

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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Case No. 2014-CP-40-3389  
Appellate Case No. 2014-001652

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**RECEIVED**  
AUG 15 2014  
**SC Court of Appeals**

Alan Wilson, Securities Commissioner  
Of South Carolina.,

Respondent,

v.

Integrated Capital Strategies, LLC,

Appellant.

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**MEMORANDUM IN SUPPORT OF APPEALABILITY**

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Appellant Integrated Capital Strategies, LLC (“ICS”) hereby submits this memorandum in response to the Court’s August 7, 2014 letter requesting Appellant address whether the Order Requiring Compliance with a Subpoena (“Order”) issued June 25, 2014 by the Honorable G. Thomas Cooper, Jr. is appealable. Because the Order is a “final order affecting a substantial right made in any special proceeding” this Court has appellate jurisdiction to review the Order on appeal. See S.C. Code Ann. § 14-3-330(3) (1977, as amended). Moreover, because the Order arises from a “self-contained” proceeding, an appeal would not delay further judicial inquiry by the lower court.

### PROCEDURAL HISTORY

On April 9, 2014, the Securities Division of the Office of the Attorney General of South Carolina (“Securities Division”) issued an administrative subpoena (the “Subpoena”) to ICS pursuant to the South Carolina Uniform Securities Act, S.C. Code Ann. § 35-1-101, *et. seq.*. The Subpoena sought various documents related to an ongoing investigation being conducted into the offer and sale of securities by Certus Holdings, Inc. and CertusBank, N.A. (collectively “Certus”). The Subpoena set the date for document production on or before April 25, 2014.

On May 6, 2014, ICS formally objected to the Subpoena on the grounds the Securities Division lacked jurisdiction over it. Thereafter, Alan Wilson, Securities Commissioner of South Carolina (the “Commissioner”) applied for and was granted a Rule to Show Cause directed at ICS. The lower court held a hearing on the matter on June 10, 2014 and subsequently issued the Order.

### ANALYSIS

Section 14-3-330(3) of the South Carolina Code (1977, as amended) provides this Court with appellate jurisdiction to review “[a] final order affecting a substantial right made in a special proceeding....” Thus, an immediate appeal can be made only upon the issuance of a final

judgment in a matter. Rule 72, SCRCP; Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) (recognizing South Carolina’s adherence to the final judgment rule). To be a final judgment, an order must “dispose of the cause ... reserving no further questions or directions for future determination. It must finally dispose of the whole subject-matter or be a termination of the particular proceedings or action, leaving nothing to be done but to enforce by execution what has been determined.” Kriti Ripley, LLC v. Emerald Invs., LLC, 404 S.C. 367, 379, 746 S.E.2d 26, 32 (2013) (quoting Good v. Hartford Accident & Indem. Co., 201 S.C. 32, 41–42, 21 S.E.2d 209, 212 (1942) (internal citation omitted)). While South Carolina courts have not directly addressed the issue of whether an order enforcing a subpoena issued by an administrative agency as part of an investigation is considered a “final judgment,” federal precedent clearly illustrates the Order is a final judgment for purposes of section 14-3-330(3) and thus immediately appealable.<sup>1</sup>

**1. The Order is a final judgment under South Carolina law, and thus immediately appealable.**

South Carolina case law discussing the final judgment rule illustrates that the Order is a final judgment because all court proceedings concluded with the Order and the only thing left to be done is for ICS to comply with the Order. This conclusion is supported by the recent decision of the Supreme Court of South Carolina in Kriti Ripley, LLC v. Emerald Investments, LLC, 404 S.C. 367, 746 S.E.2d 26 (2013). In Kriti Ripley, the original member of an LLC brought suit against a former minority member of the same LLC for termination of the company. Id. at 370, 746 S.E.2d at 27. The minority member moved to foreclose the interest of the original member

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<sup>1</sup> In Burkey v. Noce, 398 S.C. 35, 726 S.E.2d 229 (2012), this Court was asked to address whether an order fell within the scope of section 14-3-330(3) and was thus, immediately appealable. Much like the present case, South Carolina case law had not addressed the immediate appealability of the type of order before the Court. Absent South Carolina authority directly on point, the Court cited in part to federal precedent as authority in reaching its decision.

of the LLC, and the lower court denied the motion to foreclose. Id. at 377, 746 S.E.2d at 31. The minority member thereafter moved to appeal the denial of his motion and the original member argued the order was not immediately appealable. After reviewing the facts, the Supreme Court held,

The denial of Kriti's motion for foreclosure, while it also likely satisfies other subsections of section 14-3-330, was unquestionably a final judgment. A final judgment is an order that “dispose[s] of the cause, ... reserving no further questions or directions for future determination. It must finally dispose of the whole subject-matter or be a termination of the particular proceedings or action, leaving nothing to be done but to enforce by execution what has been determined.” Good v. Hartford Accident & Indem. Co., 201 S.C. 32, 41-42, 21 S.E.2d 209, 212 (1942) (quoting 2 Am. Jur. 860 § 22). Here, the only relief requested or available in the action was the issuance of a charging order and foreclosure upon the lien. Once foreclosure was denied, the action was over and nothing was left to be done. Therefore, as a final judgment, the order is immediately appealable.

Id. at 379, 746 S.E.2d at 32.

Similarly, in the present case, the relief requested was that ICS produce documents pursuant to the Subpoena. Once the lower court issued the Order enforcing the Subpoena, the only thing left to be done is for ICS to comply with the Subpoena and produce the documents. There are no further proceedings left to be conducted. Accordingly, the Order is a final judgment.

Moreover, the present case is inapposite from South Carolina cases that have held that an order directing or denying pretrial discovery of a nonparty is not immediately appealable. In Lowndes Prods., Inc. v. Bower, 262 S.C. 431, 205 S.E.2d 184 (1974) and Patterson v. Specter Broadcasting Corp., 287 S.C. 249, 335 S.E.2d 803 (1985), the South Carolina Supreme Court denied appellate review of a lower court order directing a party to participate discovery on the grounds the order was interlocutory and not directly appealable. This rule was thereafter extended to include orders that directed a nonparty to submit to discovery. Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986).

Subsequently, in Ex parte Wilson, 367 S.C. 7, 625 S.E.2d 205 (2005), the Supreme Court cited to these cases in support of its holding that an order quashing a subpoena duces tecum issued to a nonparty prior to commencement of enforcement of a judgment was not immediately appealable. Id. at 13, 625 S.E.2d 208. Having relied on these cases, the Supreme Court then noted that the issuance of the order was not a final judgment because it left “some further act to be done by the court before the rights of the parties in an enforcement proceeding are determined.” Id. n.3. Thus, it is clear in each of these cases that the purpose of the ruling was to prevent the temporary halt of the litigation process that would be required by an appeal from an order enforcing a subpoena.

Unlike the orders in the cases above, the Order in the present case is a result of proceedings occurring before the filing of any legal action. Lowndes Prods., Inc., Patterson, and Ex parte Whetstone, all involved orders that occurred after the initiation of a legal proceeding and prior to determination of each case on its merits. Likewise, in Ex parte Wilson, the creditor had not attempted to enforce its judgment against the debtor for which it wanted information. It was unknown whether the debtor would refuse to pay the judgment, and thus it was uncertain whether the Court would have to conduct future collection proceedings. In each of these four cases, there were further issues the Court would have to address prior to resolution of the case. Thus, an appeal of these orders would have resulted in a delay of the lower court proceedings.

However, in the present case, the Securities Division has not filed suit against Certus Bank nor ICS. Instead, the Subpoena was issued to aid with an ongoing investigation. There is no possibility that an immediate appeal would delay future proceedings in the lower court, as is an often cited reason for denying interlocutory appeals. Instead this Order is a final judgment analogous to the order in Kriti Ripley because it disposes of the action and “reserves no further

questions or directions for future determination....” Id. at 379, 746 S.E.2d at 32 (citing Good v. Hartford Accident & Indem. Co., 201 S.C. 32, 41–42, 21 S.E.2d 209, 212 (1942)).

**2. Federal precedent illustrates the Order is a Final Judgment, and thus immediately appealable.**

An order enforcing an administrative subpoena issued by a government agency in connection with an administrative investigation is immediately appealable because it is a “self-contained proceeding.” In Cobbledick v. United States, 309 U.S. 323, 60 S. Ct. 540, 84 L. Ed. 783 (1940), the Supreme Court addressed a line of cases arising under § 12 of the Interstate Commerce Act (“ICA”), whereby a proceeding may be brought in the district court to compel testimony from persons who have refused to make disclosure before the ICA. The Supreme Court found orders arising from proceedings brought under § 12 of the ICA are final and reviewable because they,

[M]ay be deemed self-contained, so far as the judiciary is concerned.... After the court has ordered a recusant witness to testify before the Commission, there remains nothing for it to do. Not only is this true with respect to the particular witness whose testimony is sought; there is not, as in the case of a grand jury or trial, any further judicial inquiry which would be halted were the offending witness permitted to appeal. The proceeding before the district court is not ancillary to any judicial proceeding. So far as the court is concerned, it is complete in itself.

Id., 309 U.S. 323, 330, 60 S. Ct. 540, 543, 84 L. Ed. 783 (1940).

Similarly, the Fourth Circuit Court of Appeals and its sister courts have also recognized that for the reasons set forth in Cobbledick orders arising from “self-contained” proceedings were final and immediately appealable. See, e.g., Reich v. Nat’l Eng’g & Contracting Co., 13 F.3d 93, 95 (4th Cir. 1993) (“The reasons stated by the Court in...Cobbledick for allowing immediate appeals from district court orders enforcing subpoenas in ICC investigations...apply equally in *all administrative investigations*) (emphasis added); Kemp v. Gay, 947 F.2d 1493, 1495–97 (D.C. Cir. 1991) (Department of Housing and Urban Development investigation); Dole

v. Local Union 375, Plumbers Int'l Union, 921 F.2d 969, 971–72 (9th Cir. 1990) (Department of Labor investigation), cert. denied, 502 U.S. 868, 112 S.Ct. 197, 116 L.Ed.2d 157 (1991); EEOC v. University of New Mexico, 504 F.2d 1296, 1300 (10th Cir. 1974) (Equal Employment Opportunity Commission investigation); see also, Shea v. Office of Thrift Supervision, 934 F.2d 41, 46 (3d Cir.1991) (stating that when a “subpoenaed party has been ordered [by the district court] to comply [with an Office of Thrift Supervision subpoena,] ... the party may have [the] order reviewed by this court”); cf. United States v. Stauffer Chemical Co., 684 F.2d 1174, 1177 (6th Cir.1982) (finding appealable a district court order refusing to quash an administrative search warrant in an EPA investigation), aff'd, 464 U.S. 165, 104 S.Ct. 575, 78 L.Ed.2d 388 (1984). Indeed, such orders are final “because there is no ongoing judicial proceeding that would be delayed by an appeal.” In re Subpoena Duces Tecum, 228 F.3d 341, 346 (4th Cir. 2000); see F.T.C v. Invention Submission Corp., 925 F.2d 1086, 1089 (D.C. Cir. 1992) (holding that while the agency did not take an appealable final action by issuing a subpoena, the subpoena became an appeal able final order “after the subpoenaed party refused to comply and the agency requests and receives judicial enforcement.”) Importantly, these courts have also recognized that unlike the general rule in civil, criminal, and grand jury actions requiring a party to be found in contempt prior to appealing, orders directing compliance of administrative subpoenas from “self-contained” proceedings are immediately appealable because the appeal would not halt any further judicial inquiry. Reich, 13 F.3d at 95-96; Kemp v. Gay, 947 F.2d 1493, 1495 (D.C. Cir. 1991) (holding appeals involving administrative subpoenas is exception to rule that party must be found in contempt prior to order becoming appealable); Stolt-Nielson SA v. Celanese AG, 420 F.2d 567, 574-575 (2d Cir. 2005).

The Order in the present case arises from a “self-contained” proceeding concerning the enforcement of an administrative subpoena issued as part of an investigation by the Securities

Division, an administrative agency. Having issued the Order, the lower court has concluded its involvement in the issue and there is no need for further judicial inquiry. Thus, an appeal from the Order would not halt the litigation process, obviating the reasoning behind the rule that ICS be found in contempt and then appeal a contempt order.

CONCLUSION

Based on the foregoing arguments, ICS respectfully requests this Court permit it to appeal the Order.

Respectfully submitted,

By: 

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August 15, 2014  
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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
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G. Thomas Cooper, Jr., Circuit Court Judge

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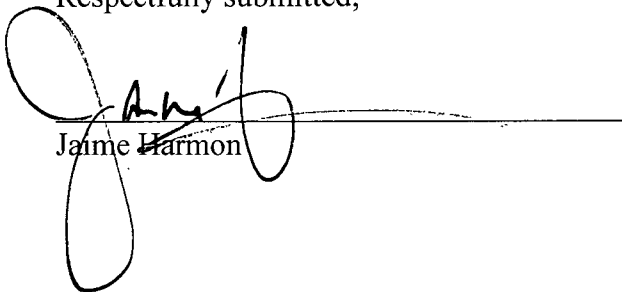
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I, Jaime Harmon, the undersigned employee of Lewis, Babcock & Griffin L.L.P, attorney for Appellant Integrated Capital Strategies, LLC, do hereby certify that I have served a copy of the foregoing Memorandum in Support of Appealability, in connection with the above-referenced case by hand delivering a copy of the same to the following address on August 15, 2014:

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Tracy Meyers, Deputy Securities Commissioner  
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Respectfully submitted,



Jaime Harmon

Columbia, South Carolina  
August 15, 2014

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**SC Court of Appeals**

**VIA HAND DELIVERY**

The Honorable Jenny Abbott Kitchings  
Clerk of Court, South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, SC 29201

**Re: Alan Wilson, Securities Commissioner of South Carolina v. Integrated  
Capital Strategies, LLC  
Case No. 2014-CP-40-03389  
Appellant Case No. 2014-001652**

Dear Ms. Abbott Kitchings:

Enclosed please find the original and three copies of Appellant's Memorandum in Support of Appealability in the above-referenced case. Please file these documents and return the clocked copies to this office via our courier.

By copy of this letter and as evidenced on the Proof of Service, I am counsel of record.

If you have any questions, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read 'Jaime Harmon', with a long horizontal flourish extending to the right.

Jaime Harmon  
Assistant to James M. Griffin

/jh  
Enclosures

cc: Ian P. Weschler (Via Hand Delivery)  
Tracy Meyers (Via Hand Delivery)