THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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S.C. SUPREME COURT

Appeal from Greenville County
Charles B. Simmons, Jr., Master in Equity

Opinion No. 5140 (S.C. Ct. App. Filed June 5, 2013)

Appellate Case No. 2013-002048

Bank of America, N.A. .... Respondent,

v.

Todd Draper, Mortgage Electronic Registration Systems, Inc., acting, Shawn Kephart, Matthew H. Henrikson, The United States of America, by and Through its Agency, South Carolina Department of Revenue, Branch Banking and Trust Company, and Linkside III Homeowners Association, Inc.,

Of Whom Todd Draper is ....Petitioner.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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I. RESPONDENT IS NOT A REAL PARTY IN INTEREST

Respondent argues the Court of Appeals "was correct in finding that Bank of America, as a servicer of a mortgage loan owned by another entity, had standing to seek a remedy of foreclosure in its own name." *See* Respondent's Return p. 3. However, Respondent's argument and the Court of Appeals's opinion disregard the clear provisions of South Carolina's Uniform Commercial Code, which govern an action to enforce a negotiable instrument.

Under South Carolina law, the plaintiff in a foreclosure suit should be the real owner of the mortgage debt. *Cleveland v. Bomar*, 178 S.C. 455, 183 S.E. 34, 34 (1936) (dismissing mortgage foreclosure action because it was not brought in the name of the real owners of the note and mortgage). It is accepted law that a party seeking to foreclose a mortgage lacks standing unless it has the right to enforce the underlying note or debt. *Deutsche Bank Nat. Trust Co. v. Matthews*, 273 P.3d 43, 46 (Okla. 2012); *Wells Fargo Bank, N.A. v. Ford*, 15 A.3d 327, 329 (N.J. Super. Ct. App. Div. 2011). "Standing is assessed at the time the action is commenced," not thereafter. *Clark v. Trailiner Corp.*, 242 F.3d 388 (10th Cir. 2000) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992)); *Associated Credit Union v. Pinto*, 677 S.E.2d 789, 791 (Ga. Ct. App. 2009); *see also Matthews*, 273 P.3d at 47 ("A plaintiff must show it became a 'person entitled to enforce' the note *prior* to the filing of the foreclosure proceeding."); *In re Parker*, 445 B.R. 301, 305 (Bankr. D. Vt. 2011) ("In order to enforce a mortgage note, a plaintiff must show that it was the holder of the note *at the time the Complaint was filed.*").

Numerous courts have held that "servicing rights" are insufficient by themselves to support standing to foreclose a mortgage. *In re Jackson*, 451 B.R. 24, 27 (Bankr. E.D. Cal.

2011); *see also James v. Litton Loan Servicing, L.P.*, 2011 WL 59737, *11 (M.D. Ga. 2011). Instead, to have standing, the party must show not only "an interest in the relevant note," but also that it has "the right, under applicable substantive law, to enforce the note[]" and it has been "injured by debtor's conduct (presumably through a default on the note)." *In re Wilhelm*, 407 B.R. 392, 398 (Bankr. D. Id. 2009); *In re Aniel*, 427 B.R. 811, 815 (Bankr. N.D. Cal. 2010); *see also U.S. Bank, N.A. v. McGinn*, No. S-12-004, 2013 WL 56157, *3 (Ohio Ct. App. Jan. 4, 2013) ("In a foreclosure action, the holder of the note and mortgage is the real party in interest.").

Respondent does not claim to be a party to the contracts at issue in this case. The question of whether, for standing purposes, a non-party to a contract has the right to enforce the contract is a matter of state contract law. *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 981 (11th Cir. 2005); *Castro Convertible Corp. v. Castro,* 596 F.2d 123, 124 (5th Cir.1979). Under South Carolina contract law, a non-party to a contract ordinarily lacks standing to sue for the breach of the contract. *Bob Hammond Const. Co., Inc. v. Banks Const. Co.*, 312 S.C. 422, 440 S.E.2d 890, 891 (S.C. Ct. App. 1994); *Trancik v. USAA Ins. Co.*, 354 S.C. 549, 581 S.E.2d 858, 861 (Ct. App. 2003). More importantly, because the promissory note at issue in this case is a "negotiable instrument," Article 3 of South Carolina's version of the UCC governs whether Respondent has the right to enforce the note. *Swindler v. Swindler*, 355 S.C. 245, 584 S.E.2d 438 (Ct. App. 2003) (Article 3 of UCC governs a note secured by a mortgage on real property); *Sewell v. Akins*, 249 S.E.2d 274, 275 (Ga. 1978) (promissory notes were negotiable instruments governed by Article 3 of the UCC).

Under the South Carolina UCC, a negotiable instrument may be enforced only by a "person entitled to enforce" as delineated in the statute. *See* S.C. CODE ANN. § 36-3-301. The "persons entitled to enforce" a note are limited to: (1) a "holder of the instrument," (2) "a

nonholder in possession of the instrument who has the rights of a holder," or (3) "a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 36-3-309 [dealing with lost, destroyed, or stolen instrument] or 36-3-418(d) [dealing with instrument paid or accepted by mistake]." Id. UCC § 3-301 provides only three ways in which a person may qualify as the "person entitled to enforce" a note. Although Respondent's return quotes *part* of § 36-3-301 on page 4 and notes that "a person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument," Respondent conspicuously fails to quote or apply the remainder of § 36-3-301. It is clear under the facts of this case that Respondent is a non-party to the loan documents and does not fall into any category of "persons entitled to enforce" the note as delineated in § 36-3-301.

(1) Holder

South Carolina's UCC defines a "holder" as the "person who is *in possession of* a [negotiable instrument] drawn, issued, or indorsed to him or to his order or to bearer or in blank." S.C. CODE ANN. § 36-1-201(20) (emphasis added). Proof that a party is in physical possession of a note made payable to him (or to bearer) at the time the lawsuit is filed is essential to establish that the party is the "holder" of the note. *See id.*; *see also Jenkins v. Wachovia Bank, Nat. Ass'n*, 711 S.E.2d 80, 82-83 (Ga. Ct. App. 2011) ("To be a 'holder' of a negotiable instrument requires possession of the instrument."); *FDIC v. West*, 260 S.E.2d 89, 92 (Ga. 1979) ("To establish status as a 'holder' and sue on a negotiable instrument, possession is the first requirement."); *Locks v. North Towne Nat. Bank of Rockford*, 451 N.E.2d 19, 20-21 (Ill. Ct. App. 1983) ("[O]nly the *holder* of the instrument has standing in an action under [the UCC]. A 'holder' is defined as a person in possession of an instrument drawn, issued or indorsed to him or to his order or to bearer or in blank. Thus, proof of possession is essential for standing to enforce payment on an

instrument."); *Matthews*, 273 P.3d at 46 (Okla. 2012) ("To show you are the 'holder' of the note you must prove you are in possession of the note and the note is either 'payable to bearer' (blank indorsement) or to an identified person that is the person in possession (special indorsement). Therefore, both possession of the note and an indorsement on the note or attached allonge are required in order for one to be a 'holder' of the note."); *Cogswell v. CitiFinancial Mortg. Co.*, Inc., 624 F.3d 395, 402 (7th Cir. 2010) (Under the UCC, "a key requirement to being a holder is physical possession of the note secured by the mortgage."); *Connolly v. Potts,* 306 S.E.2d 123, 125 (N.C. 1983) ("It is the fact of possession which is significant in determining whether a person is a holder, and the absence of possession defeats that status."); *Rex Smith Propane, Inc. v. National Bank of Commerce*, 372 F. Supp. 499 (N.D.Tex.1974) ("The negotiable instruments portion of the U.C.C. as shown by these sections is predicated on the rights of a holder and one cannot be a holder without possession.").

Because possession of the note is requisite to "holder" status, a person without actual possession of the note at the time the lawsuit is filed is not a "holder" entitled to maintain an action for its collection or enforcement. *See Jenkins*, 711 S.E.2d at 82-83; *Connolly,* 306 S.E.2d at 125; *Locks*, 451 N.E.2d at 20-21; *Liles v. Myers*, 248 S.E.2d 385, 387-88 (N.C. Ct. App. 1978); *Lamb v. Opelika Prod. Credit Ass'n*, 367 So.2d 957, 959 (Ala. 1979); *Mortgage Elec. Registration Sys., Inc. v. Saunders*, 2 A.3d 289, 296 (Me. 2010); *Investment Serv. Co. v. Martin Bros. Container & Timber Prod. Corp.*, 465 P.2d 868, 871 (Or. 1970); *Hanalei, BRC Inc. v. Porter*, 760 P.2d 676, 679-80 (Haw. Ct. App. 1988).

Consistent with the definition of a holder is the additional UCC requirement that a valid assignment of a note requires *physical transfer of the original note*. Article 3 provides that where a negotiable instrument is payable to an identified person—such as the promissory note in

this case made payable to the order of Countrywide Home Loans, Inc.—transfer of ownership of the instrument requires transfer of possession of the instrument. *See* S.C. CODE ANN. § 36-3-201(b) ("[I]f an instrument is payable to an identified person, negotiation requires *transfer of possession of the instrument* and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by *transfer of possession* alone." (emphasis added)); *see also In re Kemp*, 440 B.R. 624, 630 (Bankr. D.N.J. 2010) ("Where, as here, the ownership of an instrument is transferred, the transferee's attainment of the status of 'holder' depends on the negotiation of the instrument to the transferee. The two elements required for negotiation, both of which are missing here, are the transfer of possession of the instrument to the transferee, and its indorsement by the holder."); *U.S. Bank Nat. Ass'n v. Kimball*, 27 A.3d 1087, 1092 (Vt. 2011) ("[B]ecause the note was not issued to U.S. Bank, to be a holder, U.S. Bank was required to show that at the time the complaint was filed it possessed the original note either made payable to bearer with a blank endorsement or made payable to order with an endorsement specifically to U.S. Bank.").

Article 3 further states that an instrument is "transferred" when it is "delivered" by the holder for the purpose of giving the recipient the right to enforce the instrument. See S.C. CODE ANN. § 36-3-203(a) ("An instrument is transferred *when it is delivered* by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." (emphasis added)). "Delivery" under the UCC requires a "voluntary transfer *of possession.*" *See* S.C. CODE ANN. § 36-1-201(14) ("'Delivery' . . . with respect to instruments, documents of title, chattel paper or certificated securities means voluntary transfer of possession."). Absent possession there can be no delivery; without delivery an instrument cannot be transferred.

The UCC's requirements that the original note be delivered and endorsed to the transferee arise out of the unique nature of negotiable instruments. Production of the original instrument is required because the instrument's value, much like money, subsists in the instrument itself. The original physical instrument is itself the right to payment. *See* S.C. CODE ANN. § 36-3-203 official cmt. 1 ("An instrument is a reified right to payment. The right is represented in the instrument itself."). A photocopy of a promissory note has no more value or significance than a photocopy of a dollar bill. One appellate court, while construing UCC provisions similar to South Carolina's, explained that "[i]n the case of suit on the note, presentment of the note or satisfactory proof that it has been lost or destroyed are essential elements of the case because *the instrument itself is the exclusive ground for the cause of action.*" *Union Sav. Bank v. Cassing*, 691 S.W.2d 513, 514 (Mo. Ct. App. 1985) (emphasis added). Without the instrument—meaning the original document bearing the signatures of the maker and any indorsee—there simply is no cause of action.

The requirement for production of the original note in court also reflects the particular rights that arise in favor of the person in possession of it under the UCC. While there can be an infinite number of photocopies of any given promissory note, there can be only one original. Only by requiring the production of that single original note can the court, and the note maker, be certain that the person claiming rights under that note is the party who is truly entitled to enforce it. And, only by rigorous adherence to that requirement can the court protect a borrower against a second claim on the note by some other person coming forward with proof of actual possession of the original note. *In re Miller*, 666 F.3d 1255, 1263 (10th Cir. 2012) ("Possession is an element designed to prevent two or more claimants from qualifying as holders who could take free of the other party's claim of ownership."). This is crucial because if the "maker pays

someone other than a 'person entitled to enforce' . . . the payment generally has no effect on the obligations under the note" and "[t]he maker still owes the money to the 'person entitled to enforce,' and, at best, has only an action in restitution to recover the mistaken payment." *In re Veal*, 450 B.R. 897, 910 (Bankr. 9th Cir. 2011); *see also* S.C. CODE ANN. § 36-3-602(a) ("[A]n instrument is paid to the extent payment is made by or on behalf of a party obliged to pay the instrument; and to a person entitled to enforce the instrument.").

In this case, Respondent is not the "holder" of the promissory note. Respondent has failed to show that it had possession of the original promissory note when this lawsuit was commenced or at any other time relevant to this case.

(2) Nonholder in Possession of the Instrument

Respondent likewise fails to fall within the UCC's second category of "persons entitled to enforce" a note because it does not have possession of the instrument. Although the UCC authorizes "a nonholder *in possession of* the instrument who has the rights of a holder" to enforce the instrument, this subsection requires the party to have physical possession of the original note. *See* S.C. CODE ANN. §§ 36-1-201(20) & 36-3-301. For the reasons explained above, Respondent cannot satisfy this requirement.

(3) Non-possessor of Lost, Destroyed, or Stolen Instrument

Finally, Respondent does not fall within the definition of "a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 36-3-309 [dealing with a lost, destroyed, or stolen instrument] or 36-3-418(d) [dealing with an instrument paid or accepted by mistake]." S.C. CODE ANN. § 36-3-301. Unlike the previous two methods, this third method of qualifying as a person entitled to enforce a note does not require possession of the original note, but this method is significantly circumscribed.

Respondent does not assert that § 36-3-418(d), concerning payment or acceptance by mistake, is applicable. Moreover, Respondent failed to prove that it was entitled to enforce the note under § 36-3-309, which is entitled "[e]nforcement of lost, destroyed, or stolen instrument." The person attempting to enforce the lost, destroyed, or stolen instrument has the burden of proving these factual predicates by "clear and convincing evidence." *See, e.g.*, *Crawford v. 733 San Mateo Co.*, 854 F.2d 1220 (10th Cir. 1988); *Buster v. Gale*, 866 P.2d 837 (Alaska 1994); *Guaranty Bank & Trust Co. v. Dowling*, 494 A.2d 1216 (Conn. Ct. App. 1985); *Brunswick Corp. v. Briscoe*, 523 S.W.2d 115, 123 (Mo. Ct. App. 1975); *Castellano v. Bitkower*, 346 N.W.2d 249 (Neb. 1984); *Lutz v. Gatlin*, 590 P.2d 359 (Wash. App. 1979); *In re Veal*, 450 B.R. at 921 n.22. Respondent failed to present an affidavit showing that the original note was lost, destroyed, or stolen or otherwise attempting to satisfy the requirements of § 36-3-309.

UCC § 3-309(b) further requires the person seeking to enforce the lost, destroyed, or stolen note to show that the maker of the note is "adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument," see S.C. CODE ANN. § 36-3-309(b), which is typically satisfied in the form of a surety bond insuring that the maker will not be subjected to a double claim. *See Huckell v. Matranga*, 160 Cal. Rptr. 177, 182 (Ct. App. 1979) (corporate surety bond, and not merely personal indemnity of the person seeking to enforce the note, is required to comply with § 11-3-309(b)); *Guttman v. Nat'l Westminster Bank, USA*, 550 N.Y.S.2d 812 (1990) (plaintiff required to furnish bond before bank replaced lost check); *McKay v. Capital Res. Co. Ltd.*, 940 S.W.2d 869, 871 (Ark. 1997) ("Even if all three requirements in § 4–3–309(a) had been proven, the trial court was still obligated to ensure that Capital Resources provided adequate protection to the McKays from any future claim, and this too was not done."). Respondent did not attempt to satisfy this requirement.

Respondent does not show it satisfied the specific criteria of S.C. CODE ANN. § 36-3-301, but instead relies upon South Carolina bankruptcy cases as support for the proposition that a loan servicer has standing to sue. *See, e.g., In re Woodberry*, 383 B.R. 373 (Bankr. D.S.C. 2008); *In re Neals*, 2011 WL 5830734 (Bankr. D.S.C. Oct. 6, 2011); *In re McFadden*, 471 B.R. 136, 176 (Bankr. D.S.C. 2012). However, the bankruptcy cases actually support Petitioner's position. In those cases, the dispositive issue was whether loan servicers were a "party in interest" within the meaning of § 1109(b) of the Bankruptcy Code entitling them to seek relief from a bankruptcy stay. In *Woodberry*, the promissory note in question had been endorsed in blank (converting it to a bearer instrument), the original delivered to the servicer, and the servicer "was in possession of the note and mortgage." *Id.* at 378. While acknowledging it had "not found a dispositive case under South Carolina law," the *Woodberry* Court held that the servicer made a *prima facie* case that it "owned" the note and, as such, it had "standing to move for relief from stay in the Bankruptcy Court." *Id.* at 377-78. In *Neals*, although the servicer was not the "holder" of the note, possession of the original note had been delivered to the servicer for the purpose of giving it the right to enforce the note. *Neals*, 2011 WL 5830734, *4. Therefore, the servicer was "a nonholder in possession of the instrument who has the rights of a holder" and, as such, was a "person entitled to enforce" the note under S.C. CODE ANN. § 36-3-301. *Id.* In *McFadden*, the evidence showed that the loan servicer could obtain the original note at any time by simply requesting it from the lender, which it in fact did for the trial in that case, thus the court held that the loan servicer effectively had possession of the original note. *McFadden*, 471 B.R. at 176. However, unlike the situations in these bankruptcy cases, Respondent is not a holder of the original note, it does not have possession of the original note, and it does not have the rights of a holder. The bankruptcy cases are distinguishable from the present case because each of the loan

servicers in those cases could establish it was a "person entitled to enforce" the note under S.C. CODE ANN. § 36-3-301. In contrast, Respondent cannot make such a showing.

In summary, Respondent was not the "holder" of the note or mortgage or a person entitled to enforce the note within the meaning of the UCC, was not the real party in interest, and lacked standing to bring this action to enforce the note or foreclose upon the mortgage. Foreclosing parties must be held to the rules created by the banks and financial institutions for their own benefit, which are embodied in Article 3 of the UCC.[1] Any failure by courts to enforce those requirements will expose borrowers to the potential of erroneous judgments in favor of parties not entitled to them and to subsequent note enforcement actions by other parties proving actual possession of the original note. The requirement for the production of the original note bearing proper indorsements is a simple one. Holding Respondent to this requirement does not impose an undue burden. The Court of Appeals erred by not dismissing Respondent's claims as a matter of law.

II. SOUTH CAROLINA RULE OF EVIDENCE 1003 DOES NOT TRUMP THE UCC'S REQUIREMENTS APPLICABLE TO NEGOTIABLE INSTRUMENTS

Respondent further argues that South Carolina's adoption of the "best evidence rule" as set forth in South Carolina Rule of Evidence 1003—which states that a duplicate of a "writing,

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[1] Commercially sophisticated parties like Respondent who trade in the secondary market for negotiable instruments developed the rules set forth in UCC Article 3 and their formalities for their own benefit and protection. *See generally* Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 Creighton L. Rev. 441 (1979). Thus, "[f]inancial institutions, noted for insisting on their customers' compliance with numerous ritualistic formalities, are not sympathetic petitioners in urging relaxation of an elementary business practice." *Adams v. Madison Realty & Dev., Inc.*, 853 F. 2d 163, 169 (3d Cir. 1988); *Bank of Am., N.A. v. Miller*, 956 N.E.2d 319, 325 (Ohio Ct. Ap. 2011).

recording, or photograph" can be admissible to the same extent as the original under certain circumstances—trumps or preempts the statutory requirements of S.C. CODE ANN. § 36-3-301.

However, the Arkansas Supreme Court rejected a similar argument in *McKay v. Capital Res. Co. Ltd.*, 940 S.W.2d 869 (Ark. 1997). In that case, the Court held that an assignee of a mortgage, which neither produced the original promissory note nor satisfied the UCC's requirements for lost negotiable instruments, could not prevail in enforcing the mortgagors' note. *See* 940 S.W.2d at 871. The assignee argued it was unnecessary for it to produce the original note because it could admit a photocopy of the note pursuant to Arkansas's version of Rule 1003, which is almost identical to South Carolina's version of the rule. The Court rejected the assignee's argument and held:

> Capital Resources also urges that the trial court was correct in admitting the copy of the note as an exception under the best evidence rule. Ark. R. Evid. 1002 provides that the original is required to prove the contents of a document. However, under Rule 1003, a duplicate is admissible to the same extent as an original, unless a question of its authenticity is raised or it would be unfair to admit the duplicate in lieu of the original. *Capital Resources contends the Rules of Evidence supersede the requirements of the UCC. But we find this argument without merit.*
>
> First, as previously discussed, we mention the unfairness in these circumstances that, if a duplicate was allowed in place of the original note, the McKays could later be subjected to double liability if the actual holder of the note appeared. Next, we add that the Rules of Evidence are rules of the court involving legal proceedings, while the UCC is composed of statutes of law that established the rights and liabilities of persons. Again, as previously discussed, Capital Resources, as an assignee of the McKays' note, could not sue on the underlying debt the McKays owed to Landmark Savings. For Capital Resources to have prevailed in enforcing the McKays' note, it was required either to produce the original or satisfy the requirements for a lost negotiable instrument under § 4–3–309(a) and (b). Because Capital failed to do either, we must reverse and remand.

Id. at 871 (emphasis added). Arkansas's highest court held that, to enforce a promissory note, an assignee of a mortgage must either produce the original promissory note or comply with the requirements of the UCC relating to lost, stolen, or destroyed negotiable instruments.

Similarly, in the current case, because South Carolina's version of the UCC recognizes that a note maker may be subjected to double liability if it pays a person who was not truly entitled to enforce the note, only by rigorous adherence to the requirement for production of the original note can the court protect a borrower against a second claim on the note by some other person coming forward with proof of actual possession of the original note. See S.C. CODE ANN. § 36-3-602(a); *see also In re Miller*, 666 F.3d at 1263; *In re Veal*, 450 B.R. at 910. Moreover, South Carolina Rule of Evidence 1003 is merely a rule of court that cannot trump or supersede the South Carolina UCC, which is legislation passed by our General Assembly. Indeed, the Rules of Evidence specifically acknowledge they are subject to our state's statutory enactments, including the UCC. *See* S.C. R. EVID. 101 ("Except as otherwise provided by rule or statute, these rules govern proceedings in the courts of South Carolina to the extent and with the exceptions stated in Rule 1101."); S.C. R. EVID. 1101 ("Except as otherwise provided by rule or statute, these rules apply to the courts of South Carolina.").

In summary, Rule 1003 cannot trump or preempt the statutory requirements of S.C. CODE ANN. § 36-3-301. Thus, the Court of Appeals erred by holding that Respondent could admit a photocopy of the note without producing the original instrument.

For these reasons and those set forth in the Petition, the Court should grant the Petition for Certiorari.

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November 7, 2013

THE STATE OF SOUTH CAROLINA
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Charles B. Simmons, Jr., Master in Equity

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Todd Draper, Mortgage Electronic Registration Systems, Inc., acting, Shawn Kephart, Matthew H. Henrikson, The United States of America, by and Through its Agency, South Carolina Department of Revenue, Branch Banking and Trust Company, and Linkside III Homeowners Association, Inc.,

Of Whom Todd Draper is..Petitioner.

PROOF OF SERVICE

Counsel for the Petitioner hereby certifies that a copy of Reply to Return to Petition for Writ of Certiorari has been served on counsel for Respondent by regular U.S. mail, postage prepaid, on this 7th day of November, 2013, addressed as follows:

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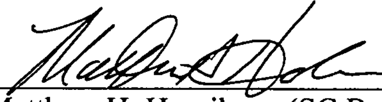

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