THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Joe M. Crosby, Master-in-Equity

Appellate Case No. 2015-000295

TD Bank, N.A., Successor by merger to Carolina First Bank, N.A., ... Respondent,

v.

Sunil V. Lalla and Sharon w. Lalla,..... Appellants.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On March 15, 2011, the Plaintiff filed a Summons and Complaint against the Defendants. (R. pp. 23-61). The pleadings were properly served. The Complaint seeks judgment against Dr. Sunil Lalla based upon the existence of an alleged note and based upon an allegation the note is owned by the Plaintiff.

The Defendants filed an Answer on or around April 11, 2011. In the Answer, the Defendants denied the existence of the note. (R. pp. 62-64). On December 10, 2012, Judge Joe Crosby, Master-in-Equity for Georgetown County, held a foreclosure hearing. After the hearing, Judge Crosby issued an Order dated April 22, 2013, in which he held that the Plaintiff's had not proven any right to a deficiency judgment. (R. pp. 3-11). The Plaintiff timely filed a Motion to Alter or Amend the Court's Order. (R. pp. 239-248). On February 4, 2015, Judge Crosby filed an Order Granting Plaintiff's Motion to Alter or Amend. (R. pp. 12-20). Defendants timely filed a Notice of Appeal. (R. pp. 254-265).

In 2006, Dr. Lalla entered into a mortgage with Carolina First Bank for property located in Garden City, South Carolina. (R. pp. 30, 43). The mortgage was filed in Georgetown County, South Carolina. At the time of the lawsuit, there had been no additional mortgages on the property, and no assignments of the mortgage had been filed with the Register of Deeds Office in Georgetown County, South Carolina. (R. pp. 110-112).

Due to the downturn in the economy, Dr. Lalla had financial issues. He attempted to work out a solution with the Plaintiff, Toronto-Dominion (TD) Bank, who claimed to have been assigned the mortgage. Plaintiff, however, instituted an action against Defendant, despite the property being residential and perhaps subject to the

Homeowner's Affordable Modification program under the Federal Government. (R. pp. 125-129).

The first cause of action in the Complaint is based upon the alleged note. This note was allegedly signed on November 13, 2006. It is alleged the note is secured by a mortgage from the property located in Garden City. The second cause of action seeks foreclosure upon a mortgage as described above. (R. p. 35, ¶¶ 23-27). In the second cause of action, Plaintiff claims its note is secured by the mortgage. The note referred to in the second cause of action is the note alleged to exist in the first cause of action. Thus, the right to foreclose on the mortgage is tied to the proof and existence of the note described in the first cause of action. Pursuant to the Complaint, the right claimed by Plaintiff to a monetary judgment is based upon the note. The right Plaintiff claims to foreclose is based upon the mortgage described in the second cause of action. The second cause of action does not seek any monetary judgment. (R. p. 35.) The third cause of action seeks attorney's fees and costs pursuant to the note. Thus, without adequate proof of the note, the third cause of action fails. The fourth cause of action is moot as it seeks a receiver to collect rents to preserve the property during the pendency of the action.

In paragraph seven (7) of the Defendants' Answer, they deny they have given Plaintiff the note that is the subject of the first cause of action. (R. pp. 63, 97). Thus, the validity of the note is in question as is the issue of ownership of the note.

ARGUMENT

I. THE TRIAL COURT ERRED IN CONSIDERING ISSUES IN THE MOTION TO ALTER OR AMEND JUDGMENT SINCE THOSE ISSUES WERE NOT BROUGHT BEFORE THE COURT.

a. The Trial Court should have denied the Motion since it raised issues not brought before the Court.

Our Courts have made it clear that "[a] party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not." *Tallent v. South Carolina Dept. of Transp.*, 363 S.C. 160, 165, 609 S.E.2d 544, 546 (Ct. App. 2005) (citing *Kiawah Prop. Owners Group v. Public Serv. Comm'n,* 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004)); *see also MailSource, LLC v. M.A. Bailey & Assoc.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003) (holding that a party cannot raise an issue for first time in a Rule 59(e) motion which could have been raised at trial). A party cannot use a motion to alter or amend judgment to present to the trial court issues the party could have raised prior to judgment but did not. South Carolina Rules Civ. Proc., Rule 59(e). *Crary v. Djebelli* 321 S.C. 38, 467 S.E.2d 128 (S.C. App. 1995).

In its Motion to Alter or Amend Judgment, the Plaintiff introduced the issue of presumption for the first time. The Motion stated: "The Master failed to apply the presumption that Defendant had executed a note in favor of Plaintiff." (R. p. 240, ¶ 4). Since the issue of presumption was not brought before the Court, it is improper. In addition, the code section cited by Plaintiff was misleading to the Court. The Plaintiff cited S.C. Code Ann § 36-3-307 (2006) to claim that the Court should have presumed that Defendant signed the note. However, this section applies only when the authenticity of a signature is questioned, not when the authenticity of the document itself is

questioned. The Court cited S.C. Code Ann § 36-3-307, but this is a definitional section only. It does not contain instructions on its application to authenticating a *document.*

The Plaintiff also introduced the issue of estoppel for the first time in the Motion. The Plaintiff stated: "Because Defendants made payments to the bank under the note, the Defendants are estopped from denying the existence of the note." (R. p. 242, ¶ 10). Since the issue of estoppel was not brought before the Trial Court, this is improper.

The Plaintiff also for the first time introduced the issue of standing. Although the Defendants' Answer to the Complaint stated that they denied the existence of the note and counterclaims were asserted, the Plaintiff did not assert that the Defendant's lacked standing as one of its defenses. (R. pp. 62, 65). The Judge improperly considered this issue in his Order, stating: "Defendants lack standing." (R. p. 13, fn. 1). Defendants did not have an opportunity to examine this assertion. It was not raised in the pleadings, nor was it raised at the hearing. This was an error of law.

These improper issues, raised for the first time in the Motion to Alter or Amend, should not have been considered by the Trial Court and the Motion should have been denied.

b. <u>The Trial Court erred in considering evidence submitted to the Court in the Motion to Alter or Amend Judgment.</u>

The Plaintiff also failed to honor the Court's instructions and attached evidence not presented to the Court, denying Defendants the opportunity to cross-examine on the evidence. (R. pp. 154-155). This is improper and should have led the Trial Court to deny the Motion. SCRCP Rule 59(e); *see Spreeuw v. Barker,* 385 S.C. 45, 682 S.E.2d 843 (S.C. App. 2009) (Appellate court considering father's challenge to child support award

could not consider financial document appearing only as an attachment to father's postjudgment motion to alter or amend judgment).

"A judge may not, after all testimony has been taken, receive additional contested evidence without reopening the case." *Johnson v. Johnson,* 288 S.C. 270, 274, 341 S.E.2d 811, 814 (Ct. App. 1986). The only exception to this rule is if the evidence is newly discovered and meets the following criteria: the evidence (1) is of such magnitude that had the court known of it earlier, the outcome would likely have been different; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; **and** (5) is not merely cumulative or impeaching. S. C. Rules of Civ. Proc., Rules 59(b), 60(b) (emphasis added).

The evidence in this case failed to meet prong number three. It was discoverable before the trial. Therefore, the additional evidence should have been submitted and considered by the Court, and the Motion should have been denied.

II. THE PLAINTIFF HAS THE BURDEN OF PROOF TO ESTABLISH THE EXISTENCE OF THE NOTE AND ASSIGNMENT OF THE MORTGAGE, WHICH IT FAILED TO DO.

"[W]here the defendant pleads special matter that denies an element of the plaintiff's cause of action, the defense is not affirmative and the burden of proof remains on the plaintiff to establish his case." *O'Neal v. Carolina Farm Supply of Johnston, Inc.,* 279 S.C. 490, 494, 309 S.E.2d 776, 779 (Ct. App. 1983). It is an elementary rule of civil practice that a Plaintiff must prove the allegations of the Complaint by a preponderance of the evidence. *Brucke v. Howard,* 74 S.C. 144, 54 S.E. 249 (1906); *Smith v. Smith,* 194 S.C. 247, 9 S.E.2d 584 (1940). In any suit on a note, a plaintiff must prove the existence of the note. Plaintiff must prove his ownership of the note. Plaintiff must prove the

terms of the note. Further, plaintiff must prove a breach of the note as a condition precedent to suit. 12 Am. Jur. 2d. *Bills and Notes*, Section 650, *et seq.*

a. The Trial Court erred in ignoring the best evidence rule.

The Order states that the Court considered a copy of a note as properly admitted evidence. This was an error of law. "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Rule 1003, SCRE. The Defendants raised the issue as to the authenticity of this copy in the hearing, therefore the original was required. The only exceptions to an original are:

> (1) Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
> (2) Original Not Obtainable. No original can be obtained by any available judicial process or procedure; or
> (3) Original in Possession of Opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
> (4) Collateral Matters. The writing, recording, or photograph is not closely related to a controlling issue.

Rule 1004, SCRE. The Plaintiff's witness testified that the alleged note was in the Plaintiff's possession, and had not been lost or destroyed. He also testified that it was obtainable. (R. pp. 90-91). The Plaintiff was put on notice that the contents would be a subject of proof at the hearing by the Answer of the Defendants, and the Plaintiff did not produce the original at the hearing. In addition, the existence of a note would be closely related to the claim by Plaintiff. Since all of the elements are met, the Court was in error to consider a copy of the alleged note. South Carolina Courts hold the admission of secondary evidence is not a favored practice. *Wynn v. Coney,* 232 S.C. 346, 102 S.E.2d

209 (1958); *Drayton v. Industrial Life & Health Ins. Co.,* 205 S.C. 98, 31 S.E.2d 148 (1944). See also *De Loach v. Sarratt,* 55 S.C. 254, 33 S.E. 2 (1899) (too much leniency should not be allowed in a party's proof of the absence of original documents when that party wishes to resort to secondary evidence of the contents of the written papers). "If [it is] impossible to obtain the original, a resort to secondary evidence would be allowed and justified, but *not so when these papers are in the custody* of the [Plaintiff], and could be obtained ... to a reasonable extent. It is plaintiff's duty to present these original[s]." *De Loach v. Sarratt,* 55 S.C. 254, 33 S.E. 2, 10 (1899). In that case, the Court held that "the circuit judge was in error in admitting ... secondary evidence" when the originals were obtainable.

Florida courts also agree that it is true that the proper party with standing to foreclose a note and mortgage is the holder of the note and mortgage or the holder's representative. *See BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean–Jacques,* 28 So. 3d 936, 938 (Fla. 2d DCA 2010). However, "[t]he party seeking foreclosure must present evidence that it owns and holds the note and mortgage in question in order to proceed with a foreclosure action." *Lizio v. McCullom,* 36 So. 3d 927, 929 (Fla. 4th DCA 2010). A plaintiff must tender the original promissory note to the trial court or seek to reestablish the lost note under section 673.3091, Florida Statutes (2010). *State St. Bank & Trust Co. v. Lord,* 851 So. 2d 790, 791 (Fla. 4th DCA 2003).

The Plaintiff is a national banking institution. Plaintiff claims to be the holder of the note described in the first cause of action. The Plaintiff did not bring the original note to the trial and it was not received into evidence. (R. pp, 76-77, 90). Plaintiff did attempt to introduce a copy of the note but counsel for the Defendants properly objected to the

alleged note on the basis of the best evidence rule. (R. pp. 90-96). *Penton v. J.F. Cleckley and Company,* 326 S.C. 275, 486 S.E.2d 742 (1997); *Shirer v. O.W.S. and Associates*, 253 S.C. 232, 169 S.E.2d 621 (1969). The copy of the note should have been excluded from evidence, and the Court should not have considered the terms or conditions of the alleged note. 12 Am. Jur. 2d. *Bills and Notes*, Section 668.

Plaintiff did bring an official from the bank to trial. He testified the note is in existence. He testified the original is still in possession of the bank. (R. p. 90). There was no legitimate reason advanced which would justify the requirement of the original document being placed into evidence. *Penton v. J.F. Cleckley and Company,* 326 S.C. 275, 486 S.E.2d 742 (1997); *Shirer v. O.W.S. and Associates,* 253 S.C. 232, 169 S.E.2d 621 (1969); 12 Am. Jur. 2d. *Bills and Notes*, Section 668.

b. Since there was no merger between TD Bank and Carolina First, S.C. Code Ann. § 34-3-850 (2006) does not apply.

The Plaintiff's Exhibit 1 is an Order Approving the Acquisition of a Bank Holding Company. It is not a merger agreement. However, the Order states that there was testimony sufficient to establish a merger. (R. p. 13-14). When questioned, Plaintiff's representative testified that there was not a merger, only a stock acquisition. (R. p. 116).

Because the Plaintiff's representative testified that there was no merger, the Court was in error to apply S.C. Code Ann. § 34-3-850. Since there was no documentation showing that TD bank had merged or had acquired Carolina First, this statute can not be used to provide that Plaintiff was the holder of the note and mortgage. This was an error of law.

c. Plaintiff failed to offer proof of assignment of the note or the mortgage.

Plaintiff claims to be an assignee of the rights of Carolina First Bank. On the other hand, no assignment of any note was placed into evidence and no assignment of any mortgage was placed into evidence. Plaintiff did introduce some securities records wherein Plaintiff acquired the "parent company" of Carolina First Bank. These documents do not establish that Plaintiff is the holder upon which suit has now been brought.

Carolina First Bank is a separate entity from its parent corporation. There simply is nothing in evidence from which the Court can conclude that Plaintiff is now the holder of the alleged note. The Plaintiff's witness testified that there was an acquisition of the South Financial Group by the TD Bank, but not that there was an acquisition of Carolina First, the holder of the note, by TD Bank. (R. pp. 81, 158). The subsidiary company of the parent company is a separate legal entity. There is nothing in the record from which this Court can conclude that Plaintiff ever acquired the note.

A mortgage is a security instrument. *Brockington v. Lynch,* 119 S.C. 273, 112 S.E. 94 (1922). In order to foreclose, a plaintiff must prove it is owed money secured by the instrument and the terms of the negotiable instrument have been breached. *Paramount Fund Inc. v. Cusaac,* 282 S.C. 497, 319 S.E.2d 354 (S.C. App. 1984); *Blackwell v. Blackwell,* 289 S.C. 470, 346 S.E.2d 731 (S.C. App. 1986); 12 Am. Jur. 2d. *Mortgages*, Section 658, *et seq*. In the present case, there is simply no proof of the essential elements of the causes of action. The witness for the Plaintiff testified that Plaintiff's Exhibits 1 and 2 establish an assignment of mortgage. However, those

exhibits refer only to TD Bank and The South Financial Group. There are no documents that refer to TD Bank and Carolina First. (R. pp. 112-125).

In order for an assignee to collect on a negotiable instrument, he must first prove a valid assignment of the instrument. *Moore v. Weinberg,* 373 S.C. 209, 644 S.E.2d 740 (S.C. App. 2007). There was no such proof in this case. The public record of Georgetown County shows the record holder of the mortgage to be Carolina First Bank and not the Plaintiff. In short, there is nothing on the public record to indicate the mortgage or the note was ever assigned to the Plaintiff. (R. pp. 112-125).

The mortgage clearly gives Carolina First the right to foreclose upon proof of default in the note or debts of the Defendants. According to the public record, Plaintiff is not the holder of the mortgage. On the other hand, the right to foreclose according to the mortgage belongs to Carolina First Bank and not to the Plaintiff.

Plaintiff claims it now owns the mortgage that it seeks to foreclose. Again, Plaintiff does not and has not explained exactly how it claims to hold title to the mortgage. Further, Plaintiff has not proven it is the holder of any debts secured by the claimed mortgage.

In this case, Plaintiff has failed to prove ownership of the note and mortgage. It is admitted the note was never given to the Plaintiff or any of its representatives. The note was given in favor of Carolina First Bank and there is no proof the note was ever assigned by Carolina First Bank to anyone.

d. Even if the mortgage was assigned, any note associated with it does not follow.

"[T]he assignment of a note secured by a mortgage carries with it an assignment of the mortgage, but ... the assignment of the mortgage alone does not carry with it an assignment of the note." *Hahn v. Smith,* 157 S.C. 157, 167, 154 S.E. 112, 115 (1930).

Therefore, even if Defendants admitted the existence of the mortgage, the note does not follow. In addition, the Defendants have not admitted the assignment of the mortgage. The Plaintiff failed to establish its ownership of the note and mortgage. The Court was in error to hold otherwise.

III. THE COURT ERRED IN ADMITTING THE TESTIMONY OF THE BANK EMPLOYEE REGARDING INFORMATION OUTSIDE HIS KNOWLEDGE OR CONTROL.

The testimony of the bank employee was not sufficient to establish the alleged assignment or merger of the banks. Therefore, it was an error of law to admit his testimony in this area. It was also an error of law to admit the Plaintiff's Exhibit 5, which were copies of printouts from a computer. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Rule 602, SCRE. The Court itself testified that it was "not exactly sure" of the witness' area of knowledge. (R. p. 104). Since the Court itself was not sure of the knowledge that the witness had, the Court should not have relied on the testimony of the witness to establish assignment, merger, payments, the note, or the mortgage.

The witness testified:

> Q – Do you know of any document where that was assigned from Carolina First Bank to its current company?
> A – I don't have anything in my possession, no.

...
Q – So we know of no document anywhere where Carolina First ever assigned its claim to this mortgage to South Financial, correct?
A – I'm not sure I know how to answer that.

(R. p. 111). The witness also stated that he was not a party to the master agreement of acquisition and has never seen the original agreement. He then stated he has never seen the document at all. (R. pp. 117-118). He then testified:

Q – And since you've never seen the document and have no firsthand knowledge, you can't tell us firsthand what TD Bank got from Carolina First or South Financial, can you?
A – I can – no I can only refer to what I've seen.
...
Q – Since you don't actually know what TD Bank acquired, you don't know what TD Bank acquired; correct?
...
A – I don't think however I answer that it's going to come out right.

(R. p. 118). The witness testified to knowledge he did not have. (R. pp. 125-126, 128-129). In addition, the testimony of the bank employee was not corroborated. To stretch the rules of evidence to admit this testimony, without corroborating evidence, could result in duplicate payments and may create a windfall for parties that may not have a legitimate claim in foreclosure proceedings.

IV. THE TRIAL COURT FAILED TO CONSIDER THAT THE PLAINTIFF OR ITS PREDECESSOR IN INTEREST RECEIVED TARP MONEY FROM THE UNITED STATES GOVERNMENT AND WAS REQUIRED TO FOLLOW CERTAIN PROCEDURES UNDER HAMP.

The Plaintiff's representative testified that he was unsure as to whether or not the home was the residence of the Defendants. First, he testified that it was not a residence. However, he then stated that it was residential. (R. pp. 125-126, 128-129). The Answer to the Complaint states "[t]he property in question is residential proper[ty] and the

Plaintiff has not complied with the regulations in regard to negotiating a modification of the note and mortgage." (R. p. 63, ¶ 15).

The Plaintiff's witness was also unsure as to whether or not the home was the Defendants' primary residence. However, the witness could not reconcile his testimony with the allegations of the Complaint:

> Q – I asked you just a moment ago was it a residential mortgage and you said yes. In the complaint you say it is not a residential mortgage.
> A – I think you're semantics at this point. That's all this is.
> Q – And I appreciate your thoughts. I just would like you to provide an explanation as to how in one breath you can tell me it's a residential mortgage and then on the other hand you can tell me that it's not. It either is or it isn't. You've testified to both. Now, which of what you have said is the truth.
> A – (No audible response.)
> Q – Which is true? You've given us two separate answers. Which one of those answers is true?
> A – It is a mortgage on a residence.

(R. p. 130-131). As a primary residence, the home was protected under the Home Affordable Modification Program. (R. 127). As such, the bank was required to comply with the HAMP prior to filing the suit.[1] The Plaintiff presented no evidence that it had complied with the law.

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[1] HAMP applies to homeowners who (1) received their mortgage on or before January 1, 2009; (2) owe up to $729,750 on their primary residence; (3) acknowledge that the property is not condemned; (4) experience financial hardship and are either delinquent or in danger of falling behind on mortgage payments; (5) have evidence of income to support a modified payment; and (6) have not been convicted within the last ten years of specific crimes generally connected to mortgage or real estate transactions. The program also applies to those who own rental property and owe up to a specific monetary amount. The homeowner must meet all criteria in order to be considered for a HAMP loan modification.

Cushla E. Talbut, *Hampered Hopes for Homeowners: An Analysis of How Litigation Trends Have Exposed the Home Affordable Modification Program's Weaknesses*, 68 U. Miami L. Rev. 295, 298 (2013) (internal citations omitted)

V. THE TRIAL COURT IMPROPERLY CONSIDERED THE ABSENCE OF THE DEFENDANTS IN ITS ORDER.

The Order stated: "Defendants failed to attend the hearing before this Court and did not refute executing the note and mortgage via testimony or other competent evidence." (R. p. 14).

The Plaintiff had the burden of proof to establish all elements of its claim. In this case, it failed to do so. The attendance or non-attendance of the Defendants should not have been included in the Court's analysis. The Court should only have considered properly admitted evidence. In addition, the Defendants did not receive a subpoena from the Plaintiff.

VI. THE TRIAL COURT ERRED IN PROUNOUNCING JUDGMENT THAT THE PLAINTIFF DID NOT SEEK.

a. The Trial Court improperly judged against Sharon Lalla, who was not a party to the alleged note.

The Plaintiff stated in the hearing that they were not seeking a judgment against Sharon Lalla. However, in the Court's Order, she is listed as a Defendant and has a judgment against her. This was an error of law.

The Plaintiff's witness stated:

> Q – You don't contend that the debt that you're attempting to foreclose is a debt of Sharon Lalla, do you?
> A – No.
> Q – Okay. Now – so the persons against whom you claim to be seeking this deficiency judgment is Dr. Sunil Lalla, correct?
> A – Yes.

(R. p. 110). Therefore, Sharon Lalla should not have been named in the Order.

b. The Trial Court erred in finding that deficiency had not been waived and in awarding a deficiency judgment.

The Trial Court was also in error by awarding a deficiency judgment. (R. p. 19). At the hearing, the Plaintiff's representative was unsure of what TD Bank asked for in the Complaint. He then stated that TD Bank wanted the property sold immediately. The Plaintiff did not want the bidding to remain open for any period of time. The witness stated he had reviewed the Complaint prior to trial, and it contained everything that TD Bank wanted. (R. pp. 132-134).

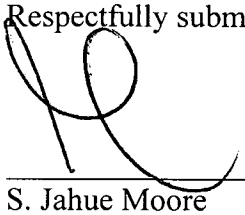
The Plaintiff did not ask for a deficiency judgment in the Complaint, which requires the bidding to remain open. The Court, however, found that deficiency had not been waived. (R. 150-154). This was an error of law.

CONCLUSION

Plaintiff has failed to prove by a preponderance of the evidence the terms of the note; any operable assignment of the note; any specific term of the note giving Plaintiff any right to judgment on the note; and any breach. In short, Plaintiff has failed to prove the allegations of its first cause of action.

The remaining causes of action are inextricably tied to the validity of the first cause of action. Without proof of the note and its breach, there is nothing that would give the Plaintiff the right to foreclose. If the first cause of action fails, there is no proof of any cause of action giving rise to the right to foreclose. Therefore, based on the foregoing, the Appellant asks this court to reverse the findings of the Master-In-Equity.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I, Lynn G. Ivey, an employee of Moore Taylor Law Firm, PA, certify that I have served the Appellants' Final Brief on counsel of record for Respondent in this action by depositing a copy of same in the United States Mail, postage prepaid, on August 10, 2015, addressed as follows:

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