THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No: 2011-CP-26-9457

Horry County, A body politic,..... .....Respondents.

v.

Aquasino Partners of South Carolina LLC, Suncruz Casino Cruises, LLC, Ventures South Carolina, LLC, Suncruz Casinos, LLC and Highland Park Real Estate Development Corporation,.....Defendants.

Of whom,

Aquasino Partners of South Carolina, LLC, Suncruz Casinos Cruises, LLC and Highland Park Real Estate Development Corporation .....Appellants.

APPELLANTS' INITIAL BRIEF

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C. Was the lower court's Order striking Appellants' Answer unduly harsh and disproportional to Appellants' alleged disobedience?

D. Did the lower court abuse its discretion in striking Appellants' Answer when Appellants were not warned that a failure to fully obey a court order could result in the striking of their Answer?

II. STATEMENT OF THE CASE:

A. Introduction:

This case is about an agreement between Horry County and Suncruz Casino Cruises, LLC dated May 5, 2010. Pursuant to the agreement, Suncruz Casino Cruises, LLC agreed to pay Horry County a surcharge of $7.00 per boarding passenger. Horry County claims that Suncruz Casino Cruises, LLC breached the agreement by failing to pay the surcharge monies for the months of August 2011 through June 2012. Suncruz Casino Cruises, LLC asserts that the agreement is void because it violates State Law.

Unfortunately, instead of the legal claims and defenses being addressed and determined, the Answer and Counterclaim of the Appellants was stricken due to alleged non-compliance with the Court's Order compelling discovery responses. However, the moving Appellants will show the striking of their pleading was not reasonable because Appellants did not willfully disobey the Court.

B. Procedural History:

On November 10, 2011, Horry County, hereinafter "the Respondent," filed its Summons and Complaint.[1] On January 20, 2012, Aquasino Partners of South Carolina LLC, Suncruz Casino Cruises, LLC, Ventures South Carolina, LLC, Suncruz Casinos, LLC and Highland Park Real Estate Development Corporation filed a Motion to Dismiss the Complaint.[2] On February 28, 2012, Respondent filed Motions for Temporary Injunction[3] and Appointment of a Receiver.[4] On May 30, 2012, Respondent filed a Motion to Compel discovery responses.[5] On July 30, 2012, an Order was filed denying the Motion to Dismiss and granting Respondent's Motions for Temporary Injunction, Appointment of Receiver, and to Compel Discovery.[6]

Thereafter, on August 9, 2012, Aquasino Partners of South Carolina LLC, Suncruz Casino Cruises, LLC, Ventures South Carolina, LLC, Suncruz Casinos, LLC and Highland Park Real Estate Development Corporation timely filed an Answer and Counterclaim.[7] On August 31, 2012, Respondent filed a Reply to Appellants' Counterclaim,[8] as well as, an Amended Summons and Complaint.[9] The Amended Summons provided thirty days to answer the amended complaint. On September 21, 2012, the undersigned filed a Notice of Appearance[10] and Answer to the Amended Complaint on behalf of Aquasino Partners of

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1 Complaint, R.p.
2 Motion to Dismiss, R.p.
3 Motion for Temporary Injunction, R.p.
4 Motion for Appointment of Receivor, R.p.
5 Motion to Compel, R.p.
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South Carolina, LLC, Suncruz Casino Cruises, LLC, and Highland Park Real Estate Development Corporation, hereinafter "the Appellants."[11] The Answer to the Amended Complaint also asserted counterclaims for Declaratory Judgment and refund of monies previously paid to Horry County pursuant to the Surcharge Agreement. On September 28, 2012, Respondent filed a Reply to Appellants' Counterclaims.[12]

On October 15, 2012, a hearing was held pursuant to Respondent's Motion and Order and Rule to Show Cause and Motion for Sanctions. On October 19, 2012, an Order of Default was filed holding Appellants in default for failure to timely file an Answer to the Amended Complaint.[13] On October 22, 2012, a Form 4 Order as to the October 15th hearing was filed in which the lower court determined Appellants willfully violated its July 30, 2012 Order.[14] The court ordered Appellants' responsive pleading stricken and Appellants held in default. A formal Order as to the October 15th hearing was filed on November 2, 2012.[15]

Appellants timely filed a Motion to Reconsider the Form 4 Order on October 22, 2012 and the formal Order on November 15, 2012.[16] On November 15, 2012, Appellants also timely filed a Motion to Set Aside Order of Default filed on October 19, 2012.[17]

By way of a Form 4 Order filed March 6, 2013, the lower court denied Appellants' Motion to Reconsider.[18] The motion was decided on briefs without oral arguments. In an Order filed April 3, 2013, the court held that there was good cause to set aside the Order of

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11 Answer to Amended Complaint and Counterclaims, R.p.
12 Second Reply, R.p.
13 Order of Default, R.p.
14 Form 4, October 22, 2012, R.p.
15 Order, November 2, 2012, R.p.
16 Motion to Reconsider, R.p.
17 Motion to Set Aside Order of Default, R.p.
18 Form 4, March 6, 2013, R.p.

Default filed October 19, 2012; however, the court determined Appellants remained in default pursuant to its Order filed November 2, 2012.[19]

III. STATEMENT OF FACTS:

A. Surcharge Agreement between SunCruz Casino Cruises, LLC and Horry County:

In 2005, the South Carolina Legislature passed the Gambling Cruise Act, S.C. Code Ann. § 3-11-400 through §3-11-500. S.C. Code Ann. § 3-11-400 (C)(2) provides that if a county does not prohibit a gambling vessel from operation, the county may assess a surcharge of up to ten percent of each ticket sold per cruise and a surcharge of up to five percent of the gross proceeds. "Gross proceeds" is defined as the total amount wagered or otherwise paid by a passenger or user of a gambling device.

On February 5, 2008, Horry County enacted Ordinance No.: 09-08 which established a surcharge for gambling vessels berthed in Horry County.[20] Pursuant to the Ordinance, Horry County would assess a surcharge derived from the gross proceeds of a vessel's gambling activities in an amount not to exceed and equal to $7.00 per boarding passenger.

On May 5, 2010, Horry County and SunCruz Casino Cruises, LLC entered into an agreement, the "Surcharge Agreement," whereby SunCruz Casino Cruises, LLC agreed to pay the $7.00 per passenger fee set forth in Horry County Ordinance No. 09-08.[21] The law firm of Thompson and Henry, P.A. represented SunCruz Casino Cruises, LLC in negotiating the surcharge agreement with Horry County. Thompson and Henry, P.A also represented

19 Order filed April 3, 2013, R.p.
20 Horry County Ordinance No.: 09-08, R.p.
21 Surcharge Agreement, R.p.

Horry County in the present case in the proceedings before the lower court. This apparent conflict of interest is the subject of a motion filed by Appellants which was rendered moot by the lower court's order striking the Appellants' pleading and holding Appellants in default.

In the present lawsuit, Horry County claims SunCruz Casino Cruises, LLC breached the Surcharge Agreement by failing to pay the $7.00 per passenger surcharge for the months of August 2011 through June 2012. SunCruz Casino Cruises, LLC asserts that the Surcharge Agreement is void because it violates State Law.

B. Hearing Held on July 23, 2012:

A hearing was held before the lower court on July 23, 2012. The primary purpose of the hearing was to address Appellants' Motion to Dismiss and Respondent's Motions for Injunction and Appointment of Receiver. The Respondent wanted a receiver appointed who would have the ability "to step in and have access to everything they have in order to collect the $7 per person surcharge going back to August 1st of 2011, whether he needs to go opening up one of those gambling machines, whether he needs to get their books, whatever he needs to do to start collecting the money that's owed."[22] During the hearing the court denied Appellants' Motion to Dismiss and granted Respondent's Motions for Injunction and Appointment of Receiver.[23]

The lower court also heard Respondent's Motion to Compel filed on May 30, 2012. The transcript of the hearing reveals that Appellants' prior counsel thought the motion was resolved because Respondent had already been to the Appellants' office to review and

22 Transcript of July 23, 2012 Hearing, R.p. page 40, line 25- page 41, line 5.

inspect Appellants' financial records.[24] Respondent admitted it was provided the opportunity to review the records but felt that it had been "spoon-fed" information; however, Respondent failed to mention specifics as to what information or documentation it believed had not been provided.[25] In response, Appellants' prior counsel informed the court that was the first time he heard Respondent was not satisfied.[26] Thereafter, Appellants offered several times to provide the Respondent with full access to all financial records.[27] Appellants' counsel agreed to provide discovery responses within thirty days with "the understanding that you all are welcome to come anytime you want to get any kind of finances."[28]

In the formal Order filed on July 30, 2012 following the hearing,[29] the lower court specifically provided:

> The Respondent and Appellants have further consented and agreed that during the pendency of this action, employees, agents and officials of the Respondent shall have full access to and the unlimited right to inspect all of the books and records pertaining to the business, assets and property of the Appellants, wherever located and however stored, whether manually, on a hard drive or by portable data storage (CD, DVD, or Flash Drives), as the Respondent deems necessary in this action. Provided, however that the information contained in these books and records shall be confidential and not for public dissemination, except to the extent necessary for any proceedings or actions the parties to this action deem necessary to prosecute or defend this action.

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23 Transcript of July 23, 2012 Hearing, R.p. page 42, lines 19-20.
24 Transcript of July 23, 2012 Hearing, R.p. page 17, lines 10-14.
25 Transcript of July 23, 2012 Hearing, R.p. page 13, lines 13-16; page 41, line 16 –page 42, line 9.
26 Transcript of July 23, 2012 Hearing, page 17, lines 10-14; page 41, line 16 –page 42, line 9.
27 Transcript of July 23, 2012 Hearing, page 11, lines 20-22; page 17, lines 14-17.
28 Transcript of July 23, 2012 Hearing page 23, lines 2-4.
29 Order, July 30, 2012 R.p.

Without any objection from Appellants , the lower court granted Respondent full access to Appellants' books and records. There was no limitation as to when and how often inspections could take place or what records could be reviewed. The only limitation was that the information obtained would remain confidential. Most litigants only dream of having such unlimited access to an opposing party's records. Surprisingly, even though it was granted this unusual "free reign" authority to review all of Appellants' books and records, Respondent failed to make any effort to do so.

C. Interim Reports of Escrow Agent:

Pursuant to the lower court's Order filed July 30, 2012,[30] Attorney Joseph F. Singleton was appointed to serve as an escrow agent. Appellants were required to designate a contact person with whom Mr. Singleton would communicate. Appellants were required to provide Mr. Singleton with any and all documentation he requested in order to determine surcharge fees due the Respondent.

According to the Initial Report of Escrow Agent filed on August 30, 2012,[31] Appellants were in compliance of the lower court's Order and no further action was mandated of the Escrow Agent at that time. Subsequently, on December 3, 2012, Mr. Singleton filed an Interim Report of Escrow Agent documenting payments made by Appellants to Respondent Horry County from July 23, 2012 through November 25, 2012 totaling $226,933.00.[32]

30 Order, July 20, 2012, R.p.
31 Initial Report of Escrow Agent, August 30, 2012, R.p.
32 Interim Report of Escrow Agent, December 3, 2012, R.p.

D. Respondent's Motion for Sanctions and Order and Rule to Show Cause:

On September 13, 2012, Respondent filed a Motion and Order and Rule to Show Cause.[33] On September 20, 2012, Respondent filed a Motion for Sanctions.[34] The Motions allege Appellants failed to comply with the lower court's Order filed July 30, 2012 and that Appellants failed to timely answer the Amended Complaint. As set forth above, Respondent's allegations were not accurate. At no time did Respondent ever attempt to inspect Appellants' books and records in accordance with the July 30, 2012 Order. Appellants' offers to have Respondent review their books and records were ignored. Furthermore, Appellants were not in default because Appellants were provided thirty days to respond to the Amended Pleading. Appellants filed an Answer to the Amended Complaint on September 21, 2012 – less than thirty days after the Amended Complaint was filed and served.

In support of their Motions, Respondent filed the Affidavit of one of its attorneys, Phillip C. Thompson on September 12, 2012.[35] In his affidavit, Mr. Thompson informed the court he granted Appellants' prior counsel, Mr. Todd Kincannon, an extension of time to answer discovery due to a personal emergency but that Mr. Kincannon failed to provide the promised responses. Attached to his affidavit was an email from Mr. Kincannon dated August 27, 2012 in which he claimed he marked that day as the due date for discovery. Mr. Kincannon further claimed "I was prepping it and my fiancé was just in a serious car accident. I am wondering if you can give me an extension until tomorrow." Mr. Kincannon's email, and subsequent failure to produce the discovery the following day as

33 Motion and Order and Rule to Show Cause, R.p.
34 Motion for Sanctions, R.p.

promised, shows that the failure to produce discovery responses was due to Mr. Kincannon's personal situation and not due to Appellants' lack of cooperation or intent to disobey the lower court.

In fact, the Appellants had no idea answers to discovery requests were due or that the lower court ordered responses be provided.[36] The Appellants did not find out about Respondent's discovery requests and that they were supposed to be providing information requested therein until **after** they retained the undersigned counsel. Once they became aware, Appellants answered the discovery requests as quickly and thoroughly as possible. On October 11, 2012, Appellants' discovery responses were hand-delivered to Mr. Thompson, four days before the scheduled rule to show cause hearing.

E. Appellants' Requests for Continuance:

On October 5, 2012, the undersigned requested that Respondent's Motion for Sanctions and Order and Rule to Show Cause not be scheduled the week of October 15, 2012.[37] The basis for the request was that the undersigned was out of the country and an Order of Protection previously filed on July 25, 2012 granted the undersigned protection from all court appearances. Additionally, Appellants were attempting to have the undersigned substituted as their attorney of record due to obvious concerns regarding their prior counsel's representation. Appellants filed a Motion requesting said relief on October

35 Phillip C. Thompson, R.p.
36 Affidavit of Spiro Naos, R.p.
36 Affidavit of Robert Weisberg. R.p.
37 Request for Continuance, October 5, 2012, R.p.

11, 2012.[38] On October 12, 2012, Appellants once again requested the lower court not go forward with the hearing scheduled for October 15, 2012.[39]

The lower court denied the requests for continuance.[40] The court referred to continued delays in bringing matters pending in the case to court as a result of prior counselors' assertion of legislative protection. As a result of prior counselors' assertion of legislative immunity, there was a six month delay in the scheduling of the hearing which eventually took place on July 23, 2012.

The record shows on April 11, 2012, a Form 4 Order was issued continuing Appellants' Motion to Dismiss on account of Attorney Thad Viers' participation in legislative session.[41] Mr. Viers resigned from the legislature on March 21, 2012 and his law license was later suspended by the Supreme Court. A Form 4 was also filed on May 29, 2012 continuing the motions.[42] On June 29, 2012, a Form 4 Order was filed continuing Appellants' Motion to Dismiss and Respondent's Motions for Temporary Injunction and Appointment of Receiver.[43] The Form 4 states Attorney Todd Rutherford gave Notice of Appearance as Appellants' attorney on June 27, 2012 and asserted legislative immunity. Accordingly, it appears that the initial hearing was pushed back from its originally scheduled hearing date of April 11, 2012 to July 23, 2012 – a period of approximately three months.

It is also important to note that while there had been a delay in having the lower court determine Appellants' Motion to Dismiss and Respondent's Motions for Temporary

38 Motion for Substitution, R.p.
39 Request for Continuance, October 12, 2012, R.p.
40 Court Denials of Requests for Continuation, R.p.
41 Form 4 Order, April 11, 2012, R.p.
42 Form 4 Order, May 29, 2012, R.p.
43 Form 4 Order, June 29, 2012, R.p.

Injunction and Appointment of Receiver, that delay did not truly affect the scheduling of a hearing to determine Respondent's Motion to Compel filed on May 30, 3012.

F. Hearing Held October 15, 2012:

1. Determination of Motion for Sanctions:

At the hearing on October 15, 2012, Respondent was represented by Phillip C. Thompson, Arrigo P. Carotti, and Sanford Cox Graves. Mr. Todd Kincannon appeared on behalf of Appellants . During the hearing, Attorney Thompson acknowledged Appellants provided discovery responses on October 11, 2012, but that he had not reviewed all that was provided. According to his "cursory review," he did not believe Appellants fully answered or responded; however, he provided no specifics as to Appellants' alleged shortcomings.[44] A few minutes later, Mr. Thompson further explained to the court that because he was dealing with another matter, he had not had a chance to look through the discovery responses. Mr. Thompson added "they are extremely thick."[45]

Mr. Kincannon informed the court that he had not previously provided written discovery responses as ordered as a result of conversations he had with Mr. Thompson. Mr. Kincannon informed the Court he believed the discovery process would move forward by Respondent having the opportunity to come review documents and records at Appellants ' business location. Mr. Kincannon stated Mr. Thompson had consented to outstanding

44 Transcript of October 15, 2012 Hearing, page 3, lines 14-22.
45 Transcript of October 15, 2012 Hearing, page 11, line 22 – page 12, line 7.

discovery issues being resolved by Appellants providing Respondent with full access to Appellants' records. However, Respondent never attempted to review the records.[46]

When the lower court asked Mr. Kincannon about responding to interrogatories asking for identity of witnesses and things like that, Mr. Kincannon informed the court that responses to interrogatories had been provided and that Appellants never intended not to provide discovery responses. Respondent "had every opportunity to come and get whatever they wanted from day one, from the entry of the Order, and so I think the standard on a Rule to Show Cause and Motion for Sanctions is, there was a willful intent to violate the Court's Order, and there certainly was not. [47]

> "My client's position in the case has been, they're an open book, anybody – they can come, Horry County can come and look and get whatever they want...The reason why this was handled the way it was, because we genuinely believe that Horry County could come and get whatever they wanted whenever they wanted, and they simply haven't."[48]

Mr. Kincannon further pointed out to the lower court that the issues involved in the case were matters of law, not disputes over facts. "[W]e think that this issue is a matter of law, and if the Court finds against us on a matter of law we lose, and if the Court finds for us on a matter of law we win, so – but beyond all that, Judge, there's no prejudice here..."[49] Horry County did not avail itself of the opportunity to come review Appellants' records. "We were so cooperative in discovery that we put a term in the Order that we wanted in the Order, along with their agreement, that they could come get whatever they wanted whenever

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46 Transcript of October 15, 2012 Hearing, page 6, line 7–page 7, line 1.
47 Transcript of October 15, 2012 Hearing, page 8, lines 8-15.
48 Transcript of October 15, 2012 Hearing, page 9, lines 5-15.
49 Transcript of October 15, 2012 Hearing, page eight, lines 19-23.

they wanted. I think it's hard to say there's willful violation of anything when you are that open-book about something."[50]

Without any showing from the Respondent that it had been prejudiced or that Appellants intentionally disobeyed the court's Order, the lower court determined Appellants were in contempt. The lower court held, "[t]hey failed to respond as required, so I find them in willful violation of that Order."[51] The lower court instructed Mr. Thompson to "prepare an order that basically finds the Appellants in willful violation of the Court's Order, strikes their Answer and Counterclaim, holds them in default...that you are entitled to judgment against the Appellants for the attorneys' fees and cost incurred..." [52]

2. Determination of Motion for Default:

During the hearing, Mr. Thompson incorrectly informed the court that Appellants had not timely filed a responsive pleading to the Amended Complaint. In response, Mr. Kincannon provided a detailed explanation as to why Appellants were not in default:

> In response to our Answer and Counterclaim Mr. Thompson filed three documents. He filed an Amended Summons, which stated that we had thirty days to respond before we would be held in default. He filed Amended Complaint, and he filed a Reply. He didn't just file an Amended Complaint then the time would have been fifteen days. He also filed an Amended Summons saying that they would not move to hold us in default for thirty days. So when that - - when he sent that Summons that said thirty days, rather than fifteen ...if he takes the position no that there were only fifteen days to respond then his Summons is erroneous, and the Summons stating thirty days is why it was calendared for thirty days.
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> But beyond that, Your Honor, I'll tell you this too. He filed a Reply in addition to an Amended Complaint. There's no reason to file a Reply if you file an Amended Complaint. If you file an Amended Complaint then the

50 Transcript of October 15, 2012 Hearing, page 10, lines 9-14.
51 Transcript of October 15, 2012 Hearing, page 21, lines 8-17.
52 Transcript of October 15, 2012 Hearing, page 22, line 24 – page twenty-three, line 5.

other party files a new answer and counterclaim, and then you file a new reply. Because he filed a Reply in addition to an Amended Complaint Rule 15 actually has two different sections that apply to it. Under Rule 15(A) there are thirty days to file an amended an amended answer and counterclaim when a reply is filed. Under Rule 15 (A) also there are fifteen days to reply to an amended complaint, but the summons that he filed along with the amended complaint stated that there were thirty days to respond to the amended complaint. Transcript page 14, line 5- page 15, line 7.

Mr. Thompson did not deny that the Amended Summons gave Appellants thirty days to file an Answer. Additionally, Mr. Thompson failed to inform the court that an Answer to the Amended Complaint had already been filed and served as of September 21, 2012 – less than thirty days after the filing and serving of the Amended Summons and Complaint. The hearing transcript shows the lower court did not explicitly rule on whether Appellants timely answered the Amended Complaint. However, the court did make clear it considered the Appellants in default as a result of the finding of contempt. When Mr. Kincannon asked what's left in the case, the court responded, "[p]robably not a whole lot, since I strike the Answer and hold the Appellants in default."[53]

G. Orders as to the Hearing Held October 15, 2012:

On October 22, 2012, a Form 4 Order was filed.[54] The Order held Appellants willfully violated the lower court's prior Order requiring them to comply with discovery requests, and as such, Appellant's responsive pleadings were stricken and the Appellants were held in default. The lower court further ordered Appellants to compensate Respondent for attorney fees and costs incurred from August 29, 2012 until October 15, 2012 associated

53 Transcript of October 15, 2012 Hearing, R.p. 21, lines 22-15.

with prosecuting the Rule to Show Cause. The Order further instructed the clerk that a default hearing on damages needed to be scheduled.

On November 2, 2012, a formal Order dated October 31, 2012, was filed.[55] The Order stated the lower court considered the significant delays in the case and that Appellants failed to provide the court with any facts or circumstances that would justify the failure to provide discovery as ordered, especially in light of Appellants' counsel's email of August 27, 2012. The Order went on to state:

> I have also weighed the nature of the discovery requests, the discovery posture of the case, being that no discovery whatsoever has been conducted since the case was filed in November 2011, the willfulness of the failure to provide the discovery responses and the prejudice to the Plaintiff in not receiving discovery responses eleven (11) months after the initial discovery requests were made. Although Plaintiff's counsel represented that Mark Neill, a new attorney for the Defendants who recently filed a Notice of Appearance, provided Plaintiff's counsel with responses to the discovery requests, Plaintiff's counsel further represented to the Court that they were not provided until October 11, 2012 and were not complete. This exemplifies the delays and last minute filings that these Defendants have engaged in throughout this case and will result in further delays for the Plaintiff to obtain complete answers to discovery responses.

The Order made no mention of the fact that the lower court's prior Order filed July 30, 2012 gave Respondent and the Court appointed receiver, full access to all of Appellants' records. Respondent had ample opportunity to conduct discovery by reviewing all the records it wanted to, but failed to do so.[56]

Additionally, how could Respondent's counsel represent the responses received *prior* to the hearing were not complete when he had not even reviewed the written discovery responses or the documents produced or made available for inspection? During the hearing,

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54 Form 4, October 22, 2012, R.p.
55 Order, October 31, 2012, R.p.

Respondent's attorney actually informed the court that because he was dealing with another matter, he had not had a chance to look through the discovery responses, and added "they are extremely thick."[57]

The Order also failed to consider the fact that Appellants were in full compliance with the lower court's Order appointing Mr. Singleton as a receiver. Mr. Singleton filed interim reports showing Appellants were cooperative and responsive to his requests. Mr. Singleton's reports also documented that Appellants were in compliance with the lower court's Order requiring them to pay the disputed surcharge monies directly to Horry County.

The lower court's Order also failed to address Appellants' Motion for Substitution of Counsel and the Affidavits of Mr. Naos and Mr. Weisberg filed October 11, 2012. In his affidavit,[58] Mr. Weisberg informed the lower court of the following relevant facts:

- I am currently one of two managing partners of Defendants Aqasino Partners of South Carolina, LLC, Highland Park Real Estate Development Corporation, and Suncruz Casino Cruises, LLC. The other managing partner is Spiro Naos.

- Without disclosing conversations and waiving the attorney-client privilege, as a result of conversations with counsel, the week of September 17, 2012, we went to the Horry County Clerk of Court's office to find out what was going on in the lawsuit and to obtain a copy of any filed documents.

- In reviewing these documents, we learned for the first time of the contents of the Order filed on July 30, 2012.

- We had not been informed that the County filed a motion to compel against the companies and that we were ordered to provide requested information and documentation. The Motion to Compel referenced discovery requests that had never been provided to us by our Counsel.

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56 Order, July 30, 2012, R.p.
57 Transcript of October 15, 2012 Hearing, page 11, line 22 – page 12, line 7.
58 Affidiavit of Robert Weisberg, R.p.

- On September 21, 2012, our new counsel, Attorney Mark D. Neill filed a notice of appearance on behalf of Aqasino Partners of South Carolina, LLC, Highland Park Real Estate Development Corporation and Suncruz Casino Cruises, LLC. He also filed an Answer and Counterclaim to the Amended Complaint.

- Only after Mr. Neill became involved did we receive a copy of the discovery requests. Since receiving the requests, we have diligently tried to answer the requests as best as we can and as quickly as possible.

- I want this Court to know that we would not knowingly act in a way that was in contempt of any Court Order. We are very concerned that mistakes made by prior counsel will result in the companies being held in contempt. We respectfully request the Court allow our new Counsel to take over for us in the lawsuit.

In his affidavit,[59] Mr. Naos confirmed Mr. Weisberg' statements and added:

- In the correspondence attached as Exhibit "A," Mr. Thompson attached an affidavit in which he stated he "notified J. Todd Kincannon and J. Todd Rutherford, Attorneys for Defendants that they had missed the Court Ordered deadline of August 22, 2012 and the extended deadline of August 28, 2012. It also demanded answers by September 7, 2012."

- Again, I was not aware that we were under a deadline and Court Order to produce information and documentation. I am extremely frustrated, angered, and frankly scared that the companies are now in jeopardy of being held in default or in contempt of the Court's order.

- We would not knowingly act in a way that was in contempt of any Court Order and would respectfully request the Court allow our new Counsel to provide the requested responses and that we be allowed to file our Answer to the Amended Complaint.

The lower court's Order made no findings of fact showing Appellants acted in a willful manner or in disregard of the court or the rights of the Respondent. The lower court's Order only referenced Mr. Kincannon's email claiming *he* needed an extension because of a personal matter and the delays caused by Mr. Viers' and Mr. Rutherford's assertion of

legislative immunity. Those delays were not related to Appellants' responses to discovery requests. There are no facts in the record showing any delays were caused by Appellants' refusal to provide information or documentation.

Furthermore, the lower court's Order made no findings as to how the Respondent was prejudiced by the delay in receiving discovery responses. How could Respondent be prejudiced when it was Respondent who made the decision not to exercise its court ordered authority to review Appellants' books and records? Additionally, the Respondent only recently filed its Amended Complaint on August 31, 2012; the record shows the Respondent received written discovery responses prior to the contempt hearing; no deposition had been taken or noticed; the case was not on any trial roster; and the primary dispute in the case concerns a question of law, not a determination of disputed facts.

IV. LEGAL ARGUMENT:

A. Standard of Review:

While Rule 37 (b), SCRCP, allows the Court to impose sanctions or order costs against a party or attorney who's conduct necessitated the motion, there must be a showing of intentional disobedience on the part of the sanctioned party. The rule "empowers the Court to impose a wide variety of sanctions. However, the sanction imposed should be reasonable, and the Court should not go beyond the necessities of the situation to foreclose on the merits of a case." Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct.App.1990).

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59 Affidavit of Spiro Naos, R.p.

"In deciding what sanction to impose for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice." Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App.1997). A sanction which results in a default or dismissal is harsh punishment which should be imposed only if there is some showing of wilful disobedience or gross indifference to the rights of the adverse party. *See generally* Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).

The imposition of sanctions is generally entrusted to the sound discretion of the trial court. Halverson v. Yawn, 328 S.C. 618, 620-21, 493 S.E.2d 883, 884 (Ct.App.1997); Downey v. Dixon, 294 S.C. 42, 46, 362 S.E.2d 317, 318 (Ct.App.1987). The circuit court's decision regarding the imposition of discovery sanctions will not be reversed absent an abuse of discretion. Samples. A failure to weigh the required factors demonstrates a failure to exercise discretion and amounts to an abuse of discretion. Id.

In CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 716 S.E.2d 877 (2011), the Supreme Court held an abuse of discretion may be found if the trial court's conclusions regarding an award of sanctions lack reasonable factual support. Ex Parte Bon Secourts-St. Francis Xavier Hosp., Inc., 393 S.C. 590, 713 S.E.2d 624 (2011). An abuse of discretion may also be found where the sanction is not proportional to the party's disobedience. Karppi v. Greenville Terrazzo Co., Inc. and Ogden Teck, Inc., 327 S.C. 538, 489 S.E.2d 679 (Ct.App.1997).

B. The lower court abused its discretion in striking Appellants' Answer because there was no showing that Appellants willfully disobeyed the court's order.

In his separately concurring opinion in Karppi v. Greenville Terrazzo Co., Inc. and Ogden Teck, Inc., 327 S.C. 538, 489 S.E.2d 679 (Ct.App.1997), Judge Anderson cited 23 Am.Jur.2d Deposition and Discovery §390 and §391 (1983) for the following:

> The sanction of striking pleadings should not be lightly used, since it can amount to judgment against the delinquent party without an opportunity to be heard on the merits. A default judgment is clearly a drastic remedy and should be resorted to only in extreme situations, as where it is determined that counsel or a party has acted willfully or in bad faith in failing to comply with rules of discovery or with court orders enforcing the rules or in flagrant disregard of those rules or orders or persists in an outright refusal to comply with discovery obligations, or where there is a series of episodes of nonfeasance on the part of counsel amounting to a near total dereliction of professional responsibility and going well beyond ordinary negligence.

In Barnette v. Adams Brothers Logging, Inc., 355 S.C. 588, 586 S.E.2d 572 (2003), the Supreme Court upheld the trial court's dismissal of Barnette's complaint given her "persistent refusal to comply with the trial court's orders." The record showed three separate hearings were held in which the trial court ordered Barnette to produce records. During the third hearing on the matter, the trial court warned that Barnette's failure to comply with its orders could result in the imposition of sanctions which may result in dismissing the action. Because Barnette failed to obey the trial court's orders, even after being warned, her complaint was dismissed. The trial court had no other choice given the fact that Barnette was intentionally trying to conceal evidence.

In McNair v. Fairfield County, 379 S.C. 462, 665 S.E.2d 830 (Ct.App.2008), the Court of Appeals upheld the trial court's decision to strike Fairfield County's pleading. The record showed the County completely ignored and failed to comply with the court's order

even after numerous hearings on the matter were held. The court warned the County that it was inclined to strike the County's Answer but would instead give the parties forty-five days to reach an agreement and to submit proposed scheduling orders. When the County once again ignored the court and failed to submit a proposed scheduling order, the trial court issued an order striking the County's Answer.

In the present case, there is no showing of bad faith, willful disobedience or gross indifference on the part of the Appellants. The record shows Appellants consented to Respondent having full access to their books and records. Appellants made no attempt to prevent the Respondent from reviewing its books and records. It was the Respondent that failed to make any efforts to do so.

The record also shows Appellants were obedient to the Orders of the lower court. For example, after the July 23, 2012 hearing, the Appellants immediately began making payment of the disputed surcharge monies to the Respondent - from July 23, 2012 through November 25, 2012 those monies totaled $226,933.00. Furthermore, the record shows Appellants fully cooperated with the court appointed receiver. The facts of this case simply do not support the finding that Appellants willfully disobeyed the court.

C. The lower court abused its discretion in striking Appellants' Answer because there was no showing that Appellants acted with gross indifference to the Respondent.

In QZO, Inc. v. Moyer, 358 S.C. 246, 594 S.E.2d 541 (Ct.App.2004), the Court determined the trial court did not abuse its discretion in striking Moyer's Answer because the facts showed Moyer intentionally and willfully violated the trial court's discovery order. The trial court ordered Moyer to produce a computer in which evidence was thought to be

stored. Before turning over the computer, Moyer caused the hard-drive of the computer to be re-formatted which effectively erased any information contained therein. The Court determined Moyer's actions in willfully destroying evidence clearly showed gross indifference to QZO's rights.

In Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997), Mitchell failed to disclose the existence of a videotape in a personal injury case which the Court determined was relevant to the issue of damages. Mitchell had the videotape for over two years before disclosing its existence just days before trial. The Court discussed:

> The entire thrust of the discovery rules involves full and fair disclosure, "to prevent a trial from becoming a guessing game or one of surprise for either party." State Highway Dep't v. Booker, 260 S.C. 245, 252, 195 S.E.2d 615, 619 (1973) (*quoting* Hodge v. Myers, 255 S.C. 542, 545, 180 S.E.2d 203, 205 (1971)). Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed. Downey v. Dixon, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct.App.1987). Unless the party who has failed to submit to discovery can show lack of prejudice, reversal is required. Id. at 46, 362 S.E.2d at 319.

In the present case, the record shows Appellants invited Respondent to come review all their records. Furthermore, in the lower court's Order filed on July 30, 2012,[60] the court set forth Appellants' consent and specifically provided:

> The Plaintiff and Defendants have further consented and agreed that during the pendency of this action, employees, agents and officials of the Plaintiff shall have full access to and the unlimited right to inspect all of the books and records pertaining to the business, assets and property of the Defendants, wherever located and however stored, whether manually, on a hard drive or by portable data storage (CD, DVD, or Flash Drives), as the Plaintiff deems necessary in this action. Provided, however that the information contained in these books and records shall be confidential and not for public dissemination, except to the extent necessary for any proceedings or actions the parties to this action deem necessary to prosecute or defend this action.

60 Order, July 30, 2012 R.p.

The record in this case shows no attempt was made by the Respondent to access Appellants' documentation or electronically stored information as provided in the July 30, 2012 Order. As such, there is no showing that Appellants made any attempt to hide discoverable materials from the Respondent or acted in gross indifference to the Respondent's rights.

Additionally, the affidavits of Robert Weisberg and Spiro Naos reveal Appellants were not aware that they were in violation of a court order. Once their new counsel, the undersigned, informed them of the order compelling discovery, Appellants worked quickly to provide discovery responses. Those responses were hand-delivered to Respondent's counsel prior to the contempt hearing. Appellants were extremely frustrated, scared, and angry to learn they were not in compliance with the lower court's order as a result of their prior counsel's actions.

Furthermore, this case was not on the trial roster. The record shows that the parties had just filed amended pleadings a few weeks prior to the lower court's order holding Appellants in contempt. No witness depositions had been taken or noticed. Unlike the situation in Samples v. Mitchell, there was no danger of Respondent being ambushed at trial. There was no showing that Appellants were trying to hide information or destroy evidence. Respondent was not prejudiced in any manner.

D. The lower court abused its discretion in striking Appellants' Answer because the sanction was unduly harsh and not proportional to Appellants' alleged disobedience.

In Karppi v. Greenville Terrazzo Co., Inc. and Ogden Teck, Inc., 327 S.C. 538, 489 S.E.2d 679 (Ct.App.1997), the Court determined the trial court abused its discretion in striking Ogden Teck's pleadings because the sanction was unduly harsh under the circumstances. The trial court struck Ogden Teck's pleading because it failed to respond to a discovery orders issued by way of a written order and a verbal order during a status conference. In reversing the trial court's order, the Court emphasized that it did not condone Ogden Teck's violation of the discovery orders, but, "[u]nder the circumstances...the harsh sanction imposed was not commensurate with Ogden Teck's disobedience, and any number of lesser, more narrowly tailored sanctions would have sufficed to protect Karppi's rights while adequately punishing the wrongdoing of Ogden Teck. Id. at 545, 683. The Court further provided in a footnote the following:

> While we agree that the trial court was well within its power to penalize Ogden Teck for what the court found to be willful disobedience, under these circumstances it seems from the record as though the attorney for Ogden Teck was at least as much to blame as the party itself, for its indiscretions. To penalize Ogden Teck so severely for apparently relying on the advice of its attorney, under these circumstances, is clearly unjust, and would not properly serve the purposes for sanctions. Cf. Dunn v. Dunn, 298 S.C. 499, 381 S.E.2d 734 (1989). Id. at 545, 683.

In a separately concurring opinion, Id. at 547, 684, Judge Anderson stated the trial judge's order holding Ogden Teck in default for failure to comply with a discovery order was an abuse of discretion. Judge Anderson cited the U.S. Supreme Court's holding in Societe

Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 78 S.Ct.1087, 2 L.E.2d 1255 (1958) for the holding "the sanction imposed should be reasonable, and the Court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case." Judge Anderson went on to state "the sanction should be a rifle-shot, not a shotgun blast. In the instant case, the sanction was a hydrogen bomb. The Appellants were denied the opportunity to present a defense."

Judge Anderson further cited Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36 (4th Cir.1995) in which the Court held "[w]hile the imposition of sanctions under Rule 37(b) lies within the trial court's discretion, it is not a discretion without bounds or limits. In the case of ordering default judgment, the 'range of discretion is more narrow' than when a court imposes less severe sanctions."

In the present case, striking the Appellants' pleadings was not proportional to their alleged disobedience. The record shows Appellants provided full access so the Respondent could review any records it wanted. The record also shows that prior to the contempt hearing, Appellants provided written discovery responses along with requested documentation. The record further shows Appellants complied with all other provisions of the lower court's July 30, 2012 Order.

E. The lower court abused its discretion because Appellants were not previously warned that a failure to fully obey its order would result in the striking of their Answer.

In determining whether or not a lesser sanction would be effective and more proportional to a party's disobedience, courts usually determine whether the sanctioned party was previously warned. *See* Barnette v. Adams Brothers Logging, Inc., 355 S.C. 588, 586

S.E.2d 572 (2003) and McNair v. Fairfield County, 379 S.C. 462, 665 S.E.2d 830 (Ct.App.2008) discussed above. Additionally, in Griffin Grading and Clearing, Inc., 334 S.C.193, 199, 511 S.E.2d 716, 719 (Ct.App. 1999), the Court considered the trial court's order striking the defendant's answer in which the trial court noted:

> Although striking the defendant's Answer is a harsh sanction, I find that no less drastic sanction would be effective in this case. Four prior Orders have been issued, without meaningful compliance by the defendant. A lesser sanction of the assessment of attorney's fees was imposed [in an earlier order], yet that did not result in meaningful compliance by the defendant. In [an earlier order], the defendant received a clear and explicit warning of the consequences if the defendant failed to comply with the Order of the Court, yet the defendant has done just that.

In Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36 (4th Cir.1995), the case discussed by Judge Anderson in Karppi, the Court provided:

> In particular, this court has emphasized the significance of warning a defendant about the possibility of default before entering such a harsh sanction. As we recently noted in a slightly different context, a party "is entitled to be made aware of th[e] drastic consequence[s] of failing to meet the court's conditions at the time the conditions are imposed, when he still has the opportunity to satisfy the conditions and avoid" the sanction. Choice Hotels Int'l v. Goodwin & Boone, 11 F.3d 469, 473 (4th Cir.1993). In Lolatchy v. Arthur Murray, Inc., 816 F.2d 951 (4th Cir.1987), reversing a default sanction as an abuse of discretion, a panel of this court considered the failure to warn a "salient fact" which distinguished that case from those in which default was appropriate. Id. at 954 n. 2. According to the Lolatchy court, if a warning had been given, "another case would be presented." Id. Because the court had issued only general scheduling orders in the case at bar, the lack of any advance notice is especially problematic.

More recently, in Prince v. Casual Furniture World of Myrtle Beach, 2013 WL 652736 (February 21, 2013), the United States Magistrate Judge Thomas E. Rogers, III stated a court must consider "(1) whether the non-complying party acted in bad faith, (2) the amount of prejudice that noncompliance caused the adversary, (3) the need for deterrence of

the particular sort of non-compliance, and (4) whether less drastic sanctions would have been effective." *citing* Belk v. Charlotte–Mecklenburg Bd. of Educ., 269 F.3d 305, 348 (4th Cir.2001). In denying the Appellants ' Motion to strike the complaint and order the case dismissed due to Plaintiff's failure to produce discovery responses, Judge Rogers held:

> At this juncture, dismissal is too harsh a sanction as Respondent has not previously been warned that a failure to participate in discovery or to obey court orders could result in dismissal. Therefore, Respondent is hereby directed to fully respond to Appellants' First Set of Interrogatories and First Set of Request for Production of Documents, both dated May 17, 2011, within fifteen (15) days of the date of this Order. Appellants may file a second motion for sanctions should Respondent fail to comply with this Order. Failure by Respondent to respond to Appellants' discovery requests may result in a recommendation that this case be dismissed pursuant to Rule 37, Fed.R.Civ.P.

A month later, in Prince v. Casual Furniture World of Myrtle Beach, 2013 WL 1901073 (April 16, 2013), Judge Rogers held dismissal of the action was appropriate at that time because: (1) Respondent acted in bad faith by failing to cooperate with her counsel prior to him being relieved; (2) Plaintiff's actions prevented Appellants from discovering relevant facts of the case and preparing a defense; (3) Less drastic sanctions would not be effective. "Respondent was specifically warned in the Court's most recent Order that her failure to serve responses to Appellants' discovery could result in a recommendation that the case be dismissed. Nevertheless, Respondent continues to ignore the orders of this Court as well as the Federal Rules of Civil Procedure." In Prince v. Casual Furniture World of Myrtle Beach, 2013 WL 1901015 (May 7, 2013), Judge R. Bryan Harwell approved Judge Rogers' recommendation and dismissed the plaintiff's complaint without prejudice.

V. CONCLUSION:

In the present case, while the record could support the determination that Appellants failed to timely produce discovery responses, that failure does not warrant the imposition of the harshest sanction available. The lower court's sanction was not reasonable in light of the following circumstances: (1) Appellants made all their books and records available to Respondent, (2) Appellants were not aware they were in violation of an order and there was no showing that they intended to cause prejudice to the Respondent, (3) Respondent was not prejudiced, (4) Appellants provided responses to discovery requests prior to the contempt hearing, (3) Appellants' prior counsel, not the Appellants, was the source of the disobedience, (4) Appellants cooperated and fully complied with all other provisions of the lower court's Order, and (5) the lower court did not warn Appellants of the possibility of having their Answer stricken and being held in default. Accordingly, the lower court's Order finding the Appellants in contempt and striking their pleading must be reversed.

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June 4, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No: 2011-CP-26-9457

Horry County, A body politic,..... .....Respondents.

v.

Aquasino Partners of South Carolina LLC, Suncruz Casino Cruises, LLC, Ventures South Carolina, LLC, Suncruz Casinos, LLC and Highland Park Real Estate Development Corporation,.....Defendants.

Of whom,

Aquasino Partners of South Carolina, LLC, Suncruz Casinos Cruises, LLC and Highland Park Real Estate Development Corporation .....Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Designation of Matter contains all material proposed to be included by any of the parties and not any other material which is irrelevant to the appeal and that it complies with Rule 210 of the South Carolina Appellate Court Rules.

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DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD OF APPEAL

Appellants propose the following be included in the Record of Appeal:

- Order Granting Motion for Relief from Entry of Default filed October 19, 2012 and filed with the Court on April 3, 2013.
- Form 4 (Order) filed March 6, 2013.
- Order filed November 2, 2012.
- Form 4 (Order) filed October 22, 2012.
- Order of Default filed October 19, 2012.
- Order filed July 30, 2012.

- Form 4 (Order) filed June 29, 2012.
- Form 4 (Order) filed May 29, 2012.
- Form 4 (Order) filed April 11, 2012.
- Summons and Complaint filed November 10, 2011.
- Defendants Answer and Counterclaim filed on August 9, 2012.
- Plaintiff's Reply to Counterclaim filed on August 31, 2012.
- Plaintiff's Amended Summons and Amended Complaint filed on August 31, 2012.
- Defendants Notice of Appearance filed September 21, 2012.
- Defendants Answer to Amended Complaint and Counterclaim filed September 21, 2012.
- Plaintiff's Answer to Defendants Counterclaims filed on September 28, 2012.
- Defendants Motion to Dismiss filed January 20, 2012.
- Plaintiff's Motion for Temporary Injunction filed February 28, 2012.
- Plaintiff's Motion for Appointment of Receiver filed February 28, 2012.
- Plaintiff's Motion to Compel filed May 30, 2012.
- Defendants Motion for Substitution of Counsel filed October 11, 2012.
- Plaintiff's Motion and Order and Rule to Show Cause filed on September 13, 2012.
- Plaintiff's Motion for Sanctions filed September 20, 2012.
- Defendants Motion to Reconsider filed on October 31, 2012 to Form 4.
- Defendants Motion to Reconsider filed November 15, 2012 on formal Order.
- Hearing Transcript of July 23, 2012.
- Hearing Transcript of October 15, 2012.

- Initial Report of Escrow Agent dated August 30, 2012.
- Affidavit of Philip Thompson filed September 12, 2012.
- Defendants Request for Continuance letter dated October 5, 2012.
- Defendants Request for Continuance letter dated October 12, 2012.
- Court denials of Requests for Continuances emails dated October 5, 2012 and email dated October 12, 2013.
- Affidavit of Spiro Naos filed October 12, 0212.
- Affidavit of Robert Weisberg filed October 12, 2012.
- Interim Report of Escrow Agent dated December 4, 2012.
- Surcharge Agreement dated May 5, 2010.
- Horry County Ordinance 009-08 enacted February 5, 2008.

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Dated: 6/4, 2013
Murrells Inlet, South Carolina.

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Of whom,

Aquasino Partners of South Carolina, LLC, Suncruz Casinos Cruises, LLC and Highland Park Real Estate Development Corporation .....Appellants.

PROOF OF SERVICE

I certify that I have served a copy of Appellants' Initial Brief and Designation of Matter to Be Included in The Record of Appeal, and Certificate of Counsel by depositing a copy of it in the United States Mail, postage prepaid, on June 5, 2013, addressed to counsel for Respondent, Philip C. Thompson, Thompson & Henry, 1300 Second Avenue, 3rd Floor, Conway, SC 29526, Arrigo P. Carrotti, 1301 Second Avenue, #2D45, Conway, SC 29526, Blake A. Hewitt, P.O. Box 7965, Columbia, SC 29202, counsel for Defendants/Respondents and J. Todd Kincannon, P.O. Box 7901, Columbia, SC 29202.

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