THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Court of Common Pleas
The Honorable Jean H. Toal, Circuit Court Judge

Civil Action No. 2023-CP-40-01759
Appellate Case No. 2024-000524

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, Inc.; SPX Corporation; Stafford Insulation Company; Standard Insulation Company Of N. C., Inc.; Starr Davis Company, Inc.; Starr Davis Company Of S.C., Inc.; Sterling Fluid Systems (USA) LLC; TE Wire & Cable LLC; Thermo Electric Company, Inc.; Union Carbide Corporation; Valves And Controls Us, Inc.; Velan Valve Corp.; Viking Pump, Inc.; Vistra Intermediate Company LLC; The William Powell

Company Wind Up, Ltd.; Yuba Heat Transfer LLC; Zurn Industries, LLC……**DEFENDANTS**,

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., De Beers PLC, individually and as successor in interest to De Beers S.A., De Beers Centenary AG, De Beers Consolidated Mines Ltd., n/k/a De Beers Consolidated Mines Proprietary Ltd., De Beers UK Ltd., De Beers Jewellers LTD., De Beers Jewellers US, Inc., Anglo American US Holdings Inc., Element Six US Corp., Element Six Technologies US Corp., Element Six Technologies (OR) Corp., First Mode Holdings, Inc., Platinum Guild International (U.S.A.) Jewelry Inc., Lightbox Jewelry Inc., Forevermark US Inc., Anglo American Crop Nutrients (U.S.A.) LLC, Charter Consolidated Ltd., ESAB Corporation, Central Mining & Investment Corporation Ltd., Cape Holdco Ltd., The Law Debenture Corporation PLC, Cape Industrial Services Group Ltd., Mohed Altrad, Altrad UK Ltd., Cape UK Holdings Newco Ltd., Altrad Services, Ltd., f/k/a Cape Industrial Services Ltd., Altrad Investment Authority S.A.S., Sparrows Offshore Group Ltd., Hawk Bidco US Inc., ArranCo US, LLC, Sparrows Offshore, LLC, and The Sparrows Group, LLC……...**THIRD-PARTY DEFENDANTS**,

Of which Charter Consolidated Ltd., ESAB Corporation, and Central Mining & Investment Corporation Ltd. are the...……..…. **PETITIONERS**.

PETITION FOR WRIT OF CERTIORARI

A.Victor Rawl, Jr. (S.C. Bar No. 09261)
Email: vrawl@grsm.com
GORDON REES SCULLY MANSUKHANI, LLP
677 King Street, Suite 450
Charleston, South Carolina 29403
Tel.: (843-714-2501

ATTORNEYS FOR PETITIONERS CHARTER CONSOLIDATED LTD., ESAB CORPORATION, AND CENTRAL MINING AND INVESTMENT CORPORATION LTD.

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QUESTIONS PRESENTED

1. **Rule 205:** Rule 205 of the South Carolina Appellate Court Rules vests the appellate court with "exclusive jurisdiction" over all issues that could be affected by an appeal. Despite having no jurisdiction to proceed, the circuit court entered an order allowing a court-appointed receiver to conduct virtually boundless discovery while the propriety of the Receiver's appointment and the Receiver's authority to undertake any activity at all are already pending on appeal. Did the circuit court err by exercising jurisdiction it no longer has and by failing to enjoin the receiver's conduct pending appeal?

2. **S.C. Code Ann. § 14-3-330:** When Petitioners sought to enjoin any further conduct by the Receiver due to the lack of jurisdiction below, the circuit court refused. Petitioners appealed that order because subsection 14-3-330(4) of the South Carolina Code vests them with a right to immediately appeal "[a]n interlocutory order . . . refusing an injunction." The court of appeals dismissed the appeal and never even mentioned this controlling statute. Did the court of appeals err in ruling that the circuit court's denial and refusal of a request via injunction for enforcement of Rule 205 of the South Carolina Appellate Court Rules in the face of repeated violations of clear precedent is not immediately appealable under subsection 14-3-330(4) of the South Carolina Code.

INTRODUCTION

This case presents a complicated history. At the highest level, the issues at play center on Rule 205 of the South Carolina Appellate Court Rules, a fairly basic request that Rule 205 be enforced, and a similarly basic request that the appealability statute and controlling appealability analysis be applied to the appealed order. Rule 205 exists to preserve jurisdiction of the appellate courts, prevent the circuit court from acting on issues affected by appeals, and protect litigants from having their appeals mooted or transmuted and by maintaining the status quo. If any case

could proceed in a lower court while foundational and appealable issues are on appeal, Rule 205 would be rendered meaningless in the same manner that the court of appeals' dismissal of an appeal resulting from a refusal of an injunction discards that portion of the appealability statute expressly permitting such an interlocutory appeal.

In a different asbestos case wholly unrelated to the circuit court action underlying this case, the same circuit court created a receivership over an entity named Cape PLC, an active, solvent entity formed in the Bailiwick of Jersey having no assets in this state. Thereafter, the Receiver for Cape PLC brought Petitioners Charter Consolidated Ltd., ESAB Corporation, and Central Mining and Investment Corporation Ltd. (collectively, "Petitioners")—all foreign entities with no assets in this state—into the lower court action underlying this appeal—*Tibbs*—as third-party defendants.

Although the circuit court has previously appointed receivers over defunct or insolvent entities in similar cases, presumably as a means to access legacy insurance policies, this non-insurer case marks a remarkable shift because here the circuit court appointed a receiver over an active, solvent, foreign entity, with no assets in South Carolina—an act with no precedent given how far it strays beyond the boundaries of the receivership statute and precedent.

Thereafter, due to a host of irreparable defects and errors—yet unremedied—plaguing the creation of the receivership, Petitioners moved to dissolve the receivership. In response, the circuit court compounded the errors by ruling its order appointing a receivership over Cape PLC somehow also applied to a completely different entity, Cape Intermediate Holdings Limited ("CIHL"), an active, solvent entity formed in the United Kingdom likewise having no assets in this state. That decision involving the granting, modification, and continuation of the receivership is on appeal before the court of appeals. As a result of that appeal, which fundamentally seeks determination of whether the receivership appointments are proper as to both Cape PLC and CIHL, Petitioners

have asserted Rule 205 should halt further action by the circuit court and Receiver, as neither has jurisdiction to proceed while that foundational issue is on appeal.

Both the circuit court and Receiver have not followed Rule 205's clear language, and as a result, Petitioners moved to enjoin all further action to enforce Rule 205 and to effectuate its purpose. After the circuit court refused and thereby denied that request, the court of appeals erroneously found Petitioners' appeal of that decision was improper and not immediately appealable, contrary to both the express language of subsection 14-3-330(4) of the statue governing appealability and the black-letter point of South Carolina law that the effect of an order—not its label—controls the analysis of appealability.

The court of appeals erred in dismissing the appeal of the circuit court's refusal to issue an injunction, and this Court should grant certiorari and remand to the court of appeals for briefing and hearing on the merits. If rulings such as the one made by the circuit court here were upheld under these circumstances, then Rule 205 would serve no purpose.

STATEMENT OF THE CASE

I. Factual Background.[1]

This case arises out of a third-party complaint filed by Respondent Peter D. Protopapas, who was appointed Receiver over an entity named Cape PLC in a different asbestos lawsuit entitled *Park v. Armstrong International, Inc., et al.*, 2021-CP-40-02727. On March 6, 2023,

[1] A detailed recitation of all facts relevant to Petitioners' earlier filed appeal—regarding the fundamental impropriety of the receivership, which was granted, modified, and continued by virtue of the circuit court's prior December 6, 2023 order—is included in their February 22 initial brief to the court of appeals and is incorporated herein by reference. For more specific background facts, Petitioners refer the Court to that February 22 initial brief. *See* C-Track entries dated Feb. 22, 2024 (Appellate Case No. 2023-002009).

counsel for the Parks filed a lengthy motion seeking appointment of Mr. Protopapas as Receiver over "Cape PLC and its subsidiaries, affiliates, successors, and assigns."

Thereafter, the circuit court in *Park* granted the motion to appoint pursuant to subsections 15-65-10(4) and (5) of the South Carolina Code (2005). Based on carried over demonstrable errors from the motion to appoint noting "Cape, a foreign corporation, has forfeited its charter and has further failed to answer this case," the Order appointing the Receiver over "Cape PLC" and "its subsidiaries and global affiliates" set forth the following expansive rights and duties, including:

> Therefore, this Court hereby appoints Peter Protopapas be and hereby is appointed Receiver *in this case* pursuant to the South Carolina Law with the power and authority fully administer all assets of Cape, accept service on behalf of Cape, engage counsel on behalf of Cape and take any and all steps necessary to protect the interests of Cape whatever they may be. This order is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Cape as well as any claims related to the actions or failure to act of Cape's insurance carriers.

The Receiver then filed a third-party complaint in *Tibbs v. 3M Company et al.*, 2023-CP-40-01759.[2] The Receiver filed the third-party complaint without leave of the circuit court and even though he was not a defendant in *Tibbs* and had not been appointed as a receiver in *Tibbs*. The Receiver's third-party complaint alleges the named third-party defendants—aggregated into three "groups" of entities, denoted as the "Altrad Third-Party Defendants," the "Oppenheimer Third-Party Defendants," and the "Charter Third-Party Defendants" (Petitioners)—"are responsible for the sale and use of asbestos or asbestos-containing products throughout the United States, including in South Carolina"; "created sham transactions to feign exits of the asbestos industry in

[2] The *Tibbs* Plaintiffs' active pleading, filed on May 3, 2023, specifically names **Cape PLC** (and not CIHL) and seeks recovery for alleged direct asbestos exposure between the late 1950s and the late 1970s, as well as "take home" exposure during years prior.

the United States, leaving shells and an absence of insurance coverage to account for their massive liability exposure"; and "amused themselves with the supposed ingenuity of their scheme to avoid any responsibility."

The Receiver's pleading alleged each grouping was in some way involved in the mining, importation, sale, or distribution of asbestos into the United States on behalf of Cape PLC and seeks to hold each Third-Party Defendant liable for the torts of Cape PLC under theories of alter ego and veil piercing. *See generally id.* That is even though each of Petitioners has nothing to do with the Cape PLC entity over which the Receiver was appointed. And that is even though multiple courts at the trial and appellate levels across the United States have determined that Charter Consolidated Ltd. and Central Mining & Investment Corporation Ltd. are *not* the alter ego of the various Cape entities (thus precluding any veil piercing) and ESAB Corporation has no connection whatsoever to any of the events or entities alleged in the Receiver's pleading other than becoming the parent corporation of Charter Consolidated Ltd. and Central Mining & Investment Corporation Ltd. in *2022*. The third-party complaint filed by the Receiver seeks "a day of reckoning" for alleged conduct that, for Charter Consolidated Ltd. and Central Mining & Investment Corporation Ltd., multiple courts have already found cannot support an alter ego theory of liability and, for ESAB Corporation occurred decades prior in an industry in which it has never participated, to which it has no relation, for which it has received no benefit.

II. Procedural History.

Petitioners seek only to have Rule 205, SCACR, enforced before the circuit court during the pendency of their appeal of the December 6 Order, as set forth more fully below. To vindicate this request, Petitioners filed a motion for injunctive relief to the circuit court on February 16, 2024. The circuit court chose not to rule, thereby refusing and denying the request for an

injunction, as reflected by the circuit court's March 12, 2024 order and the circumstances giving rise to that order. As a result, on March 19, 2024, Petitioners appealed that refusal and denial to the court of appeals.

Thereafter, the Receiver moved to dismiss the case before the court of appeals on April 1, 2024, and Petitioners filed a return on April 11, 2024. After the Receiver filed a reply on April 16, 2024, the court of appeals dismissed the appeal on April 17, 2024, finding the order appealed from was not immediately appealable. Petitioners, and others involved in the case, filed petitions for rehearing on May 2, 2024. Within just under six hours after stamped copies of the various petitions for rehearing were returned, the court of appeals denied the petition for rehearing after "careful consideration."

Petitioners now seek review of the court of appeals' determination of appealability and the circuit court's refusal of Petitioners' requests for an injunction.

III. Timeline Relevant to this Appeal.

The following timeline sets forth the particular events relevant to this appeal:

Date	Event
March 17, 2023	Cape PLC receivership created in *Park*
June 30, 2023	Third-party complaint in *Tibbs* filed
August 21, 2023	Dispositive motions filed by Petitioners, including motions to dissolve receivership and motions to dismiss, including for lack of personal jurisdiction
September 5, 2023	Motion for protective order and motion to dissolve receivership filed by Petitioners
October 25, 2023	Circuit court hearing on Petitioners' motion to dissolve and motion to dismiss for lack of personal jurisdiction
December 6, 2023	Circuit court issues order denying Petitioners' motions to dismiss for lack of personal jurisdiction and motions to

	dissolve, which is the order on appeal in Appellate Case No. 2023-002007
December 15, 2023	Petitioners' remaining dispositive motions denied by Form 4 order
December 18, 2023	Notice of appeal (initial appeal) filed by Petitioners relative to December 6 order on appeal (Appellate Case No. 2023-002007)
January 2, 2024	Petitioners file a protective answer subject to their previously filed motions to dismiss, the pending appeal, and the position that third-party defendants have no obligation to participate in post-appeal trial court proceedings and the circuit court and the Receiver have no authority to act, including pursuant to Rule 205, SCACR
January 5, 2024	Petitioners serve protective written discovery responses and, in pertinent part, explain that discovery is a matter affected by the pending appeal per Rule 205, SCACR, as applied to this case
January 12, 2024	Receiver files motions to compel
February 16, 2024	Petitioners respond to motions to compel, including on the basis of Rule 205, SCACR, and, as included therein and inextricably linked thereto, file a cross-motion for injunction
February 27, 2024	Petitioners file an objection to the circuit court ruling on, inter alia, Receiver's motions to compel, including on the basis of Rule 205, SCACR, and reiterating, in pertinent part, that a grant of the motions to compel would equate to a denial of Petitioners' cross-motion for injunction
March 12, 2024	Circuit court issues order granting motions to compel and, in effect, denying Petitioners' cross-motion for injunction and violating Rule 205, SCACR
March 19, 2024	Notice of Appeal filed by Petitioners as to the circuit court's March 12, 2024 order refusing an injunction
April 1, 2024	Respondent files motion to dismiss March 19 appeal
April 11, 2024	Petitioners file return to motion to dismiss
April 16, 2024	Respondent files reply to return to motion to dismiss

April 17, 2024	Court of appeals dismisses appeal
May 2, 2024	Petitioners file petition for rehearing
May 3, 2024	Petition for rehearing received and denied by court of appeals

IV. Post-Appeal Sanctions.

Petitioners have appealed both (1) the underlying order granting a receivership over Cape PLC and CIHL in *Tibbs* and modifying and continuing the earlier order appointing a receiver over Cape PLC in *Park* and (2) the order refusing to enforce Rule 205's exclusivity provision and refusing to enjoin the Receiver from undertaking any further activity. Even though the Remittitur has not been returned in either appeal, the circuit court has pressed forward with further litigation. The Petitioners have been sanctioned for not complying with the order that is presently on appeal (in this second appeal). This has included issuing orders essentially holding Petitioners in contempt and striking a primary defense—namely, a denial of the factual basis underlying the Receiver's claims that nearly three-dozen entities are all somehow the "alter ego" of the companies in receivership—from each of their answers. Petitioners were sanctioned for their sustained reliance on Rule 205's plain language and the full body of case law enforcing it in an Order "Granting Motion for Sanctions and Motion for Adverse Inference" and an "Order Granting Receiver's Motion to Pre-Admit 2,538 Exhibits," both of which were entered May 23, 2024.

In other words, not only have the circuit court and Receiver ignored Rule 205's unambiguous instruction and the body of case law enforcing it, the circuit court is now sanctioning litigants for relying on this unambiguous rule and the unbroken line of authority that leave no doubt that both the circuit court and the Receiver lack jurisdiction to proceed *while the issue itself is on appeal*. The ongoing nature of the circuit court's refusal to enjoin the Receiver from further

activity while an appeal involving the validity of his appointments makes it imperative that this Court grant this Petition.

ARGUMENT

Rule 242 of the South Carolina Appellate Court Rules sets forth bases on which the Court considers the granting of certiorari. Respectfully, the court of appeals' errors compounded errors by the circuit court as set forth more fully below. The cascading effect of those errors presents a circumstance where the actions of the court of appeals and the circuit court directly contradict the appealability statute and this Court's unbroken line of jurisprudence interpreting Rule 205 of the South Carolina Appellate Court Rules. *See* Rule 242(b)(3), SCACR.

Moreover, the fact Rule 205 is not being followed in the circuit court presents a substantial issue as there is no basis by which courts should be able to disregard self-executing appellate court rules that touch on fundamental issues of jurisdiction. *See* Rule 242(b)(1). In other words, Rule 205 takes away jurisdiction and authority from the circuit court; if the circuit court does not abide its absence of jurisdiction, then it is incumbent on this Court to immediately enforce the law. Otherwise, Rule 205 and its exclusivity provision would be rendered a nullity.

Similarly, the court of appeals' repeated issuance of orders dismissing arguments as to Rule 205—without discussion of the merits or any real analysis of why foundational issues on appeal do not "affect" the proceedings below such that they are required to be halted—presents a substantial issue of due process because Petitioners and those similarly situated have no recourse or relief while subjected to discovery, motions to compel, and sanctions as a result of continuing litigation in the face of what should be a clear appellate court rule. *See* Rule 242(b)(4).

Having seen other parties before the circuit court attempt to appeal blatant violations of Rule 205's clear language and fail on procedural grounds, Petitioners chose this course of action

to comply with the court of appeals' apparent instruction. Having set forth these arguments before the circuit court only to be met with summary rejection, increasing sanctions, or be otherwise ignored, Petitioners were left with no choice but to seek appellate review before the circuit court action progressed to a point of no return.

I. The March 12 Order Refusing an Injunction Is Immediately Appealable.

The court of appeals decided the appealed order at issue, in accordance with its "label," was a discovery order *only*. There is no doubt or dispute the March 12 order granted a motion to compel, but that is not where the analysis stops. *See, e.g.*, *Spalt v. S.C. DMV*, 423 S.C. 576, 584, 816 S.E.2d 579, 583 (2018) (holding that labels and nomenclature do not control); *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 540, 773 S.E.2d 144, 147 (2015) (appellate courts must "evaluate the trial court's order as what it is—not merely what it appears to be"); *Cape Romain Contrs., Inc. v. Wando E., LLC*, 405 S.C. 115, 121 n.4, 747 S.E.2d 461, 464 n.4 (2013) (appealability is a function of "substance rather than nomenclature"). Stated most simply, the court of appeals ignored that the order's inescapable effect was to also deny and refuse injunctive relief, filed pursuant to Rule 205's self-executing bar on action as to matters affected by the appeal of the circuit court's December 6 Order.[3]

In refusing to expressly rule on the injunction and allowing the Receiver to proceed with the case despite an ongoing appeal of the granting, modification, and continuation of the receivership, the circuit court violated an appellate court rule which has no applicable exception

[3] The court of appeals erroneously dismissed the appeal of the December 6 order, relying on an unrelated order from this Court for authority to do so and failing to address, in any way, the appealability statute. Petitioners have filed a petition for rehearing before the court of appeals and if that is also summarily denied, will seek review before this Court. *See* Rule 221(b), SCACR (noting court of appeals may not issue remittitur until petition for writ of certiorari is decided upon).

nor a mechanism affording a circuit court discretion in its enforcement in the face of longstanding precedent that lower courts may not proceed in any regard affected by a pending appeal. The unavoidable result and consequence of the circuit court's March 12 order was the refusal of Petitioners' cross-motion for an injunction, which renders the circuit court's March 12 order immediately appealable. *See* S.C. Code Ann. § 14-3-330(4) (authorizing immediate appeals of interlocutory orders "refusing an injunction").

"Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within § 14–3–330." *Ex parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005). In turn, subsection 14-3-330(4) states: "The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal: . . . An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver."

As set forth below, the March 12 order did, in fact, refuse and deny the request for an injunction.

a. The court of appeals did not follow section 14-3-330 of the South Carolina Code.

The General Assembly chose to use the word "refusing" in subsection 14-3-330(4). The court of appeals was required to follow that statute. "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* In other contexts, the General Assembly has indicated "refuse" and "deny" are two separate things. *See, e.g.*, S.C. Code Ann. § 15-78-

60(12) (listing "revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit . . . ").[4] Thus, the statute must mean *refuse* specifically, which is different from outright denial. *Helton v. Clements*, 787 F.2d 1016, 1017 (5th Cir. 1986) (differentiating between refusal and denial, while noting similarities in the effect); *Wooten v. Roach*, 964 F.3d 395, 405 (5th Cir. 2020) (same). Common sense alone dictates that refusal is a total lack of action when compared with denial, which would indicate a decision against a motion.

Accordingly, subsection § 14-3-330(4) vests Petitioners with the right to immediately appeal an order that "refus[es]" their request for an injunction. And, that occurred here.[5] The court of appeals' order dismissing this appeal completely failed to acknowledge that "the effect of an interlocutory order" is what "determine[s] its appealability." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011).

Indeed, the circuit court's decision—contained within a footnote and stating it would keep the motions for injunctive relief "under advisement" for nearly four months now—is a textbook *refusal*, as contemplated within the appealability statute, and renders this order immediately appealable. Yet, the court of appeals' order granting the Receiver's motion to dismiss this appeal made *no mention* of that fact.

b. The March 12 order refused and denied an injunction.

[4] Dozens of statutes reflect a similar choice to use the word "refuse" or "deny" in different contexts—indicating further, that this was a conscious choice with meaning that must be effectuated. *See, e.g.*, S.C. Code Ann. § 2-19-60 (using the word refusal); S.C. Code Ann. § 30-4-110(3)(F) (same); S.C. Code Ann. § 7-17-300 (using the word deny).

[5] And, by refusing the injunction after being alerted to the resulting impact of not ruling, the actual refusal further amounted to an outright denial of the injunction sought, even though a formal "denial" is not the applicable standard for appealability under S.C. Code Ann. § 14-3-330(4).

The court of appeals' ruling ran directly contrary to the myriad cases discussed below, and by explicitly acknowledging the circuit court's order allows the Receiver to proceed with "discovery" even though the propriety of the receivership itself is on appeal, the court of appeals' dismissal order actually confirms exactly why the circuit court's refusal to enjoin the Receiver from all activity is immediately appealable under South Carolina Code § 14-3-330(4). *See Porter v. Brown*, 149 S.C. 151, 152–59, 146 S.E. 810, 810–13 (1929) (reviewing on immediate appeal and reversing a trial court's denial of a motion to terminate an unlawful receivership because, precisely as here, the receiver was wrongly appointed over a company that had been misdescribed in the request for a receivership); *Williams v. Northwestern Sec. Life Ins. Co.*, 307 S.C. 462, 464–65, 415 S.E.2d 809, 810 (1992) (deciding otherwise-unappealable denials of Rule 12(b) motions were immediately appealable because, as here, they denied injunctions that the defendants sought as a *matter of law*, rather than as discretionary injunctions under the traditional multi-part test); *Hazel v. Blitz USA, Inc.*, 433 S.C. 120, 124, 857 S.E.2d 4, 6 (2021) (reviewing on immediate appeal the propriety of the denial of an injunction required as a matter of law).

Had the circuit court enjoined further action, it would have properly followed Rule 205. But, by choosing to compel discovery and thereby allowing the Receiver—an arm of the court—to continue acting (while also noting it would refuse to grant relief), the court denied and refused the injunction. *In re Fort Worth Chamber of Com.*, No. 24-10266, 2024 WL 1976963, at *3 (5th Cir. May 3, 2024) ("[I]f a district court does not timely rule on a preliminary-injunction motion, it can effectively deny the motion." (citing 16 Wright & Miller, *Federal Practice & Procedure* § 3924.1 (3d Ed.))); *Gray Line Motor Tours, Inc. v. City of New Orleans*, 498 F.2d 293, 296 (5th Cir. 1974) ("If, for example, an action has the effect of denying the requested relief without actually

making a formal ruling, then the refusal of the district court to issue a specific order will be treated as equivalent to the denial of a preliminary injunction and will be appealable.").

Petitioners opposed the Receiver's underlying discovery and resulting motions to compel on similar bases to the Rule 205 analysis—which are set forth below and in Petitioners' initial briefs filed March 19, 2024 with the court of appeals—as well as the pendency of motions for protective order on which the lower court did not rule prior to Petitioners filing their notice of appeal as to the December 6 order on appeal. However, 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 circuit court's ability to grant a motion to compel and dispose of pending motions for protective order, and other related actions—Petitioners included in their opposition to the Receiver's motions to compel a cross-motion for injunctive relief whereby the circuit court—if it determined it had the power to do so—could afford Petitioners the same outcome sought pursuant to Rule 205.[6]

In so moving, Petitioners 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 circuit court cannot act any further. *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

[6] Instead of recognized the self-executing effect of Rule 205 and affording Petitioners this relief, via orders entered on May 23, 2024, the circuit court has now sanctioned Petitioners—essentially holding them in contempt, striking a primary defense, and finding for the Receivership on the key sections of the third-party complaint—in pertinent part, for their reliance on Rule 205. *See Tibbs*, 2023-CP-40-01759.

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))). Third, as referenced above, the Receiver acts as an arm of the court. *See Pollock v. Carolina Interstate Bldg. & Loan Ass'n*, 48 S.C. 65, 25 S.E. 977, 980 (1896). 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. *See id*. (holding that a receiver "cannot have greater power than his creator" and concluding "[t]he stream cannot rise higher than its source"). This is not a matter of discretion.

On these bases, Petitioners 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 Petitioners' cross-motion for injunctive relief, the circuit court indicated it would simply keep it under advisement, where it has languished for over three months and counting.

In practice and substance, this was a refusal to enjoin and a resulting error of law as to Petitioners' simple and straightforward request: enforce Rule 205.

c. Remand is necessary because injunctive relief is required to give effect to Rule 205.

In denying Petitioners cross-motion, the circuit court relied not on Rule 205 but instead on this Court's interpretations of Rule 241 of the South Carolina Appellate Court Rules in unrelated matters and found it, and the Receiver, could continue acting despite the fact Petitioners' prior appeal remained pending.

As detailed by Petitioners in their February 22 initial briefs regarding the December 6 order on 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,

Petitioners have put before the circuit court on numerous occasions the straightforward and undeniably correct 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. Rule 205, SCACR, provides, *in its entirety*:

> Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

The rule is clear on its face. *Any issue* involved with an appeal is within the "exclusive jurisdiction" of the appellate court, which necessarily renders all such issues beyond the reach of the circuit court. *See Morris v. Morris*, 295 S.C. 37, 40, 367 S.E.2d 24, 26 (1988) ("This Court has exclusive jurisdiction over an appeal upon the service of a Notice of Intent to Appeal."); *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 112, 576 S.E.2d 191, 197 (Ct. App. 2003) ("Circuit courts generally lose subject matter jurisdiction of a case when a notice of appeal is filed and served."); *Binkley v. Burry*, 352 S.C. 286, 294, 573 S.E.2d 838, 843 (Ct. App. 2002) ("Once an appeal is filed, the appellate court has exclusive jurisdiction over the matter."); Jean H. Toal, *et al.*, *Appellate Practice in South Carolina* 121 (3d ed. 2016) (confirming that "[t]he appellate court obtains exclusive jurisdiction over the appeal upon service of the notice of appeal").

The court of appeals itself, in an opinion written by then-Chief Judge Few, explicitly stated the manner in which Rule 205 operates. There, the court of appeals stated, "The second question is whether the lower court may proceed with the action during the pendency of the appeal, and its answer is governed by Rule 205, SCACR," and then continued, "The question the court should have addressed is whether the issue raised in the petition was a matter affected by the appeal."

Tillman v. Oakes, 398 S.C. 245, 256, 728 S.E.2d 45, 51 (Ct. App. 2012) (distinguishing the question raised by Rule 205 with that of Rule 241 which instead addresses whether the relief issued in the appealed order may be carried out or enforced during the pendency of an appeal or whether the relief issued is subject to the automatic stay). In a related analog, the United States Supreme Court recently held that district courts must stay trials pending resolution of immediate appeals that follow the denial of a motion to compel arbitration, solely on the basis that it would be illogical to dismiss a suit when an appeal is pending. *See Smith v. Spizzirri*, 144 S. Ct. 1173, 1178 (2024). The same logic would apply here as an appeal of an issue that affects the fundamental nature of the underlying case could moot every issue before the circuit court.

In this case, the court of appeals chose to ignore this clear interpretation of Rule 205—a self-executing appellate court rule with exceptions that have no bearing here—and decide the title of the March 12 order rendered it wholly unappealable. But, a jurisdictional prohibition renders the circuit court *completely without power* to act. *See, e.g.*, *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))).

South Carolina courts have enforced Rule 205 when a circuit court does anything that touches on an issue that is already pending on appeal. This Court has repeatedly instructed circuit courts to stand down when a matter is on appeal. *See, e.g.*, *Lancaster v. Ga.-Pac. Corp.*, 403 S.C. 136, 137–38, 742 S.E.2d 867, 868 (2013) ("Pursuant to Rule 205, SCACR, upon the service of a notice of appeal, the appellate [c]ourt has exclusive jurisdiction over the appeal, with the exception of matters not affected by the appeal. The appellate court retains jurisdiction until the remittitur is

sent to the lower court. . . . [W]e hereby remind the bench and bar that action on a settlement may not be taken by the lower court, except with regard to matters not affected by the appeal, while the matter is pending before this Court."); *Grosshuesch v. Cramer*, 377 S.C. 12, 31 n.7, 659 S.E.2d 112, 122 n.7 (2008) ("We take this opportunity to reiterate that while an appeal is pending, a lower court cannot act on matters affecting the issue on appeal.").

Time after time, when circuit courts ignore that instruction, both this Court and the court of appeals have deemed circuit court orders void *ab initio*. *See, e.g.*, *Arnal v. Fraser*, 371 S.C. 512, 517–23, 641 S.E.2d 419, 421–24 (2007) (conducting matter-by-matter analysis of lower court rulings; voiding *ab initio*, "for lack of jurisdiction," those rulings that were affected by the matter on appeal; and noting that, per Rule 205, "the lower court may not act or issue orders that affect an issue on appeal"); *Wingate v. Wingate*, 289 S.C. 574, 575, 347 S.E.2d 878, 878 (1985) (holding that a family court's order reducing alimony payments "is void" because "alimony was an issue on appeal from the divorce decree" and "this Court had exclusive jurisdiction over the alimony issue"); *Wilson v. Walker*, 340 S.C. 531, 540, 532 S.E.2d 19, 23 (Ct. App. 2000) (vacating a contempt order "for lack of jurisdiction" because the trial court issued it while an earlier order on which the contempt order was based was on appeal).

Because the propriety and fundamental nature of the underlying receivership are pending before South Carolina appellate courts, all issues associated with such receivership are affected by the pending appeal and, therefore, the circuit court and the Receiver are deprived of the power to proceed thereon. By nevertheless granting the Receiver's motions to compel and refusing the mutually exclusive relief sought in Petitioners' cross-motion for injunction, the lower court has clearly acted outside of its jurisdiction and power to proceed. *See* Petitioners' Objection to Court Ruling on Their Motions for Protective Order or Receiver's Motions to Compel at 22 (filed Feb.

27, 2024) (noting "any ruling allowing discovery would equate to a denial of the requested injunction and the Sparrows Defendants' underlying motion seeking such relief").

d. Petitioners were required to appeal and have no other avenue for this remedy.

Before Petitioners chose to file an appeal of the March 12 order, the court of appeals made clear that parties with pending appeals (such as the pending appeal of the December 6 order) are not to file "motions to clarify" to seek enforcement of Rule 205, SCACR, and that the court of appeals would not take "action on any order which is not properly before it." *See* Order in Appellate Case No. 2023-000727 (filed Nov. 21, 2023).[7] In that case, the motion to clarify was filed in an appellate case on the appeal of a different order. Petitioners, rather than seeking clarification by interlocutory motion, contemporaneously filed proper notices of appeal and their initial briefs seeking enforcement of Rule 205, and in the interim, sought an injunction to preserve their rights. The only other option was to file a similar motion to clarify, which would have been directly contrary to the court of appeals' prior instruction, which was issued in spite of the fact

[7] 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 of those court of appeals' orders addresses head-on the issue as to Rule 205. One discusses only a stay, which, as discussed above, has no bearing on the question posed by a Rule 205 jurisdiction analysis. *Tillman*, 398 S.C. at 254–55, 728 S.E.2d at 50–51 (noting fundamental differences between analysis under Rule 241 and Rule 205). The other, as noted, never reached the Rule 205 question because of the manner in which it was placed before the court of appeals. And, respectfully, the September 8 order is wrong as a matter of law.

The General Assembly has expressly provided that in the event of any perceived conflict between the Appellate Court Rules (like Rule 205) and statutory procedures regarding appellate proceedings (like Section 14-3-450, as cited by the September 8 order) must be resolved in favor of the Appellate Court Rule—here, Rule 205 and its exclusivity provision. *See* 1991 S.C. Acts No. 115, § 5 ("In event of conflict between any provision of the South Carolina Appellate Court Rules and any other statutory provisions as to appellate procedure not repealed in this act, *the provision of the rules shall control*." (emphasis added)).

Rule 240 allows broad motions practice before the appellate courts of this state. *See* Rule 240, SCACR; Jean H. Toal, et al., Appellate Practice in South Carolina 379 (3d ed. 2016) ("Because motions are used in the appellate courts to seek specific relief, there is *no limit to the type of motion* that could be filed in the appellate courts." (emphasis added)).

The circuit court's March 12 order—constituting action taken in violation of the precepts and limitations of Rule 205—was placed properly before the court of appeals for enforcement. *See, e.g.*, *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14, 602 S.E.2d 772, 775 (2004) ("The requirement of service of the notice of appeal is jurisdictional."). For the court of appeals' November 21 order referenced above to provide its stated avenue for relief, it must have contemplated exactly this manner of appeal.

Moreover, the concept that individual orders such as this one *must be appealed* is rooted in this Court's jurisprudence. In *Davis v. Parkview Apartments*, 409 S.C. 266, 280, 762 S.E.2d 535, 543 (2014), this Court reviewed a finding of contempt and sanctions. However, the appellants sought review of various discovery orders issued leading up to the sanctions. But, because the appellants appealed only the order awarding sanctions, this Court held "the merits of the underlying discovery orders, including the Privilege Order and the Discovery Order, are not before us for consideration." *Davis v. Parkview Apartments*, 409 S.C. 266, 280, 762 S.E.2d 535, 543 (2014) (characterizing un-appealed rulings as "law of the case"). In so holding, the Court stated: "The Record makes clear that Appellants considered an appeal of one or more of those orders, at one time even seeking review of the Privilege Order in the court of appeals, which was held to be interlocutory." *Davis*, 409 S.C. at 280, 762 S.E.2d at 543. Thus, the Court essentially held that to have appellate review of discovery orders, they must be appealed, even though they may be

dismissed as interlocutory, to avoid having them summarily dismissed at a later stage as not before the Court for consideration.

Accordingly, based on the clear instruction of the court of appeals and the procedural issues set forth in *Davis*, Petitioners perfected an appeal of an order that not only granted a motion to compel in the face of Rule 205's clear instructions, but *also* refused and denied an injunction. That refusal falls squarely within subsection 14-3-330(4) of the appealability statute, and it was error for the court of appeals to have dismissed Petitioners' appeal.

CONCLUSION

For the reasons set forth herein, Petitioners assert the circuit court—by virtue of the appeal of its December 6 order—was, and is, required by Rule 205 to cede all action affected by the appeal. And, as a result, the circuit court was required to enjoin further action by the Receiver, an arm of the court. When it chose to not do so, and thereby refused and denied their cross-motion for injunctive relief, Petitioners were required to appeal pursuant to *Davis* and the court of appeals' prior instructions. At that juncture, the court of appeals should have heard a fully briefed case on the merits as to why Rule 205's clear language is being ignored and whether the circuit court erred in refusing to enforce the South Carolina Appellate Court Rules. But, that did not occur, and the court of appeals dismissed this appeal.

Because subsection 14-3-330(4) contemplates such an appeal, Petitioners respectfully request this Court grant the petition for writ of certiorari, reinstate this appeal as required by the appealability statute, and either consider this appeal on the merits of Rule 205's exclusivity

provision or remand the case to the court of appeals with instructions to hear the merits of Petitioner's appeal.[8]

Respectfully submitted,

/s A. Victor Rawl, Jr.

A. Victor Rawl, Jr. (S.C. Bar No. 09261)
Email: vrawl@grsm.com
Gordon Rees Scully Mansukhani, LLP
677 King Street, Suite 450
Charleston, South Carolina 29403
Tel.: (843-714-2501

ATTORNEYS FOR PETITIONERS CHARTER CONSOLIDATED LTD., ESAB CORPORATION, AND CENTRAL MINING AND INVESTMENT CORPORATION LTD.

Date: June 3, 2024

[8] Per Rules 208(b)(6) and 240, SCACR, Petitioners incorporate herein, to the extent applicable, all additional arguments raised and authorities cited by all similarly-situated parties.

PROOF OF SERVICE

I, A. Victor Rawl, the undersigned, of Gordon Rees Scully Mansukhani, LLP for Petitioners Charter Consolidated Ltd., ESAB Corporation, and Central Mining and Investment Corporation Ltd., do hereby certify that I have this date served the foregoing **PETITION FOR WRIT OF CERTIORARI**, dated June 3, 2024, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Order dated April 24, 2024, on all counsel of record using the primary email addresses listed in the Attorney Information System (if applicable).

Parties Served:

John T. Lay, Jr. (jlay@gwblawfirm.com)
Gray T. Culbreath (gculbreath@gwblawfirm.com)
Lindsay A. Joyner (ljoyner@gwblawfirm.com)
Laura W. Jordan (ljordan@gwblawfirm.com)
Eleanor L. Jones (ejones@gwblawfirm.com)
Jonathan M. Robinson (jon@smithrobinsonlaw.com)
Shanon N. Peake (shanonp@smithrobinsonlaw.com)
G. Murrell Smith, Jr. (murrell@smithrobinsonlaw.com)
Troy S. Brown (troy.brown@morganlawis.com)
Dana E. Becker (dana.becker@morganlewis.com)
Brady Edwards (brady.edwards@morganlewis.com)
Robert W. Jacques (robert.jacques@morganlewis.com)
Paul A. Scrudato (paul.scrudato@morganlewis.com)

Counsel for the Receiver for Cape PLC

Theile B. McVey (tmcvey@kassellaw.com)
John D. Kassel (jkassel@kassellaw.com)
Jamie D. Rutkoski (jrutkoski@kassellaw.com)
Charles William Branham, III (tbranham@dobslegal.com)
Kevin W. Paul (kpaul@dobslegal.com)
David Christopher Humen (dhumen@dobslegal.com)

Counsel for Plaintiffs

James H. Elliott, Jr. (jelliott@richardsonplowden.com)
Cameron D. Berthelsen (cberthelsen@richardsonplowden.com)

Counsel for Co-Appellants AA/DB Non-US Third-Party Defendants

Steven J. Pugh (spugh@richardsonplowden.com)
Benjamin P. Carlton (bcarlton@richardsonplowden.com)
Carmen V. Ganjehsani (cganjehsani@richardsonplowden.com)
Ashwin R. Sanzgiri (asanzgiri@richardsonplowden.com)

Counsel for Co-Appellants ArranCo US, LLC, Hawk Bido (US) Inc., and Sparrows Offshore, LLC

M. Todd Carroll (todd.carroll@wbd-us.com)
Kevin A. Hall (kevin.hall@wbd-us.com)
M. Elizabeth O'Neill (elizabeth.oneill@wbd-us.com)

Counsel for Co-Appellants Mohed Altrad and Altrad Investment Authority SAS

Stephen L. Brown (sbrown@ycrlaw.com)
James D. Gandy, III (tgandy@ycrlaw.com)
Stephen A. Griffith (sgriffith@ycrlaw.com)

Counsel for Asbestos Corporation Limited

/s A. Victor Rawl, Jr.
A.Victor Rawl, Jr. (S.C. Bar No. 09261)
Email: vrawl@grsm.com
Gordon Rees Scully Mansukhani, LLP
677 King Street, Suite 450
Charleston, South Carolina 29403
Tel.: (843-714-2501

ATTORNEYS FOR PETITIONERS CHARTER CONSOLIDATED LTD., ESAB CORPORATION, AND CENTRAL MINING AND INVESTMENT CORPORATION LTD.

Date: June 3, 2024