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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF COLLETON	)	CASE NUMBER: 2013-CP-15-023
	)	
James C. Kincannon, James J. Kincannon, and Carolyn R. Kincannon,	)	
	)	
Plaintiffs,	)	
	)	**ORDER GRANTING U.S. BANK'S MOTION FOR SUMMARY JUDGMENT**
vs.	)	
	)	
U.S. Bank National Association and U.S. Bank National Association ND,	)	
	)	
Defendants.	)	

Judge:	The Honorable Doyet A. Early, III
Plaintiffs' Attorney:	Todd Kincannon, Esquire
Defendants Attorney:	John C. Hawk, Esquire

This matter came before the Court on April 14, 2015, for a hearing on Defendant U.S. Bank's Motion for Summary Judgment. Plaintiffs James C. Kincannon, James J. Kincannon, and Carolyn R. Kincannon ("**Plaintiffs**") were represented by Todd Kincannon of The Kincannon Firm. Defendants U.S. Bank National Association and U.S. Bank National Association ND ("**U.S. Bank**") were represented by John Hawk of Womble Carlyle Sandridge & Rice, L.L.P. At the hearing, Plaintiffs' counsel argued that summary judgment was inappropriate because the Plaintiffs had effectively dismissed their case by filing a Judgment of Retraxit. However, on April 17, 2015, Plaintiffs' counsel advised the Court by letter that, after further consideration, Plaintiffs consented to U.S. Bank's Motion for Summary Judgment.[1]

Following entry of Judge Buckner's Order Granting Defendants' Motion to Dismiss, in Part, and Denying Defendants' Motion to Dismiss, in Part, filed on January 6, 2014, only one of Plaintiffs' original four causes of action remains in this case. The remaining claim is a request

[1] A copy of Mr. Kincannon's letter is attached as **Exhibit A**.

for a permanent injunction which would prevent U.S. Bank from performing property inspections on the Plaintiffs' mortgaged property "without Plaintiffs' express prior permission." Complaint, ¶ 59. Considering the Plaintiffs' consent, and after carefully reviewing memoranda and proposed orders submitted by the parties, hearing arguments from counsel for both parties, and considering the applicable law and facts related to this Motion, the Court finds it is proper to enter an Order Granting U.S. Bank's Motion for Summary Judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. U.S. Bank's Motion for Summary Judgment is GRANTED as to Plaintiffs' last remaining cause of action.
2. This Order ends the case.

AND IT IS SO ORDERED.

The Honorable Doyet A. Early, III

April 27, 2015
Greenville, South Carolina

(b)

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF COLLETON)

James C. Kincannon, James J. Kincannon, and Carolyn R. Kincannon, ☐ Plaintiff) CASE NO. 2013-CP-15-1023

v.) MOTION AND ORDER INFORMATION FORM AND COVER SHEET

U.S. Bank National Association, U.S. Bank National Association ND, Unknown U.S. Bank Entities, Greenville Process Service, Five Brothers Mortgage Company Services And Securing Inc., And John Does #1-50, ☒ Defendant.)

RECEIVED
NOV 30 2015
SC Court of Appeals

Plaintiff's Attorney:	Defendant's Attorney:
J. Todd Kincannon, Bar No. Address: PO Box 7901, Columbia, SC 29201 phone: fax: e-mail: other:	John C. Hawk; Jana B. Baker, Bar No. Address: WCSR, 5 Exchange Street, Charleston, SC 29401 phone: 843-722-3400 fax: e-mail: jhawk@wcsr.com; jabaker@wcsr.com other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS
2015 MAY -6 AM 11:37

SECTION I: Hearing Information

Nature of Motion: Order Granting US Bank's Motion for Summary Judgment

Estimated Time Needed: Court Reporter Needed: ☐ YES / ☒ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ May 4, 2015

Signature of Attorney for ☐ Plaintiff / ☒ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00

☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status
- ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act
- ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication
- ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

- ☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

_____

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED – AMOUNT DUE: _____

6

5

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF COLLETON	)	
	)	
James C. Kincannon, James J. Kincannon, and Carolyn R. Kincannon, ☐ Plaintiff	)	CASE NO.
	)	2013-CP-15-1023
v.	)	MOTION AND ORDER INFORMATION FORM AND COVER SHEET
U.S. Bank National Association, U.S. Bank National Association ND, Unknown U.S. Bank Entities, Greenville Process Service, Five Brothers Mortgage Company Services And Securing Inc., And John Does #1-50, ☒ Defendant.	)	

Plaintiff's Attorney:	Defendant's Attorney:
J. Todd Kincannon, Bar No. Address: PO Box 7901, Columbia, SC 29201 phone: fax: e-mail: other:	John C. Hawk; Jana B. Baker, Bar No. Address: WCSR, 5 Exchange Street, Charleston, SC 29401 phone: 843-722-3400 fax: e-mail: jhawk@wcsr.com; jabaker@wcsr.com other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Order Granting US Bank's Motion to Strike Plaintiffs' Form 4 Orders and Judgments by Confession filed January 13, 2015 and January 30, 2015

Estimated Time Needed: Court Reporter Needed: ☐ YES / ☒ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — May 4, 2015 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00

☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA COUNTY OF COLLETON	)))	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT CASE NUMBER: 2013-CP-15-1023
James C. Kincannon, James J. Kincannon, and Carolyn R. Kincannon, Plaintiffs, vs. U.S. Bank National Association and U.S. Bank National Association ND, Defendants.	)	**ORDER GRANTING U.S. BANK'S MOTION TO STRIKE PLAINTIFFS' FORM 4 ORDERS AND JUDGMENTS BY CONFESSION FILED JANUARY 13, 2015 AND JANUARY 30, 2015**

Judge:	The Honorable Doyet A. Early, III
Plaintiffs' Attorney:	Todd Kincannon, Esquire
Defendants Attorney:	John C. Hawk, Esquire

This matter came before the Court on April 14, 2015, for a hearing on Defendant U.S. Bank's Amended Motion to Strike Plaintiffs' Form 4 and Judgment by Confession (the "Hearing"). At the Hearing, the Plaintiffs James C. Kincannon, James J. Kincannon, and Carolyn R. Kincannon ("Plaintiffs") were represented by Todd Kincannon of The Kincannon Firm. Defendants U.S. Bank National Association and U.S. Bank National Association ND (collectively, "U.S. Bank") were represented by John Hawk of Womble Carlyle Sandridge & Rice, L.L.P.

At the Hearing, Plaintiffs' counsel advised the Court that Plaintiffs consented to U.S. Bank's efforts to strike their purported confession of judgment dated January 13, 2015, their Form 4 dated January 13, 2015, and their Form 4 dated January 30, 2015. As such, the only remaining issue is for the Court to determine whether the Plaintiffs' "Judgment by Confession in

Favor of Defendants as to Setoff/Recoupment," filed January 30, 2015, should be struck from the judgment roll of Colleton County.

After carefully reviewing the memoranda submitted by the parties, hearing arguments from counsel for both parties, and considering the applicable law and facts related to this Motion, the Court finds it is proper to enter an Order Striking Plaintiffs' Form 4 orders and Judgments by Confession filed January 13, 2015 and January 30, 2015.

FINDINGS OF FACT

1. On February 10, 2010, Plaintiffs James John Todd Kincannon and James Charles Kincannon executed a promissory Note promising to repay $300,000.00, plus interest, over a period of thirty years ("Note"). The Note is secured by a Mortgage on the subject property dated February 2, 2010 (the "Mortgage").
2. U.S. Bank brought a foreclosure action against Plaintiffs on November 9, 2012, styled *U.S. Bank v. Kincannon*, 2012-CP-15-885 ("Foreclosure Action"). U.S. Bank dismissed that action *without* prejudice on July 18, 2013, after the parties entered into a Loan Modification Agreement.[1]
3. After the Foreclosure Action was dismissed, Plaintiffs brought a separate action against U.S. Bank styled *Kincannon v. U.S. Bank*, 2013-CP-15-708 ("First Kincannon Lawsuit"). The First Kincannon Lawsuit sought money damages and a declaration that the Note and Mortgage were unenforceable.
4. The parties dismissed the First Kincannon Lawsuit, *with prejudice*, on October 22, 2013.
5. One day after the Stipulation of Dismissal with Prejudice was entered by the Court in the First Kincannon Lawsuit, Plaintiffs brought the present lawsuit. Like the First Kincannon

[1] The Loan Modification Agreement was filed with the Register of Deeds Office of Colleton County on May 2, 2013.

#2

Lawsuit, Plaintiffs' Complaint sought a declaration that the Note and Mortgage are unenforceable. Plaintiffs' Complaint included four causes of action: (1) declaratory judgment; (2) statutory failure to release mortgage; (3) contractual failure to release mortgage; and (4) permanent injunction.

6. On December 18, 2013, this Court rejected the Plaintiffs' legal theory and entered an Order filed on January 6, 2014 Granting Defendants' Motion to Dismiss, in Part, and Denying Defendants' Motion to Dismiss, in Part (the "Order," filed on Jan. 6, 2014). The Order dismissed all Plaintiffs' causes of action related to the enforceability of the Note and Mortgage and specifically found that "the Note and Mortgage remain enforceable." Order, p. 4.

7. Plaintiffs initially appealed the Order. However, Plaintiffs ultimately filed a Notice of Abandonment of Appeal. The Court of Appeals entered an order dismissing the appeal on January 16, 2015.

8. Plaintiffs' only remaining cause of action is equitable. Specifically, Plaintiffs seek a permanent injunction which would prevent U.S. Bank from performing property inspections on the Plaintiffs' mortgaged property "without Plaintiffs' express prior permission." Complaint, ¶ 59. Plaintiffs seek only injunctive relief, and not damages, with regard to this cause of action.

9. U.S. Bank filed an Amended Answer in response to the remaining cause of action on January 15, 2014. The Answer listed twenty-six affirmative defenses, including an affirmative defense of set-off/recoupment. That defense stated: "[I]f and to the extent Plaintiffs are entitled to recover damages against U.S. Bank, which is expressly denied, U.S. Bank is entitled to set off the damages caused by Plaintiffs' breach of the terms of

[the] promissory note against any amount U.S. Bank is required to pay on the claims asserted by Plaintiffs." Amended Answer, ¶ 78.

10. Without conferring with U.S. Bank, Plaintiffs filed a Form 4 and Judgment by Confession in Favor of Defendants on January 13, 2015.

11. In response, U.S. Bankfiled a Notice of Motion and Motion to Strike same on January 26, 2015.

12. On January 30, 2015, Plaintiffs filed a Consent to Defendants' Request to Strike Materials Filed by Plaintiffs.

13. Also on January 30, 2015, and again without conferring with U.S. Bank, Plaintiffs filed a new Form 4 ("**Form 4**") and Judgment by Confession in Favor of Defendants as to Setoff/Recoupment ("**Judgment by Confession**").

14. On the Form 4, Plaintiffs stated that the "Judgment Amount to be Enrolled" was $0.

15. The Judgment by Confession does not confess judgment to a sum certain, but rather purports to confess judgment as to "U.S. Bank's setoff/recoupment defense." It specifically states: "Plaintiffs hereby confess judgment. . . to U.S. Bank's setoff/recoupment defense. Plaintiffs authorize the entry of a final judgment in favor of U.S. Bank on the setoff/recoupment defense permitting U.S. Bank to reduce any monetary award to Plaintiffs in this action by $381,651.73."

16. On February 23, 2015, U.S. Bank filed an Amended Notice of Motion and Motion to Strike to address the Form 4 and Confession of Judgment filed on January 30, 2015.

17. On April 17, 2015, Plaintiffs' counsel consented to summary judgment on Plaintiffs' last remaining cause of action.

18. Also on April 17, 2015, Plaintiffs' counsel consented to striking from the judgment roll the Plaintiffs' Form 4 filed January 13, 2015, Plaintiffs' Judgment by Confession in Favor of Defendants filed on January 13, 2015, and Plaintiffs' Form 4 filed on January 13, 2015.

ANALYSIS

1. **U.S. Bank's affirmative defense of setoff/recoupment was legally insufficient and is hereby struck from U.S. Bank's Amended Answer.**

Any discussion of the adequacy or appropriateness of Plaintiffs' Confession of Judgment is unnecessary. Instead, this Court need only examine U.S. Bank's affirmative defense of "setoff/recoupment." That defense is legally insufficient and is therefore struck from the Amended Answer. With no affirmative defense to confess judgment to, Plaintiffs' Confession of Judgment fails as a matter of law and must also be struck from the record.

Rule 12(f) allows courts to strike insufficient pleadings *sua sponte*: "[U]pon the court's own initiative, at any time the court may order stricken from any pleading any insufficient defense." SCRCP 12(f). As set forth above, at the time U.S. Bank filed its Amended Answer, Plaintiffs' only surviving cause of action was a claim for permanent injunction.[2] This cause of action only sought to prevent U.S. Bank from performing interior inspections of the mortgaged property. Importantly, it did *not* seek actual damages. Because it is impossible to take a setoff from injunctive relief, U.S. Bank's setoff/recoupment defense was meaningless and therefore legally insufficient. The Court therefore strikes the defense of setoff/recoupment from U.S. Bank's Amended Answer.

Plaintiffs' Confession of Judgment specifically confesses judgment "as to U.S. Bank's setoff/recoupment defense." Because the setoff/recoupment defense has been struck from the

[2] Plaintiffs have since consented to summary judgment on this cause of action.

pleadings, Plaintiffs' purported Confession of Judgment confesses judgment to nothing, and therefore must also be struck. As such, to the extent it was enrolled as a judgment, Plaintiffs' Confession of Judgment shall now be struck from the judgment roll of Colleton County.

2. **Sections 15-35-350 and 15-35-360 do not permit a judgment by confession in this case.**

Even if the affirmative defense of setoff/recoupment had not been struck from U.S. Bank's Amended Answer, Plaintiffs' purported Confession of Judgment to U.S. Bank's setoff defense would still be legally insufficient and would still be struck from the judgment roll of Colleton County. The South Carolina Code does not permit a confession of judgment under these circumstances.

Judgments by confession are governed by S.C. Code Ann. § 15-35-350, *et seq.* According to the Code:

> A judgment by confession may be entered without action either for money due or to become due or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed in this article.

S.C. Code Ann. § 15-35-350.

There are three situations when a judgment by confession is permitted: when money is due, when money will become due, and to secure against a contingent liability. In the present case, none of those situations apply and a judgment by confession is not permitted. As explained, Plaintiffs' only remaining cause of action at the time U.S. Bank filed its Amended Answer was for permanent injunction. This cause of action sought a ruling that U.S. Bank is not permitted to inspect the Property without the prior written consent of the Plaintiffs. It did not seek monetary damages. Plaintiffs could not collect damages as a result of this lawsuit, and without damages, there could be no setoff. Therefore, while the Plaintiffs purport to confess judgment as to U.S.

Bank's setoff/recoupment defense, in reality, confessing judgment was impossible. There was no money due[3], no money would become due, and there could be no contingent liability. Therefore, there could be no confession of judgment on U.S. Bank's setoff/recoupment defense. S.C. Code Ann. § 15-35-350.

Further, the Plaintiffs consented to summary judgment on their claim for permanent injunction. Logically, when they consented to summary judgment on this last remaining cause of action, they waived the ability to collect damages on that cause of action. Again, Plaintiffs could not collect damages as a result of this lawsuit, and without damages, there could be no setoff. As to U.S. Bank's setoff/recoupment defense, there was no money due, no money would become due, and there could be no contingent liability. Therefore, there could be no confession of judgment on U.S. Bank's setoff/recoupment defense. S.C. Code Ann. § 15-35-350.

Further still, U.S. Bank's affirmative defense of setoff was conditional. It stated: *"[I]f and to the extent Plaintiffs are entitled to recover damages against U.S. Bank . . ."* The defense of setoff was contingent on an award of damages to the Plaintiffs, but this never happened, and indeed, could not have happened. The Court never determined, and could not have determined, that Plaintiffs were "entitled to recover damages against U.S. Bank." Therefore, there was no verdict from which Plaintiffs could take a setoff. The Confession of Judgment is a meaningless and legally insufficient filing, and must be struck from the judgment roll.[4]

S.C. Code Ann. § 15-35-360 sets out additional requirements for judgments by confession, and includes the following:

---

[3] This Order in no way implies that U.S. Bank is barred from bringing a foreclosure action on the Note and Mortgage in the future.

[4] The Form 4 filed contemporaneously with the confession of Judgment supports the finding that the confession of Judgment was meaningless. It lists the "amount to be enrolled" against Plaintiffs as $0.

> Before a judgment by confession shall be entered a statement in writing must be made and signed by the defendant and verified by his oath to the following effect:
>
> (1) It must state the amount for which judgment may be entered and authorize the entry of judgment therefor. . .

S.C. Code Ann. § 15-35-360. Plaintiffs' Confession of Judgment does not comply with these requirements because it does not actually confess judgment to any money nor does it authorize the entry of a judgment for any actual money. Again, it is a meaningless filing. It purports to confess judgment by "reduc[ing] any monetary award to Plaintiffs' in this action by $381,651.73." As set forth above, however, there can be no monetary award to Plaintiffs in this matter. That explains why, in the Form 4 accompanying the Judgment by Confession, the judgment amount to be enrolled against each of the Plaintiffs is listed by the Plaintiffs as *zero dollars*. Because the purported judgment does not actually state the amount of the judgment to be entered and does not authorize the entry of a money judgment, it fails to satisfy the statutory requirement and is therefore struck from the record.

IT IS THEREFORE ORDERED:

1. The following filings by Plaintiffs are hereby struck from the record and removed from the judgment roll of Colleton County:
    a. Form 4 filed January 13, 2015.
    b. Judgment by Confession in Favor of Defendants filed January 13, 2015.
    c. Form 4 filed January 30, 2015.
    d. Judgment by Confession in Favor of Defendants as to Setoff/Recoupment filed January 30, 2015.

2. Plaintiffs shall not file any additional Form 4 Orders or judgments by confession in this matter without first obtaining the express written consent of U.S. Bank, and if Plaintiffs fail to abide by the terms of the Order, Plaintiffs shall be contempt of this Order.
3. This Order shall not affect U.S. Bank's enforcement rights as to the subject Note and Mortgage, including U.S. Bank's rights to file future foreclosure actions against Plaintiffs.

AND IT IS SO ORDERED.

The Honorable Doyet A. Early, III

April 24, 2015
South Carolina

CERTIFICATE OF SERVICE

I, Carla Cerchione, an employee of Womble, Carlyle, Sandridge & Rice PLLC, do hereby certify that I have this date, mailed, postage prepaid, and/or via electronic mail a true and correct copy of the **ORDER GRANTING US BANK'S MOTION FOR SUMMARY JUDGMENT** AND **ORDER GRANTING US BANK'S MOTION TO STRIKE PLAINTIFFS' FORM 4 ORDERS AND JUDGMENTS BY CONFESSION FILED JANUARY 13, 2015 AND JANUARY 30, 2015** to the following counsel of record:

J. Todd Kincannon, Esquire
The Kincannon Firm
P.O. Box 7901
Columbia, SC 29202

5/4/15

PATRICIA D. GRANT
COLLETON COUNTY
COMMON PLEAS
2015 MAY -6 AM 11:38

Todd Kincannon

From: Hawk, John
Sent: Monday, May 11, 2015 12:19 PM
To: 'Todd Kincannon (todd@thekincannonfirm.com)'
Subject: RE: Kincannon v. U.S. Bank- filed orders
Attachments: Packet to Kincannon serving Filed Order Granting MSJ and Order Granting ....pdf

Todd,

Please find file-stamped copies of the below-listed orders attached. I am also sending them to you by U.S. Mail today.

Sincerely,

John

John C. Hawk IV
Womble Carlyle Sandridge & Rice, PLLC
P: (843) 720-4626
F: (843) 723-7398
jhawk@wcsr.com
5 Exchange St.
PO Box 999 (29402)
Charleston, SC 29401

From: Hawk, John
Sent: Monday, May 04, 2015 4:26 PM
To: Todd Kincannon (todd@thekincannonfirm.com)
Subject: Kincannon v. U.S. Bank- orders signed by Judge Early

Todd,

Attached please find correspondence mailed to the Colleton County Clerk of Court today. The correspondence includes two orders signed by Judge Early:

1. **ORDER GRANTING U.S. BANK'S MOTION TO STRIKE PLAINTIFFS' FORM 4 ORDERS AND JUDGMENTS BY CONFESSION FILED JANUARY 13, 2015 AND JANUARY 30, 2015**
2. **ORDER GRANTING U.S. BANK'S MOTION FOR SUMMARY JUDGMENT**

Please let me know if you would like to discuss.

Sincerely,

John

John C. Hawk IV
Womble Carlyle Sandridge & Rice, PLLC
P: (843) 720-4626
F: (843) 723-7398
jhawk@wcsr.com
5 Exchange St.
PO Box 999 (29402)
Charleston, SC 29401

WOMBLE CARLYLE SANDRIDGE & RICE
A LIMITED LIABILITY PARTNERSHIP

5 Exchange Street
Charleston, SC 29401

Mailing Address:
Post Office Box 999
Charleston, SC 29402
Telephone: (843) 722-3400
Fax: (843) 723-7398
www.wcsr.com

JOHN C. HAWK, IV
ATTORNEY AT LAW
E-Mail: jhawk@wcsr.com
Direct Dial: (843) 720-4626

May 11, 2015

J. Todd Kincannon, Esquire
The Kincannon Firm
P.O. Box 7901
Columbia, SC 29202

RE: James C. Kincannon, James J. Kincannon, and Carolyn R. Kincannon v. U. S. Bank National Association, et al.
Case No.: 2013-CP-15-1023
WCSR No.: 45479.0006.1

Dear Todd:

Enclosed for service upon you, please find the filed ***ORDER GRANTING US BANK'S MOTION FOR SUMMARY JUDGMENT*** AND ***ORDER GRANTING US BANK'S MOTION TO STRIKE PLAINTIFFS' FORM 4 ORDERS AND JUDGMENTS BY CONFESSION FILED JANUARY 13, 2015 AND JANUARY 30, 2015*** with regard to the above referenced matter.

Should you have any questions, please do not hesitate to call. Thank you for your kind assistance.

Very truly yours,

WOMBLE CARLYLE SANDRIDGE & RICE LLP

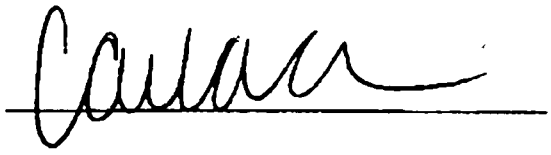
John C. Hawk, IV

JCH/cxc
Enclosures

CERTIFICATE OF SERVICE

I, Carla Cerchione, an employee of Womble, Carlyle, Sandridge & Rice PLLC, do hereby certify that I have this date, May 11, 2015, mailed, postage prepaid, and/or via electronic mail a true and correct copy of the **ORDER GRANTING US BANK'S MOTION FOR SUMMARY JUDGMENT AND ORDER GRANTING US BANK'S MOTION TO STRIKE PLAINTIFFS' FORM 4 ORDERS AND JUDGMENTS BY CONFESSION FILED JANUARY 13, 2015 AND JANUARY 30, 2015** to the following counsel of record:

J. Todd Kincannon, Esquire
The Kincannon Firm
P.O. Box 7901
Columbia, SC 29202



THE KINCANNON FIRM

April 17, 2015

Via Email to dearlylc@sccourts.org
Hon. Doyet A. Early, III
P.O. Box 90
Bamberg, SC 29003

Re: Kincannon v. U.S. Bank, 2013-CP-15-1023
Plaintiffs' Consent to U.S. Bank's Motion for Summary Judgment

Dear Judge Early:

On April 14, 2015, you heard two motions made by U.S. Bank in the above case. One was a motion for summary judgment as to the fourth cause of action in Plaintiffs' complaint, a claim for permanent injunctive relief. Please be advised that after further consideration, Plaintiffs now consent to U.S. Bank being awarded summary judgment as to that cause of action. I have enclosed a proposed order for your review reflecting Plaintiffs' consent.

I have also enclosed a proposed order for your review as to U.S. Bank's other motion, a motion to strike. While Plaintiffs consent to striking three out of the four items U.S. Bank seeks to strike, the parties continue to disagree as to whether the confession of judgment filed on January 30, 2015 should be struck. The enclosed proposed order reflects Plaintiffs' view of that issue. I apologize for its length, but I wanted to make certain that everything raised by U.S. Bank in their memorandum and at the hearing was addressed in the order.

With kindest regards, I remain,

Very truly yours,

J. Todd Kincannon

J. Todd Kincannon

cc: John Hawk, Esq., Counsel for U.S. Bank

POST OFFICE BOX 7901 · COLUMBIA, SOUTH CAROLINA 29202
OFFICE: 877.99.COURT · FAX: 888.704.2010 · TODD@THEKINCANNONFIRM.COM

Exhibit A

Exhibit 2

Todd Kincannon

From: Todd Kincannon
Sent: Monday, May 11, 2015 12:21 PM
To: John Hawk
Subject: RE: Kincannon v. U.S. Bank- filed orders

Thx. No need to mail unless you already have. I'll accept by email.

On May 11, 2015 12:19 PM, "Hawk, John" <JHawk@wcsr.com> wrote:

Todd,

Please find file-stamped copies of the below-listed orders attached. I am also sending them to you by U.S. Mail today.

Sincerely,

John

John C. Hawk IV
Womble Carlyle Sandridge & Rice, PLLC
P: (843) 720-4626
F: (843) 723-7398
jhawk@wcsr.com
5 Exchange St.
PO Box 999 (29402)
Charleston, SC 29401

From: Hawk, John
Sent: Monday, May 04, 2015 4:26 PM
To: Todd Kincannon (todd@thekincannonfirm.com)
Subject: Kincannon v. U.S. Bank- orders signed by Judge Early

Todd,

Attached please find correspondence mailed to the Colleton County Clerk of Court today. The correspondence includes two orders signed by Judge Early:

1. **ORDER GRANTING U.S. BANK'S MOTION TO STRIKE PLAINTIFFS' FORM 4 ORDERS AND JUDGMENTS BY CONFESSION FILED JANUARY 13, 2015 AND JANUARY 30, 2015**

2. **ORDER GRANTING U.S. BANK'S MOTION FOR SUMMARY JUDGMENT**

Please let me know if you would like to discuss.

Sincerely,

John

John C. Hawk IV
Womble Carlyle Sandridge & Rice, PLLC
P: (843) 720-4626
F: (843) 723-7398
jhawk@wcsr.com
5 Exchange St.
PO Box 999 (29402)
Charleston, SC 29401

Exhibit 3

Todd Kincannon

From: Hawk, John
Sent: Monday, May 11, 2015 12:23 PM
To: 'Todd Kincannon'
Subject: RE: Kincannon v. U.S. Bank- filed orders

Thanks. Already in the mail, though.

From: Todd Kincannon [mailto:todd@thekincannonfirm.com]
Sent: Monday, May 11, 2015 12:21 PM
To: Hawk, John
Subject: RE: Kincannon v. U.S. Bank- filed orders

Thx. No need to mail unless you already have. I'll accept by email.

On May 11, 2015 12:19 PM, "Hawk, John" <JHawk@wcsr.com> wrote:

Todd,

Please find file-stamped copies of the below-listed orders attached. I am also sending them to you by U.S. Mail today.

Sincerely,

John

John C. Hawk IV
Womble Carlyle Sandridge & Rice, PLLC
P: (843) 720-4626
F: (843) 723-7398
jhawk@wcsr.com
5 Exchange St.
PO Box 999 (29402)
Charleston, SC 29401

From: Hawk, John
Sent: Monday, May 04, 2015 4:26 PM
To: Todd Kincannon (todd@thekincannonfirm.com)
Subject: Kincannon v. U.S. Bank- orders signed by Judge Early

Todd,

Attached please find correspondence mailed to the Colleton County Clerk of Court today. The correspondence includes two orders signed by Judge Early:

1. **ORDER GRANTING U.S. BANK'S MOTION TO STRIKE PLAINTIFFS' FORM 4 ORDERS AND JUDGMENTS BY CONFESSION FILED JANUARY 13, 2015 AND JANUARY 30, 2015**

2. **ORDER GRANTING U.S. BANK'S MOTION FOR SUMMARY JUDGMENT**

Please let me know if you would like to discuss.

Sincerely,

John

John C. Hawk IV
Womble Carlyle Sandridge & Rice, PLLC
P: (843) 720-4626
F: (843) 723-7398
jhawk@wcsr.com
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Charleston, SC 29401

Exhibit D

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP-15-1023

James C. Kincannon, James J. Kincannon, and Carolyn R. Kincannon
PLAINTIFF(S)

U.S. Bank National Association, and U.S. Bank National Association ND
DEFENDANT(S)

Submitted by: Todd Kincannon, Esq.

Attorney for : ☒ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

2015 SEP 10 AM 10:01

COLLETON COUNTY, S.C.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: After full consideration, James C. Kincannon, James J. Kincannon, and Carolyn R. Kincannon's Motion to Reconsider is hereby DENIED.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

M Ewart III

Circuit Court Judge

0136
Judge Code

09/11/2015
Date

For Clerk of Court Office Use Only

This judgment was entered on the 14th day of Sept, 2015 and a copy mailed first class or placed in the appropriate attorney's box on this 21st day of Sept, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Patricia C. Grant fm
CLERK OF COURT

Court Reporter:

PROOF OF SERVICE

I, the undersigned Legal Secretary of the law offices of Womble Carlyle Sandridge & Rice LLP, Attorneys for Respondent, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by mailing a copy of the same, postage prepaid, to the following address(es):

Pleading: Motion to Dismiss Appeal

Parties Served: James C. & Carolyn R. Kincannon
216 Jones Avenue
Simpsonville, SC 29681

James J. Kincannon
200 Townes Road
Columbia, SC 29210

Edwin T. Mathis

November 30, 2015

Exhibit A

THE KINCANNON FIRM

April 17, 2015

Via Email to dearlylc@sccourts.org
Hon. Doyet A. Early, III
P.O. Box 90
Bamberg, SC 29003

Re: Kincannon v. U.S. Bank, 2013-CP-15-1023
Plaintiffs' Consent to U.S. Bank's Motion for Summary Judgment

Dear Judge Early:

On April 14, 2015, you heard two motions made by U.S. Bank in the above case. One was a motion for summary judgment as to the fourth cause of action in Plaintiffs' complaint, a claim for permanent injunctive relief. Please be advised that after further consideration, Plaintiffs now consent to U.S. Bank being awarded summary judgment as to that cause of action. I have enclosed a proposed order for your review reflecting Plaintiffs' consent.

I have also enclosed a proposed order for your review as to U.S. Bank's other motion, a motion to strike. While Plaintiffs consent to striking three out of the four items U.S. Bank seeks to strike, the parties continue to disagree as to whether the confession of judgment filed on January 30, 2015 should be struck. The enclosed proposed order reflects Plaintiffs' view of that issue. I apologize for its length, but I wanted to make certain that everything raised by U.S. Bank in their memorandum and at the hearing was addressed in the order.

With kindest regards, I remain,

Very truly yours,

J. Todd Kincannon

Todd Kincannon

cc: John Hawk, Esq., Counsel for U.S. Bank

POST OFFICE BOX 7901 · COLUMBIA, SOUTH CAROLINA 29202
OFFICE: 877.99.COURT · FAX: 888.704.2010 · TODD@THEKINCANNONFIRM.COM

Exhibit A

Exhibit B

Hawk, John

From: Todd Kincannon <todd@thekincannonfirm.com>
Sent: Monday, May 11, 2015 12:21 PM
To: Hawk, John
Subject: RE: Kincannon v. U.S. Bank- filed orders

Thx. No need to mail unless you already have. I'll accept by email.

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Charleston, SC 29401

Exhibit C

STATE OF SOUTH CAROLINA COUNTY OF COLLETON	IN THE COURT OF COMMON PLEAS
James C. Kincannon, James J. Kincannon, and Carolyn R. Kincannon, Plaintiffs, v. U.S. Bank National Association and U.S. Bank National Association ND, Defendants.	Civil Action No. 2013-CP-15-1023 **MEMORANDUM IN REPLY TO U.S. BANK'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO RECONSIDER SERVED MAY 26, 2015**

Plaintiffs respectfully submit the following memorandum in reply to U.S. Bank's memorandum in opposition to Plaintiffs' motion to reconsider served May 26, 2015. The substance of U.S. Bank's memorandum is that Plaintiffs' motion to reconsider is untimely because Plaintiffs' counsel agreed to accept service of the order in question by email on May 11, 2015 but did not serve the motion to reconsider until May 26, 2015, outside the ten-day deadline established by Rule 59(e), SCRCP. The basis of this memorandum in reply is that the email exchange cited by U.S. Bank's counsel is simply not an agreement to accept service by email, and even if it was, it does not comply with Rule 43(k), SCRP and is therefore not binding on Plaintiffs.

BACKGROUND

On April 14, 2015, a hearing was held before the Hon. Doyet A. Early, III on two motions filed by U.S. Bank, a motion for summary judgment and a motion to strike certain filings previously made by Plaintiffs. In late April, Judge Early decided to rule for U.S. Bank and signed two orders, one for each motion. Because U.S. Bank was the prevailing party, Judge Early provided the signed orders to U.S. Bank's counsel for filing

with the Colleton County Clerk of Court.

U.S. Bank's counsel received the signed orders at some point in late April or early May. On May 4, 2015, U.S. Bank's counsel mailed the orders to the Colleton County Clerk of Court. The submission to the Colleton County Clerk of Court was copied to Plaintiffs' counsel and included a cover letter, both of the signed orders (bearing original wet-ink signatures), a photocopy of each order to be file-stamped and returned to U.S. Bank's counsel and—for some reason—a motion/order cover sheet plus a $25 filing fee for each order along with a certificate of service.[1]

The Colleton County Clerk of Court's office received the mailing on May 6, 2015 and the originals and the copies were file-stamped that morning. The file-stamped copies were mailed back to U.S. Bank's counsel, and U.S. Bank's counsel received the file-stamped copies at some point in the next few days, on or before May 11, 2015.

At 12:19 p.m. on May 11th, U.S. Bank's counsel sent an email to Plaintiffs' counsel containing scans of the file-stamped copies and a cover letter. An authentic copy of the email plus attachments is attached as Exhibit 1. The entire body of the email is as follows: "Todd, Please find file-stamped copies of the below-listed orders attached. I am also sending them to you by U.S. Mail today. Sincerely, John." This email also contained a signature block for U.S. Bank's counsel, John Hawk.

Two minutes later, at 12:21 p.m. on May 11th, Plaintiffs' counsel sent an email in reply, an authentic copy of which is attached as Exhibit 2. The entire body of that email is

[1] The motion/order cover sheets were unnecessary, as were the filing fees, because the orders in question granted motions that U.S. Bank had already filed and paid the filing fees for. Accordingly, the Colleton County Clerk of Court returned the filing fee checks to U.S. Bank's counsel. The certificate of service was unnecessary as well because there is no service requirement when signed-but-unfiled orders are transmitted to the clerk's office for filing.

as follows: "Thx. No need to mail unless you already have. I'll[2] accept by email." Plaintiffs' counsel did not sign this email with typed text, nor does the email contain a signature block of any kind.

Two minutes after that, at 12:23 p.m. on May 11th, U.S. Bank's counsel replied to Plaintiffs' counsel's email, an authentic copy of which is attached as Exhibit 3. The entire body of that email is as follows: "Thanks. Already in the mail, though." Unlike the initial email from U.S. Bank's counsel that prompted this exchange, U.S. Bank's counsel did not sign this second email with typed text, nor did this email contain a signature block of any kind.

Plaintiffs' counsel interpreted the email from U.S. Bank's counsel as a statement that because the materials had already been mailed, there was no need for Plaintiffs' counsel to go ahead and accept service by email, which was absolutely correct. As a result, Plaintiffs' counsel's "I *will* accept by email" never materialized into "I accept by email" or anything resembling it. In fact, there were no further communications about the matter whatsoever.

Plaintiffs' counsel raised the issue of accepting service by email because U.S. Bank's counsel had emailed a scanned PDF-format copy of everything that was also being sent by postal mail. Plaintiffs' counsel maintains a generally paperless office, meaning that most every document that comes in is scanned into PDF format and shredded. Scanning and shredding is not suitable for every single document, but it would

[2] The contraction "I'll" commonly means "I will" when used by modern American English speakers in ordinary communications, and that is the meaning that Plaintiffs' counsel intended. The dictionary indicates that "I'll" can also mean "I shall," but that use of "I'll" is practically extinct among modern American English speakers and was not intended by Plaintiffs' counsel. As with many short, common words in the English language, the word "will" has multiple definitions. Plaintiffs' counsel used it as an auxiliary verb to express willingness to do something in the future, which corresponds with the first and third definitions listed in the Merriam Webster dictionary: Definition 1: "used to express . . . willingness[.]" Definition 3: "used to express futurity."

have been appropriate for all of the documents attached to the email sent by U.S. Bank's counsel on May 11th. Because U.S. Bank's counsel had already scanned the materials into a PDF file and sent that file to Plaintiffs' counsel, there was no need to mail the materials—the only thing Plaintiffs' counsel would do upon receipt would be to shred them and discard them, which is ultimately what happened.

When U.S. Bank's counsel revealed that the materials had already been sent by mail, there was no point in Plaintiffs' counsel accepting service by email, and Plaintiffs' counsel did not do so. Plaintiffs' counsel would still have to deal with the materials once they arrived in the mail, even if only to open the envelope, verify that what was in it was the same as what had been emailed, and destroy it.

Plaintiffs' counsel is quite well aware of the jurisdictional importance of the ten-day deadline imposed by Rule 59(e), SCRCP and is familiar with every single reported decision interpreting that rule ever issued by a South Carolina appellate court. Had Plaintiffs' counsel actually agreed to accept service of the order by email on May 11th, Plaintiffs' counsel would have calendared a motion to reconsider deadline for May 21st and a notice of appeal deadline for June 10th in the event Plaintiffs' counsel decided not to file a motion to reconsider prior to appealing.

Having absolutely no idea that U.S. Bank's counsel would later contend that Plaintiffs' counsel had actually accepted service by email, Plaintiffs' counsel calendared deadlines based on receipt of the order in the mail, which occurred on May 13th, two days after it was mailed. Plaintiffs' counsel accordingly calendared a motion to reconsider deadline for May 26th[3] and a notice of appeal deadline for June 12th.

[3] The tenth day after May 13th was obviously May 23rd, but May 23rd was a Saturday, May 24th was a Sunday, and May 25th was Memorial Day, a state and federal holiday. Per Rule 6(a), SCRCP, the due date

Plaintiffs' counsel decided to move for reconsideration rather than immediately noticing an appeal, and the motion for reconsideration was timely served on May 26, 2015.

If Plaintiffs' counsel had had any idea that U.S. Bank's counsel would later contend that the reconsideration deadline was May 21, 2015, Plaintiffs' counsel would have filed the motion for reconsideration on that date or sooner. Notably, U.S. Bank's counsel did not raise the issue until it was *also* too late for Plaintiffs to file an appeal based on U.S. Bank's position that the deadline started to run on May 11, 2015. Plaintiffs' counsel did not receive U.S. Bank's memorandum until June 11, 2015, one day too late reckoning from U.S. Bank's claimed deadline.

ARGUMENT

1. **Plaintiffs' counsel never agreed to accept service by email. Plaintiffs' counsel expressed a willingness to accept service by email to avoid the annoyance of receiving a second set of the same documents by mail. U.S. Bank's counsel replied that the materials had already been mailed. This obviously does not constitute an agreement to accept service by email or anything close to it.**

U.S. Bank's claim that Plaintiffs' counsel sent an email accepting service of the order is simply false. The email, in its entirety, is as follows: "Thx. No need to mail unless you already have. I'll accept by email." See Exhibit 2. The obvious meaning of this was that if the items had not already been mailed, Plaintiffs' counsel would accept service by email to save U.S. Bank's counsel the trouble of sending the materials by mail and to save Plaintiffs' counsel the trouble of receiving the materials by mail and processing them thereafter.

U.S. Bank's counsel obviously understood this and responded that the materials

---

was May 26th. "In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a State or Federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday." Rule 6(a), SCRCP.

had already been mailed, writing: "Thanks. Already in the mail, though." See Exhibit 3. Because U.S. Bank's counsel had already mailed the items, Plaintiffs' counsel dropped the matter without accepting service by email, and U.S. Bank's counsel did not discuss the matter further.

No reasonable person could conclude that Plaintiffs' counsel agreed to accept service by email. No reasonable person could even come close to that conclusion on these facts. "I *will* accept by email" is different from "I accept by email" in just the same way as "I will go to Canada" is different from "I am already in Canada." Used properly, the modal auxiliary verb "will" *always* refers to something that has not yet happened.

And as with anything that is supposed to happen in the future, "I will do X" does not necessarily mean that X will be done. Seeking to remain president in 1948, Harry Truman said "I will win this election" and did.[4] Seeking to remain a U.S. senator in 2009, Norm Coleman said "I will win this election" but did not.[5] Plenty of losing lawyers have said "The evidence will show" in opening statements,[6] and plenty of cheating husbands said "I will be faithful to you" in marriage vows.[7]

It is certainly true that "will" is sometimes misused as an auxiliary verb in the present tense, typically with an air of loquacious formality. Many a fancy city lawyer has uttered the phrase "The defense will call Mr. A to the stand" in lieu of the grammatically

---

[4] "I will win this election" appears in President Truman's acceptance of the Democratic nomination for President at the Democratic National Convention in Philadelphia on July 15, 1948. Obviously, President Truman won the 1948 election (despite a famous newspaper headline to the contrary). See http://www.pbs.org/wgbh/americanexperience/features/primary-resources/truman-nomination48/

[5] "I will win this election" appears in a web video released by Sen. Coleman on January 22, 2009 during the period in which Sen. Coleman and soon-to-be-Sen. Al Franken disputed the outcome of the 2008 election. Franken won the contested election later that year and replaced Coleman in the U.S. Senate. See http://www.citypages.com/news/coleman-in-new-video-i-will-win-this-election-6559290

[6] See Gerry Spence & the Art of Advocacy, http://myweb.wvnet.edu/~jelkins/advocacy-08/opening-statements.html

[7] See Traditional Wedding Vows from Various Religions, https://www.theknot.com/content/traditional-wedding-vows-from-various-religions

correct "The defense calls Mr. A to the stand." Many a hammy movie villain has uttered the phrase "I will agree to your terms" (typically with long pauses between the words to signify regret) in an effort to communicate "I agree to your terms" in negotiations with the hero.[8]

There is no question that grammatically challenged individuals sometimes use the construction "I will do X" to mean "I hereby do X." But Plaintiffs' counsel is not grammatically challenged, and cannot be fairly held to the standards (or lack thereof) of those who are. Plaintiffs' counsel's use of the phrase "I will accept [service] by email" plainly did not mean "I hereby accept service by email," even though a lawyer with a looser grasp of the English language might have intended such a meaning. Read in context with the preceding sentence ("No need to mail unless you already have."), Plaintiffs' counsel was obviously communicating a willingness to accept service by email in the event that the items had not already been mailed so that the items would not have to be mailed. That is the proper construction—and the only reasonable construction—of the email from Plaintiffs' counsel.

Just as obviously, U.S. Bank's counsel plainly understood that the willingness of Plaintiffs' counsel to accept service by email was entirely contingent on whether U.S. Bank sent the materials by postal mail in addition to email. And U.S. Bank's counsel plainly understood that Plaintiffs' counsel's willingness to accept service by email was mooted by the fact that U.S. Bank's counsel had already placed the items in the U.S. mail. The last email from U.S. Bank's counsel makes this painfully obvious: "Thanks. Already in the mail, though."

---

[8] Uttered by Khan Noonian Singh, the loquacious and formal villain hammily portrayed by the late Ricardo Montalban in Star Trek II: The Wrath of Khan. See http://www.chakoteya.net/movies/movie2.html

"Thanks. Already in the mail, though." plainly shows that U.S. Bank's counsel understood Plaintiffs' counsel to be offering to accept service by email *only* if the items had not yet been placed in the mail. There is no other reason why U.S. Bank's counsel would have included this phrase in the email. A parallel construction would be someone saying to a friend "I heard you're moving across town. I will let you borrow my truck to move your stuff." and the friend replying "Thanks. Already got everything moved, though." There is obviously not going to be any borrowing of the truck, and there certainly has not already been any borrowing of the truck.

Plaintiffs' counsel understood the "Thanks. Already in the mail, though." response from U.S. Bank's counsel to be shorthand for "Thank you for the offer to accept service by email to save us the trouble of mailing the items, but it is not necessary because the items have already been mailed." And that is obviously what U.S. Bank's counsel actually intended. Even if it is not, it is a natural and reasonable construction of the email from U.S. Bank's counsel in the context of the conversation, and Plaintiffs' counsel had absolutely no way to know that a different meaning was intended.

The email from Plaintiffs' counsel plainly does not constitute an acceptance of service. See Exhibit 2. It merely contains a statement of willingness to accept service by email in the event of a certain contingency that did not occur. Id. The entire email exchange does not constitute any agreement with U.S. Bank's counsel to accept service by email. See Exhibits 2 and 3. Further, nothing in the reply email from U.S. Bank's counsel signifies that U.S. Bank's counsel believed an agreement had been made—quite the contrary, in fact. See Exhibit 3. U.S. Bank's argument is nothing short of frivolous.

2. Rule 43(k), SCRCP requires that agreements between counsel made outside of open court be reduced to writing and signed by counsel. The email

exchange claimed by U.S. Bank's counsel to be an agreement regarding service of the order is not signed by counsel or anyone else. Per Rule 43(k), the absence of signatures by counsel means that nothing in the email exchange binds any party to this action.

U.S. Bank's counsel claims that the email exchange encapsulated in Exhibits 2 and 3 constitutes an agreement permitting U.S. Bank's counsel to serve certain materials on Plaintiffs' counsel by email. Rule 43(k), SCRCP governs agreements between counsel made during the pendency of litigation:

> **(k) Agreements of Counsel.** No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

Rule 43(k), SCRCP (quoted in its entirety).

In Ashfort Corp. v. Palmetto Const. Group, 318 S.C. 492, 458 S.E.2d 533 (1995), the South Carolina Supreme Court explained the reasons for the existence of Rule 43(k):

> [T]he purpose of rules such as Rule 43(k) is to prevent fraudulent claims of oral stipulations, and to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity of determining such disputes, which it has been said are often more perplexing than the case itself. The time of the court should not be taken up in controversial matters of this character.

Id. at 496, 458 S.E.2d at 535 (capitalization adjusted to fit block quote). If an agreement between counsel does not comply with Rule 43(k), SCRCP, then it is an absolute nullity from the court's perspective. See generally Motley v. Williams, 374 S.C. 107, 647 S.E.2d 244 (Ct. App. 2007).

Per Rule 43(k), agreements between counsel are binding only in three situations: (1) where they are reduced to the form of a consent order or written stipulation signed by counsel and entered in the record; (2) where they are made in open court and noted upon

the record; or (3) where they are reduced to writing and signed by the parties and their counsel. Obviously, the email exchange in question is not an agreement made in open court and noted upon the record, nor is it a consent order. Therefore, to be binding, the agreement must be a "written stipulation signed by counsel and entered in the record" or a "writing . . . signed by the parties and their counsel." Both of these methods require that the agreement be signed by counsel.

Yet the email sent by Plaintiffs' counsel is not signed in any way. See Exhibit 2. It does not bear a typed signature, an email signature block, or any other type of signature. Id. Further, the email sent in reply by U.S. Bank's counsel is not signed in any way. See Exhibit 3. This is notable because the initial email that led Plaintiffs' counsel to bring up the service-by-email issue was sent by U.S. Bank's counsel and contained both a typed signature and an email signature block. See Exhibit 1. U.S. Bank's counsel obviously knew how to affix a signature to an email but chose not to in this situation.

Plaintiffs' counsel did not sign what is alleged by U.S. Bank to be the offer of an agreement to accept service by email, nor did U.S. Bank's counsel sign what would apparently be the acceptance of the offer. See Exhibits 2 and 3. Both signatures were required by Rule 43(k), SCRCP. Because the emails in question are not signed, nothing in them is binding on any party in this action.

It bears noting that this is exactly the sort of dispute that gave rise to the creation of Rule 43(k) and its predecessor, Circuit Court Rule 14. The purpose of requiring compliance with the formalities in Rule 43(k) as an absolute condition precedent to enforcement of an alleged agreement between counsel is to prevent litigants from doing exactly what U.S. Bank is trying to do here: determine the outcome of a case on the basis

of disputed claims about the existence and terms of an agreement arising out of informal communications between counsel. That is simply not permitted by Rule 43(k).

3. **Rule 43(k), SCRCP requires that agreements between counsel made outside of open court be signed by the parties and their lawyers unless the agreement is a consent order or written stipulation entered in the record. The email exchange in question is not a consent order nor is it a written stipulation and it was not entered in the record. To qualify as a binding agreement it would have to be signed by the parties, but it is not signed by any party or anyone else. Per Rule 43(k), the absence of signatures by the parties means that nothing in the email exchange binds any party to this action.**

As noted above, Rule 43(k) establishes that agreements between counsel are binding only in three situations: (1) where they are reduced to the form of a consent order or written stipulation signed by counsel and entered in the record; (2) where they are made in open court and noted upon the record; or (3) where they are reduced to writing and signed by the parties and their counsel. And the email exchange in question is not an agreement made in open court and noted upon the record, nor is it a consent order.

Neither Plaintiffs' counsel's email (Exhibit 2) nor the entire email exchange (Exhibits 2 and 3) qualify as a written stipulation. The emails do not bear a case caption, nor do they claim to be a written stipulation. The emails look absolutely nothing like a written stipulation that is to be filed and entered in the record, and no competent attorney would think that the emails were prepared as a written stipulation to be filed and entered into the record, because they were not.

Neither side took steps to send the emails to the clerk of court for filing and entry into the record as a written stipulation. If the emails were indeed a written stipulation to be filed with the court, Plaintiffs' counsel and U.S. Bank's counsel would have discussed which of them would file the written stipulation, and the agreed-upon lawyer would have sent them to the clerk for filing on May 11, 2015 or very shortly thereafter. Absolutely

none of this happened.

A written stipulation filed with the court is filed on behalf of all parties to the stipulation with their consent. If one of the parties to a written stipulation does not consent to the stipulation being filed, the other party or parties can't simply file it anyway. Even if all parties initially consent to filing a written stipulation but one of the parties communicates withdrawal of consent prior to filing and entry into the record, the written stipulation is a nullity per Rule 43(k).

In this situation, neither Plaintiffs nor their counsel ever consented to any emails in question being filed as a written stipulation to be entered into the record on behalf of Plaintiffs and possibly U.S. Bank as well. This simply did not happen and never will. Plaintiffs do not want the emails filed as a written stipulation and object to any effort by U.S. Bank to file them as a written stipulation.

Litigation often presents situations where litigators find it necessary or advisable to come to agreements with each other on various issues in their cases. And lawyers communicate with each other using almost every imaginable form of communication this side of smoke signals. Most lawyers gravitate towards written communications for a great variety of reasons, most of which are blatantly obvious to anyone involved in the legal profession. As a result, a substantial portion of informal agreements between litigators will be expressed in some sort of written form, commonly emails, faxes, letters, and text messages (or some combination thereof).

The fact that an agreement between litigators happens to be in writing does not make it enforceable. To be enforceable, it must be reduced to a consent order or written stipulation, signed by all the lawyers involved (and a judge, in the case of a consent

order), and filed for entry into the record by the clerk. See Rule 43(k), SCRCP. All of these steps, including filing, require the consent of all the lawyers in the case. Just because an email exchange between the lawyers happens to contain a written agreement does not mean that any one of the lawyers involved can unilaterally print the emails and mail them to the clerk for filing as a "written stipulation" without the consent of the other lawyers involved. It is not enough that the lawyers involved consent to the terms of the agreement; to make it enforceable, they must also consent to filing the agreement as a written stipulation on behalf of all parties, or a consent order approved by all the other lawyers.

Because Plaintiffs' counsel has never consented and will never consent to the filing and entry into the record of a "written stipulation" consisting of the email or emails in question, the only portion of Rule 43(k) that remains is the provision indicating that written agreements signed by all counsel and also signed by all the parties are binding even if they have not been filed and entered into the record. Obviously, this provision cannot rescue U.S. Bank's position because no one, lawyer or client, signed the email from Plaintiffs' counsel that raises acceptance of service or the email from U.S. Bank's counsel in reply. Regardless of the lawyer-signature issue, the agreement is plainly unenforceable under Rule 43(k), SCRCP because none of the parties signed the emails.

The purpose of Rule 43(k) is to establish a crystal clear set of formalities that are required before courts will enforce such agreements. Rule 43(k) distinguishes between three types of agreements: oral agreements, written agreements signed by counsel but not by the litigants, and written agreements signed by counsel and by the litigants. The first two categories require entry into the court record. Only the third category is enforceable

without having been entered into the court record, and it cannot apply here because no parties signed the emails in question.

4. South Carolina lawyers have an absolute right to rely on non-enforceability of agreements between counsel that do not comply with Rule 43(k), SCRCP.

Along with most every competent lawyer who handles civil litigation in South Carolina, Plaintiffs' counsel frequently relies on the provisions of Rule 43(k), SCRCP when communicating with opposing counsel in litigation. When discussing agreements and potential agreements with other lawyers, Plaintiffs' counsel always keeps the terms of Rule 43(k) in mind and conforms his conduct accordingly. If Rule 43(k) or another rule stated that unsigned email exchanges were binding agreements in litigation, Plaintiffs' counsel would not have sent the email in the first place or would have reworded it so as to avoid any binding effect.

Further, due process plainly forbids courts from the ex post enforcement of agreements between counsel that were unenforceable under Rule 43(k) as interpreted by reported decisions of the South Carolina courts at that time the agreement was made. Litigants are free to ask South Carolina courts to expand the categories of enforceable agreements under Rule 43(k), and the courts can do so through new interpretations or even direct amendment. But any expansion will not breathe life into agreements that were unenforceable under the binding precedents at the time they were made. Lawyers have the right to rely on the current scope of Rule 43(k) to avoid accidentally creating enforceable agreements when the law changes in the future.

Plaintiffs' counsel relied on the current scope of Rule 43(k) when sending the email in question to U.S. Bank's counsel. Plaintiffs' counsel did not intend for his initial (and, ultimately, only) communication about the matter to create a binding agreement

between the parties. Had Plaintiffs' counsel wanted to send a communication that would create a binding agreement, Plaintiffs' counsel would have done one of the following: (1) Sent a consent order signed by Plaintiffs' counsel with signature blocks for U.S. Bank's counsel and a judge; (2) Sent a written stipulation signed by Plaintiffs' counsel with a signature block for U.S. Bank's counsel; or (3) Sent a written agreement signed by Plaintiffs' counsel and by Plaintiffs with signature blocks for U.S. Bank's counsel and an authorized representative of U.S. Bank. By doing none of those things, Plaintiffs' counsel acted in reliance on the then-current state of the law of Rule 43(k) jurisprudence such that no enforceable agreement would be created. Any contrary ruling at this point would violate Plaintiffs' due process rights because it would force them, against their will, into an "agreement" they did not agree to.[9]

5. **Rule 5, SCRCP governs service in this situation and contains no provision for acceptance of service, therefore any variance of that rule must be agreed to pursuant to Rule 43(k), SCRCP. But if Rule 43(k), SCRCP does not apply, Rule 4(j), SCRCP does, and the alleged acceptance of service does not comply with Rule 4(j), SCRCP because it is not signed, nor does it state the place and date service is accepted.**

Rule 5, SCRCP governed the attempt by U.S. Bank's counsel to serve Plaintiffs' counsel with the materials sent on May 11, 2015. Rule 4, SCRCP contains a provision governing voluntary acceptance of service, but Rule 5 does not. Because Rule 5 does not contain such a provision, and because acceptance of service is a type of agreement, Rule 43(k), SCRCP applies when the intended recipient of a paper to be served under Rule 5

[9] An analogous situation would be where a state legislature amended the statute of frauds to remove real estate contracts, thereby rendering oral agreements to buy and sell real estate enforceable. That legal change would apply prospectively, but it could not apply retroactively without violating due process. So long as the law says that an oral agreement to buy and sell real estate is not enforceable, buyers are free to communicate offers to sellers orally without fear that doing so vests any power of acceptance in the sellers. Due process does not permit the law to retroactively expand the types of conduct by a would-be offeror that are sufficient to vest the power of acceptance in an offeree. The law can do many things, but it is not a time machine, and it cannot retroactively deem someone to have offered or accepted a contract that the person did not in fact offer or accept based on the legal rules applicable at the time.

wishes to voluntarily accept service.

That being said, the argument might be put forward that Rule 4(j), SCRCP implicitly governs voluntary acceptance of service under Rule 5 as well. Rule 4(j), SCRCP provides as follows:

> **(j) Acceptance of Service.** No other proof of service shall be required when acceptance of service is acknowledged in writing and signed by the person served or his attorney, and delivered to the person making service. The acknowledgement shall state the place and date service is accepted.

Rule 4(j), SCRCP (quoted in its entirety).

The email cited by U.S. Bank as containing an acceptance of service does not comply with this rule because it is not signed by anyone. See Exhibit 2. Additionally, it does not state the place where service is accepted. Id. It does not explicitly state the date service is accepted either, though an argument could be made that the date of the email constitutes the date service is accepted. That issue is purely academic, however, because the email is not signed and does not explicitly state the place where service was accepted.

Ultimately it does not matter whether Rule 43(k), SCRCP or Rule 4(j), SCRCP governs the voluntary acceptance of service for papers served under Rule 5, SCRCP. The analysis leads to the same conclusion under both rules. Both rules require signatures, and the email claimed by U.S. Bank's counsel to be an acceptance of service does not contain any signature. It does not constitute a valid acceptance of service under Rule 4(j), SCRCP, nor does it constitute a valid agreement to accept service under Rule 43(k), SCRCP.

6. U.S. Bank's argument might be viewed as a waiver argument. Waiver does not apply because Plaintiffs' counsel did not voluntarily and intentionally abandon the right to be served with U.S. Bank's materials pursuant to Rule 5, SCRCP.

Waiver is the "voluntary and intentional abandonment or relinquishment of a known right." Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). Plaintiffs' counsel did not voluntarily or intentionally abandon or relinquish any rights whatsoever by sending the email of May 11, 2015 to U.S. Bank's counsel. Plaintiffs' counsel stated a willingness to accept service by email if U.S. Bank's counsel had not yet mailed the materials and would agree not to. A condition precedent to any waiver was that U.S. Bank's counsel not mail the materials, but U.S. Bank's counsel already had. Therefore, Plaintiffs' counsel never waived anything.

7. **There could not have been any enforceable agreement between counsel for acceptance of service by email because there was obviously no meeting of the minds between counsel as to the terms of such agreement.**

No agreement is enforceable if there was no meeting of the minds. This applies to agreements made pursuant to Rule 43(k) just as much as it does in general contract law. For example, suppose there are father-and-son witnesses in a car wreck case, John Doe Sr. and John Doe Jr. Suppose one of the lawyers proposes a stipulation to the other to read the deposition of "John Doe" into the record rather than having him appear at trial. The lawyer proposing the stipulation means John Doe Sr. but the other lawyer mistakenly thinks the stipulation means John Doe Jr. and accepts on that basis. Even if the John Doe stipulation is prepared and filed in full accordance with Rule 43(k), SCRCP, it is unenforceable because there was no meeting of the minds.

Taking U.S. Bank's argument at face value, there was no meeting of the minds between Plaintiffs' counsel and U.S. Bank's counsel as to the meaning of the email sent by Plaintiffs' counsel on May 11, 2015. When Plaintiffs' counsel said "I'll accept [service] by email," Plaintiffs' counsel was expressing nothing more than a willingness to

accept service by email, and a conditional one at that. Yet U.S. Bank's counsel claims to have understood "I will accept service by email" to mean "I hereby accept service by email."

There are a number of grammatical reasons why "I will accept service by email" cannot be properly interpreted as "I hereby accept service by email." But assuming that a reasonable person could understand the phrase "I will accept service by email" to mean "I hereby accept service by email," there was still no meeting of the minds. The reason for this is that the word "will" has multiple meanings. Plaintiffs' counsel used "will" to express willingness to do something in the future, a perfectly proper use of the word according to the dictionary. Yet U.S. Bank's counsel claims to have understood the word "will" as a synonym of "hereby" rather than as an expression of intention to do something in the future.

Giving the benefit of the doubt to U.S. Bank as to the questionable nature of their position as a matter of linguistics, the facts show that Plaintiffs' counsel and U.S. Bank's counsel ascribed contradictory meanings to the word "will." This is a classic example of a failed meeting of the minds and is just like the John Doe example given above. Plaintiffs' counsel meant one thing, but U.S. Bank's counsel understood something completely contradictory. There was, therefore, no meeting of the minds as to what Plaintiffs' counsel was proposing in the May 11, 2015 email. Therefore, that email does not and cannot constitute a binding agreement.

8. **To whatever extent the agreement alleged by U.S. Bank existed as of May 11, 2015, Plaintiffs withdrew from the agreement by their conduct before it was filed and entered into the record, rendering it unenforceable per Rule 43(k), SCRCP.**

Assuming for the sake of argument that the email exchange of May 11, 2015 does

constitute an agreement between counsel under Rule 43(k), SCRCP, it is not signed by the parties to the action, nor is it a consent order. Therefore, it would have to be filed and entered into the record as a written stipulation to be effective.

The email exchange has not been filed and entered into the record as a written stipulation. That being said, U.S. Bank's counsel did file it on June 10, 2015 in support of the memorandum opposing Plaintiffs' motion to reconsider. Prior to that, the email in question was completely unknown to the court's record.

When the lawyers agree to and sign a written stipulation pursuant to Rule 43(k), SCRCP, either side may back out of the agreement prior to the written stipulation being filed and entered into the record. The withdrawal of consent may be explicit or implicit. In this situation, whatever consent Plaintiffs' gave to accepting service by email was obviously withdrawn with Plaintiffs' opted to file the motion for reconsideration on May 26th rather than May 21st. Because the email had not been filed with the court and entered into the record at that point in time, whatever agreement that did exist was invalidated at that point. Of course, Plaintiffs' counsel did not and could not send an explicit withdrawal from the agreement because Plaintiffs' counsel had no idea that U.S. Bank claimed there was an agreement until mid June.

9. **Laches bars U.S. Bank's argument. And an agreement between the parties cannot have a nunc pro tunc effect in a situation like this.**

This argument is very similar to the prior argument, but is the flip-side. Assuming for the sake of argument that Plaintiffs' counsel's email of May 11, 2015 was an agreement to accept service by email, U.S. Bank should have taken steps to immediately file the agreement and have it entered into the record per Rule 43(k), SCRCP. Had U.S. Bank done so, Plaintiffs' counsel would have understood that U.S. Bank took the position

that the email was an agreement to accept service and would have met the May 21, 2015 deadline, even while disagreeing that it was the proper deadline.

When counsel in a case enter into a written agreement that is not signed by the parties, that agreement has to be filed to be enforceable. If the party responsible for filing does not do so in a timely manner, the other parties cannot be faulted for believing that the party responsible for filing has withdrawn its consent to the agreement. If the other parties then act in a manner inconsistent with the agreement because the party responsible for filing it has not done so, the party responsible for filing has only itself to blame. This is a classic example of laches.

When U.S. Bank failed to file the email as a "written stipulation" prior to May 21, 2015, it became completely unenforceable. A litigant cannot hold an agreement in its pocket like an ace in the hole, waiting to file it and seek to enforce it after the other party has violated it. This is particularly true when the other party has absolutely no idea that the alleged agreement even exists.

If U.S. Bank wanted the email exchange of May 11, 2015 to constitute an enforceable agreement between the parties, U.S. Bank should have tried to file it immediately thereafter and seen to it that the clerk entered it into the record as a written stipulation. If this had happened, Plaintiffs' counsel would have been on notice that U.S. Bank thought the email was an enforceable agreement and would have filed the motion to reconsider on May 21, 2015 instead of May 26, 2015. The law does not look kindly on the snake in the grass, and that is exactly what role U.S. Bank is playing here.

10. The agreement alleged by U.S. Bank is unenforceable against Plaintiffs because the alleged agreement is unsupported by valuable consideration.

Settlement agreements are contracts which must be supported by valuable

consideration to be enforceable. Agreements regarding the conduct of litigation are no different, though the consideration for such agreements is sometimes difficult to identify but nonetheless must be present. For example, the nebulous "litigation strategy" often serves as consideration for such agreements, even though it is not always obvious to outsiders how a particular agreement may benefit a party strategically. The reasons may be protected by the attorney-client privilege, for example, or consist of nothing more than an attorney's gut feeling about the right maneuver in a case. Nonetheless, that is good consideration for such agreements.

The agreement alleged by U.S. Bank, however, is wholly unsupported by consideration. In no way did Plaintiffs or their counsel benefit from the alleged acceptance of service in light of the fact that U.S. Bank had already put the materials in the mail. U.S. Bank claims Plaintiffs' counsel agreed to something that had no effect other than to shorten Plaintiffs' deadline to file a motion for reconsideration or appeal by two days with absolutely no benefit.

As explained above, Plaintiffs' counsel raised the issue of accepting service by email solely for the administrative convenience of being able to avoid processing U.S. Bank's mailing. Because U.S. Bank's counsel had already mailed the materials, Plaintiffs' counsel had to process the mailing anyway. Therefore, neither Plaintiffs nor their counsel realized any benefit whatsoever associated with the alleged agreement, nor could they have. The only effect of the alleged agreement was to shorten Plaintiffs' counsel's response time on the motion to reconsider and a notice of appeal. This obviously did not benefit Plaintiffs or their counsel in any way. Therefore, the alleged agreement is unenforceable because it is wholly unsupported by consideration of any

kind whatsoever.

CONCLUSION

U.S. Bank's argument that Plaintiffs' motion for reconsideration is untimely is, quite frankly, absurd. To prevent parties from advancing absurd claims like U.S. Bank's, the South Carolina Rules of Civil Procedure contain various requirements for formalities before a litigant can claim there is an enforceable agreement between the parties. None of those formalities have been met here. Most fundamentally, the email in question is not even signed, but the problems with U.S. Bank's position go far beyond that. Plaintiffs' counsel respectfully requests the Court disregard U.S. Bank's claim that Plaintiffs' motion for reconsideration is untimely for all the reasons given above.

VERIFICATION

I, the undersigned, being first duly sworn, hereby verify the facts stated in this memorandum of my own personal knowledge and authenticate the attached exhibits.

Respectfully submitted,

Sworn to and subscribed before me
this ~~24th~~ day of ~~July~~, 2015

Notary Public for South Carolina
My Comm'n Expires: 4/24/25

~~July 24,~~ 2015

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STATE OF SOUTH CAROLINA COUNTY OF COLLETON	IN THE COURT OF COMMON PLEAS
James C. Kincannon, James J. Kincannon, and Carolyn R. Kincannon, Plaintiffs, v. U.S. Bank National Association and U.S. Bank National Association ND, Defendants.	Civil Action No. 2013-CP-15-1023 **CERTIFICATE OF SERVICE**

The undersigned certifies service in accordance with Rule 5, SCRCP by first class mail on the foregoing on parties listed below on the date indicated:

1. U.S. Bank National Association and U.S. Bank National Association ND through John Hawk, Womble Carlyle Sandridge & Rice LLP

~~July 24~~, 2015
Aug. 7

J. TODD KINCANNON