THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2016-000662

Mattress by Appointment, LLC, a Florida limited liability company f/k/a Carolina Bedding Direct, LLC, a Florida limited liability company, ... Appellant,

v.

Retail Service Systems, Inc., Boxdrop Furniture, Inc., Carlton Scott Andrew, and Darren Conrad, ... Respondents.

RETURN TO MOTION

April 21, 2016

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Attorneys for Appellant

Other Counsel of Record:
Paul S. Landis
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Attorneys for Respondents

The Court of Appeals asked the parties to address the issue of appealability in a letter to counsel dated April 4, 2016. In response, Retail Service Systems, Inc. ("RSS"), and Carlton Scott Andrew submitted a document styled a memorandum but complying with the Appellate Court Rules regarding motions, including the required filing fee. See Rule 240, SCACR. In its memorandum/motion, RSS and Andrew raise two grounds for dismissing the appeal that do not concern whether the order itself is appealable. To the extent the Court of Appeals considers their memorandum/motion as a motion to dismiss the appeal, Mattress by Appointment, LLC ("MBA"), respectfully submits this Return pursuant to Rule 240(e), SCACR.

I. Immediate Appealability of the Order

MBA addressed the substantial rights impacted by the order in a memorandum served on April 14, 2016. MBA will confine its Return to the portions of the memorandum/motion that do not address appealability.

II. Timeliness of the Notice of Appeal

RSS and Andrew argue that the Notice of Appeal was not timely filed because it was filed 24 days after MBA received the Circuit Court's order denying its motion to reconsider, alter or amend, instead of within 30 days after the challenged order was entered. In so doing, they claim that because the motion to reconsider, alter, or amend is not directed at a final judgment, it is improper and did not stay the deadline for filing a Notice of Appeal.

First, there is no South Carolina authority supporting RSS and Andrew's argument that a party cannot file a motion to reconsider, alter or amend an interlocutory order. Instead, as stated by the South Carolina Supreme Court, "[t]he trial court interlocutory orders are amendable." Johnston v. Bowen, 313 S.C. 61, 63, 437 S.E.2d 45, 47 (1993). In Johnston, Bowen filed a motion for summary judgment based on the statute of limitations. Id. The trial court denied the

motion. Id. Bowen filed a motion to reconsider and the trial court amended the order to state that the motion was denied pending discovery, then later granted the motion. Id. Johnston appealed, arguing that the trial court "erred in amending the first order denying a motion for summary judgment in response to Bowen's motion to reconsider." Id. The Supreme Court summarily dispensed with this argument, "find[ing] no error" because "interlocutory orders" are amendable. Id.

Denials of motions for summary judgment are unquestionably interlocutory, see id.; U.S. Fidelity & Guaranty Co. v. City of Spartanburg, 267, S.C. 210, 211, 227 S.E.2d 188, 189 (1976) ("an order denying a motion for summary judgment is an interlocutory decision and not directly appealable."), and the Supreme Court decision's in Johnston forecloses RSS and Andrew's argument. Indeed, South Carolina authority has many examples of the Court of Appeals and Supreme Court considering appeals from the denial of motions to reconsider, alter, or amend interlocutory orders. See e.g., Watson v. Underwood, 407 S.C. 443, 457, 756 S.E.2d 155, 162 (Ct. App. 2014) (the issues raised in the [denied motion for summary judgment] motion may be raised again later in the proceedings by a motion to reconsider"); Pocisk v. Sea Coast Const. of Beaufort, 380 S.C. 584, 587, 671 S.E.2d 98, 100 (Ct. App. 2008) (appeal from denial of a motion to reconsider an interlocutory order); Tatnall v. Gardner, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002) ("This is an appeal from an order denying Joy Logan's motions to reconsider" denial of her motion to amend her answer).

This is consistent with South Carolina's long held view that "it is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court 'alter or amend the judgment,' but also as a vehicle to seek 'reconsideration' of issues and arguments." Elam v. S. Carolina Dep't of Transp., 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). The "wisdom of giving [trial courts] the

opportunity to promptly correct their own alleged errors is all the justification needed for the practice of freely allowing a motion for reconsideration." Id. (quoting Blair v. Equifax Check Svcs, Inc., 181 F.3d 832, 837 (7th Cir. 1999)). Furthermore, "there is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity." Id. at 779.

Additionally, South Carolina does not recognize the "plain error rule" and, therefore, an appellate court cannot "consider and rectify an error not raised by the party below." Elam, 602 S.E.2d at 780. Because South Carolina does not have the "plain error rule", it is "doubly important that litigants generally be freely allowed to file a first, written Rule 59(e) motion without concern a later appeal will be deemed untimely." Elam, 602 S.E.2d at 780. "A great number of reported cases in South Carolina for at least four generations...have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." Id. at 779-780 (citing to Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); Long v. Dunlap, 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); Gaffney v. Peeler, 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal)).

Given this, it is important to clearly enunciate the implication of RSS and Andrew's argument. The challenged Circuit Court order was issued *sua sponte* and not in response to any

party's motion. See Black's Law Dictionary, 7th Ed. (*Sua Sponte*: Without prompting or suggestion; on its own motion). Because it was issued *sua sponte*, no party addressed, or had the opportunity to address, the order's challenged requirements prior to the order's issuance. If MBA cannot seek reconsideration of the Court's *sua sponte* order, and if it cannot raise an issue on appeal that was not addressed by the trial court, there is no way to challenge the Court's *sua sponte* order. Said differently, if RSS and Andrew are correct and MBA appealed before obtaining a ruling on its motion to reconsider, there would have been nothing for the Court of Appeals to review because South Carolina does not adhere to the "plain error rule" and MBA's exceptions and arguments had not yet been ruled upon by the trial court. Wilke, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Certainly it is not possible that some orders of the Circuit Court are beyond the reach of appellate review.

This result is impossible in light of S.C. Code § 14-3-330's requirement of immediate appeal of certain interlocutory orders. See e.g., Hagood v. Sommerville, 362 S.C. 191, 198, 607 S.E.2d 707, 710 (2005) ("an order granting a motion to disqualify a party's preferred attorney must be immediately appealed or any later objection in a subsequent appeal will be waived."). If RSS and Andrew are correct, other *sua sponte* orders of a Circuit Court that fall within the ambit of S.C. Code § 14-3-330 cannot be reviewed by the appellate court. If a *sua sponte* order that, for example, issued an injunction, changed the mode of trial, or changed the identity of a defendant – all orders that are interlocutory and must be immediately appealed – cannot be the subject of a motion to reconsider, then because no exception or issue was raised or ruled upon by

the appealing party with respect to the order, these orders cannot be reviewed by the appellate courts.[1]

RSS and Andrew cite South Carolina authority for the proposition that the trial court has the power to alter or amend its order. Motion at 18 ("In fact, until the final judgment, it has the power to reconsider, amend, or alter the Order."). This authority would seem to support MBA's course of action in filing a motion to reconsider the order.

Additionally, RSS and Andrew cite to federal authority in support of their position that a party cannot ask a trial court to reconsider an interlocutory order. Leaving aside whether this is correct, see contra Am. Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505, 514 (4th Cir. 2003) ("Motions for reconsideration of interlocutory orders are not subject to the strict standards applicable to motions for reconsideration of a final judgment."), federal courts, unlike South Carolina, follow the "plain error rule." Tech Sys., Inc. v. Pyles, 630 F. App'x 184, 187 (4th Cir. 2015). A "plain error" is one that affects a litigant's "substantial rights." Id. Therefore, if this case were in federal court, no motion to reconsider would be necessary because MBA could appeal the decision under the plain error rule, an avenue unavailable to it in South Carolina court.

Finally, even if RSS and Andrew are correct and the motion to reconsider was improper, no South Carolina court has held that an improper Rule 59 motion impacts the deadlines for appeal as set out in Rule 203, SCACR. The Supreme Court in Elam made clear that only a successive Rule 59 motion may not stay the deadline to notice the appeal. 602 S.E.2d at 777. As stated by the Supreme Court, "civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party." Id. at 780. "If a party is unsure

[1] If RSS and Andrew reply that a motion to reconsider one of these interlocutory orders can be filed but does not stay the time for filing a notice of appeal, then appellate review of a *sua sponte* order is dependent on the Circuit Court ruling on the motion to reconsider within 30 days of its original order. Such a rule would give the Circuit Court control over whether its own orders are subject to appellate review.

whether he properly raised all issues and obtained a ruling, *he must* file a Rule 59(e) motion... without concern a later appeal will be deemed untimely." Id. (emphasis added).

Therefore, MBA had no choice but to file a motion to reconsider to make sure "all issues and arguments" were presented to and ruled upon by Circuit Court prior to filing this appeal. Elam, 602 S.E.2d at 780. MBA had no control over the amount of time needed by the Circuit Court to consider and rule on its motion to reconsider. This appeal was filed 24 days after counsel for MBA received the Circuit Court's order denying its motion to reconsider. The appeal is timely.

III. The Appellant's Filings Following the Order did not Waive the Appeal

RSS and Andrew argue that by filing a verified second amended pleading as commanded by the order, MBA waived its right to appeal. In support, RSS and Andrew cite solely to authority that concerns interlocutory orders that are not immediately appealable pursuant to S.C. Code 14-3-330. See Memorandum/Motion at 18-20 (citing to Ex Parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986) (order compelling party to participate in discovery); Davis v. Parkview Apartments, 409 S.C. 266, 280, 762 S.E.2d 535, 543 (2014) (order commanding party to provide responses to discovery requests).

Both Ex Parte Whetston and Davis concern how the appellate court acquires jurisdiction to review orders compelling discovery. When a party wishes to challenge a discovery order, the party is not aggrieved by the order until it fails to comply and is held in contempt. Ex Parte Whetstone, 347 S.E.2d at 581; Davis, 762 S.E.2d at 543 ("to challenge the specific rulings of discovery orders, the normal course is to refuse to comply, suffer contempt, and appeal from the contempt finding."). No similar defiance is required for an order affecting a substantial right because the right to appeal is granted by statute. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 6,

630 S.E.2d 464, 467 (2006) ("The right of appeal arises from and is controlled by statutory law."); Baldwin Const. Co. v. Graham, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004) ("Absent some specialized statute, determining if an interlocutory order is immediately appealable depends on whether the order falls within one of the several categories of appealable judgments, decrees, or orders listed in S.C. Code Ann. § 14-3-330.").

The only other basis by which an appeal might be waived by compliance is where compliance with the order would render challenging the order moot. An appeal is moot where some event occurs making it impossible "for the reviewing Court to grant effectual relief." Collins Music Co. v. IGT, 365 S.C. 544, 549, 619 S.E.2d 1, 3 (Ct. App. 2005). "In civil cases, there are three exceptions to the mootness doctrine." Id. The third exception is where "the decision by the trial court can affect future events or have collateral consequences to the parties, the appellate court can take jurisdiction." Id.; see also State v. Young, 66 S.C. 115, 44 S.E. 586, 588 (1903) (holding that compliance with a writ of mandamus did not render appeal moot).

Here, the Circuit Court's order affects MBA's substantial rights and the appeal is authorized by S.C. Code 14-3-330. The appeal is not moot because it sets requirements for the case that continue to affect MBA's substantial rights into the future and have collateral consequences to MBA. See Order ("Henceforth, all future pleadings, motions, and filings..."); Collins Music Co., 619 S.E.2d at 3. The requirement that a party be held in contempt to seek review of a discovery order is not a medieval test of the party's resolve but is jurisdictional and, in some instances, compliance would render an appeal moot. Neither jurisdiction or mootness are issues here.

Following the Circuit Court's order, MBA asked the Circuit Court to stay its ruling pending a ruling on its motion to reconsider. The Circuit Court denied this motion. See Order

Denying Motion to Stay, attached as **Exhibit 1**. Absent a stay from the Circuit Court, the Order was effective and had to be complied with. State v. Highsmith, 105 S.C. 505, 90 S.E. 154, 155 (1916) ("An order of a court or judge which is not void for want of jurisdiction must be respected and obeyed, until vacated or modified by competent authority, even though it may be erroneous.").

Additionally, RSS and Andrews have filed a second motion to dismiss because they argue that MBA failed to comply with the Court's order. They cannot argue here that MBA complied while arguing in Circuit Court that MBA did not.

Regardless, this Court has jurisdiction over this appeal because it affects a substantial right and the additional filings do not make it impossible "for the reviewing Court to grant effectual relief." Collins Music Co., 619 S.E.2d at 3.

CONCLUSION

For the foregoing reasons, RSS and Andrew's motion to dismiss the appeal should be denied.

Respectfully Submitted,

April 21, 2016

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Beattie B. Ashmore
Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2016-000662

Mattress by Appointment, LLC, a Florida limited liability company f/k/a Carolina Bedding Direct, LLC, a Florida limited liability company, ... Appellant,

v.

Retail Service Systems, Inc., Boxdrop Furniture, Inc., Carlton Scott Andrew, and Darren Conrad, ... Respondents.

PROOF OF SERVICE

I certify that I have served this Return to Motion on the Respondents, Retail Service Systems, Inc., Boxdrop Furniture, Inc., Carlton Scott Andrew, and Darren Conrad by depositing a copy of same in the United States Mail, postage prepaid, on April 21, 2016, addressed to their attorneys of record as follows:

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L. Walter Tollison, III
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24 Vardry Street, Suite 203
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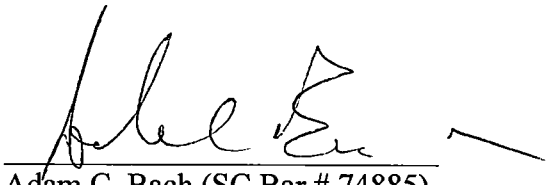

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Attorneys for Appellant

April 21, 2016

Greenville, South Carolina

Exhibit 1

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-04-02161

FILED CLERK'S OFFICE
ANDERSON SC
IN 9:31

Mattress by Appointment, LLC

PLAINTIFF(S)

Retail Service Systems, Inc., Boxdrop Furniture, Inc., Carlton Scott Andrew and Darren Conrad

DEFENDANT(S)

COMMON PLEAS AND GENERAL SESSIONS

Submitted by:	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. ☐ See Page 2 for additional information.

☐ **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.

FILED
FEB - 8 2016
CLERK OF COURT

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

Plaintiff's Motion to Reconsider, Amend or Alter Judgment [from Form 4 Order dated 1/26/16] is held in abeyance until the amended pleadings have been filed and reviewed by the undersigned.

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.**

Circuit Court Judge

2155
Judge Code

2-2-16
Date

For Clerk of Court Office Use Only

This judgment was entered on the 8th day of Feb., 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 8th day of Feb., 2016 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)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-04-2161

FILED-CLERK'S OFFICE

Mattress by Appointment LLC

PLAINTIFF(S)

Retail Service Systems Inc.

DEFENDANT(S)

Submitted by:	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. ☐ See Page 2 for additional information.

☐ **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.

TRUE COPY
FEB 24 2016
CLERK OF COURT

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

PLAINTIFF'S MOTION TO RECONSIDER DENIED WITHOUT A HEARING; NO FORMAL ORDER REQUIRED

This order ☐ ends ☒ does not end the case.

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.**

Circuit Court Judge

2155
Judge Code

2-23-16
Date

For Clerk of Court Office Use Only

This judgment was entered on the 24th day of Feb, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 24th day of Feb, 2016 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)

Richard X. Hulen
CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FILED-CLERK'S OFFICE

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April 21, 2016

Jenny Abbott Kitchings
Clerk, The South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: Mattress by Appointment, LLC vs. Retail Service Systems, Inc., Boxdrop Furniture, Inc., Carlton Scott Andrew, and Darren Conrad
C. A. No. 2015-CP-04-02161

Dear Ms. Kitchings:

Enclosed please find an original and six (6) copies of a return to motion on the above-referenced matter, along with proof of service for the same. We would appreciate your filing the original and returning a clocked copy to us in the envelope provided.

If we may provide you with any additional information, please do not hesitate to call or email.

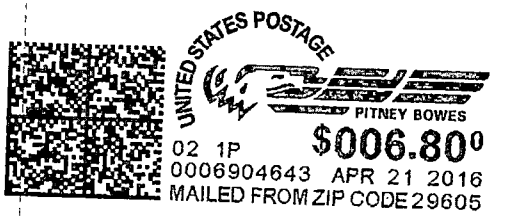
Sincerely,

ELLER TONNSEN BACH, LLC

Adam C. Bach
abach@etblawfirm.com

ACB/amp
Enclosures

cc: Attorneys for Respondents:
Beattie B. Ashmore
Paul S. Landis
L. Walter Tollison, III



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