FILE NAME: Cape Asbestos (CAPE)

DATE: 2023 Oct 13

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DOCUMENT DESCRIPTION: Affidavit of James T.H. Buxton Esq. [Legal - Tibbs Case Exhibit A]

STATE OF SOUTH CAROLINA	)	AFFIDAVIT
COUNTY OF CHARLESTON	)	

PERSONALLY APPEARED BEFORE ME, James T. H. Buxton, Esq., who deposes and stated as follows:

1. I have been requested by counsel for Third Party Plaintiff Cape PLC, by and through its duly appointed Receiver ("Plaintiff"), to express my professional opinion as an expert in matters relating to factual issues bearing on Plaintiff's causes of actions against third party defendants (the "Third Party Defendants") based upon personal jurisdiction, veil piercing, alter ego, amalgamation, and/or successor liability. Certain Third Party Defendants have filed motions to dismiss for lack of personal jurisdiction.

2. It is the Court's prerogative to make legal determinations, and the opinions expressed herein remain subject to that prerogative. This affidavit is meant to highlight facts and issues I believe are worthy of the Court's consideration with respect to the Plaintiff's claims and expressing opinions on those matters which I deem appropriate as an expert witness in light of my knowledge, background, training, and experience.

Background and Qualifications

3. My qualifications to give expert evidence include the following:

   a. I graduated from the University of South Carolina School of Law in 2002 with a Juris Doctorate, and I graduated from Princeton University in 1995 with an A.B. in History.

   b. I was admitted to the State Bar of Georgia in 2002, the Virginia State Bar in 2006, and the South Carolina Bar in 2007.

c. Immediately following graduation in 2002, I was as an attorney for Alston & Bird, LLP in Atlanta, Georgia, from 2002 until 2005, where I worked in the Capital Markets practice group and was primarily responsible for corporate governance matters, in a wide variety of public and private corporate transactions--including securities transactions regulated by the Securities Act of 1933, as amended, and the rules promulgated thereunder--and as ongoing outside general counsel for corporate clients. From 2005 until 2007, I worked as an attorney for Hunton & Williams LLP in Richmond, Virginia in a similar capacity.

d. In 2007, I moved to Charleston, South Carolina, and worked as an attorney at Young Clement Rivers LLP in the role of Special Counsel where I continued to represent clients in various business transactions and corporate governance matters.

e. In 2008, I taught Mergers & Acquisitions as an Adjunct Professor at the Charleston School of Law in Charleston, South Carolina.

f. On May 10, 2010, I started my own law practice, now known as Buxton & Collie, LLC, in Mount Pleasant, South Carolina, where I am currently employed. My practice focuses on corporate governance, private securities offerings, business transactions, and general corporate law matters.

g. Since 2018, I have served on the South Carolina Bar's Corporate, Banking & Securities Committee and am currently Vice Chair.

h. In 2018, I co-authored the *South Carolina Business Law Handbook: A Practical Guide for Business Owners, Entrepreneurs and Their Counsel*, published by the South Carolina Bar.

i. I serve on the Governing Council of the South Carolina Law Institute (the "SCLI") commissioned by the South Carolina General Assembly and based at the University of South Carolina School of Law. The SCLI is a law revision and advisory group to the state legislature, and I was selected to serve as an advisory representative with respect to corporate law matters.

j. I am familiar with the South Carolina Uniform Commercial Code, as amended, codified at S.C. Code §36-1-101 *et seq.* (the "South Carolina Uniform Commercial Code").

k. I am familiar with the South Carolina Business Corporations Act of 1976, as amended (the "South Carolina Business Corporations Act").

l. I am familiar with the South Carolina Uniform Limited Liability Company Act of 1996, as amended, codified at S.C. Code §33-44-101 *et seq.* (the "South Carolina LLC Act").

m. I am familiar with the South Carolina Uniform Limited Partnership Act, as amended, codified at S.C. Code §33-42-101 *et seq.* (the "South Carolina Limited Partnership Act").

Information Considered

4. In evaluating this matter, I have relied on the facts alleged in the Third Party Complaint, the materials of record filed with the Court by the parties involved, including the exhibits supplied by counsel for the Plaintiff referenced in its Third Party Complaint, available public records, the relevant above-listed statutes, and South Carolina and Federal case law related to various legal theories ascribed to the causes of action pleaded in this matter, including without limitation:

i. *Personal Jurisdiction.* This very Court has opined that personal jurisdiction "can be properly asserted over a corporation not physically present in the forum state if another with sufficient minimum contacts is acting as its alter ego." *Hagan v. Armstrong International*, 2020 S.C. C.P. LEXIS 649; *see also, In re: North Dakota Personal Injury Asbestos Litigation*, 737 F. Supp 1087, 1094 (D.N.D. 1990) (citing *Lakota Girls Scout Council, Inc. v. Havey Fund-Rais. Man, Inc.*, 519 F.2d 634, 637 (8th Cir. 1975). Further, this Court has acknowledged that "there is limited South Carolina case law on the issue of alter-ego theory conferring personal jurisdiction . . ." but "[i]t is a given that, when a court has engaged in traditional veil piercing, the court may exercise personal jurisdiction vicariously over an individual if the court has jurisdiction over the individual's alter ego company." *Id.* at *6. "The entire point of the alter-ego doctrine is that a defunct, dissolved or undercapitalized entity is responsible for causing injury. But because that entity is dominated or controlled by others and exercises no control of itself, others are then liable." *Hagan* at *14.

ii. *S.C. Code §36-2-803A and Due Process.* In the application of the South Carolina Long Arm Statute, if the statute authorizes jurisdiction, then the court must determine if that assertion is consistent with due process by testing for "two components: (i) minimum contacts and (ii) fairness." *Duong v. NA Transportation Servs. LLC*, 2019 U.S. District LEXIS 241092, *13; *see also, S.C. Code §36-2-803A.*

iii. *Specific Jurisdiction.* In considering specific jurisdiction, a South Carolina court must consider (1) to what extent did a defendant purposefully avail itself of the privileges of conducting activities in the forum state, (2) whether the plaintiff's claims arise out of those activities, and (3) whether the jurisdiction is reasonable. *See generally, Duong v. NA Transportation Servs. LLC*, 2019 U.S. District LEXIS 241092.

iv. *Amalgamation*, or the "single business enterprise" ("SBE") theory, applies when (i) "the various entities' operations are intertwined" and there is (ii) "further evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." *See Walbeck v. I'On Co.*, No. 28134 (S.C. Feb. 8, 2023) citing *Pertuis v. Front Roe Rests., Inc.*, 423 S.C. 640, 655, 817 S.E.2d 273,280-281; *see also, Kincaid v. Landing Dev. Corp.*, 344 S.E.2d 869, 874 (S.C. Ct. App.1986). In recognizing the SBE theory, the South Carolina Supreme Court agreed with the standard set forth by the Texas Supreme Court in a "two prong" test:

1. With respect to the first prong, such factors to be considered include, but are not limited to the following: "common employees, common offices, centralized accounting, payment of wages by one corporation to another corporation's employees, undocumented transfers of funds between corporations, and unclear allocations of profits and losses between corporations." *Pertuis*, 423 S.C. at 652; and

2. As to the second prong there must be evidence of wrongdoing such as "fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like." *Id.* at 654-655; *See also SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 445 (Tex. 2008).

v. *Piercing the Corporate Veil.* Those who abuse the corporate form may have the veil of limited liability pierced such that the individual owners of the respective corporate entities may be individually liable for their actions. *See generally, Sturkie v. Sifly*, 280 S.C. 453, 313 S.E.2d. 316 (1984). Factors a court applies in testing the veil piercing theory include whether the entity (i) was undercapitalized, (ii) failed to observe corporate formalities, (iii) paid no dividends, (iv) was insolvent, (v) lacked corporate records, (vi) had its corporate funds siphoned off by a dominant shareholder, and (vii) was used as a mere façade for operations of its dominant stockholders. *See Id.* at 457.

5. Based upon allegations asserted and the supporting materials referenced in the Third Party Complaint, it may be reasonably concluded that (i) the Third Party Defendants, directly or indirectly through their agents and ownership, purposely availed themselves of activities in South Carolina including, but not limited to, selling products they knew created harm, (ii) the sale and use of these products by South Carolina citizens gave rise to the causes of actions in the instant related matter of *John A. Tibbs and Margaret Tibbs v. 3M Company et al*, and (iii) South Carolina is an appropriate jurisdiction in which to resolve claims under that case caption as well as Plaintiff's claims.

6. This instant matter involves a unique scenario with respect to the duly appointed Receiver for Cape PLC, a successor in interest to the owner of North American Asbestos Corporation ("NAAC"), from which there was alleged to be a siphoning out of profits to overseas entities and leaving NAAC undercapitalized and underinsured, resulting in the inability to compensate South Carolina citizens harmed by Cape PLC and its direct and/or indirect agents. Further, as alleged in the Third Party Complaint, the Third Party Defendants received the benefit of siphoned funds from these respective entities which acted as direct and/or indirect agents of the Third Party Defendants.

7. It is one matter for a third party to plead facts necessary to support a viable claim for alter ego theory conferring personal jurisdiction. It is quite another matter when the facts pleaded for such a viable claim by the Third Party Plaintiff are made by and derived from within the complex

corporate structure itself. Often, the alter ego theory in corporate law is explored by courts in the parent-subsidiary relationship for vertical veil piercing because this is the manner in which it is most commonly presented before courts. It should not, however, limit the scope of review or the relative doctrine's applicability. Certain of the Third Party Defendants' motions rely on this narrow interpretation in stating that "corporate veil piercing can only be used 'to establish jurisdiction ***over a parent entity*** when the court has jurisdiction over the ***subsidiary entity***'. . ." and provides its own emphasis in citing *Duong*. *See, e.g.*, Anglo American US Holdings Inc. Motion to Dismiss, p. 3. In clinging to this added emphasis, Third Party Defendants want the Court to stop the analysis there and not only ignore the intentional actions of Cape PLC's parent entities, but the intentional actions of its grandparents, aunts, uncles, cousins and entity kin of any kind. A dismissal at this stage of pleadings would only embolden domestic and international abuse of our system of corporate jurisprudence in South Carolina, a system ultimately established for the benefit of its citizens and not for use in purposefully harming them. If jurisdiction is authorized over the subsidiary, NAAC, then the Court may exercise jurisdiction over Cape PLC as the successor in interest to NAAC's owner (even assuming Cape PLC's contacts alone were not sufficient to exercise personal jurisdiction). If Cape PLC itself had an alter ego, then logical jurisprudence follows that the Court may extend its exercise of jurisdiction in the corporate maze until there is a responsible party or parties found who actually in fact exert "control over the acts of the subsidiary." *Duong*, *31 (citing *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 61 (4th Cir. 1993)); *see also*, CAPE000141-143, CAPE 000152, CAPE000351-356, CAPE000550-551, CAPE000701, CAPE000728. In determining the ultimate controlling party or parties in circumstances involving a complex corporate structure as in this instant matter, a Court should extend its jurisdiction to the "outer limits allowed by the Due Process Clause," regardless of the potential multiple layers of alter ego entities or geographical boundaries. *Id.* at *13.

8. The amalgamation theory is focused on the intertwining of corporate relationships, which may be referred to as horizontal veil piercing. The Third Party Defendants in this instant matter want the world to believe, and the court to presuppose, that complexity and time are reasonable defenses to a repeated pattern of corporate misconduct. The facts as pleaded by the Plaintiff create a reasonable belief that the Oppenheimer/Anglo American/DeBeers/Charter conglomerate systematically and intentionally created myriad affiliate entities to perpetuate (i) the mining, manufacturing, distribution and sale of known harmful asbestos products to the world, (ii) purposefully undercapitalized and/or underinsured the affiliate entities, and (iii) siphoned funds through playing an intentional corporate shell game of domestic and international jurisdictional hopscotch to avoid existing and future liabilities. In reviewing the totality of the facts in this matter, Plaintiff has pleaded in detail the connected the ownership structure and the intertwined nature of the Oppenheimer/Anglo American/DeBeers/Charter corporate conglomerate. *See* CAPE000110-112; *see also,* Charter 1966 Annual Report, 1967 Annual Report, and 1970 Annual Report; *see also*, Anglo 1974 Annual Report, 1976 Annual Report, and 1979 Annual Report; *See also*, Anglo American Group 2022 Annual Report.

SUMMARY OF ENTITY MANIPULATION FACTS

9. The Defendants' respective Motions to Dismiss each assert that there is no general personal jurisdiction or specific jurisdiction through a corporate veil-piercing or alter ego theory; *however*, the Receiver for Cape PLC is asserting its causes of actions from its unique position *within* the very alleged amalgamated enterprise and supported by detailed corroborative facts in its referenced exhibits. *See* CAPE 000123, CAPE 000152, CAPE 000154, CAPE 000166-67, CAPE 000333. It

is my belief that the Third Party Complaint sets forth sufficient facts to state a prima facie case of (1) domination and control and (2) harm arising from the same for a potentially viable claim under an alter-ego theory among the amalgamated owners of Cape PLC.

10. The facts as alleged by the Plaintiff further appear sufficient to connect NAAC to South Carolina and Cape PLC as the successor in interest to, and exercising control over, NAAC. The facts as alleged further support that Cape PLC was the alter ego of a larger parent company conglomerate, the members of which were conceivably direct or indirect beneficiaries of the business activities of Cape PLC and NAAC while there was ongoing harm and wrongdoing suffered by citizens of South Carolina. To stop the veil piercing analysis at this initial phase of litigation with the facts as presented reasonably connecting the collective Third Party Defendants to the causes of action arising out of South Carolina, viewed in the light most favorable to the Plaintiff's claims, may be fundamentally unfair to the equitable adjudication of the harm to South Carolina citizens alleged in this matter, and validate and/or complete the Third Party Defendants' alleged total, decades-long collective liability avoidance scheme.

11. Further, when a complex liability avoidance scheme is put in place by a sprawling corporate enterprise to protect its assets from liability resulting from known foreseeable harm caused by the manufacture, distribution and sale of its products, then the entire total enterprise should be examined with respect to the Receiver's marshaling of assets to effectuate its responsibility. In this matter, I believe the Plaintiff asserts sufficient facts to establish Cape PLC as the successor in interest to the owner of NAAC; *further,* I believe Plaintiff also alleges sufficient facts—some even derived from annual reports and corporate records of Cape PLC itself and its controlling entities—to show that the amalgamated ownership of Cape PLC was intertwined and, *inter alia*, there was ongoing purposeful avoidance of existing obligations and known liabilities

arising from asbestos exposure. *See* CAPE000550-51, CAPE 000593, CAPE 001035. Therefore, this court is uniquely situated to consolidate discovery of the complex structure of the Oppenheimer/Anglo American/DeBeers/Charter corporate conglomerate once and for all with respect to the veil piercing analysis.

12. The opinions in this affidavit are given to a reasonable degree of certainty as a lawyer skilled in business corporations, partnerships, and limited liability companies, and are based specifically on the materials discussed above or the lack of evidence to the contrary of the opinions herein. I reserve the right to alter, amend, modify, reduce, or expand these opinions if and when additional information is presented for my review.

FURTHER AFFIANT SAYETH NOT.

James T. H. Buxton, Esq.

SWORN to before me this 13th day

of October, 2023.

Callie McLaughlin

Notary Public for South Carolina

My Commission expires: 06/29/2025

CALLIE MCLAUGHLIN
NOTARY PUBLIC
STATE OF SOUTH CAROLINA