THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Appellate Case No. 2023-002011
Appellate Case No. 2023-002010
Appellate Case No. 2023-002009
Circuit Court ~~Case No. 2023-C~~P-40-01759

John A. Tibbs and Margaret B. Tibbs, ... Plaintiffs,

v.

3M Company; 4520 Corp., Inc.; A.O. Smith Corporation; A.W. Chesterton Company; ABB Inc.; Air & Liquid Systems Corporation; AIW-2010 Wind Down Corp.; Amentum Environment & Energy, Inc.; Anchor/Darling Valve Company; Armstrong International, Inc.; Asbestos Corporation Limited; ASCO, L.P.; Atlas Asbestos Co.; Atlas Turner, Inc.; AWT Air Company, Inc.; Bahnson, Inc.; Banner Industries International, Inc.; Banner Industries, LLC; Banner Industries of N.E., Inc.; Barretts Minerals Inc.; Beaty Investments, Inc.; Bechtel Corporation; The Bonitz Company; Brand Insulations, Inc.; BW/IP Inc.; Canvas CT, LLC; Cape PLC; Carboline Company; CB&I Laurens, Inc.; Cleaver-Brooks, Inc.; Consolidated Electrical Distributors, Inc.; Copes-Vulcan, Inc.; Covil Corporation; Crane Instrumentation & Sampling, Inc.; Crosby Valve, LLC; Daniel International Corporation; Davis Mechanical Contractors, Inc.; Dezurik, Inc.; Duke Energy Carolinas, LLC; Duke Energy Corporation; Eaton Corporation; Ellington Insulation Company, Inc.; Emerson Electric Co.; Fisher Controls International LLC; Flame Refractories, Inc.; Flowserve Corporation; Flowserve US Inc.; Fluor Constructors International; Fluor Constructors International, Inc.; Fluor Daniel Services Corporation; Fluor Enterprises, Inc.; FMC Corporation; Foster Wheeler Energy Corporation; Gardner Denver Nash, LLC; General Boiler Casing Company, Inc.; General Cable Corporation; General Cable Industries, Inc.; General Electric Company; Gould Electronics Inc.; Goulds Pumps, Incorporated; Goulds Pumps LLC; Great Barrier Insulation Co.; Grinnell LLC; Hajoca Corporation; Howden North America Inc.; HPC Industrial Services, LLC; IMO Industries Inc.; ITT LLC; Joy Global Underground Mining LLC; K-Mac Services Incorporated; Metropolitan Life Insurance Company; Mine Safety Appliances Company, LLC; MP Supply,

Inc.; The Nash Engineering Company; Occidental Chemical Corporation; Paramount Global; Patterson Pump Company; PECW Holding Company; Pfizer Inc.; Piedmont Insulation, Inc.; Plastics Engineering Company; Presnell Insulation Co., Inc.; Redco Corporation; Riley Power Inc.; Rockwell Automation, Inc.; RSCC Wire & Cable LLC; Schneider Electric USA, Inc.; Sequoia Ventures Inc.; Spirax Sarco, Incl; SPX Corporation; Stafford Insulation Company; Standard Insulation Company of N.C., Inc.; Starr Davis Company, Inc.; Starr Davis Company of S.C., Inc.; Sterling Fluid Systems (USA) LLC; TE Wire & Cable, LLC; Thermo Electric Company, Inc.; Union Carbide Corporation; Valves and Controls US, Inc.; Velan Valve Corp.; Viking Pump, Inc; Vistra Intermediate Company LLC; The William Powell Company; Wind Up, Ltd.; Yuba Heat Transfer LLC; and Zurn Industries, LLC, ...Defendants,

of which

Asbestos Corporation Limited is the .....Appellant,

and

Cape PLC, individually and as successor in interest to Cape Asbestos Company Limited, by and through its duly appointed Receiver Peter D. Protopapas,..... Third-Party Plaintiff/ Respondent,

v.

Anglo American PLC, individually and as successor in interest to Anglo American Corporation of South Africa Ltd.; DeBeers PLC; DeBeers Centenary AG; DeBeers Consolidated Mines Ltd.; DeBeers S.A.; DeBeers UK Ltd.; DeBeers Jewelers US, Inc.; Angle American US Holdings Inc.; Element Six US Corp.; Element Six Technologies US Corp.; Element Six Technologies (OR) Corp.; First Mode Holdings, Inc.; Platinum Guild International (USA) Jewelry Inc.; Forevermark US Inc.; Anglo American Crop Nutrients (USA), LLC; Charter Consolidated Ltd.; ESAB Corporation; Central Mining & Investment Corporation Ltd.; Cape Holdco Ltd.; The Law Debenture Corporation PLC; Cape Industrial Services Group Ltd.; Mohed Altrad; Altrad UK Ltd.; Cape UK Holdings Newco Ltd.; Altrad Services Ltd., f/k/a Cape Industrial Services Ltd.; Altrad Investment Authority SAS; Sparrows Offshore Group Ltd.; Hawk Bidco US Inc.; Arranco US, LLC; Sparrows Offshore, LLC; The Sparrows Group, LLC,..... Third-Party Defendants,

of which

ESAB Corporation; Charter Consolidated Ltd.; and Central Mining & Investment Corporation Ltd. are the……Appellants.

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RETURN OF APPELLANTS CHARTER CONSOLIDATED LTD., ESAB CORPORATION, AND CENTRAL MINING AND INVESTMENT CORPORATION LTD. TO MOTION TO DISMISS APPEALS OF "INTERLOCUTORY DISCOVERY ORDER"

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Appellants Charter Consolidated Ltd. ("Charter"), ESAB Corporation ("ESAB"), and Central Mining and Investment Corporation Ltd. ("Central Mining" and, collectively, "Appellants") respectfully submit this Return to Motion to Dismiss Appeals of "Interlocutory Discovery Order" ("Motion to Dismiss") filed by Peter D. Protopapas, in his purported capacity as the court-appointed receiver for Cape PLC[1] ("Receiver").

INTRODUCTION

Appellants have filed two appeals in this case. For the present (second) appeal – Appellants are appealing, among other things, the refusal to grant injunctive relief. This position is fully briefed in Appellants' Initial Brief that was filed on March 20, 2024 (one day after Appellants filed their Notice of Appeal). Instead of addressing the merits of the appeal by way of response brief, Receiver instead blatantly ignores the underlying argument regarding the Circuit Court's lack of subject matter jurisdiction pursuant to 205 SCRAP, and attempts an end run around the merits by making the present Motion to Dismiss.

The Receiver's Motion to Dismiss mischaracterizes to the order on appeal as a "garden-variety" discovery order. In fact, the order on appeal addressed competing motions – to compel discovery on one side and to enjoin the Receiver from pursuing discovery on the other. The relief sought was mutually exclusive – granting one side's motions would deprive the other side of the requested relief. The order on appeal granted the motions to compel (clearly refusing the injunctive relief sought) and referenced the requested injunctive relief in a footnote - explaining that the

[1] The Receiver and the circuit court have defined Cape and Cape PLC different ways at various times. When citing to or referring to a filing or submission by either the Receiver or the circuit court, Appellants have attempted to use the term as used by the Receiver or the circuit court therein.

circuit court was refusing to grant the injunctive relief at this time. The Receiver argues that Appellants should have waited for the circuit court to officially deny the motion for injunction and complied with the order compelling discovery knowing full well that such action would have mooted the injunctive relief requested. The Receiver's suggestion that the order on appeal does not refuse the request for injunction is frivolous.

The issues raised in this appeal need to be evaluated with the benefit of full appellate briefing and oral argument. The Receiver's motion to dismiss addresses some of the merits set forth in Appellants' Initial Brief, but fails to cite, much less distinguish, a single case addressing the appealability of orders that have the practical effect of denying a motion for injunction. Moreover, the Receiver wholly avoids addressing the Rule 205 jurisdictional issue. Instead, the Receiver addresses a portion of the merits of the underlying appeal, but his truncated and inaccurate recitation of the facts, incorrect characterization of the appealed order, and perfunctory analysis of the law reveals his transparent effort to avoid meaningful appellate review based on a complete record.

To be clear, the issue on appeal is not a "garden variety" discovery order. It is the circuit court's clear refusal to issue the requested injunction. Accordingly, for the reasons set forth herein, the March 2024 Appeal should proceed and the Motion to Dismiss should be denied.

PROCEDURAL HISTORY

The March 2024 Appeal is predicated on the circuit court's rejection of this Court's exclusive jurisdiction pursuant to Rule 205, SCACR. As a result of the December 6, 2023 appeal of an order of the Honorable Jean Toal in the Court of Common Pleas for the Fifth Judicial Circuit, dated December 6, 2023 (the "December 2023 Order"), which (among other things), granted, modified, and continued the appointment of the Receiver. The details of the receivership

appointment are chronicled in Appellants' Initial Brief in the December 2023 Appeal, and the details of the injunction denial are chronicled in Appellants' Initial Brief in the March 2024 Appeal; both are summarized below.

I. The Receivership

The Receiver was appointed over Cape PLC in *Park v. Armstrong International, Inc.*, Case No. 2021-CP-40-02727, nine months after the *Park* plaintiff reported to the circuit court that the case was "fully resolved." The *Park* plaintiff named two distinct, active, and presently existing "Cape" entities as defendants: Cape PLC and Cape Intermediate Holdings Limited ("CIHL").[2] The *Park* plaintiff chose to only seek a receiver over Cape PLC. The Receiver is unhappy about the *Park* plaintiff's decision but admits that Cape PLC (a Jersey entity) and CIHL (a United Kingdom entity) are distinct and separately existing active companies.[3]

The *Park* plaintiff sought appointment of a receiver over Cape PLC even though Cape PLC has no assets in South Carolina, no involvement in any of the historical asbestos-related activities at issue in the *Park* lawsuit, and no contacts with this state sufficient to establish personal jurisdiction in South Carolina. Additionally, there is no evidence that the *Park* plaintiff ever served any process at all on Cape PLC, and no motion for entry of default or default judgment entered against Cape PLC in *Park*. Moreover, the Receiver admits that Cape PLC was formed in 2011, did not sell asbestos, and never did business in the United States. Nonetheless, the circuit court granted the *Park* plaintiff's motion, relying on "facts" that the Receiver has since admitted are simply not true:

[2] *See* R. p. ___; *Park* First Amended Complaint, filed November 17, 2021, at p. 1; ¶¶ 15, 26-27.

[3] *See* R. p. ___; *Tibbs* Third-Party Complaint ("Third-Party Compl.") at ¶¶ 40, 45, 113; Hearing Transcript (Oct. 25, 2023 at 42.

that Cape PLC had been dissolved, forfeited its charter, and was served in the *Park* case.[4] This receivership cannot exist as a matter of federal constitutional law and as a matter of South Carolina substantive and procedural law. It is fraught with legal errors that are detailed at length in the Appellants' opening briefs in the various other appeals arising from this same situation.

The Receiver subsequently filed the *Tibbs* action against multiple foreign companies attempting to (among other things) pierce Cape PLC's corporate veil and "recover" funds from entities alleged to have had a historic connection with CIHL to satisfy potential future CIHL liabilities. Appellants moved to dissolve the receivership on the grounds that there was no legal or equitable basis for the original receivership appointment over Cape PLC, as neither the Receiver nor the *Park* plaintiff demonstrated compliance with South Carolina Code § 15-65-10(4), provided evidence that a receivership is appropriate under South Carolina Code § 15-65-10(5), or provided evidence that there has been a judgment entered against Cape PLC (or any Cape entity) in the *Park* case or any other action.

In opposing the motions to dissolve, the Receiver readily admitted that no entity named Cape PLC was ever served in *Park*. Instead, the Receiver pivoted and argued that CIHL should be deemed the entity in receivership even though CIHL was incorporated in the United Kingdom in 1893, has no assets in South Carolina, has no judgment entered against it in South Carolina, and is not subject to personal jurisdiction in South Carolina. The Receiver urged this argument on the circuit court even though CIHL was not named in the *Park* Motion to Appoint Receiver, was not named in the Receivership Order, and is not a defendant in the underlying *Tibbs* Suit.[5] In short,

[4] *See* R. p. ___; Order Appointing Cape PLC Receiver at 1 (filed Mar. 17, 2023, in *Park*).
[5] Cape PLC and Cape Intermediate Holdings Limited were both listed as defendants in Park. The Park plaintiff for some reason chose to request appointment of a receiver over only Cape PLC. The Receiver admits that neither Cape PLC nor Cape Intermediate Holdings Limited was served with the operative Park Summons and Complaint.

the Receiver recognized that CIHL is the present, active, UK entity that was formerly known as Cape Asbestos Company Ltd (and not Cape PLC). The Receiver further recognized that unless he became the receiver over CIHL, he would have no standing to assert any of the allegations in the third-party complaint (and that the circuit court would have no basis to assert personal jurisdiction over Appellants). Accordingly, instead of dismissing his third-party action, Receiver argued that the circuit court should deny the motions to dissolve and the motions to dismiss for lack of personal jurisdiction and instead rule that he is also receiver over CIHL.

Even though the Receiver's argument bore no connection to anything in the record, the circuit court accepted it. The December 2023 Order denied the motions to dissolve the receivership, held that the Receiver is also the receiver over CIHL, modified the original receivership appointment to seemingly include CIHL (despite the absence of any notice to that foreign company of the Receiver's arguments or the potential appointment of a receiver over its assets), and held that because Receiver may act for CIHL, Appellants are subject to personal jurisdiction in South Carolina.[6]

The Appellants, as well as other third-party defendants, appealed the December 2023 Order (the "December 2023 Appeal"), as it continued a receivership over objections that it was void *ab initio* as a matter of federal and state law; specifically continued a receivership despite a motion to dissolve; modified the scope of the receivership in numerous ways; had the effect of granting a new receivership over a corporate entity that was never involved in the initial motion to create this receivership; and, by improperly placing the different foreign entity (CIHL) into receivership, it allowed the circuit court to improperly assert personal jurisdiction over Appellants. There are

[6] R. p. ___; Order (Dec. 6, 2023).

presently ***six*** appeals pending[7] involving that order – each of which involves a full challenge to the Receiver's authority to act and a full challenge to the circuit court's finding that it has personal jurisdiction over third-party defendants. Every issue in the third-party action is affected by the matters on appeal.

II. The Receiver's Discovery Requests and Post-Appeal Activities

Prior to the December 2023 Appeal, the Receiver had served certain written discovery demands (the "Discovery Requests") on Appellants, and it had also served Central Mining with an initial Notice of Deposition., requested a stay pending resolution of the motions to dismiss, and filed motions for protective orders and motions to dissolve the receivership, the circuit court addressed several of Appellants' requests for relief and "paused" discovery at a hearing on October 25, 2023. The December 2023 Order denied the motions to dissolve (as discussed above) and motions relating to personal jurisdiction but did not address the motions for protective order or the discovery "pause." Appellants then filed the December 2023 Appeal.

Although the December 2023 Appeal immediately divested the circuit court of jurisdiction over all matters affected by the legitimacy of the receivership, and although the motions for protective order were still pending, out of an abundance of caution and with an explicit reservation of all rights and defenses, Appellants served responses to the Discovery Requests on January 5, 2024 (the "Responses"). The Responses indicated that proceeding with discovery while the Appeal was pending was improper pursuant to Rule 205, SCACR, ("Rule 205") because the circuit court lacked jurisdiction to proceed with this matter, as all issues regarding the purported Receiver's appointment and his purported authority to engage in litigation were (and still are) pending before the South Carolina Court of Appeals.

[7] Appellate Case Numbers 2023-002006, 2023-002007, 2023-002008, 2023-002009, 2023-002010, and 2023-002011.

Nevertheless, on January 8, 2024, the Receiver served Appellant with a letter (the "Rule 11 Letter") stating his intention to seek relief from the circuit court compelling Appellants' further responses to the Discovery Requests and the deposition of Central Mining. The Rule 11 Letter did not address Rule 205 or acknowledge that it was the primary basis of Appellants' January 5, 2024 objections; rather, the Receiver argued that discovery should continue during the pendency of the December 2023 Appeal pursuant to Rule 62(a), SCRCP, and Sections 14-3-330(4) and 14-3-450 of the South Carolina Code (none of which are exceptions to Rule 205).

On January 10, 2024, Appellants responded to the Receiver's Rule 11 Letter, reminding him that the circuit court lacked jurisdiction to proceed based on Rule 205, SCACR. Appellants' January 10, 2024 response further explained that the arguments the Receiver raised in his Rule 11 Letter were insufficient to overcome the circuit court's clear lack of jurisdiction and also pointed out that Appellants had outstanding motions for protective orders regarding the discovery sought.

Rather than abide by Rule 205, the Receiver filed Motions to Compel Appellants' responses to the Discovery Requests and the deposition of Central Mining on January 12, 2024. As with the Rule 11 Letter, the Motions to Compel were silent as to Rule 205; rather, they relied on Rule 62(a), SCRCP, and Sections 14-3-330(4) and 14-3-450 of the South Carolina Code as they relate to stays (an argument not asserted by Appellants).

Instead of acknowledging that the Appeal deprived it of jurisdiction to hear the Motions to Compel, the circuit court directed the parties to submit competing proposed orders and objections for its review by February 27, 2024. Appellants filed their oppositions to the Motions to Compel on February 16, 2024 ("Opposition") and filed their objections to The Receiver's proposed order on February 27, 2024 ("Objections"). Both the Opposition and the Objections asserted, *inter alia*, Rule 205 and pointed out that the issues on appeal related to both i) lack of personal jurisdiction

over Appellants, and ii) whether the receivership should be dissolved. The Opposition and the Objections requested that the circuit court acknowledge its lack of jurisdiction to rule on the outstanding motions, and in the alternative to enjoin the Receiver from taking action during the pendency of the appeal.

The March 2024 Order rejected the Appellants' arguments, granted the Receiver's motion, authorized the Receiver to proceed without restriction despite the pendency of the appeal, and refused Appellants' request for an injunction. This order, which did not address or reference Rule 205, SCACR, effectively ruled that 1) the appellate courts do not have exclusive jurisdiction and 2) that Appellants' request for injunction was refused. Accordingly, Appellants filed the March 2024 Appeal, and the Receiver filed the Motion to Dismiss.

STANDARD OF REVIEW

The critical inquiry on a motion to dismiss an appeal from an interlocutory order is whether the order is immediately appealable, which arises from and is controlled by statute.[8] Absent a specialized statute, a party may only appeal from an interlocutory order that falls within § 14-3-330.[9] Under § 14-3-330, a party may appeal from an interlocutory order involving the merits; affecting a substantial right; or granting, continuing, modifying, or refusing an injunction or receivership.[10]

[8] *See Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005).

[9] *See id.*

[10] *See id.*

Whether the interlocutory order falls within one of the enumerated categories is determined on a case-by-case basis.[11] The ultimate question is the effect of the interlocutory order on the proceedings below.[12] Accordingly, the appellate court is "free to evaluate the trial court's order as what it is—not merely what it appears to be—and hold that it is one which is immediately appealable."[13]

ARGUMENT

A. The March 2024 Order is Appealable

The March 2024 Appeal is proper because the March 2024 Order constitutes a refusal to issue an injunction and therefore is immediately appealable. Although the circuit court and the Receiver style the March 2024 Order as a pedestrian "discovery order," such labels do not control.[14] Instead, appellate courts look to the order's actual effect to determine whether it is appealable.[15] In making this inquiry, appellate courts are "free to evaluate the trial court's order as

[11] *See Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015).

[12] *See Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011); *see also Dorn v. Cohen*, 418 S.C. 126, 138, 791 S.E.2d 313, 319 (Ct. App. 2016), *aff'd as modified*, 421 S.C. 517, 809 S.E.2d 53 (2017).

[13] *See Morrow*, 412 S.C. at 540, 773 S.E.2d at 147.

[14] *See Spalt v. S.C. Dep't of Motor Vehicles*, 423 S.C. 576, 584, 816 S.E.2d 579, 583 (2018) ("The label given to the order is not determinative of its immediate appealability.").

[15] *See, e.g., id.* (noting appealability depends on "the substance of the order"); *Thornton*, 391 S.C. at 304, 705 S.E.2d at 479 ("[A]n appellate court should look to the effect of an interlocutory order to determine its appealability . . . ."); *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 121 n.4, 747 S.E.2d 461, 464 n.4 (2013) (explaining that whether an order is immediately appealable is a function of "substance rather than nomenclature").

what it is—not merely what it appears to be—and hold that it is one which is immediately appealable."[16]

Here, contrary to the Receiver's characterizations, a review of the March 2024 Order reveals that it is anything but a simple discovery ruling on mundane disagreements over relevance, privilege, or burden. Instead, as Appellants' Discovery Responses, Opposition, and Objections all make clear, the issue before the circuit court was not a discovery dispute at all, but rather the mandatory application of Rule 205, SCACR, upon filing of the December 2023 Appeal, which divested the circuit court of jurisdiction over all matters relating to the Receiver's authority to act (including seeking discovery).[17]

Rule 205, SCACR is designed to be self-executing and to apply automatically; the absence of jurisdiction renders the circuit court without power to act over all matters affected by the appeal, as explained in the preceding section. Yet, the Receiver's insistence upon advancing the litigation below while the validity of his appointment is pending on appeal forced Appellants to seek an injunction against the Receiver to enforce Rule 205. Accordingly, Appellants' Opposition sought to enjoin all activity by the Receiver while the March 2024 Appeal is pending, as dictated by Rule 205, the circuit court's lack of jurisdiction, and black-letter South Carolina enforcing that lack of jurisdiction.[18]

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[16] *See Morrow*, 412 S.C. at 540, 773 S.E.2d at 147; *see also generally Towles v. United HealthCare Corp.*, 338 S.C. 29, 35, 524 S.E.2d 839, 842–43 (Ct. App. 1999) (holding that an order requiring discovery and permitting a defendant to re-seek to compel a matter to arbitration after the close of discovery was immediately appealable because "[t]he circuit court's order favored litigation over arbitration").

[17] This lack of jurisdiction by the circuit court additionally requires the Receiver as an arm of the court to be enjoined from further activity unless and until the circuit court regains jurisdiction, because his power cannot exceed the circuit court's power.

Nevertheless, despite the automatic application of Rule 205, as well as Appellants' pleas to the circuit court to abide by that rule and enjoin the Receiver from engaging in litigation while the very legitimacy of his receivership is before this Court, the March 2024 Order refused Appellants' request for an injunction by holding that the receivership is not "stayed" and allowing the Receiver to continue the very activities Appellants sought to enjoin, including taking voluminous discovery of the Appellants and others. [19] The circuit court's order permitting the Receiver to continue conducting litigation activities without the power to do so is void *ab initio* and should be vacated accordingly, and the circuit court's refusal to enjoin the Receiver was an error of law rendering the March 2024 Order immediately appealable.[20]

Although the Motion to Dismiss argues that the circuit court's comment about keeping Appellants' request for an injunction "under advisement" should immunize the March 2024 Order from appeal,[21] state and federal caselaw demonstrate otherwise. The South Carolina statute governing interlocutory appeals of injunction orders is substantially similar to the corresponding

[19] *See, e.g.*, *Towles*, 338 S.C. at 35, 524 S.E.2d at 842–43 (holding that delaying the grant of a motion to compel arbitration until after discovery rendered the order compelling discovery immediately appealable, as the circuit court had "favored litigation over arbitration" despite not finally resolving the question of arbitrability).

[20] *See Arnal v. Fraser*, 371 S.C. 512, 517-23, 641 S.E.2d 419, 421-24 (2007); *Wingate v. Wingate*, 289 S.C. 574, 575, 347 S.E.2d 878 (1985); *Wilson v. Walker*, 340 S.C. 531, 540, 532 S.E.2d 19, 23 (Ct. App. 2000); S.C. Code § 14-3-330(4) (authorizing immediate appeals of interlocutory orders "refusing an injunction"); *Hazel v. Blitz USA, Inc.*, 433 S.C. 120, 124, 857 S.E.2d 4, 6 (2021) (addressing on immediate appeal the propriety of an order that allowed a case to proceed and refused to "permanently enjoin" the claims against a defendant based on a bankruptcy court order).

[21] *See* Motion to Dismiss, p. 7.

federal rule.[22] As a result, South Carolina courts often look to federal authority when interpreting analogous state court rules or statutes.[23]

The United States Supreme Court has recognized that "where an order has the 'practical effect' of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction."[24] In recognizing the "practical effect" test, which the South Carolina Supreme Court has also adopted,[25] the Supreme Court reiterated that "the label attached to an order is not dispositive," and that "we have not allowed district courts to 'shield' [their] orders from appellate review' by avoiding the label 'injunction.'"[26] Consequently, the circuit court's footnote 1 purporting to keep the cross-motions for injunction "under advisement" while denying the relief sought is not effective to insulate the appealed order from review. Indeed, courts have held that delay or inaction in ruling on a motion for injunction is equivalent to denial and entitles the aggrieved party to interlocutory appeal:

> Because the district court did not expressly deny the motion here, we must determine whether the district court's inaction, in light of the unique expedited nature of the case, amounts to an "effective" denial.

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[22] *Compare* S.C. Code § 14-3-330(4) (authorizing appeal of "[a]n interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction"), *with* 28 U.S.C. § 1292(a)(1) (authorizing appeal of "[i]nterlocutory order of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions").

[23] *See Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016) ("In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules."); *State v. Taylor*, 333 S.C. 159, 170-72, 508 S.E.2d 870, 875-76 (1998) (examining federal authorities when "Rule 106, SCRE, has not been interpreted by this [c]ourt," but was "substantially similar to Rule 106 of the Federal Rules of Evidence").

[24] *See Abbott v. Perez*, 585 U.S. 579, 629, 138 S. Ct. 2305, 2339, 201 L. Ed. 2d 714 (2018).

[25] *See Thornton*, 391 S.C. at 304, 705 S.E.2d at 479 ("[A]n appellate court should look to the effect of an interlocutory order to determine its appealability . . . .")

[26] *See Abbott*, 585 U.S. at 594, 138 S. Ct. at 2319.

> It's generally understood that a motion for preliminary injunctive relief "must be granted promptly to be effective," so if a district court does not timely rule on a preliminary-injunction motion, it can effectively deny the motion. We have accordingly recognized that simply sitting on a preliminary-injunction motion for too long can effectively deny it.[27]

Here, particularly in light of the Receiver's insistence of proceeding with discovery in the face of multiple pending appeals challenging the propriety of his appointment, the cross-motion for injunctive relief to enforce Rule 205 must be granted promptly to be effective. If Appellants are forced to participate in discovery and trial notwithstanding their pending appeals seeking the dissolve the receivership, the protections of Rule 205 will be rendered meaningless.

The fact that the challenged order facially compelled discovery without addressing the cross-motions for injunction does not matter. Courts have found that "discovery orders" that have the practical effect of denying pending motions for injunction are immediately appealable. For example, in *United States v. Tex. Educ. Agency*, 431 F.2d 1313, 1315 (5th Cir. 1970), the court held that interlocutory appeal of an *order setting a pretrial conference* was permitted, where an injunction ordering school desegregation for the 1970-71 term was sought but the pretrial conference was set ten days *after* school began.[28] The appealed order set for September 10 (after the opening of the school year) a "preliminary pretrial conference * * * at which conference questions concerning jurisdiction, venue, pleadings, parties, severance, and pending motions will be considered." *Id.* (asterisks in original). The court found that the "effect of the order was to deny

[27] *See In re Fort Worth Chamber of Commerce*, No. 24-10266, --- F.4d ----, 2024 U.S. App. LEXIS 8336, at *7 (5th Cir. Apr. 5, 2024).

[28] *See United States v. Tex. Educ. Agency*, 431 F.2d 1313, 1315 (5th Cir. 1970).

the injunction, since desegregation plans would not be put into operation until some time after the opening of schools for the 1970-71 term.[29]

So too here. The purpose of Rule 205, and Appellants' motion for injunction to enforce it, is to prevent trial court proceedings from occurring that affect matters on appeal. The effect of the appealed order in this case was to deny the cross-motions for injunction, which sought not only to bar the Receiver from pursuing discovery but also sought to enjoin him from taking any action—inside or outside of Court—to impair the rights of Appellants under the auspices of the appealed receivership order. Consequently, the circuit court's order denying that injunctive relief is appealable under S.C. Code § 14-3-330(4).

Given the Receiver's persistence in pursuing this litigation and discovery in the face of pending appeals, an injunction was an appropriate remedy to restrain him and enforce Rule 205. Because the circuit court appeared unpersuaded by the argument Rule 205 prevented action on any matters affected by the appeal—specifically including the Receiver's ability to seek discovery, the lower court's ability to grant a motion to compel and dispose of pending motions for protective order, and other related actions—Appellants included in their Opposition a cross-motion for injunctive relief whereby the circuit court—if it determined it had the power to do so—could afford Appellants the same outcome sought pursuant to Rule 205.

In so moving, Appellants offered the following legal bases on which the circuit court *should have* ruled as a matter of law. First, and most importantly, the injunction should have been based on the plain and clear text of Rule 205. Second, and because Rule 205 creates a jurisdictional bar to action by which a lower court is divested of authority to rule on all but a few matters, the

[29] *See id.*

circuit court cannot act any further.[30] Third, as set forth above, the Receiver acts as an arm of the court.[31] Because the circuit court lacked jurisdiction to proceed, the Receiver himself also lacked authority to conduct any activity, as he cannot possibly have any greater authority to function than the circuit court itself. This is not a matter of discretion; Appellants were entitled to an injunction to enforce the clear dictates of Rule 205 as a matter of law.

On these bases, Appellants sought to have the circuit court enforce the basic and fundamental rules necessary to preserving the orderly review and determination of the issues pending on appeal. However, rather than rule on the cross-motion for injunctive relief, the circuit court indicated it would simply keep it under advisement. In practice and substance, this was a refusal to enjoin and a resulting error of law as to Appellants' simple and straightforward request: enforce Rule 205 and the results thereof.

B. The Court Should Not Prematurely Rule on the Merits of the March 2024 Appeal

The Court can and should deny this motion on jurisdictional grounds for the reasons stated above, or alternatively adjudicate the Receiver's jurisdictional objections at the merits stage with the benefit of full appellate briefing and oral argument. Aside from incorrectly labeling the challenged order as an "interlocutory discovery order" and declaring such orders unappealable without exception, the Receiver's motion to dismiss does not cite one case addressing the appealability of orders that have the effect of denying injunctions. Instead, the Receiver's motion focuses almost exclusively on arguing the merits of this appeal—whether the Receiver may

[30] *See Limehouse v. Hulsey*, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013) ("Without jurisdiction, a court cannot proceed at all in any cause; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause." (quoting 32A Am. Jur. 2d Federal Courts § 581 (2007))).

[31] *See In re Am. Slicing Mach. Co.*, 125 S.C. 214, 118 S.E. 303, 304 (1923).

proceed with litigating this case while Appellants' appeals challenging the receivership are pending.

The Court need not and should not address these hotly contested merits issues, which Appellants have already addressed in the opening brief they filed concurrently with their notices of appeal in this matter (given the urgency of the denial of injunctive relief). This motion can be adjudicated by recognizing that the challenged order is appealable and deferring the parties' disagreements regarding the interpretation of Rule 205 and Rule 241 for the merits stage where they belong. While Appellants dispute the merits arguments raised in the Receiver's motion—which boil down to the contention that the Receiver is free to do whatever he wants while any appeal is pending—the Court simply does not need to address that issue to resolve the present motion to dismiss the appeal.

This Court has jurisdiction over this appeal, and the merits arguments raised by Appellants are well grounded in South Carolina jurisprudence interpreting Rule 205. Indeed, Appellants are not aware of any South Carolina appellate authority that exempts receiverships from the ordinary operation of Rule 205. It is the Receiver that is taking unprecedented merits positions, not Appellants. As detailed by Appellants in their February 22 Initial Brief in the December 2023 Appeal, the underlying receivership cannot exist as a matter of federal constitutional law and as a matter of South Carolina substantive and procedural law. Since the filing of that appeal, Appellants have put before the circuit court on numerous occasions the argument that Rule 205 prohibits action by the circuit court on any matter affected by the currently pending appeal of the continuation, modification, and propriety of the Cape PLC Receivership and the creation and grant of a new receivership over CIHL. Because the propriety of the underlying receivership are pending before this Court, all issues associated with such receivership are affected by the pending appeal

and, therefore, the lower court and the Receiver are deprived of the power to proceed thereon. By nevertheless granting the Receiver's Motions to Compel and refusing Appellants' Cross-Motion for Injunction, the lower court has acted outside of its jurisdiction and power to proceed.

Recently, this Court has made clear that parties before it are not to file "motions to clarify" and that the court will not take "action on any order which is not properly before it." *See* Order in Appellate Case No. 2023-000727 (filed Nov. 21, 2023).[32] Accordingly, rather than seek clarification by interlocutory motion, Appellants have filed a proper Notice of Appeal and this Initial Brief to seek enforcement of Rule 205, and in the interim, seek an injunction to preserve their rights. The circuit court's March 2024 Order—constituting action taken in violation of the precepts and limitations of Rule 205—is now properly before this Court for enforcement contrary to the Receiver's contentions.

[32] The circuit court referenced both the November 21 Order in Appellate Case No. 2023-000727 as well as the September 8 Order in the same case. Neither point addresses head-on the issue as to Rule 205. One discusses only a stay, which, as discussed below, has no bearing on the question posed by a Rule 205 analysis. The other, as noted above, never reached the Rule 205 question because of the manner in which it was placed before the Court.

CONCLUSION

For the reasons set forth herein, Appellants respectfully request this Court deny the Receiver's Motion to Dismiss and resume the briefing timeline to determine the merits of the appeal of the March 12 Order refusing and denying the injunctive relief requested by Appellants.[33]

Respectfully submitted,

Dated: April 11, 2024

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[33] Per Rule 208(b)(6), SCACR, Appellants incorporate herein, to the extent applicable, all additional arguments raised and authorities cited by similarly situated Appellants Mohed Altrad, Altrad Investment Authority S.A.S., ArranCo US, LLC, Hawk Bido (US) Inc., and Sparrows Offshore, LLC.