

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Judge

Appellate Case No. 2012-213309
Common Pleas Case No. 2010-CP-28-1197

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SC Court of Appeals

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U.S. Bank National Association Successor trustee to LaSalle
Bank National Association, as trustee under the Pooling and
Servicing Agreement, dated as of April 1, 2002, among
Asset Backed Funding Corporation, Litton Loan Servicing LP
and LaSalle Bank National Association, ABFC Asset Backed
Certificates, Series 2002-SB-1,.....Respondent,

v.

Kelley Burr; FIA Card Services, N.A.; Discovery Bank, Issuer
of the Discover Card; Unifund CCR Partners; Defendants,

Of Whom Kelley Burr is the.....Appellant.

PETITION FOR REHEARING OR REHEARING *EN BANC*
AND MEMORANDUM IN SUPPORT

Appellant, Kelley Burr (hereinafter, sometimes, "Burr"), hereby moves and
petitions, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable
law, for an order granting rehearing or rehearing *en banc* in this case and submits the
memorandum below in support of the same. Appellant respectfully submits that the
court may have overlooked or misapprehended certain points in this case, as the
following shows:

I. This was not a summary judgment motion.

This court's opinion states that "[a]s the trial court looked beyond the pleadings to the loan modification process, we review the court's dismissal of Burr's affirmative defenses as a grant of summary judgment." U.S. Bank National Assn. v. Burr, Op. No. 2015-UP-091 (S.C. Ct. App. filed Feb. 25, 2015). The lower court, however, did not treat the motion as one for summary judgment. The Respondent (hereinafter "U.S. Bank") agrees. In U.S. Bank's brief in this case, it stated that "U.S. Bank's motion was not considered as a motion for summary judgment[.]" (Final Brief of Respondent p. 12.) Burr never raised any issue about this below or in her briefs in this case, since conversion of U.S. Bank's motion to one for summary judgment was never an issue in this case – it did not happen. U.S. Bank never argued that the motion had been converted to one for summary judgment; hence, Burr never made any argument about that. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 418 n. 6, 526 S.E.2d 716 (2000) (appellant may address in reply brief additional sustaining ground arguments made by respondent).

Like Rule 12(b)(6), Rule 12(c), SCRCP, provides that:

If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

The Supreme Court of South Carolina has spoken to how materially identical language in Rule 12(b)(6), SCRCP, is to be interpreted. In Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 699 (1987), the Court ruled that the trial court erred in treating a motion to dismiss as one for summary judgment where "[t]he trial court

gave no notice to the parties that it was going to consider the affidavits and hear the 12(b)(6) motion as a motion for summary judgment.” Twelve years later, the Court cited Brown in stating the following:

We have interpreted this language as meaning “the trial court may treat a 12(b)(6) motion as a motion for summary judgment and consider matters presented outside the pleadings if the parties are afforded a reasonable opportunity to respond to such matters in accordance with Rule 56(c) and (e) of the South Carolina Rules of Civil Procedure. The notice provisions in Rule 56 are incorporated into Rule 12(b)(6).” Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 698-99 (1987); see also Johnson v. Dailey, 318 S.C. 318, 457 S.E.2d 613 (1995). In Brown, we found the trial court had not given notice to the parties that it was going to consider the affidavits and hear the 12(b)(6) motion as a motion for summary judgment. Thus, the supporting affidavits in Brown were improperly considered by the trial court in ruling on the 12(b)(6) motion.

...

... We find that the trial court improperly converted County’s 12(b)(6) motions into summary judgment motions. ...

... the trial court did not give notice to the parties prior to the hearing that it was going to consider affidavits and hear the 12(b)(6) motions as motions for summary judgment. The first indication that County’s 12(b)(6) motions would be converted to summary judgment motions was the trial court’s order of dismissal. Under these facts, the trial court erred in converting County’s 12(b)(6) motions into motions for summary judgment.

Baird v. Charleston Cnty., 333 S.C. 519, 527-28, 511 S.E.2d 69 (1999). The Court noted that “[p]roviding notice” – from the context, plainly meant to refer to notice that the motion would be treated as one for summary judgment – “prior to the hearing is essential under Rule 56(c). . . . However, there is no evidence in this case suggesting Doctors had any notice prior to the hearing, in compliance with Rule 56,

SCRCP, that the trial court would look beyond the pleadings in considering County's 12(b)(6) motions." Id. at 528 n. 6.

The Court has adhered to this principle through time. In 2011, the Court, in discussing this subject, stated that it "recognize[s] that a motion to dismiss may be converted into a motion for summary judgment when the court considers matters outside the pleadings[.]" but, "in order for the conversion to take place, the parties must be afforded a reasonable opportunity to introduce evidentiary matters of their own." Charleston Cnty. Sch. Dist. v. Harrell, 393 S.C. 552, 559 n. 4, 713 S.E.2d 604, 608 n. 4 (2011) (internal quotation marks omitted). Here, Burr was given no such notice, no such opportunity. Nothing would have tipped Burr off that the motion might be treated as one for summary judgment, since nothing that can be used to support a motion for summary judgment was served with U.S. Bank's motion; all that was served with it was an unsworn certification of mortgagor noncompliance signed by U.S. Bank's lawyer. In fact, at *no point* did U.S. Bank ever offer any testimony, by affidavit or otherwise, in support of its motion. (R. pp. 38-47, 52, p. 69 ln. 11-15, p. 71 ln. 23-24, p. 74 ln. 4-5.) It would have been improper for the circuit court to convert U.S. Bank's motion into one for summary judgment. Maybe that is why U.S. Bank acknowledged that its "motion was not considered as a motion for summary judgment[.]" (Final Brief of Respondent p. 12.)

In Brown, the Court rebuked the trial court for its improper procedure in implicitly converting the 12(b)(6) motion into one for summary judgment, stating that "[t]he first indication that the respondents' affidavits would be used to support the 12(b)(6) motion was the trial court's order of dismissal." 291 S.C. at 367. In Baird, the Court issued a similar rebuke, as "[t]he first indication that County's 12(b)(6)

motions would be converted to summary judgment motions was the trial court's order of dismissal." 333 S.C. at 528. In the instant case, the first indication that U.S. Bank's motion would be converted into one for summary judgment was *when this court issued its opinion on appeal*. Even U.S. Bank says that converting its motion to one for summary judgment was something the circuit court did *not* do. (Final Brief of Respondent p. 12.)

It is dubious to say that U.S. Bank's motion was really one for judgment on the pleadings, anyway. While U.S. Bank dropped a citation to Rule 12(c) into its written motion, a look at the text of the motion reveals plainly that U.S. Bank's contention was that Burr's defenses should be stricken and her counterclaims dismissed under Rule 41(b), SCRCF, for failure to prosecute. (R. pp. 32-48.) U.S. Bank's counsel focused argument at the hearing on its contention that Burr had failed to prosecute her counterclaims by failing to respond to overtures to engage in foreclosure intervention. (R. p. 60 ln. 10 – p. 67 ln. 25, p. 73 ln. 9 – p. 74 ln. 3, p. 74 ln. 22 – p. 75 ln. 4.) U.S. Bank's counsel's only argument with regard to Rule 12(c), SCRCF, was that Burr's counterclaims were moot because U.S. Bank offered her a modification. (R. p. 65 ln. 1-5, p. 67 ln. 10-16.) That was something U.S. Bank never pled; thus, it is hard to imagine how that could be the subject of a motion for judgment on the pleadings. (R. pp. 23-30.) It was also something U.S. Bank never offered any *factual material* to support. (R. pp. 38-47, 52, p. 69 ln. 11-15, p. 71 ln. 23-24, p. 74 ln. 4-5.) Burr could not possibly have been on notice that anyone would consider this motion one for summary judgment.

Rule 220(c), SCACR, provides that this court "may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." It

does not, however, permit this court to affirm on a ground that does *not* appear in the record on appeal. Nothing in the record in this case shows a conversion of U.S. Bank's motion to a summary judgment motion. Indeed, the position of *U.S. Bank* – the *Respondent* – is that no conversion to a summary judgment motion occurred. (Final Brief of Respondent p. 12.)

Appellant respectfully submits that this court overlooked or misapprehended that no conversion of U.S. Bank's motion to a summary judgment motion occurred. To affirm on this basis was error.

II. If this had been a summary judgment motion, U.S. Bank could not have prevailed on it.

Even if U.S. Bank's motion had been for summary judgment, it could not have prevailed on the record (or lack thereof) that was before the circuit court. Accordingly, even if this court still believes that U.S. Bank's motion was converted to one for summary judgment, reversal is required.

Facts presented to the court for consideration in support of or opposition to a motion for summary judgment must be admissible evidence, with the caveat that affidavits are used in place of what would be live testimony at a trial. See Dawkins v. Fields, 354 S.C. 58, 67-68, 580 S.E.2d 433, 438 (2003); Saro v. Ocean Holiday Partnership, 314 S.C. 116, 121, 441 S.E.2d 835, 838 (Ct. App. 1994). Rule 56 notes this itself; summary judgment shall be granted “if the *pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any*, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), SCRCP (emphasis added).

It is only “*when a motion for summary judgment is made and supported as provided in this rule*” that the non-movant is required to meet the motion with factual

material that shows there is a genuine issue for trial. Rule 56(e), SCRCP (emphasis added). Under Rule 56, SCRCP, “the party seeking summary judgment has the initial responsibility of demonstrating the absence of any genuine issue of material fact.” Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545-46 (1991). “The party seeking summary judgment has the burden of clearly establishing *by the record properly before the court* the absence of a triable issue of fact.” Owens v. Magill, 308 S.C. 556, 562, 419 S.E.2d 786, 790 (1992) (emphasis added). “A party who fails to show the absence of genuine issue of material fact is not entitled to summary judgment even though his adversary does not come forward with opposing materials.” Standard Fire v. Marine Contracting, 301 S.C. 418, 421, 392 S.E.2d 460, 462 (1990).

Arguments of counsel are not evidence. Trivelas v. S.C. Dept. of Transportation, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001); Higgins v. MUSC, 326 S.C. 592, 599 S.E.2d 269, 272 (Ct. App. 1997); Historic Charleston Foundation v. Krawcheck, 313 S.C. 500, 508 n. 7, 443 S.E.2d 401, 406 n. 7 (Ct. App. 1994); Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986). Arguments of counsel were all that supported U.S. Bank’s motion. (R. pp. 32-47, p. 71 ln. 21 – p. 72 ln. 7.) No testimony, by affidavit or otherwise, was served with or ever offered in support of the motion. (R. pp. 38-47, 52, p. 69 ln. 11-15, p. 71 ln. 23-24, p. 74 ln. 4-5.)

In its order, the circuit court made findings of fact solely on the basis of the unsworn contentions of U.S. Bank’s counsel, which the circuit court apparently accepted as established, proven truths. (R. pp. 1-4.) This was error. Id. In fact, there was no cognizable evidence before the court tending to establish that anything U.S.

Bank contended was true actually was, except for the dates of service and filing of the notice of right to foreclosure intervention and the certification of mortgagor noncompliance. (R. pp. 78-86.) A certification of mortgagor noncompliance under In re: Mortgage Foreclosure Actions, 396 S.C. 209, 210, 720 S.E.2d 908 (2011) (South Carolina Supreme Court Administrative Order 2011-05-02-01) – an unsworn document – is not cognizable evidence at summary judgment of anything it states. See Rule 56(c), SCRPC. This is further supported by the Supreme Court’s administrative order itself, which provides that “[n]o document, statement or evidence of any kind shared, released or exchanged exclusively for purposes of foreclosure intervention pursuant to this order shall be admissible as evidence in any subsequent proceeding.” In re: Mortgage Foreclosure Actions, 396 S.C. at 213. A foreclosure plaintiff’s lawyer’s certification of mortgagor noncompliance is not the kind of document a court may consider on a motion for summary judgment brought by that foreclosure plaintiff. See Rule 56(c), SCRPC; Dawkins, 354 S.C. at 67-68; Trivelas, 348 S.C. at 141; Higgins, 599 S.E.2d at 272; Saro, 314 S.C. at 121; Historic Charleston Foundation, 313 S.C. at 508 n. 7; Gilmore, 290 S.C. at 58.

Rule 12(c)’s provision that “[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment” does not mean that if *any documents* other than the pleadings are offered to the court, the court should consider them as though they were properly cognizable for summary judgment purposes, regardless of whether they actually are. The rule that the evidence offered at summary judgment must be what would be admissible at trial still applies. See Dawkins, 354 S.C. at 67-68; Saro, 314 S.C. at 121. U.S. Bank did not offer any such

evidence here. Burr pointed out to the circuit court that U.S. Bank had presented no affidavit or other cognizable factual material to the court. (R. p. 69 ln. 11-15.)

Appellant respectfully submits that this court overlooked or misapprehended that summary judgment would not have been proper on this record even if U.S. Bank's motion had been converted into one for summary judgment.

III. U.S. Bank neither pled nor proved mootness.

A case is nonjusticiable for mootness where, if the party prevails, it has become impossible for the court to grant him any "effectual relief" that would have "practical legal effect upon the existing controversy." Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (internal quotation marks omitted). "In general a case becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." U.S. v. (Under Seal), 819 F.2d 1139 (4th Cir. 1987) (internal quotation marks omitted) (quoting Leonard v. Hammond, 804 F.2d 838, 842 (4th Cir. 1986)). Usually, a determination of mootness is necessarily a factual determination. Cf. id. U.S. Bank did not show that Burr's counterclaims are moot.

U.S. Bank never established that the court could afford Burr no practical relief as to the controversy subject of her counterclaims and defenses. (R. p. 53, p. 71 ln. 21 – p. 72 ln. 7.) U.S. Bank never put the documents showing the terms of the modification it proposed to Burr (or claimed it proposed to her) in the record. Nothing before the court showed that any modification U.S. Bank offered complied with applicable HAMP directives or other standards, nor was there anything before the court tending to show whether the terms of the proposed modification were the same as, better than, or worse for Burr than what she was promised. (R. p. 53.) For

example, U.S. Bank never put anything into the record showing whether its proposed modification contemplated an increase in the amount of principal to recast fees and costs related to the foreclosure action as part of the loan's modified principal. Burr pled that U.S. Bank had promised her a modification and then reneged on that promise, which could not be made moot simply by U.S. Bank later offering Burr a modification. (R. pp. 16-17, 53, p. 71 ln. 21 – p. 72 ln. 7.) Burr did not solely seek a modification as the relief to be granted on her claims; she also sought an award of damages. (R. pp. 18, 19-20, 21, 53.) U.S. Bank adduced no evidence at all to the effect that the court could afford Burr no practical relief as to the existing controversy between the parties. (R. p. 53.)

U.S. Bank made no factual showing about whether a modification was offered to Burr, what its terms were, whether those terms were better or worse than what U.S. Bank had promised her before, or anything about it at all. Nonetheless, the circuit court found that this had happened and that it made Burr's claims moot. (R. pp. 3-4.) Even if, however, there were a sufficient showing in the record that U.S. Bank had offered Burr a modification, that would not be tantamount to a showing that something has happened to make it so that Burr has sustained no damages as a result of U.S. Bank breaking its promise to modify her loan, and *that* is what U.S. Bank would have had to prove in order for Burr's claims seeking damages to be moot. See id. That did not happen. The circuit court's ruling that Burr's counterclaims are moot was reversible error, both because it is based on unsupported factual conclusions and because it is controlled by an error of law concerning what mootness is.

Frankly stated, this court's opinion on this point is directly at odds with the law. The court writes that Burr's counterclaims and defenses were moot because "Burr had been offered the primary relief which she sought, a negotiated loan modification," but mootness does not depend on whether a court can afford a party the *primary* relief she seeks. Mootness depends on whether the occurrence of some event has made it *impossible* for a court to afford the party *any* effectual relief. Curtis, 345 S.C. at 567.

Appellant respectfully submits that this court overlooked or misapprehended what it is that U.S. Bank would have had to show in order for a determination that Burr's defenses and counterclaims were moot to be proper.

IV. The court's analysis does not hew to any rule that permits the dismissal of any claim or the striking of any defense.

This court's opinion states that Burr's "defenses and counterclaims were reviewed by the trial court, deemed insufficient, and dismissed." *Exactly*. That is exactly the point of this appeal. That is exactly the problem with the circuit court's order. A court is not permitted to simply "review" a party's defenses or claims, according to no rule or precedent's analytical framework, and then dismiss them. Such is quietly among the worst of what the judiciary has ever done, because to do so is to abandon the principle of the rule of law. What should govern in our courts ought to be our rules of court, not arbitrary, *ad hoc* decisionmaking. See Rule 1, SCRCPP ("[t]hese rules govern the procedure in all South Carolina courts in all suits of a civil nature"). The "review" conducted by the circuit court was not according to any rule or recognized process. "The law recognizes two kinds of errors: trial errors and structural defects. The former are subject to 'harmless error' analysis while the latter are not. . . . [S]tructural defects in the constitution of the trial mechanism defy

analysis by harmless error standards.” LaSalle Bank Nat’l. Ass’n. v. Davidson, 386 S.C. 276, 280, 688 S.E.2d 121, 123 (2009) (internal quotation marks omitted). Structural defects are errors in the very way that the process of deciding the issue is set up. Id. When a proceeding is structurally defective, nothing but reversal can cure such a defect. See id.

As discussed above, the rubric of summary judgment does not countenance the circuit court’s ruling in this case. As discussed in Burr’s briefs, no failure to prosecute – the circuit court’s stated basis for its ruling – occurred here. Burr notes that this court did not say that one did. Also as discussed in Burr’s briefs, the pleadings in this case could not have afforded the court with a basis to render a judgment on the pleadings. The circuit court did what a court is never permitted to do: end a party’s claims and defenses solely on the basis of unsupported and unsworn contentions of fact made by the other party’s lawyer. See Trivelas, 348 S.C. at 141; Higgins, 599 S.E.2d at 272; Saro, 314 S.C. at 121; Historic Charleston Foundation, 313 S.C. at 508 n. 7; Gilmore, 290 S.C. at 58.

This court affirmed that. There is a problem with that.

Appellant respectfully submits that this court overlooked or misapprehended that neither the circuit court’s analysis in reaching its decision nor this court’s analysis in affirming that decision square with any rule that permits the dismissal of any claim or the striking of any defense.

V. Rehearing or rehearing *en banc* is warranted. This is a case of first impression about the Administrative Order, and this opinion represents a departure from precedent of this court and the Supreme Court.

An *en banc* rehearing “ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its

decisions, or (2) when the proceeding involves a question of exceptional importance.” Rule 219(a), SCACR. “[W]hile Rule 219 lists certain grounds on which rehearing *en banc* may be granted, it provides only that rehearing *en banc* ‘ordinarily will not be ordered’ except upon the listed grounds. Rule 219, SCACR (2007) (emphasis added). The Court of Appeals has discretion as to whether or not to accept rehearing[.]” Williamson v. Middleton, 383 S.C. 490, 494, 681 S.E.2d 867, 869 (2009).

This is an appropriate case for *en banc* rehearing. For one thing, this decision is inconsistent with other decisions of this court regarding conversion of motions directed at pleadings into motions for summary judgment, as well as Supreme Court decisions, as discussed above. Martin v. Companion HealthCare Corp., 357 S.C. 570, 593 S.E.2d 624 (Ct. App. 2004); Pitts v. Jackson Nat. Life Ins. Co., 352 S.C. 319, 574 S.E.2d 502 (Ct. App. 2002); Higgins v. MUSC, 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997).

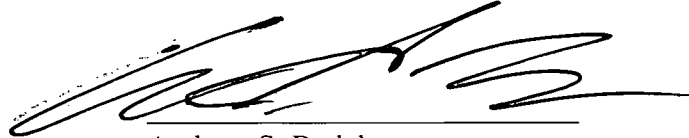
For another, this case involves a question of exceptional importance. Whether a court is permitted to dismiss or strike a foreclosure defendant’s claims and defenses for failure to participate in the foreclosure intervention process – as a judgment on the pleadings, dismissal for failure to prosecute, or anything else – is a question of first impression in this state, as well as being utterly at odds with the Supreme Court’s administrative order governing foreclosures, as discussed in Burr’s briefs. The operative Supreme Court administrative order provides that what is to happen in such circumstances is just for the foreclosure action to proceed, not for a mortgagor defendant’s claims to be dismissed and her defenses stricken. In re: Mortgage Foreclosure Actions, 396 S.C. at 212.

VI. Burr points the court to her briefs in this case.

In addition to the matters discussed above, Burr incorporates into this petition as if here set forth verbatim her final briefs in this case.

WHEREFORE Appellant prays for an order granting rehearing or rehearing *en banc* in this case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Andrew S. Radeker', written over a horizontal line.

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March 12, 2015

THE STATE OF SOUTH CAROLINA
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APPEAL FROM KERSHAW COUNTY
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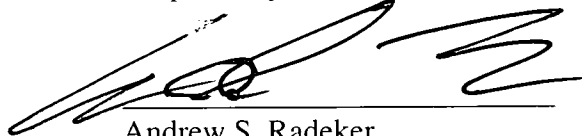
PROOF OF SERVICE

I certify that I served the foregoing petition for rehearing or rehearing *en banc*
and memorandum in support by depositing a copy of it on the date shown below in
the United States Mail, postage prepaid, addressed as follows:

Sean A. O'Connor, Esq.
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March 12, 2015

Respectfully submitted,



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March 12, 2015

VIA HAND DELIVERY

The Hon. Jenny Abbott Kitchings
Clerk of Court, Court of Appeals of South Carolina
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Columbia, South Carolina 29201

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RE: U.S. Bank, etc. v. Kelley Burr, et al.
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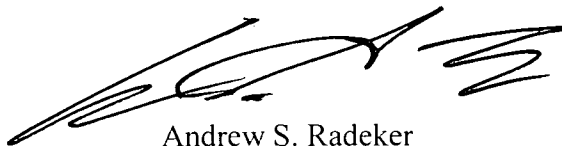
Dear Ms. Kitchings:

Enclosed herewith for filing in the above-referenced case are an original and seven copies of a petition for rehearing or rehearing *en banc* and memorandum in support, with attached proof of service thereof. Also enclosed is this firm's check in the amount of \$25.00 as the motion fee.

Kindly file these documents and return a file-stamped copy thereof to the bearer of this letter. Of course, if you or your staff have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am,

Very truly yours,
HARRISON & RADEKER, P.A.



Andrew S. Radeker

ASR/

Enclosures

cc: Sean A. O'Connor, Esq.