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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas
Scott F. Talley, Special Referee

Appellate Case No. 2025-001073
Civil Action No. 2022-CP-11-00021

Angelica Shelest, ... Respondent,

v.

Martin Maina Gitau and Mark One Freight & Logistics, LLC ..... Appellants.

MOTION TO CERTIFY AND TRANSFER CASE FROM THE COURT OF APPEALS

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, Appellants Martin Maina Gitau and Mark One Freight & Logistics, LLC (collectively, "Movants") move to certify this appeal. This Court has discretion to certify any case pending before the Court of Appeals and transfer the appeal for handling and review by this Court before it has been determined by the Court of Appeals. *See* Rule 204(b), SCACR. "Certification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance." *Id.*

This case involves an entry of default in an action involving an automobile accident, an order of reference by a clerk of court to a special referee, and ultimately a default judgment award by the Special Referee of over $5 million (over $4 million of which was for noneconomic damages). This matter involves both an issue(s) of significant public interest and a legal principle(s) of major importance: whether, in a default scenario, the *clerk of court* is empowered, *in the absence of the parties' agreement*, to without notice order a reference to and appointment

of a special referee to wield the full powers of a circuit judge going forward in the matter, to include addressing any Rule 55, 60, or damages issues. In a recent matter involving an over $30 million award in a default setting by a special referee, the Court of Appeals was confronted with the issue of whether a clerk of court is empowered in the absence of agreement by the parties to issue such an order of reference. In an unpublished decision, the Court of Appeals ruled that this Court's holding in *Roche v. Young Brothers, Inc., of Florence,* 332 S.C. 75, 504 S.E.2d 311 (1998) controlled the issues and compelled a ruling that the clerk of court is so empowered. *See Carwile v. Anderson*, No. 2023-001016, 2025 WL 1392465 (S.C. Ct. App. May 14, 2025)(certiorari pending). Respectfully, as is discussed below, *Roche* should not be so interpreted, and if it is so interpreted, it should be overruled. Further, there are South Carolina constitutional constraints applicable to this scenario, which are also set forth below briefly. In short, this Court is best positioned to address these issues and thus a transfer and certification of this matter from the Court of Appeals to this Court is hereby requested by Movants.[1]

GROUNDS FOR MOTION TO CERTIFY AND TRANSFER

This case was decided by a special referee whom the Clerk of Court for Cherokee County appointed with neither Movants' notice nor agreement. Movants' position is that South Carolina law forbids such an appointment, both because a special referee may only be appointed "upon

[1] Upon receipt of this Court's Transfer Order, Movants will promptly file their motion to stay the appeal and seek the order for a limited remand to allow Movants to move before the *circuit court* to set aside the clerk's order appointing the special referee and the default judgment in this matter ordered by the special referee, for the reasons set forth in that motion and its exhibits. That motion to stay and for limited remand, and its exhibits, is attached hereto as Exhibit 1. Originally, Movants made a motion in the circuit court regarding the default but did not raise these jurisdictional/clerk and court powers issues. The Special Referee denied their motion for relief and entered the default judgment. Movants appealed (which is this appeal), which they are seeking to transfer and certify to this Court. Rule 60(b), SCRCP requires that in order to file any further Rule 60 motion in an action on appeal, permission by the appellate court is required. Because the Special Referee's appointment and actions and orders are void, the stay motion and limited remand motion should be granted, and a subsequent Rule 60(b)(4) motion should be permitted. Any adverse rulings after remand would be appealed to this Court and consolidated with the stayed appeal as appropriate.

agreement of the parties," and because such appointment must be made by the "presiding circuit court judge." S.C. Code § 14-11-60.

Before 1988, South Carolina law did not require that the parties agree to a special referee's appointment. S.C. Code § 14-11-60 (1976). But that changed when § 14-11-60 was amended in 1988. *See* 1988 Act No. 678, Part II, § 6. In *Roche v. Young Brothers, Inc., of Florence*, this Court acknowledged that the post-1988 version of § 14-11-60 "seem[s] to require, without exception, the agreement of the parties prior to the appointment of a special referee." 332 S.C. 75, 81 (1998). But nevertheless, the *Roche* Court held that because the defendant was in default, an agreement was unnecessary, and it noted another statute (S.C. Code Ann. §14-11-85) which referenced "parties not in default" as support for its conclusion. The *Roche* Court thus upheld a circuit court's order referring that particular matter to a special referee, because the defendant was in default. *Id.* Of note is the fact that in 1999, merely months after the *Roche* case was decided, the General Assembly amended §14-11-85 and removed the words "parties not in default."

Roche is not on all fours with this matter, as here, a clerk of court, rather than a circuit court judge or the presiding circuit court judge, appointed the special referee. Further, as set forth, legislation the *Roche* Court viewed as supporting its conclusions has been amended. Regardless, if *Roche* is deemed to nevertheless control the appointment here, Movants seek to have *Roche* overruled.

BACKGROUND

Following a July 2020 vehicle accident, Plaintiff Angelica Shelest filed suit against Gitau, a truck driver, and "John Doe Trucking Company." Compl. 1. She later amended her complaint to substitute Mark One Freight and Logistics, LLC ("Mark One") for "John Doe Trucking Company." Am. Compl. 1. When neither Gitau nor Mark One answered the amended complaint,

the presiding circuit judge placed both defendants in default and ordered that a hearing be set to determine the amount of damages. Order of Default 1.

Shortly thereafter, the Clerk of Court for Cherokee County referred the case to Scott F. Talley, Esquire, "for all purposes including but not limited to taking testimony and determining the amount of damages on all causes of action contained in" Shelest's amended complaint. Order of Reference to Special Referee 1. After a hearing, Talley awarded Shelest $5,136,817.82 in actual damages for her "permanent injuries, including pain and suffering, mental anguish, medical care, and loss of enjoyment of life." Order of Judgment 8, 10. Of these damages, $46,270.54 were for "incurred medical expenses" and $743,407.28 were for "future medical expenses," *id.* at 8, meaning over $4 million were for Shelest's pain and suffering, mental anguish, and loss of enjoyment of life.

Afterwards, counsel for Gitau and Mark One moved to set aside the judgment under S.C. Rules 55(c) and 60(b), which motion the special referee denied. Order Denying Defs.' Motion to Set Aside Entry of Default and Default J. 11. Gitau and Mark One appealed, which is the instant appeal.

ARGUMENT

The Circuit Court Clerk appointed the special referee in a one-paragraph order with no mention of § 14-11-60, which by its text only authorizes "the presiding circuit court judge, upon agreement of the parties" to appoint a special referee. Instead, the Circuit Court Clerk relied on Rule 53, SCRCP exclusively.

In its entirety, § 14-11-60 states:

> In case of a vacancy in the office of master-in-equity or in case of the disqualification or disability of the master-in-equity from interest or any other reason **for which cause can be shown** the **presiding circuit judge, upon agreement of the parties**, may appoint a special referee in any case who as to the

> case has all the powers of a master-in-equity. **The special referee must be compensated by the parties involved in the action.**

(emphasis added). Importantly, the bold text above all stems from the 1988 amendment. Before then, the statute just said:

> In case of a vacancy in the office of master or in case of the disqualification or disability of the master from interest or any other reason the circuit court or a judge thereof may appoint a special referee in any case who shall as to such case be clothed with all the powers of a master.

S.C. Code § 14-11-60 (1976).

Thus, appointment of a special referee today is statutorily authorized upon a) a vacancy in the office of master-in-equity; b) the disqualification or disability of the master-in-equity; or c) any other reason "for which case can be shown." In that event, "the presiding circuit judge" has discretion to appoint a special referee "upon agreement of the parties." § 14-11-60.

Rule 53 of the South Carolina Rules of Civil Procedure, however, purports to permit "a circuit judge *or the clerk of court*"[2] to appoint a special referee "where the parties consent, *in a default case, or an action for foreclosure*." S.C. R. Civ. P. 53(b) (emphases added). All the emphasized language in the preceding sentence conflicts with § 14-11-60. *Roche* recognized this conflict, noting that § 14-11-60 "seem[s] to require, without exception, the agreement of the parties prior to the appointment of a special referee," and that "Rule 53(b), on the other hand, suggests that consent is not required in a default situation." 332 S.C. at 81. But *Roche* then resolved this textual tension by erroneously applying Rule 53(b) at § 14-11-60's expense. This was, respectfully, error.

The South Carolina Constitution empowers this Court to make rules "[s]ubject to the statutory law." S.C. Const. art. V, § 4. This Court's "rulemaking power in regard to practice and

[2] Clerks of court are not required to have legal training and are popularly elected.

procedure" is therefore "subordinate to the General Assembly," *Stokes v. Denmark Emergency Med. Servs.*, 315 S.C. 263, 266–67 (1993), and "any conflict between a statute and court rule must be resolved in favor of the statute," *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 570 (2010).

The outcome in *Roche* should have been resolved in § 14-11-60's favor. But the *Roche* Court instead tried to "reconcil[e]" the statute and rule. 332 S.C. at 81. This attempted reconciliation began with an assertion that "[t]his Court's primary function in interpreting a statute is to ascertain the intent of the legislature." *Id.* Noting that defaulting parties were treated differently *elsewhere* in the South Carolina code, the *Roche* Court decided it would be "anomalous to interpret [§ 14-11-60 and Rule 53(b)] as requiring the consent of a defaulting party whenever the circuit court chose to refer the case to a special referee." *Id.* at 82. However, as noted above, the statute cited by the *Roche* Court as an example of different treatment of defaulting parties was, shortly after *Roche* was decided, itself amended to delete the differentiating language.

Here, not only was the special referee appointed without the parties' agreement; he was appointed by the clerk of court and not the "presiding circuit court judge." The 1988 amendment's mandate that "the presiding circuit court judge" appoint the referee—replacing the previous authorization for "the circuit court or a judge thereof" to do so—was ignored.

Hence, even if it does apply here, *Roche* was, respectfully, wrongly decided. The General Assembly changed the law to substitute "the presiding circuit court judge" for "the circuit court or a judge thereof," and inserted "upon agreement of the parties" into S.C. Code § 14-11-60. "It is through consensus, in the democratic process, that the legislature forms its purpose; as such, … the best evidence of the legislature's intent is the language of the law itself." *Planned Parenthood S. Atl. v. State*, No. 2024-000997, 2025 WL 1387502, at *13 (S.C. May 14, 2025) (Hill, J., concurring). So "[w]here a statute's language is plain, unambiguous, and conveys a clear and

definite meaning, the rules of statutory interpretation are not needed, and the Court has no right to impose another meaning." *State v. Taylor*, 436 S.C. 28, 34 (2022).

Because "upon agreement of the parties" and "presiding circuit judge" in § 14-11-60 "conveys a clear and definite meaning," the statute's text applies as written and "the rules of statutory interpretation [including legislative intent] are not needed." *Id.* Hence, the clerk of court's order purporting to empower the special referee here should be deemed void. These multi-million special referee default judgments, handed down in cases where the parties do not agree to the appointment and the appointment is made only by the clerk of court, constitute matters of significant public interest and involve legal principles of major importance. Certification here also advances the efficient administration of justice, as only this Court is equipped to address the scope, application, or continued efficacy of the *Roche* decision, and to address with finality the tension between Rule 53, SCRCP and the South Carolina Code of laws[3].

CONCLUSION

Appellants Martin Maina Gitau and Mark One Freight & Logistics, LLC respectfully request that the Court grant this motion and transfer the case from the South Carolina Court of Appeals to this Court.

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[3] It should be noted that Rule 82, SCRCP, also provides "These rules shall not be construed to extend or limit the jurisdiction of any court of this state."

Attorneys for Appellants Martin Maina Gitau and Mark One Freight & Logistics, LLC

July 22, 2025

Exhibit 1

Motion for Limited Remand

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas
Scott F. Talley, Special Referee

Appellate Case No. 2025-001073
Civil Action No. 2022-CP-11-00021

Angelica Shelest, ... Respondent,

v.

Martin Maina Gitau and Mark One Freight & Logistics, LLC ..... Appellants.

MOTION FOR LIMITED REMAND

Pursuant to Rule 240 of the South Carolina Appellate Court Rules and Rule 60 of the South Carolina Rules of Civil Procedure, Appellants Martin Maina Gitau and Mark One Freight & Logistics, LLC (collectively, "Movants") hereby move this Court for leave to file a motion under Rule 60(b)(4), SCRCP (draft attached as Exhibit A), in the Cherokee County Court of Common Pleas for the purpose of arguing that the Special Referee's appointment is contrary to law and must be declared void, along with all orders and opinions arising therefrom.

BACKGROUND

Following a July 2020 vehicle accident, Plaintiff Angelica Shelest filed suit against Gitau, a truck driver, and "John Doe Trucking Company." Compl. 1. She later amended her complaint to substitute Mark One Freight & Logistics, LLC ("Mark One") for "John Doe Trucking Company." Am. Compl. 1. When neither Gitau nor Mark One answered the amended complaint,

the presiding circuit judge held both defendants in default and ordered that a hearing be set to determine the amount of damages. Order of Default 1.

Shortly thereafter, the Clerk of Court for Cherokee County referred the case to Scott F. Talley, Esquire, "for all purposes including but not limited to taking testimony and determining the amount of damages on all causes of action contained in" Shelest's Amended Complaint. Order of Reference to Special Referee 1. Neither Gitau nor Mark One was served with notice of the Special Referee's appointment.

After a hearing, the Special Referee awarded Shelest $5,136,817.82 in actual damages for her "permanent injuries, including pain and suffering, mental anguish, medical care, and loss of enjoyment of life." Order of Judgment 8, 10. Of these damages, $46,270.54 were for "incurred medical expenses" and $743,407.28 were for "future medical expenses." *Id.* at 8. The remaining damages—over $4 million—were for Shelest's pain and suffering, mental anguish, and loss of enjoyment of life.

Appellants first moved to set aside the judgment under S.C. Rules 55(c) and 60(b)(1), which the Special Referee denied. Order Denying Defs.' Motion to Set Aside Entry of Default and Default J. 11. Appellants now seek a limited remand in order to make a second motion under Rule 60(b)(4), but it should be made to the presiding circuit court, not to the Special Referee.

ARGUMENT

Appellants request this Court's leave to file a Rule 60(b)(4) motion in the Cherokee County Court of Common Pleas to challenge the Special Referee's authority to enter judgment in this case. *See* Rule 60, SCRCP ("During the pendency of an appeal, leave to make the [Rule 60] motion must be obtained from the appellate court."). Rule 60(b)(4) permits the court to relieve a party "from a final judgment, order, or proceeding if such judgment, order, or proceeding is void."

Sanders v. Smith, 431 S.C. 605, 616, 848 S.E.2d 604, 609 (Ct. App. 2020) (quoting Rule 60(b)(4), SCRCP). "The definition of void under the rule encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." *Id.* (quoting *Belle Hall Plantation Homeowner's Ass'n, Inc. v. Murray*, 419 S.C. 605, 617, 799 S.E.2d 310, 316 (Ct. App. 2017)). A motion under Rule 60(b)(4) "shall be made within a reasonable time." Rule 60, SCRCP.

Here, Appellants should be afforded the opportunity to challenge the Special Referee's appointment and judgment for at least three reasons, as detailed in the attached memorandum in support of the Rule 60(b)(4) motion. *First*, the Special Referee's appointment violated statutory law restricting special referees to cases in which the parties have agreed to the special referee's appointment. *See* S.C. Code § 14-11-60. *Second*, the Special Referee's appointment by the clerk of court violated statutory law by which "the presiding circuit court judge" is the only actor authorized to appoint a special referee. *Id. Third*, Appellants never received notice of, or an opportunity to challenge, the Special Referee's unlawful appointment, but are now nevertheless obligated to pay the Special Referee's fees. As a result, Appellants now face a judgment of over $5 million, including more than $4 million in noneconomic damages, entered by a special referee whose appointment occurred: a) without their knowledge; b) without their agreement; and c) upon the order of someone other than the "presiding circuit court judge." Because each of these circumstances runs contrary to controlling statutory authority and violates principles of due process, the Special Referee's appointment and his actions pursuant to the appoint are void.[1]

[1] As explained further in Appellants' attached Rule 60(b)(4) motion, to the extent that Rule 53 authorizes such appointments, the South Carolina Constitution requires that it yield to statutory authorities, which do not. To the extent the Supreme Court previously authorized similar appointments, in *Roche v. Young Bros. of Florence*, 332 S.C. 75, 504 S.E.2d 311 (1998), that case should be overruled.

The Special Referee entered judgment on February 26, 2024, roughly 17 months ago. The proposed Rule 60(b)(4) motion therefore falls squarely within the requirement that it be made "within a reasonable time." *See Sijon v. Green*, 289 S.C. 126, 128 n.2 (1986) ("Rule 60(b)(4) … requires that motions to set aside a judgment on the ground it is void must be brought within a reasonable time."). While Rule 60(b)(4)'s "reasonable time" requirement has teeth, *see Rish v. Rish*, 443 S.C. 220, 227 (2024) (delay of "almost seven years" was unreasonable), it is nevertheless a permissive standard, in contrast to the stricter requirement that motions brought under Rule 60(b)(1)–(3) "be made within a reasonable time not exceed one year after entry of the order," Rule 60, SCRCP.

This Court should grant leave to allow Appellants to raise these arguments before the Cherokee County Court of Common Pleas. Moreover, even if the proposed Rule 60(b)(4) motion is denied, the motion would still properly preserve for this Court's review the questions of how special referees are to be appointed in South Carolina and whether *Roche* should be overruled, which are issues "of significant public interest" involving legal principles of "major importance." Rule 204, SCACR.

CONCLUSION

Appellants respectfully request leave to file a Rule 60(b)(4) motion in the Cherokee County Court of Common Pleas and have the motion heard by the presiding circuit court judge. Appellants further request that this Court stay any briefing deadlines while the Rule 60(b)(4) motion is pending.

(Signature Page Follow)

Respectfully submitted,

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July __, 2025

Exhibit A

Defendants' Motion and Memorandum in Support of Their Motion for Relief from Judgment Pursuant to Rule 60(b)(4), SCRCP

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHEROKEE	)	SEVENTH JUDICIAL CIRCUIT
	)	
Angelica Shelest,	)	C.A. No.: 2022-CP-11-00021
	)	
Plaintiff,	)	
	)	
vs.	)	**DEFENDANTS' MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(4), SCRCP**
	)	
Martin Maina Gitau and Mark One Freight, & Logistics, LLC,	)	
	)	
Defendants.	)	
	)	

For the reasons set forth in the Defendants' Memorandum in Support of Their Motion for Relief from Judgment Pursuant to Rule 60(b)(4), SCRCP, the Defendants hereby move that the default judgment of the special referee in this matter be vacated, and that the appointment of the special referee be vacated, leaving the status of the case as having a default entry, and a motion to set aside such entry, to be heard and determined by the presiding circuit judge.

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July __, 2025

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHEROKEE	)	SEVENTH JUDICIAL CIRCUIT
	)	
Angelica Shelest,	)	C.A. No.: 2022-CP-11-00021
	)	
Plaintiff,	)	
	)	
vs.	)	**DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(4), SCRCP**
	)	
Martin Maina Gitau and Mark One Freight, & Logistics, LLC,	)	
	)	
Defendants.	)	
	)	

This matter is before the Circuit Court on the Defendants Martin Gitau and Mark One Freight & Logistics, LLC's ("Defendants") Motion for Relief from Judgment, pursuant to Rule 60(b)(4) of the South Carolina Rules of Civil Procedure. For the reasons identified below, the Court should grant Defendants relief from the Order of Reference to the Special Referee, vacate the Special Referee's orders and opinions, and consider as a matter of first impression Defendants' motion to set aside entry of default.

PROCEDURAL BACKGROUND

On July 24, 2020, Defendant Martin Gitau was driving a tractor-trailer when he collided with a car driven by Plaintiff Angelica Shelest in Cherokee County, South Carolina. On January 11, 2022, Plaintiff filed a Complaint in the Court of Common Pleas for the Seventh Judicial Circuit against Defendant Gitau. Gitau does not contest that he was properly served a copy of the Summons and Complaint.

On May 26, 2022, Plaintiff amended her Complaint to name Defendant Mark One Freight & Logistics, LLC ("Mark One"). Gitau is the registered agent of Mark One. On November 8, 2022, Gitau and Mark One were served with the Amended Summons and Complaint. Upon

receiving service, Gitau contacted Rift Valley Carriers, LLC ("Rift Valley") – a commercial carrier for whom Gitau often worked – and notified the company of the lawsuit. Mistakenly believing his legal duties to have been discharged, Gitau did not make an appearance or file a responsive pleading on his or Mark One's behalf.

On May 16, 2023, the Circuit Court Judge entered an order of default against Gitau and Mark One. On June 26, 2023, the Cherokee County Clerk of Court signed an Order of Reference to Special Referee Scott Talley, "pursuant to Rule 53, SCRCP, for all purposes including but not limited to taking testimony and determining the amount of damages on all causes of action" alleged in Plaintiff's Complaint against Defendants. Upon information and belief, Defendants were not provided prior notice of the Order of Reference.

The Special Referee scheduled a damages hearing for October 3, 2023, of which Gitau and Mark One were properly notified. Again believing that he had no legal obligation to attend, Gitau did not contact counsel or otherwise make an appearance at the damages hearing. The Special Referee heard testimony and received evidence from Plaintiff at the hearing, and on February 26, 2024, entered a judgment against Defendants in the amount of $5,136,817.82 in actual damages.

On October 29, 2024, Mark One's insurer – Wesco Insurance Company – received a copy of the Order of Judgment from Plaintiff's counsel and learned for the first time of the accident, lawsuit, and entry of default. Wesco retained counsel and on December 19, 2024, Defendants filed a motion to set aside the entry of default and default judgment under Rules 55 and 60, SCRCP. In their motion, Defendants argued that Gitau, a professional truck driver and Kenyan immigrant, failed to respond due to his mistaken but honest belief that his notice to Rift Valley fully satisfied his legal obligations. Defendants also argued that they had meritorious defenses to Plaintiff's allegations, including but not limited to contesting her damages, and that Rift Valley, not Mark

One, was the proper party defendant. On April 1, 2025, the Special Referee held a hearing on Defendants' motion, at which Defendants appeared. The Special Master heard arguments from both parties and denied the motion by written order on April 30, 2025. Defendants filed a timely notice of appeal to the Court of Appeals.[1]

Not long after filing the notice, Wesco engaged new counsel. Defendants filed a motion with the South Carolina Supreme Court to certify and transfer the case from the Court of Appeals. Along with their motion to certify and transfer, Defendants also sought leave to file the instant motion, which was granted by the Supreme Court.

STANDARD OF REVIEW

Relief under Rule 60(b) lies within the sound discretion of the trial judge. *Paul Davis Sys. v. Deepwater of Hilton Head, LLC*, 362 S.C. 220, 225, 607 S.E.2d 358, 360 (Ct. App. 2004). "An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997). "The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief." *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991).

ARGUMENT

Rule 60(b)(4) permits the court to relieve a party "from a final judgment, order, or proceeding if such judgment, order, or proceeding is void." *Sanders v. Smith*, 431 S.C. 605, 616,

[1] If the Circuit Court grants this motion, and thereby vacates the Order of Referral and declares all rulings of the Special Referee void, Defendants seek leave to file a new motion to set aside the Order of default entered by the Circuit Court, to be heard and decided by the Circuit Court.

848 S.E.2d 604, 609 (Ct. App. 2020) (quoting Rule 60(b)(4), SCRCP). "The definition of void under the rule encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." *Id.* (quoting *Belle Hall Plantation Homeowner's Ass'n, Inc. v. Murray*, 419 S.C. 605, 617, 799 S.E.2d 310, 316 (Ct. App. 2017)).

The Clerk of Court's Order of Reference to the Special Referee in this case is incurably deficient in three critical respects: it was not issued by a Circuit Judge, it was not agreed to by the parties, and it was issued without prior notice to the Defendants. Any one of these deficiencies is sufficient for the Court to find that the Order of Reference, the Special Referee's appointment, and all orders and findings issued by the Special Referee are void. As explained further below, judicial authority and consent of the parties are unambiguous statutory predicates to special referee appointment, and a referee appointed without one or both lacks valid legal authority to preside over the case. In addition, fundamental principles of due process require that parties be given notice and an opportunity to be heard before being forced to pay a private attorney to perform a public function.

I. The Order of Reference Was Issued Without Circuit Judge Authority and Agreement of All Parties, in Violation of Controlling Statutory Law.

The appointment of Special Referees in South Carolina is guided by three sources of authority: (1) S.C. Code Ann. § 14-11-60 ("Appointment of special referee"); (2) S.C. Code Ann. § 15-31-150 ("Appointment of special referees; compensation; authority"); and (3) South Carolina Rule of Civil Procedure 53 ("Masters and Special Referees").

Before turning to the text of these provisions, it is important to address the principles of law that explain how these provisions relate to one another, and how they should be reconciled when in conflict, because while all three provisions control the appointment of Special Referees,

they do not carry the same weight. More to the point, Rule 53 – like all rules promulgated by the Court – is subordinate to statutory law. This hierarchy is codified in Section 4, Article V of the South Carolina Constitution, which provides that, "*[s]ubject to the statutory law*, the Supreme Court shall make rules governing the practice and procedure in all . . . courts." S.C. Const., art. V, § 4 (emphasis added). The Supreme Court has long held that the clause "subject to the statutory law" establishes "the intent to subordinate" the Court's rulemaking power to the General Assembly's legislative authority. *Stokes v. Denmark Emergency Med. Servs.*, 315 S.C. 263, 266–67, 433 S.E.2d 850, 852 (1993).

When faced with statutes and Court-written rules that appear to be in conflict, the Court (as in any case dealing with overlapping legal authorities) should make every effort to reconcile apparent discrepancies and, if possible, bring them into harmony. *See, e.g., Ex parte Chase*, 62 S.C. 353, 362–63, 38 S.E. 718, 724 (1901) (establishing the general rule that where two portions of a statute appear to be in conflict, every effort should be made to reconcile these apparently conflicting provisions and bring them into harmony). But in cases where the discrepancies are irreconcilable, the general rule is that "any conflict between a statute and a court rule must be resolved in favor of the statute." *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 570–72, 703 S.E.2d 197, 201 (2010). And under no circumstances should the language of a rule be construed to overrule, invalidate, or render superfluous any provision of statutory law. *See Smith v. Tiffany*, 419 S.C. 548, 560, 799 S.E.2d 479, 486 (2017) ("[W]e reject the implication that a rule of civil procedure somehow trumps the Act.").

A. The Plain Language of the Relevant Statutes Unambiguously Requires that an Order of Reference to a Special Referee Must Issue from the Circuit Judge With Agreement of All Parties.

With these principles in mind, the starting point for any statutory analysis must begin with the text. *See Smith*, 419 S.C. at 555 ("It is axiomatic that statutory interpretation begins (and often ends) with the text of the statute in question."). If the text is unambiguous, "there is nothing for a court to construe" and "a court should not look beyond the statutory text to discern its meaning." *Id* at 556. Indeed, a court need not employ the canon of statutory interpretation and "has no right to look for or impose another meaning" if the language of the statute is clear and explicit. *Id.* (quoting *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995)).

The principal statute controlling the appointment of special referees is S.C. Code Ann. § 14-11-60. That section provides:

> In case of a vacancy in the office of master-in-equity or in case of the disqualification or disability of the master-in-equity from interest or any other reason for which cause can be shown the presiding circuit court judge, upon agreement of the parties, may appoint a special referee in any case who as to the case has all the powers of a master-in-equity. The special referee must be compensated by the parties involved in the action.

Section 14-11-60 sets forth five unambiguous conditions for special referee appointment. First, it establishes that a special referee may be appointed in the event of a vacancy, disqualification, or disability of the master-in-equity, or otherwise upon a showing of "cause" to the presiding circuit court judge. Second, it establishes that the authority to make such appointments is vested in the presiding circuit court judge. Third, it establishes that the special referee's appointment is conditioned "upon agreement of the parties." Fourth, it establishes that, upon appointment, the special referee "has all the powers of a master-in-equity." Last, the provision establishes that the parties must bear the cost of the special referee.

A second statute, S.C. Code Ann. § 15-31-150, aligns with Section 14-11-60 and reinforces its principal elements. That section identifies several statutory provisions (not pertinent here) that it says should not "prevent[] a circuit court from appointing a special referee in the manner as

provided" by statute.[2] Like Section 14-11-60, it says that special referees "shall be compensated by the parties involved" and shall "have the same authority as masters-in-equity." This provision includes that special referees "shall be accountable to the appointing court."

There is no daylight between Section 14-11-60 and Section 15-31-150. Together, these provisions articulate a clear and explicit statutory mandate: special referees must be appointed by the presiding circuit court judge, with the agreement of the parties, and exercise the same authority as masters-in-equity. As it relates to the appointment of special referees, the language and intent of the legislature is unmistakable and unambiguous. *See Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 429, 699 S.E.2d 687, 690 (2010) ("The text of a statute as drafted by the legislature is considered the best evidence of the legislative intent or will.").

B. Any Conflict Between Rule 53 and the Relevant Statutes Must be Resolved in Favor of the Statutes.

To the extent ambiguity exists within South Carolina's overall scheme governing the appointment and authority of special referees, it derives not from the statutes but from Rule 53, a subordinate rule. In Rule 53(a), the term "special referee" is defined with specific reference to the statute, as "a member of the South Carolina Bar to whom a matter has been referred under S.C. Code Ann. § 14-11-60." Rule 53(b) then provides in relevant part: "In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court." Rule 53(c) additionally provides that "[o]nce referred, the master or special referee shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter."

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[2] Although this provision specifically refers to Section 15-31-140, that code section no longer exists. In 1985, S.C. Code Sections 15-31-10 through 15-31-140 were repealed and reorganized under Title 14, where the requirements for special referee appointment were codified in Section 14-11-60. 1985 Act No. 100. Accordingly, Section 15-31-140 should be read to expressly incorporate Section 14-11-60 and all of its terms by reference.

In other words, Rule 53 starts with the proposition that a "special referee" is defined as a lawyer who has been referred a matter under Section 14-11-60. To be referred a matter under that statute, a lawyer must be appointed by the presiding circuit court judge, upon agreement of the parties, to exercise the authority of a master-in-equity. But Rule 53 also says that a special referee may be appointed by a clerk of court, without consent of the parties (in a default case or action for foreclosure), to exercise the full power and authority of a circuit court judge.

Rule 53's discrepancies with controlling statutory authority should result with the rule yielding to the statute. *See Stokes*, 315 S.C. at 266 (holding that the South Carolina Constitution subordinates the Supreme Court's rulemaking power to acts of the General Assembly). The General Assembly has declared that special referees must be appointed by the presiding circuit court judge with the agreement of the parties.

C. Roche Was, Respectfully, Wrongly Decided and Should be Overruled.

Though the tensions between Rule 53 and the controlling statutory scheme have existed for nearly 40 years, they have only been presented to the Supreme Court twice. In 1998, as a matter of first impression, the Supreme Court considered whether consent of a defaulting party was required for the circuit court to refer a case to a special referee.[3] *Roche v. Young Bros. of Florence*, 332 S.C. 75, 80, 504 S.E.2d 311, 313 (1998).

In *Roche*, the Court began its analysis by specifically noting that Rule 53(a) incorporates Section 14-11-60 by reference, and that both provisions "seem to require, without exception, the agreement of the parties prior to the appointment of a special referee." *Roche*, 332 S.C. at 81. The Court then observed that "Rule 53(b), on the other hand, suggests that consent is not required in a

[3] The second case, *Carwile v. Anderson*, No. 2025-001379, is currently pending before the South Carolina Supreme Court on a Petition for Writ of Certiorari.

default situation." *Id.* To resolve this conflict, the Court declared that its "primary function" was to "ascertain the intent of the legislature," and that "the statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *Id.* (citing *State v. Baker*, 310 S.C. 510, 427 S.E.2d 670 (1993)).

In the analysis that followed, the Court made several succinct observations about the procedure in default cases. Specifically, the Court noted that when a default occurs: the defaulting party is deemed to have admitted the truth of the plaintiff's allegations; the defaulting party is provided only limited participation in the damages hearing; and the trial court may conduct hearings and enter orders as it deems necessary and proper. From these observations, the Court concluded that it would be "anomalous" to interpret Section 14-11-60 as "requiring the consent of a defaulting party whenever the circuit court chose to refer the case to a special referee." *Id.* at 82. To support this view, the Court added that "[n]ot requiring consent of a defaulting party is evidenced elsewhere in the Code," and cited S.C. Code Ann. § 14-11-85, which the Court said "provides that an appeal from the judgment of a master-in-equity must be to the circuit court unless the parties not in default consent in writing or on record to a direct appeal to the Supreme Court." *Id.*

Whether or not *Roche* was rightly decided in 1998, intervening developments in the law make clear its central holding is contrary to statutory and constitutional law and can no longer stand. For the following five reasons, *Roche* should be overruled.

First, in *Roche*, the Supreme Court failed to follow the "axiomatic" principle that statutory analysis begins with the language of the *statute*. *Smith v. Tiffany*, 419 S.C. 548, 556, 799 S.E.2d 479, 486 (2017). On numerous occasions since *Roche* was decided, the Supreme Court has held that when statutory text is clear and unambiguous, courts should apply the text as written and not

seek to distill alternative meanings from other sources of authority.[4] If *Roche* were decided today, in keeping with these well-established principles, it appears it would end where it began – with the Court's recognition that a plain reading of Section 14-11-60 seems "to require, without exception, the agreement of the parties prior to the appointment of a special referee." *Roche*, 332 S.C. at 81.

Second, even assuming *arguendo* that an examination of the legislature's intent beyond the plain language of the statute was warranted, the *Roche* Court did not address, in its opinion, the history of Section 14-11-60, Section 15-31-150, or certain other relevant sections of the South Carolina Code. *Roche*, 332 S.C. at 81.

Third, noting that the statute and rule were in conflict, the Court concluded that the statute should be interpreted to align with the rule. Other opinions of the Supreme Court – both before *Roche* and after – instruct that it should have done precisely the opposite.[5]

Furthermore, by subordinatiawng the statute to Rule 53(b), the Court rendered Section 14-11-60 meaningless. If Rule 53 controls the circumstances of appointment, manner of appointment, scope of authority, and compensation of special referees, nothing is left of Section 14-11-60. Since

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[4] *See, e.g., Smith*, 419 S.C. at 556 ("Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning."); *State v. Gaines*, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008) ("Whenever possible, legislative intent should be found in the plain language of the statute itself."); *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003) (observing that unless a statute is ambiguous, "the application of standard rules of statutory interpretation is unwarranted"); *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001) (Only "[w]here the language of an act gives rise to doubt or uncertainty as to legislative intent" may the construing court "search for that intent beyond the borders of the act itself.").

[5] *Stokes*, 315 S.C. at 266–67 (holding that Section 4, Article V of the South Carolina Constitution establishes "the intent to subordinate" the Court's rulemaking power to the General Assembly's legislative authority); *Grazia*, 390 S.C. at 570–72 (acknowledging the "general rule" that "any conflict between a statute and a court rule must be resolved in favor of the statute"); *Smith*, 419 S.C. at 560 (rejecting party's implication that a rule of civil procedure "somehow trumps" an Act of the legislature). *See also*, Rule 82, SCRCP, stating that rules of civil procedure do not extend the jurisdiction of the courts.

Roche, the Supreme Court has emphasized that "no word, clause, sentence, provision or part [of a statute] shall be rendered surplusage, or superfluous," because "the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law" *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (internal citations omitted); *see also Hodges v. Rainey*, 341 S.C. 79, 88–89, 533 S.E.2d 578, 583 (2000) ("The law does not favor the implied repeal of statute."). In keeping with these principles, the Court should give effect to the legislature's words and give meaning to Section 14-11-60.

Fourth, the single statutory provision the Court relied on in *Roche* to support its holding no longer exists. Having reached its conclusion, the Court cited Section 14-11-85 as evidence that "not requiring the consent of a defaulting party is evidenced elsewhere in the Code." *Roche*, 332 S.C. at 82. The Court wrote that this section "provides that an appeal from the judgment of a master-in-equity must be to the circuit court unless the parties not in default consent in writing or on the record to a direct appeal to the supreme court." *Id.* However, in 1999, merely months after the Supreme Court issued *Roche*, the General Assembly amended Section 14-11-85 and removed the reference to "parties not in default." 1999 Act No. 55. Even assuming that *Roche* was rightly decided at its time of publication, this intervening change in the law calls its central holding into question. *See, e.g., Planned Parenthood South Atlantic v. State*, 440 S.C. 465 (2023) (explicitly recognizing that new legislation can necessitate revisiting prior judicial decisions).

Last, the timing of the implementation of Rule 53 and Section 14-11-60 is instructive. Rule 53 was first promulgated by the Supreme Court in 1985. At that time, Section 14-11-60 read:

> In case of a vacancy in the office of master or in case of the disqualification or disability of the master from interest or any other reason the circuit court or a judge

thereof may appoint a special referee in any case who shall as to such case be clothed with all the powers of a master.

S.C. Code § 14-11-60 (1976). Three years later, in 1988, as part of a reorganization of statutes relating to the courts and civil procedure, the General Assembly *added* the requirement that cause must be shown to "the presiding circuit court judge, upon agreement of the parties." 1988 Act No. 678, Part II, § 6. In that legislation, the General Assembly had the opportunity to marry the statute with the newly-adopted rule. Instead, the legislature abrogated the rule by enacting a newly-codified appointment scheme for special referees, instructing that – without exception – they must be appointed by the presiding circuit court judge, upon agreement of the parties.

As previously discussed, the Court need only read the statute and apply its literal words to get to the right result in this case. But if it is looking for additional evidence of legislative intent elsewhere, the timeline strongly corroborates a plain reading of Section 14-11-60.[6]

II. The Order of Reference Was Issued Without Notice to Defendants and a Meaningful Opportunity to Object, in Violation of Due Process.

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[6] It bears noting that the legislature's longstanding requirement that orders of reference to special referees must occur "upon agreement of the parties" is not an oversight, as *Roche* may be read to suggest, but instead a sensible and reasoned public policy choice. Specifically (as discussed further below in Section II of this brief), requiring agreement of the parties before referring a matter to a special referee mitigates against the due process concerns that arise when absent or objecting parties are forced to pay a private attorney to perform a public function. In 1978, the Supreme Court expressed deep ambivalence about the payment of fees to acting judicial officers, striking down a statute that allowed magistrates to retain fees from civil proceedings as compensation. *State ex rel. McLeod v. Crowe*, 272 S.C. 41, 49, 249 S.E.2d 772, 776–77 (1978) *("*To the degree such statutes vest judicial officers with a pecuniary interest in the proceedings before them, they violate Article I, Section 3 of the South Carolina Constitution and are likewise impermissible under the Fourteenth Amendment of the United States Constitution."). In so holding, the Court emphasized that due process violations can arise even without evidence of actual abuse, as the *potential* for abuse undermines the fairness of the system. *Id.* at 48, 776 ("We believe the potential for deprivation of due process also exists in civil matters where judicial officers possess a pecuniary interest in the outcome of litigation."). Although perspectives have no doubt changed since 1978, the fundamental policy lesson remains: principles of fairness and justice are best served when the parties agree to jointly undertake the expense of a special referee.

When the Clerk of Court issued the Order of Reference to the Special Referee, she imposed upon Defendants a financial obligation to pay the referee's legal fees without providing them notice or an opportunity to object. As a result, the cost of the special referee's legal fees was imposed on Defendants in violation of due process. Since the Order of Reference was issued in violation of Defendants' due process rights, the Court should find that it – along with all derivative orders and judgments by the Special Referee – should be set aside as void. *See* Rule 60(b)(4) (providing that the court may relieve a party from a judgment that is void); *Sanders v. Smith*, 431 S.C. 605, 616, 848 S.E.2d 604, 609 (Ct. App. 2020) (explaining that the "definition of void under the rule encompasses judgments from courts which failed to provide proper due process")

The Fifth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, explicitly prohibits states from depriving any person of life, liberty, or property without due process of law. U.S. Const. amend. V, XIV; *see also* S.C. Const., art. I, § 3, 22 (providing the same guarantees). Under federal and state law, there are few constitutional principles more well-settled than the rule that procedural due process requires notice and an opportunity to be heard before the state may deprive a person of a property interest. *See Lambert v. People of the State of California*, 355 U.S. 225, 228 (1957) ("Engrained in our concept of due process is the requirement of notice. . . . Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act."); *see also Kurschner v. City of Camden Plan. Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) ("The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.").

South Carolina law is replete with cases that have ensured these minimal protections in circumstances where judicial or agency action exposed unsuspecting citizens to fees and costs

without proper notice and meaningful opportunity to object. For instance, in *Porter v. S.C. Pub. Serv. Comm'n*, the Supreme Court held that the Public Service Commission violated ratepayers' due process rights when it raised utility rates without adequate notice. 338 S.C. 164, 170, 525 S.E.2d 866, 869 (2000). In *Burns v. Universal Health Servs. Inc.*, the Court of Appeals held that due process requires that an attorney is "entitled to notice and an opportunity to respond prior to imposition of sanctions under Rule 11, SCRCP." 340 S.C. 509, 514, 532 S.E.2d 6, 9 (Ct. App. 2000). In *Distin v. Bolding*, the Supreme Court held that local public service districts could not impose sewage assessments as liens on private property without giving the owner notice and opportunity to be heard. 240 S.C. 545, 556, 126 S.E.2d 649, 654 (1962).

There are perhaps no more instructive opinions to the present case than those articulating the due process rights of defaulting parties. The defining predicate to a default judgment, of course, is proper service of the summons and complaint, which place a defendant on notice of the plaintiff's claims and invite the defendant to appear and respond. Without such notice, a defendant may not be held in default.[7] Same too, for the damages hearing, where defaulting parties still retain minimal due process rights including notice and the opportunity to play a limited role in the evidentiary hearing. *See Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978) (holding that a "defaulting defendant has conceded liability" but has not conceded "the amount of liability"). For this reason, Rule 55(b)(2), SCRCP, provides that "notice of any trial or

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[7] *See, e.g., Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80 (1988) (holding that failure to properly serve summons and complaint violates "the most rudimentary demands of due process of law.") (internal citation omitted); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

hearing on unliquidated damages shall also be given to parties in default . . . whether or not such party has appeared in the action."

Defendants do not contest that they received proper notice of the Amended Complaint and the damages hearing. But for the same reasons they received those notices, they should have received notice of the Order of Reference, as well, and an opportunity to object. Because the Order imposed on Defendants an obligation to pay the referee without notice or meaningful opportunity to object, it was issued in violation of due process and should therefore be declared void. *See Peralta*, 485 U.S. at 87 (holding that due process requires "wip[ing] the slate clean" to restore "the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.").

CONCLUSION

Defendants Martin Maina Gitau and Mark One Freight & Logistics, LLC respectfully request that the Court grant this motion, declare the special referee's appointment void, vacate the special referee's default judgment, and permit Defendants to file a renewed motion to set aside the entry of default.

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July __, 2025

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Jul 22 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas
Scott F. Talley, Special Referee

Appellate Case No. 2025-001073
Civil Action No. 2022-CP-11-00021

Angelica Shelest, ... Respondent,

v.

Martin Maina Gitau and Mark One Freight & Logistics, LLC..... Appellants.

Proof of Service

Scarborough LLP, attorneys for Martin Maina Gitau and Mark One Freight & Logistics, LLC, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified, by electronic mail, and a copy of the letter and electronic mail is attached to this certificate.

Pleading(s): Motion to Certify and Transfer to the SC Supreme Court
Exhibit 1-Motion for Limited Remand
Exhibit A-Motion Under Rule 60(b) and Memorandum

Parties Served:

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July 22, 2025

Via Email Only
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The Honorable Patricia A. Howard
South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

RE: Angelica Shelest v. Martin Maina Gitau and Mark One Freight & Logistics, LLC
Appellate Case No. 2025-001073
Our File No. 089478/01500

Dear Ms. Howard:

Attached for filing in the above matter please find Motion to Certify and Transfer to the SC Supreme Court with Exhibit 1-Motion for Limited Remand (in draft/unsigned). Exhibit 1 has its own exhibit- a Motion Under Rule 60(b) and Memorandum on behalf of Martin Maina Gitau and Mark One Freight & Logistics, LLC (in draft/unsigned). A check will be sent to pay for the Motion to Certify and Transfer to the SC Supreme Court.

With kind regards, I remain

Sincerely yours,

s/C. Mitchell Brown

C. Mitchell Brown

CMB:jlt
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