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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy and R. Ferrell Cothran, Jr., Circuit Court Judges

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Appeal No. 2022-000403

Joseph Abruzzo,..... Petitioner,

v.

Bravo Media Productions LLC; Haymaker Media, Inc.; NBCUniversal Media, LLC; Comcast Corporation; Craig Conover; Chelsea Meissner; and Madison LeCroy,..... Respondents.

RESPONDENTS' RETURN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242, SCACR, Respondents Bravo Media Productions LLC, Haymaker Media, Inc., NBCUniversal Media, LLC, Comcast Corporation, Craig Conover, Chelsea Meissner, and Madison LeCroy, Defendants below (jointly "Defendants" or "Respondents") respond in opposition to Petitioner Joseph Abruzzo's, Plaintiff below ("Plaintiff" or "Petitioner"), Petition for Writ of Certiorari challenging the Court of Appeals' Orders dated January 28, 2022 and March 2, 2022 granting Respondents' Petition for Writ of Supersedeas, filed January 14, 2022 ("Resp. Pet."). Petitioner has not raised any novel question of law, and the Court of Appeals' grant of supersedeas is not in conflict with any prior decision of this Court. Plaintiff's Petition is nothing more than another chapter in his ongoing effort to harass Defendants and cause them to incur litigation costs in the hopes of extracting a multi-million dollar settlement from them in what is, at best, a frivolous lawsuit arising out of his regret of his decision to voluntarily and knowingly appear on a popular reality television show. The Court of Appeals correctly decided that South Carolina requires that discovery be stayed pending resolution of Defendants' appeal of the denial of their motion to compel arbitration. Plaintiff's Petition, which simply rehashes the same mischaracterizations of law and fact the Court of Appeals correctly rejected, should be denied.

In Appeal No. 2020-001095, pending before the Court of Appeals, Defendants seek review of the circuit court's July 6, 2020 and July 22, 2020 Form 4 Orders, (R. pp. 1-6; Resp. Pet. Exhs. A & B), denying their Motion to Dismiss Plaintiff's Amended Complaint and for Order Compelling Arbitration. (R. pp. 144-250). Pursuant to Rules 205 and 241, SCACR, as well as 9 U.S.C. §§ 3 & 16(a)(1)(A), all discovery in the circuit court should be stayed pending resolution of Defendants' appeal of the circuit court's Form 4 order denying their motion to compel arbitration.

As explained by numerous South Carolina (and other) courts discussed below, allowing Plaintiff to proceed through full discovery, including third-party discovery, while this appeal is

pending would severely prejudice Defendants' ability to effectively vindicate and benefit from the parties' agreement to an arbitral forum and/or a New York forum, creates the risk of inconsistent decisions, and needlessly wastes both the parties' and the court's time and resources in deciding discovery disputes and issuing decisions that will not be binding if Defendants prevail on their appeal. Rules 205 and 241 of the SCACR were promulgated to prevent precisely that result.

QUESTIONS PRESENTED FOR REVIEW

I. Did Plaintiff fail to establish that exceptional circumstance warrant this Court's review?

II. Did the Court of Appeals properly grant supersedeas and stay discovery before the circuit court while Defendants' appeal of the denial of their motion to compel arbitration is pending on appeal?

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Abruzzo is a well-educated, sophisticated, widely known, and self-proclaimed successful Florida politician and consultant, who resides in Florida[1] and, at all times relevant to this dispute, was a director for public relations for a major Florida law firm. (R. pp. 96-100). In the fall of 2018, Abruzzo pursued a romantic relationship with Kathryn Dennis ("Dennis"), one of the main cast members on the long-running hit reality television show, *Southern Charm* ("the Program" or "*Southern Charm*"), with full knowledge that Season Six of the Program was being filmed at the time. *Southern Charm* features the professional and personal lives of its cast members "and reveals a world of exclusivity, money and scandal." (R. p. 102). Plaintiff alleges that Dennis, who is not a Defendant, persuaded him to appear on the Program by telling him that it would garner her a more significant plot line. (R. p. 104). Prior to being filmed for the Program, Abruzzo voluntarily signed a three-page Appearance Release, Voluntary Participation, and Arbitration

[1] Plaintiff recently was elected to and currently serves as the Clerk of the Circuit Court and Comptroller for Palm Beach County, Florida. *See* https://www.mypalmbeachclerk.com/

Agreement. ("Release and Arbitration Agreement") (R pp. 153-156, 159). Paragraph 19 of the Release and Arbitration Agreement contains a prominently displayed agreement to mediate and, if necessary, arbitrate any disputes arising out of the Release and Arbitration Agreement ("Arbitration Agreement"), while Paragraph 20 contains a choice of law and forum selection clause, selecting both New York law and venue. (R. pp. 155, 159).

Plaintiff filed a Complaint and Summons on January 28, 2020 ("Complaint") in the Charleston County Court of Common Pleas, alleging ten causes of action against Defendants arising out of his appearance on *Southern Charm*. (R. pp. 7-37). On May 12, 2020, Defendants filed a Motion to Dismiss Plaintiff's Complaint and for Order Compelling Arbitration and Memorandum in Support. (R. pp. 38-92).

In response, on June 19, 2020, Plaintiff filed a 50-page Amended Complaint, which re-alleged his earlier causes of action and added seven additional, and often duplicative, purported causes of action entitled: Wrongful Appropriation of Personality/Infringement on the Right of Publicity; Wrongful Publicizing of Private Affairs; Public Nuisance; Private Nuisance; Fraudulent Inducement of Arbitration Agreement/Unconscionability of Arbitration Agreement; Fraudulent Inducement of Release/Unconscionability of Release; and, Rescission of "Release and Arbitration Agreement," seeking damages in excess of $10,000,000, treble damages and costs and fees, (R. pp. 94-143), along with a one-paragraph response to Defendants' Motion to Dismiss, arguing that that Motion was moot in light of his Amended Complaint. (R. p. 93).

On June 22, 2020, Defendants filed a Motion to Dismiss Plaintiff's Amended Complaint and for Order Compelling Arbitration, and a Memorandum in Support ("Motion to Compel Arbitration") (R. pp. 144-250). Defendants argued that the prominent and unambiguous Arbitration Agreement, (R. pp. 155, 159), requires Plaintiff to resolve any dispute arising out of

the Release and Arbitration Agreement before an arbitrator, and not in circuit court. Defendants also argued that the New York forum selection clause independently requires dismissal of Plaintiff's claims in South Carolina state court.

One of Plaintiff's central objections to arbitration is his internally inconsistent, facially unbelievable and legally deficient argument that he—a well-educated politician then employed at a prominent Florida law firm—was presented only with the signature block of the Release and Arbitration Agreement, which he signed, blindly relying on alleged assurances of the producers and/or film crew of *Southern Charm*, whom he had only just met and with whom he had no other relationship, and that he was justified in such reliance. (*See* R. pp. 262-263, 291, 322-323). However, indisputable evidence in the Record shows a photograph of Plaintiff holding a copy of the signed agreement, showing the entire third page of the Release and Arbitration Agreement, which contains the Arbitration Agreement along with other provisions of the broader agreement. (R. pp. 159, 210).

On July 6, 2020, Judge Price issued a Form 4 Order, (R. pp. 4-6; Resp. Pet. Exh. A), denying Defendants' Motion to Compel Arbitration. Defendants moved the Court for Reconsideration pursuant to Rule 59(e), SCRCP on July 16, 2020, (R. pp. 286-311), asking the circuit court to provide its reasoning, which the circuit court denied, in a Form 4 Order on July 22, 2020. (R. pp. 1-3; Resp. Pet. Exh. B).

Defendants timely appealed both Orders to the Court of Appeals. (Resp. Pet. Exh. C). Final Briefs and the Record on Appeal have been filed and, on October 22, 2021, the Court of Appeals requested additional bound copies of Briefs and the Record. Defendants argue on appeal that the circuit court erred in denying their Motion to Compel arbitration and, alternatively, in failing to enforce the New York forum selection clause. Thus, the issue on appeal is whether, in light of the

valid and enforceable arbitration agreement between the parties and, independently, the New York forum selection clause, the circuit court lacks the authority to hear any part of this case, including but not limited to discovery. Whether the circuit court can move forward with any aspect of this case is the main issue pending on appeal before the Court of Appeals.

Nonetheless, after Defendants filed and served their Notice of Appeal, Plaintiff served an initial, relatively limited round of discovery on Defendants. (Resp. Pet. Exh. D). Because the circuit court's authority and/or jurisdiction to try and decide the merits of this dispute is clearly a matter affected by Defendants' pending appeal of their motion to compel arbitration, Defendants objected to Plaintiff's initial round of discovery. Plaintiff moved to compel discovery responses (Resp. Pet. Exhs. F & G), *repeatedly* asserting that he was seeking *only limited discovery* that he claimed would be available to him under the JAMS Arbitration Rules. Defendants filed an Opposition arguing that, given that the central issues on appeal involve whether this dispute should be resolved by an arbitrator and not a civil court, or alternatively in a New York forum, discovery was automatically stayed by Rules 205 and 241, SCACR. Footnote 2 of Defendants' Opposition stated that, "In federal cases involving the FAA [Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA")], a party can move to stay any further proceedings during an appeal, including discovery, pursuant to section 3 of the FAA. In South Carolina, such a motion to stay is unnecessary in light of the automatic stay provided in Rules 205 and 241, SCACR. However, to the extent this Court determines that Defendants need to move affirmatively to stay discovery, Defendants request that this Court treat this Memorandum in Opposition as, alternatively, a Motion For a Stay of Discovery pursuant to 9 U.S.C. § 3 pending the outcome of their appeal to the South Carolina Court of Appeals." (Resp. Pet. Exh. H).

On February 11, 2021, Judge McCoy issued a Form 4 Order granting Plaintiff's Motion to Compel. In that Order, Judge McCoy stated that, "To the extent Defendants' response can be construed as a Motion for Stay, such motion is denied." (Resp. Pet. Exh. I) ("Form 4 Order").

Defendants moved for reconsideration of the February 11, 2021 Form 4 Order, seeking an extension of time in which to respond to discovery because Plaintiff's counsel refused to communicate with Defendants regarding any extension. (Resp. Pet. Exh. J). Defendants began providing responses to some of Plaintiff's initial discovery requests based on the understanding that Judge McCoy's Form 4 Order compelled responses *only* to Plaintiff's initial standard discovery requests, which Plaintiff repeatedly characterized as "limited." However, since Plaintiff's discovery requests sought commercially sensitive information and Plaintiff's counsel refused to engage in a constructive dialogue about a negotiated confidentiality agreement, on March 19, 2021, Defendants moved for a Protective Order asking the Court to enter a confidentiality order to protect commercially sensitive material. (Resp. Pet. Exh. K).[2]

Subsequently, and despite Plaintiff's repeated claim to Judge McCoy that he was seeking *only limited discovery* that he claimed would be available to him under the JAMS Arbitration Rules, Plaintiff served many rounds of additional discovery requests on Defendants, as well as subpoenas on eleven uninvolved third parties. These include, but are not limited to:

- Plaintiff's Requests for Admission to the Individual Defendants, served on April 23, 2021, (Resp. Pet. Exh. L);
- Plaintiff's Second Request for Production to the Corporate Defendants, served on April 23, 2021, (Resp. Pet. Exh. M);
- Plaintiff's subpoenas to eleven third-party media companies served on April 26, 2021, (Resp. Pet. Exh. N);
- Plaintiff's First Set of Interrogatories and Second Request for Production to the

[2] Plaintiff incorrectly asserts that Defendants "sought further relief from the circuit court on various issues." (Pl. Pet. p. 3). The only relief Defendants sought from the circuit court involved their attempts to limit or defend against Plaintiff's onslaught of discovery requests while their appeal was pending.

Individual Defendants, served on April 27, 2021, (Resp. Pet. Exh. O);

- Plaintiff's Third Request for Production on the Corporate Defendants, served on April 28, 2021, (Resp. Pet. Exh. P);
- Plaintiff's Third Request for Production on the Individual Defendants, served on April 30, 2021, (Resp. Pet. Exh. Q);
- Plaintiff's Fourth Request for Production to the Corporate Defendants, served on April 30, 2021, (Resp. Pet. Exh. R);
- Plaintiff's First Request for Admission to the Corporate Defendants, served on May 4, 2021, (Resp. Pet. Exh. S);
- Plaintiff's Second Request for Admission to the Individual Defendants, served on May 4, 2021, (Resp. Pet. Exh. T);
- Plaintiff's First Set of Interrogatories to the Corporate Defendants, served on May 5, 2021, (Resp. Pet. Exh. U);
- Plaintiff's Third Request for Admission to the Individual Defendants, served on May 7, 2021, (Resp. Pet. Exh. V);
- Plaintiff's Second Request for Admission to Corporate Defendants, served on May 7, 2021, (Resp. Pet. Exh. W);
- Plaintiff's Second Set of Interrogatories to the Individual Defendants, served on May 11, 2021, (Resp. Pet. Exh. X);
- Plaintiff's Second Set of Interrogatories to the Corporate Defendants, served on May 12, 2021, (Resp. Pet. Exh. Y);
- Plaintiff's Third Set of Interrogatories to the Individual Defendants, served on May 12, 2021, (Resp. Pet. Exh. Z);
- Plaintiff's Third Request for Admission to the Corporate Defendants, served on May 14, 2021, Resp. Pet. Exh. AA);
- Plaintiff's Third Set of Interrogatories to the Corporate Defendants, served on May 14, 2021, (Resp. Pet. Exh. BB);
- Plaintiff's Fourth Request for Admission to the Corporate Defendants, served on May 20, 2021, (Resp. Pet. Exh. CC);
- Plaintiff's Fourth Set of Interrogatories to the Corporate Defendants, served on May 20, 2021, (Resp. Pet. Exh. DD);
- Plaintiff's Fourth Request for Production to the Individual Defendants, served on May 20, 2021, (Resp. Pet. Exh. EE);
- Plaintiff's Fourth Request for Admission (to Defendant Craig Conover only) served on May 25, 2021 (Resp. Pet. Exh. FF);
- Plaintiff's Fifth Set of Interrogatories to the Corporate Defendants, served on May 25, 2021 (Resp. Pet. Exh. GG); and,
- Plaintiff's Fourth Set of Interrogatories and Fifth Request for Production to the Individual Defendants, served on May 25, 2021, (Resp. Pet. Exh. HH).

Many of these additional requests seek information and documents that are redundant, unduly burdensome, and/or plainly irrelevant to the claims and defenses in this lawsuit. Plaintiff made it abundantly clear that he intends to conduct a full-scale fishing expedition from Defendants

and uninvolved nonparties before the circuit court, far exceeding the "limited" discovery he claimed he is permitted under JAMS arbitration rules. Consequently, and in light of Defendants' understanding that Judge McCoy's Form 4 Order compelled responses only to Plaintiff's initial, limited discovery requests, on April 28, 2021, Defendants filed a Motion for Stay with the circuit court. (Resp. Pet. Exh. II), and a Memorandum in Support. (Resp. Pet. Exh. JJ). Contrary to Plaintiff's repeated misstatements in his Petition, Defendants never agreed that his ongoing, plainly harassing, irrelevant and overly broad discovery requests would be the proper subjects of discovery in an arbitral forum.

Defendants' Motion for a Protective Order was heard by The Honorable Robert M. Young, Sr. on May 26, 2021. At that hearing, the issue arose of whether the Form 4 Order was limited to the initial round of discovery (which Plaintiff continued to characterize as *limited* and what he would be entitled to under the JAMS arbitration rules) or whether it extended to all discovery. Judge Young indicated he would consult with Judge McCoy and advise the parties. Judge Young agreed a confidentiality order was necessary and admonished Plaintiff's counsel for continuing to serve multiple rounds of piece-meal discovery.

Nonetheless, Plaintiff continued to serve additional irrelevant and overly broad discovery requests on Defendants, including:

- Plaintiff's Fourth Request for Admission and Fifth Set of Interrogatories (to Defendants Chelsea Meissner & Madison LeCroy only) served on May 28, 2021 (Resp. Pet. Exh. KK);
- Plaintiff's Fifth Request for Admission and Fifth Set of Interrogatories (to Defendant Craig Conover only) served on May 28, 2021 (Resp. Pet. Exh. LL);
- Plaintiff's Sixth Set of Interrogatories and Fifth Request for Production to the Corporate Defendants, served on June 24, 2021 (Resp. Pet. Exh. MM); and,
- Plaintiff's Sixth Request for Production to the Individual Defendants, served on June 24, 2021 (Resp. Pet. Exh. NN).

Following the May 26, 2021 hearing, the parties agreed to a Confidentiality Order, which

was entered by the circuit court on June 21, 2021. After the entry of the Confidentiality Order, Defendants began responding to Plaintiff's initial, limited discovery requests consistent with Defendants' specific objections to those requests. Upon entry of the Court of Appeals' stay in this matter (discussed below), Defendants immediately suspended the completion of their responses to Plaintiff's initial discovery requests.

Previously, on April 29, 2021, Defendants had filed a Motion for Protective Order and to Quash the Third-Party Subpoenas that Plaintiff had served on eleven uninvolved non-parties to this dispute. (Resp. Pet. Exh. OO). The Motion to Quash was heard by Judge Cothran on December 15, 2021. At that hearing, the central issue became whether Judge McCoy's Form 4 Order was limited to Plaintiff's initial round of discovery, or whether it extended to all discovery. As Judge McCoy was present at the courthouse on other matters, Judge Cothran consulted with her while she was on a short break and advised the parties that Judge McCoy had intended her Form 4 Order to permit "full discovery" in the circuit court in this matter notwithstanding Defendants' pending appeal. As a result, Judge Cothran denied Defendants' Motion to Quash as moot. (Resp. Pet. Exh. QQ-2, pp. 8-9) (Resp. Pet. Exh. QQ-3).

Consequently, on December 17, 2021, Plaintiff filed a Motion to Compel, (Resp. Pet. Exh. RR), and a Motion to Deem Admitted Plaintiff's Requests to Admit. (Resp. Pet. Exh. SS), seeking to enforce the voluminous and inappropriate plenary party and non-party discovery requests he had served.

After Judge McCoy confirmed that her February 11, 2021 Form 4 Order was not limited to Plaintiff's initial, self-proclaimed limited discovery requests but, instead, was intended to allow full-blown discovery before the circuit court despite the pending appeal, Defendants petitioned the Court of Appeals on January 14, 2022 for a Writ of Supersedeas staying all further proceedings

before the circuit court, including all discovery and third-party subpoenas served by Plaintiff. Over Plaintiff's objection, the supersedeas was granted on January 28, 2022 and the Court of Appeals denied Plaintiff's Petition for Rehearing of same on March 2, 2022.

ARGUMENT

I. Plaintiff fails to establish that any exceptional circumstances warrant this Court's review.

This Court should deny Plaintiff's Petition because he has failed to demonstrate exceptional circumstances that warrant this Court's review. The Court of Appeals' grant of a stay in this case is clearly an interlocutory order. The very case law on which Plaintiff relies confirms that an order granting a stay of proceedings is not a final order subject to immediate review. *Edwards v. SunCom*, 369 S.C. 91, 93, 631 S.E.2d 529, 530 (2006). In *Edwards*, this Court determined that the order granting a stay "does not discontinue the proceedings. It merely temporarily stays the matter pending a ruling by" another forum. "Accordingly, we find an order granting a stay is not immediately appealable." 369 S.C. at 94, 631 S.E.2d at 530.

As Plaintiff himself points out, a petition to this Court for certiorari review of an interlocutory order requires him to demonstrate exceptional circumstances in order to warrant this Court's review. (Pet. p. 7); *see also Kubic v. MERSCORP Holdings, Inc.*, 416 S.C. 161, 167 n.1, 785 S.E.2d 595, 598 n.1 (2016) (finding that denial of a motion to dismiss was not immediately appealable, however, "this Court may issue a writ of certiorari when exceptional circumstances exist despite an order not being directly appealable").

Here, Plaintiff has not even attempted to show that exceptional circumstances exist that warrant this Court's review. At most, he suggests that documents or videos may be lost, memories may fade and employees may take other jobs. (Pet. p. 13). Those concerns fall far short of establishing exceptional circumstances warranting this Court's review. Indeed, those concerns are

present every time a discovery stay is at issue, and thus, cannot possibly establish exceptional circumstances. In addition, as Plaintiff knows, Defendants have taken reasonable steps to preserve all documents and information that may be relevant to this dispute. And, Defendants have already produced to Plaintiff some of the core discovery sought in his initial, limited discovery requests. Thus, this Court should deny Plaintiff's Petition on the basis that he failed to, and cannot demonstrate exceptional circumstances warranting this Court's review.

II. The Court of Appeals properly granted Defendants' Petition for Writ of Supersedeas

The Court of Appeals properly granted supersedeas and Plaintiff has not demonstrated any basis for this Court's review. That is true even if, as Plaintiff erroneously argues, the standard set forth in Rule 242, SCACR, applies to Plaintiff's Petition (and it does not, as set forth in Section I).

Upon service of a notice of appeal, the appellate court has exclusive jurisdiction over the appeal. The South Carolina Appellate Court Rules permit a lower court to proceed only "with matters not affected by the appeal." Rule 205, SCACR. Correspondingly, under Rule 241, SCACR, "As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision." A lower court only "retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal." Rule 241(a), SCACR.

"Under Rule 205 and the last sentence of" what is now Rule 241, "the lower court may not act or issue orders that affect an issue on appeal," but can "act only to enforce matters not stayed by the appeal." *Arnal v. Fraser*, 371 S.C. 512, 519, 641 S.E.2d 419, 422 (2007). A matter or issue should be stayed where it "depend[s] upon the success of the [party's] appeal of the trial court's order …" *Wayne Smith Constr. Co. v. Wolman, Duberstein, & Thompson*, 294 S.C. 140, 149, 363 S.E.2d 115, 120 (Ct. App. 1987). To determine whether a matter is "affected" by an appeal, a court

must closely examine the issues on appeal, asking whether there is any "action the appellate courts could take resolving th[e] appeal that would affect the" proceedings initiated by a party during a pending appeal. *Tillman v. Oakes*, 398 S.C. 245, 256, 728 S.E.2d 45, 51 (Ct. App. 2012).

Rule 241, SCACR, provides the process for seeking a writ of supersedeas. While Defendants believe discovery before the circuit court is and should have been stayed automatically by operation of Rules 205 and 241(a), they address the possibility that the circuit court (which did not provide any reasoning to support its denial of Defendants' requests for a stay) believed this case was subject to an exception to the automatic stay provisions. As required by Rule 241(d), Defendants first applied to the circuit court for a stay of proceedings, including discovery, in response to Plaintiff's self-proclaimed limited discovery requests. (Resp. Pet. Exh. H).

Until December 15, 2021, Defendants reasonably believed that the circuit court had compelled only limited discovery based, in part, on Plaintiff's repeated assertions that he would have been entitled to the same discovery under the JAMS arbitration rules. As soon as it became clear, in light of Plaintiff's voluminous additional party and non-party discovery requests, that the circuit court intended to allow Plaintiff to pursue plenary discovery, thus allowing this matter to be fully litigated at the trial level, while the fundamental question of whether the circuit court was the proper forum (as opposed to an arbitral forum or a New York court) to resolve this dispute, Defendants promptly sought relief from the Court of Appeals.

In deciding whether to impose a supersedeas of further proceedings in the forum below, "the appellate court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to preserve a contested issue from becoming moot." Rule 241(c)(2), SCACR. In addition, where "the issuance of a writ of supersedeas is insufficient to afford complete relief, the … appellate court may order other affirmative relief upon such terms as are deemed appropriate."

Rule 241(c)(3), SCACR.

Here, continued litigation of this case before the circuit court, when that tribunal's very authority to hear and resolve the dispute between the parties is the central question on appeal to the Court of Appeals, would largely vitiate the parties' contractual agreement to resolve their disputes before an arbitral forum, would effectively moot Defendants' pending appeal, runs directly counter to the very purpose of an appeal of a denial to compel arbitration, and would subject the parties to the "worst possible outcome," *Bradford-Scott Data Corp. v. Physician Computer Network*, 128 F.3d 504, 506 (7th Cir. 1997), *i.e.*, going through the time and expense of broad discovery before a civil court, only to have an appellate court order that the dispute must be arbitrated.

As the Court of Appeals correctly concluded, the circuit court's refusal to stay discovery during the pendency of Appeal No. 2020-001095 is inconsistent with the vast majority of federal court decisions, which routinely hold that discovery should be stayed while a denial of a motion to arbitrate is being reviewed by an appellate court. The test in federal court for whether an appeal divests a lower court of authority to proceed is similar to that applied under Rules 205 and 241, SCACR: "As a general rule, the filing of an appeal 'confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case *involved in the appeal*.'" *Levin v. Alms & Assocs.*, 634 F.3d 260, 263 (4th Cir. 2011) (emphasis added), *quoting Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982), and 9 U.S.C. § 16(a)(1)(A). The terms "involved in" and "affected by" are substantively similar and, to the extent there is any substantive difference, "affected by" (the language of Rules 205 and 241 of the SCACR) arguably has a broader scope than does "involved in."

Clearly, the permissible scope and timing of discovery, among other discovery-related

issues, are "affected by" Defendants' pending appeal. Indeed, in *Lummus Co. v. Commonwealth Oil Refining Co.*, the First Circuit instructed that "a court order of discovery would be affirmatively inimical to appellee's obligation to arbitrate, if this court determines it to have such obligation. It seems clear that if arbitration is to be had of the entire dispute, appellee's right to discovery must be far more restricted than if the case remains in a federal court for plenary trial …" 273 F.2d 613 (1st Cir. 1959).

For similar reasons, the Fourth Circuit holds that "an appeal on the issue of arbitrability automatically divests the district court of jurisdiction over the underlying claims and requires a stay of the action, unless the district court certifies the appeal as frivolous or forfeited." *Levin*, 634 F.3d at 26. While "*Levin* does not elaborate on the meaning of 'frivolous'" in this context, "the 'common application' of frivolity in the context of appeal is when '[none] of the legal points [are] arguable on their merits.'" That is a high bar and, therefore, courts in the Fourth Circuit regularly stay discovery while a motion to compel arbitration is pending. *See, e.g.*, *Berkeley County Sch. Dist. v. Hub Int'l Ltd.*, No. 2:18-cv-00151-DCN, 2019 U.S. Dist. LEXIS 86712 *3-4, 2019 WL 2233145 (D. S.C. May 23, 2019) (applying the rule adopted in *Levin* and staying underlying case where the issue on appeal was whether the parties formed an agreement to arbitrate); *see also Lummus*, 273 F.2d at 613 (staying discovery while denial of defendant's motion to compel arbitration was on appeal, noting that the plaintiff's "right to discovery must be far more restricted" in an arbitral forum than it would be in federal district court).

"To assume ongoing jurisdiction over discovery," while an appeal of a denial of a motion to compel arbitration is pending, "would be inconsistent with the bedrock principle that once a case is appealed, jurisdiction rests with the court of appeals, not in both the court of appeals and the district court." *Combined Energies v. CCI, Inc.*, 495 F. Supp. 2d 142, 143-144 (D. Me. 2007).

"Congress acknowledged that one of the principal benefits of arbitration, avoiding the high costs and time involved in judicial dispute resolution, is lost if the case proceeds in both judicial and arbitral forum. If the court of appeals reverses and orders the dispute arbitrated, then the costs of the litigation in the district court incurred during appellate review have been wasted and the parties must begin again in arbitration." *Blinco v. Green Tree Serv., LLC*, 366 F.3d 1249, 1251 (11th Cir. 2004).

As Plaintiff concedes, this case is subject to the provisions of the FAA. (*See* R. pp. 102, 276-279 (asserting *Southern Charm* is broadcast nationally and internationally, and arguing he is entitled to a jury trial under the FAA)). Sections 3 and 16 of the FAA provide additional authority that all further proceedings before the circuit court, including all pending discovery, should be stayed pending the outcome of Defendants' appeal to the Court of Appeals. "Whether the case should be litigated in the [lower] court is not an issue collateral to the question presented by an appeal under § 16(a)(1)(A)," the appeal provision of the FAA; instead, "it is the mirror image of the question presented on appeal. Continuation of the proceedings in the district court largely defeats the point of the appeal and creates a risk of inconsistent handling of the case by two tribunals." *Bradford-Scott*, 128 F.3d at 505; *see also Levin*, 634 F.3d at 264 ("Discovery is a vital part of the litigation process and permitting discovery constitutes permitting the continuation of the litigation over which the district court lacks jurisdiction. [citation and quote omitted] Furthermore, allowing discovery to proceed would cut against the efficiency and cost-saving purposes of arbitration").

Under the well-settled case law and statutory authority cited above, Defendants' pending appeal divests the circuit court of jurisdiction to hear any aspect of this case, and allowing Plaintiff to engage in plenary discovery while that appeal is pending would moot Defendants' appeal, vitiate

their rights to an arbitral forum, and would unnecessarily waste the court's time and resources. The ultimate issue argued in Defendants' initial motion to compel arbitration, as well as in Appeal No. 2020-001095, is whether the circuit court has jurisdiction to proceed with any aspect of the litigation of Plaintiff's claims. It is not disputed (nor could it be) that if the Court of Appeals reverses the circuit court and orders the parties to mediation, and if necessary, arbitration or litigation in New York, the circuit court would have no jurisdiction to issue any rulings on the scope of discovery in this action and any such discovery rulings would not be enforced in an arbitration nor would any discovery obtained through such rulings be admissible in arbitration to the extent it exceeds the far more restricted discovery permitted in an arbitral forum. *E.g., Lummus*, 273 F.2d at 613 (observing that the plaintiff's "right to discovery must be far more restricted" in an arbitral forum than it would be in federal district court). As the Court of Appeals correctly held, this issue is not collateral to Defendants' appeal; rather, the extensive case law cited herein clearly holds that whether to permit plenary discovery while a motion to compel arbitration is pending is a matter directly involved in Defendants' pending appeal, and thus, a supersedeas of further proceedings in the circuit court is warranted.

As the Seventh Circuit succinctly explained in *Bradford-Scott*, "Arbitration clauses reflect the parties' preference for non-judicial dispute resolution, which may be faster and cheaper. These benefits are eroded, and may be lost or even turned into net losses, if it is necessary to proceed in both judicial and arbitral forums, or to do this sequentially. The worst possible outcome would be to litigate the dispute, to have the court of appeals reverse and order the dispute arbitrated, to arbitrate the dispute, and finally to return to court to have the award enforced …. Combining the costs of litigation and arbitration is what lies in store if a district court continues with the case while an appeal under § 16(a) is pending." 128 F.3d at 506.

A. The Court of Appeals' grant of supersedeas does not conflict with any prior decisions of this Court.

None of the cases cited by Plaintiff concerning the "appealability of stays" addresses a Rule 241 petition for supersedeas or even a stay of proceedings during a pending appeal. Instead, *Carolina Water Serv. v. Lexington County Joint Mun. Water & Sewer Comm'n*, involved the denial of a stay of matters "pending the resolution of a related case before the South Carolina Administrative Law Court." 373 S.C. 96, 97, 644 S.E.2d 681, 682 (2007). In *Edwards*, this Court found that an order granting a stay while SunCom petitioned the FCC in a separate proceeding regarding a core issue in the case was not immediately appealable. 369 S.C. at 93, 631 S.E.2d at 530. *Service Corp. v. Bahama Sands Dev., LLC*, 2011 S.C. App. Unbpub. LEXIS 351, 2011 WL 11734673 (Ct. App. June 14, 0211), an unpublished Court of Appeals' decision with no precedential value, involved the denial of a motion to stay foreclosure proceedings while a related breach of contract claim was litigated. All three cases are inapposite, as none addresses the propriety and necessity of staying lower court proceedings while that forum's jurisdiction to hear any aspect of a case is pending on appeal, which is the crux of Defendants' appeal. Nor do any of those three cases involve or address the Appellate Court Rules at issue here or the procedural posture of the instant case, *i.e.*, the automatic stay provisions of Rules 205 and 241, SCACR, and the grant of a writ of supersedeas pursuant to Rule 241, SCACR. In the two cases involving a *denial* of a motion for a stay, *Carolina Water* and *Service Corp.*, the moving party attempted to challenge the denial of a stay via a direct appeal as opposed to seeking a writ of supersedeas. In *Edwards*, as is discussed above, the party challenging the grant of a stay had to demonstrate exceptional circumstances in order to warrant this Court's review, which, as discussed above, Plaintiff has not done here.

As he did below, Plaintiff erroneously relies on *Grosshuesch v. Cramer*, 377 S.C. 12, 659

S.E.2d 112 (2008) and *Oncology & Hematology Assocs of S.C., LLC v. S.C. Dep't of Health & Env't Control*, 387 S.C. 380, 692 S.E.2d 920 (2010), for the proposition that discovery orders generally are not immediately appealable and, at the same time, he cites *State v. Rearick*, 417 S.C. 391, 790 S.E.2d 192 (2016), for the proposition that an unappealed order becomes the law of the case. The Court of Appeals correctly rejected Plaintiff's legally deficient and an internally inconsistent attempt to argue both sides of the fence: *i.e.*, that Defendants cannot appeal Judge McCoy's Form 4 Order compelling discovery and denying a stay because it is an interlocutory order, (Pet. pp. 4-5, 10-11), and simultaneously that Defendants are somehow bound by that very same order which has become "the law of the case." Defendants did not appeal Judge McCoy's initial Form 4 order compelling production of information and documents in response to his first set of discovery requests because they reasonably believed that Judge McCoy's Form 4 Order did not extend beyond the limited discovery that Plaintiff claimed would be available in an arbitral forum. Thus, the Court of Appeals did not grant supersedeas in response to an appeal of a discovery order but, instead, properly granted Defendants relief from an order unjustifiably denying their motion for a stay of further proceedings before the circuit court during the pendency of Appeal No. 2020-001095, which relief Defendants sought immediately after it became clear that the circuit court intended to allow plenary discovery to proceed.

Plaintiff incorrectly suggests that the Court of Appeals' grant of supersedeas is in conflict with its own prior decisions, citing *Sanders v. Savannah Highway Auto. Co.*, 432 S.C. 328, 852 S.E.2d 744 (Ct. App. 2020). *Sanders* is wholly inapplicable to this case, and thus, the Court of Appeals correctly found Plaintiff's reliance on *Sanders* to be unpersuasive. In *Sanders*, the defendant argued on appeal that the circuit court lacked "*subject matter jurisdiction* to enter the order compelling discovery after they had filed their Notice of Appeal." 432 S.C. at 334, 852

S.E.2d at 747 (emphasis added). Critically, the defendant never moved for a stay of proceedings while its appeal was pending and did not seek a writ of supersedeas. Instead, the defendant only challenged the circuit court's *subject matter jurisdiction* to order discovery in its appeal. Thus, the Court of Appeals in *Sanders* did not discuss, let alone decide, the issues presented in Respondents' Petition for Supersedeas because, as that Court has explained, "Appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991). As a result, while *Sanders* stands for the unremarkable proposition that a circuit court has jurisdiction to hear and try tort cases, that fact is irrelevant to whether discovery is automatically stayed, and if not, whether discovery should be stayed during an appeal of a denial of a motion to compel arbitration in light of all of the considerations pointed out in the case law cited by Respondents in their Petition for Supersedeas and herein. Contrary to Plaintiff's attempt to read a nonexistent holding into the Court of Appeals' decision in *Sanders*, it does *not* stand for a blanket proposition that, while an appeal of an order denying arbitration is on appeal, full-blown discovery can be conducted before the circuit court, and he cites no authority interpreting or extending *Sanders* accordingly. At best, *Sanders* reinforces the conclusion that the process Defendants undertook here—moving first before the circuit court for a stay and, when that was denied, petitioning the Court of Appeals for a writ of supersedeas—is the proper procedure by which to stay further discovery while Appeal No. 2020-001095 is pending.

B. Plaintiff misstates the standard for granting a writ of supersedeas.

As he did below, Plaintiff argues, on one hand, that the decision to grant a writ of supersedeas is discretionary, properly citing *State v. Smith*, 322 S.C. at 213, 471 S.E.2d at 460-461 (1995), and, on the other, that it requires "extraordinary circumstances," citing *Oncology &*

Hematology Assoc. Indeed, Plaintiff, as he did below, bases much of his Petition on his incorrect assertion that *Oncology & Hematology Assoc.* requires a demonstration of exceptional circumstances to warrant a writ of supersedeas. While the exceptional circumstances standard certainly applies to Plaintiff's current Petition, *see* discussion in Section I, above, this Court did not address the standard for granting a writ of supersedeas in *Oncology & Hematology Assoc.* Instead, there the petitioners "initially combined their writ of certiorari with a writ of supersedeas and a notice of appeal," and the court's holding only extended to the writ of certiorari. 387 S.C. at 381 n.1, 692 S.E.2d at 921 n.1 (stating that this Court "dismissed the notice of appeal from the discovery orders as interlocutory and not immediately appealable. We determined exceptional circumstances existed, *warranting the grant of a writ of certiorari*.") (emphasis added); *see also id.* at 387, 692 S.E.2d at 924 ("A writ of certiorari may be issued to review a discovery order where exceptional circumstances exist"). Here, Defendants did not attempt to appeal nor did they petition the Court of Appeals to review a discovery order but, instead, pursuant to Rule 241, SCACR, properly sought a stay of all further proceedings before the circuit court, including discovery.

As he also did below, Plaintiff again makes the absurd argument that materials sought in discovery constitute "the delivery of documents," referenced in the Rule 241(b)(2) exception to the automatic stay rule and, in combination with S.C. Code Ann. § 18-9-150, required that the documents he seeks in discovery had to "be brought into court or placed in the custody of such officer or receiver" or that "an undertaking be entered on the part of the appellant," in order for Defendants to seek supersedeas. The Court of Appeals correctly rejected this argument. Rule 241(b)(2) and Section 18-9-150 apply to documents that have value in and of themselves, such as a note or a deed, but not to routine discovery documents. The result urged by Plaintiff is patently absurd and clearly not what either Rule 241(b)(2) or Section 18-9-150 intend, *see*, *e.g.*,

Florence County Democratic Party v. Florence County Republican Party, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) (noting that "in construing a statute, this Court will reject an interpretation which leads to an absurd result that could not have been intended by the General Assembly").

Plaintiff's argument, relying on the standard of review for discovery matters, that the Court of Appeals erred by not addressing whether Judge McCoy had discretion to deny a stay in this case is unavailing for several reasons. First, a petition for a writ of supersedeas granting a stay after the same has been denied by the lower tribunal is not a direct appeal of a discovery dispute in which the discretionary standard of review applies. Second, as Plaintiff noted, it appears the Court of Appeals' decision under Rule 241, SCACR, is discretionary. (Pet. p. 7, citing *State v. Smith*).

Third, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S. Ct. 927 (1983), does not support Plaintiff's position. That case did not involve a petition for supersedeas while an appeal of a denial of a motion to compel arbitration was being decided, nor even an appeal of a denial of a motion to arbitrate. Instead, *Moses* involved successive lawsuits filed in both state and federal court and whether the federal court should have stayed the federal litigation while the state court litigation was proceeding—even though both courts would address the issue of arbitrability. Thus, *Moses*, including the quote from that case regarding "severability" that Plaintiff takes out of context, is inapposite. What is applicable to this case, however, is the U.S. Supreme Court's pronouncement that "Congress' clear intent, in the Arbitration act, [was] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." 460 U.S. at 22, 103 S. Ct. at 940.

Plaintiff's reliance on *Hill v. Peoplesoft USA, Inc.*, 341 F. Supp. 2d 559 (D. Md. 2004), *Motorola Credit Corp. v. Uzan*, 388 F.3d 39 (2d Cir. 2004) and *Britton v. Co-op Banking Group*, 916 F.2d 1405 (9th Cir. 1990), is also misplaced. As an initial matter, all three cases involved

arbitration appeals that were plainly frivolous. *See Hill*, 341 F. Supp. 2d at 561; *Britton*, 916 F.2d at 1412; *Motorola Credit Corp.*, 388 F.3d at 53. Plaintiff has not even attempted to assert—nor could he plausibly—that either Defendants' motion to compel arbitration or their appeal of the denial of that motion is frivolous.

Moreover, while the Maryland district court in *Hill* noted "a split of authority among the circuits" on which "the Fourth Circuit ha[d] not explicitly ruled," *Hill*, 341 F. Supp. 2d at 560, the Fourth Circuit since *has* ruled on this issue: describing *Bradford-Scott* as the "seminal case adopting the majority position," the Fourth Circuit unequivocally joined the majority of circuits that hold that, with the exception of frivolous appeals, "the filing of an appeal 'confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal,'" which necessarily includes discovery. *Levin*, 634 F.3d at 263-264. As the Fourth Circuit explained, "[t]he core subject of an arbitrability appeal is the challenged continuation of proceedings before the district court on the underlying claims …. Discovery is a vital part of the litigation process and permitting discovery constitutes permitting the continuation of the litigation over which the district court lacks jurisdiction … allowing discovery to proceed would cut against the efficiency and cost-saving purposes of arbitration." *Id.* at 264.

C. The stay granted by the Court of Appeals in this case is entirely appropriate.

Plaintiff suggests that the Court of Appeals erred in granting supersedeas due to "the appellants' actions or inactions in earlier stages of this litigation." (Pet. pp. 10-11). Plaintiff suggests that, because Defendants did not appeal Judge McCoy's Form 4 Order but, instead, began responding to his initial discovery requests, which he repeatedly asserted were "limited," Defendants have somehow waived their right to seek a writ of supersedeas. He cites no case law in support of his position because there is none. Furthermore, as noted above, Defendants did not

petition the Court of Appeals for a writ of supersedeas until Judge McCoy clarified that she intended to allow full-blown plenary discovery during the pendency of Defendants' appeal. Once that became clear, Defendants moved promptly for relief pursuant to Rule 241, SCACR.

Plaintiff also suggests, incorrectly, that Defendants have somehow waived their right to demand arbitration by "seeking further relief from the circuit court on various issues." (Pet. pp. 3, 11). First, the only relief Defendants have sought before the circuit court has been protection from Plaintiff's relentless and harassing discovery maneuvers. Second, contrary to Plaintiff's misrepresentation, Defendants did not simply wait for "a negative ruling on its motion to quash" Plaintiff's Third Party Subpoenas to seek supersedeas but, instead, Defendants moved for supersedeas relief promptly upon receiving clarification at the December 15, 2021 hearing that Judge McCoy intended her February 11, 2021 Form 4 Order to allow full-blown plenary discovery.

And, as set forth above, contrary to Plaintiff's false assertion, Defendants have never agreed that full-scale plenary discovery would be permitted in an arbitral forum. Rather, they, after being compelled to do so, produced some core discovery in response to Plaintiff's self-proclaimed limited initial discovery requests consistent with their specific objections to those requests. Defendants consistently have preserved their position that any additional discovery should be stayed pending the outcome of Appeal No. 2020-001095. *See* Defendants' Motion for Stay (Resp. Pet. Exh. II), and Memorandum in Support of their Motion for Stay. (Resp. Pet. Exh. JJ). Notably, Defendants have not served any discovery on Plaintiff,[3] which is consistent with their position that this entire dispute, including discovery, should be resolved in an arbitral forum.

[3] Plaintiff's assertion that Defendants "have all the information in this case," is both unsupported and incorrect. Plaintiff bears the burden of proving all seventeen of his purported causes of action, including, among many other issues, falsity, causation, and alleged damages. Defendants will seek appropriate discovery once the proper forum for this dispute has been determined.

Finally, Plaintiff's argument—entirely unsupported by any authority whatsoever—that the permitted scope of discovery in arbitration is "not vastly different" than what would be permitted in court defies logic and is inconsistent with well-settled case law from the Fourth Circuit and other courts (which Plaintiff fails entirely to address). *See*, *e.g.*, *Lummus*, 273 F.2d at 613 (a plaintiff's "right to discovery must be far more restricted" in an arbitral forum than it would be in federal district court); *Atlantic Textiles v. Avondale Inc. (In re Cotton Yarn Antitrust Litig.)*, 505 F.3d 274, 286 (4th Cir. 2007) (noting that "discovery generally is more limited in arbitration than in litigation"); *see also Bradford-Scott*, 128 F.3d at 506; *Levin*, 634 F.3d at 264.

Plaintiff's equally unsupported argument that allowing him to litigate this matter before the circuit court—presumably including taking depositions, issuing third-party subpoenas, and even conducting pre-trial hearings—while Appeal No. 2020-001095 is pending would "actually benefit the parties and the arbitrator," and narrow or streamline the resolution of this dispute is patently absurd. As the Seventh Circuit explained in *Bradford-Scott*, "[a]rbitration clauses reflect the parties' preference for non-judicial dispute resolution, which may be faster and cheaper. These benefits are eroded, and may be lost or even turned into net losses, if it is necessary to proceed in both judicial and arbitral forums, or to do this sequentially. The worst possible outcome would be to litigate the dispute, to have the court of appeals reverse and order the dispute arbitrated, to arbitrate the dispute, and finally to return to court to have the award enforced …. Combining the costs of litigation and arbitration is what lies in store if a district court continues with the case while an appeal under § 16(a) is pending. Cases of this kind are therefore poor candidates for exceptions to the principle that a notice of appeal divests the district court of power to proceed with the aspects of the case that have been transferred to the court of appeals." 128 F.3d at 506.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that this Court deny Plaintiff's Petition for certiorari review of the Court of Appeals' grant of supersedeas. Plaintiff has identified no exceptional circumstances that warrant this Court's review, nor any conflict between the Court of Appeals' Order and this Court's precedent or any novel question of law.

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April 22, 2022

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