FILE NAME: Cape Asbestos (CAPE)

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND JOHN A. TIBBS and MARGARET B. TIBBS, Plaintiffs, v. 3M COMPANY *et al.*, Defendants. ************************ CAPE PLC, individually and as successor in interest to CAPE ASBESTOS COMPANY LIMITED, by and through its duly appointed Receiver Peter D. Protopapas, Third-Party Plaintiff, v. ANGLO AMERICAN PLC, individually and as successor in interest to ANGLO AMERICAN CORPORATION OF SOUTH AFRICA LTD.; DE BEERS PLC, individually and as successor in interest to DE BEERS S.A., et al., Third-Party Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C/A No. 2023-CP-40-01759 In Re: Asbestos Personal Injury Litigation Coordinated Docket

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THE RECEIVER'S MOTION FOR SUMMARY JUDGMENT AGAINST THE CHARTER AND ALTRAD THIRD-PARTY DEFENDANTS

Pursuant to Rule 56 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 granting summary judgment in his favor with respect to successor liability and/or alter ego/veil piercing liability against (i) Charter Consolidated Ltd. ("Charter"), and ESAB Corporation ("ESAB"; together with Charter, the "Charter Third-Party Defendants"), and (ii) Mohed Altrad and Altrad Investment Authority S.A.S. ("AIA"; together with Mr. Altrad, the "Altrad Third-Party Defendants").[1]

I. INTRODUCTION

In 1977, Cape, the leading supplier of amosite asbestos to the United States found itself at a crossroads. Cape's international sale of asbestos made it the profit center of Charter, its parent within the broader network of interconnected companies with overlapping leadership, ownership, and holdings that formed the Oppenheimer Group System. But entering into settlement discussions

[1] Eleven entities within the Altrad Group, along with Mohed Altrad, its founder and President, were named as Third-Party Defendants. Seven of those 12 defendants failed to respond to the Third-Party Complaint: Altrad UK Ltd.; Cape Industrial Services Ltd., n/k/a Altrad Services Ltd. (since June 1, 2021); Cape Holdco Ltd.; Cape Industrial Services Group Ltd.; Cape UK Holdings Newco Ltd.; Sparrows Offshore Group Ltd.; and The Sparrows Group LLC. As a result, on December 6, 2024, the Court entered default against those seven non-responding Altrad entities, several of which—including Altrad UK Ltd.—have the same registered address of Cape Intermediate Holdings Ltd. (*i.e.*, the current name of the Cape Asbestos Company Ltd.) in England at 6-7 Lyncastle Way Barleycastle Lane, Appleton, Warrington. *See generally* Order Entering Default (December 6, 2023).

its first-ever asbestos-related product liability lawsuit in Tyler, Texas that summer, the threat of becoming embroiled in U.S. litigation loomed:

> We here, having heard more disturbing information recently about the value of Texas awards are rapidly coming to the conclusion that Cape and Cape Fibres should take a risk on the UK enforceability and withdraw, as in practice we cannot foresee any court or government here enforcing a judgment which would have enormous financial and employment repercussions, when we really cannot be said to have a moral responsibility and are simply victims of the US product liability cult.
>
> An urgent meeting is obviously essential as clearly you cannot indefinitely continue my instructions of taking no further steps in the proceedings. Suggest 21st and 22nd July in London.[2]

Cape did not face the decision of how to respond to this looming risk alone. It was a subsidiary in a much larger Group System controlled by the Oppenheimer family. Designed to dominate the mining industry, the Oppenheimer Group System employed a system of top-to-bottom control to manage what was, by that time, over 1,000 companies under the Anglo American Corporation of South Africa, Ltd. ("Anglo American") umbrella. While the Oppenheimers and their close allies ran the companies as one, the Group System afforded them the flexibility of walling off liabilities and evading responsibilities or authorities at critical moments such as this.

Given the Group System's *modus operandi*, Cape's predictable reaction to the looming risk of U.S. liability for the known harms of its asbestos was to (i) strip its wholly owned U.S. subsidiary, North American Asbestos Company ("NAAC"), of assets and shutter it; (ii) ostensibly flee the jurisdiction; and (iii) establish a new Lichtenstein corporation (still part of the Oppenheimer Group System) to mask Cape's identity in the United States so that it could continue to profit from asbestos sales to the U.S. market. Because of the Group System protections, these

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[2] Ex. 1, Cape General Counsel A. Penna telex to Lord Bissell in Chicago, July 4, 1977, Cape_Receiver_00133865.

decisions were effective. Cape and Charter have evaded their U.S. liabilities for the devasting harm caused to U.S. claimants exposed to Cape's asbestos for more than four decades.

Even now, decades later, Cape and Charter, along with their new owners—in Cape's case, AIA and Mohed Altrad, its founder, President, and majority owner, and in Charter's case, ESAB—continue to refuse to answer for the harm they caused in the United States. Through baseless legal challenges to this Court's appointment of the Receiver, to serial improper appeals of this Court's discovery orders, to an outright refusal to participate in the discovery process, the Charter and Altrad Third-Party Defendants persist in the scheme of litigation avoidance.

Even with the Charter and Altrad Third-Party Defendants' continued obstructionism, the evidence adduced by the Receiver is damning. It is also completely unrebutted, and further supported by the adverse inferences drawn by this Court as a result of their discovery misconduct. For the reasons set forth below, there is no genuine issue of material fact that could prevent summary judgment in the Receiver's favor with respect to his equitable claim of alter ego and veil-piercing liability.

II. RELEVANT BACKGROUND

A. Cape Is Responsible for NAAC's Fraud on the U.S. Market.

The story of Charter, Cape, and NAAC's conscious—and coordinated—decision to protect Cape from U.S. liability related to the sale of tens of thousands of tons of raw asbestos fiber into the U.S. market is not just about three companies. It is a story of a highly efficient and integrated operation that originated in the South African mining industry, spread internationally, made huge profits by suppressing the known health risks associated with asbestos, and successfully avoided the attendant U.S.-based liabilities for the harm caused by their operation.

Nobody questions the identity of the wizards behind the curtain: Ernest and Harry Oppenheimer. NAAC, Cape, and Charter are not separate. The Oppenheimers and their superexecutive committee controlled all of these companies. The evidence of top-to-bottom control is abundant—and completely unrebutted by the Charter and Altrad Third-Party Defendants—and extends to both daily activities and critical decisions. Indeed, there is no more compelling evidence of control and dominion than the directive Charter gave Cape that its profits were not Cape's to control. The Oppenheimer control over Charter and Cape here aligns fully with the analysis of the South African Group System submitted to this Court by Dr. Steven Press. Dr. Press's report outlines the hallmarks of the Group System control, perfected by the Oppenheimer family and clearly documented in the relationship between Charter and Cape.

Charter and Cape's use of the Group System to cover up their knowledge of the hazards associated with asbestos, as detailed in Dr. Barry Castleman's report and corroborated in NAAC's and Cape's historical documents, is a scheme for which Charter's and Cape's successors, Altrad and ESAB, should be held liable.

This story is most clearly told through NAAC due to NAAC's participation in the U.S. litigation system, as compared to Charter and Cape, which maneuvered to minimize their participation in that system. But the Group System permeated the relationships among Charter, Cape, and NAAC—all one and the same—and makes each company equally responsible for the bad acts of the group. These companies must be held responsible for their conscious choices to send tens of thousands of pounds of raw asbestos fibers into the U.S. market and strategically avoid those liabilities through complex corporate maneuvering. They cannot be permitted to continue to profit on their scheme.

B. The Oppenheimer Family Built an Empire Based on Group Control.

To dominate the South African commodity mining industry, the Oppenheimer family perfected the South African Group System. "Although the full picture of these corporate relationships remains murky, it is generally acknowledged that the Oppenheimers' reach extends to some six hundred corporations involved in everything from diamonds and gold to insurance and investment houses. The details of cross-ownership have never been fully revealed, but evidence indicates that ultimate control over all the companies remains firmly in the hands of E. Oppenheimer & Sons, a privately held family concern. For all practical purposes, then, the entire conglomerate functions under the direction and at the will of the Oppenheimers."[3]

This system, in which the Oppenheimer family could create an empire with only limited investments in hundreds of companies, is best described in the family's own words. Ernest Oppenheimer, the original Oppenheimer family patriarch explained, "it has been shown that the mining companies individually and the industry as a whole have benefited to an enormous extent through the presence of strong parent companies. The advantages of the [Group] system are manifold, the financing of the individual mining enterprises is facilitated thereby, the parent company provides the link between the various producing companies and promotes co-operation on matters of common interest, and, perhaps most important, by engaging a staff of highly skilled experts, is able to give valuable technical assistance."[4]

Harry Oppenheimer, Ernest's son, who controlled the family empire for decades after his father, further explained that "[t]he control of the parent company in each group over its associated concerns is normally fully effective."[5] "The controlling corporation undertakes the administration of all the companies in the group, provides centralized secretarial services, attends to the share

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[3] Ex. 2, Debora L. Spar, THE COOPERATIVE EDGE: THE INTERNAL POLITICS OF INTERNATIONAL CARTELS 76 (1994).

[4] Ex. 3, T.E. Gregory, SIR ERNEST OPPENHEIMER AND THE ECONOMIC DEVELOPMENT OF SOUTH AFRICA 98 (1962).

[5] Ex. 4, Union's Group Mining System, H.F. Oppenheimer, The Mining and Industrial Magazine of Southern Africa, Vol. 44, No. 9 (Sept. 1954), at Cape_Receiver_00215701-6.

transfer work and maintains a central buying department to ensure that the buying for all the group companies is conducted by experts."[6]

The Oppenheimer family's perfection of the Group System led to nearly unparalleled financial results. In its issue dated July 1, 1989, *The Economist* wrote: "By any measure, the Oppenheimers are the Rockefellers, Morgans and Gettys of South African all rolled into one. Anglo American, the holding company which the family created and still guides, is vast. It is at the center of the world's largest mining group, producing a fifth of the non-communist world's gold. Anglo also has a firm grip on the platinum market and towers over the South African economy with interests in industry, farming and finance. De Beers, its sister company, controls the world diamond market."[7]

C. The Operating Principles of the Group System: Minimum Investment, Maximum Control.

The Oppenheimer Group System's dominance was predicated on the theory of "minimum investment, maximum control."[8] The Group System relied on three pillars: (i) minimum investment—harness outside investment to spread risk, (ii) maximum control—run all companies as a single unit with top-to-bottom control, and (iii) illusion of separateness to limit liability and risk.

Minimum Investment. The Group System did not require full ownership of subsidiary entities—or even a controlling share. Dr. Steven Press, an expert on the Oppenheimer empire,

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[6] *Id.*

[7] Ex. 5, *The Oppenheimer Empire: South Africa's Family Affair*, THE ECONOMIST, July 1, 1989, 73-75.

[8] Ex. 6, Anglo American Corp., FORBES, June 15, 1973, 49, at Cape_Receiver_00215757; Ex. 7, A.J. Limebeer, "The Group System of Administration in the Gold Mining Industry," *Optima*, vol. 1, no. 1 (1951), 26-30.

describes the Oppenheimer Group System as a complicated web of perhaps hundreds of companies that "was typically not detectable in majority stock shareholdings."[9] Indeed, in an "off-the-cuff" portion of an interview in 1969, Harry Oppenheimer addressed "taking control" of "big enterprises," stating "[w]hen I say 'control,' I don't necessarily mean 51 per cent."[10] Instead, the Oppenheimer family owned a portion of each company in the web, but relied on outside investors to supply additional capital and, perhaps most importantly, to spread the risk.

Dr. Press's account of the founding of Anglo American Corporation of South Africa, Limited ("Anglo American"), a Third-Party Defendant that is not the focus of this Motion, best describes this investment strategy. As he explains, early in the company's history, Ernest Oppenheimer relied on an Anglo American investor to help guide Anglo American's purchase of a crucial diamond asset: "Late in the course of World War I, Ernest Oppenheimer received insider information concerning the fate of diamonds in German Southwest Africa—a German colony that South Africa had occupied after defeating German colonial forces here. A South African state official and former treasury secretary, H.C. Hull, who had been a participant in Anglo American's founding, indicated to Oppenheimer that the German rights holders in Southwest Africa were willing to sell their diamond claims."[11] Oppenheimer was able to purchase the diamond rights because of his American investors in Anglo American.[12] The Oppenheimers' focus on investment

[9] Ex. 8, Expert Report of Steven Press, Nov. 8, 2024 ("Press Report") at 12.

[10] Ex. 8, Press Report at 83 (citing Ex. 9 "I'm not keen on power," *Anglo: Supplement to the Financial Mail*, July 4, 1969, at Cape_Receiver_00215719-24).

[11] Ex. 8, Press Report at 42.

[12] Indeed, according to Press, in 1935, William Westrup, an Anglo American director, described the goal of attracting U.S. investors: "Mr. Honnold [cofounder of Anglo along with Ernest Oppenheimer] was a resident of the United States and was in close touch with various financial houses there. In consideration of his efforts to obtain American capital and introduce the Corporation's shares in America, Mr. Honnold was made a permanent director [...] *his remuneration was granted in effect on American capital*." *Id.* at 40, *citing* W. Westrup to Receiver

from the outside allowed them to leverage significantly more capital and capitalize on the social networks of those investors for additional investment and insider knowledge of new opportunities to build the empire.

Maximum Control. The Oppenheimers used certain hallmarks of control to dominate the companies within the group. It allowed the Group entities to function as a single unit, no matter how much the empire expanded. As Dr. Press describes, these hallmarks include the deployment of "super-directors to the boards of individual Group companies,"[13] maintaining "a culture of subservience among directors in individual companies within the Group," "dominat[ing] financing arrangements made by, and for, individual companies within the Group," and "siphon[ing] off profits and dividends from individual companies and moved them to entities at the head of the Group, which used this revenue stream to pay dividends to shareholders in the Group parent's holding companies."[14]

The following table of interconnected board memberships across NAAC, Cape, Charter, and Charter's parent, Anglo American, illustrates how Harry Oppenheimer deployed (and re-deployed) individuals across Oppenheimer Group companies to assert top-to-bottom control over them:

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of Revenue in Johannesburg, William L. Honnold Papers Collection (H.MSS.0381, Box 42, Folder 32. Honnold himself attested to the "strength" and importance of these American connections. *Id.* at fn. 105, *citing* Letter from Honnold to E. Oppenheimer, Aug. 17, 1943, William L. Honnold Papers Collection (H.MSS.0381, Box 42, Folder 32) (emphasis added).

[13] Ex. 8, Press Report at 12.

[14] *Id.*

1976	Anglo American	De Beers	Charter	Minorco	Cape	NAAC
Chairman	Harry F. Oppenheimer	Harry F. Oppenheimer	Sidney Spiro	W.D. Wilson	R.H. Dent	C.G. Morgan
Deputy Chairman	Sir Keith Acutt	N/A	Sir Philip Oppenheimer	Sidney Spiro	L.G. Stopford-Sackville	Max E. Meyer
	W.D. Wilson					
Directors	Sidney Spiro William Graham Boustred	Sidney Spiro Sir Keith Acutt	W.D. Wilson Murray Hoffmeyr	Z.J. de Beer G.A. Carey Smith	Sidney Spiro Geoffrey Higham	Robert Brook R.H. Dent (former)
	Z.J. De Beer	E.T.S. Brown	G.A. Carey-Smith	Murray Hoffmeyr	F.P. Parkes	Geoffrey Higham (former)
	J.N. Clarke	E.M. Charles	J.N. Clarke	F.S. Benning	B.3. Stevenson	R. Gaze (former)
	Murray Hoffmeyr	P.J.L. Crokaert	F.S. Berning	H.R. Fraser	M.W. Stevenson	
	D.A. Etheredge	E.G.J. Dawe	J.E.H. Collins	G.C. Fletcher	R. Gaze	
	G.C. Fletcher H.R. Fraser	M.H. de Kock H.B. Dyer	R.H. Dent H.R. Fraser	N.K. Kinkead-Weekes Sir Philip Oppenheimer	R.A.W. Caine M.A F. Newton	
	C.J.L. Griffith	G.C. Fletcher	J.O. Hambro	Harry R. Oppenheimer	J.G. Mackeurtan	
	N.K. Kinkead-Weekes	A.S. Hall	N.K. Kinkead-Weekes	J.G. Richardson	W.R. Doughty	
	G. Langton	L.G. Murray	Harry F. Oppenheimer	B.W. Pain	A.E. Hepper	
	D.G. Nicholson	Sir Philip Oppenheimer	J.G. Richardson	Gavin Relly	J.R. Sim	
	Nicky Oppenheimer Sir Philip Oppenheimer	A.E. Oppenheimer B.W. Pain	J. Ogilvie Thomson B.W. Pain	L.G. Stopford-Sackville J. Ogilvie Thompson	J.G. Richardson G.A. Carey-Smith	
	B.W. Pain	J. Ogilvie Thompson	Gavin Relly	Gordon H. Waddell	H.R. Fraser	
	Gavin Relly	A. Wilson	M.W. Thomas	E.P. Gush		
	F.S. Berning		L.G. Stopford-Sackville	Sir H. Tucker		
	L.G. Stopford-Sackville		P.C.D. Burnell	Sir J.E. Pearman		
	IJ. Oilvie Thompson			F.M.F. Ellis		
	Gordon H. Waddell E.P. Grush					
	A. Wilson (Alternate)					
	M.W. Stephenson (Alternate)					
	G.A. Carey-Smith (Alternate)					

Dr. Press describes this as "a visual depiction of board membership for certain 'Group' companies in 1976: Anglo American, De Beers, Charter Consolidated, Minorco (see later in this report), Cape Industries, and NAAC. Names marked in red on this chart are repeat directors within the Anglo American / De Beers Group. In a few cases, such as that of J.E.H. Collins, 'repeat' directors are marked red because of additional board memberships within the Group that are not depicted in the chart."[15] Harry Oppenheimer's trusted advisors were the engine of his Group System; they allowed him to run what appeared to be a web of entities as a single unit.

The Illusion of Separateness. This tenet of the Group System refers to maintaining separate corporate entities to create a mechanism to wall off potential risk, and to create a fluid structure to evade government investigation both in South Africa and elsewhere.

[15] *Id.* at 48.

Initially, these separations played an important role in maintaining a strong relationship with the South African government.[16] But it became clear that the illusion of separateness was critical in the United States, where antitrust laws threatened the Oppenheimers' De Beers diamond cartel. As Dr. Press recounts, "Around 1943, the US government believed that Anglo American[]was involved in an amalgamated enterprise with De Beers: the running of a global diamond cartel."[17]

Once W.L. Honnold, a trusted U.S. Oppenheimer advisor responsible for engaging American capital to build Anglo American, became aware that the U.S. government was intercepting his communications with Ernest Oppenheimer, "[t]here was a stark shift in Anglo American's documented corporate behavior . . . ."[18] Another Oppenheimer entity, Rand Selection, "received some of Anglo Group's diamond business without any real transaction taking place."[19] Rand Selection formed a new company under its control, Industrial Distributors Limited; as Ernest Oppenheimer reported to Anglo American's board, this new company would be the conduit for all industrial diamonds to be sold, separately from the sale of gem diamonds.[20] A new company was being created by Oppenheimer, and an old "alter ego" partially repurposed, with the effect of shielding one part of the amalgamated business enterprise (industrial diamonds) from another, and further obscuring the amalgamation of the business enterprise itself. Anglo American retained

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[16] *Id.* at 45 ("Partly, the nominal separation of Anglo American and De Beers was maintained because Oppenheimer, Anglo American, and De Beers were seen as 'English' concerns in a South Africa where Afrikaner nationalism was a potent force, and where the threat of antimonopoly action by the state was quite real in the 1930s and 1940s. To have combined all the Oppenheimer businesses formally into one unit would have brought unwanted attention.").

[17] *Id.* at 49.

[18] *Id.*

[19] *Id.* at 49-50.

[20] *Id.* at 50.

control, however, because of its "group system."[21] The Oppenheimer empire was able to continue its diamond sales—and effectively evade detection—because of its façade of separateness.

The appearance of separation, though highly effective, was a pure fiction. Harry Oppenheimer and his closest advisors used it as a façade for walling off liability and government investigation. This Group System model of control created by the Oppenheimers governed the relationships among Anglo, Charter, Cape, and NAAC: while separate on paper, they operated as a single unit.

D. Charter Controlled Cape.

As Cape's parent in the Group system, Charter controlled Cape's overall decision making on all issues, including over anything related to Cape's dividend. Francis Howard, a Charter employee who sat on Cape's board,[22] explained that Charter, not Cape, set the Cape dividend: "the directors of Cape, who were in the employment of Charter, would discuss within Charter with its executive committee that recommendation. There was no involvement of Cape personnel."[23] This testimony is consistent with documented Charter Executive Board meeting minutes. For example, the minutes dated October 28, 1969 included the following entry: "It was agreed that in the future Cape dividend recommendations would be discussed with Charter before being presented to the board."[24] Even Richard Dent, the one-time Cape chairman who attempted unsuccessfully to

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[21] *Id.* (noting that his reference to "alter ego" as found in historical document: "Rand Selection," *Financial Mail*, Feb. 25, 1972).

[22] Howard agreed that he was on the Cape board only because he was a Charter employee; his board membership would cease if he retired from Charter. *See* Ex. 10, Deposition of F. Howard, Nov. 13, 1980, at Cape_Receiver_00100173.

[23] *Id.* at Cape_Receiver_00100270.

[24] *Id.* at Cape_Receiver_00100266-7.

distance the company from Charter's control, agreed that Charter discussed and decided the Cape dividend before the issue was discussed at Cape board meetings.[25]

To set its subsidiary's dividend, Charter's financial department was responsible for reviewing subsidiary financial reporting, performing internal calculations, and recommending a dividend. The Charter financial department issued a memorandum to the Charter representatives on the Cape board to explain the rationale behind the dividend and to establish the dividend amount. An example dated October 25, 1971, just one day before a Cape board meeting, opens as follows: "This short note comments on the papers for the Cape Board Meeting to be held on 26th October. Charter is represented on the Board by Mr. S. Spiro, Mr. L.G. Stopford Sackville and Mr. J.G. Richardson."[26] The memo summarizes Cape's financials, including an analysis of the projected pre-tax profits compared to recent years.[27] Based on the analysis, the financial team recommended a 7.5% dividend, noting that Charter's portion "would amount to £196,000," the payment of which in December 1971 "should not present any problems."[28]

Charter's dominance over Cape also extended to secondments, another hallmark of group system control. As Dr. Press explains in one example of many, "Geoffrey A. Higham, as of 1967, was a director of Cape Asbestos – two years after Higham started with Cape Asbestos in 1965.

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[25] Ex. 11, Deposition of R. Dent, Apr. 7, 1981, at Cape_Receiver_00098922 ("I would not like to say that there was no occasion on which we did not discuss dividend possibilities with the Charter directors ahead of a Cape board meeting, but the operative decision was taken at an open meeting of the [C]ape board with all directors present.").

[26] Ex. 12, Memorandum, "The Cape Asbestos Company Limited," Oct. 25, 1971, at Cape_Receiver_00002569-70.

[27] *Id.* ("When it is borne in mind that Ordinary Dividends were not reduced in 1970 despite the 15% fall in earnings there seems little reason for thinking that there is any prospect of the 1971 distributions being increased because we are forecasting a return to profits close to the 1969 level.").

[28] *Id.*

Higham received payment for this work through Cape Building Products Limited, not Cape Asbestos. Later, after Higham became Chairman of Cape Industries PLC (the renamed Cape Asbestos), Higham received payment for his work from Charter Consolidated Services."[29]

Charter also relied on key executives to dominate Cape's board during crucial moments—another hallmark of group system control. By way of example, Stephen Pollen, an Oppenheimer insider, dominated the Cape board at significant moments in the company's history. Charter Executive Committee meeting minutes dated April 25, 1967 address Cape Asbestos, stating that "[Pollen] has suggested that an executive committee of the board should be appointed. Mr. R. Dent has agreed with this proposal and confirmed that [Pollen] should be appointed to the committee on its formation."[30]

Similarly, when the Charter executive committee determined in a November 13, 1972 meeting that tighter control of the "local management of subsidiaries" was warranted, meeting minutes indicated that "[i]t was therefore agreed that the subsidiaries would be retained directly, that an executive director of Charter would take over as chairman for Mr. Dent, who would remain a director; that local management should be strengthened; that greater financial control should be exercised by Charter." [31]

Consistent with the Group System, Charter's control over Cape was absolute in meaningful moments throughout Cape's history.[32] Indeed, several courts have found that Charter "controlled"

[29] Ex. 8, Press Report at 93.

[30] Ex. 13, Charter Consolidated Limited Executive Committee Minute No. 51/67, Apr. 25, 1967, at Cape_Receiver_00002539.

[31] Ex. 14, Charter Consolidated Limited Executive Committee Minute No. 124/72, Nov. 13, 1972, Cape_Receiver_00002554.

[32] Ex. 8, Press Report at 8.

Cape. *See Craig v. Johns Manville*, No. 82-0321, 1987 WL 10191 (E.D. Pa. Apr. 23, 1987), at *1 (list of other courts finding Charter controlled Cape). That conclusion also accords with this Court's adverse inferences as to Charter.[33]

E. Cape Controlled NAAC in Its Scheme to Maximize Sales from a Deadly Product and Siphon Proceeds Out of the United States to Protect Against the Reach of U.S. Creditors.

Just as Charter controlled Cape, Cape in turn controlled its U.S. subsidiary, NAAC. In contrast to Cape's sprawling South African operation, with thousands of mine workers employed at the asbestos mines, NAAC was small. NAAC's president described the company as a "one-man" operation, which consisted of "myself and four girls."[34] This small footprint protected Cape from exposure to U.S. tax liabilities and, more importantly, allowed for a quick collapse of the company's U.S. presence to escape looming tort liability.

From the beginning, Cape worked to ensure the appearance of separateness between it and NAAC, both for tax purposes and liability avoidance.[35] Behind this façade, Cape fully and

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[33] *See* Order Granting Cape Receiver's Motion for Sanctions, May 23, 2024 ¶¶ 20, 22 ("Charter[]owned, dominated, and controlled Cape and its subsidiaries, including NAAC, between 1965 and 1996, including with respect to their financing and capitalization."; "Charter[]and Central Mining seconded employees and other officials to work for Cape, or otherwise financed and spent resources for Cape, including operational, marketing, research and development, and lobbying activities.").

[34] Ex. 15, Deposition of C. Morgan, May 20, 1975, at Cape_Receiver_00095787-90; *see also* Ex. 16, Answers to Plaintiff's Request for Production, Nov. 24, 1982, at Cape_Receiver_00127971-72 (describing NAAC's lean staffing); Ex. 17, Letter to J. Morris, Dec. 3, 1975, at Cape_Receiver_00127267 ("Despite the volume of sales and profits of NAAC, our operation is a very small one, with only a total of 5 employees").

[35] *See* Ex. 18, Deposition of M. Meyer, Mar. 24, 1981, at Cape_Receiver_00098400-1 ("I came to the firm and I was a new partner at the time, but I was involved in tax work. One of the things involved in connection with [NAAC] was, since it was to be the wholly-owned subsidiary of an English company, a tax question and to be sure that tax questions were considered and be sure that it wasn't done in a wrong manner, make sure that [NAAC] was independent and that Cape wasn't doing business in this country.").

carefully controlled every facet of NAAC through its U.K. staff, including Ronald Dent, Richard Gaze, and Tony Penna. When day-to-day decisions required on-the-ground monitoring and decision making, Cape relied on its Chicago team of lawyers at Lord Bissell, led by Max Meyer. This U.K. and Lord Bissell team made every necessary decision for NAAC—from the content of its by-laws[36] to the makeup of its board,[37] the content of board meeting minutes,[38] the

[36] Ex. 19, Letter from M. Meyer to R. Cryor, Jan. 19, 1954, at Cape_Receiver_00133477-8 (responding to Dent's detailed inquiries into whether certain potential by-laws would be permissible under U.S. law).

[37] *See* Ex. 20, Letter from R. Dent to R. Cryor, Apr. 13, 1959, at Cape_Receiver_00133219-20 ("I have discussed this with Mr. Newton and we both feel that the best method would be to approach Lord, Bissell & Brook and to ask them whether they would be kind enough to nominate one or the other in accordance with their own wishes. Mr. Newton, I think, would like to write to John Lord himself asking him to do this, and subject to your reply he will do so accordingly."). Dent also rejected Cryor's suggestion as to an additional board member suggestion, Harper Boyd); *see also* Ex. 21, Letter from R. Dent to R. Cryor, Dec. 17, 1953, at Cape_Receiver_00231839-40 (Dent noting that he believed that the corporate secretary should be "a member of the firm of Lord, Bissell & Kadyk or the Accountants.").

[38] Cape sought tight control over the content of the NAAC board meeting minutes—requiring not only detailed financial information, but strict adherence to a form for the minutes themselves. Ex. 21, Cape_Receiver_00231839-40.

determination of its commission,[39] the process by which it was paid for its work,[40] the strategic

[39] *See* Ex. 22, Management Report to the Nov. 29, 1955 NAAC Board of Directors Meeting, Cape_Receiver_00232090-8 ("early in September, it became apparent that NAAC could not in the future expect to enjoy the same freedom in establishing profit margins on Amosite as in the past. Effective January 1, 1956, NAAC will have 2-1/2 per cent commission on all sales of fiber to established customers and 5 per cent on sales to new users. NAAC may not, under the terms of new agreement now in negotiation with the Mines, resell Amosite or Blue asbestos at prices and profit margins of its own choosing. Rather, we will be required to operate on a fixed price list established by the Mines"); *see also* Ex. 23, Letter from R. Gaze to R. Cryor, June 6, 1969, at Cape_Receiver_00134097 ("I feel that in any event I should emphasize that while the overall profit of N.A.A.C. is an important consideration, the actual movement of large tonnages of fibres must have priority."); Ex. 24, Letter from R. Cryor to R. Gaze, July 8, 1969, at Cape_Receiver_00134093-4 ("Whatever the financial arrangements between the Mines and NAAC that you may plan for the future, I hope you will keep in mind that we have an increasing burden here in the cost of doing business, in increased services, and the administration of these services. . . . Naturally, I accept your decision in this matter and we can revert to the 2.5% basis whenever you wish to have it become effective, although, as you point out, it is a source of some disappointment and concern to me.").

[40] *See* Ex. 25, Deposition of J. Holtze, Nov. 7, 1980, at Cape_Receiver_00097895-6 (Cape Asbestos Fibers paid NAAC commissions on a monthly basis that was "based on sales – on fiber shipped during a given month.").

practice of underinsurance,[41] the setting of dividends,[42] and the salaries of its employees.[43]

Cape's control over NAAC infiltrated every aspect of the company's operations. Charles Morgan, who joined NAAC in 1970 as company vice president, and served as president from 1975 until the company's closure in 1978, described Cape's Richard Gaze and Lord Bissell's Max

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[41] Officially, Cape had a company-wide policy to purchase insurance "at minimum cost consistent with adequate cover." Ex. 26, Memo, Oct. 10, 1975, at Cape_Receiver_00127206-8. But in reality, NAAC felt "pressure from [its] Home Office in London [that] forced [it] to seek lower rates" and choose carriers and policy terms based solely on short-term cost. *See* Ex. 27, Letter from NAAC to J. Kirk of Talbot Bird & Co. (Nov. 17, 1959), at Cape_Receiver_00231434-5; *see also* Ex. 28, Letter from Meyer to Gaze, June 29, 1977, at Cape_Receiver_00244712-3 (Having explained two quoted options for new coverage, Meyer noted, "[o]bviously the premiums involved would have exceeded the net income of the corporation in some years and would gradually have eaten up the net worth that has accumulated."[41] Having failed at an attempted to ask NAAC's prior year insurer to insure NAAC for one more year, Meyer noted, "we appear to be at the end of the rope at the present time.").

[42] *See, e.g.,* Ex. 29, Letter from R. Dent to C. Morgan dated Apr. 8, 1974, at Cape_Receiver_00133126 ("In view of the situation in the U.K., and having regard to the cash balances in N.A.A.C., we must ask you this year to increase the dividend to the sum of $120,000."); Ex. 30, Letter from R. Dent to C. Morgan, May 1, 1974, at Cape_Receiver_00133958 (stating "I would be grateful if the dividend requested [of $120,000] could be declared. There is no need for it to be paid immediately and it could be remitted in instalments, or in full at any time between now and the end of December 1974," even "if it involves an overdraft in NAAC," and dismissing Meyer's "argument" that "solely because of a dividend which is some $60,000 - $80,000 in excess of the normal, that there should need to be a bank loan 'more or less permanently on the books' amounting to $50,000 - $100,000."); Ex. 31, Letter from Gaze to Morgan, Apr. 15, 1975, Cape_Receiver_00133528 ("So far as the dividend is concerned, we should expect this to be not less than two thirds of the after tax profit, and a dividend of $150,000 is expected in 1975. The question of payment of the dividend should be delayed in this instance, until November.").

[43] While Cape controlled all NAAC employee salaries, the story of Cape's decision to reduce NAAC's West Coast agent, Jim Polizzi's, retainer amount best illustrates this facet of control. In a letter to Meyer, dated November 16, 1972, Dent wrote, "We have agreed that this should be reduced from the present $10,000 per annum to $5,000 per annum, to take effect from 1st January next year." Ex. 32, Letter from R. Gaze to M. Meyer, Nov. 16, 1972, at Cape_Receiver_00240205. Not only did Dent make the decision, but he also was the one to meet with Polizzi and inform him of the change. Dent noted, "I pointed out, of course, that this resulted from our need to keep down expenses in the United States and in the light of our reduced activity on the West Coast." *Id.* Dent asked Meyer to inform Morgan of this change: "I hope that you will be satisfied with the outcome of this discussion and if so, I should be grateful if you would inform Gerry and make the appropriate arrangements." *Id.*

Meyer in the context of their interview of him for a position at NAAC. Morgan described Max Meyer's many roles at NAAC, stating "[w]ell, he actually held three positions, I suppose I should say. He was a Director, he was the Acting President of North American Asbestos, and he was also legal counsel for North American Asbestos."[44]

Morgan described his second interviewer, Dr. Richard Gaze, as in charge of NAAC: "Well, it was my understanding that Dr. Gaze was on the Board of Directors, and he was, I guess, theoretically, in charge of this North American Asbestos organization, and he would be the gentleman that would probably say, 'Yes' or 'No' after I talked to him."[45] Morgan's impression of Gaze persisted after he began working for NAAC, with Gaze having the final say "[a]s far as the distribution of fibers."[46] The clearest evidence of Gaze's control over NAAC, though, was his role in NAAC after he resigned from the company's board. He held no office in NAAC, but continued to communicate with Morgan through written correspondence, telex, telephone, and visits.[47] Even after resigning, Gaze effectively still ran NAAC:

> Q. It would be fair to say – wouldn't it, Mr. Morgan – even after Gaze resigned from the Board of Directors you considered him your superior as it related to the discharge of your duties at North American Asbestos Corporation, isn't that correct?
> A. Yes.
> Q. He, in fact, ran the company, didn't he?
> A. It would appear he did.[48]

Cape's control over NAAC was sweeping and absolute.

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[44] Ex. 33, Deposition of C. Morgan, Oct. 31, 1980, at Cape_Receiver_00096079-81.

[45] *Id.* at Cape_Receiver_00096219.

[46] Ex. 15, Deposition of C. Morgan, May 20, 1975, at at Cape_Receiver_00095835.

[47] Ex. 34, Testimony of C. Morgan, Sept. 18, 1986, at Cape_Receiver_00133416-7.

[48] *Id.* at Cape_Receiver_00133417-8.

1. **Cape Knew of the Hazards of Asbestos, but Suppressed—and Acted Contrary to—that Knowledge.**

Throughout the era of the Oppenheimer Group System expansion, top executives were aware of the devastating health hazards associated with asbestos exposure. Indeed, over time they were met with stricter and more careful scrutiny in the U.K., where asbestos regulations first developed. Cape nevertheless did nothing to protect workers in South Africa or consumers in the United States – it only accelerated South African mining and U.S. sales.

a. Cape Had Every Reason to Be on the Leading Edge of Asbestos Hazard Knowledge.

In 1953, Cape's amosite asbestos mine achieved an output of 50,000 tons and employed 5,000 African workers.[49] Cape's South African mines produced 95 percent of the amosite and 60 percent of the crocidolite in South Africa.[50] In addition to its mining operations, Cape had five factories in England, and others in France, Italy, and South Africa. By 1974, Cape's subsidiaries sold its asbestos in the United States, Germany, Belgium, India, Sweden, and New Zealand.[51] There is no question that Cape's operations were sprawling.

There is also no question that Cape was aware of the hazards associated with breathing asbestos dust by the early 1930s. Dr. Barry Castleman, a chemical engineer and researcher specializing in health issues, has spent the last several decades working with public interest groups on the control of asbestos and chemical hazards. His research into Cape indicates that when the U.K. Factory Inspectorate "moved to develop regulations for the asbestos industry following the issuance of the first survey of the prevalence of asbestosis in asbestos factory workers, government

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[49] Ex. 35, Expert Report Barry Castleman, Nov. 8, 2024 ("Castleman Report") at 3.

[50] *Id.* (citing Ex. 36, Cape_Receiver_00133187).

[51] *Id.*

engineers met with representatives of the three largest UK asbestos companies, including Cape."[52] The U.K. Asbestos Industry Regulations took effect in 1933.[53]

Cape's participation in these discussions with the government came at the same time as health officials and the popular press reported on employees of the Cape Barking plant in East London who were suffering and dying from asbestosis and lung cancer at rates well above general population levels.[54] Cape had the technical know-how to understand the medical literature, with doctors and other medical advisers on staff.[55]

Through NAAC, Cape nevertheless continued mining and selling amosite and crocidolite asbestos to an ever-expanding client list in the United States and elsewhere well into the late 1970s.[56]

b. Cape Had Every Reason to Cover Up the Knowledge of Asbestos Hazards.

Information demonstrating the hazards associated with asbestos threatened Cape's survival. While "Cape returned a dividend to its shareholders in excess of twenty per cent per annum in each year from 1950 to 1965, its "most bountiful years were the two decades until 1976," *i.e.*, the period after medical research "had established conclusively the dangers of exposure to

[52] *Id.* at 1.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 3 (noting "Dr. Wyers, who worked for Cape until his death in 1956, published a report of his findings in 115 fatal cases. He noted that an excess mortality from cancer of the lung and pleura in cases of asbestosis had been reported by the UK Factory Inspectorate (13.2%, compared with 1.32% in silicotics) and that German authors had written about asbestos causing pulmonary cancer, too. In his series, 17 out of 115 (14.8%) died from cancers of the lung and pleura (Ex. 37, Asbestosis, *Postgrad. Med. J.* Dec. 1949 [Cape_Receiver_00193212-9]). The rate of pulmonary cancer at autopsy in the general population was about 1%.").

[56] *See* Ex. 38, NAAC Customer Lists, Cape_Receiver_00138265-82.

crocidolite and amosite."[57] Facing the ever-expanding body of medical research demonstrating the dangers of the products it sold, Cape determined the best path forward was an extensive cover-up both in South Africa and in the United States. This was carefully executed primarily by two Cape insiders: Dr. Walter Smither and Dr. Richard Gaze.

(i) Dr. Walter Smither's cover-up of the Pneumoconiosis Research Unit ("PRU") Investigation.

Dr. Walter Smither was Cape's senior medical officer beginning in the 1950s. He attended almost every major international conference regarding the health hazards of asbestos between 1960 and 1972,[58] gaining state of the art knowledge on asbestos and its associated health risks. As a result of this knowledge, he was the ideal candidate to travel to South Africa on behalf of Cape in June 1962. Just two months earlier, the South African PRU published a field study of the North Western Cape and at Penge in the Transvaal, which detailed the rates of asbestosis and cancer among asbestos mine workers in the area. The report made the following statement "based on proven fact": "an alarmingly high number of cases with mesothelioma of the pleura have been discovered among people who live or who have lived in the North Western Cape area, and that there is evidence to suggest that this condition is associated with exposure to asbestos dust inhalation which need not be industrial."[59]

Dr. Smither visited Prieska—the site of one of Cape's asbestos mines—where he described "the conditions around and about the mill are not good," and "it was obvious that quite a cloud of

[57] Ex. 39, Jock McCulloch, *Women Mining Asbestos in South Africa, 1893-1980*, 29 J. S. AFR. STUD. 2 (Jun. 2003), at Cape_Receiver_00248445.

[58] Ex. 40, Attendance at Conferences Etc. (1959-1972), at Cape_Receiver_00133479.

[59] Ex. 41, Pneumoconiosis Research Unit, Report on the Progress of the Mesothelioma Survey, Apr. 30, 1962, at Cape_Receiver_00248466.

dust was being produced and blown away by a fairly strong wind toward the town."[60] After local doctors advised Smither they had 10 active mesothelioma patients, Smither insisted that those patients be moved to Johannesburg at Cape's cost.[61] According to Smither, "[t]he advantage from the standpoint of the company is that these cases will be treated as a group, will be removed from the area of conflict, if one may call it that, and taken some hundreds of miles away."[62]

As Dr. Castleman explains, "Smither was concerned that discovery or documentation of so many cases in the Prieska hospital could further establish the lethality of crocidolite. The removal of the 10 Prieska patients was contrary to their best interests. They would endure a painful and frightening trip, be removed from their families who could not afford to go to Johannesburg, and there was no treatment for mesothelioma."[63]

Dr. Smither ultimately recommended that Cape ***suspend*** its support of the PRU Surveys: "My recommendation would be that the company should not support any future wide-ranging survey of the industry with a view to discovering either asbestosis or mesothelioma. The reason for this is that the company is well aware of the problem and has already some idea of its extent."[64] Following this recommendation, the PRU conducted no further asbestos surveys.

(ii) Dr. Richard Gaze's cover-up of the harm caused by amosite asbestos.

Dr. Richard Gaze, an employee of Cape beginning in 1943, served as Cape's Chief Scientist, and was an executive director of Cape beginning in 1961. He also served on NAAC's

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[60] Ex. 42, Visit to South Africa by W.J. Smither, Aug. 1962 ("Smither Report"), at Cape_Receiver_00248283.

[61] Ex. 35, Castleman Report at 5.

[62] *Id.*

[63] *Id.*

[64] Ex. 42, Smither Report at Cape_Receiver_00248286.

board of directors, and was spokesperson for the Asbestosis Research Council, which eventually purported to collaborate with "the Environmental Services Laboratory of Cape Industries Limited," set up by Cape in 1970, on monitoring techniques for asbestos dust.

As Cape's Chief Scientist, Gaze was responsible for educating customers on Cape's products. When Dr. Irving Selikoff produced a landmark 1964 study warning "that all the construction trades that worked alongside the insulators shared their risk, even the supervising architect," Gaze worked to distinguish Cape's asbestos fibers from that which already was identified as causative of disease and death. [65]

By March 1966, Gaze formulated Cape's response to valid concerns generated by Selikoff's report, which he characterized as a "scare":

> whether or not one accepts all of the clinical and statistical evidence concerning mesothelioma and its association with asbestos, it is a fact that <u>not one</u> authenticated case of mesothelioma has been associated with exposure to amosite anywhere in the world.[66]

In August 1966, the foregoing articulation became the company line to be used by Cape's salespeople.[67]

There was one problem with Gaze's statement: it was false, and he knew it. Gaze had spent seven years working at the Cape Barking plant in East London along with the then-plant manager, Anthony Mendelle, who described Gaze as a "very close" colleague. At a 1984 trial in Pennsylvania, Mr. Mendelle testified that in his time at the factory between 1956 and 1968,

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[65] Ex. 35, Castleman Report at 7.

[66] Ex. 43, Letter from R. Gaze to R. Cryor, Mar. 22, 1966, at Cape_Receiver_00134022-3 (emphasis in original).

[67] *See* Ex. 44, Confidential Memo, Aug. 19, 1966, at Cape_Receiver_00134000 ("The same careful research, to which I have referred, has so far revealed <u>not one</u> case of mesothelioma associated with exposure to amosite asbestos.").

Barking factory workers who worked in the amosite department were diagnosed with mesothelioma:

> Q. Mr. Mendelle, with respect to the Caposite department, where I think you testified amosite was used exclusively, were there any mesothelioma cases that came out of that department?
>
> A. Yes, many.[68]

Cape knew amosite asbestos caused mesothelioma. This and other concerns related to asbestos hazards ultimately led to Cape closing the Barking plant in 1968.[69]

2. **Charter, Cape, and NAAC Perpetrated a Fraud on the U.S. Market.**

Cape knew that asbestos was harmful decades before it established NAAC in the United States in 1953. That knowledge only deepened after it established NAAC; even as it experienced record sales of amosite and crocidolite fiber in the United States, Cape grew increasingly aware that people working at and living nearby its South African mines were developing and dying from mesothelioma, and that workers in the amosite-only portions of its Barking plant in East London were dying of mesothelioma and other asbestos-related diseases. Despite its longstanding understanding of the serious health hazards associated with asbestos, including mesothelioma and death, Cape suppressed this information, rejected initial consideration of a warning label, lobbied government agencies to accept less onerous standards, and made misleading public statements

[68] Ex. 45, Trial Testimony of A. Mendelle, Nov. 13, 1984, at Cape_Receiver_00116253.

[69] *Id.* at Cape_Receiver_00116235-6 ("Q. Mr. Mendelle, you said you closed the Barking plant in 1968; is that correct? A. Yes. Q. Do you know the reasons for that plant being closed? A. Yes Q. Did you close it or did you have orders to close it? A. I made recommendations to close it. Q. Why was the recommendation made? A. Because of the high incidence of asbestosis and death in the factory.").

minimizing the risk of asbestos.[70] And it continued to sell its products to the U.S. market through its agent, NAAC.

It was only after Cape risked exposure to U.S. litigation that it considered leaving the U.S. market. Even when it closed NAAC's doors, though, Cape could not resist the opportunity to sell asbestos to U.S. companies. To avoid tort liability, Cape created a new sales company with a Liechtenstein parent company.

a. Cape Engaged in a Purposeful Scheme to Insulate Itself from Liability While Continuing to Take Advantage of the U.S. Market.

Following the federal Fifth Circuit's landmark 1973 decision in *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, the threat of litigation was looming in the United States. The threat was made more real the following year, when Cape was sued by William Morris and more than 400 other asbestos workers in what became known as the Tyler, Texas Action.[71]

This U.S. litigation precipitated a flurry of communications between Cape and NAAC regarding the future of NAAC and a concerted effort to insulate Cape from liability:

June 20, 1975: "it is possible that we may wish to do something to change the identity of NAAC in order to avoid exposing the company unnecessarily. At the same time, I am determined to do everything possible to maintain a successful selling operation in the United States."[72]

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[70] *See* Ex. 46, Haroon Siddique, UK Asbestos Maker Withheld Information on Material's Risks, Court Papers Show (Mar. 20, 2022), https://www.theguardian.com/uk-news/2022/mar/20/uk-asbestos-maker-withheld-information-on-material-risks-court-papers-show#:~:text=%E2%80%9CThey%20clearly%20show%20that%20Cape,father%2C%20have%20lost%20their%20lives.

[71] Ex. 47, David Burnham, *Asbestos Workers' Illness—and Their Suit—May Change Health Standards*, N.Y. Times (Dec. 20, 1977), at Cape_Receiver_00248287-93.

[72] Ex. 48, Letter from Gaze to Morgan, June 20, 1975, at Cape_Receiver_00133112 ("thought I should send this to your home address so as to avoid unnecessary speculation in the office.").

June 25, 1975: "we feel that it may be advisable to change the identity of NAAC in an attempt to limit its and Cape's exposure to future U.S. litigation."[73]

July 4, 1975: to avoid future Cape liability for NAAC, Gaze and Higham resigned from the NAAC board: "Tony [Penna] has recommended that it would be as well for Mr. Higham and me to resign from these and other boards which could conceivably be involved in future actions. You will understand that the reason for this is to dissociate the Parent Company as fully as possible from the operating companies and that it does not imply any change whatever in the method of operation or the present responsibilities of individuals concerned, including yourself."[74]

July 15, 1975: Tony Penna sends Gaze and Higham's resignation letters to Max Meyer, noting "we feel that it would be a sensible precaution against Cape involvement in any future proceedings for Mr. Higham and Dr. Gaze to resign from the N.A.A.C. Board."[75]

October 3, 1975: Max Meyer writes a detailed strategy letter to Tony Penna, opening with, "The objective under consideration is an attempt to limit NAAC's and Cape's exposure to future United States litigation," and going on to discuss the potential liquidation of and replacement for NAAC.[76]

Indeed, in connection with that personal injury action, Cape and NAAC ultimately entered into a $1 million settlement in litigation, with NAAC contributing $100,000 toward settlement.[77] But rather than take responsibility for their tortious conduct, the Tyler, Texas litigation prompted Cape

[73] Ex. 49, Letter from A. Penna to M. Meyer, June 25, 1975, at Cape_Receiver_00133116-7 (observing that if Cape Canada were to replace NAAC, "we would probably change the name and ensure that shareholding was held through another *seemingly unconnected subsidiary* such as Amosa."). Ultimately, Cape elected not to use Cape Canada but did use a "seemingly unconnected subsidiary" in Lichtenstein called Associated Mines Company to escape detection and exposure, *see infra*.

[74] Ex. 50, Letter from R. Gaze to C. Morgan, July 4, 1975, at Cape_Receiver_00133328.

[75] Ex. 51, Letter from A. Penna to M. Meyer, July 15, 1975, Cape_Receiver_00133347.

[76] Ex. 52, Letter from M. Meyer to A. Penna, Oct. 3, 1975, at Cape_Receiver_00133925-30.

[77] *See* Ex. 52, Deposition of M. Meyer, Mar. 24, 1981, at Cape_Receiver_00098328. In addition to the $100,000 from NAAC, Cape contributed $1,000,000, and NAAC's insurers contributed $4,000,000. *See* Ex. 53, Deposition of A. Penna, Mar. 14, 1988, at Cape_Receiver_00132204. Cape admitted that some insurance was still available and that it was in the best interest of Cape companies, other than NAAC, to not respond to new litigation. *See* Ex. 54, Cape_Receiver_00127912; Ex. 55, Cape_Receiver_00127885.

to liquidate NAAC, create a new, disguised U.S. company to continue its U.S. operations, and openly refuse to participate in future U.S. litigation.[78] A single tort case against Cape was enough to begin the process of extracting Cape from the U.S. market.

NAAC was liquidated effective January 31, 1978.[79] Existing commercial debts were paid, with any remaining assets transferred upstream to NAAC's direct parent company at the time, Cape Industries Overseas Ltd.—a U.K. entity wholly owned by Cape Industries Ltd., formed in 1975 to create the ***appearance*** of separation.[80] As part of its overall scheme, and in light of Cape's funneling of cash from NAAC to overseas entities over many years, NAAC's assets at liquidation were minimal, especially when compared to the total wealth of Cape and the broader Oppenheimer empire.[81] NAAC's liquidation was central to Cape's liability-avoidance strategy, based on legal

[78] Ex. 56, Dec. 23, 1975 Correspondence from S. Milwid to A. Penna, Dec. 23, 1975, at Cape_Receiver_00127259-61. A memorandum laid out that "a new corporate arrangement is being made concerning entities which will sell asbestos to purchases in the Western Hemisphere" and that the purpose of doing so is to eliminate or reduce as much as much exposure as possible. *See* Ex. 57, Memo from M. Meyer to A. Sarabia, Jan. 23, 1978, at Cape_Receiver_00133618-20.

[79] *See, e.g.* Ex. 58, Letter from J. Holtze to J. Sparkes, Apr. 19, 1978, at Cape_Receiver_00134134 (April 1978 letter noting liquidation and requesting, "for safety's sake," that Cape officials stop sending accounting memoranda to former NAAC officials).

[80] *See* Ex. 59, Memo from M. Grear to M. Meyer, Dec. 30, 1980, at Cape_Receiver_00127960-62 (noting conveyance of assets); Ex. 58, Letter from J. Holtze to M. House, Oct. 7, 1975, at Cape_Receiver 00127204 (noting new entity).

[81] *See, e.g.,* Ex. 54, Letter from A. Penna to M. Meyer, Mar. 23, 1979, at Cape_Receiver_ 00127912 (Cape counsel writing in 1979 with respect to whether the remaining assets in the NAAC liquidating trust should be written off, soon after its creation); *see also* Ex. 60, Letter from S. Milwid to A. Penna, Mar. 7, 1979, at Cape_Receiver_00127909 (1979 correspondence noting that NAAC's auditor "agree[d] that the potential loss of all NAAC's outstanding assets is not material in the Cape Group context" (capitalization altered)); Ex. 61, Letter from S. Milwid to C. Morgan, May 24, 1978, at Cape_Receiver_00127882 (1978 correspondence noting judgment non-enforceability and "[auditor] advice to [Cape] that the loss of NAAC's outstanding assets is not material in the Cape Group context").

advice that no British or South African court would enforce a judgment against a Cape entity if it never appeared again in the United States.[82]

At the same time, the Oppenheimer entities, fixated on maximizing profits,[83] schemed to continue selling Cape asbestos—and many other Charter products[84]—in the United States.[85] Their scheme, which included establishing a Lichtenstein invoicing company, allowed the

[82] *See, e.g.*, Ex. 56, Letter from S. Milwid to A. Penna, Dec. 23, 1975, at Cape_Receiver_00127259-61 (1975 legal letter advising Cape on default-judgment risk); Ex. 55, Memo, S. Milwid to A. Penna, May 24, 1978, at Cape_Receiver_00127885 (1978 memorandum agreeing that it would be in the "best interests of Cape companies other than NAAC" to make "no response" to litigation); Ex. 62, Memo, S. Milwid to E. Burkholder, Nov. 28, 1984, at Cape_Receiver_00128026-8 (summarizing 1984 deposition testimony regarding litigation strategy).

[83] The decision to liquidate NAAC occurred notwithstanding consistent years of record profits from Cape's sale of asbestos fiber in the United States. *See, e.g.* Ex. 63, Charter, Annual Report (1976), at Cape_Receiver_00075720, Cape_Receiver_00075751-52 (reporting £10.2 million of operating profit "in spite of difficult trading conditions, with the "greatest increase" in improved profit "arising in the mining division, which raised total tonnage both mined and sold," even despite "substantial price increases"); Ex. 064, Charter, Annual Report (1977), at Cape_Receiver_00075769, -75773 (reporting another "record year" from Cape with pre-tax profit of £14.2 million, with the "mining division again perform[ing] exceptionally well").

[84] Ex. 065, J. Clarke Deposition, Apr. 21, 1983, at Cape_Receiver_00100736-7.

[85] *See* Ex. 53, Testimony of A. Penna, Mar. 14, 1988, at Cape_Receiver_00132232 (discussing Cape board meeting minutes from November 1, 1977, Penna testified, "It is clearly indicated in [paragraph] 9 that there was to be a reorganization of the selling arrangements following from the liquidation of NAAC.").

Oppenheimers to continue to profit from the lucrative U.S. market while hiding themselves from future U.S. asbestos plaintiffs.[86] In short, it was profits over people.[87]

Cape even disguised its scheme from NAAC's then-president, Charles Morgan. He testified that he was not made aware of the decision to close NAAC until the decision had been made: "I remember it well, I don't remember the exact date, but I remember it well. I think it was in late October of 1977. I was called down to Lord, Bissell & Brook and a Dr. Gaze, who was visiting, took me into a private room and gave me the big news. It was my very first indication. . . . He said that they had elected to discontinue distributing asbestos in this market and that they were liquidating [NAAC]."[88] When Dr. Gaze told Morgan that his employment was being terminated, Gaze was not in any executive position, nor was he a member of the board of directors of NAAC.[89] The news similarly came to Joan Holtze, NAAC's corporate secretary, "as an utter and absolute shock out of the blue."[90]

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[86] Due to the rising threat of civil litigation against Cape for its tortious and fraudulent conduct in hurting U.S. citizens, in 1975, Cape and its lawyers had to do "something to change the identity of NAAC" in order to avoid exposing [Cape Industries]." Ex. 48, Letter from R. Gaze to C. Morgan, June 20, 1975, at Cape_Receiver_00133112. *See also* Ex. 53, Testimony of A. Penna, Mar. 14, 1988, at Cape_Receiver_00132249 ("Q. With respect, what Cape wanted was to have the benefits of a presence in the United States of America without it being recognized, and hence the camouflage? A. That is an inference you could make if you chose to make it. . . . Q. What would be the would-be enquirer one was trying to disguise it from? A. The Would-be enquirer could potentially be plaintiffs in future U.S. asbestos litigations.").

[87] Indeed, NAAC could have purchased additional insurance—it had the resources—but doing so was viewed as too expensive. *See* Ex. 132, Minutes of Annual Meeting of Directors of North American Asbestos Corporation, Apr. 28, 1977, at Cape_Receiver_00133883; *see also* Ex. 53, Excerpts of Testimony of A. Penna, Mar. 14, 1988, at Cape_Receiver_00132233 ("As the shareholder in NAAC, Cape certainly did not want to be putting more and more money into NAAC to fight legal claims if the insurers were not handling them, and bearing in mind NAAC's revenues which were not large.").

[88] Ex. 66, Deposition of C. Morgan, Feb. 20, 1981, at Cape_Receiver_00095966.

[89] Ex. 33, Deposition of C. Morgan, Oct. 31, 1980, at Cape_Receiver_00096088.

[90] Ex. 25, Deposition of J. Holtze, Nov. 7, 1980, at Cape_Receiver_00097943.

Anthony Penna, in-house counsel for Cape with other senior roles in the Oppenheimer-related companies, orchestrated the plan to have Morgan open a new company—Continental Products Corporation ("CPC")—to perform the same facilitation services for Cape that NAAC had previously performed, with only "a difference in form."[91] It was plug and play, pure and simple.

CPC's offices were in the same building as NAAC had previously had its offices: "North American Asbestos was on the 29th floor and Continental Products Corporation took a lease on the 12th floor."[92] All of the NAAC filing cabinets that had been on the 29th floor had moved to the 12th floor, and all of the NAAC employees—Joan Holtze, Jean Canzoneri, and Sue Purrington—moved with Charles Morgan to CPC.[93] CPC also took over the NAAC employees' pension plan.[94] Joan Holtze testified that she sat at the same physical desk at CPC as she had when she worked for NAAC.[95]

Even before NAAC closed, Morgan reached out to customers to let them know of the formation of CPC, thereby ensuring a seamless sales transition between the companies.[96] To ensure

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[91] Ex. 53, Testimony of A. Penna, Mar. 14, 1988, at Cape_Receiver_00132247 ("It was a difference in form; and, as I have said, the Morgan company, new company, CPC, did carry on very much the same role that NAAC had carried on in trading terms."); *id.* at Cape_Receiver_00132236 ("Our mining companies wished to continue selling asbestos in the United States, yes. . . . There needed to be an organization which could liaise with the customers."), *id.* at Cape_Receiver_00132247 ("Certainly, Howard Tanner, the Sales Director of the South African mining companies was extremely keen to ensure that sales to America, that is there could be some continuation of sales to American customers.").

[92] Ex. 66, Excerpts of Deposition of C. Morgan, Feb. 20, 1981, at Cape_Receiver_00095991.

[93] *Id.* at Cape_Receiver_00095992-3.

[94] *Id.* at Cape_Receiver_00096066.

[95] Ex. 67, Deposition of J. Holtze, Apr. 12, 1979, at Cape_Receiver_00097838-9.

[96] Ex. 66, Deposition of C. Morgan, Feb. 20, 1981, at Cape_Receiver_00096022. ("I advised them that North American Asbestos was being liquidated, it was no longer to be in the position to supply them with fiber, I had made a connection where I thought I could supply them with fiber, I would

the success of the new venture, Morgan testified that CPC received a $12,000 check "[c]are from North American Asbestos" to start the company.[97] Once Morgan agreed to establish CPC, Cape's lawyers at Lord Bissell drew up the incorporation documents.[98] Rather than establishing a direct connection between the newly formed CPC and a Cape-named company, Penna spearheaded the creation of a Liechtenstein company, Associated Minerals Corporation ("AMC"), a seemingly unrelated entity, which was in truth an Oppenheimer subsidiary. As Penna described, "everyone was concerned whether they were mining companies or Cape Industries or any company that was a party to these sales should not by its actions put either the mining companies or Cape at risk."[99] "The Lichtenstein company was a separately constituted company but it certainly had no direct employees of its own. . . . It was primarily an invoicing company."[100] Cape's fingerprints were all over the deal. Confronted with evidence, Penna was forced to admit, "Yes, it seems to be contemplated that Cape Asbestos Fibres would subscribe the initial capital."[101]

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like their consideration very much."); Ex. 66, Deposition of C. Morgan, Feb. 20, 1981, at Cape_Receiver_00096003, Cape_Receiver_00096063-4 ("Q. When Tony Penna contacted you on behalf of the Lichtenstein corporation you knew, did you not, in fact he was actually contacting you on behalf of Cape Asbestos? A. No, Sir, I did not know that."); *id.* at Cape_Receiver_00096064 ("Q. Do you know who owns the Lichtenstein corporation? A. No, Sir. Q. Has anyone ever suggested to you that Cape Asbestos has some ownership in the Lichtenstein corporation, Associated Minerals Corp.? A. Definitely not. Q. has anyone ever suggested to you that any of the principals of Cape Asbestos had some interest in that Liechtenstein corporation? A. No, Sir.").

[97] Ex. <u>66</u>, Deposition of C. Morgan, Feb. 20, 1981, at Cape_Receiver_000 96000.

[98] *Id.* Cape_Receiver_000 95988 ("Q. Who drew the Articles of Incorporation? A. Mr. Max Meyer. At least I asked him to do this work for me. Who actually did the work I couldn't say.").

[99] Ex. 53, Excerpts of Testimony of A. Penna, Mar. 14, 1988, at Cape_Receiver_00132246.

[100] *Id.* at Cape_Receiver_00132239-40.

[101] *Id.*

While Cape averred that Morgan was well aware of the connection to Cape,[102] in reality, the true scheme was on a need-to-know basis, and Morgan did not need to know anything. He was simply Cape's U.S. puppet. Morgan testified that Tony Penna "said he was the attorney representing Associated Minerals Corporation."[103] Morgan testified that he did not know that Penna was contacting him on behalf of Cape.[104] He did not know who owned AMC, and no one had suggested to him that there was a relationship between Cape and it.[105] In this way, Cape escaped liability, but continued selling asbestos fibers to virtually the same contact list using a shell game and companies in Liechtenstein and South Africa to conceal any connection between it and the United States.

b. Charter Participated in the Fraud.

Cape, of course, did not act in a vacuum. It was part of the Oppenheimer Group System and was the profit generating center of Charter. Charter relied on Cape for dividends and service fees, the payment of which were premised on Cape making a profit. Importantly, Charter was a

[102] *Id.* at Cape_Receiver_ 00132215 ("Q. And also the reason why you did not wish the new arrangements [related to Cape's involvement in setting up CPC] to become publicly known? A. Yes, I did. I think that it probably omitted one additional reason – that certainly Mr. Morgan in his new entity would not have wanted it to be disclosed that he was dealing with a company that was still related to Cape.").

[103] Ex. 66, Deposition of C. Morgan, Feb. 20, 1981, at Cape_Receiver_00096003.

[104] *Id.* at Cape_Receiver_00096063-4 ("Q. When Tony Penna contacted you on behalf of the Lichtenstein corporation you knew, did you not, in fact he was actually contacting you on behalf of Cape Asbestos? A. No, Sir, I did not know that.").

[105] *Id.* at Cape_Receiver_00096064 ("Q. Do you know who owns the Lichtenstein corporation? A. No, Sir. Q. Has anyone ever suggested to you that Cape Asbestos has some ownership in the Lichtenstein corporation, Associated Minerals Corp.? A. Definitely not. Q. Has anyone ever suggested to you that any of the principals of Cape Asbestos had some interest in that Liechtenstein corporation? A. No, Sir.").

holding company which conducted virtually all of its business through subsidiaries like Cape, and the Charter made money through dividends and the like from such investments.[106]

Cape's board, whose membership included Charter employees, was made aware of the progress of the Tyler, Texas litigation against Cape, and of Cape's decisions related to its continued sale of asbestos in the United States. Geoffrey Higham, who served as both a Cape board member and a Charter employee (as well as a Cape employee and a NAAC board member at various points), testified at deposition that he was aware plans were being made to continue to sell asbestos in North America as soon as NAAC closed: "I mean clearly I would have known generally that it was being done and it was clearly necessary that it should be done."[107] He further testified, "I think all of this is entirely consistent with Cape's position that it did not feel liable for damage to people in the United States caused by asbestos, which it had supplied through subsidiaries, but felt that employers here should be picking up that tab. Equally, I think Cape felt that the supply of asbestos was not of itself an iniquitous thing to do since, if handled properly, it is not dangerous."[108]

At another deposition ten years later, Higham testified as follows: "[w]e didn't like the rules, we didn't think that it was a reasonable burden to place upon a supplier of material that he should control how the material was used. We thought, we still think, I feel very strongly that it was a totally ridiculous way of proceeding and so, we withdraw. We say, fine, we don't like the rules, we don't like that playing field so we won't have any more to do there."[109]

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[106] Ex. 68, Deposition of G. Higham, Oct. 17, 1986, at Cape_Receiver_00096909.

[107] *Id.* at Cape_Receiver_00096935.

[108] *Id.* at Cape_Receiver_00096936.

[109] Ex. 68, Deposition of G. Higham, Oct. 24, 1996, at Cape_Receiver_00097120. This testimony was consistent across Cape's board of directors. *See, e.g.*, Ex. 10, Deposition of F. Howard, Nov. 13, 1980, at Cape_Receiver_00100178-9 ("I think it was something along the lines that there were cases against the company which would eventually exhaust its funds and, therefore, there was no further purpose in continuing the company's operations."); Ex. 69, Deposition of A. Hepper, Oct.

Indeed, Charter reported on Cape's liability avoidance scheme in its 1982 Annual Report:

> Cape has received legal advice that default judgments, in certain of which plaintiffs have been granted damages totalling approximately US$57 million, and any other judgments obtained in the United States in such actions against Cape group companies will not be enforceable in the United Kingdom. The directors believe, in light of legal advice received, that the outcome of all the actions against Cape and Charter and the obligations retained by Cape are unlikely to have any material effect on Charter's financial position, and accordingly no provision for them has been made.[110]

c. Cape Pivots to Asbestos Abatement.

In 1982, Cape purported to cease all manufacturing of asbestos products.[111] Cape then made the incredible about-face into "[a]sbestos management and removal," leveraging its history of dominance in asbestos manufacturing and distribution.[112] It later evolved into a scaffolding company primarily for the oil and gas industry.[113]

F. Altrad and ESAB Acquire Cape and Charter, Respectively.

Although neither individually was present for the initial decision to perpetrate the liability avoidance scheme that has worked a fraud on the U.S. market, both Altrad and ESAB benefitted

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6, 1986, at Cape_Receiver_00095547 ("I don't think the company were in a – the company felt that they were not responsible for other people's employees. They were responsible for employees in the United Kingdom and they were adopting a responsible attitude in that regard. They were not in a position financially to withstand claims the size that were being mounted in the United States.").

110 Ex. 70, Charter, Annual Report (1982), Cape_Receiver_00076050.

111 Ex. 71, Cape_Receiver_00244898-9, *Cape Website: Our History* (May 17, 2013), *available at* https://web.archive.org/web/20130517130040/http:/www.capeplc.com/about-cape/our-history.aspx (last visited Nov. 8, 2024).

112 Ex. 72, Cape_Receiver_00244891-2, *Cape Website: Our Services, Insulation* (Oct. 20, 2012), *available at* https://web.archive.org/web/20121020173812/http://www.capeplc.com/services-and-markets/our-services/insulation.aspx (last visited Nov. 8, 2024).

113 Ex. 71, Cape_Receiver_00244898-9, *Cape Website: Our History* (May 17, 2013), *available at* https://web.archive.org/web/20130517130040/http:/www.capeplc.com/about-cape/our-history.aspx (last visited Nov. 8, 2024).

from and bear responsibility for that decision—as well as for the litigation avoidance scheme that they actively continue today, including in this action.

1. *The Altrad Owners Acquired 100% of Cape and Are Responsible for Cape.*

Since 2017, Cape has been part of the Altrad Group, a self-described "world leader in industrial services with a turnover of £5 billion per year."[114] In particular, on or around October 9, 2017, AIA, through Altrad UK Ltd. (controlling Cape UK Holdings Newco Ltd.), acquired Cape for £332 million, and has controlled it since that time.[115] AIA, the head of the Altrad Group, purchased Cape through its wholly owned subsidiary, the defaulted Third-Party Defendant Altrad UK Ltd., which (i) was incorporated in June 2017 for the purpose of acquiring Cape, (ii) acts as a "wholly owned subsidiary of AIA [that has been] financed by AIA through a current account," and (iii) also "proceeded to refinance Cape's debt" as part of the acquisition.[116] AIA publicly touted the acquisition of Cape as an "exceptional opportunity" to acquire "one of the world's leading providers of services to industry."[117]

The Altrad Group—and thus Cape—is controlled by its President and Founder, Mohed Altrad, the so-called "Scaffolding King" who was convicted of corruption charges in a French

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[114] Ex. 73, Correspondence from Winston & Strawn London LLP to Peter D. Protopapas, at 2 (Aug. 30, 2024).

[115] Ex. 74, Altrad, Annual Report (2017), at Cape_Receiver_00040530 ("The acquisition of Cape PLC shares was carried out through the intermediary holding company Altrad UK, a wholly owned subsidiary of AIA and financed by AIA through a current account."); *see id.* at Cape_Receiver_00040529.

[116] Ex.75, Certificate of Incorporation of a Private Limited Company, Altrad UK Limited (June 1, 2017), at Cape_Receiver_00185738-72 (identifying AIA as owner of all shares and Mohed Altrad as sole "Individual Person with Significant Control" and as Company Director 1 and Chairman); Ex. 74, Altrad, Annual Report (2017), at Cape_Receiver_00040530-1;; Reuters, Altrad Investment to Buy UK Oil Services Firm Cape for 332.2 Mln Pounds (July 7, 2017), https://www.reuters.com/article/cape-ma-altrad-investment/altrad-investment-to-buy-uk-oil-services-firm-cape-for-332-2-mln-pounds-idUSL4N1JY2KG.

[117] Ex. 74, Altrad, Annual Report (2017), at Cape_Receiver_00040529.

court in 2022.[118] Upon Altrad UK Ltd.'s formation in 2017 for the purpose of the acquisition of Cape, and continuing after the acquisition, Mr. Altrad was director of Altrad UK Ltd. and later a director of Cape UK Holdings Newco Ltd. and Cape Industrial Services Group Ltd.[119] Indeed, in the year the Altrad Group acquired Cape, Mr. Altrad "h[e]ld 77.78% of the [Altrad Group's] shares."[120] Since AIA's acquisition of Cape, Mr. Altrad's control has only grown. The annual reports of Altrad UK identifies AIA as being "controlled by Dr M Altrad."[121] Further, as of September 30, 2023, Mr. Altrad controlled 97.60% of the Altrad Group.[122]

Altrad purchased Cape fully aware of Cape's asbestos liabilities.[123] When Altrad purchased Cape in 2017, it stated its intention to ensure that members of the Cape Group continued

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[118] *See* Ex. 76, Altrad, Annual Report (2022), at Cape_Receiver_00040825; *see also* Ex. 77, Gaspard Sebag & Tara Patel, *Billionaire Scaffolding 'King' Guilty of Bribing Rugby Boss*, Bloomberg (Dec. 13, 2022) (reporting Mr. Altrad's 2022 conviction of bribery, influence peddling, and misuse of corporate assets charges, punished with an 18-month suspended jail term and €50,000 fine), https://www.bloomberg.com/news/articles/2022-12-13/scaffolding-billionaire-convicted-of-corruption-over-sponsorship#xj4y7vzkg.

[119] Ex. 75, Certificate of Incorporation of Altrad UK Ltd., June 1, 2017, at Cape_Receiver_00185738 (showing creation of company one month prior to media reports of Cape takeover); Ex. 74, Altrad, Annual Report (2017), at Cape_Receiver_00040530 ("The acquisition of Cape PLC shares was caried out through the intermediary holding company Altrad UK, a wholly owned subsidiary of AIR and financed by AIA." (modified from all caps)); *see also* Ex. 78, Termination of a Director Appointment of Altrad UK Ltd., Nov. 11, 2017, Cape_Receiver_00185779; Ex. 79, Termination of a Director Appointment of Cape UK Holdings Newco Ltd., Oct. 29, 2020, Cape_Receiver_00187939; Ex. 94, Termination of a Director Appointment of Cape Industrial Services Group Ltd., Oct. 29, 2020, Cape_Receiver_00187592.

[120] Ex. 74, Altrad, Annual Report (2017), at Cape_Receiver_00040519.

[121] Ex. 80, Altrad UK Ltd., Annual Report (2021), at Cape_Receiver_00185906.

[122] Ex. 81, Altrad, Annual Report (2023), at Cape_Receiver_00040879.

[123] Altrad's 2017 Annual Report acknowledged Cape's establishment (pursuant to a Scheme of Arrangement) of a compensation fund in 2006 for its employees who were exposed to asbestos. Ex. 74, Altrad, Annual Report (2017), at Cape_Receiver_00040530; *see also* Ex. 82, The Scheme Of Arrangement, June 9, 2006, Cape_Receiver_00104532-56.

to fund their commitments to the Scheme of Arrangement established in 2006 (the "IDC Scheme") to address certain asbestos liabilities:

> Altrad has undertaken to the IDC Scheme Directors and the IDC Scheme Shareholder that, whilst it intends to explore collaboratively with the IDC Scheme Directors and the IDC Scheme Shareholder (subject always to the appropriate consent of the IDC Scheme Directors and the IDC Scheme Shareholder) certain administrative revisions or clarifications to Cape's constitutional documents to facilitate intra-group transactions between members of the Enlarged Group post-Acquisition and to assist financial reporting following the Acquisition, ***it intends to procure that each member of the Cape Group honours its obligations under, or in connection with, the IDC Scheme (including with respect to the funding commitments for future liabilities of the IDC Scheme, the current IDC Scheme administrative arrangements and all related contractual obligations to which members of the Cape Group are subject) following completion of the Offer***.[124]

In the years since the acquisition, Altrad has continued to acknowledge Cape's asbestos liabilities—and reaffirm its responsibility for them. For example, in its annual report for the year ended August 31, 2022, Altrad Services Ltd. (a member of the Altrad Group and another Third-Party Defendant against which default has been entered) not only acknowledged Cape's responsibility for harm from asbestos exposure, reporting that the Altrad Group had set aside £118 million to address certain ***non-U.S.*** historical claims relating to asbestos exposure, but also disclosed AIA's letter of support of it as a going concern.[125] That 2022 annual report stated that

[124] Ex. 83, Recommended Cash Offer for Cape plc, Cape_Receiver_00104914-40 (emphasis added).

[125] Ex. 84, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2022, at Cape_Receiver_00248438 ("The Group continues to receive claims, from both individuals and insurance companies, in connection with historical alleged exposure to asbestos. Where claims are determined to have merit, the costs are provided for and claims are settled in the ordinary course, otherwise claims are defended."); Ex. 85, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2023, at Cape_Receiver_00248371 (referring to the letter of support from AIA, which "confirms continuing support for the going concern period until 30 April 2025").

AIA "manages risk at a Group level"[126] and further acknowledged that "[m]any of [AIA's] operating environments have associated health and safety risks," including Cape: "The Company [Altrad Services Ltd.] is maintaining a provision in respect of lodged and future industrial disease claims for which the Board of Directors of Cape plc believes the Group to be liable, arising on alleged exposure to previously manufactured asbestos products."[127] The Altrad Group thus made a £118.1 million provision of funds to address certain non-U.S. historical asbestos claims that reportedly "captured all expected material industrial disease scheme liabilities for which the Board believes ***the Group may become liable***" (the "Provision of Funds").[128]

Most recently, AIA's 2023 Annual Report acknowledged its asbestos liability and affirmed its commitment to pay a limited number of claims pursuant to a court order:

> When Altrad acquired Cape in 2017, the acquired business had well disclosed outstanding claims related to the manufacture and distribution of asbestos in the mid twentieth century and the resulting damaging health consequences of exposure, leading to related industrial diseases including mesothelioma. Altrad . . . ***is fully committed to settling claims that are determined to have merit*** pursuant to Cape's court approved mechanism for settling such claims. An amount of £ 118 million has been paid or set aside for the settling of valid claims.[129]

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[126] Ex. 84, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2022, at Cape_Receiver_00248391.

[127] *Id.* at Cape_Receiver_00248392.

[128] *Id.* at Cape_Receiver_00248438 (emphasis added); *see also* Joshua Stein, *Altrad Makes £118m Provision for Asbestos Claims*, Construction News (Apr. 14, 2023), *Available at* https://www.constructionnews.co.uk/health-and-safety/altrad-makes-118m-provision-for-asbestos-claims-14-04-2023/#:~:text=Altrad%20has%20set%20aside%20%C2%A3,historic%20alleged%20exposure%20to%20asbestos

[129] Ex. 81, Altrad, Annual Report (2023) at Cape_Receiver_00040862 (emphasis added). This mechanism for payment of claims, of course, does not account for claims by U.S. plaintiffs; it is limited to Cape's former U.K. employees.

In the years since it acquired Cape, AIA also has exercised operational control over Cape on issues ranging from branding—as reflected by its renaming of Cape entities, including defaulted Third-Party Defendant Altrad Services Ltd. (f/k/a Cape Industrial Services Ltd.)—to risk management.[130] As part of its risk management for the Altrad Group, AIA has continued Cape's policy of litigation avoidance, with Cape refusing to participate in litigation in the United States relating to its historic asbestos sales (including in the *Park* lawsuit), and instead accepting default judgments.[131]

2. *ESAB Is Responsible for Charter.*

The story of Charter is a tortured one of constant reorganizations. Despite this history, there is no question that ESAB, a Delaware company created in 2022, holds the liability for Charter.

Beginning in 1994, Charter became intertwined with ESAB, first with ESAB as a subsidiary of Charter, and then ultimately, with ESAB as Charter's parent. The following is a timeline of critical events in this history:

1993: Charter plc ("New Charter") acquires all the interest of Charter Consolidated pursuant to a 1993 Scheme of Arrangement.[132]

1994: New Charter acquires all of the equity interests of ESAB AB.[133]

[130] Ex. 84, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2022, at Cape_Receiver_00248391 ("The Board of [AIA] (the ultimate parent company) manages risk at a Group level"); *id.* at Cape_Receiver_00248439 ("Altrad Services Limited (formerly Cape Industrial Services Limited)").

[131] Ex. 84, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2022, at Cape_Receiver_00248391 (AIA "manages risk at a Group level," including with respect to asbestos-related claims).

[132] Ex. 86, 1993 Scheme of Arrangement, Aug. 18, 1993, Cape_Receiver_00178003-16.

[133] Ex. 87, ESAB Holdings Limited Annual 1994 Report (ESAB Holdings Limited was a subsidiary of ESAB AB).

2008: Charter International Limited ("PubCo Charter", and formerly known as Charter International PLC) is formed. Pursuant to a 2008 Scheme of Arrangement, Pubco Charter acquires all of the equity interest of New Charter.[134]

2011: Colfax UK Holdings Ltd., a wholly-owned subsidiary of Colfax Corporation ("Colfax Parent"), acquires all of the equity interest of Pubco Charter (including Esab) pursuant to an Implementation Agreement and effected by a Scheme of Arrangement.[135]

2021: Colfax Parent forms ESAB Corporation, a Delaware corporation.[136]

2022: Colfax Parent, the ultimate parent of Colfax UK Holdings, completes a spin-off of ESAB Corporation, the parent of Colfax UK and indirect parent of PubCo Charter. In this spin-off, PubCo Charter, which holds the Charter liabilities, spun off into ESAB Corporation.[137]

When Colfax spun off ESAB Corporation as a public entity which was the parent company of Charter, it agreed to assume certain liabilities of its subsidiaries and provided certain financial guarantees to its subsidiaries.[138] Indeed, post-separation, several Charter subsidiaries reported that ESAB Corporation was their ultimate parent and "controlling party" and that ESAB Corporation had agreed to meet all liabilities with respect to their ability to operate as going

[134] Ex. 88, 2008 Scheme of Arrangement, Cape_Receiver_00182324-31.

[135] Ex. 89, Implementation Agreement, dated as of September 12, 2011, by and among Colfax Corporation, Colfax UK Holdings LTD and Charter International PLC, Cape_Receiver_00102613-95.

[136] Ex. 90, Certificate of Incorporation of ESAB Corporation, dated May 19, 2021, Cape_Receiver_00185411-3.

[137] Ex. 91, Separation and Distribution Agreement, by and between Colfax Corporation and ESAB Corporation (hereinafter "Separation Agreement") (April 4, 2022), at Cape_Receiver_00183869-936. New Charter later transferred the shares of ESAB AB to ESAB Group Limited, a newly formed wholly owned subsidiary, which itself was later renamed Charter Overseas Holdings Limited and was the parent company of various ESAB entities until 2011.

[138] Ex. 91, Separation Agreement, § 2.1(a), at Cape_Receiver_00183887 ("Transfers of Assets and Assumptions of Liabilities; ESAB Assets; Enovis Assets.") (emphases added).

concerns.[139] Post-separation, ESAB has continued the familiar liability avoidance strategy, refusing to acknowledge this Court's jurisdiction over it or to participate in discovery.

G. Procedural History.

1. *This Court Appointed the Receiver When Cape Failed to Appear in an Asbestos Personal Injury Action.*

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* Compl., *Park v. Armstrong Int'l, Inc. et al.*, No. 2021-CP-4002727 (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.

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* First Amended Compl., *Park et al. v. Armstrong Int'l, Inc., et al.*, No. 2021-CP04002727 (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 Company Ltd. and were both identified as the successors in interest to that company. *Id.* at 9; *see also id.* at ¶¶ 26–27. In December 2021, the *Park* Plaintiffs

[139] *See, e.g.*, Ex. 92, 2022 Charter Consolidated Ltd. Report (Oct. 25, 2023), Cape_Receiver_00172486; Ex. 93, 2023 Central Mining & Inv. Corp. Ltd. Report (Mar. 27, 2024), Cape_Receiver_00172654.

served the named Cape entity, which (as has been Cape's practice for decades) never answered, moved, or otherwise responded.

After Cape failed to answer the *Park* Complaint, Ms. Park moved for the appointment of a Receiver. *See* Mot. to Appoint Receiver (March 6, 2023) (2021-CP-40-02727, Richland County). On March 17, 2023, this Court 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* Order, *Park et al. v. Armstrong Int'l, Inc., et al.*, No. 2021-CP-4002727 (Mar. 17, 2023) ("Appointment Order"), at 1.

2. *The Receiver Initiated this Third-Party Action Against Participants to and Beneficiaries of Cape's Liability Avoidance Scheme.*

Following his appointment, the Receiver confirmed from court records and other publicly available information that Cape's failure to appear in *Park* was just one example of a decades-long liability avoidance scheme described herein. Further, the Receiver discovered that rather than perpetuate that scheme alone, Cape's business practices were directed, guided, and inured to the benefit of numerous entities associated with Cape over their histories.

On June 30, 2023, the Receiver filed the above-captioned action against third-party defendants with responsibility for Cape's fraud on the U.S. market in arising from its Cape's U.S.-based asbestos sales and associated diversion of proceeds outside of the United States and its attendant Cape's liability avoidance scheme, including the Charter and Altrad Third-Party Defendants.

H. The Altrad and Charter Third Party Defendants' Ongoing Refusal to Participate in Discovery Results in Adverse Inferences.

The Altrad and Charter Third Party Defendants' refusal to participate in discovery, as chronicled below, has limited the Receiver's ability to learn key information related to its causes of action other than from publicly available sources. After a series of Motions to Compel directed to the Altrad and Charter Third-Party Defendants' wholesale refusal to participate in the discovery process, this Court entered adverse inferences against the Charter and Altrad Third-Party Defendants.[140] To date, the Altrad and Charter Third-Party Defendants have made no attempt to rebut those adverse inferences.

1. *Trial Continued Due to Third-Party Defendants' Refusal to Participate.*

Although originally set for a bench trial in the trial block set to commence April 15, 2024, the Court was forced to continue the trial during the 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." Order Granting Cape Receiver's Mot. for Sanctions (May 23, 2024); *see also* Order Setting Trial Date (June 20, 2024) (trial continued "due to the lack of participation in the discovery process" by the Charter and Altrad Third-Party Defendants). This matter was ultimately reset for trial on February 3, 2025.

2. *This Court Enters Adverse Inferences After It Grants Two Motions to Compel.*

Two Orders on Motions to Compel further demonstrate the Charter and Altrad Third-Party Defendants' discovery recalcitrance. First, on March 12, 2024, this 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," among other things.[141] The Third-Party Defendants did not meaningfully comply with this Order.

[140] *See generally* Order Granting Cape Receiver's Mot. for Sanctions (May 23, 2024).

[141] Order Granting Receiver's Mot. Compel Disc. Resps. (March 12, 2014), at 13.

As a result, on May 23, 2024, this Court granted the Receiver's second Motion to Compel. This time, 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." May 23, 2024 Order 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.

The Court found that the Charter and Altrad Third-Party Defendants' "continued discovery misconduct"—*i.e.*, their refusal to participate in discovery "amount[ed] to bad faith, willful disobedience, and gross indifference to the rights of the Receiver and this Court's management of its docket," entered a series of adverse inferences against the Charter and Altrad Third-Party Defendants.[142]

As to Charter, adverse inferences included the following:

- It is " part of a single business enterprise . . ., ha[s] an amalgamation of corporate interests, entities, and activities, and ha[s] unified, integrated, and intertwined business operations and resources to achieve and act with a common business purpose" (Adverse Inference No. 71);
- It was" responsible for efforts to misinform companies, persons, and the general public about the health hazards associated with asbestos" (Adverse Inference No. 16);

[142] Order Granting Cape Receiver's Mot. Sanctions (May 23, 2024), at 15, 17, 27-31 ("[T]he 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. Despite multiple warnings by this Court and directives to **proceed with discovery**, these Third Party Defendants have continued their misconduct while filing multiple frivolous appeals that, based on clearly applicable precedent, will inevitably be dismissed." (emphasis in original)).

- It was "responsible for operating NAAC in an undercapitalized manner, including through the siphoning of funds from NAAC" (Adverse inference No. 17);

- Along with Central Mining, it "owned, dominated, and controlled Cape and its subsidiaries including NAAC, between 1965 and 1996, including with respect to their financing and capitalization" (Adverse Inference No. 20);

- It "seconded employees and other officials to work for Cape, or otherwise financed and spent resources for Cape, including for operational, marketing, research and development, and lobbying activities" (Adverse Inference No. 22);

- It was "aware that Cape asbestos was being sold or ultimately distributed into the State of South Carolina" (Adverse Inference No. 23);

- Charter was responsible for (i) "the decision to close and liquidate NAAC," and (ii) "designing ways to continue the flow of South African asbestos to US customers and the counterflow of asbestos profits out of the United States after the liquidation of NAAC," (Adverse Inference Nos. 30 and 32); and

- It was "part of a corporate arrangement to eliminate or reduce as much as possible [its] exposure in the United States to lawsuits brought against them for the sale of asbestos in the United States" (Adverse Inference No. 39).[143]

As to the Altrad Third-Party Defendants, the Court drew the adverse inference that "each of the Altrad Third-Party Defendants is responsible for or has benefitted unjustly from Cape's liability-avoidance scheme."[144] The Court also entered 46 separate adverse inferences, including as follows:

- Mr. Altrad is the majority shareholder of the Altrad Group and "controls the Altrad Group, including AIA" (Adverse Inference Nos 1, 2, 42);

- AIA and Mr. Altrad dominate and control Altrad UK Ltd. (Adverse Inference No. 11);

- AIA and Mr. Altrad were aware of Cape's asbestos-related liabilities and liability avoidance scheme prior to the acquisition of Cape" and "acquired Cape with the intent to continue Cape's liability avoidance scheme and refusal to respond to litigation in the United States" (Adverse Inference Nos. 12 and 13);

[143] *See generally* Order Granting Cape Receiver's Mot. for Sanctions (May 23, 2024).

[144] *Id.* at 27.

- Since the acquisition, AIA and Mohed Altrad have dominated and controlled Cape, including with respect to its financing and capitalization" as well as appointment of executive personnel and directors (Adverse Inference Nos. 14 and 15); and

- AIA and Mr. Altrad "are responsible for Cape's continued failure to respond to litigation against Cape in the United States" (Adverse Inference Nos. 18, 32, and 33).[145]

As to ESAB, the Court drew several adverse inferences, including as follows:

- ESAB " obfuscated the relationship between ESAB and its post-spinoff subsidiaries—including Charter Consolidated Ltd. and Central Mining—and also historically with Cape, with the purpose of frustrating creditors and avoiding liability" (Adverse Inference No 55);

- ESAB " is the successor in interest to Central Mining and Charter Consolidated Ltd" (Adverse Inference No 56);

- "Charter Consolidated Ltd. [is] financially dependent upon ESAB Corporation" (Adverse Inference No 63); and

- "The Charter Third-Party Defendants—with Cape prior to 1996—are subject to the same total dominion and control, and ability to be influenced with respect to major business decisions and are mere instrumentalities for the purposes of committing fraud or other violations of statutory or legal duties—namely, by ESAB Corporation currently, and by Charter Consolidated Ltd. previously" (Adverse Inference No 69).

The Court emphasized that those inferences were rebuttable, should these Third-Party Defendants choose to start participating in the litigation and offering a viable defense. They have not.

3. *The Charter and Altrad Third-Party Defendants Persist in Refusal to Participate in Discovery.*

After entry of those adverse inferences, the Charter and Altrad Third-Party Defendants continued to pursue their strategy of stonewalling by filing serial improper interlocutory appeals[146]

[145] *Id.* at 27-31.

[146] In an attempt to avoid trial in this matter, the Third-Party defendants have filed 16 improper appeals of interlocutory orders. Most recently, on November 1, 2024, the Charter and Altrad Third-Party Defendants each filed appeals of the Court's October 2, 2024 Scheduling Order.

and then incorrectly claiming that the pendency of those appeals protects them from answering discovery.[147] The Altrad Third-Party Defendants also have refused to appear for depositions or provide substantive responses to any other discovery.[148] While the Receiver has reported these continued deficiencies to the Court, including initially in a June 11 report of the Third-Party Defendants' continued non-compliance, the Charter and Altrad Third-Party Defendants continue their non-compliances while fighting progress of this action in other ways.[149]

Because the Altrad and Charter Third-Party Defendants' ongoing wholesale refusal to participate in discovery, they have failed to adduce any evidence to contest their liability, much

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[147] *See, e.g.*, Ex. 95, Third-Party Def. Mohed Altrad's Resps. and Objs. Receiver's Second Set of Interrogs. and Second Set of Reqs for Produc., 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").

[148] *E.g.*, Ex. 96, Correspondence from T. Carroll to L. Seaborn et al. (Sept. 3, 2024) ("[T]he Altrad Defendants will not be attending these depositions. . . I'll be sending . . . our objections by separate cover[.]"); *see also, e.g.*, Ex. 133, Third-Party Defs.' Charter's Resps. Second Set Interrogs. (May 31, 2024) (refusing to provide responses to Second Set of Interrogatories); Ex. 97, Altrad Owners Third-Party Def. Mohed Altrad's Resps. and Objs. Receiver's Second Set of Interrogs. and Second Set of Reqs for Produc. (May 31, 2024) (refusing to provide responses to Second Set of Interrogatories and, as to Mohed Altrad, Second Set of Requests for Production); Ex. 98, Third-Party Def. Charter's Objs. Deps. (June 3, 2024) (stating no witnesses to appear on June 5–7, 2024); Ex. 99, Altrad Owners Third-Party Defs.' AIA and Mohed Altrad Objs. Deps. (June 9, 2024) (stating no witnesses to appear on June 10–11, 2024); Ex. 100, Third-Party Defs.' Arranco, Hawk Bidco, and Altrad Sparrows Objs. Deps. (June 10, 2024) (stating no witnesses to appear for depositions noticed for June 12–14, 2024); Ex. 101, Charter Third-Party Defs.' First Obj. Letter (July 8, 2024) (refusing to provide responses to Second Set of Requests for Production); Ex. 102, Charter Third-Party Defs.' Second Obj. Letter (July 16, 2024) (refusing to provide responses to Third Set of Requests for Production); Ex. 96, Altrad Owners Third-Party Defs.' Obj. Letter (Sept. 4, 2024) (stating no witnesses to appear on September 4 and 5, 2024); Ex. 103, Arranco, Hawk, and Sparrows' Third-Party Defs.' Obj. Letter, at 2 (Sept. 4, 2024) (stating no witnesses to appear on September 6, 10, and 11, 2024); Ex. 104, Charter Third-Party Defs.' Obj. Letter (Sept. 4, 2024) (stating no witnesses to appear on September 9, 12, and 13, 2024).

[149] *See, e.g.*, Altrad Third-Party Defs.' Obj. to Entry of New Order Setting Nonjury Trial (Sept. 26, 2024); Charter Third-Party Defs.' Obj. to Entry of New Order Regarding Non-Jury Trial (Sept. 26, 2024).

less evidence sufficient to create a genuine issue of material fact or otherwise rebut the record evidence (or the adverse inferences made by this Court in its May 23 Order).

III. LEGAL STANDARD

"Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 575, 757 S.E.2d 399, 404 (2014) (citing Rule 56(c), SCRCP). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *McNair v. Rainsford*, 330 S.C. 332, 342, 499 S.E.2d 488, 493 (Ct. App. 1998) (citing *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 401 S.E.2d 537 (1991)). "With respect to any issue upon which the nonmoving party bears the burden of proof, this initial responsibility may be discharged by showing the trial court where there is an absence of evidence to support the nonmoving party's case." *McNair v. Rainsford*, 330 S.C. at 342, 499 S.E.2d at 493.

When opposing a summary judgment motion, the nonmoving party must do more than 'simply show that there is a metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial." *Dunes W. Golf Club, LLC v. Town of Mt. Pleasant*, 401 S.C. 280, 293, 737 S.E.2d 601, 608 (2013) (citing *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 220, 578 S.E.2d 329, 335 (2003) (quoting *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545)). Once the initial burden of showing an absence of evidentiary support for the opponent's case is met, "the opponent cannot simply rest on mere allegations or denials contained in the pleadings . . . [r]ather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005) (citing *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003)); *see also Moody v. McLellan*, 295 S.C. 157, 163, 367 S.E.2d 449, 453 (Ct. App. 1998) (genuine issues of fact must be supported by "admissible . . . evidence" and "summary judgment should be entered" if the opposing party fails to "so respond").

In determining whether a genuine issue of material fact exists, the court views the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009). However, "when the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted." *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997).

IV. ARGUMENT

A. The Receiver Is Entitled to Summary Judgment on Liability Under Various Successorship or Veil Piercing Theories (Third Cause of Action).

1. *Charter Is Liable for Cape's Actions and Debts Under an Alter Ego Theory.*

The Receiver is entitled to summary judgment that each of the Charter Third-Party Defendants are the alter egos of Cape, which in turn is the alter ego of NAAC. The question of whether to pierce the corporate veil via an allegation of alter ego sounds in equity. *Oskin v. Johnson*, 400 S.C. 390, 397, 735 S.E.2d 459, 463 (2012) (Toal, C.J.); *see also Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008) (Toal, C.J.) ("In general, equitable principles govern the veil-piercing remedy," and "[i]n applying South Carolina's veil-piercing doctrine, as all forms of equitable relief, the equities of both sides are to be considered, and each case must be decided on its own particular facts." (internal quotation marks and citations omitted)). Indeed, "[t]he 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, those others are also liable. *Hagan v. Armstrong Int'l*, 2020 S.C. C.P. LEXIS 649, at *14 (Richland Cnty. Ct. Com. Pl. June 29, 2020).

"An alter-ego theory requires a showing of (1) total domination and control of one entity by another and (2) inequitable consequences caused thereby." *Oskin*, 400 S.C. at 400, 735 S.E.2d at 465 (citing *Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty.*, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006) (Toal, C.J.)). "This theory does not apply . . . in the absence of fraud, injustice, or contravention of public policy." *Oskin*, 400 S.C. at 400, 735 S.E.2d at 465 (citing *Colleton Cnty.*, 371 S.C. at 237, 638 S.E.2d at 692). The alter ego theory nevertheless "is meant to be 'flexible' to enable courts to 'weigh the circumstances of the individual case.'" *Ret. Plan of UNITE HERE Nat'l Ret. Fund v. Kombassan Holdings A.S.*, 629 F.3d 282, 288 (2d Cir. 2010) (using flexible alter ego test in ERISA context (citation omitted)). Acknowledging the need for flexibility to achieve justice, the "majority of jurisdictions addressing" this issue "allow veil-piercing against nonshareholders." *Buckley v. Abuzir*, 8 N.E.3d 1166, 1172 (Ill. App. 2014). "[W]ith few exceptions, those jurisdictions that allow veil-piercing against nonshareholders have not required that the nonshareholder hold other formal roles within the corporation—for instance, as an officer, director, or employee—but rather abandon such formalism in favor of an equitable approach focusing on the individual's domination of the corporation." *Id.* "If veil piercing were solely dependent on a party's ownership interest in an entity, unscrupulous parties could avoid personal liability under the doctrine by simply acting in a capacity that does not involve ownership." *Equity Trust Co. v. Cole*, 766 N.W.2d 334, 339 (Minn. Ct. App. 2009).

Based on the unrebutted record evidence, there is no genuine issue of material fact that, just as Cape was NAAC's alter ego, and Charter was Cape's alter ego.

a. Cape Is NAAC's Alter Ego.

At the outset, there is no genuine issue of material fact that Cape is NAAC's alter ego. As set forth at length in Section II.E *supra*, Cape established NAAC in 1953 as a direct subsidiary designed to operate as its wholly controlled instrumentality for the "purpose of expediting and facilitating the movement" of asbestos from South African mines into the United States (including South Carolina).[150] Throughout NAAC's existence, Cape exercised total dominion and control over NAAC, and that dominion and control produced gravely inequitable consequences. *See Oskin*, 400 S.C. at 400, 735 S.E.2d at 465.

(i) Cape exercised total dominion and control over NAAC.

NAAC was Cape's sales agent in the United States, with exclusive authority to offer Cape products and responsibility for transmitting information about customer needs to Cape mines, and ensure that shipments from South African mines made it "all the way through to the customer's plant," including to locations in South Carolina or through South Carolina ports.[151] NAAC "effect[ively] . . . put the Mines at every U.S. port."[152] Indeed, Cape's "most bountiful years were the two decades until 1976"—the period when Cape operated NAAC to provide raw amosite asbestos fiber to customers in the United States.[153] By 1970, NAAC was the "largest U.S. importer of Amphibole Fibres," which were "re-distributed from . . . warehouse locations in East Coast, Gulf Coast and West Coast Ports."[154]

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[150] *See* Ex. 105, Cape_Receiver_00127365; Ex. 16, Cape_Receiver_00127971-2 (1982 court filing describing NAAC's history); Ex. 106, Cape_Receiver_00128081 (identifying NAAC as the sole U.S.-based entity of the Cape mining division); Ex. 107, Cape_Receiver_00126974 (1973 letter describing NAAC as "a division of Cape Asbestos Co. Ltd., with corporate offices in London").

[151] *See* Ex. 108, Cape_Receiver_00126392-4 (describing intended business of NAAC); Ex. 109, Cape_Receiver_00127141 (1975 Cape cover letter of NAAC director resignations); Ex. 110, Cape_Receiver_00128071 (appointment announcement describing NAAC as "specialize[d] in marketing and distribution of Blue and Amosite asbestos in the United States, Canada, Mexico and the Caribbean"); Ex. 111, Cape_Receiver_00126847-8 (1969 NAAC memorandum describing customer services).

[152] Ex. 111, Cape_Receiver_00126847-8.

[153] Ex. 112, Jock McCulloch, Asbestos Blues: Labour, Capital, Physicians & the State 68 (2002).

[154] Ex. 113, Cape_Receiver_00126883-4.

Cape and NAAC implemented a "conscious pattern of product distribution [of asbestos] nationally"—particularly, amosite, over which Cape had a monopoly. *See In re: Asbestosis Cases*, Case No. 78-CP-06-105, Order (S.C. Common Pleas Apr. 7, 1980) (rejecting objection to the exercise of personal jurisdiction over NAAC in South Carolina). Despite this "conscious pattern of product distribution," and NAAC's success in distributing Cape's asbestos, in fact, it was "essentially a one-man operation" consisting of an operational lead supported by four office clerical personnel.[155] All key decisions, including with respect to the fulfillment of specific purchase orders, were closely coordinated with and directed by Cape, or made by a board made up of Cape lawyers and executives (until Cape executives resigned in 1975, in what they described at the time as a "sensible precaution" against U.S. litigation).[156]

As detailed in Section II.E, Cape's control over NAAC was vast and complete; it controlled company governance issues, board make-up, the content of board meeting minutes, the determination of its commission, the process by which it was paid, its strategic underinsurance, the establishment of dividends, and the salaries of its employees.

(ii) Cape's dominion and control over NAAC caused gravely inequitable consequences.

Cape exercised this absolute control over NAAC to devastating, and plainly inequitable, end. As set forth in Section II.E.1, Cape actively suppressed its knowledge of the health hazards of asbestos to protect and expand its mining efforts and U.S. sales. After the onset of asbestos-related products liability litigation in the early 1970s, Cape undertook numerous actions in a

[155] *See* Ex. 16, Cape_Receiver_00127971-2 (describing NAAC's lean staffing); Ex. 17, Cape_Receiver_00127267 ("Despite the volume of sales and profits of NAAC, our operation is a very small one, with only a total of 5 employees").

[156] *E.g.*, Ex. 114, Cape_Receiver_00127141; Ex. 115, Cape_Receiver_00127025 (listing six directors in 1970)

deliberate effort to limit its own responsibility for the known harm caused by its products.[157] While Cape went through tortured machinations to make it *appear* it was reducing oversight over NAAC, in reality, NAAC continued to operate as a controlled instrumentality under Cape's domination.[158] Indeed, 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 Cape and others in the Group system.[159]

Cape's records confirm its implementation of a litigation-avoidance scheme that involved, among other things, (i) taking steps to make it appear—falsely—that Cape was reducing oversight of NAAC, (ii) disclaiming any "moral responsibility" to respond to products liability lawsuits in the United States, (iii) strategically declining to reserve funds in the United States to address those liabilities, and (iv) refusing to accept process or appear in any U.S. judicial proceedings (including

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[157] *See, e.g.*, Ex. 116, Cape_Receiver_00127185-90 (1975 lawyer letter referring to "attempt to limit NAAC's and Cape's exposure to future United States litigation"); *see also Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973) (successful suit by insulation worker, widely acknowledged to have precipitated a wave of asbestos litigation in the 1970s).

[158] *See* Ex. 117, Cape_Receiver_00127808 (NAAC discouraging Cape visits to the U.S. in 1978 or else negate "maneuvers" related to "continued problems with product liability litigation"); Ex. 118, Cape_Receiver_00127138 (1975 letter suggesting to "disassociate the Parent Company as fully as possible from the operating companies"); Ex. 119, Cape_Receiver_00127140 (1975 letter raising whether to "do something to change the identity of NAAC in order to avoid exposing the company unnecessarily," while doing "everything possible to maintain a successful selling operation in the United States"); Ex. 120, Cape_Receiver_00127008-9 (1974 NAAC letter suggesting that "no one from Cape be an officer of NAAC since we want it to be as independent as possible in order to avoid any contention that it is the alter ego of Cape and that Cape is doing business in the United States"); Ex. 114, Cape_Receiver_00127141 (1975 Cape Asbestos letter stating "that it would be a sensible precaution against Cape's involvement in any future proceedings for [Cape personnel] to resign from the N.A.A.C. Board," and enclosing resignation letters).

[159] *See* Ex.56, Cape_Receiver_00127259-61 (NAAC counsel advising Cape on risk of judgments attaching to Charter assets).

in the Park lawsuit pending here).[160] Cape's communications with its former counsel reveal a focus on avoiding exposure to U.S. litigation or assets that could be garnished in the United States in light of the strategy of accepting default judgments:

> If Cape in the future should set up or acquire any U.S. Company or business, then such Company or business would be deemed to be an asset of Cape, even though acquired after entry of any default judgments. Such new Company or business would be considered an asset of Cape in the U.S. and subject to garnishment to satisfy the default judgments.[161]

Put simply, NAAC existed only to do the bidding of Cape and the entities that controlled Cape, *i.e.*, to serve as a mechanism to both extract profits from the sale and distribution of deadly asbestos in the U.S. market and to insulate Cape from suit in the United States. The unrebutted evidence makes clear that Cape was NAAC's wholly controlled agent, and further that Cape exercised that control for fraudulent purposes, *i.e.*, using NAAC to make sales of its asbestos in the lucrative U.S. market, siphon those profits outside of the United States, and avoid answering to the U.S. legal system for the resulting harms.

b. Charter Is Cape's (and in Turn, NAAC's) Alter Egos.

There is likewise no genuine issue of material fact with respect to Charter's status as alter egos of Cape. Just as NAAC operated as an instrumentality for Cape, Cape was an instrumentality for the Oppenheimer Group System, including Charter. That is how the Group System was designed to operate, and it functioned perfectly here.

[160] Ex. 1, July 4, 1977 Letter from A. J. Penna, Esq. Group Solicitor, Cape Industries Limited, Cape_Receiver_00133865 ("We here, having heard more disturbing information recently about the value of Texas awards are rapidly coming to the conclusion that Cape and Cape Fibers should take a risk on the UK enforceability and withdraw, as in practice we cannot foresee any court or government here enforcing a judgement which would have enormous financial and employment repercussions, when ***we really cannot be said to have a moral responsibility and are simply victims of the US product liability cult***." (emphasis added)).

[161] Ex. 56, Cape_Receiver_00127259-61; *see also* Order Granting Cape Receiver's Mot. for Sanctions (May 23, 2024).

(i) Charter exercised total dominion and control over Cape (and, in turn, over NAAC).

Cape had no true control over its own operations—it was part of a Group System in which power was concentrated in the hands of the Oppenheimer family and their trusted advisors. The top-to-bottom control exercised in the Group System governed every aspect of a Group subsidiary's operations, made possible by control at the board level and operational control through immediate parent entities. For Cape, its immediate parent Charter. Within the Group System, Charter was designed to exert full dominion and control over Cape.

Cape became part of the Oppenheimer Group by the late 1950s as part of the Oppenheimer Group's plan to dominate the global mining industry. As Dr. Press explains, after Ernest Oppenheimer "poached the Corner House's diamond business, as run by De Beers, in the 1920s," Harry Oppenheimer would "swallow and rearrange the various parts of the Corner House" starting in the late 1950s.[162]

By 1960, the former Corner House interests, including Cape, were fused with an Anglo American subsidiary, Rand Selection.[163] Then, as part of a broader reorganization, Harry Oppenheimer created Charter in 1965 as a "pet project" designed to diversify the Oppenheimer business operations.[164]

As a holding company, Charter conducted virtually all of its business through subsidiaries like Cape, such that it made money through dividends and other diverted funds, payments, or

[162] Ex. 8, Press Report at 56.

[163] First, Harry Oppenheimer relied on his American business partner, Charles Engelhard, to take over the Corner House through Rand American Investments. Second, in 1960, Rand American Investments merged into an Anglo American entity, Rand Selection. *See* Ex. 8, Press Report at 54-58.

[164] Ex. 8, Press Report at 54-58.

returns from such investments.[165] As detailed in Section II.D, Cape was Charter's profit-generating center, and Charter relied on Cape to operate NAAC in an undercapitalized manner such that dividends and service fees could be siphoned from NAAC and diverted first to Cape and then to Charter.[166] Charter owned, dominated, and controlled Cape and its subsidiaries, including NAAC, between 1965 and 1996, including with respect to their financing and capitalization; by exercising influence in Apartheid-era South Africa, thereby allowing Cape to profitably mine and export asbestos to the United States and distribute it throughout the nation, including in South Carolina; and by its presence on Cape's board and operational team, including through seconded employees and expenditures to support Cape's operations, marketing, research, and lobbying.[167]

(ii) Charter exercised its control over Cape (and NAAC) to produce inequitable results.

Charter used its control over Cape and NAAC to effect a fraud on the U.S. market that remains unaddressed decades later. As set forth in Sections II.E.1 and II.E.2, Charter knew of the health risks of asbestos, including death, throughout Cape's efforts to expand distribution of its asbestos in the United States. It directed and financed efforts to conceal these risks and provide false information about the health hazards of asbestos to the general public. It was responsible for operating NAAC in an undercapitalized manner, including by siphoning off funds from NAAC and diverting them outside of the United States, and for NAAC's inadequate risk management and strategic underinsurance decisions. When the risk of litigation loomed, Charter was responsible for the decisions to create the appearance of separation between NAAC and Cape, to deplete

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[165] Ex. 68, Deposition of G. Higham, Oct. 17, 1986, at Cape_Receiver_00096909.

[166] *See* Section II.D; *see also* Order Granting Cape Receiver's Mot. for Sanctions (May 23, 2024), at 18 ¶ 17.

[167] *See* Section II.D; *see also* Order Granting Cape Receiver's Mot. for Sanctions (May 23, 2024), at 19 ¶¶ 20-23.

NAAC of assets that would be available to claimants, and to implement Cape's litigation avoidance strategy.[168] Charter also was responsible for the decision to close and liquidate NAAC, to permit default judgments to be entered against Cape and its subsidiaries, and to design new ways to continue the flow of South African asbestos to the United States after NAAC's liquidation.[169]

2. *Charter Is Liable for Unaddressed Harm Caused by Cape's Asbestos Under a Veil Piercing Theory.*

Charter is likewise responsible for the harm caused by Cape (and NAAC) through a traditional veil piercing theory. Although it overlaps to some extent with alter ego analysis, courts in South Carolina considering whether to pierce the corporate veil undertake a separate inquiry based on the South Carolina Court of Appeals' decision in *Sturkie v. Sifly*, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984). A two-prong test is used to determine whether the corporate entity should be disregarded. The first part of the test is an eight-factor analysis that looks to observance of the corporate formalities by the dominant shareholders. The second part of the test requires that there be an element of injustice or fundamental unfairness if the veil were not pierced. *Sturkie*, 280 S.C. at 458-59.

In determining whether the corporate formalities were observed under the first prong of the *Sturkie* test, courts consider the following eight factors:

(1) whether the corporation was grossly undercapitalized;

[168] Ex. 70, Charter Annual Report (1982), at Cape_Receiver_00076050 ("Cape has received legal advice that default judgments, in certain of which plaintiffs have been granted damages totalling approximately US$57 million, and any other judgments obtained in the United States in such actions against Cape group companies will not be enforceable in the United Kingdom. The directors believe, in light of legal advice received, that the outcome of all the actions against Cape and Charter and the obligations retained by Cape are unlikely to have any material effect on Charter's financial position, and accordingly no provision for them has been made.").

[169] *See* Section II.E.2; Ex. 68, Deposition of G. Higham, Oct. 17, 1986, at Cape_Receiver_00096935-6; *see also* Order Granting Cape Receiver's Mot. for Sanctions (May 23, 2024), at 19 ¶¶ 20-23.

(2) failure to observe corporate formalities;

(3) non-payment of dividends;

(4) insolvency of the debtor corporation at the time;

(5) siphoning of funds of the corporation by the dominant stockholder;

(6) non-functioning of other officers or directors;

(7) absence of corporate records; and

(8) the fact that the corporation was merely a facade for the operations of the dominant stockholder.

Hunting v. Elders, 359 S.C. 217, 224, 597 S.E.2d 803, 807 (Ct. App. 2004). "The conclusion to disregard the corporate entity must involve a number of the eight factors, but need not involve them all." *Id.* While the eight *Sturkie* factors may not perfectly fit the facts of any given case,[170] the record evidence makes clear that at least half of the factors are satisfied with respect to Charter's control of Cape (and in turn NAAC):

- ***Factor 1:*** At Charter's direction, Cape ensured that its U.S. subsidiary was grossly undercapitalized, with funds regularly siphoned out of the United States—purportedly out of the reach of U.S. creditors and into the hands of NAAC's ultimate owners;

- ***Factor 5:*** Charter siphoned funds from Cape (and NAAC) for its own benefit, stripping NAAC of funds to answer U.S. claimant harmed by Cape's asbestos;

- ***Factor 6***: Cape and NAAC's employees were directed by Charter leadership;

- ***Factor 8***: Cape and NAAC were mere instrumentalities for Charter and the broader Oppenheimer Group System to profit from the sale of a deadly product in the U.S. market for asbestos while avoiding the attendant liability.[171]

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170 *See Rochester Gas & Elec. Corp. v. GPU, Inc.*, 355 F. App'x 547, 550 (2nd Cir. 2009) (observing that application of veil-piercing factors "to the infinite variety of situations that might warrant disregarding the corporate form is not an easy task because disregarding corporate separateness is a remedy that differs with the circumstances of each case." (quoting *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 139 (2d Cir. 1991) (internal quotation marks omitted)).

171 *See* Sections II.D and II.E.

Neither NAAC nor Cape was permitted to act contrary to its Group Parents' interests. The Group Parents—Charter for Cape, and Cape for NAAC—acted in a self-serving manner by prioritizing their own profits, in the form of subsidiary dividends, over those of their subsidiaries and, more importantly, over the health and safety of U.S. consumers.

Cape, Charter, and the Oppenheimer Group knew that asbestos could cause lung disease, including mesothelioma.[172] To protect the profitability of Cape—Charter's primary profit generator in the 1960s and 1970s—Cape, Charter, and the Oppenheimer Group actively concealed their knowledge of the dangers associated with the high volume of asbestos fibers they sold in the U.S. market.[173]

Moreover, when it became clear that NAAC, Cape, and Charter could face liability in U.S. litigation for its asbestos sales, Cape and Charter worked a fraud on the U.S. market by (i) shuttering NAAC to cut clear ties from the U.S. to the Oppenheimer Group and (ii) concocting a scheme to continue selling Cape raw asbestos fiber to the U.S. market through a new company nearly identical to NAAC, CPC. It would be fundamentally unfair to allow Cape and Charter to benefit from this fraud.

Charter and Cape's activity thus satisfies the second *Sturkie* element. Under the second prong of the *Sturkie* test, the party seeking to pierce the corporate veil must prove an element of "injustice or fundamental unfairness" if the corporate veil is not pierced. To demonstrate fundamental unfairness, the plaintiff must show that "(1) the defendant was aware of the plaintiff's claims against the corporation, and (2) thereafter, the defendant acted in a self-serving manner with

[172] *See* Section II.F.1.

[173] *See* Section II.F.1.

regard to the property of the corporation and in disregard of the plaintiff's claim in the property." *Dumas*, 463 S.E.2d at 644. The Supreme Court of South Carolina has held that "awareness" of the claims against the corporation need not be actual awareness. *Multimedia Publishing of S.C., Inc. v. Mullins*, 314 S.C. 551, 431 S.E.2d 569 (1993) ("A corporate director is chargeable with all matters pertaining to the corporate affairs, of which he has or should have knowledge in the exercise of the duties required of him as a director. . . . We find that knowledge of the Multimedia account gained by [defendant] in his capacity as the director of FSG was sufficient to put him on inquiry, which, if pursued with reasonable diligence, would have lead [sic] to knowledge that the account was unpaid.").

The Oppenheimers perfected a system of control in which they acted in a capacity that did not involve full ownership—they relied on others to spread risk.[174] They were proud of the "minimum investment, maximum control" system they created.[175] No entity should be permitted to profit from a corporate structure specifically designed to avoid liability in this way. *See Drury Dev. Corp.*, 380 S.C. at 101, 668 S.E.2d at 800.

3. *Cape and Charter Shared an Amalgamation of Interests and/or Were Part of a Single Business Enterprise.*

South Carolina courts recognize another method—distinct from traditional alter ego and veil piercing doctrines—to hold separate entities responsible for harm caused by another business, *i.e.*, the "amalgamation of interests" theory or the "single business enterprise" theory. This theory provides another framework by which this Court should find Charter liable for the harm caused by Cape's distribution of deadly asbestos throughout the United States.

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[174] *See* Section II.C.

[175] Ex. 6, *Anglo American Corp.*, Forbes, June 15, 1973, at 49; Ex. 7, A.J. Limebeer, *The Group System of Administration in the Gold Mining Industry*, I Optima 26, 26-30 (1951); *see also* Ex. 8, Press Report at 10, 34, and 75.

Under this theory, where affiliated entities function as a single enterprise, South Carolina law requires the enterprise as a whole to answer for the debts and liabilities of its members.[176] *See Las Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 235 Cal. App. 3d 1220, 1249–50, 1 Cal. Rptr. 2d 301, 318 (1991) ("In effect what happens is that the court, for sufficient reason, has determined that though there are two or more personalities, there is but one enterprise; and that this enterprise has been so handled that it should respond, as a whole, for the debts of certain component elements of it." (quotations and citation omitted)) (cited by *Pertuis v. Front Roe Rests., Inc.*, 423 S.C. 640, 817 S.E.2d 273, 279 n.5 (2018)).

In 2018, the South Carolina Supreme Court formally recognized and named the theory the "single business enterprise theory," describing it as follows:

> [W]here multiple corporations have unified their business operations and resources to achieve a common business purpose and where adherence to the fiction of separate corporate identities would defeat justice, courts have refused to recognize the corporations' separateness, instead regarding them as a single enterprise-in-fact, to the extent the specific facts of a particular situation warrant.

Pertuis, 817 S.E.2d at 279; *see also id.* at 281. In doing so, the Court in *Pertuis* made clear that, to combine different corporate entities into a single business enterprise, there must also be a showing

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[176] This concept was first recognized in South Carolina by the court of appeals in *Kincaid v. Landing Development Corp.*, 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986) and initially described as the "amalgamation of interests" theory. The Court of Appeals in *Kincaid* affirmed the trial court's finding that three related corporations (a development corporation, a management corporation, and a construction corporation) sued for negligent construction and breach of warranty were properly regarded as a single entity, because the evidence showed "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities." *Kincaid*, 344 S.E.2d at 874. Thereafter, the South Carolina Supreme Court recognized the theory in *Kennedy v. Columbia Lumber & Manufacturing Co., Inc.*, finding a lender could be liable if "it is so amalgamated with the developer or builder so as to blur its legal distinction." 299 S.C. 335, 384 S.E.2d 730, 734 (1989) (concluding amalgamation was not appropriate at liability stage and affirming trial court). The theory also was considered in a series of cases involving construction defects. *Magnolia N. Prop. Owners' Association v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012); *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011).

of "bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." *Id.* at 281. In other words, "when corporations are not operated as separate entities but rather integrate their resources to achieve a common business purpose, each constituent corporation may be held liable for debts incurred in pursuit of that business purposes." *Id.* at 279 n.5 ("Factors to be considered in determining whether the constituent corporations have not been maintained as separate entities 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; common business name; services rendered by the employees of one corporation on behalf of another corporation; undocumented transfers of funds between corporations; and unclear allocation of profits and losses between corporations.").

Despite the Charter Third-Party Defendants' refusal to participate in the discovery process, the record is replete with evidence that Cape and Charter "unified their business operations and resources to achieve a common business purpose"—namely, promoting both the sale and distribution of hazardous asbestos from South African mines into the United States and the flow of resulting funds out of the United States, including for the purpose of stripping their U.S.-based instrumentality, NAAC, of funds that could otherwise be available to U.S. creditors. Moreover, there is no legitimate dispute that the adherence to the fiction of separate corporate entities would defeat justice and deny U.S. citizens harmed by Cape's asbestos any recourse for that harm.[177] *See Walbeck v. I'on Co., LLC*, 439 S.C. 568, 889 S.E.2d 537 (2023) ("While it is true that courts should be hesitant to invade the corporate form, here there is more than enough evidence that the creation of various entities furthered Developers' abilities to refrain from doing that which they repeatedly

[177] *See* Sections II.D and II.E; *see also* Order Granting Cape Receiver's Mot. for Sanctions (May 23, 2024), at 16-21, 25-26.

told the HOA and the residents they would do . . . [T]he corporate structure should not shield—fraud, ***evasion of existing obligations***, circumvention of statutes, monopolization, criminal conduct, and the like." (emphasis in original)).

4. *AIA Is Liable for Cape's Asbestos-Related Liabilities as the Successor to Cape Based on Its Express Assumption of Responsibility or, in the Alternative, as Cape's Alter Ego with Respect to Its Continuing Litigation Avoidance.*

a. <u>AIA Expressly Assumed Responsibility for Cape's Asbestos-Related Liabilities.</u>

In connection with its 2017 acquisition of Cape, AIA expressly affirmed the assumption of responsibility for Cape's historical asbestos liability, and it has continued to affirm that responsibility over the intervening years. As a result of this express assumption of responsibility, AIA is liable as a successor for Cape's asbestos-related liabilities.

AIA formed Altrad UK Ltd. (or Altrad Bidco) in June 2017 for the purpose of acquiring Cape.[178] At the time of its purchase of Cape, AIA expressly acknowledged the asbestos-related liabilities of Cape.[179] More significantly, as part of its recommended tender offer for Cape, AIA stated its commitment to ensuring that Cape's asbestos liabilities be honored, affirming its "inten[tion] to procure that each member of the Cape Group honours its obligations under, or in

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[178] Ex. 75, Certificate of Incorporation of a Private Limited Company, Altrad UK Limited (June 1, 2017), Cape_Receiver_00185738-72 (identifying AIA as owner of all shares and Mohed Altrad as sole "Individual Person with Significant Control" and as Company Director 1 and Chairman; Ex. 74, Altrad, Annual Report (2017), at Cape_Receiver_00040530 ("The acquisition of Cape PLC shares was carried out through the intermediary holding company Altrad UK, a wholly owned subsidiary of AIA and financed by AIA through a current account."); *see id.* at Cape_Receiver_00040529.

[179] Altrad's 2017 Annual Report acknowledged Cape's establishment (pursuant to a Scheme of Arrangement) of a compensation fund in 2006 for its employees who were exposed to asbestos. Ex. 74, Altrad 2017 Annual Report, at Cape_Receiver_00040530; *see also* Ex. 82, The Scheme Of Arrangement, In the High Court of Justice, Chancery Division (June 2006), at Cape_Receiver_00104532-56.

connection with, the IDC Scheme (including with respect to the funding commitments for future liabilities of the IDC Scheme, the current IDC Scheme administrative arrangements and all related contractual obligations to which members of the Cape Group are subject) following completion of the Offer."[180]

In the years since the acquisition, AIA has continued to acknowledge Cape's asbestos liabilities and reaffirm its responsibility for them. For example, in its annual report for the year ended August 31, 2022, defaulted Third-Party Defendant Altrad Services Ltd. (f/k/a Cape Industrial Services Ltd.) acknowledged Cape's responsibility for harm from asbestos exposure and reported the Altrad Group had set aside £118 million in a Provision of Funds to address certain non-U.S. historical claims relating to asbestos exposure "for which the Board believes ***the Group may become liable***."[181] That 2022 annual report further explained that that "[t]he Company [Altrad Services Ltd.] is maintaining a provision in respect of lodged and future industrial disease claims for which the Board of Directors of Cape plc believes the Group to be liable, arising on alleged exposure to previously manufactured asbestos products."[182] That annual report further stated that "[t]he Group continues to receive claims, from both individuals and insurance companies, in connection with historical alleged exposure to asbestos. ***Where claims are***

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[180] Ex. 83, Recommended Cash Offer for Cape plc, at Cape_Receiver_00104914-40 (touting the acquisition as an opportunity to "deliver attractive near and longer term benefit for the Cape Group and the Altrad Group and their respective stakeholders, ***including the IDC Scheme***" (emphasis added)).

[181] Ex. 84, Altrad Servs. Ltd. Annual Report and Financial Statements for the Year Ended 31 August 2022, at Cape_Receiver_00248438-441. Corporate documents define Altrad Group to mean AIA. Ex. 83, Recommended Cash Offer, at Cape_Receiver 00104914.

[182] Ex. 84, Altrad Servs. Ltd. Annual Report and Financial Statements for the Year Ended 31 August 2022, at Cape_Receiver_00248438-441

determined to have merit, the costs are provided for and claims are settled in the ordinary course, otherwise claims are defended."[183]

AIA's 2023 annual report likewise acknowledged its responsibility for Cape's asbestos-related liabilities and stated "Altrad . . . is ***fully committed to settling claims that are determined to have merit*** pursuant to Cape's court approved mechanism for settling such claims. An amount of £ 118 million has been paid or set aside for the settling of valid claims.[184] Of course, a purchaser like AIA can assume the liabilities of an acquired entity if it does so expressly.[185] *Cf. Portfolio Fin. Servicing Co. ex rel. Jacom Computer Servs. v. Sharemax.com, Inc.*, 334 F. Supp. 2d 620, 625 (D.N.J. 2004) (quoting *Arch v. Am. Tobacco Co.*, 984 F. Supp. 830, 841 (E.D. Pa. 1997)) ("where a corporation acquires the stock of another corporation and the target corporation continues to operate as a separate corporate entity, the purchaser corporation does not thereby assume the liabilities of the acquired corporation ***unless it does so expressly***" (emphasis added)).

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[183] Ex. 84, Altrad Servs. Ltd. Annual Report and Financial Statements for the Year Ended 31 August 2022, at Cape_Receiver_00248438 n.23; *id.* at Cape_Receiver_00248392 (reporting that "[m]any of [AIA's] operating environments have associated health and safety risks," including Cape: "The Company [Altrad Services Ltd.] is maintaining a provision in respect of lodged and future industrial disease claims for which the Board of Directors of Cape plc believes the Group to be liable, arising on alleged exposure to previously manufactured asbestos products.").

[184] Ex. 81, Altrad 2023 Annual Report, at Cape_Receiver_00040862. This mechanism for paying claims does not account for U.S. plaintiffs, but is limited to Cape's former U.K. employees.

[185] It is likewise the case that a purchaser can agree to assume liabilities in the context of an asset purchase. In the context of an asset purchase rather than a stock purchase, and in the absence of a statute, a successor corporation is not ordinarily liable for the obligations of the predecessor, unless (i) there was an agreement to assume those obligations, (ii) the circumstances surrounding the transaction amount to a consolidation or merger of the two corporations, (iii) the successor company was a mere continuation of the predecessor, or (iv) the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims. *Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 818 S.E. 2d 447 (2018) (citing *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924)).

b. Even If AIA Had Not Assumed Cape's Asbestos Liabilities, It Is Cape's Alter Ego With Respect to Its Ongoing Litigation Avoidance.

Even if AIA were deemed not to have assumed Cape's asbestos liabilities despite its repeated public statements to the contrary, AIA would be liable for Cape's ongoing efforts to avoid responsibility as the alter ego of the acquired Cape entities (including Altrad UK Ltd and Altrad Services Ltd.) for continuing the long-running litigation avoidance scheme. *Oskin*, 400 S.C. at 400, 735 S.E.2d at 465 ("An alter-ego theory requires a showing of (1) total domination and control of one entity by another and (2) inequitable consequences caused thereby.").

(i) AIA dominates and controls its wholly owned subsidiaries through which it purchased Cape and that have provided for funds to resolve non-U.S. asbestos claims.

As set forth in Section II.F.1, AIA dominates and controls its wholly owned subsidiaries that acquired Cape (Altrad UK Ltd.) and that have made provisions of funds to address non-U.S. claims stemming from Cape's asbestos liabilities (Altrad Services Ltd.). Altrad UK Ltd. was created by AIA for the sole purpose of effectuating the acquisition of Cape for AIA, and AIA remains its "immediate and ultimate parent undertaking."[186]

In connection with the acquisition of Cape itself, AIA asserted its control, making clear it would ensure that members of the Cape Group continued to fund their existing commitments to the IDC Scheme, stating it

> ***intends to procure that each member of the Cape Group honours its obligations*** under, or in connection with, the IDC Scheme (including with respect to the funding

[186] Ex. 121, Altrad UK Ltd. Annual Report for the Year Ended 31 August 2022, at Cape_Receiver_00185943 ¶ 14 ("Controlling party"; "The company's immediate and ultimate parent undertaking is Altrad Investment Authority S.A.S., a company controlled by M Altrad."); Ex. 122, Altrad UK Ltd. Annual Report for the Year Ended 31 August 2023, at Cape_Receiver_00185987 ¶ 14 ("Controlling party"; "The company's immediate and ultimate parent undertaking is [AI], a company incorporated in France. [AIA], which is controlled by Dr M Altrad.").

> commitments for future liabilities of the IDC Scheme, the current IDC Scheme administrative arrangements and all related contractual obligations to which members of the Cape Group are subject)[.][187]

Moreover, since its acquisition, AIA has controlled Cape financially and with respect to risk management (including the management of asbestos liabilities).[188] Altrad Services' financial statements state that AIA "manages risk at a Group level," including the "health and safety risks" present in "[m]any of [AIA's] operating environments.[189] AIA also provided a letter of support for Altrad Services Ltd., the entity that made the £118.1 million Provision of Funds to address certain non-U.S. historical claims relating to asbestos exposure, as a going concern in connection with that entity's financial statements.[190] Altrad UK Ltd. is substantially indebted to AIA, including

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[187] Ex. _83, Recommended Cash Offer for Cape plc, at Cape_Receiver_00104914-40 (emphasis added).

[188] Ex. 84, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2022, at Cape_Receiver_00248391 ("The Board of [AIA] (the ultimate parent company) manages risk at a Group level.").

[189] Ex. 85, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2023, at 3, 4; *see also* Ex. 84, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2022, at Cape_Receiver_00248391.

[190] Ex. 85, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2023, at Cape_Receiver_00248371 (referring to the letter of support from AIA, which "confirms continuing support for the going concern period until 30 April 2025"); Ex. 84, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2022, at Cape_Receiver_00248399; Ex. 84, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2022, at Cape_Receiver_00248412, Cape_Receiver_00248438 n.23; *see also* Joshua Stein, *Altrad Makes £118m Provision for Asbestos Claims*, Construction News (Apr. 14, 2023), *available at* https://www.constructionnews.co.uk/health-and-safety/altrad-makes-118m-provision-for-asbestos-claims-14-04-2023/#:~:text=Altrad%20has%20set%20aside%20%C2%A3,historic%20alleged%20exposure%20to%20asbestos.

£448,304,150 in 2018, growing to £996,570,000 in 2023, but AIA has confirmed no repayment will be sought until such time as Altrad UK Ltd. has sufficient funds to repay it.[191]

(ii) AIA has exercised its dominion and control to produce inequitable results.

Despite its stated "commit[ment] to supporting victims of asbestos," and its avowed ability to "procure that each member of the Cape Group honor its obligations," AIA has exercised its control to perpetuate Cape's wrongful litigation avoidance scheme, at least with respect to U.S. claimants.[192] The continuation of this scheme is evidenced not only by Cape's lack of appearance in the *Park* lawsuit, even after the appointment of a Receiver, but also by the non-appearance of seven Altrad entities named as Third-Party Defendants ***in this action***, including (i) Altrad UK Ltd., which is represented by the same counsel as AIA, and (ii) Altrad Services Ltd.[193] This unrebutted evidence is consistent with the adverse inferences previously drawn by this Court.[194]

Application of alter ego theory requires fraud, injustice, or contravention of public policy, and each are manifest here. *See Oskin*, 400 S.C. at 400, 735 S.E.2d at 465 (citing *Colleton Cnty.*, 371 S.C. at 237, 638 S.E.2d at 692). AIA publicly purports to be "fully committed to settling [asbestos-related] claims that are determined to have merit," but directs its wholly owned subsidiaries to continue perpetuating Cape's decades-long scheme to avoid answering to U.S.

[191] Ex. 123, 2019 Altrad UK Ltd. Annual Report, at Cape_Receiver_0018526; Ex. 122, 2023 Altrad UK Ltd. Annual Report, at Cape_Receiver_00185980.

[192] Ex. 81, Altrad Annual Report 2023, at Cape_Receiver_00040862 ("Altrad takes these commitments seriously. . . . Looking forward, the company is actively looking for opportunities to support victims of mesothelioma . . .").

[193] Order Entering Default (Dec. 6, 2023); *see also* Ex. 124, Correspondence Between L. Joyner, J. T. Lay, and T. Carroll, dated August 18–20, 2023, at Cape_Receiver_00001982.

[194] Order Granting Cape Receiver's Mot. for Sanctions (May 23, 2024), ¶¶ 18, 33, 34, 36, 44-46 ("AIA and Mohed Altrad are responsible for Cape's and other non-responding Altrad Third-Party Defendants' failure to respond to litigation involving Cape it the United States. . . .").

citizens harmed or killed by its asbestos.[195] That is precisely the inequitable outcome the doctrine is meant to prevent.

5. *Mr. Altrad Is Liable for Cape's Historic Asbestos Liabilities Based on AIA's Assumption of Liability or, in the Alternative, Is Liable for Cape's Continuing Litigation Avoidance as an Alter Ego.*

Mohed Altrad, the founder and President of the Altrad Group, is the alter ego of AIA and its Cape-related subsidiaries and is liable for Cape's asbestos-related liabilities and ongoing litigation avoidance scheme to the same extent as AIA.[196]

a. <u>Mr. Altrad Dominates and Controls AIA and the Wholly Owned Subsidiaries Through Which AIA Purchased Cape and That Have Provided for Funds to Resolve Non-U.S. Asbestos Claims.</u>

There is no legitimate dispute that Mr. Altrad is the alter ego of AIA and the various subsidiaries that bear his name. Mr. Altrad owns nearly all of the Altrad Group, including Cape. As of 2017, the year AIA acquired Cape, Mr. Altrad "h[e]ld 77.78% of the [Altrad Group's] shares."[197] By September 30, 2022, ***Mr. Altrad held 97.60% of the company's shares***.[198] As of September 30, 2023, Mr. Altrad maintained that near-total ownership level, owning 97.60% of the

[195] Ex. 81, Altrad 2023 Annual Report, at Cape_Receiver_00040862.

[196] *See* Ex. 76, Altrad 2022 Annual Report, at Cape_Receiver_00040825; *see also* Ex. 77, Gaspard Sebag & Tara Patel, *Billionaire Scaffolding 'King' Guilty of Bribing Rugby Boss*, Bloomberg (Dec. 13, 2022) (reporting Mr. Altrad's recent corruption conviction, punished with an 18-month suspended jail term and €50,000 fine), *Available at* <u>https://www.bloomberg.com/news/articles/2022-12-13/scaffolding-billionaire-convicted-of-corruption-over-sponsorship#xj4y7vzkg</u>.

[197] Ex. 74, Altrad, Annual Report (2017), at Cape_Receiver_00040519.

[198] Ex. 76, Altrad, Annual Report (2022), at Cape_Receiver_00040825 (depicting new shareholder structure as of September 30, 2022, as 97.60% owned by Mohed Altrad and 2.40% owned by "Others").

Altrad Group.[199] As the overwhelmingly dominant owner of all of the Altrad Group, all of its entities—including AIA and Cape—are financially dependent on Mr. Altrad and under his control.

Moreover, just as AIA controls Cape's operational policies, including relating to risk management relating to asbestos claims, as detailed above, Mr. Altrad—as its founder, President, dominant majority shareholder, avowed leader, and namesake—controls AIA.[200] Indeed, it acknowledged as much in its Recommended Cash Offer for Cape plc, in which it stated "Altrad [defined as AIA] is a private company which is ***controlled by Mr. Mohed Altrad***."[201] As the Altrad Group's website currently states, Mr. Altrad "still le[ads]" the Altrad Group of companies.[202] The "Governance" section of the Altrad Group's website states that "General Management defines the strategy for the Altrad Group. It is headed by Mohed Altrad, founder and President of the group, and by Jan Vanderstraeten and Ran Oren, joint-Chief Executive Officers."[203]

In addition to his controlling ownership and leadership of the AIA, Mr. Altrad was identified as the "individual person with significant control" over Altrad UK Ltd. upon its

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[199] Ex. 81, Altrad, Annual Report (2023), Cape_Receiver_00040879.

[200] Ex. 125, Affidavit of M. Altrad ¶ 32; Ex. 84, Altrad Services Limited Annual Report and Financial Statements for the Year Ended 31 August 2022, Cape_Receiver_00248388.

[201] Ex. 83, Recommended Cash Offer for Cape plc, at Cape_Receiver_00104914 ¶ 7 ("Information on the Altrad Group") (emphasis added).

[202] Ex. 126, Altrad Website, *Our History*, https://www.altrad.com/en/our-history.html, Cape_Receiver_00002425-6 ("Today, the group is still led by its founder, Mohed Altrad.") (last visited November 3, 2024).

[203] Ex. 127, Altrad Website, *Governance*, https://www.altrad.com/en/governance.html#:~:text=It%20is%20headed%20by%20Mohed,humanist%20conception%20of%20the%20company, Cape_Receiver_00002423-4 (last visited November 3, 2024).

formation.[204] Mr. Altrad also was a director of Altrad UK Ltd. at its formation and subsequently became a director of defaulting Third-Party Defendants Cape UK Holdings Newco Ltd. and Cape Industrial Services Group Ltd.[205] Further, in Altrad UK Ltd.'s most recent annual report, Mr. Altrad is identified as the ultimate controlling party: "The company's immediate and ultimate parent undertaking is [AIA]," which in turn "is controlled by Dr M Altrad." [206]

b. Mr. Altrad has exercised his dominion and control to produce inequitable results.

Like AIA, and as set forth in Section II.F.1, Mr. Altrad has exercised his control for fraudulent and inequitable purposes, *i.e.*, to reaffirm AIA's commitment to accept responsibility for Cape's asbestos-related liabilities while continuing to evade those liabilities in the United States, and to perpetuate Cape's wrongful litigation avoidance scheme even today.[207] For the reasons set forth in Sections II.F.1 and IV.A.4, equity requires that he be recognized as the alter ego of AIA and its Cape-related subsidiaries. *Oskin*, 400 S.C. at 400, 735 S.E.2d at 465. This

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[204] Ex. 75, Certificate of Incorporation of a Private Limited Company, Altrad UK Limited (June 1, 2017), Cape_Receiver_00185738-72 (identifying Mohed Altrad as sole "Individual Person with Significant Control" and as Company Director 1 and Chairman); Ex. 74, Altrad, Annual Report (2017), at Cape_Receiver_00040529-30; *Altrad Investment to Buy UK Oil Services Firm Cape for 332.2 mln Pounds*, REUTERS (July 7, 2017), https://www.reuters.com/article/cape-ma-altrad-investment/altrad-investment-to-buy-uk-oil-services-firm-cape-for-332-2-mln-pounds-idUSL4N1JY2KG.

[205] Ex. 75, Certificate of Incorporation of Altrad UK Ltd. (June 1, 2017); Ex. 79, Cape_Receiver_00187939, Termination of a Director Appointment of Cape UK Holdings Newco Ltd., dated October 29, 2020; Ex. 94, Cape_Receiver_00187592, Termination of a Director Appointment of Cape Industrial Services Group Ltd., dated October 29, 2020).

[206] Ex. 122, Altrad UK Annual Report for the Year Ended 31 August 2023, at Cape_Receiver_00248387 ("Controlling party.").

[207] Ex. 81, Altrad, Annual Report (2023), at Cape_Receiver_00040862 ("Altrad takes these commitments seriously. . . . Looking forward, the company is actively looking for opportunities to support victims of mesothelioma . . .").

evidence is unrebutted and consistent with consistent with the adverse inferences previously drawn by this Court.[208]

6. *ESAB Corp. Controls Charter Today and Should Be Held Responsible for Its Wrongful Litigation Avoidance.*

ESAB is the corporate successor-in-interest to Charter and has assumed the historical liability associated with their asbestos-related activities. In August 1993, Charter plc ("New Charter") acquired all of the interests of Charter Consolidated plc (f/k/a Charter Consolidated Limited) under a court-approved Scheme of Arrangement via a share exchange, with Charter Consolidated plc becoming New Charter's subsidiaries.[209] In 2008, Charter International Limited ("PubCo Charter", and formerly known as Charter International PLC) acquired all of the interests of New Charter under a court-approved Scheme of Arrangement, also via a share exchange.[210]

These were not arm's-length transactions with unrelated parties; instead, they were internal reorganizations in which the liabilities of Charter remained Charter's, whether it was called New Charter, PubCo Charter, or some other variant. Stated another way, this was an extension of the Group System and Charter's control over Cape from prior decades. *See Ed Peters Jewelry Co. v. C & J Jewelry Co.*, 124 F.3d 252, 268 (1st Cir. 1997) ("equity is loath to elevate the form of the transfer over its substance, and deigns to inquire into its true nature"); *Kaiser Found. Health Plan of Mid-Atl. States v. Clary & Moore, P.C.*, 123 F.3d 201, 205 (4th Cir. 1997).

[208] Order Granting Cape Receiver's Mot. for Sanctions (May 23, 2024), at 27-31, ¶¶ 18, 33, 34, 36, 41, 42, 44–46 ("Mohed Altrad controls decision making within the Altrad Group, including for Cape."; "AIA and Mohed Altrad are responsible for Cape's and other non-responding Altrad Third-Party Defendants' failure to respond to litigation involving Cape it the United States. . . .").

[209] Ex. 86, 1993 Scheme of Arrangement, Cape_Receiver_00178003-16.

[210] Ex. 128, 2008 Scheme of Arrangement, Cape_Receiver_00182324-31.

Meanwhile, in 1994, New Charter had acquired all of the equity interests of ESAB AB (including its South Carolina subsidiary and operations), with the ESAB conglomerate also becoming a subsidiary New Charter.[211] Once PubCo Charter acquired New Charter's interests (and the Charter liabilities), it also acquired the ESAB conglomerate's interests.

In 2011, Colfax UK Holdings Ltd., a wholly owned subsidiary of Colfax Corporation ("Colfax Parent"), acquired all of the equity interest of Pubco Charter (including the ESAB conglomerate) pursuant to an Implementation Agreement, with Pubco becoming a wholly owned subsidiary of Colfax UK Holdings Ltd.[212] In 2021, Colfax Parent formed ESAB Corporation, a Delaware corporation,[213] and the next year, Colfax Parent, the ultimate parent of Colfax UK Holdings, completed a spin-off of the new ESAB Corporation, which became the parent of Colfax UK and indirect parent of PubCo Charter.[214]

As a result of this spin-off, Charter became part of ESAB Corporation. In its prospectus, Colfax stated that "subsidiaries to be contributed by Colfax" to the newly spun off ESAB Corp. were "each one of many defendants in a large number of lawsuits that claim personal injury as a result of exposure to asbestos," including for products that "were provided to meet specifications of the subsidiaries' customers, including the U.S. Navy" (referencing Cape's monopoly over

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[211] Ex. 90, Certificate of Incorporation of ESAB Corporation, May 19, 2021, at Cape_Receiver_00185411 (ESAB Holdings Limited was a subsidiary of ESAB AB).

[212] Ex. 89, Implementation Agreement, dated as of September 12, 2011, by and among Colfax Corporation, Colfax UK Holdings LTD and Charter International PLC, Cape_Receiver_00102613-95.

[213] Ex. 90, Certificate of Incorporation of ESAB Corporation, dated May 19, 2021, Cape_Receiver_00185411-3.

[214] Ex. 91, Separation Agreement, at Cape_Receiver_00183869.

amosite).[215] The contributed subsidiaries included Charter.[216] As part of the spin-off, Colfax and ESAB Corp. executed a 2022 Separation Agreement that addressed the transfer of assets and liabilities to ESAB and memorialized ESAB's assumption of liabilities and provision of financial guarantees to its new Charter subsidiaries:

> In order to effect the Separation, the Parties ***shall, to the extent necessary, cause, and shall, to the extent necessary, cause the members of their respective Groups to cause***, (i) the ESAB Group to own, to the extent it does not already own, all of the ESAB Assets and none of the Enovis Assets, and (ii) ***the ESAB Group to be liable for***, to the extent it is not already liable for, ***all of the ESAB Liabilities***.[217]

"ESAB Group" was defined to include not only ESAB Corp., but also "***each Subsidiary of ESAB***,"[218] which included Charter. "ESAB Liabilities" was defined broadly and included:

> any and all Liabilities relating to, arising out of or resulting from the actions, inactions, events, omissions, conditions, facts or circumstances occurring or existing prior to, at or after the Effective Time (whether or not such Liabilities cease being contingent, mature, become known, are asserted or foreseen, or accrue, in each case before, at or after the Effective Time), in each case to the extent that such Liabilities relate to, arise out of or result from . . . an ESAB Asset . . . , including: (i) all Liabilities included or reflected as liabilities or obligations of ESAB or the members of the ESAB Group on the ESAB Balance Sheet, subject to any discharge of such Liabilities subsequent to the date of the ESAB Balance Sheet; . . . [or] (iv) any and all Liabilities that are expressly provided by this Agreement or any Ancillary Agreement as Liabilities to be assumed by ESAB or any other member of the ESAB Group, and all agreements, obligations and Liabilities of any member of the ESAB Group under this Agreement or any of the Ancillary Agreements; . . . [219]

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[215] Ex. 129, *Information Statement of Colfax Corp.*, at Cape_Receiver_00184395, Cape_Receiver_00184400-1 (Mar. 17, 2022).

[216] ESAB Corp.'s subsidiaries include Charter Consolidated Limited, Charter Overseas Holdings Limited, Charter International Limited, among other related entities..

[217] Ex. 91, Separation Agreement, § 2.1(a) ("Transfers of Assets and Assumptions of Liabilities; ESAB Assets; Enovis Assets.") at Cape_Receiver_00183887 (emphases added).

[218] Ex. 91, Separation Agreement, § 1.1 ("Definitions") at Cape_Receiver_00183874.

[219] Ex. 91, Separation Agreement, § 2.1(d)(i), (iv) ("Transfers of Assets and Assumptions of Liabilities; ESAB Assets; Enovis Assets.") at Cape_Receiver_00183889-90.

Finally, not only was ESAB Corp. the ultimate parent for the Charter entities post-spinoff, in their annual reports, Charter describes ESAB Corp. as "the controlling party."[220] Several Charter entities also reported post-separation that "***ESAB Corporation will support the company to meet all liabilities for a period to 31 December 2024***, which is consistent with the company's going concern assessment period."[221] Several of these Charter entities appear to have neither operational revenue nor employees.[222] By their very own admissions, Charter no longer operate, have employees, or generate revenue, but instead are shells of what they once were and are "controlled" by their new American parent corporation, ESAB Corp.

As with AIA's control over Cape, ESAB's control over Charter has been exercised to result in inequitable results, *i.e.*, the continuation of a litigation avoidance scheme to deny U.S. claimants redress, including as reflected in the wholesale failure of ESAB and Charter to participate in discovery in this case. This evidence, much of which is a matter of public record, is unrebutted and is consistent with the adverse inferences previously drawn by this Court.[223] Indeed, ESAB

[220] *See, e.g.*, Ex. 92, Charter Consolidated Ltd. Report (2022), at Cape_Receiver_00177649 (reporting £664,288,000 in net assets in 2022, with the "company's shares . . . held by Charter limited, its immediate parent ***and controlling party***," while it "regards ESAB Corporation . . . as the Company's ultimate parent company ***and controlling party***" (emphasis added)); Ex. 93, Central Mining & Inv. Corp. Ltd. Report (2023), Cape_Receiver_00172654-57 (also reporting ESAB Corporation as "ultimate parent company ***and controlling party***," and net assets of £78,857,000 (emphasis added)).

[221] Ex. 92, Charter Consolidated Limited Audited Financial Statements for the Year Ended 31 December 2022, at Cape_Receiver_00177636; Ex. 131, CAST Limited Audited Financial Statements for the Year Ended 31 December 2022 at 3.

[222] Ex. 130, Central Mining Annual Report for the Period Ended 31 December 2022, at Cape_Receiver_00175381 ("The Company has not prepared a profit and loss account as there was no revenue during the period ended 31 December 2022"); Ex. 92, Charter Consolidated Limited Audited Financial Statements for the Year Ended 31 December 2022, at Cape_Receiver_00177646 (no income or employees); Ex. 131, CAST Limited Audited Financial Statements for the Year Ended 31 December 2022 at 13 (no employees).

[223] Order Granting Cape Receiver's Mot. for Sanctions (May 23, 2024) at 21-26, ¶¶ 54-66, 69-71.

has not produced a shred of evidence in this action, much less evidence that would relieve it of responsibility for the unaddressed harm of its "controlled" subsidiary, Charter. For decades, Charter has escaped liability by dissolving NAAC and retreating from U.S. shores. Now that they are "controlled" by ESAB Corp., a U.S. corporation, equity demands that this Court hold ESAB responsible for the reprehensible acts of Charter. *Oskin*, 400 S.C. 390, 397.

V. CONCLUSION

For the foregoing reasons, the Receiver respectfully requests entry of summary judgment in his favor and against the Charter and Altrad Third-Party Defendants on the issue of their successor liability and/or alter ego/veil piercing liability for the harm caused by, and the continuing litigation avoidance scheme of, Cape and NAAC.

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