STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge
Appellate Case No. 2014-001652

ALAN WILSON, SECURITIES COMMISSIONER OF SOUTH CAROLINA,

Respondent,

v.

INTEGRATED CAPITAL STRATEGIES, LLC,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Securities Commissioner

TRACY A. MEYERS
Deputy Securities Commissioner

IAN P. WESCHLER
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-9916

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. The circuit court properly enforced the Securities Division's subpoena on the Appellant.

2. The circuit court correctly ruled that that subpoena was properly served on the Appellant.

3. Documents showing CertusBank, N.A.'s cooperation with the Securities Division's investigation are irrelevant.

STATEMENT OF THE CASE

On April 9, 2014 the Securities Division of the Office of the Attorney General issued an administrative subpoena (the "Subpoena") to Integrated Capital Strategies, LLC, (the "Appellant"). The Appellant refused to comply with the Subpoena. Pursuant to the South Carolina Uniform Securities Act of 2005 (the "Securities Act"), the Securities Commissioner (the "Respondent") sought enforcement of the Subpoena in the Richland County Court of Common Pleas. Following a hearing on the Respondent's request, the Honorable G. Thomas Cooper, Jr. issued an order enforcing the Subpoena on the Appellant (the "Order"). Following the denial of its motion to reconsider, the Appellant appealed the Order to this Court.

STATEMENT OF FACTS

During the early months of 2014, the financial troubles of CertusBank, N.A. and Certus Holdings, Inc. (collectively, "Certus") began to become apparent to its investors and the general public. The Greenville, South Carolina-based bank's losses had spiraled at an alarming pace, while allegations of mismanagement by the Certus' executive leadership team (the "ELT") had reached numerous financial publications. Many of the most vocal complaints about the bank were made by the Bank's investors. At this time, the Securities Division, statutorily charged with enforcing the Securities Act, began an investigation to determine whether or not South Carolina's securities laws had been violated. At the same time, as these allegations by investors and employees reached a fever pitch, Certus' Board of Directors terminated the remaining members of the ELT and embarked on an internal investigation of the allegations of mismanagement and malfeasance. Subsequently, Certus' federal regulators, including the Office of the Comptroller of the Currency, began investigations into the bank.

Among other subpoenas issued in the early days of the Securities Divison's investigation, was the Subpoena which was issued to the Appellant and mailed through Federal Express overnight delivery to the Appellant's business address in Charlotte, Carolina. (Subpoena; R. 292-299). The Appellant and Certus were closely intertwined, sharing many employees. Indeed, the members of the ELT were founders and members of the

Appellant as well. Over the course of its relationship with Certus, the Appellant received millions of dollars in funds from the Bank, allegedly in exchange for various consulting services. Obtaining information sufficient to understand this relationship was a primary purpose of the Subpoena.

On April 23, 2014, the Appellant's attorney contacted the Securities Division and requested an extension of time in which to examine the Subpoena and prepare a response. On May 2, 2014, representatives of the Securities Division met with the Appellant's attorney and reiterated the request for documents. On Tuesday, May 6, 2014, the Appellant, by letter, objected to the subpoena, alleging that the Securities Division lacked jurisdiction over it. (ICS Letter; R. 301-303). On May 23, 2014, the Respondent applied to the Richland County Court of Common Pleas for a Rule to Show Cause directed to the Appellant, which was granted, ordering both parties to appear before the circuit court on June 10, 2014. (RTSC; R. 2-3). At the June 10, 2014 hearing, the Honorable G. Thomas Cooper, Jr. heard arguments from counsel for both the Respondent and the Appellant. (Transcript; R. 19-39). Following the submission of proposed orders by each party, the Court ordered Appellant to comply with the Subpoena. (Order; R. 4-15). Following a denial of its motion to reconsider, the Appellant filed notice of appeal on July 30, 2014. Subsequently, this Court requested the Appellant file a Memorandum of Appealability, which it filed on August 15, 2014. On September 19, 2014, this Court requested the Respondent file a Return to the

Appellant's Memorandum of Appealability. The Respondent filed a Return on September 23, 2014, agreeing with the Appellant that the Order was immediately appealable. Appellant filed its Initial Brief on December 22, 2014. The Respondent's Initial Brief follows.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY ENFORCED THE SECURITIES DIVISION'S SUBPOENA ON THE APPELLANT

In enforcing the Subpoena against the Appellant, the circuit court employed the appropriate analysis and reached the correct conclusion. On appeal, the Appellant raises a number of objections ranging from preemption to jurisdiction; however, the circuit court correctly ruled that, so long as the Subpoena met the well-established test for judicial enforcement, it should be ordered enforced over the Appellant's objections.

Case law is clear that, in administrative subpoena enforcement actions, "the scope of issues which may be litigated...must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity." *F.T.C. v. Texaco, Inc.,* 555 F.2d 862, 872 (D.C. Cir.1977) (citations omitted); *see also United States v. Am. Target Adver., Inc.*, 257 F.3d 348, 351 (4th Cir. 2001) (citations and internal quotation marks omitted) ("[A] court's role in enforcing administrative subpoenas is sharply limited."); *RNR Enterprises, Inc. v. SEC,* 122 F.3d 93, 96 (2d Cir. 1997), *cert. denied sub nom*, *Wells v. S.E.C.*, 522 U.S. 958 (1997) (same); Louis Loss & Joel Seligman, *Fundamentals of Securities Regulation* 1490-1493 (4th Ed. 2004). Indeed, the public interest is not served if subpoena enforcement proceedings are drawn out and lead to "parties clash[ing] over, and judges grappl[ing] with, the thought processes of each investigator." *United States v. LaSalle Nat. Bank*, 437 U.S. 298, 316 (1978). Accordingly, when presented

with an administrative agency's request, courts should enforce an administrative subpoena when "the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant." *United States v. Morton Salt*, 338 U.S. 632, 650 (1950); *see also See v. City of Seattle*, 387 U.S. 541, 544 (1967) (*Morton Salt* analysis in the context of a state administrative subpoena); *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1023-24 (D.C. Cir. 1978); *United States v. Powell,* 379 U.S. 48, 57-58 (1964). State courts throughout the nation have adopted a similar analysis for administrative subpoena enforcement. *See, e.g., State ex rel. Miller v. Publishers Clearing House, Inc.*, 633 N.W.2d 732, 736 (Iowa 2001); *Florida Dep't of Ins. & Treasurer v. Bankers Ins. Co.*, 694 So. 2d 70 (Fla. Dist. Ct. App. 1997); *Harris v. Stutzman,* 536 N.E.2d 1154 (Ohio 1989); *Greer v. New Jersey Bureau of Sec.*, A.2d 1080, 1085 (N.J. App. Div. 1996) (state securities bureau's subpoena authority is similar to the United States Securities and Exchange Commission); Joseph C. Long, *Blue Sky Law,* § 11:31 (2014).

In the instant case, the Subpoena was issued to the Appellant pursuant to the broad investigative authority granted to the Respondent and his designee, the Securities Division, pursuant to S.C. Code Ann. § 35-1-602. During the course of an investigation under Section 602, the Securities Division may "subpoena witnesses, seek the compulsion of evidence, take evidence, require the filing of statements, and require the production of *any*

records that the Securities Commissioner [or his designee] considers *relevant or material* to [an] investigation." S.C. Code Ann § 35-1-602(b) (Supp. 2013) (emphasis added). Here, the Subpoena seeks relevant information from the Appellant related to an ongoing investigation into allegations of securities fraud at Certus. In interpreting the reach of this provision, the circuit court properly sought guidance from the Reporter's Comments to Section 602 which explain that "[t]he standards for the issuance of subpoenas have been generally established in federal and state securities laws." S.C. Code Ann § 35-1-602, cmt. 2 (citing 10 Louis Loss & Joel Seligman, *Securities Regulation* 4917-4937 (3d ed. Rev. 1996)). This guidance led the circuit court to employ the analysis set forth above in assessing the Respondent's request for enforcement of the Subpoena. The Reporter's Comments were an appropriate guide for the circuit court "as aids in interpreting the act." *The Lite House, Inc. v. J.C. Roy Co.*, 309 S.C. 50, 53, 419 S.E.2d 817, 819 (Ct. App. 1992); *see also Atlanta Skin & Cancer Clinic, P.C. v. Hallmark Gen. Partners, Inc.*, 320 S.C. 113, 120, 463 S.E.2d 600, 605 (1995); *State v. Sterling*, 396 S.C. 599, 616, 723 S.E.2d 176, 185 (2012) (employing the definition of "willfulness" as set forth in the Reporter's Comments to the Securities Act). Employing the appropriate analysis, the circuit court found that the Certus investigation was within the Securities Division's grant of authority, that the information sought from the Appellant was relevant, and that the Subpoena was not

indefinite, and thus, the Court correctly ordered the Appellant to comply with the Subpoena.

A. The Instant Investigation Is Within The Securities Division's Grant Of Authority.

Consistent with established precedent, an administrative agency, state or federal, "can investigate merely on suspicion that the law is being violated, or just because wants assurance that it is not." *Morton Salt*, 338 U.S. at 642-43. Thus, the Respondent is acting within the scope of its legislatively granted authority, and pursuant to S.C. Code Ann 35-1-602, even where its investigation is based on nothing more than "official curiosity." *Arthur Young & Co.*, 584 F.2d at 1023-24 & n. 45. In the instant investigation, which is still ongoing, the Securities Division is looking into allegations of securities fraud at a South Carolina-based entity, and such an inquiry falls directly within its mandate as set forth in the Securities Act.

On appeal, as in the circuit court, the Appellant alleges that the Securities Division's investigation is preempted by the National Bank Act of 1864 (the "NBA"), 12 U.S.C.A. § 484 (West 2013). The Appellant relies heavily on *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519 (2009), for this unavailing argument. However, aside from the fact that the Appellant has no standing to make an argument on behalf of Certus, the instant investigation is not an exercise of visitorial powers over a nationally chartered bank, and is not preempted by the NBA or any other federal

statute or regulation.[1] Rather, the Securities Division is investigating to determine whether Certus or any of its officers violated the Securities Act. Indeed, *Cuomo* itself lays bare the weakness of the Appellant's arguments in making plainly clear that securities fraud investigations are not an exercise of visitorial powers. 557 US at 528-29 (citing *Peoples Bank of Danville v. Williams*, 449 F.Supp. 254, 260 (4th Cir. 1978); *Bank of America Nat. Trust & Savings Ass'n v. Douglas*, 70 App.D.C. 221, 227 (D.C. Cir. 1939)).

Furthermore, the circuit court correctly found that the Appellant was subject to the Securities Division's investigative authority. In both the circuit court and on appeal, Appellant has raised the claim that, because the Appellant allegedly did not offer or sell securities in South Carolina, it cannot be subject to the Securities Division's subpoena power. However, administrative agencies have the authority to subpoena relevant materials from individuals and entities who are not subject to their regulatory authority. Indeed, for nearly seventy years similar objections to administrative investigative authority have been utterly rejected by both federal and state courts. *See* 27 A.L.R 1208 (1953); *Freeman v. Fidelity Trust Co.*, 248 F.Supp 487, 492 (E.D. Penn. 1965) ("It is by now abundantly clear

[1] In the context of the NBA, the term visitation means "the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations." *Cuomo* 557 U.S. at 526 (citations and internal quotation marks omitted). The Securities Division is not a bank superviser attempting to enforce banking laws or regulations against Certus, but a securities regulator attempting to determine if Certus violated the Securities Act.

that for an administrative agency to exercise subpoena power in aid of its investigatory power, it need not show that it has jurisdiction over the witness subpoenaed."); *United States v. Art Metal-U.S.A., Inc.*, 484 F. Supp. 884, 887 (D.N.J. 1980); *Sandsend Financial Consultants, Ltd. v. Federal Home Loan Bank Board*, 878 F.2d 875 (5th Cir. 1989); *McGarry v. SEC*, 147 F.2d (10th Cir. 1945); *Petro v. N. Coast Villas Ltd.*, 735 N.E.2d 985, 986 (Ohio Ct. App. 2000) (State Auditor has the authority to subpoena records relevant to an audit from third parties); *State ex rel. R.R. & Warehouse Commission v. Mees*, 49 N.W.2d 386, 392 (Minn. 1951) (witness subpoenaed by administrative agency need not be under direct regulatory authority of the agency so long as "the information sought is relevant and material to the investigation"). As the circuit court correctly stated, imposing such a limitation would "utterly frustrate the law enforcement purpose of administrative agency investigations to limit an administrative agency's subpoena power to entities within that agency's regulatory jurisdiction." (Order. 9; R. 13). Without the authority to obtain relevant information, no administrative agency would be able to conduct a complete investigation.

Furthermore, subpoena enforcement proceedings are not the proper forum in which to deploy a subject matter jurisdiction defense as administrative agencies "must be free without undue interference or delay to conduct an investigation which will adequately develop a factual basis for a determination as to whether particular activities come

within...[their]...regulatory authority." *SEC v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1053 (2nd Cir. 1973), *cert. denied*, 415 U.S. 915 (1974); *see also Gardner v. Lefkowitz*, 412 N.Y.S.2d 740, 745 (N.Y.Sup.Ct. 1978) (holding that New York's securities act permits the Attorney General to investigate in order to determine whether or not "the subject being investigated comes within the scope of his authority"). Arguing lack of subject matter jurisdiction as a defense is proper only when an agency takes action against a respondent. *Texaco*, 555 F.2d at 879 ("As a general rule, substantive issues which may be raised in defense against an administrative complaint are premature in [a subpoena] enforcement proceeding."); *see also SEC v. Vacuum Can Co.*, 157 F.2d 530, 532 (7th Cir. 1946) (citations omitted) ("The purpose of a subpoena is to gather evidence, not prove a pending charge."); 1 Davis, *Administrative Law*, § 4.1 (3rd ed. 1994); *SEC v. Wall Street Transcript Corp.*, 422 F.2d 1371, 1375 (2nd Cir. 1970), *cert. denied*, 398 U.S. 958 (1970) ("It has long been established that the question of inclusion of a particular person or entity within the coverage of a regulatory statute is generally for initial determination by an agency, subject to review on direct appeal, rather than for a...court whose jurisdiction is invoked to enforce an administrative subpoena.") (citing, *inter alia*, *Powell*, 379 U.S. at 57-58; *FTC v. Crafts*, 355 U.S. 9 (1957); *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 517 (1943) (not even a showing of probable coverage can be required in a subpoena enforcement action)). Applying the law, the circuit court correctly

ruled that Appellant is clearly subject to the Securities Division's investigative powers.

B. The Information Sought By The Subpoena Is Relevant To The Securities Division's Investigation.

The circuit court was also correct in finding that the information sought from the Appellant by the Subpoena was relevant to the Respondent's ongoing investigation. In assessing relevance, a court must also bear in mind that "law enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest." *Morton Salt,* 338 U.S. at 652. For that reason, courts "defer to the agency's appraisal of relevancy, which must be accepted so long as it is not obviously wrong." *RNR Enterprises,* 122 F.3d at 97 (citations and internal quotation marks omitted); *see also Arthur Young & Co.*, 584 F.2d at 1031 (the SEC is given the sole discretion to determine what is relevant to an investigation). Information is relevant to an investigation when it is "not plainly incompetent or irrelevant to any legal purpose." *Endicott Johnson*, 317 U.S. at 509. Here, the Subpoena seeks information related to the Appellant's relationship with Certus, which the Securities Division, as a threshold matter, has determined to be relevant to the ongoing investigation into Certus.

Further, in addition to the voluminous case law defining relevance in relation to an administrative subpoena, the plain language of the Securities Act does not contract the plain meaning of the word relevant. Section 602

clearly states that the Securities Commissioner or his designee may "require the production of any records that the Securities Commissioner considers *relevant*...to an investigation. S.C. Code Ann 35-1-602(b) (Supp. 2013) (emphasis added). Pursuant to the plain meaning rule, "it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Here, the General Assembly placed no limitation on relevant, which has the meaning of "rationally tending to persuade people of the probability or possibility of some alleged fact." *Black's Law Dictionary* 1068 (8th ed. 2005). Under this plain meaning, information about the Appellant, an entity owned and operated by the ELT, which received nearly $10 million from Certus, is undoubtedly relevant to the Securities Division's investigation. Thus, under both the case law interpreting administrative subpoena enforcement and the plain meaning rule, the information sought by the Subpoena is clearly relevant.

C. The Subpoena Is Not Too Indefinite.

A person or entity aggrieved by an administrative subpoena might also object to an administrative subpoena by arguing that the information sought is too indefinite and thus "unreasonable." *Morton Salt*, 338 U.S. at 653. Here, the Subpoena clearly sets forth what information it seeks, and while the request is expansive, it is neither indefinite nor unreasonable. The circuit court, after finding the information sought by the Subpoena to be relevant, then shifted the burden to the Appellant for a showing that the information

sought was unreasonable. However, "where, as here, the agency inquiry is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met." *Brigadoon Scotch*, 480 F.2d at 1056. The Appellant did not so much as attempt, in the circuit court or on appeal, to make such a showing, meaning that the question of indefiniteness is not before the court. Consequently, the circuit court's correct ruling on this prong of the *Morton Salt* test should remain undisturbed.

II. DOCUMENTS SHOWING CERTUSBANK, N.A.'S COOPERATION WITH THE SECURITIES DIVISION'S INVESTIGATION ARE IRRELEVANT

It its attempt to draw attention away from the correct ruling by the circuit court, the Appellant alleges that it was in some way prejudiced in the proceedings in the circuit court. During the hearing before the circuit court, the counsel for the Respondent presented to the Court documents from Certus to show that the Bank was cooperating with the investigation (the "Documents"). The Court asked that counsel for the Respondent show the Documents to counsel for the Appellant and then bring them to the bench. (T. 5; R. 23). The record is unclear as to what actually happened to the documents and whether or not they were filed with the Court or destroyed. The Appellant suggests the Documents should have then provided to the Appellant for examination and that the Appellant then be given the opportunity to refute their veracity. The Appellant does not, however, explain how it would refute the undisputed fact that the Bank is cooperating with the Securities Division's investigation, which is all the Documents were presented to show. (T. 4-5; R. 22-23). Appellant seems to confuse an administrative investigation with a trial or administrative proceeding in alleging that its right to Due Process was violated. However, the current investigation is ongoing and "an administrative investigation adjudicates no legal rights," *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 742 (citing *Hannah v. Larche*, 363 U.S. 420, 440-443 (1960)). Furthermore, the Order made no

mention of the Documents, nor of Certus' cooperation, nor of any other information contained in the Documents, laying bare their irrelevance and making it evident that the Appellant suffered no prejudice.

Nonetheless, if this Court does determine the circuit court to have erred in not requiring the Appellant to be given copies of the Documents, that error would clearly be harmless. In order to apply the harmless error standard, "the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt." *State v. Watts*, 321 S.C. 158, 165, 467 S.E.2d 272, 276-77 (Ct. App. 1996) (citing *Chapman v. California,* 386 U.S. 18 (1967)). In this case, such an analysis becomes even more straightforward as Appellant is not a defendant in a trial, but merely the respondent in a self-contained subpoena enforcement action. As the case law set forth above makes clear, if the elements necessary for the enforcement of an administrative subpoena are present, a circuit court should order a subpoena enforced. All the required elements for subpoena enforcement were adequately presented by the Respondent and the Order reflected this. The contents of the Documents are irrelevant to question whether or not the Subpoena should be enforced on the Appellant. For that reason, even if the circuit court erred with regard to the Documents, there could, necessarily, have been no change in whether or not the Subpoena was

ordered enforced. This would appear to be the very definition of harmless error.

III. THE CIRCUIT COURT CORRECTLY RULED THAT THE SUBPOENA WAS PROPERLY SERVED ON THE APPELLANT

The Appellant, in addition, alleges that the Subpoena was not properly served upon it. However, the Subpoena was served in compliance with the Securities Act, and thus, as the circuit court found, its service was valid. The Subpoena was mailed through Federal Express on April 9, 2014. (Subpoena; R. 292-299). The Appellant, however, reads into the service provision of the Securities Act the requirement that subpoenas be sent by registered mail. Such a limitation is not present in S.C. Code Ann § 35-1-611, the service provision of the Securities Act. Section 611 states:

> (c) Service under subsection (a) or (b) may be made by providing a copy of the process to the office of the Securities Commissioner, but it is not effective unless:
>
> (1) the plaintiff, which may be the Securities Commissioner, promptly sends notice of the service and a copy of the process, *return receipt requested*, to the defendant or respondent at the address set forth in the consent to service of process or, if a consent to service of process has not been filed, at the last known address, or takes other reasonable steps to give notice; and
>
> (2) the plaintiff files an affidavit of compliance with this subsection in the action or proceeding on or before the return day of the process, if any, or within the time that the court, or the Securities Commissioner in a proceeding before the Securities Commissioner, allows.
>
> (d) Service pursuant to subsection (c) may be used in a proceeding before the Securities Commissioner or by the Securities Commissioner in a civil action in which the Securities Commissioner is the moving party.

S.C. Code Ann. § 35-1-611 (Supp. 2013) (emphasis added). Thus, all that is necessary for service is that there be a return receipt, which would include the signature requested feature of any overnight delivery service such as

Federal Express in the case of the Subpoena. The creation of an artificial limitation, by requiring each subpoena to be served by through registered mail and disallowing overnight delivery, would be utterly contrary to the goal of remedial legislation such as the Securities Act. *Gordon v. Drews*, 358 S.C. 598, 606, 595 S.E.2d 864, 868 (Ct. App. 2004) ("Securities laws are remedial in nature and, therefore, should be liberally construed to protect investors."). Here, Federal Express required a signature and placed that information on a receipt including the time and date of delivery, which is all that the Securities Act requires. As a result, the circuit court was correct in finding the Subpoena was properly served.

Notwithstanding the mailing by Federal Express, the Appellant's objection to valid service is irrelevant because of the plain language of Section 611, which permits the Securities Division to effect service by taking "other reasonable steps to give notice." S.C. Code Ann. § 35-1-611 (c)(1)(Supp. 2013). By any measure, the overnight mailing of the Subpoena to a listed business address should qualify as a "reasonable step...to give notice." *Id.* Indeed, as the Appellant subsequently objected to the Subpoena, it was clearly noticed of its existence and the documents requested by it. This notice satisfies the requirements of the Securities Act, independent of Federal Express' signature form. Accordingly, the Securities Act's service provisions were complied with—by multiple means—and the Subpoena was properly served on the Appellant.

CONCLUSION

For the foregoing reasons, the Respondent submits that circuit court's Order enforcing the Subpoena against the Appellant be affirmed.

Respectfully submitted,

ALAN WILSON
Securities Commissioner

TRACY A. MEYERS
Deputy Securities Commissioner

BY: _____
IAN P. WESCHLER
Assistant Attorney General
Securities Division
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
S.C. Bar No. 101422
(803) 734-9916

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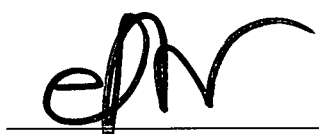
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.



IAN P. WESCHLER
Assistant Attorney General
S.C. Bar No. 101422

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CERTIFICATE OF SERVICE

I hereby certify that I have served the Final Brief of Respondent and Certificate of Counsel upon the Appellant by mailing a copy to each of its attorneys of record at the address below via the United States Mail this April 13, 2015:

James M. Griffin, Esq.
Margaret N. Fox, Esq.
Lewis, Babcock & Griffin, L.L.P.
1513 Hampton Street
Columbia, South Carolina 29201

IAN P. WESCHLER
Assistant Attorney General
S.C. Bar No. 101422