IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY

Ellis B. Drew, Jr., Master in Equity

Appellate Case No. 2015-001416

Deutsche Bank National Trust Company as
Indenture Trustee for MortgageIT Trust 2004-1,

Respondent,

v.

Joseph F. DeBoskey; and Suntrust Bank,

Defendants,

Of whom Joseph F. DeBoskey is the,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On February 26, 2004, Joseph F. DeBoskey ("Appellant") executed a promissory note in favor of MortgageIt, Inc., secured by a corresponding mortgage in favor of Mortgage Registration Systems, Inc. ("MERS") as nominee for MortgageIt, Inc. The mortgage was recorded on February 27, 2004, and constituted a purchase money mortgage with the proceeds of the loan being used to purchase the subject property. By assignment dated August 25, 2011 and recorded September 15, 2011, the note and mortgage were assigned to Deutsche Bank National Trust Company as Indenture Trustee for MortgageIT Trust 2004-1 ("Respondent"). After Appellant defaulted on the monthly mortgage payments on May 1, 2011 and Respondent, via its servicer, provided notice of Appellant's default, Respondent accelerated the monthly mortgage payments and demanded the balance of the loan payable in full. The foreclosure action was subsequently commenced by the filing of a Lis Pendens, Summons, Complaint, and Notice of Foreclosure Intervention on November 10, 2011.

Appellant was served by substitution at the subject property address on November 14, 2011, and an Affidavit of Service was filed on November 15, 2011. After Appellant failed to respond to the Notice of Foreclosure Intervention, a Denial of Foreclosure Relief was filed on January 20, 2012 and a Certification of Compliance with the S.C. Supreme Court Administrative Order 2011-05-02-01 ("2011 Administrative Order") was filed on February 21, 2012. In the interim, Appellant filed a Motion for More Definite Statement on February 17, 2012 and a Return to same was filed by Respondent on March 15, 2012. Pursuant to Order entered on June 11, 2012, the action was referred to the Master in Equity for Anderson County. Respondent filed an Affidavit of Non-Military Service and Default for Appellant on August 13, 2012, based on his failure to serve an Answer to the Complaint.

The trial court denied Appellant's Motion for a More Definite Statement for failure to prosecute by Order entered on August 13, 2012. Bridget D. Swing, Esquire, filed a Notice of Appearance on behalf of Appellant on September 14, 2012. Ms. Swing appeared on behalf of Appellant at the final hearing held on September 17, 2012, at which the Master granted the foreclosure and an Order and Judgment of Foreclosure and Sale was entered. A status conference was held via telephone with counsel for both Appellant and Respondent on November 19, 2012, at which the scheduled foreclosure sale date of December 4, 2012 was cancelled pending a response to Appellant's request for assistance with SC Help. A corresponding form order was entered on December 3, 2012, and Ms. Swing was relieved as Appellant's counsel by Order entered on December 6, 2012.

On October 23, 2013, Marshall P. Sherard, Esquire, filed a Motion for Relief from Entry of Judgment on behalf of Appellant. Respondent filed a Return to same on November 15, 2013. The Master held a hearing on the Motion on May 12, 2015, at which counsel for both Respondent and Appellant appeared. The Master denied the Motion, and entered a corresponding Order on June 3, 2015. Appellant filed the instant appeal of the Order denying his Motion for Relief form Entry of Judgment on June 30, 2015.

A supplemental hearing to update the damages portion of the Order of Judgment of Foreclosure and Sale was scheduled to occur on July 6, 2015, for which Appellant's attorney was served notice on June 22, 2015. No one appeared on behalf of Appellant. The Master continued the hearing and directed Respondent's counsel to prepare an Order of Continuance. The Master requested that the Order of Continuance include specific provisions regarding the posture of the foreclosure action and applicable law pertaining to appeal bonds. The Order of Continuance was prepared in accordance with the directive of the trial court, and entered on July 24, 2015.

Thereafter, Marshall P. Sherard, Esquire was relieved as Appellant's counsel by the Court of Appeals on September 10, 2015.

The supplemental hearing was rescheduled for September 15, 2015, for which Appellant was provided Notice. Appellant then filed a Motion for Recusal of the Master in Equity on August 6, 2015. The Motion for Recusal and supplemental hearing were scheduled to be heard on September 15, 2015. The Master granted Appellant's request of a continuance of the September 15, 2015 hearings, and they were rescheduled to October 28, 2015. Appellant then requested continuances of the October 28, 2015 hearings from both the Court of Appeals and Master, which were respectively denied. Appellant did not appear at the September 15, 2015 hearings, and the Master took both decisions under advisement. On February 9, 2016, the Master notified the parties of his recusal.

During the course of the underlying action, Respondent's counsel provided Appellant with some eight reinstatement quotes by correspondence dated December 27, 2011, October 9, 2012, November 16, 2012, December 20, 2012, June 27, 2013, January 7, 2014, June 23, 2014, and January 22, 2015. Appellant has not reinstated the loan.

ARGUMENT

I. THE MASTER IN EQUITY PROPERLY DENIED APPELLANT'S MOTION FOR RELIEF FROM ENTRY OF JUDGMENT UNDER APPLICABLE LAW.

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. *Sundown Operating Co., Inc. v. Intedge Indus., Inc.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009) (citing *Harbor Island Owners' Ass'n v. Preferred Island Props. Inc.*, 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006)). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of discretion. *Id.* at 607, 681 S.E.2d at 888. An abuse of discretion occurs when the judgment is controlled by some

error of law or when the order is without evidentiary support. *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997).

A judgment may be set aside more than one year after its entry only if it is void or if it has been satisfied, released, or discharged. SCRCP Rule 60(b)(4)-(5); *Thomas & Howard Co., Inc. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343-44 (1995) (finding that movant was not entitled to any relief when a 60(b)(1) motion was made more than one year after entry of the default judgment.) Rule 60(b) of the South Carolina Rules of Procedure provides, in relevant part, as follows:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud, misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.
>
> **The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken.** A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court.

SCRCP Rule 60(b) (emphasis added).

In determining whether to grant a motion under Rule 60(b), the trial judge should consider: (1) the promptness with which relief is sought, (2) the reasons for the failure to act

promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other party. *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510-11, 548 S.E.2d 223, 225-26 (Ct. App. 2001) (citing *New Hampshire Ins. Co. v. Bey Corp.*, 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993)). "A meritorious defense is necessary in order for a judgment to be set aside under Rule 60(b)." *McClurg v. Deaton*, 395 S.C. 85, 86-87, 716 S.E.2d 887, 887-88 (2011). If the meritorious defense factor is not ruled upon by the lower court, the denial of a Rule 60(b) claim is not preserved for appellate review. *Id.* at 87, 716 S.E.2d at 888.

As a threshold and dispositive matter, the Master in Equity did not make any finding as to the meritorious defense factor in the Order denying Appellant's Motion for Relief from Judgment. Indeed, Appellant made no mention of a meritorious defense in either his written motion or argument at the hearing held May 12, 2015. Therefore, Appellant's claim is not preserved for appellate review.

Second, the plain language of Rule 60, SCRCP and the black letter law of South Carolina expressly prohibit any relief from judgments entered more than a year prior to a motion under Rule 60(b)(1), (2), and (3). Appellant's motion did not cite ***any*** rule of procedure or make any allegation that the judgment was void, satisfied, released, or discharged. Further, Appellant did not make any oral argument at the hearing that the judgment was void, satisfied, released, or discharged. Thus, the motion was properly denied as untimely and procedurally defective.

Finally, Appellant merely sought equitable relief under the 2011 Administrative Order under which, notably, he did not seek foreclosure intervention. As properly determined by the trial court, the 2011 Administrative Order provides no basis for relief as sought by Appellant.

The record in the underlying action reveals ample evidentiary support for denying the motion, and the plain language of Rule 60, SCRCP compels it as a matter of law. Accordingly,

this Court should affirm the Master in Equity's Order denying Appellant's Motion for Relief from Judgment.

II. ALL REMAINING ISSUES RAISED BY APPELLANT ARE NOT PRESERVED FOR APPELLATE REVIEW AND SHOULD BE DENIED.

As an initial matter, an issue must be raised and ruled upon in order to preserve it on appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). An objection, which is sufficiently specific as to inform the court of the point urged by the objector, will preserve an issue for appellate review. *See Busillo v. City of N. Charleston*, 404 S.C. 604, 607, 745 S.E.2d 142, 144 (Ct. App. 2013); *see also State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) ("To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court."); *Busillo*, 404 S.C. 604, 745 S.E.2d 142 (holding that appellant's arguments were not adequately presented to the trial court or not presented at all and thus were not preserved for appellate review); *Armstrong v. Collins*, 366 S.C. 204, 225, 621 S.E.2d 368, 378 (Ct. App. 2005) (holding that an issue was not preserved for review on appeal where the argument was not presented to the trial court and the court was not given an opportunity to rule on it). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." *Johnson*, 363 S.C. at 58-59, 609 S.E.2d at 523 (citing *State v. Pauling*, 322 S.C. 95, 99, 470 S.E.2d 106, 109 (1996)).

For the first time since the commencement of this action, Appellant claims, in his initial brief, that the underling foreclosure: (1) is governed by federal law and the internal requirements of foreclosure relief programs; (2) was stayed by the U.S. Constitution, federal law, and the 2011 Administrative Order; and (3) was improperly granted because Respondent lacks standing to foreclose. At no point did Appellant make any of the foregoing assertions by way of written motion or oral argument to the lower court. By the same token, the lower court did not make any

rulings as to the applicability of federal law, foreclosure relief programs, or the U.S. Constitution to the case, and instead entered default judgment against Appellant. The lower court similarly did not issue an order staying the action pursuant to the 2011 Administrative Order. Therefore, all remaining issues raised by Appellant are not preserved for review and Appellant is thus procedurally barred from raising these issues.

Even if this Court finds that Appellant's arguments are preserved, this Court should nevertheless reject these arguments for the reasons set forth below:

A. State law governs the foreclosure action.

The only motions filed by Appellant were a Motion for More Definite Statement, which was denied for failure to prosecute, and the Motion for Relief from Judgment giving rise to the instant appeal. Neither Motion makes reference to federal law, the U.S. Constitution, or the provisions of foreclosure relief programs. Accordingly, Appellant's attempt to argue that anything other than South Carolina state law applies to the foreclosure action should be summarily rejected because this issue is not preserved for appellate review.

Notwithstanding the foregoing, Appellant fails to cite any authority to support his claim that federal law or the U.S. Constitution are applicable to a state court foreclosure action in which a default judgment was entered. Similarly, Appellant does not cite any authority supporting his claim that South Carolina state courts are bound by the internal administrative requirements of loss mitigation relief programs. Therefore, these claims are without merit and must be denied.

B. Respondent complied with the requirements of the 2011 Administrative Order.

In his Motion for Relief from Judgment, Appellant contended that Respondent was in violation of the 2011 Administrative Order but did not argue that the case was subject to a stay

imposed by said Order. The lower court denied Appellant's Motion for Relief from Judgment, and did not rule upon Appellant's assertion that Respondent was in violation of the 2011 Administrative Order in the resulting order. Appellant did not file a Motion for Reconsideration. Appellant also did not argue that the action was stayed under the 2011 Administrative Order at any point in the proceedings. Therefore, this issue is not preserved for appeal and must be denied.

Nevertheless, the record below indicates that Respondent complied with its requirements under the 2011 Administrative Order and Appellant failed to file any timely objection to same. Specifically, the Master in Equity made a finding in the Order of Judgment of Foreclosure and Sale that the 2011 Administrative Order does not apply to the action based upon the Certification of Compliance filed by Respondent. Appellant did not object to the Certification of Compliance. After a status conference with the parties on December 3, 2012, the lower court issued a stay of the December 4, 2012 foreclosure sale to allow Appellant time to obtain a response to his request for assistance from SC Help. Nonetheless, the court did ***not*** find that the action was stayed by the 2011 Administrative Order or any other statute, rule of civil procedure, or foreclosure relief program.

At the May 12, 2015 hearing on his Motion from Relief from Judgment, Appellant's counsel sought equitable relief from the lower court and argued the "purpose" of the 2011 Administrative Order is to require "lenders to act in good faith and deal with borrowers in order to stem the flood of foreclosures." (Transcript, 7: 2-14). However, Appellant was unable to point to any provision of the 2011 Administrative Order which Respondent failed to satisfy, or any other basis for relief under the 2011 Administrative Order. The record also reveals that Appellant was provided with multiple opportunities to reinstate the loan, but did not

do so. Furthermore, Appellant's Motion for Relief from Judgment was filed approximately ten months after the court's stay of the December 4, 2012 sale. Appellant did not argue in that Motion or the subsequent hearing that the case was stayed indefinitely for him to pursue loss mitigation efforts. Therefore, this issue is without merit and should be denied.

C. Respondent has standing to foreclose.

Appellant argues for the first time in his initial brief that Respondent lacked standing to foreclose and thus the judgment is void, based on information he obtained subsequent to filing his notice of appeal. This issue is not preserved for review and should be denied.

Notwithstanding the foregoing, Appellant has not presented any evidence to show that Respondent lacks standing to foreclose the subject mortgage.

"Generally, a party must be a real party in interest to the litigation to have standing." *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 28, 630 S.E.2d 474, 479 (2006). "An assignee stands in the shoes of its assignor." *Accord, Moore v. Weinberg*, 373 S.C. 209, 220, 644 S.E.2d 740, 745 (Ct. App. 2007); *Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.*, 335 S.C. 636, 640-41, 518 S.E.2d 44, 46 (Ct. App. 1999); *Singletary v. Aetna Cas. & Sur. Co.*, 316 S.C. 199, 201, 447 S.E.2d 869, 870 (Ct. App. 1994). "Thus, an innocent assignee receives all the rights of his assignor." *BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 624, 731 S.E.2d 547, 549 (2012) (citing *Singleton v. Singleton*, 60 S.C. 216, 234-35, 38 S.E. 462, 469 (1901)); *see also Twelfth RMA Partners, L.P.*, 335 S.C. at 640, 518 S.E.2d at 46. ("[T]he assignee [has] all the same rights and privileges, including the right to sue . . . as the assignor.").

At the time Respondent commenced the foreclosure action on November 10, 2011, it was the real party in interest because it was the mortgagee based upon a recorded assignment of mortgage from the original lender. The trial court properly granted the foreclosure at the final

default hearing based upon the evidence presented, which included copies of the note, mortgage, and assignment of mortgage recorded on September 15, 2011. As the mortgagee at the time the action was filed and at the final hearing, Respondent was clearly the real party in interest and thus had standing to foreclose.

Moreover, the purported evidence which Appellant is attempting to offer nearly three years and four months since the judgment was entered does not contradict the fact that Respondent is the mortgagee. Instead, this document merely states that Residential Credit Solutions, Inc. is the servicer of the subject mortgage loan and that Deutsche Bank National Trust Company is the "indenture trustee pursuant to an indenture for MortgageIT Mortgage Loan Trust 2004-1."

Accordingly, this Court should deny this issue on appeal and affirm the Master in Equity's ruling granting Respondent's Motion to Amend Caption.

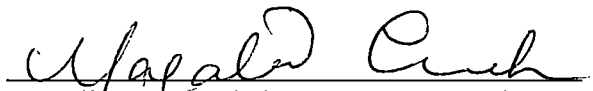
CONCLUSION

This Court should affirm the Master in Equity's ruling denying Appellant's Motion for Relief from Entry of Judgment on the grounds that it was procedurally and substantively defective. Appellant has failed to preserve for review his issues regarding the applicability of federal law, the U.S. Constitution, foreclosure relief programs, the 2011 Administrative Order, and standing. Even if they had been preserved, these arguments fail on the merits and therefore they should be denied by this Court.

(SIGNATURE PAGE FOLLOWS)

Green Tree Servicing, LLC v. Joel Clay Bracken
Appeal from Greenville County Court of Common Pleas
Appellate Case No. 2015-000942

Respectfully submitted,



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February 11, 2016

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY

Ellis B. Drew, Jr., Master-in-Equity

Appellate Case No. 2015-001416

Deutsche Bank National Trust Company as
Indenture Trustee for MortgageIT Trust 2004-1,

Respondent,

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Joseph F. DeBoskey; and Suntrust Bank, Defendants,

Of whom Joseph F. DeBoskey is the,

Appellant.

PROOF OF SERVICE

I certify that I have served the *Respondent's Initial Brief and Designation of Matter* by depositing a copy of same in the United States Mail, postage prepaid, on February 11, 2016, addressed to Appellant of record, Joseph F. DeBoskey, 115 Caribou Cove, Anderson, South Carolina 29621.

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February 11, 2016

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REPLY TO:
CHARLESTON LITIGATION

February 11, 2016

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

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RE: Deutsche Bank v. Joseph DeBoskey
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Our File No.: 56430. 47496

Dear Ms. Kitchings:

Enclosed for filing is the *Respondent's Initial Brief and Designation of Matter* and related *Proof of Service* in the above-referenced case, along with six (6) copies, which we kindly ask you to file and return in the attached, self-addressed, stamped envelope.

Should you have any questions concerning this matter, please do not hesitate to contact our office at your earliest convenience.

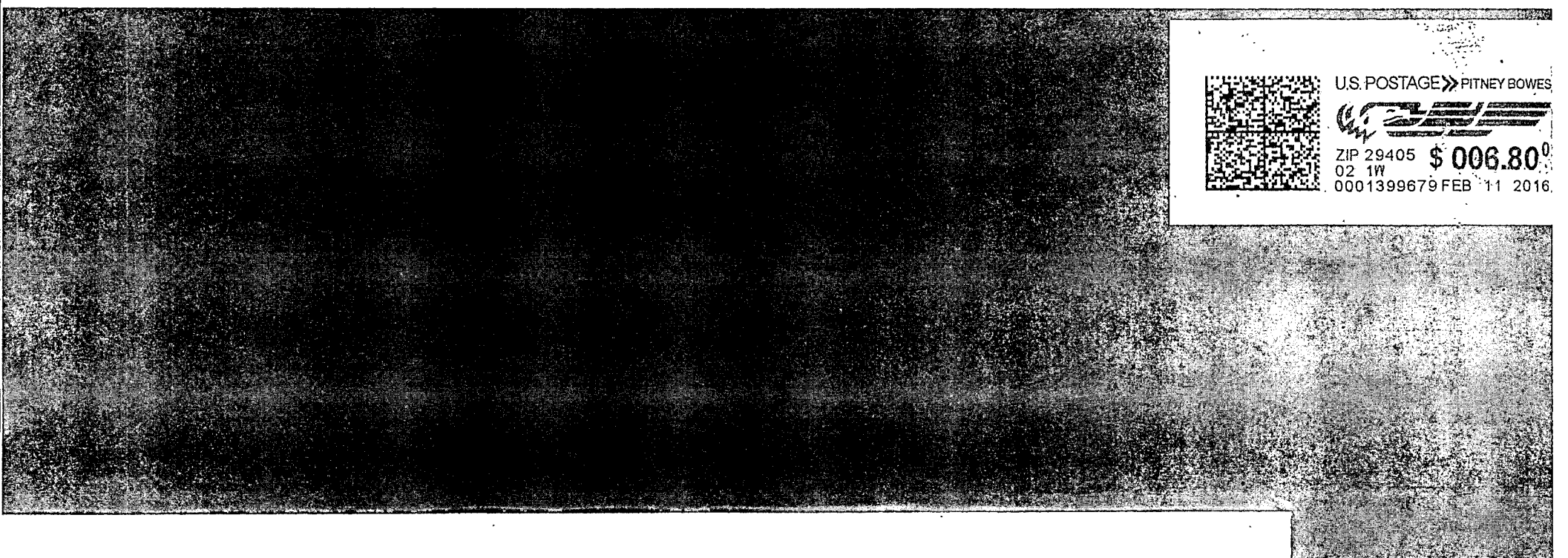
With kind personal regards, we are

Yours very truly,

FINKEL LAW FIRM

Magalie A. Creech

CC: Joseph DeBoskey



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