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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM NEWBERRY COUNTY
In The Court of Common Pleas

Eugene C. Griffith, Circuit Court Judge
Civil Action No. 2008-CP-36-417

Appellate Case No. 2013-000602
South Carolina Court of Appeals Unpublished Opinion No. 2013-UP-015

Travelers Property Casualty Co.,Respondent

v.

Senn Freight Lines, Inc., Petitioner

PETITION FOR REHEARING AND
INCORPORATED MEMORANDUM IN SUPPORT

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AND NOW COMES Respondent Travelers Property Casualty Co. ("Travelers"), by and through its undersigned counsel, pursuant to S.C.A.C.R., Rule 221(a), and petitions this Court for rehearing and to reconsider its July 2, 2014 *per curiam* opinion reversing the Court of Appeals. The grounds for this Petition are set forth below.

SUMMARY

Travelers respectfully petitions the Court to reconsider its decision granting *certiorari*, summarily reversing the Court of Appeals, and ordering the jury's verdict for actual and punitive damages reinstated. The Court should grant this Petition for several reasons. First, if the Court reverses the holdings of the Court of Appeals, it should remand the case to the Court of Appeals to rule upon grounds of Travelers' appeal that it did not consider because of its disposition of the case. Specifically, Travelers argued that: (a) no evidence supported the jury's compensatory damage award, in that South Carolina law does not recognize a cause of action in tort for bad faith cancellation of a commercial insurance policy not resulting in a denial of benefits; (b) no evidence supported the measure of compensatory damages; and (c) the punitive damage award — amounting to more than sixteen times actual damages — was patently excessive and not supported by the evidence. Second, the Rules of Appellate Procedure afford the parties a right to brief their arguments after this Court grants *certiorari* to review the Court of Appeals and identifies the issue(s) to be addressed. Finally, the Court of Appeals correctly decided the issues before it.

BACKGROUND

I. Background Facts

Petitioner Senn Freight Lines, Inc. ("Senn Freight") is a for-hire freight carrier, hauling on tractor-trailers. (*See R. p. 57, lines 8-12*). Senn Freight typically receives requests from customers to move loads of freight from one location to another. (*See R. p. 57, lines 13-19*). During the time at issue (2003-05), Senn Freight had an annual employee payroll of \$3-4 million. (*See R. p. 57, line 20- p. 58, line 8*). The President of

Senn Freight is Danny Senn ("Mr. Senn"), one of two witnesses at trial. (*See* R. p. 56 line 24- p. 57 line 1). Mr. Senn's responsibilities included procuring insurance coverage, including the policies at issue. (*See* R. p. 58, lines 9-16).

Senn Freight utilized two types of drivers to perform its primary business. First, it used leased employees ("Leased Drivers") hired through a leasing company (PEO); in such an arrangement, the PEO would provide workers' compensation insurance covering the leased drivers. (*See* R. p. 53, lines 19-21, p. 61, lines 16-21). From 2002 through February, 2004, Senn Freight engaged a leasing company, Vanguard. (*See* R. p. 72, lines 1-7). In March, 2004, Senn Freight began leasing employees from Workforce Outsourcing. (*See* R. p. 72, lines 8-10; *accord* R. pp. 208-12). In February, 2005, Senn Freight began leasing employees from Certified HR Services. (*See* R. p. 74, line 5- p. 75, line 9). Evidence at trial included Certificates of Liability Insurance for Vanguard, Workforce and Certified HR, containing the following language:

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

(*See* R. pp. 213-15).

Senn Freight also utilized "contractor" and/or "owner-operator" drivers ("Contractor Drivers"), who were required to retain their own workers' compensation coverage. (*See* R. p. 61, line 22- p. 62, line 3, p. 88, line 19- p. 90, line 3). The evidence at trial included numerous 1099-MISC forms from Senn Freight that identified and memorialized the remuneration that Senn Freight paid Contractor Drivers in 2003-05. (*See* R. pp. 186-206). Senn Freight did not proffer any evidence at trial that those Contractor Drivers had sufficient workers' compensation insurance coverage. The evidence at trial disclosed that — while Senn Freight claims it had proof of workers' compensation insurance coverage for the Contractor Drivers — the actual insurance certificate that Great American Insurance Group issued states that "[t]his policy does not

provide workers compensation coverage" (See R. p. 67, line 1- p. 70, line 25; p. 207). The Certificate introduced into evidence at trial was, according to the testimony, "an example of what [Senn Freight] provided to Traveler's (sic) when they asked for proof of that coverage." (See R. p. 68, lines 13-16). Thus, no evidence supported that Senn Freight provided Travelers proof of coverage for Contractor Drivers.

This lawsuit concerns three Workers Compensation and Employers Liability Policies Travelers issued Senn Freight (collectively the "Policies"). (See R. pp. 133-85). Travelers claims that it is entitled to unpaid, earned premiums under the policies. Senn Freight counterclaims that Travelers terminated the policies in bad faith.

II. Procedural History

Travelers commenced this action against Senn Freight on August 11, 2008 asserting a claim to recover \$197,958.00 for unpaid premiums. (See R. pp. 19-20 ¶¶ 4-5). On November 10, 2008, Senn Freight filed its Answer and Counterclaim, denying liability for Traveler's claims and asserting counterclaims against Travelers, including breach of contract and bad faith. (See generally R. pp. 25-30).

This case proceeded to trial, and the jury returned a verdict against Travelers on its primary claims and in favor of Senn Freight on its counterclaims. (See R. pp. 14-16). The Court of Appeals reversed, holding that Senn Freight could not succeed on its Counterclaim and that the trial court should have granted Travelers a directed verdict as to liability on its unpaid premium claim. As to Travelers' claim for premiums (#1), the Court of Appeals held that: (a) the evidence could only support that the Contractor Drivers were "statutory employees" of Senn Freight upon whose remuneration premiums should be calculated and (b) no evidence showed that Senn Freight provided Travelers with proof that those Contractor Drivers had lawfully secured workers' compensation obligations. As to Senn Freight's bad faith counterclaim, the Court of Appeals held that Travelers had a reasonable basis to cancel Senn Freight's policy. Because of these conclusions, the Court of Appeals did not decide several other arguments that Travelers

properly raised, including whether South Carolina would recognize a bad faith claim under these circumstances in the first instance and whether the damage awards were proper under the evidence and the law.

Senn Freight then petitioned this Court for a writ of *certiorari*. Senn Freight's Petition for Writ of Certiorari identified the following issues that it asked this Court to review:

1. After correctly defining the term "lawfully secured their workers' compensation obligations" as meaning "proof of compliance with workers' compensation laws," did the Court of Appeals err in overturning the trial court's denial of JNOV and new trial motions when there is specific evidence in the Record to support the jury's findings that Senn Freight Lines, Inc. (hereinafter "Senn") complied with the Worker's Compensation laws and provided Travelers Property Casualty Co. (hereinafter "Travelers") with all requested and necessary documents to show proof of said compliance?
2. Where there is ample evidence to support the jurors' determination that Travelers cancelled Senn's assigned risk workers' compensation insurance policy without justification and in bad faith, including actions by Travelers after the policy was cancelled, did the Court of Appeals err in overturning the trial court's denial of Travelers' JNOV motion regarding Senn's counterclaim for bad faith cancellation of the insurance policy?

(See Petition for Writ of *Cert.*, at p. iii). Travelers filed an opposition to Senn Freight's Petition for Writ of Certiorari, and Senn Freight filed a reply.

On July 2, 2014, this Court issued a *per curiam* decision that not only granted *certiorari*, but also summarily reversed the Court of Appeals' decision. In doing so, the Court "dispense[d] with further briefing." This unpublished *per curiam* opinion did not include an analysis of the substance of the arguments made in this case. To the contrary, the Court included two string cites of cases, one each for "Issue 1" and "Issue 2." Notably, the Court did not specifically state what Issue 1 and Issue 2 were (presumably they were the issues identified in Senn Freight's Petition for Writ of *Certiorari*) and did not explain why the cited cases required reversal of the Court of Appeals decision. The

Court stated that the effect of its decision is to "reverse the Court of Appeals' decision, and reinstate the jury verdict."

For the reasons that follow, Travelers respectfully requests that the Court reconsider its *per curiam* reversal, grant rehearing, permit the parties to brief the issues in accordance with the Rules of Appellate Procedure, and affirm the Court of Appeals' decision.

ARGUMENTS

I. The Court's Summary Disposition of This Appeal Failed to Address Arguments That Travelers Properly Raised and Preserved

In its appeal, Travelers raised several arguments urging the reversal of the jury's verdict against Travelers as to bad faith, including that: (a) South Carolina would not recognize a cause of action for bad faith termination of an insurance policy in the absence of a denial of coverage for a specific claim; (b) no evidence supported the jury's compensatory damage award; (c) no evidence supported the imposition of punitive damages; and (d) the punitive damage award was excessive. Because the Court of Appeals reversed the jury's verdict, it did not address these arguments. (*See Ct. of App. Opin.*, at p.4 ("Because of our findings above, we need not address Travelers' remaining arguments.")). Moreover, because the Court of Appeals did not reach those issues, Senn Freight did not discuss them in its Petition for Certiorari. Consequently, this Court did not address those issues in its *per curiam* reversal of the Court of Appeals. Each of these arguments would justify the reversal of the jury's verdict for Senn Freight, and Travelers is entitled to have appellate review of those issues (either in this Court or the Court of Appeals).

Travelers will briefly discuss those arguments, which have not yet had appellate review, in the following Sections.

A. The Court Has Not Addressed Whether South Carolina Law Would Recognize a Bad Faith Claim in the Circumstances of This Case

South Carolina law has never recognized a bad faith claim based on cancellation of a commercial insurance policy where there is no denial of coverage for a claim. The elements of bad faith have been defined as follows:

The elements of an action for breach of the covenants of good faith and fair dealing in an insurance contract are as follows:

1) the existence of a mutually binding contract of insurance between plaintiff and defendant;

2) a refusal by an insurer to pay benefits due under the contract;

3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing in the contract;

4) that causes damage to the insured.

See Cock-N-Bull Steak House, Inc. v. Generali Ins., Co., 321 S.C. 1, 6, 466 S.E.2d 727, 730 (1996) (emphasis added) (enumerating the elements of a claim for bad faith refusal to pay benefits under an insurance contract).

See Gaskins v. Southern Farm Bureau Cas. Ins. Co., 343 S.C. 666, 673, 541 S.E.2d 269, 272 (Ct. App. 2000) (emphasis added). "A **necessary element** of this cause of action is 'a refusal by the insurer to pay benefits due under the contract.'" *See Walters v. Canal Ins. Co.*, 294 S.C. 150, 151, 363 S.E.2d 120, 121 (Ct. App. 1987) (quoting *Bartlett v. Nationwide Mut. Fire Ins. Co.*, 290 S.C. 154, 158, 348 S.E.2d 530, 532 (Ct. App. 1987)). Of particular note, no South Carolina case has ever explicitly stated that the bad faith tort may be extended to encompass bad faith cancellation of an insurance policy (in the absence of denial of coverage for a particular claim). Rather, every South Carolina appellate bad faith case has involved a failure to pay a specific claim, rather than the mere cancellation of a policy in the abstract. This dispute does not concern coverage for

a particular accident or indemnity.¹

The cases that this Court cited in its reversal of the Court of Appeals as to bad faith are consistent:

- *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009): This case involved the cancellation of a first-party health insurance policy after the insured was diagnosed as HIV-positive. Such cancellation **was a denial of coverage** for a particular health condition.
- *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004): In this case, the issue was whether the insurer "had a reasonable ground for contesting the claims associated with recovering the environmental cleanup costs."
- *Labouseur v. Harleystville Mut. Ins. Co.*, 302 S.C. 540, 397 S.E.2d 526 (1990): In this case, the Court analyzed the proper tribunal to decide a claim for bad faith cancellation of a workers' compensation policy **in the face of an actual workers' compensation claim.**

In other words, in the cases that this Court cited in its *per curiam* reversal, the bad faith claims were premised on a denial of coverage for an actual claim, as opposed to an abstract termination of an insurance policy. On the other hand, there is **no specific workers' compensation claim** at issue in this case. Senn Freight does not claim that Travelers denied coverage for a workers' compensation claim. Rather, this is a purely commercial contract dispute, in which Senn Freight's only alleged harm is that it needed to seek workers' compensation coverage elsewhere. South Carolina has **never** recognized the bad faith claim Senn Freight asserted in this case.

¹ Travelers' conclusion is bolstered by this Court's holding in *Masterclean, Inc. v. Star Ins. Co.*, 347 S.C. 405, 556 S.E.2d 371 (2001), where this Court declined to recognize a bad faith claim in the context of a purely commercial surety bond, citing in part this Court's "reluctance to extend tort actions for violating good faith obligations."

B. No Evidence Supports the Amount of Compensatory Damages

South Carolina law has long required that a party seeking to recover damages present sufficient evidence to permit the jury to calculate the amount of damages with reasonable certainty:

In order for damages to be recoverable, the evidence should be sufficient to "enable the court or jury to determine the amount thereof with reasonable certainty or accuracy." *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981). "While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required." *Id.* The evidence, however, should be such that a court or jury can reasonably determine an appropriate amount. *Gray v. S. Facilities, Inc.*, 256 S.C. 558, 570, 183 S.E.2d 438, 444 (1971). Moreover, bald allegations are insufficient to establish a claim for diminution in value, and the evidence must not be speculative as to the amount of the alleged diminution. *See Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 117, 410 S.E.2d 537, 546 (1991).

See Winters v. Fiddie, 394 S.C. 629, 647, 716 S.E.2d 316, 325 (Ct. App. 2011). Senn Freight never even attempted to present evidence sufficient to satisfy this standard.

On its bad faith cancellation counterclaim, the jury awarded Senn Freight \$6,000.00 in compensatory damages. (*See R.* pp. 14-16). However, Senn Freight did not proffer a scintilla of evidence supporting that measure of damages. Senn Freight did not provide the jury with evidence providing an objective basis to estimate the amount of actual harm from cancellation of the policy. The only number that Senn Freight presented to the jury was the amount of "unearned premium" it claimed it was entitled to recover because of the early cancellation of Senn Freight's policy; this amount was contained in the verdict on Senn Freight's breach of contract claim and could not have been included in the bad faith verdict. The amount of the bad faith compensatory damage award was sheer speculation, unsupported by any evidence.

C. The Jury's Award of Punitive Damages Was Excessive

The trial court also erred in denying Travelers' Post-Trial Motions because the jury's award of punitive damages was plainly excessive.

Our supreme court recently indicated an appellate court's scope of review to be *de novo*. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 185, 183 (2009).

In reviewing an award of punitive damages, we consider (1) the reprehensibility of the conduct, (2) the disparity or "ratio" between actual harm and the punitive damage award, and (3) the comparative penalties. *Fortis*, 385 S.C. at 587–89, 686 S.E.2d at 185–86. . . .

In considering reprehensibility, a court should consider whether:

(i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

Id. at 185, 686 S.E.2d at 587. This encompasses the defendant's culpability, the duration of the conduct, the defendant's awareness or concealment, and the existence of similar past conduct. *Id.* at 185, n. 7, 686 S.E.2d at 587, n.7.

See Limehouse v. Hulsey, 397 S.C. 49, 723 S.E.2d 211, 227 (Ct. App. 2011). On Senn Freight's bad faith counterclaim, the jury awarded compensatory damages of only \$6,000.00 and \$100,000.00 in punitive damages. (*See R.* pp. 14-16).

There is no evidence of reprehensibility here. Senn Freight's alleged harm was purely economic, not physical. There was no evidence that Travelers was indifferent to the health or safety of others. Moreover, Senn Freight is a sophisticated and successful business entity, not a financially vulnerable party. Mr. Senn testified that he was a college-educated, experienced Certified Public Accountant who had been involved with Senn Freight for most of his life; as such, he had knowledge of and experience with accounting practices and audits. (*See R.* p. 54, line 15-p. 58, line 16). Senn Freight presented no evidence of trickery, deceit or intentional malice by Travelers. This was a single, discrete incident, and there was no evidence that Travelers had ever engaged in similar conduct.

Moreover, the ratio of punitive to actual damages here is patently unreasonable.

The amount of punitive damages awarded (\$100,000.00) was 16.67 times the amount of compensatory damages awarded (\$6,000.00). This ratio is facially excessive. *See Hollis v. Stonington Development, LLC*, 394 S.C. 383, 399, 714 S.E.2d 904, 912-13 (Ct. App. 2011) ("The ratio of punitive damages awarded by the jury in this case to actual damages is 8.75 to 1. We find this to be an excessive disparity between the punitive damages awarded and the harm actually suffered by the Hollises and Robinsons."). While there is no concrete limit on the ratio between actual and punitive damages, "few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process." *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 410 (2003). There is no evidence to support that cases involving similar facts have warranted such severe punitive damage awards.

D. No Evidence Supports the Jury's Award of Punitive Damages

The law is well-settled as to the showing required for the imposition of punitive damages:

In order to recover punitive damages, the plaintiff must present clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights. S.C. Code Ann. § 15-33-135 (2005) ("In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence."); *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). "The test by which a tort is to be characterized as reckless, wil[l]ful or wanton is whether it has been committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights." *Rogers v. Florence Printing Co.*, 233 S.C. 567, 577-78, 106 S.E.2d 258, 263 (1958); *see also Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (*quoting Rogers*). "It is this present consciousness of wrongdoing that justifies the assessment of punitive damages against the tort-feasor...." *Rogers*, 233 S.C. at 578, 106 S.E.2d at 263. In other words, "at the time of his act or omission to act the tort-feasor [must] be conscious, or chargeable with consciousness, of his wrongdoing." *Id.* at 578, 106 S.E.2d at 264.

See Cody P. v. Bank of America, N.A., 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct. App. 2011). There was no evidence presented at trial that would support the imposition of

punitive damages.

Senn Freight did not present a scintilla of evidence of Travelers' culpable or wrongful conduct. To the contrary, Senn Freight has relied solely on speculation, conjecture and innuendo, which is insufficient to carry the burden of proving punitive damages by "clear and convincing evidence." Senn Freight never presented any evidence that Travelers cancelled Senn Freight's policy in such a blameworthy manner as to warrant punitive damages. At the very most, Travelers exercised a contractual right to cancel for a reason with which Senn Freight does not agree.

II. The Court Should Reconsider Its Summary Disposition of This Case, as It Was Contrary to the Governing Rules of Appellate Procedure

The procedure that this Court employed in this matter does not comport with the Rules of Appellate Procedure. As a result, the Court should reconsider its *per curiam* reversal and, if it elects to grant *certiorari*, allow the parties the opportunity to fully brief the issues.

The South Carolina Rules of Appellate Procedure spell out the proper procedure when the Court grants *certiorari*:

If the petition is granted, the Clerk *shall notify* each party or his attorney, specifying the question or questions to be considered, and the parties shall prepare briefs addressing the question(s). Petitioner *shall have* thirty (30) days from the date the petition is granted to serve a copy of his brief on all parties to the appeal, and file with the Clerk of the Supreme Court fifteen (15) copies of his brief, along with proof of service. . . . Within thirty (30) days after service of petitioner's brief, respondent *shall serve* a copy of his brief on all parties to the appeal, and file with the Clerk of the Supreme Court fifteen (15) copies of his brief, along with proof of service.

See S.C.A.C.R., Rule 242(i) (emphasis added). In other words, when the Court grants *certiorari*, it must advise the parties of the issues it wishes to hear and give the parties the opportunity to argue their positions on those issues. Importantly, the Rule does not permit the Court to *sua sponte* summarily dispose of a case on the merits without any further briefing or argument. The Rules of Appellate Procedure do not authorize the

procedure that the Court followed in this case.

This Court's *per curiam* reversal cites, as the only procedural basis for its action, Appellate Rule 220(b)(1), which provides:

In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case. This rule does not apply to the following:

- (1) The Supreme Court may file a memorandum opinion dismissing an appeal, affirming or reversing the judgment appealed from, or granting other appropriate relief when, in unanimous decision, the Supreme Court determines that a published opinion would have no precedential value and any one or more of the following circumstances exists and is dispositive of issues submitted to the Court for decision: (A) that a judgment of the trial court is based on findings of fact which are or are not clearly erroneous; (B) that the evidence to support a jury verdict is or is not insufficient; (C) that the order of an administrative agency is or is not supported by such quantum of evidence as prescribed by the statute or law under which judicial review is permitted; or (D) that no error of law appears

See S.C.A.C.R., Rule 220(b)(1). However, this Rule does *not* deprive the parties of their right to submit memoranda to this Court on the issues that the Court selects for review. To the contrary, when read with the other rules, Rule 220(b)(1) merely permits this Court — in certain types of cases — to issue its decision in an unpublished opinion. This Rule does not, expressly or by implication, permit the Court to summarily reverse a Court of Appeals decision without permitting the parties an opportunity to brief the issues.

For the foregoing reasons, even if this Court is inclined to grant Senn Freight's Petition for Writ of *Certiorari*, it should reconsider and vacate its *per curiam* reversal and: (a) identify the question(s) to be considered and (b) permit the parties to file briefs on those questions as provided in the Rules.

III. The Court Should Reconsider Its Reversal of the Court of Appeals' Decision

The Court's *per curiam* reversal of the Court of Appeals does not specifically

analyze the issues raised in this case. Instead, the Court uses string cites to dispose of two undefined "Issue[s]." Presumably, these "Issues" correspond to the issues set forth in Senn Freight's Petition for Writ of *Certiorari*. Respectfully, because the Court only provides string cites and does not set forth its analysis of the issues, it is not clear *why* the Court reversed the Court of Appeals. In any event, for the reasons set forth in Travelers' Return to Petition for Writ of *Certiorari*, which Travelers incorporates herein by reference as if set forth at length, Senn Freight's arguments on the issues it defined are without merit. Therefore, this Court should reconsider its *per curiam* reversal and grant this Petition for Rehearing.

CONCLUSION

For all of the reasons set forth herein, Travelers Property Casualty Co. respectfully petitions this Court to grant rehearing and reconsider its *per curiam* reversal of this case.

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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing and Incorporated Memorandum in Support on Senn Freight Lines, Inc. by depositing a copy of it in the United States Mail, postage prepaid on, on July 16, 2014, addressed to its attorney of record, W. Chad Jenkins, Esquire, Post Office Box 190, Newberry, South Carolina 29108.

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