Hill, Plaintiff,

v.

Advance Auto Parts, Inc.; 4520 Corp., Inc., Successor-in-Interest to Benjamin F. Shaw Company; Air & Liquid Systems Corporation, individually and as Successor-in-Interest to Buffalo Pumps; Alcoa, Inc., successor to Reynolds Metals Company; Aurora Pump Company; BW/IP, Inc., individually and as Successor-in-Interest to Byron Jackson Pumps; CB&I Group Inc., individually and as Successorin-Interest to The Shaw Group, successor to Benjamin F. Shaw Company; CB&I Laurens, Inc., f/k/a B.F. Shaw, Inc.; CBS Corporation, a Delaware Corporation f/k/a Viacom, Inc., Successor by Merger to CBS Corporation, a Pennsylvania Corporation, f/k/a Westinghouse Electric Corporation; Celanese Corporation; CAN Holdings, LLC, f/k/a Celanese Corporation f/k/a Hoechst Celanese Corporation, sued individually and as Successor-in-Interest to Fiber Industries, Inc.; Circor Instrumentation Technologies, Inc., individually and f/k/a Hoke Inc.; Cleaver Brooks, Inc., f/k/a Aqua-Chem, Inc., d/b/a Cleaver-Brooks Division; Covil Corporation; Crane Co.; Crosby Valve, LLC; Dana Companies LLC; Daniel International Corporation; The Dow Chemical Company; Federal-Mogul Asbestos Personal Injury Trust, sued as successor to Felt-Products Manufacturing Co.; Fisher-Controls International, LLC, wholly owned subsidiary of Emerson Electric Company; Fluor Constructors International, f/k/a Fluor Corporation; Fluor Enterprises, Inc.; Foster Wheeler Energy Corporation; General Electric Company; Genuine Parts Company, d/b/a Rayloc, a/k/a NAPA; The Goodyear Tire & Rubber Company; Goulds Pumps, Inc.; Gorman-Rupp Company; Hollingsworth & Vose Company; Honeywell International, Inc., f/k/a Allied-Products Liability Signal, Inc., sued as Successor-in-Interest to Bendix Corporation; Imerys Talc America, Inc., f/k/a Luzernac America, Inc., individually and as Successor-in-Interest to United Sierra Division of Cyprus Mines, Cyprus Industrial Minerals Company and Windsor Minerals, LLC; Ingersoll-Rand Company; International Paper Company; ITT LLC, f/k/a ITT Corporation, ITT Industries, Inc., individually and as successor to ITT Fluid Products Corp., ITT Hoffman ITT Bell & Gossett Company and ITT Marlow; Johnson & Johnson; Johnson & Johnson Consumer Companies LLC, a subsidiary of Johnson & Johnson; Mallinckrodt LLC; Maremont Corporation; McDermott International, Inc., individually and as Successor-in-Interest to The Shaw Group, successor to Benjamin F. Shaw Company; McNeil (Ohio) Corporation; McNeil & NRM, Inc.; Metropolitan Life Insurance Company, a Wholly-Owned Subsidiary of Metlife Inc.; Mine Safety Appliances Company, LLC; National Automotive Parts Association; OfficeMax, Incorporated, f/k/a Boise Cascade Corporation; Pneumo Abex, LLC, individually and as Successor-in-Interest to Abex Corporation; R.J. Reynolds Tobacco Company, individually and as Successor-by-Merger to Lorillard Tobacco Company LLC, f/k/a Lorillard Tobacco Company; Resolute FP US Inc., individually and as Successor-in-Interest to Bowater, Inc.; Reynolds American, Inc., individually and as Successor-by-Merger to The American Tobacco Company; Riley Power, Inc., f/k/a Riley Stoker Corporation and D.B. Riley, Inc.; Spence Engineering Company, Inc.; Spriax Sarco, Inc.; SPX Cooling Technologies, Inc., individually and as Successor-in-Interest to Marley Cooling Towers Co.; Union Carbide Corporation; United Conveyor Corporation; The William Powell Company; and Zurn Industries, LLC, individually and as Successor-in-Interest to Zurn Industries, Inc., Defendants,

AND

Denver D. Taylor and Janice Taylor, Plaintiff's
v.
Air & Liquid Systems Corporation; Aurora Pump Company; BASF Catalyst LLC; BASF Corporation; BorgWarner Morse Tec, LLC; CBS Corporation; CAN Holdings, LLC; Cameron International Corporation; Carrier Corporation; Carver Pump Company; Caterpillar, Inc.; Celanese Corporation; Cleaver-Brooks, Inc.; Continental Tire The Americas, LLC; Covil Corporation; Crane Co.; Daniel International Corporation; Fisher Controls International, LLC; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Frito- Lay, Inc.; Gardner Denver, Inc.; General Electric Company; The Gorman-Rupp Company; Goulds Pumps, Incorporated; Grinnell, LLC; Hobart Brothers LLC; Ingersoll-Rand Company; International Paper Company; ITT LLC; John Crane, Inc.; The Lincoln Electric Company; Linde, LLC; McNeil (Ohio) Corporation; McNeil & NRM, Inc.; McWane, Inc.; Metropolitan Life Insurance Company; Resolute FP US Inc.; Riley Power, Inc.; Spriax Sarco, Inc.; SPX Cooling Technologies, Inc.; Springs Global US, Inc.; Trane US, Inc.; Viking Pump, Inc.; Warren Pumps, LLC; Weir Valves & Controls USA, Inc.; York International Corporation; and Zurn Industries, LLC, Defendants.

PROOF OF SERVICE

I certify that a true copy of the Respondent's Motion for Sanctions in this case has been served on the following, this 10th day of August, 2020, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to subsection (g)(3) of the South Carolina Supreme Court's May 29, 2020 Amended Order. Pursuant to subsection (g)(3) of the South Carolina Supreme Court's May 29, 2020 Amended Order, service on the attorneys admitted pro hac vice is accomplished by service on the associated South Carolina attorneys.

Pleading:	Motion for Sanctions
Parties served:	William Pearce Davis (wdavis@brblegal.com) Matthew Todd Carroll (todd.carroll@wbd-us.com) Kevin A. Hall (kevin.hall@wbd-us.com) Bryant Sparks Caldwell (bryant.caldwell@wbd-us.com) *Attorneys for USF&G*

(Signature page follows)

*s/Shanon N. Peake*_____
Shanon N. Peake (SC Bar No. 102723)
Smith Robinson Holler DuBose and Morgan, LLC
2530 Devine Street
Columbia, SC 29205
T: (803) 254-5445
shanonp@smithrobinsonlaw.com
Attorney for Respondent Peter D. Protopapas, in his capacity as the Receiver for Covil Corporation

August 10, 2020.

From:	Shanon Peake
To:	wdavis@brblegal.com; "todd.carroll@wbd-us.com"; "kevin.hall@wbd-us.com"; bryant.caldwell@wbd-us.com
Cc:	Jon Robinson; Murrell Smith; Dot Faulkenberry; Lindsay Valek
Subject:	Appellate Case No. 2020-000845
Date:	Monday, August 10, 2020 4:28:00 PM
Attachments:	Proof of Service - Motion for Sanctions.pdf Motion for Sanctions.pdf

Good Afternoon All,

Please find attached a copy of the Motion for Sanctions and Proof of Service Respondent is filing in the Court of Appeals today, served on you pursuant to subsection (g)(3) of the South Carolina Supreme Court's May 29, 2020 Amended Order discussing the operation of the appellate courts during the coronavirus emergency.

Thank you,
Shanon

SMITH ROBINSON
Forward thinking. Results driven.
Smith Robinson Holler DuBose and Morgan, LLC
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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Covil Corporation, by and through its duly appointed Receiver Peter D. Protopapas, Plaintiff, v. Pennsylvania National Mutual Casualty Insurance Co.; Sam J. Crain & Co., Inc.; and South Carolina Property and Casualty Insurance Guaranty Association, Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C.A. No. 2020-CP-40-02098 **COVIL CORPORATION'S NOTICE OF SECOND SUPPLEMENTAL MOTION TO COMPEL AND MOTION FOR SANCTIONS**

Pursuant to Rule 37 of the South Carolina Rules of Civil Procedure, Covil Corporation, by and through its Receiver Peter D. Protopapas ("Covil"), respectfully files its Second Supplemental Motion to Compel and Motion for Sanctions based on the supplemental August 26, 2021 Rule 30(b)(6) deposition of Penn National. What is now clear is that Penn National has paper records that it could and must search to comply with both the spirit and the letter of this Court's order. But it refuses to do so. Rather than considering the best and most orderly fashion in which to comply with this Court's clear orders, Penn National has spent months fighting the Order and has caused the Receiver to incur substantial costs to litigate this issue multiple times before this Court.

BACKGROUND

Covil has sought discovery of its insurance policies and related documentation from Penn National since 2018. The requested discovery includes documents naming Covil not only as a primary insured, but also as an additional insured. *See, e.g.*, Ex. 1, July 1, 2021 Order on Motions to Compel at 2, C.A. No. 2019-CP-40-03003.

Penn National continues to willfully ignore this Court's orders by refusing to search its records. It claims that it cannot search its documents unless Covil provides the policy numbers where Covil was designated as an additional insured. It simply refuses to perform a manual search or to scan the documents so they can be searched electronically. Covil has thus been forced to litigate this issue since January, as summarized here:

1. After the January 7, 2021 deposition of Penn National's corporate representative revealed the inadequacy of Penn National's policy search, Covil moved to compel Penn National to perform a complete search.

2. At the January 2021 hearing, the Court *ordered* Covil to provide lists of relevant job sites, owners, and agents to Penn National for further searches, and it ordered Penn National to promptly respond with its findings. Ex. 2, Jan. 25, 2021 Hrg. Tr. at 138–42. Penn National did not comply with the Court's Order.

3. Covil was forced to file a Supplemental Motion to Compel on April 22, 2021. The Court granted Covil's motion, finding that "Penn National has a duty to fully, completely, and thoroughly search both its electronic records and its hard copy paper records for the information and documents sought by the Receiver." Ex. 1, July 1, 2021 Order on Motions to Compel at 6. The Court ordered Penn National to "thoroughly search its paper records using the list of contractors and facilities provided by the Receiver in connection with [Covil's] February 8, 2021, subpoena to Penn National." *Id.* Penn National again failed to comply with the Court's Order.

4. Covil was forced to file another motion on August 20, 2021, that is currently pending before the Court. It informs the Court that, among other things, Penn National's Brent Reifsnyder spent ***less than five minutes*** trying to locate documents responsive to the Court's Order, Ex. 3, Reifsnyder Dep. at 65:3–11, and he admitted that Penn National designed the system of organizing its records by policy number. *Id.* at 43:11–16.

Subsequently, on August 26, 2021, Covil deposed Penn National's 30(b)(6) deponent, Boyd Wright. Mr. Wright was responsible for coordinating Penn National's electronic search. Like Mr. Reifsnyder's complete refusal to search Penn National's *paper files*, Mr. Wright doubled down on Penn National's assertion that "[y]ou'd have to have a policy number" to search *electronically* for an "additional insured," such as Covil, as well. Ex. 4, Wright Dep. at 23:22–24.

Without a policy number, Mr. Wright admitted, Penn National would "have to look in the policy documents to see if there was any supplemental insureds." *Id*. at 23:22-24:1. But Penn National is adamant it will not do such a search regardless of this Court's prior orders. Mr. Wright testified that he did not even speak with Mr. Reifsnyder about the process or logistics for manually searching the paper archives for documents responsive to the Subpoena, let alone begin that task. *Id.* at 36:6–11. Penn National continues to stonewall, refusing to conduct the most basic of searches to determine whether Covil was an additional or supplemental insured with applicable coverage to defend and indemnify against asbestos suits.

ARGUMENT

Penn National has willfully refused to comply with legitimate discovery requests since 2018. It has willfully refused to comply with this Court's orders since January. Penn National's defense—that it has to have a policy number—is hogwash. Penn National has options: it could manually search its documents, it could hire someone to manually search its documents, or it could scan its documents, making them easily searchable. Penn National has not done so because it costs money. Also, it does not want other insureds to have easy access to their historical policies and related documents.

Penn National's conduct stands in stark contrast to other insurers' document searches. For example, one insurer readily agreed to search its paper files for responsive documents related to Covil. That insurer issues a status report to the Receiver every two weeks. Covil simply asks that Penn National also perform a reasonable search.

Penn National holds all the cards, leaving its additional insureds unable to access their own policies. Penn National and its 30(b)(6) representative have "fail[ed] to obey [this Court's Orders] to provide or permit discovery." Rule 37(b)(2), SCRCP. Covil thus requests that the Court require

Penn National, within fourteen days of any order, to file for Court approval a proposed plan and timetable for completing these searches that includes status reports every two weeks. If Penn National fails to show sufficient progress, Covil requests that this Court impose monetary sanctions on Penn National for each two-week period it does not make progress.

In addition, Covil seeks sanctions under Rule 37, SCRCP. Covil defers to the Court, of course, but respectfully suggests one or more of the following:

1. Per Rule 37(b)(2)(A), SCRCP, "an order that the matters regarding which the order was made . . . shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order[.]" Here, sanctions would establish that Covil was designated as an additional insured of Penn National's policies for the contractors and job sites provided by Covil; or

2. Per Rule 37(b)(2)(D), SCRCP, "In lieu of any of the foregoing order[] or in addition thereto, an order treating as a contempt of court the failure to obey [its] orders[.]"

CONCLUSION

For these reasons, Covil respectfully requests that this Court sanction Penn National as it sees fit. Covil further requests that Penn National reimburse all costs associated with filing this motion, and that this Court grant Covil all other relief at law or equity to which it is justly entitled. Pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, counsel for Covil certifies that Covil's counsel had discussions with counsel for Penn National but were unable to resolve the matters contained herein and further consultation would serve no useful purpose.

Respectfully submitted,

/s/ Jonathan M. Robinson
G. Murrell Smith, Jr. (S.C. Bar No. 66263)
Jonathan M. Robinson (S.C. Bar No. 68285)
Smith Robinson Holler DuBose and Morgan, LLC
2530 Devine Street, 3rd Floor
Columbia, SC 29205
Phone: (803) 254-5445

Counsel for the Receiver for Covil Corporation

This 9th day of September, 2021.

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Tracy Jolly Pavlish, individually and as Personal Representative of the Estate of Beverly Dale Jolly, and Brenda Rice Jolly, Plaintiffs, vs. Covil Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	C/A NO.: 2019-CP-42-03968 **NOTICE OF MOTION AND MOTION FOR SANCTIONS PURSUANT TO RULE 11, SCRCP, AND THE SOUTH CAROLINA FRIVOLOUS PROCEEDINGS SANCTIONS ACT**

TO: R. HAWTHORE BARRETT, ESQUIRE, WILLIAM TAYLOR STANLEY, ESQUIRE, AND JOHN S. WILKERSON, III, ESQUIRE, ATTORNEYS FOR ZURICH AMERICAN INSURANCE COMPANY, AND ZURICH AMERICAN INSURANCE COMPANY:

PLEASE TAKE NOTICE that Peter D. Protopapas, as Receiver for Covil Corporation, an administratively revoked South Carolina corporation ("the Receiver"), by and through the undersigned counsel, will move before the Honorable Chief Justice Jean Hoefer Toal ten (10) days after this Motion is served upon you, or as soon thereafter as this matter may be conveniently heard, for an Order of the Court granting sanctions against Zurich American Insurance Company ("Zurich") and its attorneys pursuant to Rule 11 of the South Carolina Rules of Civil Procedure and the South Carolina Frivolous Proceedings and Sanctions Act[1] ("the Act"). This Motion is based upon the following grounds, including Zurich's frivolous pleadings filed in connection with its Petition for Writ of Mandamus filed with the South Carolina Supreme Court on May 8, 2020,

[1] S.C. Code Ann. §§ 15-36-10 to -100.

and any other grounds that may be raised by any supporting memorandum filed prior to a hearing on this motion.[2]

LAW GOVERNING FRIVOLOUS CONDUCT

Two sets of laws govern frivolous conduct of parties and their attorneys: the Act and Rule 11, SC.R.C.P. The Act precludes sophisticated litigants, such as Zurich, from filing frivolous objections, motions and engaging in delay tactics for the mere sake of delay. The Act requires all motions, pleadings, and other documents to be signed by at least one attorney of record licensed to practice law in South Carolina or a pro se litigant. *See* S.C. Code Ann. § 15-36-10(A)(1). According to the Act, an attorney's signature on a pleading, motion, or other document certifies:

> (a) the person has read the document;
>
> (b) a reasonable attorney in the same circumstances would believe that under the facts his claim or defense may be warranted under the existing law or, if his claim or defense is not warranted under the existing law, a good faith argument exists for the extension, modification, or reversal of existing law;
>
> (c) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of a civil cause is not intended merely to harass or injure the other party; and
>
> (d) a reasonable attorney in the same circumstances would believe his claim or defense is not frivolous, interposed for delay, or brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based.

[2] In an effort to procedurally simplify this Motion, the Receiver has filed this Motion only in the above-referenced case. However, the Receiver notes Zurich's sanctionable conduct also occurred in *Sandra S. Hutto, et al. v. Covil Corporation, et al.*, C/A No.: 2019-CP-40-06956; *Hagan, et al. v. Armstrong International, Inc., et al.*, C/A No.: 2020-CP-40-00265; *Joseph Franklin Rampey v. Covil Corporation, et al.*, C/A No.: 2020-CP-40-00585; *James Joseph Reilly, et al. v. Covil Corporation, et al.*, C/A No.: 2020-CP-40-00952; *Ronnie J. Jonas v. Air & Liquid Systems Corporation, et al.*, C/A No.: 2020-CP-40-01163; and *Nicholas Lean Murphy, et al. v. Covil Corporation, et al.*, C/A No.: 2020-CP-40-01364.

S.C. Code Ann. § 15-36-10(A)(3). The Act allows a party and/or an attorney to be sanctioned for (1) filing a frivolous pleading, motion, or document; (2) "making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts;" or (3) "making frivolous arguments a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for extension, modification, or reversal of existing law." S.C. Code Ann. § 15-36-10(A)(4). An attorney's act of filing a frivolous pleading, motion, or document is sanctionable if:

> (i) the person has not read the frivolous pleading, motion, or document;
>
> (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
>
> (iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or
>
> (iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based[.]

Id.

On its own or upon the motion of a party, the Court may award any sanction the Court "considers just, equitable, and proper under the circumstances." S.C. Code Ann. § 15-36-10(B)(2). Sanctions may include reasonable costs and attorney's fees, a reasonable fine to the Court, or a directive of nonmonetary nature. S.C. Code Ann. § 15-36-10(G).

In determining whether to award sanctions pursuant to the Act, the Court should consider (1) the number of parties, (2) the complexity of the claims and defenses, (3) the length of time

available to investigate, (4) information disclosed or undisclosed through discovery or investigation, (5) previous violations of the provisions of this section, (6) the response of the person alleged to have violated the Act, and (7) other factors the Court deems equitable. S.C. Code Ann. § 15-36-10(E).

Similarly, Rule 11 also requires every pleading, motion, or other paper to be signed by at least one attorney of record who is admitted to practice law in South Carolina or the unrepresented party. Rule 11(a), SCRCP. "The . . . signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay." *Id.* If a pleading, motion, or other paper is signed in violation of Rule 11,

> the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

Id. The standard for sanctions under Rule 11 is essentially the same as that of the FCPSA. *Father v. S.C. Dep't of Soc. Servs.*, 353 S.C. 254, 261, 578 S.E.2d 11, 15 (2003). Both the Rule and the Act afford this Court the opportunity to review and sanction Frivolous conduct.

DISCUSSION

From the outset of Zurich's involvement in asbestos actions pending in South Carolina against Covil, Zurich has attempted to subvert this Court's jurisdiction and undermine this Court's authority at any cost, including in filing numerous frivolous motions and memoranda that a reasonable attorney would know was not supported by law.[3] Zurich has consistently used improper

[3] The Receiver currently has a motion pending seeking sanctions against Zurich due to its frivolous filings related to the Court's approval of three settlements between the Receiver and Sentry, TIG,

tactics in an attempt to frustrate the purpose of the Receivership and delay rulings by this Court in order to obtain more favorable rulings in other courts. Zurich has been willing to ignore South Carolina law in order to do so.

On February 6, 2020, Zurich filed a Motion for the Recusal of Chief Justice Jean H. Toal. In the Motion, Zurich alleged the Court should recuse herself because her ability to administer the statewide asbestos litigation in an impartial manner was called into question, arguing the Court improperly held it in contempt in other cases and the Court issued findings in other cases without evidentiary support. The Court denied Zurich's Motion on May 7, 2020, finding Zurich did not satisfy the statutory or constitutional requirements for recusal, the Court's findings were supported by the record, and the Court's January 8, 2020 contempt order was a proper and warranted sanction.

After denial of its Motion, Zurich continued its tactics of trying to subvert this Court's jurisdiction at any cost by frivolously moving before the South Carolina Supreme Court for a Writ of Mandamus to force the Court to recuse herself and moving before the Court for a supersedeas staying all matters until the Supreme Court ruled. Zurich's request for mandamus was meritless and not based on South Carolina law. A simple review of South Carolina law would have shown Zurich that a writ of mandamus could not be granted because mandamus is clearly only warranted where a party seeks to compel a ministerial act. *See Porter v. Jedziniak*, 334 S.C. 16, 18, 512 S.E.2d 497, 498 (1999) ("[T]he petitioner must show (1) a duty of respondent to perform the act, (2) the ministerial nature of the act, (3) the petitioner's specific legal right for which discharge of the duty is necessary, and (4) a lack of any other legal remedy."). South Carolina law clearly

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and Hartford. *See Denver D. Taylor, et al. v. Air & Liquid Systems Corporation, et al.*, C/A 2018-CP-40-04940.

shows mandamus is not proper for the refusal of a judge to recuse herself because that decision requires the judge to exercise her discretion. *See City of Rock Hill v. Thompson*, 349 S.C. 197, 200, 563 S.E.2d 101, 103 (2002) (explaining the "[i]ssuance of a particular decision by a judge is typically a matter of discretion and, therefore, not proper for mandamus"). As such, the Supreme Court dismissed Zurich's Petition on May 22, 2020. *See* Exhibit A, May 22, 2020 Order, Appellate Case No. 2020-000749.This is not the first time Zurich has attempted to manufacture a proceeding to improperly obtain appellate review of this Court's orders. Previously, Zurich filed a Notice of Appeal and Petition for Writ of Certiorari in the original jurisdiction of the South Carolina Supreme Court seeking appellate review of this Court's September 19, 2019 interlocutory discovery order. *See* Appellate Case Nos. 2019-001651 and 2019-001654. The Supreme Court dismissed the Notice of Appeal as an improper attempt to appeal an interlocutory order and denied the Petition for Writ of Certiorari. *See* Appellate Case Nos. 2019-001651 and 2019-001654.

As the Petition for Writ of Mandamus was frivolous and clearly not supported by South Carolina law, Zurich's Motion for Writ of Supersedeas, requesting the Court stay all proceedings in this case and the six cases included in footnote 2 pending a ruling by the Supreme Court on the Petition, was also frivolous.[4] As discussed above, a simple review of South Carolina law shows a writ of mandamus is only appropriate to compel ministerial actions and not to compel a judge to exercise her discretion in a certain way. As noted by the Supreme Court in its order denying the Petition, "[a] recusal motion, which is dependent on the circumstances presented, is not a matter that can be fairly characterized as ministerial." *See* Exhibit A. Zurich knew there was not a reasonable argument for the Court to stay all proceedings in seven actions because their Petition

[4] Although the Court has not yet ruled on Zurich's Petition for Supersedeas, it is now moot as the Supreme Court has denied the Petition.

was improper under South Carolina law. Instead, Zurich filed the Motion for Writ of Supersedeas with this Court in order to further interrupt the South Carolina asbestos docket and prevent this Court from ruling.

Further, a motion for writ of supersedeas is only appropriate where an appeal is pending. *See* Rule 241(c)(1), SCACR ("In a case subject to an exception, any party may move for an order imposing a supersedeas of matters decided in the order, judgment, decree or decision on appeal *after service of the notice of appeal*." (emphasis added)). Although Zurich filed its Petition after this Court denied their Motion for Recusal, it was not an appeal of the order denying recusal as an appeal of this interlocutory order would have been improper. *See Townsend v. Townsend*, 323 S.C. 309, 311, 474 S.E.2d 424, 427 (1996) ("A denial of a motion for disqualification of a judge is an interlocutory order not affecting the merits and, thus, is reviewable only on appeal from a final order."). In its Petition, Zurich sought an order of the Supreme Court directing the Court to recused herself. Rule 241 indicates a supersedeas is not appropriate until after a notice of appeal is filed. As there was no notice of appeal here, the Motion for Writ of Supersedeas was impermissible under the South Carolina Appellate Court Rules and filed in contravention of the rules.

Zurich's Petition to the Supreme Court and request to this Court to grant a supersedeas were frivolous and not appropriately supported by law. Unsatisfied and unwilling to abide by South Carolina law and its Rules of Civil and Appellate Procedure, Zurich sought to manufacture its own rules, procedures, and law to accomplish its purposes and circumvent the well-established rule that interlocutory orders, such as orders denying a motion to recuse, are not immediately appealable. Zurich has continued to attempt to forge its own path outside of the confines of the law and flout the authority of South Carolina courts in the asbestos cases. Zurich and its attorneys

knew these arguments were not raised in good faith and were merely meant to harass the Receiver and prevent this Court from ruling in an effort to obtain more favorable rulings from other jurisdictions.

Zurich's frivolous conduct satisfies the elements required for sanctions under the Act and Rule 11. Pursuant to the second factor for frivolous proceedings, the fact that a party may only obtain a writ of mandamus to compel a ministerial act and not a discretionary act is clearly set forth in South Carolina law and is not complex. Further, pursuant to the third factor, Zurich affirmatively sought relief in the South Carolina Supreme Court and, as it was under no impending deadline to do so, had adequate time to investigate and research the applicable South Carolina law related to writs of mandamus prior to filing. Further, Zurich has previously violated the Act and Rule 11, as shown by the Court's January 8, 2020 contempt order and further outlined in the Receiver's pending motion seeking sanctions against Zurich due to its frivolous filings related to the Court's approval of settlements between the Receiver and Sentry, TIG, and Hartford. *See Denver D. Taylor, et al. v. Air & Liquid Systems Corporation, et al.*, C/A 2018-CP-40-04940. Thus, Zurich's conduct satisfies the relevant factors for a frivolous proceeding and Rule 11 sanctions, and the Court should sanction Zurich in order to deter it from future frivolous filings.

CONCLUSION

Accordingly, the Receiver respectfully requests the Court sanction Zurich and its attorneys for their conduct in violation of Rule 11 and the Act and award the Receiver attorney's fees and costs incurred as a result of Zurich's numerous frivolous motions, documents, and arguments. The Receiver further requests any other relief the Court deems just and proper.

(Signature page follows)

Respectfully submitted,

s/ G. Murrell Smith, Jr.

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Attorneys for the Receiver

June 4, 2020.

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
TRACY JOLLY PAVLISH, individually and as Personal Representative of the Estate of Beverly Dale Jolly, and Brenda Rice Jolly, Plaintiffs, vs. COVIL CORPORATION SENTRY INSURANCE A MUTUAL COMPANY SOUTHERN INSULATION, INC. STARR DAVIS COMPANY, INC. STARR DAVIS COMPANY OF S.C., INC. UNITED STATES FIDELITY AND GUARANTY COMPANY ZURICH AMERICAN INSURANCE COMPANY, a/k/a ZURICH NORTH AMERICA, INC., Defendants.	Case Number: 2019-CP-42-03968 **RECEIVER FOR COVIL CORPORATION'S NOTICE OF MOTION AND MOTION TO SANCTION DEFENDANTS ZURICH AMERICAN INSURANCE COMPANY FOR VIOLATION OF THIS COURT'S ORDERS**

Peter D. Protopapas, as Receiver for Covil Corporation ("Covil"), by and through the undersigned counsel hereby moves this Court to sanction ZURICH AMERICAN INSURANCE COMPANY ("Zurich") for violation of this Court's Orders of November 2, 2018 and March 4, 2019.

On November 2, 2018, this Court appointed a Receiver for Covil which set forth: "This order is inclusive of but not limited to the right and obligation to administer any insurance assets of Covil Corporation as well as any claims related to the actions or failure

to act of Covil's insurance carriers." On March 4, 2019, the Court clarified that: [T]he Receiver is appointed in all asbestos related cases and for asbestos related matters." The Receiver for Covil is properly appointed for the instant case.

On January 31, 2020, Covil Corporation had a deadline to respond to the Complaint in this matter. The Receiver proposed to Zurich and to USF&G that the Receiver be responsible for the portions of the instant lawsuit that involve allegations of alter ego and insurance and that the Carriers appoint counsel to defend Covil from the asbestos allegations. Attached is the Receiver's proposed Answer and Crossclaim. See Exhibit A.

In response to the Receiver's recommended path, Zurich wrote the Receiver and threatened the Receiver that if the Complaint in this matter were answered accurately that Zurich would walk away from its duties to Covil: "To be clear, if you on behalf of Covil take this step, you will be rejecting Zurich's proffered defense. In this regard, please note that in no event may you or your firm be engaged to act as defense counsel or Covil. You and Rikard &Protopapas, LLC have been appointed by the court to act as receiver for Covil. Your job as receiver is to resolve Covil's liabilities, collect its assets and wind up the company as quickly as possible. If you engage yourself or your firm to defend tort suits against Covil, you give yourself an interest adverse to your obligation as receiver, namely, you acquire an interest in defending cases, including an interest in defending them slowly and expensively, and an interest in inviting more litigation against Covil, to make Covil's receivership last as long as possible. "[1]

[1] For the entire unredacted letter, see Exhibit A to Receiver for Covil Corporation's Notice of Motion and Motion for Status Conference filed under seal with the Court contemporaneously herewith.

In other cases, the Receiver has made allegations that Zurich is the alter ego for Covil that are similar to the allegations in the instant case. Zurich's threat of withdrawing a defense in the instant matter hours before the answer was due was an improper exercise of control over the Receiver. Furthermore, it is Covil's position through tis Receiver that Zurich is the alter ego of Covil. Zurich has improperly infringed upon the authority given to the Receiver by this Court.

Respectfully, this Court should sanction Zurich for the knowing violation of this Court's orders setting forth the duties and responsibilities of the Receiver.

Respectfully submitted,

s/ G. Murrell Smith, Jr.
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February 7, 2020.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
DENVER D. TAYLOR and JANICE TAYLOR, Plaintiffs, vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	C/A NO.: 2018-CP-40-04940 **NOTICE OF MOTION AND MOTION FOR SANCTIONS PURSUANT TO RULE 11, SCRCP, AND THE SOUTH CAROLINA FRIVOLOUS PROCEEDINGS SANCTIONS ACT**

TO: M. TODD CARROLL, ESQUIRE, WILLIAM P. DAVIS, ESQUIRE, MARIEL D. NORTON, ESQUIRE, ATTORNEYS FOR UNITED STATES FIDELITY & GUARANTY COMPANY:

PLEASE TAKE NOTICE that Peter D. Protopapas, as Receiver for Covil Corporation, an administratively revoked South Carolina corporation ("the Receiver"), by and through the undersigned counsel, will move before the Honorable Chief Justice Jean Hoefer Toal ten (10) days after this Motion is served upon you, or as soon thereafter as this matter may be conveniently heard, for an Order of the Court granting sanctions against United States Fidelity & Guaranty Company ("USF&G") and its attorneys[1] pursuant to Rule 11 of the South Carolina Rules of Civil Procedure and the South Carolina Frivolous Proceedings and Sanctions Act[2] ("the Act"). This Motion is based upon frivolous objection to settlement, the following grounds and any other

[1] USF&G (Travelers) is a sophisticated litigant with national counsel, and this motion is directed towards USF&G and its national counsel rather than its local counsel.
[2] S.C. Code Ann. §§ 15-36-10 to -100.

grounds that may be raised by any supporting memorandum filed prior to a hearing on this motion.[3]

A. LAW GOVERNING FRIVOLOUS CONDUCT

Two sets of laws govern frivolous conduct of parties and their attorneys: the Act and Rule 11, SC.R.C.P. The Act precludes sophisticated litigants, such as USF&G, from filing frivolous objections, motions and engaging in delay tactics for the mere sake of delay. The Act requires all motions, pleadings, and other documents to be signed by at least one attorney of record licensed to practice law in South Carolina or a pro se litigant. *See* S.C. Code Ann. § 15-36-10(A)(1). According to the Act, an attorney's signature on a pleading, motion, or other document certifies:

> (a) the person has read the document;
>
> (b) a reasonable attorney in the same circumstances would believe that under the facts his claim or defense may be warranted under the existing law or, if his claim or defense is not warranted under the existing law, a good faith argument exists for the extension, modification, or reversal of existing law;
>
> (c) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of a civil cause is not intended merely to harass or injure the other party; and
>
> (d) a reasonable attorney in the same circumstances would believe his claim or defense is not frivolous, interposed for delay, or brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based.

S.C. Code Ann. § 15-36-10(A)(3). The Act allows a party and/or an attorney to be sanctioned for (1) filing a frivolous pleading, motion, or document; (2) "making frivolous arguments a reasonable

[3] In an effort to procedurally simplify this Motion, the Receiver has filed this Motion only in the above-referenced case. However, the Receiver notes USF&G's sanctionable conduct also occurred in *Roxanne Falls, et al. v. Covil, et al.*, C/A No.: 2015-CP-46-02155; *Timothy W. Howe, et. al v. Covil, et al.*, C/A No.: 2015-CP-46-03456; *Charles T. Hopper, et al. v. Covil, et al.*, C/A No.: 2019-CP-40-00076; and *James Hill, et al. v. Covil, et al.*, C/A No.: 2018-CP-40-04680.

attorney would believe were not reasonably supported by the facts;" or (3) "making frivolous arguments a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for extension, modification, or reversal of existing law." S.C. Code Ann. § 15-36-10(A)(4). An attorney's act of filing a frivolous pleading, motion, or document is sanctionable if:

> (i) the person has not read the frivolous pleading, motion, or document;
>
> (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
>
> (iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or
>
> (iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based[.]

Id.

On its own or upon the motion of a party, the Court may award any sanction the Court "considers just, equitable, and proper under the circumstances." S.C. Code Ann. § 15-36-10(B)(2). Sanctions may include reasonable costs and attorney's fees, a reasonable fine to the Court, or a directive of nonmonetary nature. S.C. Code Ann. § 15-36-10(G).

In determining whether to award sanctions pursuant to the Act, the Court should consider (1) the number of parties, (2) the complexity of the claims and defenses, (3) the length of time available to investigate, (4) information disclosed or undisclosed through discovery or investigation, (5) previous violations of the provisions of this section, (6) the response of the person

alleged to have violated the Act, and (7) other factors the Court deems equitable. S.C. Code Ann. § 15-36-10(E).

Similarly, Rule 11 also requires every pleading, motion, or other paper to be signed by at least one attorney of record who is admitted to practice law in South Carolina or the unrepresented party. Rule 11(a), SCRCP. "The . . . signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay." *Id.* If a pleading, motion, or other paper is signed in violation of Rule 11,

> the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

Id. The standard for sanctions under Rule 11 is essentially the same as that of the FCPSA, Father v. S.C. Dep't of Soc. Servs., 353 S.C. 254, 261, 578 S.E.2d 11, 15 (2003). Both the Rule and the Act afford this Court the opportunity to review and sanction Frivolous conduct.

B. PATTERN OF FRIVILOUS AND IMPROPER CONDUCT

USF&G, a subsidiary of Travelers, has utilized improper tactics to frustrate the purpose of the Receivership. The tactics have been deployed in several courts, including this Court. This strategy has resulted in USF&G and its national attorneys filing frivolous discovery, motions and memoranda. USF&G has repeatedly engaged in frivolous and improper arguments that a sophisticated litigant such as USF&G and a reasonable attorney would know were not supported by law, in violation of both the Act and Rule 11. Up to this point, the Receiver has abstained from seeking a finding of frivolous conduct against USF&G for this pattern of obstruction and delay.

The Receiver has not sought frivolous proceedings sanctions for (1) an improper removal, (2) improper use of mediation communications, (3) failing to comply with this Court's September Order and produce evidence of the issuance of insurance policies including those from 1954-1964; and (4) threats against the Receiver and abusive discovery tactics.

1. Improper Removal

On June 18, 2019, the Receiver filed a Motion for a Status Conference due, in part, to his inability to obtain necessary information from Covil's insurers, including USF&G, regarding insurance policies issued to Covil. On June 21, 2019, this Court emailed the Receiver along with USF&G and other insurers and indicated the Court was setting a status conference for July 11, 2019 at 10:00 a.m. In a response email, USF&G objected to the Court's jurisdiction to hold the status conference due to pending litigation between USF&G and Covil in the United States District Court for the District of South Carolina. On July 5, 2019, this Court filed an Order granting Receiver's Motion for a Status Conference and set a status conference for July 11, 2019, and requiring USF&G and other insurers to attend the status conference in the July 5, 2019 Order.

On the evening of July 10, 2019, counsel for USF&G emailed the Court and all parties, advising the Court it no longer had jurisdiction to hold the status conference due to the removal of the status conference and USF&G would not be in attendance. Despite being told by the Court that the status conference would still take place and USF&G was expected to be there, USF&G's counsel filed notice of the improper removal thirty minutes after the status conference began on July 11, 2019, and failed to appear at the status conference until the Court contacted counsel for USF&G multiple times.

Despite there being no action to remove to federal court, USF&G attempted to remove what it termed the "amorphous proceeding" of the status conference solely to prevent the Court

from exercising its jurisdiction. The filed removal documents were in clear violation of Rule 11 and the Act. Judge Hendricks dismissed the attempted removal and noted USF&G's baseless removal was an attempt to "manufactur[e] a removable 'action'" for the sole purpose of "stall[ing] the underlying state court proceedings." *See* Exhibit A, July 26, 2019 Order, Civil Action No. 3:19-1948-BHH. Furthermore, even after this Court informed USF&G at the July 11, 2019 status conference that the removal was improper and was not supported by law, USF&G continued to insist the Court did not have jurisdiction to have the status conference due to the removal despite not being able to cite to any supporting law allowing it to remove a status conference. As already noted by the District Court, the removal documents and arguments before this Court were clearly meant to subvert the Court's jurisdiction and delay the status conference without any reasonable basis in the law. As such, this conduct by USF&G and its national attorneys is sanctionable under Rule 11 and the Act.

2. Improper use of mediation communications

On February 28, 2019, this Court issued an Order requiring Covil's Insurers to attend mediation on March 4-6, 2019 in Charleston. One of the cases the Court ordered into mediation was *Taylor v. Covil*, 2018-CP-40-04940, which along with *Hill v. Covil*, was in default. Mediation occurred in March 2019 and all parties at the mediation, including Covil's Insurers, agreed all documents "prepared for the purpose of, or in the course of, or pursuant to, the mediation" were subject to confidentiality and not admissible into evidence in any other action. The parties were unable to resolve *Hill* and *Taylor* at mediation but continued negotiating after mediation. On March 20, 2019, this Court denied Covil's Motion to Lift Entry of Default in *Hill* and *Taylor*.

The parties reached a settlement agreement in *Hill* and *Taylor* on April 19, 2019. The day before the settlement, on April 18, 2019, the Receiver communicated with Covil's Insurers in an

email with the subject line "Covil – Subject to Absolute Mediation Privilege" in which he set forth his position regarding settlement.

On April 24, 2019, the Receiver filed an action in state court against Wall, Templeton & Haldrup PA and Covil's Insurers asserting, in part, that Covil's Insurers acted as Covil and the lawyers hired by Covil's Insurers were negligent. Covil's Insurers removed this case to federal court on June 6, 2019.[4] USF&G used these protected communications in the federal court proceeding against the Receiver. The Receiver sought, and this Court imposed non-monetary sanctions against USF&G for sharing the protected communications. *See* Exhibit B, September 19, 2019 Orders, Order on Mediation.

3. Failure to disclose purge of documents and failure to disclose secondary evidence of 1964-64 policies

From his appointment in November of 2018, the Receiver has sought documents evidencing Covil's insurance policies. In particular, the Receiver sought insurance policies that Palmer Covil asserted that USF&G had issued from 1964-1964. USF&G frustrated the Receiver's multiple requests for this information thereby necessitating Court intervention. The Court required USF&G to produce its policies as well as documents which would evidence an insuring relationship. As a result of the Court's intervention, the Receiver obtained evidence of insurance policies issued by USF&G to Covil from 1954-1964.

USF&G produced some claims' ledgers pursuant to this Court's Order that directly show a contractual relationship between Covil and USF&G during the 1950s and 1960s. *See* Exhibit B, September 19, 2019 Orders, Order on Documents. As evidence of USF&G's continued defiance,

[4] There is currently a Motion to Remand pending in the federal court action.

to date, USF&G has not complied with this Court's September Order and completed its review of its records from the 1950s and 1960s. *See* January 30, 2020 Deposition of Mark Esposito p. 12-13 ll 21-5. Furthermore, USF&G was not able to produce the actual insurance policies from 1954-1964. Throughout these extensive Court proceedings, USF&G did not ever disclose, but the Receiver was able to identify, the reason that the policies could not be produced. Starting in 1984, USF&G engaged in a purge of insurance policies to preclude asbestos claims coverage by their insureds. USF&G should have been candid with this Court.[5]

4. Threats to the Receiver and Improper Discovery

Since the Receiver's appointment, he has been barraged with threats of personal litigation by several of Covil's insurers, particularly USF&G. In fact, whether the Receiver may be sued was an issue subject of the Receiver's June 18, 2019 Motion for Status Conference and July 11, 2019 hearing in *Falls v. CBS Corporation, et al.*, 2015-CP-02155; *Howe v. Air & Liquid Systems Corporation, et al.*, 2015-CP-46-03456; *Hopper v. Air & Liquid Systems Corporation, et al.*, 2019-CP-40-00076; *Hill v. Advance Auto Parts, Inc., et al.*, 2018-CP-40-04680; and *Taylor v. Air & Liquid Systems Corporation, et al.*, 2018-CP-40-04940. At the time, the Court gave the insurers the benefit of the doubt in considering the threats to be hyperbole, however, noting that threatening to sue the Receiver would be "highly inadvisable." (Hrg. Tr. 131:9-25, Jul. 11, 2019).

Despite the Court's admonition, USF&G continues to improperly threaten the Receiver personally. By letter dated January 22, 2020, counsel for USF&G threatened the Receiver, **personally**, for failure to cooperate and with bad faith allegations of "undermin[ing] the Insurer's defense of Covil." *See* January 22, 2020 Letter from Simpson Thacher to Receiver's Counsel filed

[5] The Receiver provides this information as background context. The Receiver is not seeking rulings or sanctions related to USF&G's insurance policies.

on February 7, 2020 **under seal**. USF&G even went so far as to seek discovery of the Receiver's personal insurance information, because USF&G contended that it may "have rights of action against the Receiver for which the Insurers may be entitled to coverage[.]" *Id.* at pp. 2-3.

USF&G also improperly served a subpoena on the Law Offices of Dean Omar Branham & Shirley, LLP ("Dean Omar") seeking almost every communication between Dean Omar and the Receiver; USF&G apparently speculates there is collusion between the Receiver and Dean Omar in which the Receiver "has received or been promised payments." *Id.* at p. 3. The threats, thinly veiled as discovery requests, were not appropriate, and the North Carolina court found that the discovery "border[ed] on harassment." *See* Exhibit C, March 11, 2020 North Carolina Order. The North Carolina Court invited a motion for sanctions (which the Receiver declined to file) but Dean Omar did seek sanctions. The Motion for Sanctions was resolved by payment from USF&G to Dean Omar of the full amount sought in sanctions. *See* Exhibit D, Dean Omar Branham Shirley LLP's and the Individual Defendants Motion for Attorney's Fees filed March 23, 2020 at ECF 275 in Zurich v. Covil, Case Number 1:18-cv-932).

USF&G has furthered contended that the Receiver has been derelict in his obligations by failing to wind up Covil's business and publish notice of Covil's dissolution. Certainly, if USF&G has a complaint with the way that the Receiver is discharging his responsibilities as Receiver, it should address those complaints with this Court, the Court responsible for overseeing the Receivership.

The threats have continued, most recently, by way of email correspondence from USF&G's counsel in which USF&G threatened "to file a motion to enforce the February 27, 2020 injunction, unless the Receiver is willing to withdraw his March 30, 2020 Supplemental Memorandum In Support of Motions to Approve Settlements and his April 7, 2020 Proposed Order on Objections

to Settlement." *See* Exhibit E, April 8, 2020 Email Correspondence from Simpson Thacher. Despite being assured by this Court that it would "faithfully adhere to Judge Hendricks' rulings and stay out of ruling on coverage matters that are before [Judge Hendricks]," USF&G made good on its threat and filed a motion to enforce the injunction on April 14, 2020. *See* Exhibit E and *See* Exhibit F, USF&G's Motion to Enforce Injunction filed at ECF 142 in Covil v. Zurich, Case Number 7:18-cv-03291-NHH on April 10, 2020. Notably, keeping with its recurrent theme of threatening the Receiver personally, USF&G seeks sanctions against the Receiver personally for seeking this Court's approval of the Receiver's settlements with TIG, Hartford, and Sentry.

Not having learned its lesson for having to settle a sanctions motion in North Carolina for an improper subpoena, USF&G's continued its pattern of "subpoena harassment" to South Carolina by issuing an improper subpoena in the above captioned cases. Despite not being a party, USF&G issued a subpoena in the above matter on March 18, 2020. The improper subpoena sought seven categories of documents related to the proposed Qualified Settlement Fund and settlement agreements between the Receiver, TIG, Sentry, and Hartford. On its face, the improper subpoena purported to require the document production *two days later* by March 20, 2020 by 5:00 p.m. The subpoena is facially invalid as to the issuer, the time for compliance, and the documents requested.[6]

USF&G's improper threats have been unrelenting against the Receiver for nearly the entirety of the Receiver's appointment. The insurers opposed the Receiver's appointment and USF&G has, since that time, continued to obstruct and harass the Receiver, who is simply effectuating his Court-ordered duties. The repeated threats and litigation misconduct of USF&G and its national lawyers warrant sanctions.

[6] The Receiver filed a Motion to Quash the unlawfully issued subpoena on March 20, 2020 in which he is also seeking sanctions and costs and incorporates by reference his prior filings relating to the Motion to Quash.

C. OBJECTION TO SETTLEMENT

USF&G's latest frivolous act and the basis for this motion, was objecting to settlements with TIG, Hartford, and Sentry. S.C. Code Ann. § 15-36-10(E) sets forth seven factors for the Court to consider: (1) the number of parties, (2) the complexity of the claims and defenses, (3) the length of time available to investigate, (4) information disclosed or undisclosed through discovery or investigation, (5) previous violations of the provisions of this section, (6) the response of the person alleged to have violated the Act, and (7) other factors the Court deems equitable. USF&G's objections to the establishment of the Qualified Settlement Fund and this Court's approval of the settlements satisfy the relevant Frivolous Proceeding factors.

USF&G and its national attorneys filed non-party objections to the Receiver's and the Settling Insurers' joint motions to approve settlements with TIG, Sentry, and Hartford and the joint motion seeking the establishment of a Qualified Settlement Fund. [7] The Receiver and the Settling Insurers filed the Joint Motion to Establish a Qualified Settlement Fund on March 4, 2020, and joint motions to approve the three settlement agreements on March 5, 6, and 16, 2020. The Court set a hearing on the motions for March 23, 2020. On March 19, 2020, counsel for USF&G sent an email correspondence to this Court and others ***notifying*** this Court, that in light of a COVID-19 Administrative Order, they "..will look forward to Monday's hearing being rescheduled at an appropriate time…". Once again, USF&G took up it upon itself to issue directives to this Court in an effort unilaterally to subvert this Court's jurisdiction and docket management. Once again this Court found itself in the position of informing USF&G counsel that the hearing was not

[7] This action satisfies the first factor for Frivolous Proceeding, the number of parties because USF&G was not a party.

cancelled because the Chief Justice of the South Carolina Supreme Court, by Administrative Order, had permitted such hearings to proceed.

Undaunted, on March 20, 2020 (the Friday afternoon before the Monday hearing), Counsel for USF&G filed a frivolous non-party objection to the establishment of the Qualified Settlement Fund and the approval of the three settlements which necessitated the Court to postpone the hearing to allow the Receiver and settling insurers time to respond to USF&G's newly raised and meritless objections. USF&G improperly filed the objection despite not being a party to the action or settlements and not having standing to object.[8]

On April 8, 2020, nineteen days after USF&G filed their last-minute objection and nine days after the Receiver filed his opposing memorandum, national counsel for USF&G emailed the Court objecting to the Court ruling on the settlements, reasoning it needed additional time to respond to new issues allegedly raised by the Receiver. USF&G's representation to the Court that it had not had a full opportunity to respond to the issues related to the settlements and QSF was disingenuous and merely an attempt to further delay the Court from ruling. When the Court emailed the parties and counsel for non-party USF&G on April 9, 2020 of its intent to issue an Order on USF&G's objection and on the Joint Motion of the Receiver and Settling Carriers' Motion to Establish a Qualified Settlement Fund and Approve Settlement, USF&G's out of state attorney Andy Frankel (who has not been admitted pro hac vice in this case) informed this Court that he represented USF&G and posited arguments and "clarification" to this Court on the motions

[8] This action satisfies the second factor for Frivolous Proceeding, the complexity of the claims and defenses, as it is not complex to file for leave to intervene in a case. It further satisfies the third factor, the length of time available to investigate, as USF&G has been aware of the settlements since November of 2018. *See* Exhibit G, November 21, 2019 Text Entry of Partial Settlement in Principle filed in Zurich v. Covil, 1:18-cv-932, Middle District North Carolina.

pending before this Court. This Court notified Attorney Frankel of his lack of bar credentials in this matter and suggested Attorney Frankel read the Order when it was submitted. [9]

Since the appointment of a Receiver, USF&G and its attorneys have undertaken a plan to prevent rulings from this Court and subvert the Court's jurisdiction by any means possible regardless of the confines of the law. As discussed above, these attempts have included, but are not limited to, baseless attempts to prevent and postpone this Court's hearings on at least two separate occasions, failing to produce insurance policies and evidence of insurance policies,[10] filing numerous motions and memoranda without any appropriate legal support, violating the confidentiality of mediation,[11] and obstinately refusing to abandon their frivolous arguments even when confronted with the arguments' legal inadequacy. When faced with no legal grounds to object, USF&G has attempted to manufacture reasons to prevent this Court from ruling and has shown its willingness to ignore South Carolina law to do so.

Instead of following proper channels to raise objections, such as by intervening as a party in the matter which it has vigorously argued it is not a party, USF&G has attempted to improperly forge its own path outside of the confines of the law. USF&G and its attorneys know these arguments by USF&G were not raised in good faith and were merely meant to harass the Receiver and delay this Court from ruling in an effort to obtain more favorable rulings from other jurisdictions.

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[9] The Receiver filed an Objection and has a pending Motion to Reconsider the Pro Hac Vice admittance of Attorney Frankel in another case involving USF&G and the Receiver (Pavlish v. Covil, et al, C/A No. 2019-CP-42-03968).

[10] USF&G's prior conduct in failing to produce evidence of their insurance policies speaks to the fourth factor of a frivolous proceeding motion, information disclosed or undisclosed through discovery or investigation.

[11] The prior finding of violating mediation privileges implicates the fifth factor, previous violations of the provisions of this section.

D. CONCLUSION

USF&G's conduct satisfies the relevant factors for a frivolous proceeding and Rule 11 sanction. Accordingly, the Receiver respectfully requests the Court sanction USF&G and its national attorneys for their conduct in violation of Rule 11 and the Act and award the Receiver attorney's fees and costs incurred as a result of USF&G's numerous frivolous motions, documents, and arguments. The Receiver further requests any other relief the Court deems just and proper. Pursuant to Rule 11, the undersigned counsel certifies that further consultation would serve no useful purpose in resolving the issues raised herein.

Respectfully submitted,

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Attorneys for the Receiver

This 20th Day of April, 2020

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
DENVER D. TAYLOR and JANICE TAYLOR, Plaintiffs, vs. Air & Liquid Systems Corporation, et al., Defendants. In Re: Receivership of Covil Corporation by and through its Receiver Peter D. Protopapas	C/A NO.: 2018-CP-40-04940 **NOTICE OF MOTION AND MOTION FOR SANCTIONS PURSUANT TO RULE 11, SCRCP, AND THE SOUTH CAROLINA FRIVOLOUS PROCEEDINGS SANCTIONS ACT**

TO: M. TODD CARROLL, ESQUIRE, WILLIAM P. DAVIS, ESQUIRE, MARIEL D. NORTON, ESQUIRE, MARY BETH FORSHAW, ESQUIRE AND ANDREW T. FRANKLE, ESQUIRE, ATTORNEYS FOR UNITED STATES FIDELITY & GUARANTY COMPANY AND JOHN WILKERSON, ESQUIRE ROBERT E. KNEECE, III, ESQUIRE AND TAYLOR STANLEY, ESQUIRE ATTORNEYS FOR ZURICH AMERICAN INSURANCE COMPANY:

PLEASE TAKE NOTICE that Peter D. Protopapas, as Receiver for Covil Corporation, an administratively revoked South Carolina corporation ("the Receiver"), by and through the undersigned counsel, will move before the Honorable Chief Justice Jean Hoefer Toal as soon as this matter may be conveniently heard, for an Order of the Court granting sanctions against United States Fidelity & Guaranty Company ("USF&G"), Zurich American Insurance Company ("Zurich") and their attorneys pursuant to Rule 11 of the South Carolina Rules of Civil Procedure and the South Carolina Frivolous Proceedings and Sanctions Act[1] ("the Act"). This Motion is based upon the frivolous continued objection to settlement,[2] the following grounds, and any other

[1] S.C. Code Ann. §§ 15-36-10 to -100.

[2] The Receiver has a Motion pursuant to Rule 11 and the Act currently pending before the Court, filed on April 20, 2020, requesting sanctions against USF&G for its frivolous objection to

grounds that may be raised by any supporting memorandum filed prior to a hearing on this motion.[3]

A. LAW GOVERNING FRIVOLOUS CONDUCT

Two sets of laws govern frivolous conduct of parties and their attorneys: the Act and Rule 11, SC.R.C.P. The Act precludes sophisticated litigants, such as USF&G, from filing frivolous objections, motions and engaging in delay tactics for the mere sake of delay. The Act requires all motions, pleadings, and other documents to be signed by at least one attorney of record licensed to practice law in South Carolina or a pro se litigant. *See* S.C. Code Ann. § 15-36-10(A)(1). According to the Act, an attorney's signature on a pleading, motion, or other document certifies:

> (a) the person has read the document;
>
> (b) a reasonable attorney in the same circumstances would believe that under the facts his claim or defense may be warranted under the existing law or, if his claim or defense is not warranted under the existing law, a good faith argument exists for the extension, modification, or reversal of existing law;
>
> (c) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of a civil cause is not intended merely to harass or injure the other party; and
>
> (d) a reasonable attorney in the same circumstances would believe his claim or defense is not frivolous, interposed for delay, or brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based.

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settlement and outlining the USF&G's pattern of frivolous conduct before the Court. The Receiver incorporates by reference his prior Motion and related filings herein. The Receiver now brings this Motion related to USF&G's and Zurich's frivolous conduct arising after the Receiver filed the April 20, 2020 Motion.

[3] In an effort to procedurally simplify this Motion, the Receiver has filed this Motion only in the above-referenced case. However, the Receiver notes USF&G and Zurich's sanctionable conduct also occurred in *Roxanne Falls, et al. v. Covil, et al.*, C/A No.: 2015-CP-46-02155; *Timothy W. Howe, et. al v. Covil, et al.*, C/A No.: 2015-CP-46-03456; *Charles T. Hopper, et al. v. Covil, et al.*, C/A No.: 2019-CP-40-00076; and *James Hill, et al. v. Covil, et al.*, C/A No.: 2018-CP-40-04680.

S.C. Code Ann. § 15-36-10(A)(3). The Act allows a party and/or an attorney to be sanctioned for (1) filing a frivolous pleading, motion, or document; (2) "making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts;" or (3) "making frivolous arguments a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for extension, modification, or reversal of existing law." S.C. Code Ann. § 15-36-10(A)(4). An attorney's act of filing a frivolous pleading, motion, or document is sanctionable if:

> (i) the person has not read the frivolous pleading, motion, or document;
>
> (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
>
> (iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or
>
> (iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based[.]

Id.

On its own or upon the motion of a party, the Court may award any sanction the Court "considers just, equitable, and proper under the circumstances." S.C. Code Ann. § 15-36-10(B)(2). Sanctions may include reasonable costs and attorney's fees, a reasonable fine to the Court, or a directive of nonmonetary nature. S.C. Code Ann. § 15-36-10(G).

In determining whether to award sanctions pursuant to the Act, the Court should consider (1) the number of parties, (2) the complexity of the claims and defenses, (3) the length of time

available to investigate, (4) information disclosed or undisclosed through discovery or investigation, (5) previous violations of the provisions of this section, (6) the response of the person alleged to have violated the Act, and (7) other factors the Court deems equitable. S.C. Code Ann. § 15-36-10(E).

Similarly, Rule 11 also requires every pleading, motion, or other paper to be signed by at least one attorney of record who is admitted to practice law in South Carolina or the unrepresented party. Rule 11(a), SCRCP. "The . . . signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay." *Id.* If a pleading, motion, or other paper is signed in violation of Rule 11,

> the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

Id. The standard for sanctions under Rule 11 is essentially the same as that of the FCPSA. *Father v. S.C. Dep't of Soc. Servs.*, 353 S.C. 254, 261, 578 S.E.2d 11, 15 (2003). Both the Rule and the Act afford this Court the opportunity to review and sanction frivolous conduct.

B. FRIVOLOUS AND IMPROPER CONDUCT SINCE APRIL 20, 2020

After failing in its attempt to once again subvert this Court's jurisdiction by directing the Court on how to manage its docket and despite the Court's denial of their frivolous non-party objection to the three settlements, USF&G's and Zurich's frivolous conduct continues unabated. As seen in this Court and other courts, USF&G and Zurich have deployed improper tactics to obstruct and delay rulings from this Court at any cost and frustrate the purpose of the Receivership, even when it means filing frivolous discovery, motions, and memoranda that a reasonable attorney

would know was not supported by law. On April 20, 2020, USF&G and Zurich filed non-party Motions to Reconsider, Alter, or Amend ("Motion to Reconsider") this Court's April 10, 2020 Order approving the three settlements ("the settlement order"). USF&G also filed a non-party Motion to Stay the Court's enforcement of the settlement order until the Court ruled on its Motion to Reconsider and until the settlement order was not subject to further appellate review.

In its Motions to Reconsider, USF&G and Zurich largely reasserted their previous arguments, which the Court already ruled (1) they did not have standing to raise by virtue of their non-party status and refusal to avail itself of the procedure available to become a party to this action and (2) their arguments were without merit. *See* April 10, 2020 Order approving settlements and establishing qualified settlement fund, C/A No. 2015-CP-46-02155. Despite the Court repeatedly finding USF&G and Zurich lack standing to raise non-party objections, USF&G and Zurich continues to assert their non-party status and flout South Carolina law and procedure.

USF&G also raised, for the first time in its Motion to Reconsider, an argument about the effect of a prior Covil receivership on this Court's Receivership. Zurich has made these same frivolous arguments in other Courts. *See, e.g.*, Motion To Intervene and Motion for Relief from Judgment under Rule 60(b) filed in *Ann Finch v. Covil Corporation* on 5/1/20 (MDNC 1:16-CV-01077); Motion for Leave to Amend and Supplement Pleadings filed in *Covil Corporation v. Zurich American Insurance Company, et al* on 5/14/20 (DSC 7:18 -cv- 3291) ("As a result of disavowing and seeking judicial determination [from Chief Justice Toal] as to the invalidity of the statutory defense, the Receiver has breached his contractual duty to cooperate with Zurich in Covil's defense"); and Motion to Intervene and Motion for Relief from Order Transferring Jurisdiction Dated May 1, 2020 filed in *First Savings Bank v. Covil Corporation* on 5/15/20 (Greenville County Court of Common Pleas c/a/ 91-CP-23-4445). In their arguments, Zurich and

USF&G disingenuously argue they recently discovered Covil was judicially dissolved in the prior receivership, and the prior receiver was the permanent receiver of Covil. However, as the Court found in its Order denying reconsideration, USF&G knew about the prior receivership for over twenty-eight years, and any argument that the prior receivership affects these proceedings is meritless. *See* May 7, 2020 Order Denying Motions to Reconsider and Motion to Stay, C/A No.: 2015-CP-46-02155. The Receiver will provide the Court *in camera* with documents previously identified to Zurich and USF&G detaining their knowledge of the prior Receivership from 1992 to present. Those documents include:

DATE	**EVENT(S)**	DOCUMENT(S)
11.14.1991	Danny White (insurance appointed counsel for Covil) writes to the former Receiver, Winston Lee, and copied the three carriers, including USFG and Zurich (Maryland) adjuster, David Kappus.	Exh. A. Sealed ZUR 6413, produced by Zurich 11.8.2019
11.14.1991	Danny White (insurance appointed counsel for Covil) wrote to the three carriers, including USF&G and Zurich (Maryland) adjuster, David Kappus: "[redacted]"	Exh. B. Sealed ZUR 6414-6415, produced by Zurich 11.8.2019 (highlighted at ZUR 6414)

11.25.1991	Danny White (insurance appointed counsel for Covil) wrote to the three carriers, including USF&G and Zurich (Maryland) adjuster, David Kappus: "[redacted]"	Exh. C. Sealed ZUR 6408, produced by Zurich 11.8.2019 (highlighted at ZUR 6408)
2.14.1992	Danny White (insurance appointed counsel for Covil) wrote to the three carriers, including USF&G and Zurich (Maryland) adjuster, David Kappus: "[redacted]"	Exh. D. Sealed ZUR 6366-6367, produced by Zurich 11.8.2019 (highlighted at ZUR 6367)
2.24.1992	Danny White (insurance appointed counsel for Covil) wrote to Reid Merline at Nelson Mullins Riley Scarborough advising: "[redacted]"	Exh. E. Sealed GWBC 4141
3.10.1992	Danny White (insurance appointed counsel for Covil) wrote to the three carriers, including USF&G and Zurich (Maryland) adjuster, David Kappus: "[redacted]"	Exh. F. Sealed ZUR 6335-6336, produced by Zurich 11.8.2019

	[redacted]"	(highlighted at ZUR 6336)
3.10.1992	Danny White (insurance appointed counsel for Covil) writes to Jim Covil and copies the three carriers, including USF&G and Zurich (Maryland) adjuster, David Kappus: [redacted]	Exh. G. Sealed ZUR 6337, produced by Zurich 11.8.2019
4.15.1992	Danny White (insurance appointed counsel for Covil) wrote to the three carriers, including USF&G and Zurich (Maryland) adjuster, David Kappus: "[redacted]	Exh. H. Sealed TRAV ST 13257- 13259 (highlighted at TRAV ST 0013258)
5.11.1992	Greenville County Master In Equity, Judge Simmons issues an interim Order setting forth judicial dissolution.	Exh. I. Not sealed 5/11/92 Order

6.24.1992	Danny White (insurance appointed counsel for Covil) writes to Jerri Soloman of Taraska, Grower, Unger and Ketcham law firm, blind copying three carriers, including USF&G and Zurich (Maryland) adjuster, David Kappus and Paul Inferrara: "[redacted]	Exh. J. Sealed TRAV ST 169098
12.7.1992	Greenville County Master In Equity, Judge Simmons issues the final Order and does not mention dissolution.	Exh. K. Not sealed 12/7/1992 Order
7.30.1993	South Carolina Secretary of State administratively revokes Covil Corporation.	Exh. L. Not Sealed 7/30/1993 SOS Record
3.23.1994	Lori J. Sheppard, adjuster for Zurich (Maryland) prepares an internal memorandum: "[redacted]	Exh. M. Sealed ZUR 905-907, produced by Zurich 11.8.2019 (highlighted at ZUR 906)
9.15.1994	Danny White (insurance appointed counsel for Covil) writes to Lori J. Sheppard, Environmental Claims Supervisor for Zurich (Maryland): "[redacted]	Exh. N. Sealed ZUR 5497-5498, produced by Zurich 11.8.2019 (highlighted at ZUR 5498)

	[redacted]	
9.15.1994	Lori Sheppard of Zurich (Maryland) prepares an internal Memorandum after a Conference call with Danny White (insurance appointed counsel for Covil), Zurich (Maryland), USFG, and Sentry and notes: "[redacted]	Exh. O. Sealed ZUR 5492-5496, produced by Zurich 11.8.2019 (highlighted at ZUR 5492)
11.11.1994	Danny White (insurance appointed counsel for Covil) wrote to the three carriers, including USF&G and Zurich (Maryland) adjuster, Lori J. Sheppard: [redacted]	Exh. P. Sealed ZUR 5473-5487, produced by Zurich 11.8.2019 (highlighted at ZUR 5474)
11.16.1994	Zurich Claim File Activity Memorandum handwritten notes: "[redacted]	Exh. Q. Sealed ZUR 5471, produced by Zurich 11.8.2019
10.3.1995	Zurich (Maryland) internal Memorandum from Paul Bender to Charles Brock: [redacted]	Exh. R. Sealed ZUR 5389, produced by Zurich 11.8.2019

5.3.1996	Zurich (Maryland) internal 180 Day Report: “[redacted]”	Exh. S. Sealed ZUR 1458-1461, produced by Zurich 11.8.2019 (highlighted at ZUR 1458)
8.16.1996	Danny White of Gallivan White & Boyd (insurance appointed counsel for Covil) wrote a letter to Harriet Vinyay of Teague Campbell. Teague Campbell was Covil’s lawyers in North Carolina asbestos Industrial Commission claims: “[redacted]”	Exh. T. Sealed GWBC 3578
8.31.1998	Gallivan White & Boyd (insurance appointed counsel for Covil) sends a billing statement billing for: “[redacted]”	Exh. U. Sealed TRAV ST 11510
8.25.1999	Danny White of Gallivan White & Boyd (insurance appointed counsel for Covil) wrote a letter to Regina Ryan of Zurich and USFG and the other carriers: “[redacted]”	Exh. V. Sealed TRAV ST 13014
11.17.1999	Gallivan White & Boyd (insurance appointed counsel for Covil) send a billing statement to John Truzzulonio of Zurich. Billing statement reflects that: Stephanie Flynn, attorney at Gallivan White & Boyd billed for [redacted]	Exh. W. Sealed ZUR 9218-9264 (extract only), produced by Zurich 11.8.2019 (highlighted at ZUR 9221)

3.19.2001	Zurich Claim File Activity Memorandum handwritten notes: "[redacted]"	Exh. X. Sealed. ZUR 6076, produced by Zurich 11.8.2019
4.4.2001	Danny White of Gallivan White & Boyd (insurance appointed counsel for Covil) wrote to Mona Wallace at Wallace and Graham copying Michele A. Horutz of Zurich, USF&G and other carriers: "[redacted]"	Exh. Y. Sealed. ZUR 5994-5995, produced by Zurich 11.8.2019 (highlighted at ZUR 5994)
4.5.2017	In Finch vs. BASF Catalysts, LLC, et al, (pending in the United States District Court, Middle District of North Carolina, Case Number 1:16-cv-01077), Gallivan White & Boyd (insurance appointed counsel for Covil) stated as its 18th Affirmative Defense in Covil's Answer to First Amended Complaint: **"Covil is a dissolved corporation and therefore lacks the capacity to sue or be sued."**	Exh. Z. Not sealed. Finch v. BASF, ECF 74 - April 5, 2017 Covil's Answer to First Amended Complaint
8.26.2017	In Finch vs. BASF Catalysts, LLC, et al, (pending in the United States District Court, Middle District of North Carolina, Case Number 1:16-cv-01077), Gallivan White & Boyd (insurance appointed counsel for Covil) stated as its 18th Affirmative Defense in Covil's Answer to Second Amended Complaint: **"Covil is a dissolved corporation and therefore lacks the capacity to sue or be sued."**	Exh. AA. Not sealed. Finch v. BASF, ECF 87 - August 26, 2017 Covil's Answer to Second Amended Complaint

10.23.2017	Danny White (insurance appointed counsel for Covil) billed Zurich for a telephone call he had with Carol Weill of Zurich: "[redacted]	Exh. BB. Sealed 1/31/2018 Gallivan White & Boyd Billing Statement Extract
11.17.2017	Ron Tate of Gallivan White & Boyd (insurance appointed counsel for Covil) billed Zurich for a research memo on [redacted]	Exh. BB. Sealed. 1/31/2018 Gallivan White & Boyd Billing Statement Extract
12.27.2017	In Finch vs. BASF Catalysts, LLC, et al, (pending in the United States District Court, Middle District of North Carolina, Case Number 1:16-cv-01077), Gallivan White & Boyd (insurance appointed counsel for Covil) stated as its 18th Affirmative Defense in Covil's Answer to Third Amended Complaint: **"Covil is a dissolved corporation and therefore lacks the capacity to sue or be sued."**	Exh. CC. Not sealed Finch v. BASF, ECF 156 - December 27, 2017 Covil's Answer to Third Amended Complaint
1.5.2018	In Jerry H. Crawford v. Celanese Corporation, et al, (pending in Spartanburg County, South Carolina, Case Number 2017-CP-42-04429), Gallivan White & Boyd (insurance appointed counsel for Covil) stated as it's 4th Affirmative Defense: **"Covil is a dissolved corporation and therefore lacks the capacity to sue or be sued."**	Exh. DD. Not sealed. 1/5/2018 Covil Answer to Complaint.
3.1.2018	Hartford counsel James P. Ruggeri writes to Ronald G. Tate of Gallivan White & Boyd (insurance appointed counsel for Covil): "[redacted]	Exh. EE. Sealed. March 1, 2018 Ruggeri Letter to Gallivan White & Boyd.

	[redacted] " He continues: "[redacted]	
3.13.2018	Barb Davis of Sentry Insurance emailed Gallivan White & Boyd (insurance appointed counsel for Covil) copying Zurich and USF&G: "[redacted] " David Rheney of Gallivan White & Boyd (insurance appointed counsel for Covil) replied at 2:41 PM to Davis and copied Carol Weill and John Weiss of Zurich, and Steven Fries of Travelers: "[redacted]	Exh. FF. Sealed. TRAV ST 51550 –51551

	[redacted]	
5.18.2018	James P. Ruggeri of Hartford writes to Gerald Begley of Travelers: "[redacted]"	Exh. GG. Sealed. Receiver_Hartford005382
6.15.2018	Carol Weill of Zurich wrote to Mark Wall of Wall Templeton Haldrup (insurance appointed counsel for Covil) and carriers: "[redacted]" Mark Wall responded to Weill of Zurich: "[redacted]".	Exh. HH. Sealed TRAV ST 48242-48243
8.13.2018	William A. Bulfer of Teague Campbell (represents Zurich) writes to attorney for Hartford James P. Ruggeri: "[redacted]"	Exh. II. Sealed Receiver_Hartford004538

11.2.2018	Order Appointing a Receiver for Covil Corporation entered by Chief Justice Jean H. Toal (Ret): **"The Court finds that the application is meritorious under the applicable statute because Covil Corporation has dissolved."**	Exh. JJ. Not sealed. November 2, 2018 Order appointing Receiver
4.20.2020	USF&G's raises the prior receivership orders to Chief Justice Toal in Falls for Smith, Howe, Hopper, Hill and Taylor matters (pending in South Carolina state courts). USF&G's Motion to Reconsider: **"(I)t now appears that by operation of law Covil no longer has any underlying liabilities in the asbestos suits currently pending against Covil or which may be filed in the future as any such claims had been extinguished ten years following Covil's dissolution."** See USF&G's Motion to Reconsider, pg. 3, ¶3, filed in A) Falls for Smith vs. CBS Corporation, et al, York County, SC, 15-CP-46-02155; B) Howe vs. Air & Liquid Systems Corporation, et al, York County, SC, 15-CP-46-03456; C) Hopper vs. Air & Liquid Systems Corporation, et al, Richland County, SC, 19-CP-40-00076; D) Hill vs. Advance Auto Parts, Inc., et al, Richland County, SC, 18-CP-40-04680; and, E) Taylor vs. Air & Liquid Systems Corporation, et al, Richland County, SC, 18-CP-40-04940.	Exh. KK. Not sealed. April 20, 2020 Non-Party USF&G's Motion to Reconsider (without exhibits)
5.1.2020	Judge Simmons transfers First Savings Bank FSB vs. Equitable Enterprise, Covil Corporation, Oxytherm, Inc. (91-CP-23-0445) (the prior receivership) to Chief Justice Jean H. Toal: **"..the Court finds it proper that the within case be referred and transferred to the Honorable Jean Toal for any and all further proceedings"**	Exh. LL. Not sealed. May 1, 2020 Simmons Form 4 Order
5.7.2020	Chief Justice Toal denies USF&G and Zurich's Motions to Reconsider and Stay: **"Non-Party USF&G waited until its Motion to Reconsider (and concurrently filed Motion to**	Exh. MM. Not sealed.

	Stay) to lodge, for the first time, an objection to this Court's Approval order based on the existence of a prior receiver for Covil, Mr. Winston Lee….However, based on the conclusive evidence submitted in connection with this motion, it is abundantly clear that USF&G and Zurich have been aware of the first Covil receivership since at least 1991. Yet, remarkably, USF&G waited over 28 years to raise this objection and now feigns to have only recently learned about this previous receivership proceeding. USF&G even goes so far as to blame Covil, a corporation that was administratively dissolved in 1993 and operated by the Objecting Insurers until the appointment of a Receiver in 2018, for not bringing this prior receivership to this Court's attention. USF&G is not being honest with this Court." See Toal Order, p. 5-6 Toal continues: **"The Court finds sections 33-14-107(a) and (b) are clearly inapplicable in the context of these asbestos claims against Covil. Further, section 33-14-107(c)(3) did not exist at the time of Covil's 1992 dissolution, and the Comments to section 33-14-107 show the General Assembly specifically chose not to adopt what is today subsection (c)(3), which addresses the bar of contingent claims and claims based on an event after dissolution, from the Model Act. In fact, the Comments note the clear legislative intent behind the version of the statute in effect at the time of Covil's dissolution was that "[t]he statue of repose only applie[d] *to claims existing at dissolution*." *See* South Carolina Reporter's Comments, S.C. Code Ann. 33-14-107. The General Assembly did not adopt subsection (c)(3) until 2004, and as such, this subsection, which did not exist until either eleven or twelve years after Covil's dissolution, clearly cannot apply."** See Toal Order, p. 13	May 7, 2020 Order Denying Motions to Reconsider and Motion to Stay

	Finally, Toal states: **"The Objecting Insurers repeatedly insinuate that the Receiver's key role in these proceedings is to protect the Objecting Insurers from the contractual obligations that they voluntarily assumed when they sold insurance policies to Covil. This Court views the Receiver's role differently. As the Court's appointed receiver, Mr. Protopapas is charged with marshaling Covil's assets and prudently using those assets to address Covil's asbestos liabilities in a responsible fashion. This Court's appointed Receiver is certainly under no obligation to advance frivolous arguments or to assert specious defenses to Covil's asbestos cases. Non-Party USF&G's contention that the Receiver is somehow not cooperating with Covil's insurers and is undermining Covil's asbestos defenses by refusing to behave unethically (at USF&G's behest) is absurd."** See Toal Order, p. 14	

USF&G also raised an argument that "Covil no longer ha[d] any underlying liabilities in the asbestos suits currently pending against Covil or which may be filed in the future, as any such claims had been extinguished ten years following Covil's dissolution." *See* USF&G's Motion to Reconsider, p. 3. Although this Court ruled against the Insurers on this baseless argument, Zurich has now repeatedly made this same argument in the above-referenced cases.

After the Receiver submitted a memorandum in opposition explaining why the bar did not apply and informing the Court of a relevant change in the statutory law that USF&G failed to mention, USF&G changed positions in an attempt to prevent a ruling from this Court by arguing that, although it was the one to raise the issues to the Court, it did not mean to seek a ruling from the Court "as to whether any asbestos claims are barred, whether jurisdiction is lacking over any claims or parties, or whether the Receiver was properly appointed." *See* USF&G's Reply in further

support of its Motion to Reconsider, p. 2. Zurich went so far as to file three documents in three different Courts arguing that the Receiver is failing to cooperate with Zurich because the Receiver is following this Court's rulings.

The frivolous conduct of USF&G and Zurich in continuing to raise meritless objections to this Court's approval order is sanctionable by the Court. Section 15-36-10(E) sets forth seven factors for the Court to consider: (1) the number of parties, (2) the complexity of the claims and defenses, (3) the length of time available to investigate, (4) information disclosed or undisclosed through discovery or investigation, (5) previous violations of the provisions of this section, (6) the response of the person alleged to have violated the Act, and (7) other factors the Court deems equitable. USF&G's objections to the establishment of the Qualified Settlement Fund and this Court's approval of the settlements satisfy the relevant Frivolous Proceeding factors.

USF&G's and Zurich's conduct satisfies the relevant factors for a frivolous proceeding and Rule 11 sanction. As USF&G and Zurich are not a party to this action, this action satisfies the first factor the Court should consider in determining whether to award sanctions. This action further satisfies the second factor because it is not complex to file for leave to intervene as a party, and the Court has previously indicated USF&G must intervene as a party to have standing to raise these objections.[4]

As further outlined in the Receiver's pending April 20 Motion, USF&G and its attorneys have undertaken a plan to prevent rulings from this Court and subvert the Court's jurisdiction by any means possible regardless of the confines of the law. Even after specific rulings and directions from this Court, USF&G continues its attempts to manufacture reasons to prevent this Court from

[4] The Receiver incorporates the arguments set forth in it April 20, 2020 Motion for Sanctions which address the remaining factors.

ruling and has shown its willingness to ignore South Carolina law to do so. Instead of following proper channels to raise objections, such as by intervening as a party in the matter which it has vigorously argued it is not a party, USF&G has attempted to improperly forge its own path outside of the confines of the law. USF&G has further presented new, meritless arguments to this Court in its Motion to Reconsider, mischaracterizing its own knowledge of the facts and referring to law that did not apply during the relevant time period. Further, after raising issues to the Court in its argument in support of reconsidering the approval order, USF&G has changed positions to then argue the Court should reverse the approval order but not rule on the issues it raised. USF&G and its attorneys know these arguments by USF&G were not raised in good faith and were merely meant to harass the Receiver and delay this Court from ruling.

C. IMPACT OF MERITLESS LITIGATION AND OBJECTIONS ON SETTLEMENT

The Covil Qualified Settlement Fund (Covil QSF) exists as a tool to manage Covil's assets and defend against Covil's legacy liabilities. The Covil QSF's assets must be used to meet its expenses in handling Covil's litigation and to fund settlements or judgments in asbestos cases, as and where appropriate. At the conclusion of Covil's asbestos litigation experience, any remaining funds will be donated to several 501(c)(3) charitable organizations. Accordingly, Covil QSF's assets must be managed carefully and prudently with an eye toward these critical goals. Unfortunately, Zurich and USF&G's litigation misconduct places an unnecessary strain and burden on the Covil QSF's resources by forcing it to respond, again and again, to baseless and previously overruled litigation positions while being forced to hound these Insurers to respond responsibly to the scores of pending asbestos cases that Covil faces. This Court has maintained continuing jurisdiction over Covil QSF so as to supervise its operations to ensure that it fulfills its core functions. Likewise, the Receiver takes these obligations very seriously and would request

that Zurich and USF&G be required to reimburse and replenish the Covil QSF for the unnecessary expenses and undue burden that their misconduct has forced the Covil QSF to endure. These Insurers' strategy of "litigation attrition" is inappropriate, and it is not a burden that the Covil QSF should be required to bear in the first instance.

D. CONCLUSION

Accordingly, the Receiver respectfully requests the Court sanction USF&G and Zurich for their conduct in violation of Rule 11 and the Act and award the Receiver attorney's fees and costs incurred as a result of their numerous frivolous motions, documents, and arguments. The Receiver further requests any other relief the Court deems just and proper. Pursuant to Rule 11, the undersigned counsel certifies that further consultation would serve no useful purpose in resolving the issues raised herein.

Respectfully submitted,

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Attorneys for the Receiver

This 18th Day of May, 2020

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
JOHN A. TIBBS and MARGARET B. TIBBS,

Plaintiffs,

v.

3M COMPANY *et al.*,

Defendants.

****

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

Third-Party Plaintiff,

v.

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

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

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

Third-Party Defendants.

THE RECEIVER'S MOTION FOR SANCTIONS

Pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, Third-Party Plaintiff Peter D. Protopapas, as duly appointed receiver for Cape PLC, individually and as successor in interest to Cape Asbestos Company Ltd., n/k/a Cape Intermediate Holdings Ltd. (the "Receiver" or "Receivership"), by and through undersigned counsel, hereby moves this Court for an Order sanctioning Third-Party Defendants[1] for improperly removing this action to the United States District Court for the District of South Carolina on June 28, 2024, less than six months before trial.

This case has been repeatedly waylaid by Third-Party Defendants' numerous attempts to use procedural gamesmanship purely for the purpose of delay. In fact, the Third-Party Defendants have collectively filed multiple appeals of non-appealable interlocutory orders in this matter alone,

[1] The Third-Party Defendants include four groups: (1) the "Oppenheimer Third-Party Defendants," in reference to the Oppenheimer family of South African oligarchs that dominated the Anglo-De Beers mining/mineral group for most of the 20th century (Anglo American PLC, individually and as successor in interest to Anglo American Corporation of South Africa Ltd., De Beers PLC, De Beers Centenary AG, De Beers Consolidated Mines Proprietary Ltd., and De Beers UK Ltd.), (2) the "Charter Third-Party Defendants" (Charter Consolidated Ltd., ESAB Corporation, and Central Mining & Investment Corporation Ltd.), (3) the "Altrad Owners Third-Party Defendants" (Altrad Investment Authority S.A.S. and Mohed Altrad), and (4) the "Altrad Sparrows Third-Party Defendants" (ArranCo US, LLC, Hawk Bidco (US) Inc., and Sparrows Offshore, LLC) (together with the "Altrad Owners Third-Party Defendants," the "Altrad Third-Party Defendants").

clogging the South Carolina Court of Appeals and Supreme Court dockets. *See, e.g.*, Appellate Case No. 2023-002009 (June 18, 2024) (denying petition for rehearing for dismissal of initial appeal); Appellate Case No. 2024-000524 (May 3, 2024) (denying petition for rehearing for dismissal of second appeal); Appellate Case No. 2023-002006 (Altrad Owners filing third notice of appeal, this time regarding the Court's May 23, 2024 order). In addition, the Receiver has also filed five motions to compel discovery from Third-Party Defendants, resulting in sanctions against the non-Oppenheimer Third-Party Defendants in the form of adverse inferences, a pre-admitted trial exhibit list, and an award of the Receiver's attorneys' fees. Third-Party Defendants, including the Oppenheimer set, have nevertheless persisted in their delay campaign. As a result, the Receiver is constrained to file another motion for sanctions.

"A trial court may impose sanctions on a party, a party's attorney, or both for filing a pleading, motion, or other paper to cause delay or when no good grounds exist to support the filing." *Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 597, 713 S.E.2d 624, 628 (2011) (Toal, J.) (imposing sanctions for improper removal to federal court). Indeed, "repeatedly engag[ing] in "vexatious' behavior" is an appropriate ground for Rule 11 sanctions. *Pee Dee Health Care, P.A. v. Est. of Thompson*, 424 S.C. 520, 534, 818 S.E.2d 758, 766 (2018).

This case was originally set for a bench trial to commence on April 15, 2024, but the Court reluctantly continued it during the April 10 pretrial hearing "due to the lack of participation in the discovery process by the Third-Party Defendants." June 20, 2024 Order Setting Trial Date. This matter was ultimately reset for trial on December 9, 2024. *Id*. With that date fast approaching, on June 28, 2024, Third-Party Defendant Anglo American PLC filed a notice of removal (to which the other Third-Party Defendants consented), a move that multiple courts, including the Fourth Circuit Court of Appeals, have ***repeatedly*** held is improper in light of the *Barton* doctrine,

including in other South Carolina receivership actions. *See Protopapas v. Travelers Cas. & Surety Co.*, 94 F.4th 351 (4th Cir. 2024); *Pipe & Boiler Insulation, Inc. v. Cont'l Ins. Co*., No. 3:21-cv-03033-SAL, ECF No. 153, at 4–9 (D.S.C. Mar. 9, 2023) (remanding receivership matter because "the *Barton* doctrine prevents Defendants from removing this matter, filed by a Receiver, to federal court," while also considering judicial economy in light of the fact that any "settlement agreement is not final until the Receivership Court approves the settlement"); *Protopapas v. Zurich Am. Ins. Co.*, No. 3:21-cv-04086-DCC, ECF No. 180, at 4–6, 10 (D.S.C. Feb. 24, 2023) (remanding receivership case because "*Barton*, and its subsequent application in *Porter*, act as a limitation on federal jurisdiction when a state court has previously exercised its authority by appointing a receiver," such that allowing removal "would directly interfere with the exclusive jurisdiction of the receivership court over this dispute").

Undeterred by case law squarely on point, Third-Party Defendant Anglo American PLC[2] removed the case to federal court, falsely claiming that removal was proper because the claims against Cape had been dismissed (they had not) before the Receiver filed his Third-Party Complaint against it and, therefore, it was in the position of an original defendant. This lack of candor to the Court is shocking, as is other Third-Party Defendants' joinder and adoption of Anglo American PLC's arguments in their oppositions to the Receiver's motion to remand, including the false assertion that Cape had been dismissed from the *Tibbs* and *Park* actions.[3] *See* C/A No. 3:24-3771-MGL, ECF Nos. 46, 47, 48.

[2] The Receiver surmises that the reason Anglo American PLC was the removing party is that it is one of the few Third-Party Defendants that has not yet been sanctioned.

[3] Nor was this the first time that Third-Party Defendants have been less than candid with the courts. When this Court granted the Receiver's January 12, 2024 motion to compel and also denied Third-Party Defendants' cross-motions to compel in its March 12, 2024 Order, the non-Oppenheimer Third-Party Defendants immediately appealed that interlocutory and non-appealable order, falsely characterizing it to the South Carolina Court of Appeals as a denial of injunctive relief. *See, e.g.*,

Ultimately, Anglo American PLC's gambit failed. On August 13, 2024, the Honorable Mary Geiger Lewis, United States District Judge, continuing the above-cited line of cases from the Fourth Circuit and the District of South Carolina, swiftly remanded this case to this Court, based on the *Barton* doctrine, 104 U.S. 126 (1881) and *Home Depot*, 587 U.S. 435 (2019). *See* Order, attached hereto as **Exhibit 1**. Further, Judge Lewis specifically rejected Third-Party Defendants' unsupported contention that the claims against Cape had been dismissed. Not only was the tolling agreement that the Receiver produced to them mischaracterized, Judge Lewis also quoted from a transcript that Anglo American PLC supplied, in which counsel for the Tibbs and Park plaintiffs stated that "Cape is still in it." *See* Order at 10–11 ("The Court finds, based on the state court judge's understanding, Cape plc was not dismissed from the *Tibbs* action prior to the Receiver's filing of the third-party complaint."). Third-Party Defendants were aware of these facts, demonstrating their true reason for removal was to "cause delay" because the record objectively shows "no good grounds exist[ed]." *Ex parte Bon Secours-St. Francis Xavier Hosp.*, 393 S.C. at 597, 713 S.E.2d at 628.

The Receiver therefore requests, as a sanction for these Third-Party Defendants' ongoing campaign to manufacture procedural delays, that this Court award Receiver all fees and costs associated with bringing this Motion and all associated briefing related to their improper removal to federal court.

Order Granting Mot. to Dismiss Appeals of Interlocutory Discovery Order, Appellate Case No. 2024-000524 (Apr. 17, 2024) (noting that "Appellants [incorrectly] characterize the circuit court's action as refusal to enter an injunction," rather than "an order granting the receiver's motions to compel discovery").

Pursuant to Rule 11, SCRCP, the undersigned counsel certifies that consultation on this matter would serve no useful purpose given these Third-Party Defendants' continued refusal to participate in discovery and repeated delay tactics.

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August 16, 2024
Columbia, South Carolina

RECEIVED
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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas
Jean Hoefer Toal, Circuit Court Judge

Appellate Case No. 2023-001461
Case No. 2023-CP-40-01759

John A. Tibbs and Margaret B. Tibbs,

Respondents,

v.

3M Company; 4520 Corp., Inc.; A.O. Smith Corporation; A.W. Chesterton Company; ABB Inc.; Air & Liquid Systems Corporation; Aiw-2010 Wind Down Corp.; Amentum Environment & Energy, Inc.; Anchor/Darling Valve Company; Armstrong International, Inc; Asbestos Corporation Limited; ASCO, L.P.; ACL Asbestos Co.; ACL Turner, Inc.; AWT Air Company, Inc.; Bahnson, Inc.; Banner Industries International, Inc.; Banner Industries, LLC; Banner Industries Of N.E., Inc.; Barretts Minerals Inc.; Beaty Investments, Inc.; Bechtel Corporation; The Bonitz Company; Brand Insulations, Inc.; BW/IP Inc.; Canvas Ct, LLC; Cape PLC; Carboline Company; CB&I Laurens, Inc.; Cleaver-Brooks, Inc.; Consolidated Electrical Distributors, Inc.; Copes-Vulcan, Inc.; Covil Corporation; Crane Instrumentation & Sampling, Inc.; Crosby Valve, LLC; Daniel International Corporation; Davis Mechanical Contractors, Inc.; Dezurik, Inc.; Duke Energy Carolinas, LLC; Duke Energy Corporation; Eaton Corporation; Ellington Insulation Company, Inc.; Emerson Electric Co.; Fisher Controls International LLC; Flame Refractories, Inc.; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Gardner Denver Nash, LLC; General Boiler Casing Company, Inc.; General Cable Corporation; General Cable Industries, Inc.; General Electric Company, Gould Electronics Inc.; Goulds Pumps, Incorporated; Goulds Pumps LLC; Great Barrier Insulation Co.; Grinnell LLC; Hajoca Corporation; Howden North America Inc.; HPC Industrial Services, LLC; IMO Industries, Inc.; ITT LLC; Joy Global Underground Mining LLC; K-Mac Services Incorporated; Metropolitan Life Insurance Company; Mine Safety Appliances Company, LLC; MP Supply, Inc.; The Nash Engineering Company; Occidental Chemical Corporation; Paramount Global; Patterson Pump Company; PECW Holding Company; Pfizer Inc.; Piedmont Insulation, Inc.; Plastics Engineering Company; Presnell Insulation Co., Inc.; Redco Corporation; Riley Power Inc.; Rockwell Automation, Inc.; RSCC Wire & Cable LLC; Schneider Electric USA, Inc.; Sequoia Ventures Inc.; Spirax Sarco, Inc,; SPX Corporation; Stafford Insulation Company; Standard Insulation Company Of N. C., Inc.; Starr Davis Company, Inc.; Starr Davis Company of S.C., Inc.; Sterling Fluid Systems (USA) LLC; TE Wire & Cable

LLC; Thermo Electric Company, Inc.; Union Carbide Corporation; Valves and Controls Us, Inc.; Velan Valve Corp.; Viking Pump, Inc.; Vistra Intermediate Company LLC; The William Powell Company; Wind Up, Ltd.; Yuba Heat Transfers LLC; Zurn Industries, LLC,

Defendants,

Of which Asbestos Corporation Limited is the Appellant.

and

Peter D. Protopapas, Asbestos Corporation Limited's Duly Appointed Receiver is Respondent.

THE RECEIVER FOR ASBESTOS CORPORATION LIMITED'S MOTION TO SUPPLEMENT THE RECORD AND FOR SANCTIONS FOR FRAUD ON THE COURT

SMITH ROBINSON HOLLER DuBOSE
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ATTORNEYS FOR THE RECEIVER

Peter D. Protopapas, the duly-appointed receiver for the insurance assets of Asbestos Corporation Limited (the "Receiver"), submits this Motion to Supplement the Record and for Sanctions for Fraud on the Court.

INTRODUCTION

Since Asbestos Corporation Limited ("ACL") filed its Notice of Appeal on September 13, 2023, the Receiver has come into possession of documents that directly bear on the issues in this case, and which reveal that ACL has committed fraud upon this Court, the circuit court, and injured claimants. This information is well known to ACL's insurers, who have sat idly by while ACL lied to South Carolina courts.

On August 21, 2023, ACL represented to the circuit court:

- "We have no insurance to tender against. It's just that simple. I'm not paid by insurance. It would make no sense not to tender, Your Honor."
- "[W]e have gone through [what] we can find and we know of and there is no coverage for us to tender against."
- "[T]here's nothing [showing] that we have insurance."
- "Why would they not move forward and tender if there was something there to tender for?"
- "[B]ut there was nothing to tender. … This [chart of historical insurance] doesn't prove that this insurance is in place."

Attached as Exhibit B is the most recent annual report from ACL's chief financial officer, Mario Simard, to ACL's excess insurers. This communication, dated February 15, 2023, encloses ACL's "[r]eport of the asbestos litigation as of December 31, 2022," including summaries of the number of claims pending, dismissed and settled, and summaries of expense and indemnity paid

for such claims. ACL has hundreds of millions of dollars of insurance.[1]

PROCEDURAL BACKGROUND

On August 21, 2023, the circuit court held a hearing on Respondents' motions to hold ACL in contempt, strike its answer, and to appoint a receiver for ACL's insurance assets. In opposing Respondents' motions, ACL repeatedly represented to the court that ACL had no insurance available that provides coverage for the asbestos litigation against it.

Following the hearing, the circuit court granted Respondents' motions and appointed Mr. Protopapas as Receiver for ACL's insurance assets, directing him to "investigate the existence of all insurance or indemnification coverages or claims relating thereto which are potentially available to ACL."

ACL has appealed the orders that led to the Receiver's appointment and has sought to shut down any investigation of its insurance while its appeal is pending. To that end, ACL recently filed a procedurally defective petition for supersedeas and for a stay—asking this Court to rule that the circuit court and the Receiver "lack jurisdiction" to investigate what ACL refers to as its "so called" insurance assets.

Notwithstanding ACL's continuing attempts at obstruction and delay, in the three months since his appointment, the Receiver has begun investigating ACL's potential insurance as directed by the circuit court. Recently, in the course of that investigation, the Receiver was provided with documents that show that ACL's counsel's statements to the circuit court at the August 21, 2023 hearing regarding ACL's purported lack of insurance were unequivocally false.

[1] According to the report, the first named insured on ACL's excess coverage was General Dynamics Corporation. It appears ACL was included as an insured under these policies because General Dynamics had an ownership interest in ACL when the policies were issued.

Accordingly, the Receiver submits this motion to supplement the record to provide the Court with the documentation demonstrating ACL's false statements. Additionally, the Receiver respectfully moves for attorneys' fees and such other sanctions that the Court may deem appropriate as result of ACL's fraud on the court. In the alternative, the Receiver requests the Court remand this case to the circuit court for further proceedings to investigate and make findings regarding ACL's fraudulent representations.

A. ACL Represents to the Circuit Court That It Has No Insurance

At the August 21, 2023 hearing on Respondents' motions that ultimately resulted in the circuit court appointing the Receiver, ACL through counsel ("ACL Counsel"), was questioned by the circuit court regarding the existence of insurance coverage for asbestos claims against ACL.

In the course of a lengthy back-and-forth between the court and through ACL Counsel, ACL Counsel repeatedly represented that ACL had "no insurance" and "no coverage" to which it could tender the asbestos claims against it.

A complete copy of the official transcript of the August 21, 2023 hearing is attached as Exhibit A to this motion.[2] Set forth below are excerpts from the circuit court's inquiry into ACL's insurance, and ACL's responses:

> MS. McVEY [Respondents' counsel]: Your Honor, we know that there is insurance for ACL. We know that they're depleting it. I don't understand why they're not tendering these

[2] Multiple attorneys representing insurers that issued insurance policies covering ACL—including counsel representing Travelers Casualty and Surety Company, Century Indemnity Company, Federal Insurance Company, Continental Insurance Company, National Union Insurance Company of Pittsburgh, Pa., Certain London Market Insurers, Lexington Insurance Company, First State Insurance Company, and Zurich American Insurance Company, as well as affiliates of the same—appeared at the August 21, 2023 hearing in front of the circuit court (because they were present for other receivership matters being heard that day, including a hearing regarding ACL affiliate, Atlas Turner Inc.) *See* Exhibit D, Excerpts from Transcripts of Aug. 21, 2023 (listing counsel appearances). At no point did counsel for ACL's insurers—whether at the August 21, 2023 hearing, or at any time thereafter—communicate to the circuit court to correct ACL's false statements that it had no insurance.

cases to their insurance carrier, who have policies who would cover Mr. Tibbs and other South Carolinians. . . .

* * *

THE COURT: And most particularly, Mr. Brown, [the documents ACL has made available to Respondents] are not any kind of insurance information about coverage that would have been available. All of these policies back at that time were per-occurrence policies. They cover things like this, even though mesothelioma has a latency period of many years. It's when the occurrence took place that those policies come alive. The insurance industry now calls them legacy policies.

If [ACL] had [at least one historical insurance settlement setting up a qualified settlement fund] with the Maryland [Casualty Company], they had others. But as a Quebec corporation, they had no problem with setting up a qualified settlement fund to take care of asbestos claims back in the '80s that were '70s policies. They would have no problem bringing that forward today.

I feel quite confident, while they're still in business, as big a corporation as they were, they had commercial general liability [CGL] policies, probably per-occurrence coverage. And that's what they're trying to seek.

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 that simple. I'm not paid by insurance. It would make no sense not to tender, Your Honor.**

* * *

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 [settlement] agreement [with Maryland Casualty], 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.

MR. BROWN: And **we have gone through [what] we can find and we know of and there is no coverage for us to tender against**.

THE COURT: Well, that's your contention, but they're entitled to depose the people that you had go through those records and ask them what they looked at and so forth. It's not acceptable to say, "We're just not going to tender anybody because it's too old and everybody is dead." You have got people now, is what you're

representing to me, who looked at old records and says there's no coverage. Isn't that right?

MR. BROWN: Attorneys.

THE COURT: I don't care whether they're attorneys or who they are. There are people that are looking at some record of ACL's to make the representation that you're making, upon your oath as a lawyer in this court today, which is they don't have any coverage. They are entitled to look at the same material that your internal people looked at and make their own determination about that. That's what discovery in 30(b)(6) is all about.

MR. BROWN: I understand exactly what Your Honor is saying. I respectfully disagree. I believe 30(b)(6)—I can read the rule. I understand what it says. I also read lots of articles where 30(b)(6) is a huge problem within the judicial system in and of itself by going in and trying to create witnesses, and circuit courts have put limitations on that.

THE COURT: Mr. Brown, you just, not three minutes ago, told me, "We have looked to see if there are any policies." You looked at something to make that representation, and you're a good enough lawyer, you don't make representations that aren't true. I have ultimate respect for your integrity and your ability to sort out the facts in this case, but if your folks—your clients, whether they be attorneys for the client or whatever—looked, they looked at something. And you are a good enough trial lawyer to know we're entitled to see what they looked at…

* * *

MR. BROWN: Okay. Our argument was that, at the time of them filing for this receivership in Tibbs, nobody can show—nobody can claim—**there's nothing [showing] that we have insurance** and that we're out there muddling, which is the word that continues to be used—

THE COURT: The insurance has to be discovered by looking at your records or having someone who is familiar enough with the corporation to take a look. You, obviously, have some people that you think are capable of taking a look because you're representing to the Court that there is no insurance. It's an affirmative representation. They are entitled to explore whether you have been given correct information by your client about that. That is the argument that they are making now.

MR. BROWN: And, again, I understand Your Honor's argument—well, position on this.

* * *

MS. McVEY [on reply]: … I want to show you what the receiver for Atlas Turner filed. And this goes to the argument of whether or not there's insurance applicable to ACL and Atlas Turner, and they're intertwined. And if you look at the document that's filed, there is—this came from discovery responses that Asbestos Corporation answered in an old case. And in that, you see a listing of, I don't know, 20 or 30 insurance policies. And my fast math is not great, but it looks like it's about $2 billion—billion with a "b"—of insurance.[3]

* * *

THE COURT [to Mr. Brown]: You're the third lawyer that's taken this. Two other lawyers could not get these people [at ACL] to cooperate one bit, except to say, "We don't have to do anything and we're not doing anything and we're not even going to provide a 30(b)(6)," which . . . [the] Quebec Records Act certainly doesn't effect. But they said no to everything.

Appointing a receiver would give someone, who is very knowledgeable about how to find insurance coverage, the ability to at least take a look at what apparently unknown people that you have checked with say they looked at and couldn't find anything.

He found an enormous amount of potential coverage. Now, does—have I seen the insurance policies? Has he? I don't know. Probably not yet. But he has at least found coverage for this corporation—CGL-type coverage with very reputable, known insurance companies that started out in the '60s with 200,000 and is now up to $2 million, $4 million. I mean, these are big insurance coverages that Mr. Protopapas found and indicates are potential suspected insurance programs with Atlas.

They're asking that that same methodology be used to discover insurance policies of ACL. And I don't understand why ACL is fussing about that. These policies protect them. And these policies stand good for claims that are going to be made because their stuff came into the stream of commerce, if that can be proven, and I have to take it as proven at this moment.

[3] A copy of the ACL insurance schedule that Ms. McVey provided to the circuit court is attached as Exhibit C to this motion.

MR. BROWN: And I think Your Honor hit the nail—hit a nail on the head. **Why would they not move forward and tender if there was something there to tender for**?

THE COURT: Well, that's what I don't understand. There at least was some that Mr. Protopapas had showed, and apparently, they can't agree to nobody.

MR. BROWN: **This chart is just a chart of insurance. It doesn't indicate that that insurance is there, binding, valid, and applicable today.**

THE COURT: Well, let's argue about all of that. They have come forward with some showing that there are policies that pertain to this very dispute and cover this very corporation for times that are involved in this lawsuit. That gives you the right to at least move forward and make some kind of discovery of that, and your client is just stonewalling. That's all it is. They don't want to tender to anybody any insurance. Apparently, that's the position they have put you into, rather awkward, I think, for you.

MR. BROWN: Again, I'm not going to belabor the point, **but there was nothing to tender**. It's not offered for me to say that. **This doesn't prove that this insurance is in place**.

* * *

THE COURT: One of the concerns I have got, Mr. Brown . . . in this very case is whether a hot fraud would take place, meaning whether this corporation would attempt to convert some of these assets into cash at this very moment before entitlement to coverage is ascertained by someone on behalf of the State. Because what you're telling me that is occurring now is that Atlas is making no attempt and ACL is making no attempt to locate policies because they say there aren't any.

Here sits a receiver who has found some, and we can now look and see if they provide coverage. But saying I'm going to stonewall it and then say that's the excuse for not even taking a look is something I don't understand the logic of from their point of view, but it promotes some real potential skullduggery if it's not shown the light of day before we go any further with the lawsuit.

MR. BROWN: And, again, I understand Your Honor's position, and **I stand by my arguments previously** . . . as well as the fact that, with all due respect, the requirements of the statute for receivership are not met in this case . . . and . . . [one] should not be

> . . . appointed. It would be improper. And if we take the toothpaste out, we'd never be able to get it back in.

Exhibit A at 12:21-25; 24:2-24; 25:18-27:13; 35:2-18; 38:3-13; 43:9-45:9; 45:15-46-18 (emphasis added).

B. ACL and Its Insurers Seek to Stop the Receiver's Investigation

Following the hearing, by order dated September 8, 2023, the circuit court appointed Mr. Protopapas as receiver ACL's insurance, granting him "the power and authority [to] fully administer all insurance assets of [ACL] and take any and all steps necessary to protect the interests of ACL whatever they may be." Exhibit E, Sept. 8, 2023 Order Granting Plaintiffs' Motion to Appoint a Receiver at 6. The Receiver's charge is to "investigate the existence of all insurance or indemnification coverages or claims relating thereto which are potentially available to ACL." *Id.* at 7. In the three months since his appointment by the circuit court, the Receiver has endeavored to investigate potential insurance available to ACL, but has encountered evasion and delay tactics from ACL (as well as many of its insurers) at every turn.

ACL appealed the orders that led to the Receiver's appointment and has taken the position that, simply because it filed a Notice of Appeal, the receivership action in the circuit court, and the Receiver's investigation, must come to a dead stop until ACL's appeal is resolved. To that end, ACL recently filed a petition for supersedeas asking this Court to "confirm" that a stay is in place, to rule that the Receiver "lacks jurisdiction." As set forth in the Receiver's (and Respondents') December 4, 2023 responses, ACL's petition to this Court was procedurally improper—because

ACL was required to file the petition in the circuit court in the first instance.[4] ACL has since requested to withdraw its petition for supersedeas.

In the meantime, the Receiver has filed in the circuit court a third-party insurance coverage action seeking declaratory judgment as to the handful of ACL insurers that were identified in the chart that was discussed at the August 21, 2023 hearing (Exhibit C hereto).[5] Joining in ACL's efforts to obstruct the Receiver's investigation, the third-party insurer-defendants have filed motions to dismiss the Receiver's complaint, and have sought protective orders from the circuit court—adopting as their own ACL's contentions that the receivership is improper and should be dissolved, that there is an "automatic stay" of the third-party coverage action, and that the circuit court and the Receiver "lack jurisdiction" to investigate ACL's insurance while ACL's appeal is pending. The insurers' motions remain pending in the circuit court.

Two of the ACL insurer-defendants, Century Indemnity Company and Federal Insurance Company (collectively, the "Chubb Insurers") have filed a motion to intervene in ACL's appeal for the purpose of challenging the validity of the Receiver's appointment—again parroting ACL's arguments seeking to "enforce" a stay against the Receiver, and contending that the circuit court and Receiver do not have "jurisdiction" during the appeal. The Chubb Insurers' filings to this Court seek to defeat all discovery into ACL's insurance policies, and fail to disclose to this Court that ACL misrepresented its purported lack of insurance to the circuit court. The Chubb Insurers' motion remains pending in this Court at the time of filing.

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[4] This Court dismissed a nearly identical motion filed by ACL's affiliate, Atlas Turner, Inc., as procedurally improper by order dated December 1, 2023. *See* Exhibit G, Order Denying Motion to "Enforce" Stay and for Supersedeas, Appellate Case No. 2023-001096.

[5] The Receiver did not name ACL insurer Maryland Casualty Company as a third-party defendant in light of the settlement agreement and release that had been previously produced by Maryland Casualty's counsel and which was discussed at the August 21, 2023 hearing.

C. The Receiver Obtains Evidence Revealing That ACL Made False Statements to the Circuit Court

Notwithstanding these efforts to obstruct his investigation, the Receiver has managed to obtain significant additional information regarding ACL's insurance—including documents and communications between ACL and its insurers that directly contradicts the statements that ACL made to the circuit court at the August 21, 2023 hearing.

Specifically, Great American Insurance Company ("GAIC")—an insurance company located in Ohio—recently produced to the Receiver various documents that ACL had provided in communications to GAIC. These documents show that ACL has for years provided regular updates to excess insurers regarding the status of ACL's U.S. asbestos liabilities, as well as the impairment of ACL's insurance program's limits of liability through the payment of costs of ACL's asbestos litigation.

The most recent annual report from ACL's chief financial officer, Mario Simard, to the excess insurers is attached as Exhibit B hereto. This communication dated February 15, 2023, encloses ACL's "[r]eport of the asbestos litigation as of December 31, 2022," including summaries of the number of claims pending, dismissed and settled, and summaries of expense and indemnity paid for such claims.

Notably, Mr. Simard's letter states that "[a]s previously advised, Asbestos Corporation Limited and its primary insurers are in agreement that the primary insurance coverage has been completely exhausted," but goes on to state that "**Asbestos Corporation Limited presently finances the costs of the asbestos litigation using the third and fourth excess layer coverage**" (emphasis added).

This statement by ACL's CFO in February 2023 directly contradicts the repeated representations that ACL has no insurance that it made to the circuit court six months later at the August 21, 2023 hearing.

Many additional documents produced by GAIC confirm the existence of multiple layers of excess insurance coverage available to ACL with respect to U.S. asbestos liabilities. For example, attached at Exhibit F hereto is a chart that was provided to GAIC in 2011, depicting multiple years of hundreds of millions in liability insurance available to ACL for U.S. asbestos litigation and providing "details of the impairment of the excess insurance policies **presently triggered and used in the financing of ACL's litigation costs**" (emphasis added).[6]

These communications directly from ACL and its representatives confirm that ACL has been accessing excess liability insurance policies to finance the costs of its U.S. asbestos litigation for many years. There is simply no way to reconcile the statements made by ACL to the circuit court—that it has looked for and has no insurance—with the statements that ACL has been making to excess insurers like GAIC, that it is "presently financing" asbestos litigation through excess insurance policies providing coverage to ACL.

D. Documents Located by the Receiver also Demonstrate that ACL's Bases for Resisting Respondents' Discovery Were Premised on Falsehoods

The ACL documents obtained by the Receiver also shows that ACL's principal basis for resisting discovery in the circuit court below—the purported restrictions of the Quebec Business Concerns Records Act (QBCRA)—was nothing but a self-serving ruse. ACL regularly sends detailed reports and detailed information to insurers in the United States—including to GAIC in

[6] These communications from ACL appear to fill out some of the details of the approximately $2 billion in excess insurance coverage that was discussed at the August 21, 2023 hearing based on a historical schedule of insurance that had no specific policy information as to the excess coverage. *See* Exhibit C.

Ohio—without any concern that communicating insurance information would put ACL at risk of civil or criminal penalties under the QBCRA. In addition, even if the QBCRA in some way limited ACL's discovery obligations in the circuit court—and it does not—any in-formation that has been sent either to or from ACL's insurers in the United States over many years is information that is already "lawfully in the United States," and thus falls within what even ACL Counsel concedes is an established exception to the QBCRA. *See* Exhibit A at 31:9-14 ("There's an exception, of course, as Your Honor is aware, where documents are lawfully within America. That's what most courts and judges have done in these cases, sat there and said, 'If you have documents that are lawfully in America, you produce them. If you don't, rely on the Act.'"). Accordingly, the QBCRA did not and does not stand in the way of ACL providing truthful disclosures regarding its insurance coverage in the circuit court.[7]

E. Subsequent to the Hearing, Neither ACL Nor Its Insurers Have Corrected ACL's False Representations

Following the August 21, 2023 hearing and the subsequent orders leading to appointment of the Receiver, ACL has directed all its efforts to seeking to reverse those orders and shutting down the Receiver's ability to investigate ACL's insurance. In multiple filings with this Court, ACL has never corrected nor sought to clarify the false statements that it made to the circuit court in the proceedings that led to the orders on appeal.

Indeed, in its most recent petition for supersedeas (improperly filed in this Court instead of the circuit court), ACL continues to refer to "so-called" insurance assets and never acknowledges

[7] The documents also show that—while ACL has refused to substantively participate in South Carolina asbestos litigation in violation of the circuit court's orders—it has litigated tens of thousands of asbestos claims in multiple jurisdictions throughout the country—resulting in hundreds of millions in indemnity and expenses. *See* Exhibit B, at GAIC_ACL_000038.

that it does in fact have active insurance that is presently financing its asbestos litigation costs. *See, e.g.*, ACL's Petition for Supersedeas, Nov. 22, 2023, at 18.

In addition, multiple attorneys representing many of ACL's insurers were present at the August 21, 2023 hearing. They heard in person ACL's false statements to the circuit court that ACL had no insurance for its asbestos liabilities. None of ACL's insurers' attorneys spoke up to correct ACL's false statement at that time, and none have taken steps thereafter to correct the record, whether in the circuit court or in this Court. Instead, all of ACL's insurers' efforts in the South Carolina courts have been directed toward joining ACL's in opposing appointment of the Receiver, seeking protective orders from discovery, asking this Court to "confirm" an automatic stay, and otherwise shutting down the circuit court receivership action and the Receiver's ability to continue his investigation however possible.

ARGUMENT

"Where an appeal . . . is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending . . . parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require." Rule 269, SCACR. Fraud upon the court is "that species of fraud, which does, or attempts to, subvert the integrity of the Court itself . . . so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Chewning v. Ford Motor Co.*, 354 S.C. 72, 78, 579 S.E.2d 605, 608 (2003). Fraud on the court occurs when a party "has acted with an intent to deceive or defraud the court." *Id.* (quoting *United States v. Buck*, 281 F.3d 1336, 1342 (10th Cir. 2002)).

ACL's false statements to the circuit court constitute fraud on the court. As recounted above in detail, ACL represented to the circuit court multiple times that ACL had looked and was unable to locate insurance providing coverage for its asbestos litigation:

- "We have no insurance to tender against. It's just that simple. I'm not paid by insurance. It would make no sense not to tender, Your Honor."
- "[W]e have gone through [what] we can find and we know of and there is no coverage for us to tender against."
- "[T]here's nothing [showing] that we have insurance."
- "Why would they not move forward and tender if there was something there to tender for?"
- "[B]ut there was nothing to tender. … This [chart of historical insurance] doesn't prove that this insurance is in place."

Moreover, it is perfectly clear that the circuit court understood these statements by ACL Counsel to be affirmative representations to the court that ACL did not have insurance coverage currently available for the asbestos claims at issue:

- "You have got people now, is what you're representing to me, who looked at old records and says there's no coverage. Isn't that right?"
- "There are people that are looking at some record of ACL's to make the representation that you're making, upon your oath as a lawyer in this court today, which is they don't have any coverage."
- "Mr. Brown, you just, not three minutes ago, told me, "We have looked to see if there are any policies." You looked at something to make that representation, and you're a good enough lawyer, you don't make representations that aren't true. I have ultimate respect for your integrity and your ability to sort out the facts in this case, but if your folks—your clients, whether they be attorneys for the client or whatever—looked, they looked at something. And you are a good enough trial lawyer to know we're entitled to see what they looked at…"

- "The insurance has to be discovered by looking at your records or having someone who is familiar enough with the corporation to take a look. You, obviously, have some people that you think are capable of taking a look because you're representing to the Court that there is no insurance. It's an affirmative representation."

In the more than three months since the August 21 hearing, ACL has not communicated to the circuit court or this Court seeking to withdraw or correct any of the false statements.

Moreover, the communications between ACL and GAIC (an insurer located in the United States), which have come to light through the Receiver's investigation, show that ACL has intentionally concealed extensive documentation regarding of its insurance policies, while representing to the court that it looked for and had located no policies.

"The entire thrust of the discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party." Samples v. Mitchell, 329 S.C. 105, 113, 495 S.E.2d 213, 217 (Ct. App. 1997) (internal quotations omitted). As one Circuit Court Judge has explained:

> In describing the role of discovery in a lawsuit, courts often refer to the child's game of "blind man's bluff," explaining that the discovery process is designed to prevent such guessing games. *See, e.g., U.S. v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). Here, the child's game reflected by the actions of the [Defendants] is more akin to 'Go Fish,' where Plaintiff's counsel continually ask for discoverable material and instead of handing over that material, defense counsel makes opposing counsel "go fish" until they happen to stumble upon crucial witnesses and critical documents.

Order Granting Sanctions, December 29, 2025, *Greenberg v. Five Star Quality Care, Inc., et al.*, Civil Action No. 2013-CP-40-03071 (Richland Cty., South Carolina) (Gee, J.).

Here, ACL has intentionally concealed documents and information regarding its insurance coverage, representing that there was no insurance. This conduct constitutes fraud on the court. ACL's fraud began in the circuit court and is continuing in this Court as ACL would have this

Court make a ruling in this appeal based on its fraudulent representations. It is imperative that these misrepresentations be corrected in the record on appeal.

CONCLUSION

Through fraud on the court, ACL has engaged in a scheme to conceal insurance that provides coverage for bodily injury claims brought by asbestos claimants in South Carolina. Although it is not necessary to demonstrate prejudice to establish fraud on the court, here the Receiver has been forced to undertake substantial efforts to investigate ACL's insurance, while ACL and its insurers sit on information and documentation that directly refutes ACL's misrepresentations. The Receiver therefore respectfully requests that this Court grant its motion to supplement the record, award the Receiver attorneys' fees incurred to date in the investigation of ACL's insurance coverage, and impose such other sanctions on ACL that it considers appropriate as a remedy for ACL's fraud on the court. In the alternative, the Receiver requests the Court remand this case to the circuit court for further proceedings to investigate and make findings regarding ACL's fraudulent representations.

December 11, 2023

Respectfully submitted,

/s/ Jonathan M. Robinson
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EXHIBIT A

STATE OF SOUTH CAROLINA)	COURT OF COMMON PLEAS
)	
COUNTY OF RICHLAND)	TRANSCRIPT OF RECORD

----------x

JOHN A. TIBBS and)
MARGARET B. TIBBS,)
)
Plaintiffs,)
vs.) Case No. 2023-CP-40-01759
)
3M COMPANY, et al.,)
)
Defendants.)

----------x

August 21, 2023

B E F O R E:

The Honorable Justice Jean H. Toal, Presiding Judge

A P P E A R A N C E S:

Thiele McVey, Esq.
Attorney for Plaintiffs

Stephen Brown, Esq.
Attorney for ACL

Court Reporter: Bobbi Fisher, RPR
SC Official Court Reporter III

I N D E X

E X H I B I T S

(None.)

P R O C E E D I N G S

(The following proceedings started at 9:28 a.m.:)

THE COURT: Good morning, ladies and gentlemen. We have got a good many matters today and some very late flying-in-the-door material that got to me -- some of it is still not to me. What I could find pretty late last night, I have tried to read, but I cannot tell you that I'm completely familiar with some of these very late filings, but I am not going to postpone these things. I'm going to try to go through them and see what I can do; and what I can't do, we'll come back at a later time and revisit. But I'm going to go through this agenda as it now stands, so that's how we're going to proceed.

The first matter is Tibbs against Asbestos Corporation. This is Plaintiff's motion to hold Asbestos Corporation in contempt and to strike answer and Plaintiff's motion to appoint a receiver.

Ms. McVey?

MS. McVEY: Good morning, Justice Toal. I know you drove in this morning, so we really appreciate the time.

THE COURT: Look here, everybody had to make an effort this morning.

MS. McVEY: That's right.

I think Eva is stuck.

THE COURT: Hang on. Eva's trapped. Okay. We got

it.

Just -- of course, just as a reminder for all of you: I hope all of you have given your cards to the court reporters. We have got the State court reporter and we have a privately engaged court reporter. I'd advise you to give them all your attorney cards, anyone who has got any concern about the record and receiving it. And when you address the Court, of course you always state your name and the party you represent, even if you have to do that two or three times during the course of this matter. We do that for our court reporters to be sure they keep up with all these various cases.

In this case, Tibbs, we're talking about 2023-CP-40-01759.

Ms. McVey, you may proceed.

MS. McVEY: Thank you, Your Honor. Thiele McVey for the plaintiffs in this case.

And, Your Honor, just for the record, as you know, the August block is now fully settled, and so all of those motions are off the docket. So, hopefully, it will be a little bit of a lighter day today. We'll see.

Judge, I want to introduce you to Asbestos Corporation Limited, but you have a lot of this background already because they're related to Atlas Turner.

THE COURT: Right. But I believe that because there

are so many moving parts to this thing now, I think making each record complete by some recitation on all sides of the basics of the controversy is probably a pretty good idea.

MS. McVEY: Absolutely. So, with that, let me go over a little bit of the background with Atlas -- I'm sorry -- Asbestos Corporation. They supplied asbestos to companies and contractors throughout the Southeastern United States, but they followed the same type of playbook that Atlas Turner does. They filed a motion to dismiss for lack of personal jurisdiction, and despite doing that, they refused to engage in any kind of jurisdictional discovery, even limited jurisdictional discovery.

Despite that refusal, we found and submitted to Your Honor, during the motion to dismiss, sales into South Carolina of raw asbestos. You heard the motion to dismiss on July 10th, and you denied their motion to dismiss for lack of personal jurisdiction. And during that hearing, orally in open court, you ordered them to produce a witness and to fully answer discovery.

On July 19th, you issued that order from that July 10th hearing and stated in your order, "Failure to answer the court-ordered discovery and to provide a corporate representative for deposition shall result in ACL being held in contempt."

In short, Your Honor, just like Atlas Turner, ACL is refusing to comply with your orders, but this time, they're trying to not be quite as defiant. And let me explain that a little bit.

Well, they -- first of all, they flat out refused to produce a 30(b)(6) witness. This time, though, they don't just say, "We're not doing it," they say, "We're not doing it because it's too hard. This corporation -- this stuff happened a long time ago. We don't have a witness that we can produce."

And, Your Honor, if that were the accepted legal standard in asbestos cases, no one would put up a corporate representative. They have a duty to educate a witness with all the prior stuff. They have refused to do that.

THE COURT: Well -- and moving forward from that, one of the very reasons that I have appointed receivers for corporations that are not active or corporations that do not cooperate is to try to discover their only -- sometimes their only asset, which is insurance, but the other reason to do it is so that there is then some entity -- the receiver, who operates on the basis of the benefit to the corporation. And I did that beginning with the Covil case when I discovered that the representation, for years, pretended that Covil had someone to accept the

service and was active in the case but just couldn't locate their files because they were so old, but it turned out that the insurance companies were really running the show, saying that there was no coverage but settling for low amounts.

And under that scenario, in the Covil case, that resulted in a good many receiverships being created here to deal with corporations who supply asbestos-containing materials here and, therefore, have status as a potential defendant in matters here.

And, also, the receiver has the ability then to answer 30(b)(6) requirements and to try to find corporate records of other things, because as we know, even though you Plaintiffs don't like it, 30(b)(6) witnesses don't sometimes have direct knowledge, but they have knowledge that the corporation can speak to its affairs and its operation because of business records, normal exceptions to hearsay.

MS. McVEY: Yes, ma'am.

THE COURT: So I just give you that by way of supplementing what you were going to say. This is another in a long line of cases in which the Court has tried to protect the integrity of the process and the discovery of assets by the use of a receiver who can then cause this corporation to adequately respond to 30(b)(6).

MS. McVEY: That's right.

THE COURT: Now, ACL has resisted the appointment of a receiver.

MS. McVEY: And, Your Honor, we are -- let me walk through where we are in terms of that as well. Just in full disclosure, Mr. Brown -- and this is the third law firm to represent Atlas Turner and ACL. You know, they were represented by Nelson Mullins and then Murphy Grantland and now Clement Rivers.

And we have had some pretty candid conversations with Mr. Brown, but what he essentially said is, "Look, I'm going to give you some old transcripts from ACL, I'm going to answer one set of interrogatories." They didn't answer the second set of interrogatories.

THE COURT: Right. You submitted those. I have read them.

MS. McVEY: Okay.

THE COURT: I'm familiar with those.

MS. McVEY: So you know all the history. It's not enough. They have -- they're fail- -- they're not complying with your order. And so, Your Honor, I believe that they should be held in contempt. And if they are held in contempt for refusing to engage in discovery period -- and they made it clear; they're not going to produce a witness and they're not going to produce

documents, period.

We have argued -- they want to rely on this Quebec Records Act. I'm happy to discuss that with you. That is -- we argued that with Atlas Turner. That's a case and an act that Judge Joe Anderson ruled on in Lyon (ph) saying it doesn't apply.

THE COURT: Yes. I find it interesting in these last set of briefings that several United States District Court for the District of South Carolina decisions, not just Judge Anderson but others over the years, have ruled on the applicability of the Quebec Records Act to discovery proceedings.

MS. McVEY: That's right.

And, Your Honor, they want to rely on that. But of course the statute is, even if it were appropriate and it applied and it could prevent them from producing discovery, which I don't think it does, but even if it did, the statute itself is not self-enforcing and, in fact, it requires a petition by the Attorney General in Canada to a district judge for an order requiring the documents not to be sent out of the province. They have made no allegation that that is happening or that it will happen or anything else.

Your Honor, we strongly believe that they cannot just say, "We're not going to produce discovery," and not

be held -- not be sanctioned for that.

THE COURT: Does the Quebec Records Act, in your opinion, prevent them from appointing a 30(b)(6) representative in discovery matters?

MS. McVEY: It does not. And they aren't even saying it does. They're just saying, "We're not going to do it because it's too hard." Even more importantly, they refuse to produce documents. And, you know, this Act kind of came into effect before there were photocopiers, for example, that could easily reproduce documents. It just doesn't apply. And almost every Court who has looked at that agrees it cannot prevent discovery when jurisdiction is appropriate, as you have found here.

Your Honor, we believe, because of their refusal to comply, this will be now the second hearing on this, with their refusal to comply. They should be held in contempt. And if you hold them in contempt, we believe the appropriate sanction is to strike their answer, and so we would ask you to do that.

If you decide to hold them in contempt and strike their answer -- and I think it has to be in that order -- then, Your Honor, we would move to have a receiver appointed over ACL. And, again, it's a limited receivership in some ways. It would allow the receiver to marshal the insurance assets to the extent there are any

insurance assets. It would also allow them -- allow him to control the defense -- hire counsel and control the defense. Because what's happening is ACL and Atlas Turner is not tendering these cases to the insurance carriers, and we know, Judge, that there is a ton of insurance.

We also know, based on the receiver's filing in Atlas Turner, that the liquidation of insurance assets is a real concern. My concern is that they are going to liquidate these policies -- "they" being ACL -- and then take the money and keep it in Canada where they think we can't get to it.

Your Honor, we know that they know how to do that because the receiver filed -- and I'll hand it up -- an Agreement of Transaction, Settlement, and Release between Asbestos Corporation Limited and the Maryland Casualty Company. And this is from 1989. And I'll hand it up to you, but it's essentially establishing a fund to pay victims who have been hurt by ACL's conduct. And so Maryland Casualty Company gave ACL millions of dollars to pay asbestos victims.

And, Judge, I'm happy to hand this up. And I have highlighted --

THE COURT: Hang for a minute. Let me just --

MS. McVEY: Yes, ma'am.

THE COURT: -- identify this. And I assume this is

something Mr. Brown is aware of.

Mr. Brown; right?

MR. BROWN: Yes, ma'am.

THE COURT: It's Agreement of Transaction, Settlement, and Release between Asbestos Corporation Limited and the Maryland Casualty Company, bearing the form date of July the 18th, 1989. And it's a document that looks like it's a complete copy of that agreement signed by Asbestos Corporation Limited and Maryland Casualty. Attached to it is an email from Lindsay Valek at Rikard & Protopapas to Stephanie Hanes, and it's a tender to Continental CNA and Resolute of Atlas Turner --

MS. McVEY: Judge, I --

THE COURT: -- actions -- causes of action, and it lists them. These are all causes of action that I'm familiar with. Almost all of them are pending in front of me at this time.

MS. McVEY: And that was a filing that Mr. Protopapas made on Friday.

THE COURT: Right.

MS. McVEY: Your Honor, we know that there is insurance for ACL. We know that they're depleting it. I don't understand why they're not tendering these cases to their insurance carrier, who have policies who would cover Mr. Tibbs and other South Carolinians. And I have a very

large concern that, without a receiver, ACL will do what it is attempting to do in Atlas Turner.

Your Honor -- I'm sorry.

THE COURT: Let me ask this question: The Maryland policies that are an issue in this agreement ACL made with Maryland back in 1989 are policies from '67 to '71, three different policies with those effective periods.

And it looks to me like this document sets up something similar to our qualified settlement funds. We have set up a variety of qualified settlement funds for asbestos cases involving insurance companies for corporations for which a receiver has been appointed, and the receiver and receiver's counsel have negotiated with insurance companies a settlement of their liabilities, much like what Maryland is doing in this agreement, which creates qualified settlement funds whose funds then stand for the tendering of claims for the periods covered by the policies for which the settlement is reached.

Now, are any of the actions that are currently pending affected by this qualified settlement fund or do you know?

MS. McVEY: I don't know, but they may be. And my concern is, I don't know how many other ones there are.

THE COURT: Yes, that was the next question I was going to ask. Are you aware of others? I would be

surprised if there were not others.

MS. McVEY: That's my concern. I know Mr. Protopapas filed, in Atlas Turner, another document like that that involved Atlas Turner, but I don't know. And part of the problem when they won't participate --

THE COURT: Well, that's what a receiver would do --

MS. McVEY: That's right.

THE COURT: -- would be to suss this out.

I don't understand what you mean by "limited receivership." Why wouldn't I just set up a receivership like a normal receivership?

MS. McVEY: You would. And it would be to target -- because ACL is an ongoing corporation, although, I think all they do is deal with asbestos lawsuits. I don't think they do anything else.

THE COURT: Right. We dealt with corporations whose sole function is to deal with management of old claims when they were still actively in an asbestos-related business.

MS. McVEY: That's right. So it would be limited only in the sense that they would affect the policies that would be in play in the United States, in South Carolina --

THE COURT: Right.

MS. McVEY: -- and it would allow him to control the

defense in the sense that we need to be able to tender -- he needs to be able to tender the Tibbs case and other cases to these carriers. Right now, I believe what the carriers will say is ACL is saying, "We don't need you to come in here."

And I don't know, without doing discovery, which they refused to participate in, why that is, where the insurance is, all that kind of stuff.

THE COURT: Right.

MS. McVEY: Your Honor, so I think it has to be they're in contempt, the answer is struck, and if that happens, then the appointment of a receiver would take place.

Now, I do want to address just briefly. They -- we have moved to have Mr. Protopapas appointed the receiver. You have a lot of experience with him. And ACL says in their briefing -- and this is a quote -- that "a receiver should not be appointed. This is especially true when the proposed receiver is one suggested by Plaintiff's counsel, who serves in such roles repeatedly, an entity over which he attempts to assert authority as an existing Canadian corporation with no assets in South Carolina."

Now, you know the quality of Mr. Protopapas's work --

THE COURT: Well, let's back up for a minute. With

respect to assets in South Carolina, as we know, the case law is that, if there is a claim pending in South Carolina where South Carolina has proper jurisdiction, as there would be at least on the basis of averment so far made with the products that were put into the stream of commerce in South Carolina by ACL, then the insurance that's in place for those claims is regarded as an asset present in South Carolina.

MS. McVEY: That's right.

THE COURT: Isn't that correct?

MS. McVEY: Yes, ma'am. The case law is clear on that, and you have ruled on that many times.

THE COURT: Right.

MS. McVEY: So we believe of course there are assets here. There's insurance that would cover South Carolinians' claims here.

But I also want to say, it's not just Chief Justice Jean Toal who has appointed Mr. Protopapas as a receiver but the Delaware business court just recently appointed him.

THE COURT: Well, the Wisconsin court also recently appointed Mr. Protopapas.

MS. McVEY: That's right. So I think other courts have recognized his expertise in this field, and so we believe he would be the appropriate person.

THE COURT: And, quite honestly, if you look in the broader scheme of things of mass courts in this country, receivers are quite often appointed to marshal assets and to manage claims. The famous 9/11 mass tort cases against the governments of several countries and so forth that -- or whether it's more typical class action-type things, individual corporations similarity -- or financial distress are set up only to handle old claims, typically have receivers appointed maybe sometimes in several different states to marshal assets that would affect claims in that state.

MS. McVEY: That's right. It's a very common tool --

THE COURT: Right.

MS. McVEY: -- used.

And so, Your Honor, thank you for hearing me. I'm happy to answer any questions, but we believe they should be held in contempt, their answer struck, and a receiver appointed.

THE COURT: Very good.

Mr. Brown.

MR. BROWN: Thank you, Your Honor. May it please the Court?

If you don't mind, Your Honor, I'd like to go in reverse order just to -- it might make everything go a

little easier.

THE COURT: Sure. However you wish to handle it, Mr. Brown.

MR. BROWN: And I apologize; I have got stuff spread everywhere.

THE COURT: That's all right. Me too.

MR. BROWN: I have never met Mr. Protopapas in my career, unfortunately. The comment or the quote that was put in the brief about a receiver being independent and should not be the person suggested by the plaintiff came from the 1930-something case that has been cited both in Ms. McVey's briefs to this Court and this Court's order. That was straight from our Supreme Court.

THE COURT: Well, I'll put that in the context for you right now, Mr. Brown, that -- when that's the beginning of any kind of receivership, that case may have some applicability, but this receiver has performed as a receiver now in 17 or 18 different asbestos cases involving different plaintiffs, involving different lawyers.

And the inferences made in that old case and the inferences made in your brief that somehow or another the receiver is the tool of the plaintiff or too close to the plaintiff -- I appointed Mr. Protopapas as the receiver in the first Covil case not by anybody's recommendations but

because of my knowledge of Mr. Protopapas. And he has now operated in a good many receiverships, and I will assure you, he is a vigorous defender in the receiverships in which a proper settlement fund has been established. He does not settle cases casually. He protects the fund, just as any defense lawyer would do.

The attorneys he handles -- he hires to handle the defense are well-recognized defense lawyers to the nth degree in this state and vigorously represent the defense's point of view.

So I know -- I'm familiar with the case you cite. It has no applicability to what we're talking about here, in my view.

MR. BROWN: And I understand Your Honor's position on that, but that's where that came from. In the response they filed, they referred to me as making a thinly veiled defamation attempt. It was a never thinly veiled attempt at defamation. It was simply Ms. McVey specifically requested him in her motion.

THE COURT: Well, she did because of the experience we have all had with Mr. Protopapas in these many other receiverships.

MR. BROWN: And I understand. And I was, Your Honor, just going by the ruling or the language that the Supreme Court had used in that case --

THE COURT: Yes, sir.

MR. BROWN: -- and then relied on by this Court in its ruling.

With regard to ACL, ACL, as Your Honor is aware, is the Thetford mines in Quebec. It is a live Canadian corporation.

THE COURT: Is it set up for any other purpose than to handle claims -- old claims against ACL?

MR. BROWN: Yes, Your Honor. It also --

THE COURT: It has an ongoing independent business?

MR. BROWN: It operates with regard to certain properties it owns up there, trying to --

THE COURT: Right. That's typical of companies that are set up after the active manufacturing and sale of products as long as it's out of the way and all these claims they manage properties of the corporation as well as claims against -- the most famous is J&J Corporation, which was set up separately to do just that for Johnson & Johnson.

MR. BROWN: It has been doing this since the 1980s when it stopped with asbestos, Your Honor. So it is a --

THE COURT: And it actively, apparently, negotiated this agreement with the Maryland -- with regard to setting up a qualified settlement fund to take care of certain asbestos claims.

MR. BROWN: In 1989 --

THE COURT: Right.

MR. BROWN: -- and as Your Honor pointed out, relating to policies from 1967 to 1971 -- and I'd point out that that agreement was negotiated, and by its very terms, is governed by the law of Quebec.

THE COURT: Yeah, that's fine. I understand.

MR. BROWN: In this particular case, Your Honor, I did -- Ms. McVey and I have had good conversations or conversations and never heated or to things of that -- anything of that nature.

THE COURT: You are both pros of the first tier. I respect both of you tremendously, and I am confident that the exchanges on behalf of your client are professional in every way. And I say that with all sincerity to you. You're a fine lawyer and so is she. So I don't -- you don't need to get into what your clients want you to say about each other.

MR. BROWN: I'm not worried about what my client wants to say; I'm worried about what Steve Brown wants to say --

THE COURT: Well, I --

MR. BROWN: -- based upon his research and his appearances in front of Your Honor.

THE COURT: Well, I understand. You don't need to

tarry on that. Let's get to the meat of this thing.

MR. BROWN: Well, let me get to my point, which is, it's not that it's too much for us to produce a 30(b)(6). It's not that we don't want to produce a 30(b)(6). They're all dead.

THE COURT: No, sir. Now, Mr. Brown, somebody is paying you, and it's ACL. And it may be their insurance company. I don't know. But you're not here as a gift. You're here because a company is actively engaging a very fine lawyer to represent them.

I have had many of these corporation situations in which the corporation has not operated for many years, says it has no records, but when you appoint a 30(b)(6) representative, that 30(b)(6) does not have to have ever operated within the company. That 30(b)(6) is the repository of businesses records and other records such as insurance records that can be found that pertain to the claims being made against it.

And this excuse that they're all dead is not something that carries much weight with me. I have had many, many corporations -- including Covil, the most famous one -- where everybody that would have had anything to do with this is no longer with us. It didn't prevent them from appointing a very competent 30(b)(6) representative to marshal their records and speak to

matters with regard to claims against them.

MR. BROWN: And those cases, Your Honor, I believe you had a different factual setup to deal with, because I understand that Your Honor thinks very little of the Quebec Business Records Concern Act. We have a situation and we cited some cases. I understand what Judge Anderson did. I read his case. His opinion is, obviously, not binding on Your Honor. You make your own decisions on these, obviously, and we cited other cases from around the country from other district courts that have looked at this issue, and they said, "You know what, we understand" -- one of them, I had go to look up Greek mythology to understand that quote they were using about --

THE COURT: Scylla and Charbdis. Very -- very famous quote.

MR. BROWN: Well, I'm poorly educated because I had no clue and had to go look it up. But in any event...

THE COURT: Two rocks, you gotta steer between them.

MR. BROWN: Having done that, Your Honor, that is where we are, because with regard to the 30(b)(6), Ms. McVey is correct in this one point. There are certain things I can give her -- I have a rolling cart over here, and I can show -- it's this big --

THE COURT: I have seen a sample of those things. They're not what she's asking for.

MR. BROWN: I understand that, Your Honor.

THE COURT: And most particularly, Mr. Brown, they are not any kind of insurance information about coverage that would have been available. All of these policies back at that time were per-occurrence policies. They cover things like this, even though mesothelioma has a latency period of many years. It's when the occurrence took place that those policies come alive. The insurance industry now calls them legacy policies.

If they had one with the Maryland, they had others. But as a Quebec corporation, they had no problem with setting up a qualified settlement fund to take care of asbestos claims back in the '80s that were '70s policies. They would have no problem bringing that forward today.

I feel quite confident, while they're still in business, as big a corporation as they were, they had commercial general liability policies, probably per-occurrence coverage. And that's what they're trying to seek.

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 that simple. I'm not paid by insurance. It would make no sense not to tender, Your Honor.

THE COURT: Well, how about when, in relation to the

Maryland, did y'all quit buying insurance? Or do you know?

MR. BROWN: I don't know, Your Honor.

THE COURT: Well, that's one thing --

MR. BROWN: But I know the mid '80s.

THE COURT: -- that somebody -- somebody within ACL is capable of digging out. Don't tell me they have burned them all. I don't have fires, now, that --

MR. BROWN: There haven't been any fires, Your Honor.

THE COURT: They have got their records.

MR. BROWN: I haven't claimed any fires. They stopped operations with regard to asbestos in the mid '80s.

THE COURT: They're going to have those records, unless you tell me differently.

MR. BROWN: Who doesn't have the records?

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.

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.

THE COURT: Well, that's your contention, but they're entitled to depose the people that you had go through those records and ask them what they looked at and so forth. It's not acceptable to say, "We're just not going to tender anybody because it's too old and everybody is dead." You have got people now, is what you're representing to me, who looked at old records and says there's no coverage. Isn't that right?

MR. BROWN: Attorneys.

THE COURT: I don't care whether they're attorneys or who they are. There are people that are looking at some record of ACL's to make the representation that you're making, upon your oath as a lawyer in this court today, which is they don't have any coverage. They are entitled to look at the same material that your internal people looked at and make their own determination about that. That's what discovery in 30(b)(6) is all about.

MR. BROWN: I understand exactly what Your Honor is saying. I respectfully disagree. I believe 30(b)(6) -- I can read the rule. I understand what it says. I also read lots of articles where 30(b)(6) is a huge problem within the judicial system in and of itself by going in

and trying to create witnesses, and circuit courts have put limitations on that.

THE COURT: Mr. Brown, you just, not three minutes ago, told me, "We have looked to see if there are any policies." You looked at something to make that representation, and you're a good enough lawyer, you don't make representations that aren't true.

I have ultimate respect for your integrity and your ability to sort out the facts in this case, but if your folks -- your clients, whether they be attorneys for the client or whatever -- looked, they looked at something. And you are a good enough trial lawyer to know we're entitled to see what they looked at. We here in South Carolina in this case -- and Quebec Records Act has nothing to do with that.

The Quebec Records Act does not prevent you from entering into this agreement in 1989 when they were a Quebec corporation. This is the same kind of agreement they're trying to effectuate for their clients ultimately which is some agreement that can look at the insurance coverage and pursue it.

MR. BROWN: Your Honor, I would confess, you lost me there. The Quebec Records Act would never stop us from entering into an agreement. It has to do with the production of that agreement here and in Maryland.

THE COURT: I don't think it has to do with a darn thing with regard to records that have already been produced and a category of things that, apparently when it suits you, are produced and agreements entered into with insurance companies.

MR. BROWN: I just respectfully disagree with Your Honor on that issue.

THE COURT: All right. I understand.

MR. BROWN: With regard, though, I did -- on contempt, I did -- it was important to me to try to show -- and you say it's not what Ms. McVey asked for, and I understand that -- but tried to do more than was done at Atlas Turner. They talked about the other attorneys. The other attorneys had conflicts. They didn't just walk away from this case. My understanding is conflicts developed.

However, in this particular case, when I've -- I wanted to buy things that have come through America so that the Quebec Act would not come into play with them. It goes to them. You say that's not enough. Again, I understand --

THE COURT: Well, if they came to America to talk with you so the Quebec Records Act would not apply, then why can't they sit for a deposition by Ms. McVey? They have already waived any reliance on it if they have come to America to talk to you and show you records or show you

how they searched. That makes no sense to me.

MR. BROWN: No, ma'am, they did not come to America to show me what we did. What we did was via telephone conferences and Zoom conferences, not them coming to America.

Lost throughout all of that is this a functioning Canadian corporation. The Court might say, No, I have seen these --

THE COURT: No, we're fine with that. It's a functioning corporation who refuses to cooperate with South Carolina courts. It's a functioning corporation whose business is to manage the assets of a formally active asbestos business.

MR. BROWN: And that is a portion of what it does. It's not set up as some new corporation to manage these claims as Your Honor has said.

Number two, unlike any other case that I believe we have had within this court, the Quebec Act is going to get down to either South Carolina Supreme Court or a court in Canada, and they can fight that issue out eventually.

THE COURT: Has the Attorney General applied for enforcement of this Records Act?

MR. BROWN: Not to my knowledge at this point.

THE COURT: Well, isn't that a predicate to having you put this Act in any kind of role of impact in this

case?

MR. BROWN: Don't hold me 100 percent to this, but I believe it has to do with trying to get your way around or out of contempt. Because you have both criminal and civil contempt on this, Your Honor -- criminal and civil contempt for the production of documents that this Court says we don't care about.

THE COURT: I haven't said a word to that effect. And you're mischaracterizing --

MR. BROWN: I apologize.

THE COURT: -- my rulings completely, Mr. Brown.

MR. BROWN: Well, let me rephrase it. I believe the last memo filed said, basically, that's not our problem, not from you, but from --

THE COURT: Well, exactly. That's the lawyers talking. My orders have been pretty clear about this, which is, this whole scenario that was pitched by your client that says we want to do it so much but we're prevented by this Act, it would have to do with a scenario in which the Quebec government actively pursued them for some sort of violation of the Quebec Act. That hasn't been done. It wasn't done back way back in 1989, for sure.

MR. BROWN: The 1989 agreement, Your Honor, I don't believe has anything to do with --

THE COURT: Yes, it does. They had to produce to the Maryland corporation all kinds of records. This agreement is replete with the discussion of this agreement and the internal workings of ACL and everything else.

MR. BROWN: And I believe that document had made its way lawfully into America --

THE COURT: Made its way what?

MR. BROWN: Lawfully into America.

There's an exception, of course, as Your Honor is aware, where documents are lawfully within America. That's what most courts and judges have done in these cases, sat there and said, "If you have documents that are lawfully in America, you produce them. If you don't, rely on the Act."

And we list those cases, Your Honor. We talk about them. And if you -- they're very interesting to go look how the judges tried to balance as best they could.

On the contempt, my one point, too, Your Honor, is this: It was not an attempt -- or an attempt was made, Your Honor, to show some good faith, some willingness to try and get to the bottom of this, if there's a way to do it. You may not find it sufficient, but there was an effort. It was not a willful disregard or putting the nose up at Your Honor or counsel or this Court.

And so, for that reason, we think contempt, which

Your Honor is well aware our Supreme Court says is something that you need to balance carefully and make sure you're not going too far, look at what people are trying to do. Was it a deliberate act of disobedience, or was there an attempt to try to deal with it that's not sufficient in our opinion, but you know what? It showed at least some good faith. It wasn't willful and wanton disregard. That would be the argument I would make to Your Honor on contempt.

With regard to the striking of an answer, again -- or striking of pleadings, I believe the case law from the Supreme Court says that the Court needs to, again, weigh carefully what has been done, the results from it, how it will come into play before you simply strike an answer, which is a severe remedy and one that our Court has at times said that courts have gone too far in.

So, in this case, I think -- and the totality of what we have tried to do, maybe not enough to make that, Your Honor, but have tried to do. It shows an effort of good faith and an effort to try, and that has been my goal. That is what I'm trying to do.

And then the final thing would be on the receivership. Respectfully -- and I'm not going to re-argue Your Honor's previous order because I realize it's not appropriate, but when you have a Canadian

corporation with no assets in South Carolina -- Your Honor talks about the insurance. I went back and reread Sangamo, and as I recall, the plant in issue there was setting up in Pickens, which is a reason recently, I believe, Joe Anderson and another federal judge have distinguished it in two cases within the last year or so. So I don't know that Sangamo gets us as far as the Court has put it.

And then the third thing is, you have an entry of default in the Welch case. The order in the Welch case specifically says that, from that point on, it's ministerial to get a default judgment. That is not the law. That is not the law. And, in fact, I cite case law that says, even if you have an entry of default, you're not entitled to a default judgment. You still have to prove -- they still have to prove the entitlement of damages.

THE COURT: That's been the case -- I struck an answer before in proceedings like this.

MR. BROWN: Yes, ma'am.

THE COURT: And that simply means that the -- there's no contest to the averments of the complaint. But you've still got to prove -- and that's what has been done in those cases.

MR. BROWN: And taking that to its next step,

though, Your Honor, that was used in the order to appoint a receiver to try and treat the Welchs almost as if they were creditors. They go under Sections 4 and 5 in both Welch and in Tibbs, and they say, "Well, we're entitled to get a receivership because of the old" -- I can't remember the exact quote, but sort of the old way of doing things in equity --

THE COURT: How does Welch -- I don't understand why you're making an argument about Welch. You're representing Asbestos Corporation Limited in Tibbs; right?

MR. BROWN: Yes, ma'am.

THE COURT: Are you representing Atlas Turner in Welch?

MR. BROWN: Yes, ma'am.

THE COURT: All right. Well, haven't we got that next on the list of cases to be argued?

MR. BROWN: We do. I was pointing out simply about the receivership. In Tibbs, they say there should be a receiver because ACL was, one, either an insurance company -- and counsel has said, "I really don't know what insurance is out there. I don't know what they have done. I don't know. I don't know. I don't know."

I was taken to task in a reply filed by the receiver because of this 1989 agreement that Your Honor has in front of you.

THE COURT: Yes.

MR. BROWN: Okay. Our argument was that, at the time of them filing for this receivership in Tibbs, nobody can show -- nobody can claim -- there's nothing that we have insurance and that we're out there muddling, which is the word that continues to be used --

THE COURT: The insurance has to be discovered by looking at your records or having someone who is familiar enough with the corporation to take a look. You, obviously, have some people that you think are capable of taking a look because you're representing to the Court that there is no insurance. It's an affirmative representation. They are entitled to explore whether you have been given correct information by your client about that. That is the argument that they are making now.

MR. BROWN: And, again, I understand Your Honor's argument -- well, position on this.

THE COURT: I'm telling you about what they're arguing about --

MR. BROWN: I understand.

THE COURT: -- under the status of the suits here.

MR. BROWN: I understand. However, they have not met the requirements to get a receivership under the statute. They have not. It limits Your Honor from going out of this state against a non-South Carolina

corporation. It also limits Your Honor from going across an international border to put a receivership --

THE COURT: Well, you say that so glibly, but what's your authority for that?

MR. BROWN: The statute that talks about assets in this state?

THE COURT: Yes. And, again, we dealt with that. Our case law regards insurance as an asset in this state. It's insurance that covers a claim in this state.

MR. BROWN: And I have read Sangamo, Your Honor, and I have read the cases that follow it, and I believe that, in that case, you had a specific insured entity plant up in Pickens County.

THE COURT: We have a specific insured entity here, a company that you say is still alive and operational. We have sufficient proof at this stage of the proceedings to indicate that they placed asbestos in the stream of commerce in South Carolina at many locations. That means that they can be a defendant in a South Carolina lawsuit, and their insurance is regarded as being an asset of theirs located here because it covers claims here.

MR. BROWN: And I would respectfully disagree. Almost every state, I think, has a statute similar to the one that Sagamo [sic] was ultimately interpreting.

THE COURT: Sangamo.

MR. BROWN: Sangamo. I apologize.

And so, would that open the door, Your Honor, not to every state that has that statute, to be able to come in to get a receivership? How do you deal with that situation?

THE COURT: I have been dealing with it for about three years now, and it's worked pretty well. And it resulted in the same kind of agreement that your clients entered into when the Maryland wanted to buy a piece with respect to asbestos claims in 1989. That's the same kind of thing they're attempting to do here, and they've got the right to at least explore that.

MR. BROWN: Insurance, to me, based upon my reading of the case law, is something very different than a physical asset.

THE COURT: No, sir. Assets are assets whether they are pieces of paper, whether they're contractual agreements, or whether they're buildings constructed and sitting on the ground. Assets are assets. They're not limited in that statute in any way.

MR. BROWN: Well, I respectfully disagree. I believe that this is a Canadian corporation with no assets in this state. It does no business in this state.

THE COURT: I think I understand your position.

MR. BROWN: Okay. Thank you, Your Honor.

THE COURT: Yes, sir.

Ms. McVey, in reply?

MS. McVEY: Yes, ma'am. Just briefly.

I want to show you what the receiver for Atlas Turner filed. And this goes to the argument of whether or not there's insurance applicable to ACL and Atlas Turner, and they're intertwined.

And if you look at the document that's filed, there is -- this came from discovery responses that Asbestos Corporation answered in an old case. And in that, you see a listing of, I don't know, 20 or 30 insurance policies. And my fast math is not great, but it looks like it's about $2 billion -- billion with a "b" -- of insurance.

Now, I don't know what --

THE COURT: This is a notice of filing in the Welch case and in the case of Atlas Turner against Zurich, which is a third-party complaint through its duly-appointed receiver, Peter Protopapas. Mr. Protopapas was able to -- third-party Zurich; Federal Insurance; Aetna, also known Travelers; Certain Underwriters at Lloyd's; etc. I am very familiar with that litigation, and what it did was to -- once you got a receiver appointed for Atlas Turner, these policies from the Maryland, from Aetna, from Insurance Company of North America, from Federal, from Continental, from Aetna, INA again, these are a variety of

policies that cover a period of time from 1964 through 1981 --

MS. McVEY: And Your Honor --

THE COURT: -- that, according to the receiver, are potential insurance programs of Atlas -- I don't think there's any question of whether they're insurance programs of Atlas, but he says they're insurance companies -- programs of Atlas that cover the Welch case.

MS. McVEY: And, Your Honor, I believe it also covers -- and maybe the receiver could speak to --

THE COURT: The receiver doesn't need to speak right now. This speaks for itself.

MS. McVEY: So this is -- that document came from Asbestos Corporation's answers to interrogatories.

THE COURT: Right.

MS. McVEY: So it applies to Atlas Turner but it also applied to Asbestos Corporation.

THE COURT: Well, Atlas Turner, as you know, was formally known as Atlas -- Asbestos Company Limited, and it has a business relationship closely intertwined with Atlas Corporation Limited.

MS. McVEY: That's right. And so you have that.

THE COURT: Or Asbestos Corporation Limited.

MS. McVEY: That's about $2 billion worth of insurance that would cover this stuff. And I have to say,

you got a lot of late filings last night. We were all up late last night and early this morning.

THE COURT: I know. I did not have a chance to see all those.

MS. McVEY: Well, I'm just wondering, if there's no insurance, why is Travelers, why is CNA, where are Lloyd's, why are they coming in and objecting?

Your Honor, this is why a receiver brings transparency. All we're asking for is an even playing field that we can do -- that we understand what they have and why.

And I respectfully think that Section 5 of the receivership statute is very applicable in this case, and of course you know that that means a receiver can -- may be appointed by a judge of the circuit court, either in or out of court, in such cases as are provided by law or may be in accordance with the existing practice.

And we cite to you an old case, a 1909 case, and it's Carolina Chem Company vs. Hunter. And it talks about the appointment of a receiver to correct injustice, particularly when a debtor 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 its creditors in collection of the debts.

Mr. Tibbs has a claim against Asbestos Corporation.

They cannot come and ignore every order. And I told every lawyer who represents them in the past, "If you guys will answer discovery and produce a witness and give us documents, then this goes away," and they refuse. There's no other option that we have other than to get a receiver appointed who can be fair to both sides and force them transparency, and that's what we're asking you to do, if you strike their answer and hold them in contempt.

THE COURT: Thank you, ma'am.

Anything further?

MR. BROWN: Just briefly, Your Honor, while I grab my pen that was left up here.

THE COURT: Yes, sir.

MR. BROWN: There's two cases that Ms. McVey talks about, are about active frauds ongoing right then at that time -- that same time period when the cases were being brought, etc. They're all right there put together. Whereas here, Your Honor is looking at something back from 1989, however many years that is.

THE COURT: Well, Mr. Brown, here's one thing I'm looking at in the Welch case that you referenced when you were making your argument -- we're going to get to that in a minute -- and this is a document -- a notice of filing dated August the 20th, 2023. And that was yesterday. And it lists $2 billion worth of insurance coverage for your

allied corporation, Atlas Turner. And that's not something that took place in 1989. That's something that Mr. Protopapas searched around and found and reported to the Court a day ago.

MR. BROWN: Okay. And I will --

THE COURT: If a receiver were appointed for ACL, my bet is you would find that's the same body of insurance program information for ACL, if you looked hard enough.

MR. BROWN: And I apologize, but I came up late last night and couldn't get a printer to work at the Hilton. Does Your Honor know the range of coverage on that? Because I have not been able to open it.

THE COURT: No, but I -- I don't need to know the range of coverage. This thing, yes, it tells you -- for example, the very first one -- and this illustrates, if nothing else, exactly what is happening with trying to get this insurance coverage.

Maryland Casualty Company policy -- this was for Atlas Turner -- from January 1, 1961, to January 1, 1964, $200,000 occurrence annual aggregate. Occurrence policies. That's what all this is about: These old per-occurrence policies.

There came a time when CGL policies quit being written as per-occurrence policies. All the ones you see listed on this page, some $2 billion worth are

per-occurrence policy written back before they started changing these policies to make them claims made rather than per occurrence.

One would have to plow further into these policies to see whether they provide what Mr. Protopapas suspects is coverage, but he dug around and found this just since he's been appointed as receiver. And that's the very reason they want a receiver appointed in Tibbs.

You're the third lawyer that's taken this. Two other lawyers could not get these people to cooperate one bit, except to say, "We don't have to do anything and we're not doing anything and we're not even going to provide a 30(b)(6)," which is a Canadian -- Quebec Records Act certainly doesn't effect. But they said no to everything.

Appointing a receiver would give someone, who is very knowledgeable about how to find insurance coverage, the ability to at least take a look at what apparently unknown people that you have checked with say they looked at and couldn't find anything.

He found an enormous amount of potential coverage. Now, does -- have I seen the insurance policies? Has he? I don't know. Probably not yet. But he has at least found coverage for this corporation -- CGL-type coverage with very reputable, known insurance companies that

started out in the '60s with 200,000 and is now up to $2 million, $4 million. I mean, these are big insurance coverages that Mr. Protopapas found and indicates are potential suspected insurance programs with Atlas.

They're asking that that same methodology be used to discover insurance policies of ACL. And I don't understand why ACL is fussing about that. These policies protect them. And these policies stand good for claims that are going to be made because their stuff came into the stream of commerce, if that can be proven, and I have to take it as proven at this moment.

MR. BROWN: And I think Your Honor hit the nail -- hit a nail on the head. Why would they not move forward and tender if there was something there to tender for?

THE COURT: Well, that's what I don't understand. There at least was some that Mr. Protopapas had showed, and apparently, they can't agree to nobody.

MR. BROWN: This chart is just a chart of insurance. It doesn't indicate that that insurance is there, binding, valid, and applicable today.

THE COURT: Well, let's argue about all of that. They have come forward with some showing that there are policies that pertain to this very dispute and cover this very corporation for times that are involved in this lawsuit. That gives you the right to at least move

forward and make some kind of discovery of that, and your client is just stonewalling. That's all it is. They don't want to tender to anybody any insurance. Apparently, that's the position they have put you into, rather awkward, I think, for you.

MR. BROWN: Again, I'm not going to belabor the point, but there was nothing to tender. It's not offered for me to say that. This doesn't prove that this insurance is in place.

And the last thing was -- getting back to those two cases, Your Honor. There was an ongoing hot -- sort of a hot fraud right then. Somebody was going out and buying $10,000 worth of --

[Overlapping conversation.]

THE COURT: One of the concerns I have got, Mr. Brown --

MR. BROWN: -- right at the same time of a receivership.

THE COURT: -- in this very case is whether a hot fraud would take place, meaning whether this corporation would attempt to convert some of these assets into cash at this very moment before entitlement to coverage is ascertained by someone on behalf of the State. Because what you're telling me that is occurring now is that Atlas is making no attempt and ACL is making no attempt to

locate policies because they say there aren't any.

Here sits a receiver who has found some, and we can now look and see if they provide coverage. But saying I'm going to stonewall it and then say that's the excuse for not even taking a look is something I don't understand the logic of from their point of view, but it promotes some real potential skullduggery if it's not shown the light of day before we go any further with the lawsuit.

MR. BROWN: And, again, I understand Your Honor's position, and I stand by my arguments previously --

THE COURT: I understand.

MR. BROWN: -- as well as the fact that, with all due respect, the requirements of the statute for receivership are not met in this case --

THE COURT: I understand. I understand.

MR. BROWN: -- and should not be -- should not be one appointed. It would be improper. And if we take the toothpaste out, we'd never be able to get it back in.

THE COURT: Well, okay.

All right. Anything further?

MS. McVEY: No, Your Honor.

RULING

THE COURT: All right. I think there is more than sufficient evidence to indicate that this corporation is deliberately refusing to comply with discovery rules of

South Carolina quite harsh on the alleged application of the Quebec Business Records Act.

The ACL's attorney concedes that a 30(b)(6) representative has nothing to do with the Quebec Business Records Act, and the appointment of a receiver is not anything that is effected by the Quebec Business Act. Now, he has other arguments about jurisdiction and so forth and so on, and I understand that, but I've ruled on that. I ruled on that some time ago. I ruled that there was jurisdiction, and we moved forward to deciding what to do about this discovery.

This would be my third time revisiting this now. This company has made it clear that they are not going to cooperate with their South Carolina counsel in doing anything that leads to the discovery of business records.

The discovery of -- already of the agreement I have referenced of July 18th, 1989, between this very corporation, Asbestos Corporation Limited, and its insurer, Maryland Casualty Company, indicates enough at this moment in the proceedings to justify a much more detailed examination by discovery of the records and information from ACL as to its insurance program.

And the notice of filing in another case in which an allied corporation, Atlas Turner, is involved, disclosing the location of potential coverage by many American

insurance companies of commercial general liability insurance policies covering from 1961 to 1982, and perhaps beyond, is enough to indicate that there is potential insurance coverage assets which would stand for claims made in South Carolina for business transactions and material put into the stream of commerce in South Carolina by Defendant Atlas Company Limited to support a finding by this Court that Atlas Corporation -- Atlas Company Limited is deliberately ignoring the orders of this Court and the Rules of Civil Procedure of South Carolina in failing to cooperate in any way with producing materials, answering this complaint, or anything else of the like that involves dealing with the status of this matter in South Carolina.

I, therefore, find that this -- that ACL is in contempt of this court and its orders, and I sanction ACL by striking their answer.

I ask Ms. McVey to, within the next five business days, to get to me and to Mr. Brown a proposed order memorializing the rulings I have made. And I give Mr. Brown five days after that to make any response that he wishes to make.

The ruling stands as it is made now but will be further memorialized by an order that I will file in this matter that details the rulings I have just made.

All right. That's Tibbs.

MR. BROWN: May I clear up one question or one sentence, Your Honor? You stated that I had conceded that the Quebec Business Records --

THE COURT: If you -- if I have made a finding with which you disagree, you can certainly deal with that in the reply you make. I'm not going to relitigate my ruling right now.

MR. BROWN: I didn't want --

THE COURT: I made a ruling. It may be that it was Ms. McVey that may have pitched the Quebec Records Act does not prevent the appointment of a 30(b)(6). If so, I'll withdraw that. I don't put it on you that you conceded anything on behalf of this client. Okay?

MR. BROWN: Thank you so much.

THE COURT: All right.

All right. Next is Welch against Atlas Turner, motion for stay.

MS. McVEY: And, Judge, just for clarity, you struck their answer -- held them in contempt, struck their answer. And are you appointing Mr. Protopapas as receiver?

THE COURT: Oh, absolutely. I'm sorry. For the reasons stated as this argument was made in my discussion of the history of the appointment of receivers in asbestos cases in South Carolina for the purpose of marshaling the

assets of defendant corporation and providing an active defense for the defendant corporation, I find that Asbestos Corporation Limited has absolutely and deliberately refused to cooperate in any way with this litigation in South Carolina, and therefore, the appointment of a receiver is necessary in order to have a receiver that can adequately defend this corporation.

And the fact that this corporation is represented to be an ongoing corporation with assets makes it all the more important to this corporation that, if there's insurance available, it is used rather than to invade the assets of what Mr. Brown represents is an ongoing corporation with assets which would otherwise have to stand good for any claims that were made and proved here.

So, for all of those reasons, a receiver is needed to marshal these assets and provide a real defense and not simply "We're not going to cooperate" a defense. It may be that Mr. Protopapas will move to undue the contempt after he is appointed and be allowed to file an answer, and I would consider that, but at the moment, the activity on behalf of ACL is completely defiant of the orders of this Court and the law of South Carolina.

I find that Mr. Protopapas is a highly capable receiver who has been appointed to operate without fear or favor in many asbestos cases in South Carolina, and he has

taken his role as a defender of the corporations for which he is appointed as receiver with the utmost seriousness and has not only marshaled their assets but defended against unwarranted claims, invalid claims, or claims which he considers to be more than what is appropriate to be put forward out of the assets he marshals.

So I find he is a completely independent receiver who has done a very, very capable job in other receiverships and will be appointed in this one.

All right. That's that.

(The above hearing concluded at 10:33 a.m.)

CERTIFICATE OF COURT REPORTER

State of South Carolina)

County of Richland)

RE: John Tibbs vs. 3M Company, et al.

I, Bobbi J. Fisher, Registered Professional Reporter (RPR) and Official Court Reporter III for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the hearing of the captioned case in the Court of Common Pleas for Richland County, South Carolina, on the 21st of August, 2023.

Submitted: August 28, 2023

___/s/ Bobbi Fisher_____

Bobbi J. Fisher, RPR

Official Court Reporter III

NOTE: PURSUANT TO RULE 607(h)(1)(B), SCACR, "A COURT REPORTER SHALL RECEIVE THE FEE OF $1.00 PER PAGE FOR FURNISHING A COPY OF A PREVIOUSLY PREPARED TRANSCRIPT." ALL REQUESTS FOR COPIES (FORM 800) OF THE ATTACHED TRANSCRIPT FROM OPPOSING PARTY OR NON-PARTIES MUST BE SENT TO THIS REPORTER AT BFISHER@SCCOURTS.ORG.

EXHIBIT B

ASBESTOS

SOCIÉTÉ ASBESTOS LIMITÉE

840, boulevard Ouellet, Thetford Mines (Québec) Canada G6G 7A5

VIA E-MAIL ONLY

February 15, 2023

TO ALL EXCESS COVERAGE INSURERS

RE: Insured: **Asbestos Corporation Limited**
Reference: **General Dynamics Corporation Excess Insurance Program**

Dear Madam:
Dear Sir:

Please find enclosed our Report of the asbestos litigation as of December 31, 2022 which provides the following information:

1. Summary of Plaintiffs — Bodily Injury: by state, showing how many plaintiffs have settled or dismissed their Complaint and the number of pending plaintiffs;

2. Summary of Bodily Injury Claims for the year 2022 by state;

3. Summary of Claims — Property Damage: by year, showing how many claims have been settled or dismissed and the number of pending claims;

4. 2022 Summary of Expense and Indemnity Fees for Bodily Injury by quarter;

5. Cumulative Summary of Expense and Indemnity Paid as of December 31, 2022.

As previously advised, Asbestos Corporation Limited and its primary insurers are in agreement that the primary insurance coverage has been completely exhausted. Asbestos Corporation Limited presently finances the costs of the asbestos litigation using the third and fourth excess layer coverage.

Trusting the enclosed information will be of interest to you, we remain,

Yours truly,
ASBESTOS CORPORATION LIMITED

Mario Simard
Chief Financial Officer

MS/ads
Enclosures

Téléphone : (418) 338-5195 ◆ Télécopieur : (418) 338-6069 ◆ Courriel : mail@asbestos-corp.com

SUMMARY OF BODILY INJURY CLAIMS

ASBESTOS CORPORATION LIMITED

STATE	PLAINTIFFS SERVED	PLAINTIFFS SETTLED	PLAINTIFFS DISMISSED	PLAINTIFFS PENDING AS OF 12/31/2022
ALABAMA	16	0	16	0
ALASKA	6	5	1	0
ARIZONA	5	1	4	0
ARKANSAS	259	6	253	0
BRITISH COLUMBIA	56	0	56	0
CALIFORNIA	6,810	2,747	3,890	173
COLORADO	1	0	1	0
CONNECTICUT	388	192	196	0
DELAWARE	773	48	720	5
FLORIDA	12	4	8	0
GEORGIA	129	73	56	0
HAWAII	10	0	10	0
IDAHO	32	27	5	0
ILLINOIS	1462	388	1061	13
INDIANA	494	8	485	1
IOWA	2	1	1	0
KENTUCKY	2	0	2	0
LOUISIANA	9,305	1030	2,554	5,721
MAINE	12	0	12	0
MARYLAND	672	2	670	0
MASSACHUSETTS	1,546	1,154	392	0
MICHIGAN	1,438	320	1,106	12
MINNESOTA	119	93	25	1
MISSISSIPPI	1,164	0	1,164	0
MISSOURI	726	55	668	3
MONTANA	1	1	0	0
NEVADA	2	1	1	0
NEW HAMPSHIRE	16	10	6	0
NEW JERSEY	4,969	3,800	1,141	28
NEW MEXICO	1	0	1	0
NEW YORK	970	428	510	32
NORTH CAROLINA	89	74	15	0
NORTH DAKOTA	388	277	65	46
OHIO	13,631	3,733	9,897	1
OKLAHOMA	1	0	1	0
OREGON	377	211	165	1
PENNSYLVANIA	3,244	1,587	1,593	64
PUERTO RICO	65	0	65	0
QUEBEC	1	0	1	0
RHODE ISLAND	18	3	15	0
SOUTH CAROLINA	300	238	62	0
TENNESSEE	2	0	2	0
TEXAS	4,124	81	4,043	0
UTAH	11	0	11	0
VIRGINIA	195	79	116	0
WASHINGTON	996	752	244	0
WEST VIRGINIA	2,193	2,078	115	0
WISCONSIN	8	2	6	0
TOTAL	57,041	19,509	31,431	6,101

SUMMARY OF BODILY INJURY CLAIMS **2022** ASBESTOS CORPORATION LIMITED

STATE	PLAINTIFFS PENDING AS OF 12/31/2021	PLAINTIFFS SERVED 2022	PLAINTIFFS SETTLED 2022	PLAINTIFFS DISMISSED 2022	PLAINTIFFS PENDING AS OF 12/31/2022
ALABAMA	0				0
ALASKA	0				0
ARIZONA	0				0
ARKANSAS	0				0
BRITISH COLUMBIA	0				0
CALIFORNIA	162	13		2	173
COLORADO	0				0
CONNECTICUT	0				0
DELAWARE	8	1		4	5
FLORIDA	0				0
GEORGIA	0				0
HAWAII	0				0
IDAHO	0				0
ILLINOIS	71	17	3	72	13
INDIANA	2			1	1
IOWA	0				0
KENTUCKY	0				0
LOUISIANA	5,722	5	5	1	5,721
MAINE	0				0
MARYLAND	0				0
MASSACHUSETTS	0				0
MICHIGAN	17	7	4	8	12
MINNESOTA	1				1
MISSISSIPPI	0				0
MISSOURI	6			3	3
MONTANA	0				0
NEVADA	0				0
NEW HAMPSHIRE	0				0
NEW JERSEY	20	10		2	28
NEW MEXICO	0				0
NEW YORK	33	8	6	3	32
NORTH CAROLINA	0				0
NORTH DAKOTA	42	5		1	46
OHIO	2		1		1
OKLAHOMA	0				0
OREGON	1				1
PENNSYLVANIA	66	20	8	14	64
PUERTO RICO	0				0
QUEBEC	0				0
RHODE ISLAND	0				0
SOUTH CAROLINA	0				0
TENNESSEE	0				0
TEXAS	0				0
UTAH	0				0
VIRGINIA	0				0
WASHINGTON	3		1	2	0
WEST VIRGINIA	0				0
WISCONSIN	0				0
TOTAL	6,156	86	28	113	6,101

02/09/2023/lc ACL-Summary 2022-December.xlsx

ASBESTOS CORPORATION LIMITED

As of December 31, 2022

SUMMARY - PROPERTY DAMAGE CLAIMS SERVED

Year	Plaintiffs
1983	5
1984	25
1985	47
1986	6
1987	16
1988	2
1989	2
1990	3
1991	1
1992	0
1993	0
1994	0
1995	0
1996	1
1997-2022	0
	108

Plaintiffs settled as of December 31, 2022	12
Plaintiffs dismissed as of December 31, 2022	96
Plaintiffs pending as of December 31, 2022	0

ASBESTOS CORPORATION LIMITED

2022
Summary of Expense and Indemnity
Bodily Injury
(U.S. Dollars)

	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	Total
Expense	$340,390.03	$375,889.70	$309,746.81	$329,557.82	$1,355,584.36
Indemnity	$281,000.00	$82,000.00	$110,000.00	$395,000.00	$868,000.00
TOTAL	**$621,390.03**	**$457,889.70**	**$419,746.81**	**$724,557.82**	**$2,223,584.36**

ASBESTOS CORPORATION LIMITED

Cumulative Summary of Expense and Indemnity Paid
as of December 31, 2022
(U.S. Dollars)

	EXPENSE	INDEMNITY	TOTAL
BODILY INJURY			
As of 12/31/2022	$115,359,898	$108,331,103	$223,691,001
PROPERTY DAMAGE			
As of 12/31/2022	$1,100,678	$128,045	$1,228,723
TOTAL	**$116,460,576**	**$108,459,148**	**$224,919,724**

EXHIBIT C

Exhibit «B»

Maryland Casualty Company Policy No. 56C-104668 from January 1 1961 to January 1, 1964	$200,000/occurrence annual aggregate $1,000,000
Maryland Casualty Company Policy No. 56-C-106117 from January 1, 1964 to January 1, 1967	$200,000/occurrence annual aggregate $1,000,000
Maryland Casualty Company Policy No. 56C-107294 from January 1, 1967 to January 1, 1970	$1,000,000/occurren sub-limit $200,000 person, annual aggregate BI limit $1,000,000
Maryland Casualty Company Policy No. 56-108541 from January 1, 1970 to May 21, 1970	$1,000/occurrence sub-limit $200,000 person, annual aggregate $1,000,00
Maryland Casualty Company Policy No. 56-108801 from May 21, 1970 to October 1, 1971	$3,000,000
Continental Insurance Company Policy No. 3147150 from October 1, 1971 to December 6, 1971	$3,000,000
Federal Insurance Company Policy No. CGL-4400523 from December 6, 1971 to July 31, 1975	$2,000,000
Aetna Life & Casualty Insurance Co. Policy No. 51-985LG26921SCA from July 31, 1975 to April 1, 1976	$2,000,000/occurrenc $2,000,000 aggregate
Aetna Life & Casualty Insurance Co. Policy No. 51-985LG26920SCA from April 1, 1976 to July 1, 1976	$2,000,000/occurrenc $2,000,000 aggregate
Aetna Life & Casualty Insurance Co. Policy No. 51-985LG30513SCA from July 1, 1976 to July 1, 1977	$2,000,000/occurrence $2,000,000 aggregate
Aetna Life & Casualty Insurance Co. Policy No. 985LG31719SCA from July 1, 1977 to July 1, 1978	$2,000,000/occurrence $2,000,000 aggregate
Insurance Company of North America from July 1, 1978 to July 1, 1981 #CJL-5971	$ 500,000/occurrence $4,000,000 annual aggregate
Insurance Company of North America from July 1, 1981 to February 12, 1982 #CJL-5971	$2,000,000/occurrence $4,000,000 annual aggregate

EXHIBIT B

A. Primary Coverage-

PRIMARY	LIMITS	APPROXIMATE BODILY INJURY DEDUCTIBLE
Maryland Casualty Co. Policy #56C-106117 1/1/57 to 2/2/67*	Unknown	Unknown
Maryland Casualty Co. Policy #56-107294 1/1/67 to 1/1/70	$200,000 per person. $1,000,000 annual aggregate.	None
Maryland Casualty Co. Policy #56-108451 1/1/70 to 5/21/70	$200,000 per person. $1,000,000 aggregate.	None
Maryland Casualty Co. Policy #56-108801 5/21/70 to 10/1/71	$3,000,000	None
Continental Insurance Co. Policy #3147150 10/1/71 to 12/6/71	$3,000,000	None
Federal Insurance Co. Policy #CGL-4400523 12/6/71 to 7/31/75	$2,000,000	None
Aetna Life & Casualty Policy #51-985LG26921SCA 7/31/75 to 4/1/76	$2,000,000 per occurrence $2,000,000 aggregate.	$250,000 per occurrence. $2,000,000 aggregate

*There is a possibility of earlier coverage which is under investigation.

[illegible] Casualty Policy #51-985LG26920SCA 4/1/76 to 7/1/76	$2,000,000 per occurrence $2,000,000 aggregate.	$250,000 per occurrence. $2,000,000 aggregate.
Aetna Life & Casualty Policy #51-985LG30513SCA 7/1/76 to 7/1/77	$2,000,000 per occurrence $2,000,000 aggregate.	$250,000 per occurrence. $2,000,000 aggregate.
Aetna Life & Casualty Policy #985LG31719SCA 7/1/77 to 7/1/78*	$2,000,000 per occurrence $2,000,000 aggregate.	$500,000 per occurrence. $9,100,000 ~~aggregate~~. Per occ.
Insurance Co. of North America Policy #CGL-5971 7/1/78 to 7/1/81	$2,000,000 per occurrence. $4,000,000 aggregate. per policy year.	$500,000 per occurrence $4,000,000 aggregate per policy year.

*ACL retained 53.67% of losses between $500,000 and $1 million and 43.67% of losses between $1 million and $2 million.

B. Excess Coverage-

No excess coverage prior to July 1, 1973. From that date forward coverage was provided by numerous carriers at the following aggregate amounts:

07/73 to 10/74	$ 98,000,000
10/74 to 07/76	198,000,000
07/76 to 07/77	298,000,000
07/77 to 11/77	123,000,000
11/77 to 01/78	148,000,000
01/78 to 07/78	173,000,000
07/78 to 07/79	298,000,000
07/79 to 07/80	298,000,000
07/80 to date	298,000,000

EXHIBIT D

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
)
COUNTY OF RICHLAND) TRANSCRIPT OF RECORD

----------x
LENORA CHILDERS,)
Individually and as Personal)
Representative of the Estate)
of LEWIS C. CHILDERS,)
)
Plaintiff,)
vs.) Case No. 2021-CP-40-03484
)
DAVIS MECHANICAL)
CONTRACTORS, INC., et al.,)
)
Defendants.)
----------x
FLAME REFRACTORIES, INC.,)
et al,)
)
Third-Party Plaintiff,)
)
vs.)
)
ZURICH AMERICAN INSURANCE)
COMPANY, et al.,)
)
Defendants.)
----------x

August 21, 2023

B E F O R E:

The Honorable Justice Jean H. Toal, Presiding Judge

Court Reporter: Bobbi Fisher, RPR
SC Official Court Reporter III

A P P E A R A N C E S:

Thiele McVey, Esq.
Attorney for Plaintiff Childers

Jonathan Robinson, Esq.
Attorney for Payne & Keller

Wesley Sawyer, Esq.
Attorney for National Union Ins. Co. Of Pittsburgh; Berkshire Hathaway; Continental Ins. Co./London Market Ins; AIG Property & Casualty Co.; Lexington Insurance Company

Aaron Hayes, Esq.
First State Ins. Co.

Kevin Bell, Esq.
Zurich American Insurance Company

Todd Carroll, Esq.

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
)
COUNTY OF RICHLAND) TRANSCRIPT OF RECORD

----------x
MELVIN G. WELCH and)
DONNA B. WELCH,)
)
Plaintiffs,)
vs.) Case No. 2022-CP-40-03834
)
3M COMPANY, et al.,)
)
Defendants.)
----------x

August 21, 2023

B E F O R E:

The Honorable Justice Jean H. Toal, Presiding Judge

A P P E A R A N C E S:

Thiele McVey, Esq.
Attorney for Plaintiffs

Victor Rawl, Esq.
Attorney for Certain Underwriters at Lloyd's

Todd Carroll, Esq.
Attorney for Travelers

Court Reporter: Bobbi Fisher, RPR
SC Official Court Reporter III

EXHIBIT E

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 F

DUFOUR MOTTET

(Société en nom collectif)

ANNIE BREAULT
abreault@dufourmottet.com

November 29, 2011

VIA E-MAIL

Ms. Mary A. Bohlig, CCLA
Claim Specialist
GREAT AMERICAN INSURANCE COMPANY
Tower 19S
301 E. Fourth Street
Cincinnati, OH 45202

SUBJECT: **Insured: Asbestos Corporation Limited / General Dynamics**
Claim No: 990-020031
Our reference : Great American Insurance Company

Dear Ms. Bohlig:

We are in response to your letter dated November 15, 2011, addressed to Mr. Mario Simard.

We understand that you will now handle this file in replacement of Mr. Ted Mueller and will update our records accordingly. We would appreciate being informed if you are also handling this matter on behalf of Agricultural Insurance Company.

As requested, you will find attached a coverage chart of all excess carriers indicating which layers are impaired or exhausted.

Also, we are sending the Summary of the Bodily Injury Claims showing the total numbers of claims filed, dismissed, settled and pending, the whole as of October 31, 2011.

Finally, we are sending the details of the impairment of the excess insurance policies presently triggered and used in the financing of ACL's litigation costs.

Should you need any additional information, do not hesitate to contact the undersigned.

Yours truly,
DUFOUR, MOTTET

Annie Breault

Enclosures

ASBESTOS CORPORATION LIMITED

LAYERS OF EXCESS COVERAGE

4th	LIBERTY	2 M	AETNA	4 M	AETNA	4 M	AETNA	4 M	STATE PENNSYLVANIA	4,4 M
	MIDLAND	5,5 M	LUMBERMENS	5 M	LUMBERMENS	5 M	LUMBERMENS	5 M	AETNA	5 M
	STATE PENNSYLVANIA	2 M	LEXINGTON	4 M	LEXINGTON	4 M	LEXINGTON	4 M	LLOYD'S (VH1631)	48,36615 M
	INA	5 M	FEDERAL	1 M	FEDERAL	1 M	FEDERAL	1 M	AMERICAN REINSURANCE	1,325 M
	NORTH STAR	3 M	FIRST STATE	2 M	FIRST STATE	2 M	FIRST STATE	2 M	(From 10-03-76)	
	LLOYD'S (K23200)	5 M	AMERICAN	3 M	AMERICAN	3 M	AMERICAN	3 M	CENTRAL NATIONAL	1 M
	EMPL. LIABILITY (CGU)	2,5 M	HOME	5 M	HOME	5 M	HOME	5 M	(From 12-31-76)	
		25 M	STATE PENNSYLVANIA	6 M	STATE PENNSYLVANIA	6 M	STATE PENNSYLVANIA	6 M	DRAKE	0,5 M
			INTERNATIONAL	20 M	INTERNATIONAL	20 M	INTERNATIONAL	20 M	(From 12-31-76)	
				50 M		**50 M**		**50 M**	FIDELITY	3,15885 M
									(From 12-31-76)	
										63,75 M
3rd			INA	7 M	INA	7 M	INA	7 M		
			HOME	5 M	HOME	5 M	HOME	5 M		
			MIDLAND	5 M	MIDLAND	5 M	MIDLAND	5 M	LLOYD'S (UHL0883)	4,525 M
	CONTINENTAL (CNA)	3 M	STATE PENNSYLVANIA	4 M	STATE PENNSYLVANIA	4 M	STATE PENNSYLVANIA	4 M		
			UNIGARD	2 M	UNIGARD	2 M	AETNA	2 M	LLOYD'S (UHL0884)	5,475 M
			NORTHBROOK	5 M	NORTHBROOK	5 M	NORTHBROOK	5 M		**10 M**
				28 M		**28 M**		**28 M**		
									IMPAIRED	
2nd	LLOYD'S (CX3586)	12 M	LLOYD'S (K26383)		LLOYD'S (K26383)		LLOYD'S (K26383)		LLOYD'S (UHL 0881)	5,575 M
									LLOYD'S (UHL0882)	4,425 M
										10 M
									EXHAUSTED	
1st	HOME	8 M	HOME		HOME		HOME		HOME	3 M
									EXHAUSTED	
			EXHAUSTED		**EXHAUSTED**		**EXHAUSTED**			
	04/01/73 - 07/01/73		**07/01/73 - 07/01/74**		**07/01/74 - 07/01/75**		**07/01/75 - 07/01/76**		**07/01/76 - 07/01/77**	

N.B. ACL and Home have reached agreement as to the Home policies coverign the period 07/01/73 to 07/01/76 to the effect that 2 occurrences apply to this period.

LAYERS OF EXCESS COVERAGE

	04/01/73 - 07/01/73	07/01/73 - 07/01/74	07/01/74 - 07/01/75	07/01/75 - 07/01/76	07/01/76 - 07/01/77
7th					STATE PENNSYLVANIA 9 M ZURICH 5 M EMPL. WAUSAU 2 M AETNA 5 M CONCORDE 10,625 M INTERNAT. SURPLUS 6,375 M (From10-03-76) FIRST STATE 3 M (From10-03-76) LEXINGTON 3,4525 M (From12-31-76) LLOYS'S (VH1636) 80,5475 M **125 M**
6th			* AETNA 2 M *LLOYD'S (uUFL606) 1 M *FEDERAL 4 M *INA 3 M *STONEWALL 5 M *EMPL. WAUSAU 2 M *STATE PENNSYLVANIA 14 M *NORTH RIVER 6 M *ZURICH 6 M *EMPL. REINSURANCE 5 M **48 M** * (From 10-16-74) (vs 50M)	AETNA 2 M LLOYD'S (UFL1606) 1 M INA 3 M STONEWALL 5 M EMPL. WAUSAU 2 M STATE PENNSYLVANIA 14 M NORTH RIVER 6 M ZURICH 6 M CENTRAL NATIONAL 7 M EMP. REINSURANCE 5 M **51 M** (vs 50M)	LLOYD'S (VH1635) 31,816625 M PURITAN 2,065 M (From 10-03-76) **33,881625 M** **(vs 37.5M)**
5th	AETNA 3,5 M EMPLOYERS COM. UNION 7,55 M LLOYD'S (K23202) 4 M AMERICAN 3 M ST-PAUL 2 M HOME 5 M LUMBERMENS 5 M FEDERAL 1 M UNITED STATES FIRE 8,2 M ROYAL INDEMNITY 1 M AMERICAN HOME 7,75 M FIRST STATE 2 M GREAT AMERICAN 0,5 M (vs 50M) **50,5 M**		STATE PENNSYLVANIA 25 M (From 10-16-74) LLOYD'S (UFL1586) 7,5 M (From 10-16-74) NORTH RIVER 17,5 M (From 10-16-74) **50 M**	STATE PENNSYLVANIA 25 M (From 11-14-75 : 27,5M) LLOYD'S (UFL1586) 7,5 M AMERICAN BANKERS (From 11-14-75 : 4,5M) NORTH RIVER 17,5 M (From 11-14-75 : 10,5M) (From 11-14-75 : 50M) **50 M**	STATE PENNSYLVANIA 5,6 M (From 10-03-76 : 6.6M) LLOYD'S (VH1633) 37,3669 M PURITAN 1,16 M (From 10-03-76) (From 12-31-76 : 2.935M) FIDELITY 1,84115 M (From 12-31-76) **45,96805 M** (From 12-31-76 : 48.743050M) (vs 48.75M)

LAYERS OF EXCESS COVERAGE					
10th					
9th					
8th					
	04/01/73 - 07/01/73	07/01/73 - 07/01/74	07/01/74 - 07/01/75	07/01/75 - 07/01/76	07/01/76 - 07/01/77

ASBESTOS CORPORATION LIMITED

LAYERS OF EXCESS COVERAGE

4th	LLOYD'S (UJL0666)	8,8875 M	LLOYD'S (UKL1056)	8 M	BERMUDA	0,75 M	LLOYD'S (PY161380)	28,2 M	GUARANTEE	0,3 M
					LLOYD'S (PY117379)	28,25 M	INTERNATIONAL	1 M	HOLLANDSCHE	0,3 M
	LLOYD'S (UJL0667)	16,1125 M	LLOYD'S (UKL1057)	17 M	AMERICAN HOME	1 M	BISON	0,3 M	LLOYD'S (PY037181)	29,4 M
		25 M		**25 M**		**30 M**	BERMUDA	0,5 M		**30 M**
								30 M		
3rd	LLOYD'S (UJL0664)	3,7 M	LLOYD'S (UKL1054)	3,673 M	LLOYD'S (PY117279)	20 M	LLOYD'S (PY161280)	20 M	LLOYD'S (PY037081)	20 M
	LLOYD'S (UJL0665)	6,3 M	LLOYD'S (UKL1055)	6,327 M						
		10 M		**10 M**						
	IMPAIRED		**IMPAIRED**		**IMPAIRED**		**IMPAIRED**		**IMPAIRED**	
2nd	LLOYD'S (UJL0662)	5,1 M	LLOYD'S (UKL1052)	4,836 M	LLOYD'S (PY117179)	5 M	LLOYD'S (PY161180)	6 M	LLOYD'S (PY036981)	6 M
	LLOYD'S (UJL0663)	4,9 M	LLOYD'S (UKL1053)	5,164 M						
		10 M		**10 M**						
	EXHAUSTED		**EXHAUSTED**		**EXHAUSTED**		**EXHAUSTED**		**EXHAUSTED**	
1st	HOME	3 M	HOME	3 M	INA	3 M	INA	2 M	INA	2 M
	EXHAUSTED		**EXHAUSTED**		**EXHAUSTED**		**EXHAUSTED**		**EXHAUSTED**	
	07/01/77 - 07/01/78		**07/01/78 - 07/01/79**		**07/01/79 - 07/01/80**		**07/01/80 - 07/01/81**		**07/01/81 - 07/01/82**	

LAYERS OF EXCESS COVERAGE

	07/01/77 - 07/01/78		07/01/78 - 07/01/79		07/01/79 - 07/01/80		07/01/80 - 07/01/81		07/01/81 - 07/01/82	
7th	INTERNAT. SURPLUS	2,5 M	GRANITE STATE	16 M	LANDMARK	2 M	LLOYD'S (PY161680)	24 M	GUARANTEE	1 M
			LLOYD'S (UKL1061)	3,5 M	LLOYD'S (PY117679)	12,5 M	INA	13 M	INTERNAT. SURPLUS	6,75 M
	HOME	5 M	LLOYD'S (UKL1062)	8 M	LEXINGTON	7 M	ZURICH	5 M	LLOYD'S (PY037481)	23,25 M
			NAT. UNION FIRE	5 M	AETNA	10 M	EXCESS	5 M	ROYALE BELGE	1 M
	STATE PENNSYLVANIA	12,5 M	HOME	5 M	GRANITE STATE	7 M	INTERNAT. SURPLUS	1,5 M	INA	13 M
			EMPL. MUTUAL	5 M	CALIFORNIA UNION	3 M	ROYALE BELGE	1 M	MIDLAND	5 M
	NAT. UNION FIRE	5 M	LEXINGTON	3,5 M	INA	2,5 M	BERMUDA	0,5 M		**50 M**
		25 M	INTERNAT. SURPLUS	2,5 M	INTERNAT. SURPLUS	2 M		**50 M**		
			ZURICH	1,5 M	INTEGRITY	1 M				
				50 M	EXCESS	**47 M**				
6th	FIRST STATE	4 M	FIRST STATE	4 M	AIU	5 M	LLOYD'S (PY161580)	21 M	INTERNAT. SURPLUS	3,85 M
	INTERNAT. SURPLUS	5 M	INTERNAT. SURPLUS	5 M	EMPL. MUTUAL	5 M	EMPL. MUTUAL	5 M	IDEAL MUTUAL	3,5 M
	ZURICH	5 M	ZURICH	5 M	EUROPEAN GÉN.	3 M	TRANSIT CAS.	5 M	SAFETY MUTUAL	10 M
	GRANITE STATE	5 M	LLOYD'S (UKL1060)	2,175 M	BERMUDA	1,65 M	EVANSTON	5 M	CENTAUR	2 M
	LLOYD'S (UJL0670)	0,65 M	AIU	5 M	LEXINGTON	3 M	INTERNAT. SURPLUS	3,65 M	ZURICH	5 M
	LLOYD'S (UJL0671)	5,35 M	GREAT ATLANTIC	1 M	INTERNAT. SURPLUS	2 M	CALIFORNIA UNION	3 M	ROYALE BELGE	1 M
		25 M	SWISS REINS.	1 M	LLOYD'S (PY117579)	3,75 M	ZURICH	1,7 M	LLOYD'S (PY037381)	24,65 M
			ALLIANZ VERG.	0,5 M	GRANITE STATE	18,9 M	BERMUDA	1,65 M		**50 M**
			BERMUDA	0,975 M	NAT. UNION FIRE	5 M	ROYALE BELGE	1 M		
			MUTUELLE GÉN.	0,35 M	ZURICH	1,7 M	CENTAUR	1 M		
				25 M	ALLIANZ VERG.	1 M	INA	1 M		
						50 M	IDEAL MUTUAL	0,5 M		
							BERMUDA	0,5 M		
								50 M		
5th	PURITAN	5 M	LLOYD'S (ukl1058)	3,4175 M	LLOYD'S (PY117479)	10,5 M	LLOYD'S (PY161480)	28,3 M	GUARANTEE	1,2 M
	STATE PENNSYLVANIA	2,7 M	LLOYD'S (UKL1059)	1,5825 M	NAT. UNION FIRE	5 M	IDEAL MUTUAL	1 M	LLOYD'S (PY037281)	25,3 M
	LLOYD'S (UJL0668)	5,5825 M	PURITAN	5 M	CALIFORNIA UNION	2 M	BERMUDA	1,2 M	IDEAL	1,5 M
	LLOYD'S (UJL0669)	1,7175 M	AIU	5 M	AIU	5 M	GREAT ATLANTIC	0,5 M	INA	1 M
	NAT. UNION FIRE	5 M	NAT. UNION FIRE	5 M	INTEGRITY	2 M	INTEGRITY	6 M	INTEGRITY	6 M
	GRANITE STATE	5 M	GRANITE STATE	5 M	AMERICAN HOME	1 M	CALIFORNIA UNION	2 M	AMBASSADOR	**5 M**
		25 M		**25 M**	GREAT ATLANTIC	0,5 M	SOUTHERN AMERICAN	1 M		**40 M**
					PURITAN	7 M		**40 M**		
					GRANITE STATE	7 M				
						40 M				

LAYERS OF EXCESS COVERAGE

	07/01/77 - 07/01/78		07/01/78 - 07/01/79		07/01/79 - 07/01/80		07/01/80 - 07/01/81		07/01/81 - 07/01/82	
10th			LLOYD'S (UKL1067)	37 M						
			NORTHBROOK	5 M						
			BERMUDA	5 M						
			UNION INDEMNITY	2 M						
			CALIFORNIA UNION	1 M						
				50 M						
9th	AETHNA	3,29375 M	INTEGRITY	4,5 M						
	(From 01-01-78)		MIDLAND	4,5 M						
	LLOYD'S (WJ2121)	12,717 M	PRUDENTIAL	4 M						
	(From 01-01-78)		AMER. CENTENNIAL	3 M						
	LLOYD'S (UKL0201)	8,98925 M	CALIFORNIA UNION	2 M						
	(From 01-01-78)	**25 M**	BERMUDA	0,25 M						
			SWISS REINS.	1,5 M						
			HAFTPFLICHTVERBAND	1 M						
			CENTRAL NATIONAL	1 M						
			LLOYD'S (UKL1066)	20,835 M						
			LLOYD'S (UKL1065)	7,415 M						
				50 M						
8th	LLOYD'S (E002695)	5 M	AETNA	10 M	LLOYD'S (PY117779)	50,4 M	NORTHBROOK	10 M	LLOYD'S (PY037581)	10,8 M
	PRUDENTIAL	5 M	INA	10 M	AIU	7 M	BERMUDA	5,5 M	SAFETY MUTUAL	17,5 M
	RIUNIONE ADRIATICA	1 M	LONDON CO. (UKL1063)	2,725 M	ZURICH	5 M	MIDLAND	2 M	NORTHBROOK	12,5 M
	LEXINGTON	4 M	LLOYD'S (UKL1064)	6,95 M	NAT. UNION FIRE	5 M	HAFTPFLICHTVERBAND	1 M	INTERNAT. SURPLUS	10 M
	NORTHBROOK	5 M	HOME	5 M	MIDLAND	5 M	LLOYD'S (PY161780)	64,5 M	TRANSIT CASUALTY	10 M
	MISSION	5 M	GRANITE STATE	3 M	INTERNAT. SURPLUS	4,5 M	TRANSIT CASUALTY	10 M	INA	**6 M**
	(From 01-01-78)	**25 M**	LANDMARK	2 M	UNION INDEMNITY	2 M	CONTINENTAL	5 M	CONTINENTAL	5 M
			CALIFORNIA UNION	2 M	CENTRAL NATIONAL	1 M	AGRICULTURAL	2 M	NEW ENGLAND	5 M
			BERMUDA	1,325 M	HAFTPFLICHTVERBAND	1 M	(Cancelled 12-17-80)		ALLIANZ	**5 M**
			LEXINGTON	7 M	BERMUDA	7,6 M	NEW ENGLAND	2 M	COLUMBIA CASUALTY	5 M
				50 M	INA	10 M	(From 12-17-80)	**100 M**	GUARANTEE	5,5 M
					INTEGRITY	1,5 M			MIDLAND	2 M
						100 M			PEOPLE'S	2 M
									HARTFORD	1,7 M
									CENTRAL NAT.	1 M
									HAFTPFLICHTVERBAND	1 M
										100 M

EXHIBIT G

The South Carolina Court of Appeals

Donna B. Welch, individually and as Personal Representative of the Estate of Melvin G. Welch, deceased, Respondent,

v.

Advance Auto Parts, Inc., American Honda Motor Co., Inc., Atlas Asbestos Co, Atlas Turner, Inc. as successor to Atlas Asbestos Co, a foreign company, Bahnson, Inc., Covil Corporation, Daniel International Corporation, Davis Mechanical Contractors, Inc., Ellington Insulation Company, Inc., Fluor Constructors International f/k/a Fluor Corporation, Fluor Constructors International, Inc., Fluor Daniel Services Corporation, Fluor Enterprises, Inc., General Parts, Inc. individually and as successor-in-interest to Carquest Corporation; Goodrich Corporation f/k/a The B. F. Goodrich Company, The Goodyear Tire & Rubber Company, Graybar Electric Company, Inc., Honeywell International, Inc. individually and as successor-in-interest to Allied Signal, Inc., as successor to Bendix Corporation, Morse Tec LLC f/k/a Borgwarner Morse Tec LLC, and successor-by-merger to Borg-Warner Corporation, Occidental Chemical Corporation as successor to Durez Corporation; O'reilly Automotive Stores, Inc., Paramount Global f/k/a Viacomcbs Inc., f/k/a CBS Corporation, a Delaware corporation f/k/a Viacom, Inc., successor-by-merger to CBS Corporation, a Pennsylvania corporation, f/k/a Westinghouse Electric Corporation, Pneumo Abex LLC successor-in-interest to Abex Corporation, Redco Corporation f/k/a Crane Co., Reinz Wisconsin Gasket LLC f/k/a and/or successor to Reinz Wisconsin Gasket Co. and Wisconsin Gasket Manufacturing Co., a wholly owned subsidiary of Dco LLC, Rust Engineering & Construction, Inc., Rust International Inc., Southern Insulation, Inc., Spirax Sarco, Inc., Union Carbide Corporation, Westrock MWV, LLC individually and as successor-in-interest to

Westvaco, ZF Active Safety US Inc. f/k/a Kelsey-Hayes Company, Defendants,

of which Atlas Turner, Inc. is the Appellant.

Appellate Case No. 2023-001096

ORDER

Appellant's motion to "confirm" the automatic stay or, alternatively, petition for supersedeas is denied. Appellant failed to petition the circuit court first or to satisfactorily establish that extraordinary circumstances made it impracticable to do so. *See* Rule 241(d)(1), SCACR ("Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court."). Because Appellant did not first petition the circuit court to supersede its order, the petition is denied.

C.J.

FOR THE COURT

Columbia, South Carolina

cc:
Aaron Daniel Chapman, Esquire
John D. Kassel, Esquire
Theile Branham McVey, Esquire
Jamie Rae Rutkoski, Esquire
Stephen Lynwood Brown, Esquire
Russell Grainger Hines, Esquire
James D. Gandy, III, Esquire
Peter Demos Protopapas, Esquire
John Kenneth Chandler, Esquire
Brian Montgomery Barnwell, Esquire
Ka'Leya Q. Hardin, Esquire
Todd Barnes, Esquire

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Case No. 2023-CP-40-01759
Appellate Case No. 2023-001461

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

v.

3M Company; 4520 Corp., Inc.; A.O. Smith Corporation; A.W. Chesterton Company; ABB Inc.; Air & Liquid Systems Corporation; Aiw-2010 Wind Down Corp.; Amentum Environment & Energy, Inc.; Anchor/Darling Valve Company; Armstrong International, Inc.; Asbestos Corporation Limited; ASCO, L.P.; Atlas Asbestos Co; Atlas Turner, Inc.; AWT Air Company, Inc.; Bahnson, Inc.; Banner Industries International, Inc.; Banner Industries, LLC; Banner Industries Of N.E., Inc.; Barretts Minerals Inc.; Beaty Investments, Inc.; Bechtel Corporation; The Bonitz Company; Brand Insulations, Inc.; BW/IP Inc.; Canvas Ct, LLC; Cape PLC; Carboline Company; CB&I Laurens, Inc.; Cleaver-Brooks, Inc.; Consolidated Electrical Distributors, Inc.; Copes-Vulcan, Inc.; Covil Corporation; Crane Instrumentation & Sampling, Inc.; Crosby Valve, LLC; Daniel International Corporation; Davis Mechanical Contractors, Inc.; Dezurik, Inc.; Duke Energy Carolinas, LLC; Duke Energy Corporation; Eaton Corporation; Ellington Insulation Company, Inc.; Emerson Electric Co.; Fisher Controls International LLC; Flame Refractories, Inc.; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Gardner Denver Nash, LLC; General Boiler Casing Company, Inc.; General Cable Corporation; General Cable Industries, Inc.; General Electric Company; Gould Electronics Inc.; Goulds Pumps, Incorporated; Goulds Pumps LLC; Great Barrier Insulation Co.; Grinnell LLC; Hajoca Corporation; Howden 3 North America Inc.; HPC Industrial Services, LLC; IMO Industries Inc.; ITT LLC; Joy Global Underground Mining LLC; K-Mac Services Incorporated; Metropolitan Life Insurance Company; Mine Safety Appliances Company, LLC; MP Supply, Inc.; The Nash Engineering Company; Occidental Chemical Corporation; Paramount Global; Patterson Pump Company; PECW Holding Company; Pfizer Inc.; Piedmont Insulation, Inc.; Plastics Engineering Company; Presnell Insulation Co., Inc.; Redco Corporation; Riley Power Inc.; Rockwell Automation, Inc.; RSCC Wire & Cable LLC; Schneider Electric USA, Inc.; Sequoia Ventures Inc.; Spirax Sarco, Inc.; SPX Corporation; Stafford Insulation Company; Standard Insulation Company Of N. C., Inc.; Starr Davis Company, Inc.; Starr Davis Company Of S.C., Inc.; Sterling Fluid Systems (USA) LLC; TE Wire & Cable

LLC; Thermo Electric Company, Inc.; Union Carbide Corporation; Valves And Controls Us, Inc.; Velan Valve Corp.; Viking Pump, Inc.; Vistra Intermediate Company LLC; The William Powell Company Wind Up, Ltd.; Yuba Heat Transfer LLC; Zurn Industries, LLC, Defendants,

Of which, Asbestos Corporation Limited is the Appellant,

and

Peter D. Protopapas, Asbestos Corporation Limited's Duly Appointed Receiver, is Respondent.

PROOF OF SERVICE

I certify that a true copy of the Receiver for Asbestos Corporation Limited's Motion to Supplement the Record and For Sanctions for Fraud on the Court in this case has been served on the following, this 11th day of December, 2023, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to subsection (g)(3) of the South Carolina Supreme Court's March 20, 2020 Order, as amended May 29, 2020. Pursuant to subsection (g)(3) of the South Carolina Supreme Court's Order, service on the attorneys admitted pro hac vice is accomplished by service on the associated South Carolina lawyer.

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Attorneys for Receiver Peter D. Protopapas

December 11, 2023

From:	Dot Faulkenberry
To:	sbrown@ycrlaw.com; rhines@ycrlaw.com; tgandy@ycrlaw.com; dchumen@yahoo.com; Theile McVey; jrutkoski@kassellaw.com; Kevin K. Bell; Aaron Chapman
Cc:	Jon Robinson; Shanon Peake; Murrell Smith
Subject:	Tibbs v. Asbestos Corporation Limited, et al., Case No. 2023-001461
Date:	Monday, December 11, 2023 2:57:00 PM
Attachments:	Receiver"s Motion to Supplement the Record and for Sanctions for Fraud on the Court, 3.pdf Exhibits A-G combined, 2.pdf

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On behalf of Jonathan Robinson, please find attached for service a copy of the Receiver's Motion to Supplement the Record and For Sanctions for Fraud on the Court that we are filing today.

Thank you,
Dot

SMITH ROBINSON
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