STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Business Court: The Honorable Maite Murphy

Appellate Case No. 2021-000225

The Carolina Appraisal Group, Inc. and The Carolina Appraisal Group-Residential, LLC ..... Respondents,

v.

Wagener Insurance Agency and Realty, Inc.; Douglas Appraisal, LLC, And Robert D. Douglas..... Appellants,

v.

Harris Benjamin Davis, Jr., The Carolina Appraisal Group W-2, LLC, ...Third Party Defendants.

RESPONDENTS' RETURN IN OPPOSITION TO APPELLANTS' PETITION FOR *EX PARTE* ORDER GRANTING WRIT OF SUPERSEDEAS OR, IN THE ALTERNATIVE, FOR AN EXPEDITED ORDER GRANTING A WRIT OF SUPERSEDEAS

Appellants' Emergency Petition for *Ex Parte* Order Granting Writ of Supersedeas or, in the alternative, for an Expedited Order Granting a Writ of Supersedeas, filed March 4, 2021 ("Petition"), is not properly before this Court because Appellants failed to first file an application for supersedeas with the lower court as required by Rule 241(d)(1), SCACR. That Appellants are impatient with the procedures set forth in the SCACR is no reason for this Court to hear this

Petition or grant an expedited or *ex parte* supersedeas, especially in the absence of any extraordinary or exigent circumstances.

No extraordinary circumstances exist which warrant a sidestepping of the Business Court pursuant to Rule 241(d)(1), SCACR. Further, no exigent circumstances exist which warrant *ex parte* emergency relief pursuant to Rule 241(d)(6), SCACR. In fact, Appellants neither reference the circumstances set out in either rule that constitute "extraordinary" and "exigent circumstances" nor explain how those circumstances exist here. Appellants fail to articulate what irreparable damage or injury will occur before there is time for a hearing or before Respondents are allowed ten (10) days to respond.

For the following reasons, Appellants' Petition should be denied. Even if the Petition were procedurally proper before this Court (and it is not), it fails on the merits. Appellants argue that they will be irreparably damaged by the Business Court's injunction if it is not stayed during the duration of this appeal, but the Business Court's order was based upon its conclusion, on its review of all the evidence and arguments put forward by the parties through extensive briefing, that *Respondents* will be irreparably injured *without* the ordered injunctive relief. Thus, the Court must weigh the evidence as to which side is more injured by enforcement of the injunction or a stay. The evidence received by the Business Court and now before this Court supports enforcement of the preliminary injunction, which is likely to be in effect only for six months, as a trial on the merits is currently scheduled for late August 2021.

Dismissing the Petition will not unfairly prejudice Appellants. Following consideration of the Petition by the Business Court, as mandated by the SCACR, Appellants may seek review in this Court. *See* Rule 241(d)(2), SCACR. As implicitly recognized by the Rules of Appellate Procedure, the question of whether a supersedeas is appropriate is highly fact-intensive and is more

appropriately done by a trial court, which is more familiar with the facts, allegations, and procedural history, and is in a better position to accept additional evidence in the form of testimony and/or documentation. Here, the Business Court should first determine whether supersedeas is appropriate and, if so, set "the terms of [supersedeas], including but not limited to the filing of a bond or undertaking, as the lower court . . . may deem appropriate." Rule 241(c)(2), SCACR; Rule 62(c), SCRCP. After the Business Court's decision is made, an aggrieved party may then petition for review in this Court at which time a record on these issues will be more fully developed. *See* Rule 241(d)(2), SCACR ("After the lower court … has ruled, any party may petition the appellate court where the appeal is pending … for review of this order….").

BACKGROUND

On May 12, 2020, Plaintiffs The Carolina Appraisal Group, Inc. and The Carolina Appraisal Group-Residential, LLC ("Respondents"), filed a Verified Complaint and Motion for Temporary Restraining Order and Preliminary Injunction. This case primarily involves a dispute over the rights and obligations of two members of a South Carolina Limited Liability Company, The Carolina Appraisal Group-Residential, LLC ("the Company"). The Company's business involves commercial and residential real estate evaluations and appraisals.

Plaintiff The Carolina Appraisal Group, Inc. ("TCAG") owns 90% of the Company's outstanding membership interests and Defendant Wagener Insurance and Realty, Inc. ("Wagener") owns 10% of the Company's outstanding membership interests. Defendant Robert Douglas ("Douglas") is the sole owner of Wagener and is also the sole owner of an affiliated appraisal company, Defendant Douglas Appraisal, LLC ("Douglas Appraisal"). In their Verified Complaint, Respondents assert that Appellants are wrongfully competing against the Company in violation of the Company's Operating Agreement, are in breach of certain contractual agreements prohibiting

competition and solicitation of customers, and are in violation of the South Carolina Limited Liability Company Act (the "LLC Act"), specifically S.C. Code Ann. § 33-44-409 (requiring certain fiduciary duties of members of an LLC), among other tort claims. Respondents contend that Appellants' wrongful competition is causing the Company irreparable injury and damage which should be enjoined pending a trial in the case.

On September 21, 2020, the case was assigned to the Honorable Maite Murphy through the Business Court Pilot Program. The Business Court reviewed extensive briefing filed by the parties as to Respondents' Motion for Preliminary Injunction, including numerous conflicting affidavits. The Business Court conducted a hearing on the motion on November 19, 2020. At that same time, the Business Court also heard Respondents' Motion to Compel, filed July 24, 2020.

In Respondents' Motion to Compel, Respondents brought to the Business Court's attention that Appellants wholly failed or refused to respond to interrogatories and requests for production, served on Appellants on May 22, 2020, despite numerous attempts to consult by Respondents' counsel. Indeed, as of the date the Motion to Compel was heard by the Business Court in November 2020, Appellants had failed or refused to fully respond to discovery requests after nearly *six months* from the date they were served. Respondents asserted that Appellants' discovery deficiencies were intentional—an attempt to stall and evade Respondents' effort to obtain evidence of Appellants' wrongful competition and the amounts received therefrom, which would be used against Appellants to support Respondents' request for injunctive relief. The Business Court agreed.

On December 1, 2020, the Business Court granted Respondents' Motion to Compel, finding that Appellants violated Rules 26, 33, and 34, SCRCP, by failing or refusing to timely respond to Respondents' discovery requests (the "Discovery Order"). Appellants did not appeal the Discovery Order. Based on its December 1, 2020 finding that Appellants violated the Rules of

Civil Procedure, on December 3, 2020, the Business Court entered judgment against Appellants in the amount of $9,963.24, as sanctions pursuant to Rule 37, SCRCP, in the amount of Respondents' reasonable attorneys' fees and costs incurred in connection with the motion to compel (the "Attorneys' Fee Order").

On December 3, 2020,[1] the Business Court also entered an order granting Respondents' Motion for Preliminary Injunction (the "Injunction Order"). Through the Injunction Order, the Business Court found that Respondents had demonstrated irreparable harm and an inadequate remedy at law as a result of Appellants' wrongful competition in violation of the statutory fiduciary duties set forth in the South Carolina Limited Liability Company Act (the "SC LLC Act"). *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 626 S.E.2d 34 (Ct. App. 2006); *County of Richland v. Simkins*, 348 S.C. 664, 560 S.E.2d 902, 904 (Ct. App. 2002).

[1] Appellants materially misstate the posture of this case by alleging that "[b]efore and for more than a year after the commencement of the underlying case, the *status quo* was that both Appellants and respondents continued to conduct their respective businesses." Petition at p. 2 (emphasis added).

First, Appellants fail to inform the Court that before this case was filed, Respondents repeatedly asked Appellants to cease and desist from performing competitive appraisals. *See* Verif. Compl. at ¶¶ 39-49. This evidence was put before the Business Court in its consideration of the Motion for Preliminary Injunction. *See* Motion for Preliminary Injunction at pp. 5-6.

Second, Appellants' assertion that "more than a year after commencement of the underlying case . . . [the parties] continued their business," is patently false. Respondents filed this action on May 12, 2020, less than 12 months ago. At the time of their filing of the Verified Complaint, Respondents contemporaneously filed a Motion for Temporary Restraining Order and Preliminary Injunction. Respondents have at all times sought expedited, and *ex parte*, relief from the lower court and Appellants' counsel have requested time to prepare.

Appellants should not be able to mischaracterize and unfairly benefit from any purported passage of time between the date of Respondents' initiation of this lawsuit and entry of the injunction.

The Business Court held Respondents had demonstrated a likelihood of success on the merits as to Respondents' claims for breach of fiduciary duties under Section 33-44-409 and aiding and abetting breaches of fiduciary duties. S.C. Code Ann. § 33-44-409 provides that a member's duty of loyalty to a member-managed company includes:

> (1) to account to the company and hold as trustee for it any property, profit, or benefit … derived from a use by the member of the company's property, including the appropriation of a company's opportunity;
>
> (2) to refrain from dealing … on behalf of a party having an adverse interest to the company; and
>
> (3) to refrain from competing with the company in the conduct of the company's business before the dissolution of the company.

In accordance with the express provisions of this statute, the Business Court ordered the following *temporary*[2] injunctive relief against Appellants:

> (1) Appellants "are prohibited from providing real estate evaluation and appraisal services, or accepting any new orders or requests therefor . . . .";
>
> (2) Appellants "are ordered to provide to Plaintiffs . . . an accounting of all residential real estate evaluation and appraisal services performed directly or indirectly, by or on behalf of any [Appellant] for which [Appellants] did not pay [the Company] its split of the commission. . . .";
>
> (3) Appellants "are ordered to open an escrow account with a nationally chartered bank and no later than ten (10) days from the date of filing of this order deposit into such escrow account thirty-five percent (35%) of all property, profits, or other benefit derived by [Appellants] for all residential real estate evaluation and appraisal services performed by or on behalf of any [Appellant] for which [the Company] has not already received its split of the commission" and "ordered to deliver to [Respondents] . . . evidence that the escrow account has been established and funded . . . .";

[2] The Court's order "restrain[s], prevent[s], and enjoin[s], *pendent lite*, Wagener from violating its statutory fiduciary obligations under the LLC Act and restrain[s], prevent[s], and enjoin[s], *pendent lite*, Douglas and Douglas Appraisal's aiding and abetting of such breaches of fiduciary obligations." *See* Injunction Order at p. 22. *See* Black's Law Dictionary at 1248 (9th ed 2009) ("pendent lite": "[Latin 'while the action is pending'] During the proceeding or litigation; in a manner contingent on the outcome of litigation.").

(4) Appellants "are ordered to refrain from dealing on behalf of each other and any third person having an adverse interest to [the Company] with respect to any residential real estate evaluation and appraisal services."

See Injunction Order at pp. 22-23.

Appellants filed motions to alter, amend and/or reconsider the Injunction Order and the Attorneys' Fee Order pursuant to Rule 59(e), SCRCP. Appellants did not contest the court-ordered accounting in the Injunction Order. *See* Motion to Alter or Amend at p. 20 (D). The Business Court conducted a hearing on February 10, 2021 on Appellants' Motion to Alter or Amend the Attorneys' Fee Order. On February 18, 2021, the Business Court issued orders granting in part and denying in part Appellants' reconsideration motions. As to the Attorneys' Fee Order, the Business Court reduced the money judgment to Respondents by $2,000. As to the Injunction Order, the Business Court clarified that the injunction was not enforceable unless and until Respondents posted an injunction bond in the amount of $55,000.

On February 25, 2021, Appellants filed a notice of appeal, challenging the Injunction Order and the Attorneys' Fee Order. Appellants did not appeal the Discovery Order through which the Business Court concluded that Appellants' conduct violated Rules 26, 33, 34, SCRCP, and that sanctions were warranted in accordance with Rule 37, SCRCP. At the time Appellants filed the notice of appeal, Appellants did not post a supersedeas bond with the Business Court pursuant to Rule 62(d), SCRCP. Appellants also did not file an application for supersedeas before the Business Court pursuant to Rule 62(c) or (d), SCRCP, as required by Rule 241(d)(1), SCACR.

On February 26, 2021, Respondents posted the required injunction bond in the amount of $55,000 with the Orangeburg Clerk of Court. Approximately one week later, on March 3, 2021, Respondents attempted to confer with Appellants regarding the relief awarded in the Injunction Order. Respondents indicated that because the Injunction Order was not automatically stayed by

Appellants' Notice of Appeal, the injunctive relief in the order was immediately enforceable. Appellants did not respond to Respondents' correspondence or file any petition for supersedeas with the Business Court. Instead, as Appellants acknowledge in their Petition (p. 6), on March 4, 2021, Appellants filed the Petition that is presently before the Court.

ARGUMENT[3]

I. APPELLANTS FAILED TO FIRST APPLY FOR SUPERSEDEAS BEFORE THE BUSINESS COURT AND THEIR FAILURE TO DO SO IS NOT JUSTIFIED BY THE CIRCUMSTANCES.

Appellants concede that the relief awarded in the Injunction Order is not automatically stayed by this appeal. *See* Petition at p. 8. Indeed, because the order "grant[s] an injunction or temporary restraining order," it is expressly *excepted* from automatic stay under Rule 241(b)(8), SCACR. Moreover, although not addressed in Appellants' Petition, the Business Court's Attorneys' Fee Order, also on appeal before this Court, but not asked to be stayed, grants a "money judgment" in the amount of $7,963.24 and is also expressly excepted from automatic stay pursuant to Rule 241(b)(1), SCACR. Because Appellants have not asked for supersedeas of the Attorneys' Fee Order, the Attorneys' Fee Order is currently enforceable under Rule 241(b), SCACR.

Appellants did not seek supersedeas before the Business Court before filing their request with this Court. Absent "extraordinary circumstances," (which do not exist as addressed herein), Appellants must apply first to the lower court for this relief in accordance with Rule 241(d)(1), SCACR ("an application for an order . . . for supersedeas must first be made to the lower court . . . which entered the order or decision on appeal"). Only "[a]fter the lower court . . . has ruled" on the application for supersedeas, can the appealing party then "petition the appellate court where

[3] Respondents incorporate by reference all arguments and evidence previously submitted to the Business Court in support of Respondents' Motion for Preliminary Injunction and Motion to Compel.

the appeal is pending . . . for *review* of this order." Rule 241(d)(2), SCACR. Accordingly, unless those "extraordinary circumstances" exist, the Rules of Appellate Procedure mandate the Business Court first *consider* the Petition before this Court is empowered to *review* the decision. *See id.*

Contrary to the Appellants' claim that they petitioned the Business Court for supersedeas prior to filing this appeal, (Petition at p. 8 (citing Appellants' Motion to Alter or Amend)), a request for supersedeas cannot be made until *after* the service of a notice of appeal. As clearly stated in Rule 241(c)(1): "Supersedeas or Lifting of Automatic Stay": "[i]n a case subject to an exception, any party may move for an order imposing supersedeas of matters decided in the order, judgment, decree or decision on appeal *after the service of the notice on appeal*. Rule 241(c)(1), SCACR (emphasis added). Therefore, when Appellants requested a stay of the Injunction Order from the Business Court in their Motion to Alter or Amend, Appellants had not served any notice of appeal. As such, any such "request" did not constitute a request for supersedeas per the plain language of Rule 241(c)(1), SCACR.

Consequently, the Business Court has not undertaken the analysis required by Rule 241(c), SCACR, for any request for supersedeas. Specifically, the Business Court has not addressed either the standard for imposing supersedeas as set out in Rule 241(c)(2), SCACR, or how such an order might be conditioned (e.g. a supersedeas bond) as set out in Rule 241(c)(3), SCACR. As such, this Court has no order of the Business Court to "review" pursuant to Rule 241(d)(2), but would be making these determinations for the first time and in the absence of any "emergency circumstances" that would justify this Court's involvement at this premature stage.

Appellants have shown no "extraordinary circumstances" to justify filing their request for supersedeas in this Court and bypassing the Business Court. Appellant may only avoid petitioning the lower court for supersedeas and, instead, go directly to the appellate court, "where

extraordinary circumstances make [such a request] impracticable[.]" Rule 241(d)(1), SCACR. Rule 241(d)(1) defines "extraordinary circumstances" as follows: (1) if the lower court's order was issued *ex parte* in the first instance (which the Injunction Order was not) or (2) "an unnecessary delay by the lower court" in ruling on the application for supersedeas (which also has not occurred since Appellant failed to file any application for supersedeas with the Business Court). Appellants do not address those requirements or show that they were met.

Instead, Appellants concede that the precipitating factor for their filing of the Petition before this Court was *not* the alleged injury or damage from the Injunction Order or circumstances making it impracticable to petition the Business Court for relief, but, instead, Appellants' receipt of correspondence from Respondents on March 3, 2021. *See* Petition at p. 6; *see also* Petition at Exhibit G. In that letter, Respondents stated that the Injunction Order was immediately enforceable as of February 26, 2021, the date Respondents posted an injunction bond pursuant to Rule 65(c), SCRCP. *Id.*

Nor are Appellants entitled to an *ex parte* order. "A supersedeas . . . may be issued ex parte only where exigent circumstances require that action be taken *before there is time for a hearing*." Rule 241(d)(6), SCACR (emphasis added). "An ex parte order shall issue only if: (A) it clearly appears from specific facts shown by affidavits or included in the verified petition that immediate and irreparable injury, loss or damage will result *before the opposing party can respond*; and (B) the moving party's attorney certifies in writing, as an officer of the court, the efforts which have been made to give notice, or the reasons supporting the claim that notice should not be required." *Id.* (emphasis added). Here, Appellants have not given this Court any reason to excuse Appellants' requirement of first seeking a stay from the Business Court. Appellants have also not given this

Court any explanation for why a stay should be entered before Respondents can respond to the Petition (a mere ten (10) days pursuant to Rule 240(e), SCACR).

Appellants' request for immediate, ex parte, and expedited relief is further undermined by the following two conceded points in Appellants' Petition:

First, between the date of the Business Court's issuance of the Injunction Order on December 3, 2020, and the date of the Business Court's issuance of an order denying Appellants' Motion to Alter or Amend the Injunction Order, on February 18, 2021, Appellants allegedly "complied" with the injunction. *See* Petition at p. 6 (alleging Appellants "suspend[ed] their business while seeking reconsideration."). In other words, rather than seeking a stay while the motion for reconsideration was pending, as allowed by Rule 62(b), SCRCP,[4] Appellants voluntarily complied with the injunction for some period of time. The fact that Appellants were able to comply with the injunction and did not request a stay from the Business Court is proof that there is no extraordinary circumstances justifying Appellants' efforts to sidestep the requirement of seeking supersedeas first from the Business Court at this time. In other words, Appellants' argument that "they will not be able to resume the[ir] business they have today if they have been enjoined for weeks, months or longer," (Petition at p. 8), has already been proven untrue by their own voluntary conduct. For the same reasons, there are no exigent circumstances requiring an *ex parte* ruling from this Court pursuant to Rule 241(d)(6), SCACR.

[4] *See Stearns Bank Nat. Ass'n. v. Glenwood Falls, LP*, 375 S.C. 423, 426, 653 S.E.2d 274, 275-76 (2007) ("If [a party] wishes to stay enforcement of [a] judgment pending the trial court's disposition of [a] Rule 60(b) motion, the burden is on it to make the motion under Rule 62(b), SCRCP. Whether to grant such a stay rests in the court's discretion 'on such conditions for the security of the [creditor] as are proper ...' Rule 62(b). … Accordingly, absent the grant of some extraordinary relief to the [party] by the appellate court during the pendency of such an appeal, the [opposing party] is entitled to enforce its judgment.").

Second, and in addition, Appellants did not seek supersedeas from the Business Court or this Court concomitant with the filing of the Notice of Appeal (February 25), but instead waited until March 4 to file the instant Petition. Appellants fail to explain why they did not seek a stay from the Business Court during this time pursuant to either Rule 62, SCRCP, or Rule 241(d)(1), SCACR (or why they failed to seek such "emergency" relief from this Court two weeks ago). Again, Appellants' ability to wait any period of time before seeking supersedeas before this Court is proof that there is no need for expedited, emergency, and *ex parte* relief. *See* Rule 241(d)(6), SCACR (requiring evidence supporting the moving party's assertion "that action be taken before there is time for a hearing" and "that immediate and irreparable injury, loss or damage will result before the opposing party can respond").

As detailed in Rule 241(c), SCACR, in order to determine whether a stay of the relief entered in the Injunction Order is appropriate, this Court would need to review all of the evidence, including all of the briefing and affidavits submitted to the Business Court in connection with Respondents' Motion for Preliminary Injunction and Respondents' Motion to Compel. It would also need to consider substantial additional evidence as asserted by Appellants as to the purported damage they will suffer if the Injunction Order is not stayed as well as evidence anticipated to be submitted by Respondents in opposition. As the Rules of Appellate Procedure make clear, this determination should be made by the lower court in the first instance and then reviewed by this Court later. *See* Rule 241(c)(3)-(4), (d)(1)-(2), SCACR ("[A]n application for an order … for supersedeas must first be made to the lower court[.]" "The granting of supersedeas … may be conditioned upon such terms including but not limited to the filing of a bond or undertaking, as the lower court … may deem appropriate." "After the lower court or administrative tribunal has

ruled, any party may petition the appellate court where the appeal is pending … for review of this order.").

Appellants' protestations that the sky is falling and only *ex parte*, emergency relief can save their business grossly mischaracterizes and exaggerates the factual and procedural circumstances in this case. In sum, there is no basis for Appellants to sidestep the clear procedures set forth in Rule 241(d)(1), SCACR, or seek emergency, *ex parte,* relief from this Court and Appellants' Petition should be denied.

II. IF NOT PROCEDURALLY BARRED, APPELLANTS' PETITION SHOULD BE DENIED ON THE MERITS.

The basis of Appellants' Petition is that Appellants will be substantially and irreparably damaged if the Injunction Order is not stayed while the appeal is pending. *See* Petition at p. 3 (asserting the Injunction Order will "permanently damage[] or end[] . . . Robert Douglas' business and his own career"); and p. 5 (asserting "the Preliminary Injunction, if not immediately superseded by this Court, will halt Appellants' work abruptly and threaten Appellants' ability to ever resume or rebuild its business after the resolution of this appeal and the underlying litigation."). This assertion is unsupported, is based on the flawed assumption that the preliminary injunction will be in place for years, which is not accurate, and cannot overcome the Business Court's conclusion that *Respondents* will be permanently and irreparably damaged based on claims they are likely to succeed on between now and the time of trial in this case if the injunction cannot be enforced.

First, as to the length of time that the preliminary injunction is likely to be in place, Appellants incorrectly assert that the Injunction Order "enjoin[s] Appellants from working for an indefinite period." Petition at p. 2. The order is clear that the injunctive relief is only in place until

a trial on the merits.[5] The Appellants fail to mention that a scheduling order sets a trial in this case for August 30, 2021, a mere six months from now. Pursuant to Rule 241(a), SCACR, the lower court "retains jurisdiction over matters not affected by the appeal[,] including the authority to enforce any matters not stayed by the appeal." Thus, because the Injunction Order only grants *preliminary* injunctive relief, which does not affect the merits of the case,[6] the Business Court retains jurisdiction and can proceed toward a trial on the merits as scheduled.

Appellants fail to explain how the ordered *preliminary* injunctive relief, which only lasts until a trial in this case, which is scheduled for six months from now, will "threaten Appellants' ability to ever resume or rebuild its business" and "permanently discontinue Appellants' business." Petition at p. 5. As evidenced by the affidavits underlying the Business Court's Injunction Order, Appellants have been in business for nearly two decades and have established a reputation for themselves in the industry. Appellants' failure to explain how a period of days, weeks, and/or months of not working would permanently impair their ability to do business in the future is telling. In fact, their assertion makes no logical sense, especially given Appellants' concession that they voluntarily suspended their business during the time period of December 3, 2020, the date of the Business Court's Injunction Order, and February 18, 2021, when the Business Court denied Appellants' Motion to Alter or Amend. *See* Petition at p. 6 ("Appellants complied [with the Injunction Order] by suspending their business while seeking reconsideration[.]").

[5] *See* note 2, supra.

[6] *See Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 481, 167 S.E.2d 313 (1969) ("It is well settled that, in determining whether a temporary injunction should issue, the merits of the case are not to be considered, except in so far as they may enable the court to determine whether a prima facie showing has been made. When a prima facie showing has been made entitling plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits.") (citation omitted).

Second, as to the alleged irreparable and permanent injury anticipated to be suffered by Appellants as asserted in the Petition is supposedly supported by an affidavit of Mr. Douglas. However, Douglas' affidavit (Petition at Exhibit C) it is notable for its terseness and lack of detail, especially as to future injury or damage. The only testimony about damage is the following two statements: "I understand if I stop working for the Veteran's Administration, I will be removed from their appraisal panel and I would hate to lose one of my biggest clients. My only source of income is what I receive performing appraisals." Petition at Exhibit C, ¶¶ 10-11. This testimony is insufficient to overcome the evidence previously put forward before the Business Court to support issuance of the Injunction Order in the first place.

In order to establish damage caused by the Injunction Order, Appellants must come forward with evidence that their damages are reasonably certain to occur.

> [R]ecovery cannot be had for [damage] that [is] conjectural or speculative. The proof must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and amount of the loss can be logically and rationally drawn.

Moore v. Moore, 360 S.C. 241, 254, 599 S.E.2d 467, 473-74 (Ct. App. 2004) (quoting *Drews Co. v. Ledwith-Wolfe Assocs.*, 296 S.C. 207, 213, 371 S.E.2d 532, 535-36 (1998) (internal citations and quotations omitted). Mr. Douglas' scant testimony about his desire not to lose the U.S. Department of Veteran's Affairs (the "VA") as a client, is insufficient.

Appellants baldly assert: "As set out in Mr. Douglas' affidavit . . . Appellants will not be able to resume the business they have today if they have been enjoined for weeks, months or longer. Even an expedited briefing and decision on the merits of this appeal would result in Appellants' business being ruined." Petition at p. 8. When comparing this naked assertion by Appellants' counsel in the Petition to the allegations in Mr. Douglas' affidavit, the supposed evidence is strikingly absent. Nothing in Mr. Douglas' affidavit states or establishes that a delay

of any length of time will "ruin[]" Appellants' business, whether permanently or even temporarily. In addition, no evidence has been adduced by Appellants through Mr. Douglas' testimony or any officer or agent of the VA that if Appellants are not permitted to do appraisals for a period of six months that they will never again be able to do work in the future. As is already in the record of evidence considered by the Business Court, Mr. Douglas maintains an active license to sell real estate and license to sell insurance. Therefore, his bare statement, "[m]y only source of income is what I receive performing appraisals," Petition at Exhibit C, ¶¶ 10-11, is questionable. In short, Appellants' Petition is unsupported by the kind of competent evidence necessary to establish damages and therefore the Petition should be denied.

Appellants also contend that they do not have the financial ability to comply with the Injunction Order to the extent that it requires them to place 35% of past appraisal services into an escrow account. Petition at p. 12. Oddly, Appellants flip the necessary burden of proof on its head, asserting: "Respondents offered no evidence that Appellants have any ability to raise those funds[.]" *Id.* Appellants further state: "Appellants have confirmed in the affidavit filed herewith that they cannot [raise these funds]." *Id.* However, Mr. Douglas' affidavit does not support this assertion. Mr. Douglas testifies: "I have no financial ability to deposit that much money into an escrow account." Petition at Exhibit C, ¶ 6.

First, there is no evidence before this Court on which this Court could find that *all Appellants*, including Douglas Appraisal and Wagener in addition to Douglas, do not have the financial ability to fund such an escrow account because Mr. Douglas' affidavit only says "I have no financial ability to deposit that much money into an escrow account." *Id.* Second, Appellants have provided this Court with no evidence supporting even Mr. Douglas' bald assertion of his financial inability to fund the account. In the absence of such evidence, a stay of the Injunction

Order is not appropriate, especially given that it was based on the Business Court's conclusion that *Respondents* would be permanently and irreparably damaged without such relief. Even if Defendants had supported their assertion of financial inability to comply, economic hardship to the responding party is not an automatic reason to stay the ordered injunctive relief. "Even though the injunctive remedy may cause some economic hardship . . . , injunctions have routinely been granted in such instances." *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 275, 363 S.E.2d 891, 896 (1987) (citations omitted).

Appellants' assertion that they cannot afford to fund the required escrow account is undermined by the accounting produced by Appellants following the Business Court's issuance of the Injunction Order. That accounting revealed over $400,000 in commissions earned by Appellants for competitive appraisal work from April 29, 2019 until December 7, 2020, and, upon information and belief, continues to grow now that Appellants have conceded they are continuing to perform appraisals. *See* Petition at p. 6 ("Appellants resume[d] their business[.]"). The Injunction Order requires Appellants to fund an escrow account with only thirty-five percent (35%) of the proceeds from such work which Appellants already received. Appellants do not and cannot explain how they have earned $400,000 and yet cannot afford to place one-third of that amount into escrow for Respondents' benefit until a trial of this case. They also fail to explain how they cannot obtain a loan or other source of funding in order to establish the ordered escrow account.

Even if the Court accepts Mr. Douglas' statement that he and his businesses are unable to fund the required escrow account, Respondents have been hampered by *Appellants' conduct* in their efforts to obtain evidence to verify or disprove these allegations. As the Business Court has already concluded, Appellants have failed to fully respond to discovery requests, including

production of complete financial records.[7] Appellants should not be allowed to meagerly state they do not have the financial ability to place certain funds in escrow when they have been held in violation of the discovery rules by failing to fully produce financial records which would provide Respondents with the ability to fully respond and, upon information and belief, disprove such assertions.

Appellants also argue that the Injunction Order would moot contested issues in the underlying litigation, Petition at p. 8, but this position is illogical and inconsistent with the very nature of the *preliminary* injunctive relief ordered by the lower court. Although the Business Court was required to examine the merits of the case to the extent necessary to determine whether Respondents' Motion for Preliminary Injunction set forth facts sufficient to justify issuance of an injunction, the lower court was *not* allowed to make a final determination or decide the ultimate merits. *Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 167 S.E.2d 313 (1969); *Roberts v. Union Cnty Bd. of Sch. Trustees*, 284 S.C. 299, 326 S.E.2d 163 (Ct. App. 1985). Instead, "[o]nce a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted *without regard to the ultimate termination of the case on the merits*." *Helsel v. Cty of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992) (emphasis added).

As recognized by Justice Toal in her book *Appellate Practice in South Carolina* (3d ed. 2016), appellate "[c]ourts rarely see a party appeal an interlocutory order" concerning injunctions or receivers, *id.* at p. 145, perhaps because such orders necessarily do *not* determine any issues on the merits in the underlying action. For the same reasons, such orders should not be stayed while

[7] Tellingly, there are still gaps in Appellants' document production in connection with evidence of their financial ability, as the Business Court has already held. *See* Discovery Order at pp. 3-4 (finding, in relevant part, that records of monthly checking and savings accounts are incomplete, either not beginning in January 2018 or ending months before present). Appellants have still yet to produce monthly financial statements since August/September 2020, more than six months ago, which would reveal actual evidence of Appellants' ability to fund the ordered escrow account.

they are on appeal. In six months if Appellants succeed on their counterclaims and defenses at the trial of this case, the preliminary injunction and this appeal will be mooted. If that occurs, Appellants have the injunction bond posted by Respondents to protect them from alleged damages they stand to incur as a result of enforcement of the injunctive relief. On the other hand, if *Respondents* win at the trial of this case, a stay of the preliminary injunction will have *further* permanently and irreparably harmed Respondents as the Business Court has already held.

Appellants take issue with the substantive rulings in the Business Court's Injunction Order. *See* Petition at pp. 7, 11-12. These issues are already before the Court on Appellants' Notice of Appeal and will be fully briefed before this Court. Appellants' assertions for why the Injunction Order should be reversed on the merits is not substantively appropriate for consideration before this Court on Appellants' Petition for supersedeas.

Finally, Appellants allege "Respondents' conduct and communications make clear that they intend . . . to cause . . . irreparable harm [to] Appellants[.]" Petition at p. 9 (citing Exhibit G). This assertion impugns the conduct of Respondents' undersigned counsel and assigns to Respondents a nefarious intent, neither of which Appellants support with any evidence. To be clear, Respondents have no desire to cause "irreparable harm" to Appellants. Instead, Respondents seek nothing more than to protect their own interests and enforce the preliminary injunction Respondents obtained from the Business Court, which is reasonable, necessary, and based on a proper interpretation and application of the facts and law by the Business Court. The Rules of Appellate Procedure make clear that orders granting injunctive relief are not automatically stayed by an appeal. Therefore, there is nothing improper or reprehensible about Respondents' actions, including correspondence or attempts to enforce the Injunction Order even while the order is on appeal.

III. ALTERNATIVELY, IF SUPERSEDEAS IS GRANTED, SUCH RELIEF SHOULD BE CONDITIONED UPON APPELLANTS' FILING OF A BOND OR OTHER UNDERTAKING AS THE COURT MAY DEEM APPROPRIATE.

In granting Respondents' Motion for Preliminary Injunction, the Business Court explicitly found that Respondents would be permanently and irreparably injured without a temporary injunction between now and the date of a trial on the merits. Should Appellants succeed in their Petition and obtain supersedeas as to the relief ordered in the Injunction Order, Respondents respectfully request a hearing at which time the Court may consider "such terms, including but not limited to the filing of a bond or undertaking, as the [Court] . . . may deem appropriate" pursuant to Rule 241(c)(3), SCRCP.

CONCLUSION

Respondents respectfully request this honorable Court deny Appellants' Petition and require Appellants to first file an application for supersedeas with the Business Court pursuant to Rule 241(d)(1), SCACR. Respondents believe the Business Court is in a better position to determine whether supersedeas is appropriate and, if so, set "the terms of [supersedeas], including but not limited to the filing of a bond or undertaking, as the lower court . . . may deem appropriate." Rule 241(c)(2), SCACR. Dismissing the Petition will not unfairly prejudice Appellants as they are permitted to seek review in this Court following consideration of the Petition by the Business Court. *See* Rule 241(d)(2), SCACR.

If this Court determines that Appellants' Petition is procedurally proper, Respondents respectfully urge this Court to deny supersedeas or conduct a hearing at which time the Court can consider evidence as to "such terms, including but not limited to the filing of a bond or undertaking [by Appellants], as the [Court] . . . may deem appropriate" should supersedeas be granted. *See* Rule 241(c)(3), SCACR.

Respectfully submitted,

s/Lyndey R. Z. Bryant
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Attorneys for Respondents The Carolina Appraisal Group, Inc. and The Carolina Appraisal Group-Residential, LLC

March 9, 2021

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
Business Court: The Honorable Maite Murphy

Appellate Case No. 2021-000225

The Carolina Appraisal Group, Inc. and The Carolina Appraisal Group-Residential, LLC ..... Respondents,

v.

Wagener Insurance Agency and Realty, Inc.; Douglas Appraisal, LLC, And Robert D. Douglas..... Appellants,

v.

Harris Benjamin Davis, Jr., The Carolina Appraisal Group W-2, LLC, ...Third Party Defendants.

PROOF OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency" dated March 20, 2020, as Amended May 29, 2020, the undersigned hereby certifies a true copy of the **Respondents' Return in Opposition to Appellants' Petition for *Ex Parte* Order Granting Writ of Supersedeas or, in the alternative, for an Expedited Order Granting a Writ of Supersedeas** was served upon the parties of record, at the primary e-mail address listed in the Attorney Information System on this 9th day of March 2021, as follows:

Adam T. Silvernail
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March 9, 2021

Via Electronic Mail: ctappfilings@sccourts.org

The Honorable Jenny Abbott Kitchings
Clerk of Court, Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: The Carolina Appraisal Group, Inc. and The Carolina Appraisal Group-Residential, LLC *Respondents* v.
Wagener Insurance Agency and Realty, Inc.; Douglas Appraisal, LLC and Robert D. Douglas, *Appellants* v.
Harris Benjamin Davis, Jr., The Carolina Appraisal Group W-2, LLC, *Third Party Defendants.*
Appellate Case No. 2021-000225
A&R File No. 052854-000004

Dear Mrs. Kitchings:

I have enclosed for filing the Respondents' Return in Opposition to Appellants' Petition for *Ex Parte* Order Granting Writ of Supersedeas or, in the alternative, for an Expedited Order Granting a Writ of Supersedeas. I am serving a copy of the Return on all counsel to this matter as set forth in the Proof of Service.

Thank you for your help with these matters.

Sincerely,

s/ Lyndey R. Z. Bryant
Lyndey R. Z. Bryant

LRZB/jas

Enclosure

cc: via electronic mail
Adam T. Silvernail, Esq.
Robert L. Buchanan, Jr., Esq.
Paul K. Simons, Jr., Esq.