

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM EDGEFIELD COUNTY  
Court of Common Pleas

Kathy Ouzts Rushton, Special Referee

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**Appellate Case No. 2014-001742**

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Bernard Loyer, Jr. and Sherry Loyer, Respondents,

v.

S17 Owners Association, Inc.; John L. Avent; Frances Avent; Sylvia S. Berger; Robert J. Berning; Jeanne M. Clavel; Greg Connell; Gerald Crawford; Bruce C. Douglas; Jonathan D. Dunn; Les Galazka; Michael V. Goransky; Frank L. Gougher; David E. Harris; Cathryn A. Knight; John H. Lacher; Kyle R. Larson; Laura Linn; Roger McCoig; Charles Wilmont Miller; Michael O'Brien; Carolyn M. Rischbieter; William Satcher and Belinda Smith-Sullivan, Defendants,

OF WHOM S17 Owners Association, Inc.; John L. Avent; Frances Avent; Sylvia S. Berger; Greg Connell; Jonathan D. Dunn; Michael V. Goransky; Frank L. Gougher; David E. Harris; Cathryn A. Knight; John H. Lacher; Kyle R. Larson; Michael O'Brien; Carolyn M. Rischbieter; and Belinda Smith-Sullivan are Appellants.

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**APPELLANTS' REPLY TO INITIAL BRIEF OF RESPONDENTS**

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Philip H. Woolhiser  
SC Bar No.: 12466  
112 Trafalgar Street, SW  
Aiken, South Carolina 29801  
Phone: 803-648-9994  
Attorney for Appellants

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NOV 06 2014

**SC Court of Appeals**

**Note: Respondents have not issued an Initial Brief. Defendant, Charles Wilmot Miller has issued an “Initial Brief”. However, the position of said Defendant, in this Case, has not been confirmed by the Court of Appeals. Therefore, the Appellants provide this Reply in the event the Respondents are allowed to assume the Defendant, Charles Wilmot Miller’s “Initial Brief” as their own.**

**ISSUES RAISED BY RESPONDENTS’ INITIAL BRIEF**

**I. WERE THE GROUNDS FOR APPEAL RAISED BY APPELLANTS PROPERLY PRESERVED FOR APPELLATE REVIEW?**

**1. THE RESPONDENTS’ STATEMENT OF THE CASE ON PAGE 4 DOES NOT COMPLY WITH SCACR RULE 208 (b)(1)(C).**

In the penultimate sentence of Page 4 of the Respondents’ Initial Brief, the Respondents state that Appellants have “failed to raise any affirmative defenses except the defense of improper venue”. The Respondents’ “affirmative defenses” statement referred to a pre-foreclosure hearing answer, which was not relevant due to evidence presented at the Foreclosure Hearing.

In the last sentence of the second paragraph of Page 5 of the Respondents’ Initial Brief, the Respondents again state that the Lower Court did not receive evidence that the Appellants were owners of their respective notes. Paragraph 7 of the Special Referee’s Order and Judgment dated 6/5/2014, states that notes were made, executed and delivered to various lenders – not only to the Respondents. The Court acknowledged that terms and conditions are stated in the Notes. In Paragraph 8 of the Special Referee’s Order and Judgment dated 6/5/2014, the Court acknowledged that all of the Respondents and Appellants received a mortgage, which evidences the repayment of money advanced by the mortgagees to the mortgagor.

Plaintiffs' Exhibits #2, #3, and #7 clearly show that all the notes signed by the mortgagor, S17 Owners Association, Inc., only contain 2 variables, i.e., the note amount and the installment amount. The amortization table accompanying each note is only dependent upon the note amount. The claim for unpaid principal and interest by each Respondent and Charles Wilmot Miller is exactly proportional to the applicable note amount. The mortgage placed into evidence by the Respondents, (Plaintiffs' Exhibit #4), can be used to identify the exact note amount for each Appellant.

Therefore, the absence of evidence of the note amount and unpaid note principal/interest that is proclaimed by the Respondents as "uncontested", is certainly contested. The note amounts, unpaid principal and unpaid interest do not require additional evidence; the Court could have easily determined the status of the note held by each Respondent without additional evidence being entered.

**2. THE LAST SENTENCE ON PAGE 5 OF THE RESPONDENTS' STATEMENT OF THIS CASE IS NOT SUPPORTED BY CASE EVIDENCE AND IGNORES THE MERIT OF OTHER SCRCP ACTIONS.**

In the last sentence of Page 5 of the Respondents' Initial Brief, the Respondents state that the Appellants did not make a SCRCP Rule 59 (e) Motion to alter or amend. This is not correct.

Attorney Marsha Banks, who perhaps represented some of the Appellants, explained that the Court experience at that point would have demonstrated the ease of proving their note, (TP 31, L1-22) The Court accepted that a motion was being made. (TP 31, L23-24) The Respondents' Attorney objected to the use of affidavits, which use was never mentioned by Attorney Banks. (TP 33, L16-23) The Court denied the motion

for a 5-day delay; a delay designed to allow time for all Appellants to appear with their individual note. The Court assumed all the defendants understood what the Court wanted to see. Faced with the prospect of a 5-day continuance that would have guaranteed all Appellants and others an equitable share in the foreclosure, the Court ruled: “This has been going on long enough”. (TP 34, L5-17) This is not a sufficient reason for denial of a motion.

The 6/5/2014 Judgment for a Foreclosure Sale, was appealed to the Court of Appeals with a Notice of Appeal filed with the Edgefield Clerk of Court on July 7, 2014. The Appeal included the validity of excluding a group of Defendants from the distribution of Sale Proceeds. On July 8, 2014 the Appellants filed a “Motion to Postpone Sale Fund Distribution” with the Edgefield County Clerk of Court. This motion would have held the Sale Proceeds in escrow to efficiently and equitably respond to the results of the “Notice of Appeal”. While similar in effect to a SCRPC Rule 59(e) Motion, the SCRPC Rule 59(a) “Postpone Motion” could not be filed within the 10-day service requirement of Rule 59(e).

SCRPC Rule 46. Exceptions Unnecessary. Also applies as a substitute for a Rule 59(e) Motion. The Notice of Appeal, served by the Appellants, makes known to the Court, the Appellants’ objection to the action of the Court. The absence of an opportunity to object at the time of the Lower Court’s Order, results in the absence of an objection being non-prejudicial to the Appellants.

Concerning the remaining seven potential issues, listed by the Respondents on pages 6 and 7 of their Initial Brief, the statement of the Appellant Court in Kneale v. Bonds, 452 S.E. 2d 840, 317 S.C. 262 (S.C. Ap. 1994) is correctly on-point: “On appeal

of an equitable action tried by a master, this court has authority to find facts in accordance with our own view of the preponderance of the evidence.”

The Respondents provide extensive discussion of the case law surrounding issues raised for the first time on appeal; even going so far as to label the “first time on appeal” issue as “axiomatic”. The Appellants in this case, are not raising issues for the first time by this appeal. Instead, the Appellants are asking the Appellant Court to consider the evidence and testimony and using equity principles, to decide if the proper action was taken by the Lower Court.

The Respondents’ Footnote (1) on page 7 of their Initial Brief applies to the Record on Appeal and an administrative tribunal proceeding. The application to the Lower Court proceedings is not apparent.

**3. THE RESPONDENTS IGNORE EQUITY PRINCIPLES AND IMPROPERLY GIVE THE TRIAL COURT THE RESPONSIBILITY TO CONSIDER ONLY MATTERS SPECIFICALLY OBJECTED TO BY THE APPELLANTS IN THE LOWER COURT.**

*U.S. Bank Trust Nat. Ass'n v. Bell*, 684 S.E.2d 199, 385 S.C. 364 (S.C.App. 2009) included the following statement in its Standard of Review: "A mortgage foreclosure is an action in equity." This was confirming a 1997 case. The Respondents agreed the current Foreclosure Case is an action in equity and the Court of Appeals has a broad scope of review. (Respondents’ Initial Brief, page 6) The Respondents then continue to list eight possible errors that could have been made by the Lower Court, but then the Respondents state that since the eight errors were not considered by the Trial Court, then the issues were not preserved for Appellate review.

The issue of personal jurisdiction is of primary concern, since the lack of jurisdiction nullifies all subsequent issue consideration. A typical example of the Lower Court's investigation of the jurisdiction issue is the Lower Court's question presented to the courtroom audience: "So is everyone else represented by Ms. Banks, is there anyone else that's not represented by her?" No response from the courtroom. (TP7, L22-25) This action by the Lower Court raises several questions. First, how did the Court even know the courtroom heard the question? Second, how did the Court know that every named Defendant was present in the courtroom? The answer to both questions is that there was no way for the Court to know all involved parties were under the Court's jurisdiction based upon a general question addressed to a random assemblage of hearing onlookers.

**II. DID THE TRIAL COURT ERR IN ITS ORDER AND JUDGMENT OF FORECLOSURE AND SALE BY FINDING IT HAD PERSONAL JURISDICTION OVER THE PARTIES?**

**1. THE APPELLANT COURT CAN CONSIDER EVIDENCE FROM THE LOWER COURT TO REACH A DECISION.**

In the first sentence of the 2<sup>nd</sup> Issue of the Respondents' Initial Brief, on page 8, the Respondents again state that the lack of personal jurisdiction was not presented to the lower court. As described above, (the last 4 lines of page 4), this is an equity case and the Appellant Court certainly should review the existing evidence to confirm a lack of personal jurisdiction does, in fact, exist. In the second sentence of the above referenced

2<sup>nd</sup> Issue, the Respondents claim some Appellants have waived the right to appeal. As set out above, the waiver is not relevant.

**2. SUFFICIENCY OF SERVICE HAS NOT BEEN RAISED AS AN ISSUE  
BY THE APPELLANTS.**

The Respondents' discussion of sufficiency of service on page 8 of its Initial Brief is not relevant. The Appellants are only claiming that there are a certain number of individuals in this case who have not been served at all. These are individuals who have not been served by any mechanism set forth in SCRCF Rule 4(d) as effective. The Respondents possess a small, but easily ascertainable, number of affidavits of service. The Lower Court improperly relied upon the Respondents' attorney to identify the Defendants represented by Attorney Marsha Banks. (TP 7, L11-14) Earlier, the Lower Court recognized that Attorney Marsha Banks did not represent all Defendants. (TP6, L24 to P7, L3) Later in the Foreclosure Hearing, Attorney Marsha Banks again informed the Lower Court that she represents "quite a few Defendants in this case". (TP21, L11 and 12) The Lower Court did not ask Attorney Marsha Banks, which Defendants were or were not represented. Although the evidence indicates there is a question of Defendant representation, there are no issues raised and no evidence in the record that pertains to "sufficiency of service". There are Defendants claiming no service, not the insufficiency of some service.

**3. VOLUNTARY APPEARANCE CAN NOT BE USED IN THIS CASE TO  
ESTABLISH JURISDICTION.**

In the second sentence of the Respondents' 2<sup>nd</sup> Issue of their Initial Brief, "voluntary appearance" is correctly stated to be present in SCRCF Rule 4(d). What is

incorrect is the discussion of “voluntary appearance” in page 9 of the Respondents’ Initial Brief. The Respondents state that all Appellants filed an answer to the Complaint through Attorney Marsha Banks. The Respondents’ attorney admitted that was incorrect by acknowledging Defendant Mr. Berning was not represented by Attorney Marsha Banks. (TP 7, L11-15) In addition, as described above, the Lower Court knew that some Defendants were not represented, as did Attorney Marsha Banks. To be the attorney of record for all Defendants, as stated in the Respondents’ Initial Brief, page 9, Marsha Banks would have to have some written evidence of “acceptance of representation” by all Defendants, which she apparently does not. Otherwise, the attorney would not have stated she represents only “quite a few defendants”, as stated above.

The Respondents’ reliance on *Sterns Bank Nat. Ass’n v. Glenwood Falls, LP*, 644 S.E. 2d 793, 373 S.C. 331 (S.C. App. 2007) is misplaced. The Court in *Sterns Bank* did give examples of voluntary appearances; however, the examples do not match the current case. In the current case, there are Defendants who never accepted representation by Attorney Marsha Banks and never announced that they did. The operative phrase from *Sterns Bank* is: “Accordingly, Courts decide on a case by case basis whether a Defendant’s act demonstrates intent to submit to the Courts’ jurisdiction.” For some defendants in the current case, there are no acts that can be used as a basis for the said decision.

The Appellants have filed a Motion with the Appellant Court to require the Respondents’ Attorney to certify the specific valid affidavits of service he possesses; and to require Attorney Marsha Banks to provide copies of specific Defendant’s Retention Agreements. This Motion has not been answered by the Appellant Court at this time.

In the last full sentence of page 8 of the Respondents' Initial Brief, there is the statement: "The failure of Appellants to dispute Ms. Banks' representation is compelling." The compelling aspect of disputing representation would seem to be claimed by the Respondents to be some form of a "voluntary appearance". The Respondents fail to recognize that some of the Defendants could have believed the runway operation was a benefit to the community, the S17 Owners Association, Inc. should be given the opportunity to survive, and the Loyer Lawsuit was primarily of benefit to the Respondents – not the Community. Attorney Marsha Banks described this position of some community residents, unsuccessfully, to the Lower Court. (TP21, L11–P23, L5)

The Respondents argue the insufficiency of service issue in pages 10-12 of their Initial Brief. As discussed by the Appellants before, the use of an "Insufficiency of Service" defense would only be of use to a Defendant, if there had been some attempt to actually serve the Defendant. On page 10 of their Initial Brief, the Respondents refer to Garner v. Houck, 312 S.C. 481 (S.C. 1993) as an example of an attempted use of "insufficient service of process under Rule 12". In Garner, a Defendant claimed the Plaintiff had served an unauthorized agent. There was an actual physical transfer of a document to some person; the transfer just involved the wrong person. The Garner attempted service and other examples of the use of SCRPC Rule 12, all involved at least an attempted transfer of a document to an actual person. In the present case, the Respondents did not even come close to transferring a Summons and Complaint document to certain Defendants. Not a single Appellant is claiming delivery of a document was insufficient, instead, the claim is that delivery of the Summons and

Complaint did not occur at all. SCRCR Rule 4(d)(8) addresses refused delivery by certified mail; that event would not allow the Plaintiff to claim sufficiency of service. Therefore, the level of an attempt of service must exceed simply mailing a certified letter. There is no evidence that the Respondents' attempt at service even rose to the level of a certified letter to all Appellants.

In the penultimate sentence of page 11 of the Respondents' Initial Brief, the Respondents again state: "the Trial Court was never asked to rule upon any such jurisdictional challenge by Appellants." The reason for this lack of challenge is clear, i.e. a named defendant, who was never physically served (or made a voluntary appearance) would legally never know he had any case involvement.

**III. DID THE TRIAL COURT ERR BY BARRING APPELLANTS FROM RECEIVING A PORTION OF THE SALES PROCEEDS RESULTING FROM THE FORECLOSURE SALE?**

**1. THE APPELLANTS DO NOT HAVE AN ADEQUATE REMEDY AT LAW.**

In the last paragraph of page 12 of the Respondents' Initial Brief, the Respondents are arguing that the current case is not based in equity. This is disregard of U.S. Bank Trust Nat. Ass'n. listed in Page 4 above, which holds that a foreclosure action is in equity. The 3 cases cited by the Respondents do not apply in the present case. The following argument will prove that an adequate remedy at law is not available in the current case.

The Respondents' addition that equity does not aid those who slumber seems to revert to the Respondents' argument that all the Defendants had to do was to appear

before the Lower Court, prove their principal/interest balances, and just like that they share in the sale proceeds. This concept of slumbering Defendants ignores the point that Attorney Banks made several times. Her last attempt being her description of defendants not understanding the type of justice being handed out by the legal system, (i.e. how can a lender of funds end up being a defendant?) and a group of individuals trying to do what is best for their community. (TP 30, L9 to P31, L22)

In the second sentence of page 13 of the Respondents' Initial Brief, the Respondent claims the Appellants had an adequate remedy at law. That remedy being to sell the most valuable asset of their community and receive a small share of the runway's actual worth. Also, the Respondents claim the Appellants have a continuing adequate remedy at law; that remedy most likely being to pursue a judgment via their individual notes. The judgment, perhaps being against an entity with minimal assets, (S17 Owners Association, Inc.), or perhaps against the new runway owner with uncertain results.

In the first full paragraph of page 13 of their Initial Brief, the Respondents attempt to utilize Lever v. Lighting Galleries, Inc., 647 S.E. 2d 214, 374 S.C. 30 (S.C. 2007) to prove the Appellants, having both a note and a mortgage, originally had the option of an action on the note or a foreclosure action. The Respondents' overlook the third available action, that is doing nothing, except giving their mortgagee time to solve its financial issues. The Respondents ignore the possibility that the multiple note/single mortgage combination selected by the runway community was a design that would make it difficult for a minority of mortgagors/note holders to foreclose against the community's central, valuable assets. Equity principals giving all note holders a share of risk/reward

based only on the amount of their investment in the community was perhaps the primary goal of the community's note/mortgage/contribution campaign.

## **2. THE BALANCE OF EQUITIES ARE IN THE APPELLANTS FAVOR.**

The last paragraph of page 13 of the Respondents' Initial Brief asserts the concept that equity principles would require the foreclosure. If the principle of fairness and unjust enrichment would have been properly applied, the total principal and accrued interest of all notes would be \$446,920.20.<sup>1</sup> It is unlikely a foreclosure sale would have been pursued, since all noteholders would have been in the same position as before the sale. The foreclosed sale brought in less than 20% of the outstanding amount owed. There is a very real possibility the noteholders would have decided to pursue other options and avoid all the expenses, such as advertising and legal fees, suffered by the foreclosure sale.

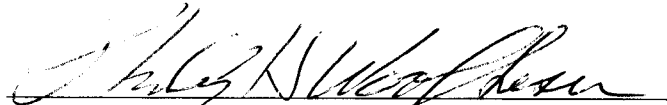
The Respondents' final paragraph on page 12 states the Appellants were being advised by attorney(s) to cross-claim. If the Appellants had taken the advice, the proceeding result of a \$446,920.20 claim would have resulted, the foreclosure sale would have produced a small return of the initial investment to all note holders, including the Respondents, and the only winner would have been the high bidder at the foreclosure sale. Certainly not an outcome favored by most note holders and the principles of equity.

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<sup>1</sup>Total original note total was \$3000,000.00. Using Mr. Miller's \$15,000.00 note as an example, at the time of the Foreclosure Hearing, the note principal was reduced to \$14,015.76 and accrued interest was \$8,300.25 or a total amount owed of \$22,346.01. (TP 19, L1-14) The same payments were made for all notes. Therefore the total owed is  $\$300,000.00 \times \$22,346.01 \div \$15,000.00 = \$446,920.20$ .

## CONCLUSION

- 1) The grounds for appeal raised by Appellants were properly preserved. If valid service is proven, the Appellant Court should confirm that this case is an equity action, and should review the evidence presented to the Lower Court. Said evidence is adequate to determine the amount owed to all note holders. This case should then be remanded for rebidding and reallocation of the winning bid, or other actions.
2. The Trial Court did err in its order and judgment of foreclosure and sale. Personal jurisdiction was lacking. The Special Referee did not make an adequate determination of the Lower Court's personal jurisdiction over the parties of the case. Lacking this determination, the Appellant Court should require the Respondents and Attorney Marsha Banks to prove the service affidavits and representation agreements, as applicable, that they hold. If the proof of complete service is lacking this case should be voided and the parties returned to their original positions.
3. The Trial Court did err by barring Appellants from receiving a portion of the foreclosure sale proceeds. The Special Referee's decision ignores the equity principles of fairness and unjust enrichment that the Special Referee was obligated to uphold. If this case is not remanded, the sale proceeds should be redistributed, and the Appellants' right to action their notes against the high bidder at the Foreclosure Sale should be confirmed. Alternately, the "waiver of a deficiency" provided by only a minority of note holders should be voided, and the approval of all note holders should be required. This action would likely result in voiding the previous foreclosure sale.



Philip H. Woolhiser

SC Bar No.: 12466

112 Trafalgar St. SW

Aiken, South Carolina 29801

(803) 648-9994 (O)

(803) 753-9018 (F)

Attorney for Appellants

November 3, 2014

Aiken, South Carolina

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM EDGEFIELD COUNTY  
Court of Common Pleas

Kathy Ouzts Rushton, Special Referee

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Case No. 2014-001742

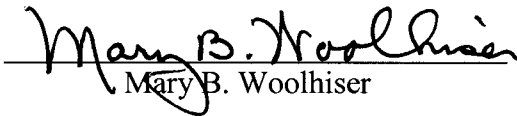
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**CERTIFICATE OF SERVICE**

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I, Mary B. Woolhiser, Secretary for Attorney Philip H. Woolhiser, certify that I have caused copies of Appellants' REPLY TO INITIAL BRIEF OF RESPONDENTS, and this Certificate of Service, in the above-referenced matter to be served, via U.S. Mail on November 3, 2014, to applicable Counsel and parties as addressed below:

Aiken, South Carolina  
November 3, 2014

  
Mary B. Woolhiser

Michael S. Medlock, Esquire  
3600 Forest Drive, Suite 102  
Columbia, SC 29204

Paul Knapp Simons, Esquire  
111 Park Ave SW  
Aiken, SC 29801

Marsha M. Banks, Esquire  
319 Park Ave SE  
Aiken, SC 29801

S-17 Owners Association, Inc.  
81 Rachel Ave  
Trenton, SC 29847

Robert J. Berning  
120 Pine Needle Rd.  
Aiken, SC 29803

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**Philip H. Woolhiser, Attorney at Law**

**112 Trafalgar St. SW  
Aiken, SC 29801-3744**

**Phone: (803) 648-9994  
FAX: (803) 753-9018**

**Email: woolhiser@bellsouth.net**

November 3, 2014

The Honorable Jenny Abbott Kitchings  
Clerk of the South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211-1629

Subject: Bernard and Sherry Loyer v. S17 Owners Association, Inc. et al.  
Case No.: 2014-001742

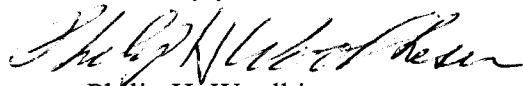
Dear Ms. Kitchings,

A copy of the Appellants' Reply to the Initial Brief of the Respondents, the original of the Designation of Matter, and the original Proof of Service for both the Reply and the Designation are enclosed, in compliance with SCACR Rule 209 (a) and Rule 208 (a)(3) and (b)(3).

An extra copy of the Appellants' Reply Caption is enclosed. Please stamp the extra copy "received" and return the stamped copy in the SASE.

The Appellants' record does not indicate the Appellant Court's permission for the dismissal of Attorney Medlock has been provided, nor is there permission for Charles Wilmot Miller to join the action as a Respondent. The Brief of the Respondents has not been received. SCACR Rule 208 (a)(4) contains the provision for Appellate Court action in the current case of failure of Respondents to timely file a brief. If the Court of Appeals so directs, the Appellants will be glad to revise any of the submitted documents.

Sincerely yours,



Philip H. Woolhiser

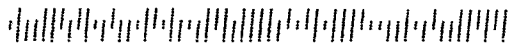
Enclosures  
PW/mw

cc: Michael S. Medlock, Esquire  
Paul Knapp Simons, Esquire  
Marsha M. Banks, Esquire  
S-17 Owners Association, Inc.  
Robert J. Berning

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**PHILIP H. WOOLHISER**  
**ATTORNEY AT LAW**

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112 Trafalgar St., S.W.  
 Aiken, South Carolina 29801

The Honorable Jenny Abbott Kitchings  
 Clerk of the SC Court of Appeals  
 PO Box 11629  
 Columbia, South Carolina 29211-1629

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