

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2014-000091

RECEIVED

JUN 30 2016

SC Court of Appeals

James Spencer, individually and on
behalf of the Estate of Doris Holt and on
behalf of Southern Holdings, Inc.; and
Irene Santacroce, Plaintiffs,

of whom James Spencer is the,

Appellant,

v.

John R. Rakowsky, Adrian L. Falgione,
and the Law Offices of Adrian Falgione,
LLC, Defendants,

of whom John R. Rakowsky
and Adrian L. Falgione are the,

Respondents.

**RESPONDENT JOHN RAKOWSKY'S SUPPLEMENTAL RETURN
TO APPELLANT'S MOTION TO REINSTATE**

Respondent John R. Rakowsky ("Rakowsky"), by and through his undersigned counsel, submits this supplemental return to the motion to reinstate submitted by Appellant James B. Spencer ("Spencer" or "Appellant") in the above-referenced appeal.

By way of background, the Court dismissed Spencer's appeal by order dated March 4, 2016 for failure to serve and file a record on appeal that included all matters designated by the

parties. On March 21, 2016, Spencer filed a motion to reinstate. On May 26, 2016, the Court issued an order requiring Respondents Rakowsky and Falgione to provide copies of certain documents in their possession to Appellant Spencer within ten days, and requiring Appellant Spencer to serve and file an amended record “that includes the excluded documents and complies with Rule 210, SCACR” within twenty days of receipt of the documents. The May 26, 2016 order further stated that the Court will consider Appellant Spencer’s motion to reinstate upon receipt of the amended record or the expiration of thirty (30) days.

As set forth below, Spencer has wholly failed to comply with both the timing and substantive requirements of the May 26, 2016 order and the South Carolina Appellate Court Rules by serving an amended record four days after the deadline, misrepresenting the date of service of the amended record, and erroneously certifying that the amended record contains “all materials proposed to be included by any of the parties and not any other material.” The amended record served by Spencer still does not include the court exhibits designated by Respondent Rakowsky, and inexplicably adds new materials that neither he nor Respondents proposed to be included in the record.

Pursuant to the Court’s May 26, 2016 order, counsel for Respondents Rakowsky and Falgione provided copies of the documents to Appellant Spencer on June 3, 2016. Copies of the email correspondence and attachments, which were also sent by U.S. Mail, are attached as Exhibits 1 and 2. Spencer received the documents on June 3, 2016 and was required to serve and file the amended record by June 23, 2016.

On June 24, 2016, Appellant Spencer mailed a blank envelope to counsel for Rakowsky. See Affidavit of Counsel dated June 28, 2016, attached as Exhibit 3. Upon information and belief, Spencer also sent blank envelopes to the Court and counsel for Respondent Falgione.

On June 29, 2016, the undersigned received another package from Spencer containing an amended record on appeal. The mailing label, which is attached as Exhibit 4, reflects that Spencer mailed the amended record on June 27, 2016, four days after he was required to do so pursuant to the Court's May 26, 2015 order. Spencer signed the proof of service attached as Exhibit 5 erroneously stating that the amended record was served on June 22, 2016.

Moreover, contrary to Spencer's certificate of compliance attached as Exhibit 6, and in complete disregard for this Court's May 26, 2015 order, the amended record does not contain "all materials proposed to be included by any of the parties and not any other material." Although Spencer received the court exhibits designated by Respondent Rakowsky on June 3, 2016, he did not include them in the amended record. Instead, he added new materials that neither he nor Respondents proposed to be included in the record. Unbelievably, Spencer then labeled the new materials in the index in a way that would lead the reader to believe that he did include the designated court exhibits. What Spencer describes in the index as "Court Exhibit Presented, June 5, 2013 hearing before Judge Addy" is actually an affidavit that was not marked as a court exhibit at the June 5, 2013 hearing, and again, was not designated by any party to be included in the record on appeal.¹

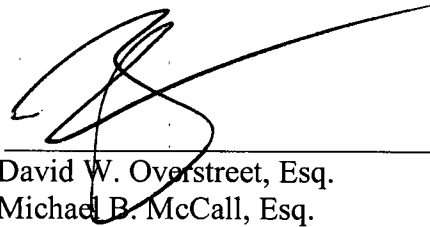
The Court's May 26, 2016 order gave Spencer another opportunity to prepare a proper record before considering his motion to reinstate. Spencer had everything he needed to prepare and timely serve a proper amended record, but inexplicably, he refused. Not only did he refuse, he inserted new materials that were not designated and erroneously labeled those new materials

¹ It is unclear at this point what other changes were made to the amended record, but it appears that other new matters were included, and some previously included matters have been removed. Curiously, the amended record contains 39 fewer pages than the initial record, notwithstanding that the Court ordered Spencer to amend the record to add omitted materials.

as the omitted court exhibits. The Court gave Spencer twenty days to complete what it asked of him, but again, he refused, first mailing empty envelopes to the Court and counsel on the day after the deadline, then mailing the amended-but-still-deficient record four days after the deadline. And if that were not enough, Spencer signed a proof of service that blatantly misrepresented the date of service as five days earlier than the date it was actually served. Enough is enough. Spencer's motion to reinstate should be denied.

This 29th day of June, 2016.

Respectfully submitted by,



David W. Overstreet, Esq.
Michael B. McCall, Esq.
Earhart Overstreet LLC
P.O. Box 22528
Charleston, South Carolina 29413
(843) 972-9404

Attorneys for Respondent John Rakowsky

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

JUN 30 2016

SC Court of Appeals

APPEAL FROM THE LEXINGTON COUNTY
Court of Common Pleas

Frank R. Addy, Circuit Court Judge

APPELLATE CASE NO.: 2014-000091

James Spencer, individually and on behalf of the Estate of Doris Holt
and on behalf of Southern Holdings, Inc.; and Irene Santacroce, Plaintiffs,

Of whom James Spencer is the Appellant, Appellant,

v.

John R. Rakowsky, Adrian L. Falgione, and The Law Offices of
Adrian Falgione, LLC, Defendants,

Of whom John R. Rakowsky and Adrian L. Falgione are the Respondents.

PROOF OF SERVICE

I, Camille M. Gardner, an employee of Earhart Overstreet LLC, attorneys for Respondent John Rakowsky, certify that I served a copy of the attached *Supplemental Return to Appellant's Motion to Reinstate* by depositing a copy of it in the U.S. Mail, postage prepaid, on March 31, 2016, addressed to the *pro se* Appellant, James B. Spencer, 7001 Saint Andrews Road, Suite 183, Columbia, South Carolina 29212, and to Respondent Adrian Falgione's attorneys of record, Benjamin C. Bruner, Esquire and Warren C. Powell, Jr., Esquire, at Bruner, Powell, Wall & Mullins, LLC, P.O. Box 61110, Columbia, South Carolina 29260.

June 29, 2016


Camille M. Gardner

Mike McCall

From: Camille Gardner
Sent: Friday, June 03, 2016 3:56 PM
To: JamesBSpencer@sc.rr.com
Subject: Spencer v Rakowsky
Attachments: Spencer ltr enc excluded docs.docx.pdf; Spencer June 3 2016 attachments.pdf

Attached is correspondence from Mike McCall. Should you have any difficulty opening the above, please contact me. Thank you.



Camille M. Gardner
Paralegal

Phone: 843.972.9400
www.earhartoverstreet.com
camille@earhartoverstreet.com

Earhart Overstreet LLC, PO Box 22528, Charleston, SC 29413

****This correspondence is being sent only by email to conserve paper. Please let us know if you would like us to send a paper copy as well.****





Earhart Overstreet
ATTORNEYS AT LAW

Main: 843.972.9400
www.earhartoverstreet.com
PO Box 22528, Charleston, SC 29413

Mike@earhartoverstreet.com
Direct: 843.628.3780

June 3, 2016

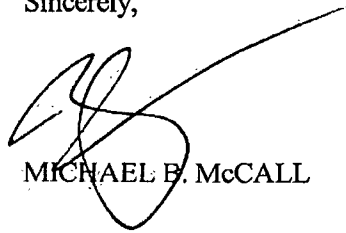
James B. Spencer
7001 Saint Andrews Road, Box 183
Columbia, SC 29212

Re: James Spencer v. John R. Rakowsky, et al.
Appellate Case No.: 2014-000091
EO File No.: 110-0159

Dear Mr. Spencer:

Pursuant to the order entered on May 26, 2016 in the above-referenced appeal, enclosed please find documents in Respondent Rakowsky's possession, including the documents identified as Court Exhibits at the June 5, 2013 hearing, and unfiled copies of Respondent Falgione's Motion to Change Venue and Memorandum in Support of Motion to Dismiss. By copy of this correspondence, I am notifying the Court of Appeals and all counsel of record that the documents have been sent. With kind regards, I am

Sincerely,



MICHAEL B. McCALL

MBM/cmg
Enclosures

cc: Jenny Abbott Kitchings
Benjamin Bruner, Esq.
Warren C. Powell, Esq.

6/14

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
THE FIFTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-40-5384

James Spencer, individually, on behalf of)
the Estate of Doris Holt and on behalf of)
Southern Holdings, Inc., and Irene)
Santacroce,)

Plaintiffs,)

**DEFENDANT JOHN R. RAKOWSKY'S
MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION TO DISQUALIFY**

v.)

John R. Rakowsky, Adrian L. Falgione, and)
The Law Offices of Adrian Falgione, LLC,)

Defendants.)

2012 JUN 14 AM 9:52
JEANETTE W. MORBRIDGE
C.C.P. & G.S.
RICHLAND COUNTY
FILED

Defendant John R. Rakowsky, by and through his undersigned counsel, hereby offers this Memorandum in opposition and response to Plaintiffs' Motion to Disqualify.

BACKGROUND

This is a legal malpractice action the *pro se* Plaintiffs filed on August 15, 2011. Defendant Rakowsky is a lawyer in Lexington, South Carolina. He and Defendant Adrian L. Falgione represented the Plaintiffs in a lawsuit filed in 2002 in Federal Court in South Carolina. In the that case, the Plaintiffs maintained that the Horry County Police Department and others conspired to ruin James Spencer's ("Spencer") credibility in order to gain control of a company called Southern Holdings so they could access Southern Holdings' tobacco contracts in South America. The authorities arrested Spencer in 2000 as part of the alleged conspiracy, and Spencer alleged he incurred approximately \$150,000 in medical bills related to treatment for post-traumatic stress disorder following the arrest.

The case was ultimately scheduled for trial in May 2007; however, the case settled right before trial. Plaintiffs now allege that Defendants wrongfully coerced them into agreeing to the

settlement, and Plaintiffs filed a Complaint against Mr. Rakowsky and Mr. Falgione on August 15, 2011. On November 3, 2011, counsel for Defendant Rakowsky filed a Motion to Dismiss Plaintiffs' Complaint on several grounds, including lack of supporting expert affidavit or testimony, expiration of the statute of limitations, and failure to serve the Complaint within 120 days of filing. Defendants' Motion to Dismiss has been scheduled and continued on more than one occasion and is still pending. On March 27, 2012, Plaintiffs filed a Motion to Disqualify Mr. Rakowsky's attorneys.

ARGUMENT

Plaintiffs have offered no factual or legal basis for their Motion to Disqualify Mr. Rakowsky's attorneys Amanda Dudgeon and Andrew Countryman. Plaintiffs improperly claim attorney Dudgeon's representation of Mr. Rakowsky in New Amsterdam Capital Partners, LLP v. John Rakowsky, et al. ("LawMax Matter") disqualifies her as counsel for Mr. Rakowsky in the present matter.¹ LawMax, a legal funding company, filed with the American Arbitration Association ("AAA") a Demand for Arbitration on July 19, 2007.² The Demand for Arbitration named as Respondents Spencer and Mr. Rakowsky. Spencer was named because he had received monies to fund the underlying Southern Holdings litigation, and Mr. Rakowsky was named as a respondent, purportedly because he was Spencer's attorney in the underlying litigation.

Spencer claims he had no notice of the LawMax Matter. However, Spencer appears to have received notice to his address at 7001 Saint Andrews, the same address he currently uses today.³ Likewise, Mr. Rakowsky's counsel copied Mr. Spencer on Mr. Rakowsky's Answering

¹ Attorney Andrew Countryman had no involvement in the representation of Mr. Rakowsky in the LawMax Matter.

² The Demand for Arbitration was dated July 19, 2007, but received by the AAA on August 10, 2007. Mr. Rakowsky moved to withdraw as counsel for Spencer and other plaintiffs on July 13, 2007.

³ See Exhibit A: August 16, 2007 Correspondence from AAA to LawMax, Spencer, and Rakowsky.

Statement and corresponding cover letter to the AAA as a *pro se* party.⁴ Finally, Spencer presumably had some communication with the AAA in the fall of 2007 because he appears to be copied on an email from the AAA to the parties.⁵

Again, Attorney Dudgeon and the law firm of Carlock, Copeland & Stair, LLP, represented only Mr. Rakowsky in the LawMax Matter.⁶ At no point did attorney Dudgeon or her law firm represent Spencer.⁷ The matter never progressed to any type of litigation or arbitration proceedings. Mr. Rakowsky opposed jurisdiction of the AAA as well as the New York locale and maintained he was an improper party,⁸ and LawMax ultimately ceased pursuing the action. As such, the AAA closed the file.⁹ No settlement agreement or funds were ever exchanged.¹⁰ Therefore, the end result of the LawMax matter – essentially a non-suit by LawMax – only benefitted Mr. Spencer.

Unfortunately, this Motion appears to be an attempt to further delay the matter and to avoid adjudication of the same. There is no basis to prolong the frivolous litigation or increase costs by requiring Mr. Rakowsky to find new counsel. The facts remain that (1) no attorney at the law firm of Carlock Copeland & Stair, LLP, has represented Mr. Spencer in any matter; (2) Mr. Spencer was aware of the LawMax Matter; and (3) the facts related to Attorney Dudgeon's representation of Mr. Rakowsky in the LawMax matter have no bearing on the present case.

⁴ See Exhibit B: September 7, 2007 Correspondence and Answering Statement from Dudgeon to AAA (cc: Zolberg and Spencer)

⁵ See Exhibit C: September 19, 2007 Email Correspondence from AAA to Zolberg, Dudgeon, and "center4legalreform@sc.rr.com" (Upon information and belief, "center4legalreform@sc.rr.com" is one of James Spencer's email addresses).

⁶ David Overstreet and Amanda Dudgeon of Carlock Copeland began representing Mr. Rakowsky at the end of August 2007. The undersigned submitted an Answering Statement on behalf of Mr. Rakowsky on September 7, 2007 (Exhibit B).

⁷ See Exhibit E: Affidavit of Amanda Dudgeon, June 12, 2012.

⁸ See Exhibit B.

⁹ See Exhibit D: June 2, 2008 Correspondence from AAA to Daniel Zolberg (LawMax) and Amanda Dudgeon.

¹⁰ See Exhibit E: Affidavit of Amanda Dudgeon; see also Exhibit F: Affidavit of John Rakowsky, June 7, 2012.


CONCLUSION

In sum, Plaintiffs' Motion and Memoranda include false accusations of ethical misconduct and Mr. Spencer's Affidavit is not accurate. Defendant Rakowsky and his counsel emphatically deny the accusations and move to strike the same. Defendant Rakowsky requests this Court deny Plaintiffs' Motion to Disqualify and allow the case to proceed without further unwarranted delay.

This 12th day of June, 2012.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, LLP

By: 
DAVID W. OVERSTREET
State Bar No.: 16965

AMANDA K. DUDGEON
State Bar No.: 72516

Attorneys for Defendant John R. Rakowsky

40 Calhoun Street, Suite 400
Charleston, SC 29401-3531
843-727-0307

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

James Spencer, individually, on behalf of)
the Estate of Doris Holt and on behalf of)
Southern Holdings, Inc., and Irene)
Santacroce,)

Plaintiffs,)

v.)

John R. Rakowsky, Adrian L. Falgione, and)
The Law Offices of Adrian Falgione, LLC,)

Defendants.)

IN THE COURT OF COMMON PLEAS
THE FIFTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-40-5384

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing pleading upon all parties to this matter via hand delivery or by depositing a true copy of same in the U.S. Mail, proper postage prepaid, as follows:

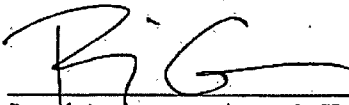
RICHLAND COUNTY
FILED
2012 JUN 14
JEANNETTE K. HERRIDGE
C.C.P. CLERK
AM 9:52

James Spencer, individually and
on behalf of the Estate of Doris Holt and as interim
Administrator/Trustee of Southern Holdings, Inc.
Pro se Plaintiff

Irene Santacroce
205 Deer Trace Circle
Myrtle Beach, SC 29588
Pro se Plaintiff

Benjamin C. Bruner, Esq.
Bruner, Powell, Wall & Mullins, LLC
PO Box 61110
Columbia, SC 29260-1110
Counsel for Adrian L. Falgione and the Law Offices of Adrian L. Falgione, LLC

This 12th day of June, 2012.



Legal Assistant to Amanda K. Dudgeon



American Arbitration Association
Dispute Resolution Services Worldwide

Northeast Case Management Center
Catherine Shanks
Vice President
Christopher Francis, Yvonne L. Baglini
Assistant Vice Presidents

August 16, 2007

950 Warren Avenue, East Providence, RI 02914
Telephone 866-293-0033 Facsimile 401-433-6329
Internet <http://www.adr.org/>

New Amsterdam Capital Partners, LLC
459 Columbus Avenue, Suite 299
New York, NY 10024-5129

Via Electronic Mail

James Spencer
7001 Saint Andrews Road
Suite 183
Columbia, SC 29212

Via First Class Mail

John Rakowsky, Esq.
Law Offices of John Rakowsky
P.O. Box 3593
West Columbia, SC 29171

Via Facsimile

Re: 13 194 01700 07
New Amsterdam Capital Partners, LLC
and
James Spencer
and
John Rakowsky, Esq.

Dear Parties:

This will acknowledge receipt on August 10, 2007, of a Demand for Arbitration dated July 19, 2007, of a controversy arising out of a contract between the above-captioned parties, containing a clause providing for administration by this Association. We understand that a copy was sent to Respondent. A copy of our Commercial Arbitration Rules and Mediation Procedures, as amended and in effect September 15, 2005, may be obtained from our website at www.adr.org. Pursuant to the Rules, this matter is being administered under the Expedited Procedures.

In accordance with the Rules, if Respondent does not answer on or before August 31, 2007, we will assume that the claim is denied. If Respondent wishes to counterclaim, file the appropriate number of copies, together with the administrative fee, to the attention of the undersigned. A copy should be directly sent to Claimant.

We note the parties' agreement stipulates the locale as New York, New York.

We note the claim is \$63,000. If this amount is incorrect, please advise us on or before August 24, 2007 of the correct amount.

This will confirm an Administrative Conference is scheduled on August 28, 2007 at 10:00am EST via conference call. The Association will initiate this call.

The purpose of the administrative conference is to assist the Association in administering your case efficiently and expeditiously. Please be prepared to discuss the following:



- a. estimates on the expected duration of the case;
- b. number of arbitrators/party-appointed arbitrator provision;
- c. method of appointment of arbitrators, if applicable;
- d. your views on the qualifications of the arbitrators to be proposed;
- e. the possibility of submitting this dispute to mediation;

Enclosed is a Checklist for Conflicts to list those witnesses you expect to present, as well as any persons or entities with an interest in these proceedings. The Conflicts Checklist is due within fifteen days from the date of this letter. The parties are to exchange copies of all correspondence except this checklist and the arbitrator list.

The Association will make maximum use of fax machines when communicating in writing, and request that the parties do the same. If you have not provided us with your fax number, we ask that you do so at this time. If a party does not provide us with their fax number, then that party will have to rely on receiving correspondence via regular mail.

Parties will not send copies of documents being exchanged between the parties to the Association, such as discovery, unless they are being referred to the arbitrator for a determination. These documents will be returned to you if we receive them.

The Association has a strict policy regarding requests for extensions. If you need to extend any deadline during the course of these proceedings, please try to obtain the other party's agreement prior to contacting the AAA. Without the consent of the parties, case managers only have the authority to grant one extension per deadline, provided the request is reasonable and necessary. Unwarranted filings will not be considered by the Association.

This case will be administered by facilitating the exchange of appropriate written documents through the AAA. To ensure the proper handling of all case-related documents, the parties are asked not to submit correspondence directly to the arbitrator. Correspondence should be submitted to the undersigned for transmittal to the arbitrator, copying the other parties.

The Association will require advance deposits once the arbitrator is appointed. These deposits are calculated on the number of days the parties have suggested will be necessary, in addition to the pre and post hearing time that the arbitrator may charge pursuant to the arbitrator's resume.

Additionally, the parties may desire to mediate this case prior to an arbitration hearing. Mediation is a private, non-binding process under which the parties submit their dispute to a third-party neutral. The mediator may suggest ways of resolving the dispute, but may not impose a settlement on the parties; the parties attempt to negotiate their own settlement agreement. Please contact the undersigned for further details regarding mediation.

We invite the parties to visit our website to learn more about how to file and manage your cases online. As part of our administrative service, AAA's WebFile allows parties to perform a variety of case related activities, including:

- File additional claims
- Complete the Checklist for Conflicts form
- View invoices and submit payment
- Share and manage documents
- Strike and rank listed neutrals

• Review case status

AAA WebFile provides flexibility because it allows you to work online as your schedule permits - day or night. Cases originally filed in the traditional offline manner can also be viewed and managed online.

In closing we wish to remind the parties that the AAA has a refund schedule in the administrative fee section of the Rules. After 60 days or the appointment of the arbitrator the filing fees are non-refundable. If the parties enter settlement negotiations at any time after the AAA has opened its file, you should take into consideration the refund schedule in the Rules. In accordance with the administrative fee schedule, the Association charges a Case Service Fee when the hearing on the merits is scheduled. The Case Service Fee is the balance of the filing fee. It is refundable if the hearing on the merits is cancelled and the Association is notified at least 24 hours prior to the hearing. The AAA will only refund filing fees as outlined in the Rules and does not refund neutral costs incurred when parties settle their dispute or withdraw their claims. We encourage parties to resolve their disputes as amicably as possible and this notice is just to alert you to this issue so that it doesn't become a concern in the future.

Please feel free to call if you have any questions. We look forward to assisting you in this matter.

Sincerely,

Melanie Cabrera

Case Manager

401 431 4798

CabreraM@adr.org

Supervisor Information: Karen Fontaine, 401 431 4798, fontainek@adr.org

Encl. Commercial Expedited Procedures Fact Sheet
Checklist for Conflicts

LAW OFFICES
CARLOCK, COPELAND, SEMLER & STAIR, LLP

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

DAVID W. OVERSTREET

DIRECT DIAL NUMBER
843-266-8203

E-MAIL ADDRESS
doverstreet@carlockcopeland.com

FACSIMILE
843-727-2995

134 MEETING STREET, SUITE 500
CHARLESTON, SC 29401-3001

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www.carlockcopeland.com

ATLANTA OFFICE

2600 Marquis Two Tower
285 Peachtree Center Ave.
Atlanta, Georgia 30303-1235
(404) 522-8220

REPLY TO SC OFFICE

September 7, 2007

Melanie Cabrera, Case Manager
American Arbitration Association
950 Warren Avenue
East Providence, RI 02914

Re: New Amsterdam Capital Partners, LLC v. John R. Rakowsky, Esq
File No.: 2283-35025
AAA Claim No.:

Dear Ms. Cabrera:

We represent John Rakowsky in the above-referenced claim pending in the American Arbitration Association. It is our position that there is no proper basis for naming Mr. Rakowsky as a party to this action, as he is not a party to the contract between Respondent Spencer and Claimant New Amsterdam Capital Partners, LLC ("LawMax"), which is the basis of this matter. To that end, we plan to file a Motion to Dismiss this claim. We will likewise file a declaratory judgment action and/or action to stay arbitration in the near future. Further, at this point we cannot agree to the proposed venue of New York or agree pay any fees associated with the arbitration.

The joinder of Mr. Spencer's former attorney (Rakowsky) to this proceeding is improper and without jurisdiction. Nevertheless, in an abundance of caution and in an effort to avoid any potential finding of default, we are submitting the attached Answering Statement of John Rakowsky, Esq.

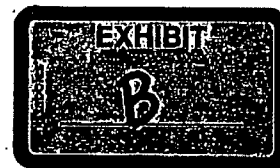
If you have any questions, please do not hesitate to contact me.

Very truly yours,

Mandi Dudgeon

DAVID W. OVERSTREET
AMANDA K. DUDGEON

DWO/kjj
cc: Daniel Zolberg
James Spencer



35025



American Arbitration Association
Dispute Resolution Services Worldwide

ARBITRATION
Answering Statement and Counterclaim Request

MEDLATION: If you would like the AAA to contact the other parties and attempt to arrange mediation, please check this box.
There is no additional administrative fee for this service.

Name of Claimant New Amsterdam Capital Partners, LLC			Name of Representative (if known) Pro Se		
Address: 458 Columbus Avenue, Suite 298			Name of Firm (if applicable) N/A		
			Representative's Address: N/A		
City New York	State NY	Zip Code 20024-5129	City N/A	State N/A	Zip Code N/A
Phone No. 212-480-3707	Fax No. 212-480-3674		Phone No. N/A	Fax No. N/A	
Email Address: danle@fundmycase.com			Email Address: N/A		
AAA CASE # (if known) 13 194 01700 07			Filing a Counterclaim: Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>		

If yes, please describe nature of counterclaim in space below.

PLEASE ANSWER CLAIMANT DEMAND FOR ARBITRATION (AND DESCRIBE COUNTERCLAIM, IF APPLICABLE):
Attach additional pages as necessary.

See Attachment A, Answering Statement of Respondent John Rakowsky, Esq.

Dollar Amount of Claim or Counterclaim \$ 0.00	Other Relief Sought: <input checked="" type="checkbox"/> Attorneys Fees <input type="checkbox"/> Interest <input checked="" type="checkbox"/> Arbitration Costs <input type="checkbox"/> Punitive/ Exemplary <input type="checkbox"/> Other
--	--

AMOUNT OF FILING FEE ENCLOSED WITH THIS DEMAND (please refer to the fee schedule in the rules for the appropriate fee) \$ 0.00

PLEASE DESCRIBE APPROPRIATE QUALIFICATIONS FOR ARBITRATOR(S) TO BE APPOINTED TO HEAR THIS DISPUTE:
Neutral

Hearing locale West Columbia, SC (check one) Requested by Respondent Locale provision included in the contract

Estimated time needed for hearings overall: _____ hours or 2 days

Signature (may be signed by a representative) <i>Amanda K. Dudgeon</i>		Date: 9/7/07	Name of Representative: David W. Overstreet, Esq. and Amanda K. Dudgeon, Esq.		
Name of Respondent: John Rakowsky, Esq.			Name of Firm (if applicable) Carlock, Copeland, Semler & Stair, LLP		
Address (to be used in connection with this case) P.O. Box 3583			Representative's Address: 134 Meeling Street, Suite 500		
City West Columbia	State SC	Zip Code 29171	City Charleston	State SC	Zip Code 29401
Phone No. 803-791-8830	Fax No. 803-794-2788		Phone No. 843-727-0304	Fax No. 843-727-2995	
Email Address:			Email Address: doverstreet@carlockcopeland.com		

PLEASE SEND TWO COPIES OF THIS ANSWERING STATEMENT, WITH THE FILING FEE FOR ANY COUNTERCLAIM, AS PROVIDED FOR IN THE RULES, TO THE AAA. SEND THE ORIGINAL ANSWERING STATEMENT TO THE CLAIMANT.

Please visit our website at www.ndr.org if you would like to file this counterclaim online. AAA Customer Service can be reached at 800-778-7879.

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration between)
NEW AMSTERDAM CAPITAL PARTNERS, LLC)

Claimant)

and)

JAMES SPENCER and JOHN RAKOWSKY, ESQ.,)

Respondents.)

Case Manager: MELANIE CABRERA)

Case No.:
13 194 01700 07

ATTACHMENT A:
ANSWERING STATEMENT OF JOHN RAKOWSKY, ESQ.
TO DEMAND FOR ARBITRATION OF
NEW AMSTERDAM CAPITAL PARTNERS, LLC

John Rakowsky, Esq., ("Rakowsky") responds to New Amsterdam Capital Partners, LLC ("New Amsterdam") d/b/a Law Max's Demand for Arbitration, received via regular mail on or about August 22, 2007, as follows:

1.

By answering New Amsterdam's Demand for Arbitration, Rakowsky in no way avails himself of the jurisdiction of the American Arbitration Association, in no way waives any right to move to dismiss or stay this action, and in no way waives any rights afforded him under the laws of the State of New York or any other jurisdiction which may be found to have jurisdiction over this matter.

2.

Rakowsky denies that he is subject to arbitration and will file a declaratory judgment action seeking a determination of the rights of the parties and a stay of this arbitration.

3.

Rakowsky denies liability for the issues raised by New Amsterdam and otherwise denies all claims of liability asserted by New Amsterdam.

4.

Rakowsky did not withhold any information from New Amsterdam critical to its agreement with Respondent Spencer, and denies any and all allegations or assertions of New Amsterdam to the contrary.

5.

Rakowsky did not breach any contract with New Amsterdam and denies all allegations or other assertions made by New Amsterdam to the contrary.

6.

There is no valid or enforceable contract between New Amsterdam and Rakowsky.

7.

There is no valid or enforceable agreement to arbitrate between New Amsterdam and Rakowsky.

8.

New Amsterdam has failed to plead its claim with the requisite particularity and has failed to state a claim for which relief can be granted.

9.

New Amsterdam has failed to name a necessary and indispensable party.

10.

Any damages sustained by New Amsterdam are or may be the result of the negligent acts or omissions of a third-party and/or the result of concurrent acts and omissions of a third-party and the Claimant.

11.

Any damages suffered by New Amsterdam are or may be the direct and proximate result of its own negligence or recklessness or the negligence or recklessness of its employee, agent, independent contractor, or another under its control, and its recovery should be barred, or alternatively, reduced proportionately to the extent of their comparative negligence.

12.

Any alleged injury New Amsterdam claims to have sustained may have been due to and proximately caused by New Amsterdam's own voluntary action taken in full knowledge of any risk associated therewith of which New Amsterdam, in the exercise of due care, should have known and appreciated, and, therefore, New Amsterdam's voluntary assumption of the risk may operate as a complete or partial bar to this action.

13.

New Amsterdam's own acts and/or omissions constitute waiver.

14.

New Amsterdam's own acts and/or omissions are barred by the doctrine of laches.

15.

New Amsterdam is estopped from asserting this claim based upon its own acts and/or omissions.

16.

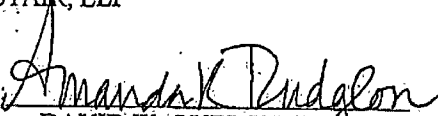
To the extent not otherwise set forth above, Rakowsky denies any and all allegations which form the basis of liability claims asserted by New Amsterdam, and otherwise denies that he is liable to any party for any amount in connection with the matters which are the subject of this dispute.

WHEREFORE, Rakowsky does not waive his rights to contest the jurisdiction of the American Arbitration Association, contests the jurisdiction of the American Arbitration

Association, and denies any and all liability to New Amsterdam and asks that he be dismissed from this action, for costs of this claim, including Arbitrator Fees, to be cast upon New Amsterdam, and for any other relief which may be deemed appropriate.

CARLOCK, COPELAND, SEMLER
& STAIR, LLP

BY:


DAVID W. OVERSTREET
AMANDA K. DUDGEON

Attorneys for John Rakowsky, Esq.

134 Meeting Street, Suite 500
Charleston, SC 29407
(843) 727-0307

Travis, Sarah H.

From: Dudgeon, Amanda K.
Sent: Wednesday, September 19, 2007 12:24 PM
To: Travis, Sarah H.
Subject: FW: Case no. 13 194 01700 07 (New Amsterdam Capital v Spencer & Rakowsky)

From: Melanie Cabrera [mailto:cabreram@adr.org]
Sent: Wednesday, September 19, 2007 12:14 PM
To: daniel@fundmycase.com; center4legalreform@sc.rr.com; Dudgeon, Amanda K.
Subject: Case no. 13 194 01700 07 (New Amsterdam Capital v Spencer & Rakowsky)

Dear Parties,

It has come to my attention that the initial letter I sent incorrectly stated that the above-referenced matter falls under the Expedited Procedures. Per my conversation today with Ms. Dudgeon, this e-mail shall confirm that the matter is to be heard pursuant to the regular Commercial Arbitration Rules and Mediation Procedures as there are more than two parties involved in the matter. For further clarification, please see R-1(b) of the Rules.

If you have any questions or concerns, please do not hesitate to contact me.

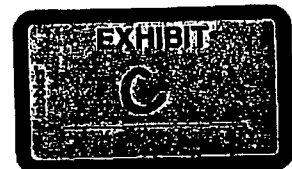
Respectfully,

Melanie D. Cabrera
American Arbitration Association - Northeast Case Management Center
950 Warren Avenue
East Providence, RI 02914
Toll Free #: 866-293-4053
Direct Dial #: 401-431-4802
Fax #: 401-435-6529
Web: www.adr.org
E-mail: cabreram@adr.org

Supervisor Information:
Karen Fontaine, (401) 431-4798, fontainek@adr.org

This e-mail communication is confidential and is intended only for the individuals or entities named above. If you are not the intended recipient, please do not read, copy, distribute or otherwise disclose the contents of this communication. Please notify the sender that you received this e-mail in error by replying to the e-mail or by telephoning 866-293-4053 during the hours of 8:30 am a.m. and 5:30 p.m. eastern time. Please then delete the e-mail and any copies of it. Thank you.

9/19/2007



Bruce, Katherine J.

From: James Medeiros [MedeirosJ@adr.org]
Sent: Monday, June 02, 2008 3:00 PM
To: Dudgeon, Amanda K.
Subject: Document for Case: 13 194 01700 07
Attachments: 13_194_1700_7_CC10D_7671760.doc

Right-click here to download pictures. To help protect your privacy, Outlook prevented automatic download of this picture from the Internet.
American Arbitration Association - Dispute Resolution Services

<http://www.adr.org>

950 Warren Avenue, East Providence, RI 02914
telephone: 866-293-4053 facsimile: 401-435-6529
<http://www.adr.org>

DATE 06/02/2008 3:00:10 PM

TO Amanda K. Dudgeon
COMPANY Carlock, Copeland, Semler & Stair, LLP
EMAIL adudgeon@carlockcopeland.com
FROM James Medeiros
NUMBER OF 1
ATTACHMENTS

RE Case number: 13 194 01700 07
Please see the attached documents in connection with the above referenced case.

RECIPIENTS Daniel Zolberg; Amanda K. Dudgeon

NOTES:

THIS EMAIL TRANSMISSION IS INTENDED ONLY FOR THE USE OF THE PERSON TO WHOM IT IS ADDRESSED. IT MAY CONTAIN INFORMATION THAT IS CONFIDENTIAL, PRIVILEGED OR OTHERWISE EXEMPT FROM DISCLOSURE. IF YOU ARE NOT THE INTENDED RECIPIENT OR THE PERSON AUTHORIZED TO DELIVER THIS FAX TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION OF THIS FAX IS PROHIBITED. IF YOU HAVE RECEIVED THIS FAX IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE (COLLECT) AND RETURN THE ORIGINAL FAX TO US BY FIRST CLASS MAIL AT THE ABOVE ADDRESS.

3/28/2012





American Arbitration Association
Dispute Resolution Services Worldwide

Northeast Case Management Center
Catherine Shanks
Vice President
Christopher Fracassa, Yvonne L. Baglini
Assistant Vice Presidents

VIA ELECTRONIC MAIL

950 Warren Avenue, East Providence, RI 02914
telephone: 866-293-4053 facsimile: 401-435-6529
Internet: <http://www.adr.org/>

June 2, 2008

Daniel Zolberg
LawMax
459 Columbus Avenue
New York, NY 10024-5129

Amanda K. Dudgeon
Carlock, Copeland, Semler & Stair, LLP
134 Meeting Street
Suite 500
Charleston, SC 29401

Re: 13 194 01700 07
New Amsterdam Capital Partners, LLC
and
James Spencer
and
John Rakowsky, Esq.

Dear Counselors:

As the Association received no response to our letters dated January 29, 2008, and May 14, 2008, please be advised we are this date closing our file. Please note that the case file will be destroyed six (6) months after the date of this letter.

Cordially yours,

James F. Medeiros
Case Manager
401 431 4724
MedeirosJ@adr.org

Supervisor Information: Karen Fontaine, 401 431 4798, fontainek@adr.org

Encl.

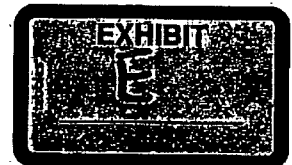
STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 James Spencer, individually, on behalf of)
 the Estate of Doris Holt and on behalf of)
 Southern Holdings, Inc., and Irene)
 Santacroce,)
)
 Plaintiffs,)
)
 v.)
)
 John R. Rakowsky, Adrian L. Falgione, and)
 The Law Offices of Adrian Falgione, LLC,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 THE FIFTH JUDICIAL CIRCUIT
 CASE NO.: 2011-CP-40-5384

**AFFIDAVIT OF
 AMANDA DUDGEON**

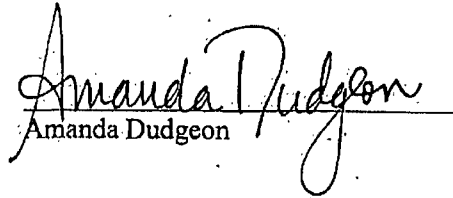
PERSONALLY APPEARED BEFORE ME, Amanda Dudgeon, who, under oath, states
 as follows:

1. I am over the age of 18 years and competent to give this affidavit.
2. I have personal knowledge of the facts contained in this affidavit.
3. The facts herein are true and correct to the best of my knowledge.
4. I, along with attorney David Overstreet of Carlock, Copeland & Stair, LLP, represented John Rakowsky in the Demand for Arbitration filed by New Amsterdam Capital Partners, LLC ("LawMax Matter") in which John Rakowsky was named as a Respondent.
5. Our representation of Mr. Rakowsky began on or about August 28, 2007.
6. I represented only John Rakowsky in the LawMax Matter. Neither I nor any attorney at the law firm of Carlock, Copeland & Stair, LLP, represented James Spencer at any time.



7. To my knowledge, no settlement offer or payment was made by John Rakowsky, or on his behalf, to New Amsterdam Capital Partners, LLC and/or LawMax.

FURTHER AFFIANT SAYETH NOT.


Amanda Dudgeon

SWORN to and subscribed before me
this 12th day of June, 2012


Notary Public for South Carolina

My commission expires: My Commission Expires December 15, 2020

3002243v.1



STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

James Spencer, individually, on behalf of)
the Estate of Doris Holt and on behalf of)
Southern Holdings, Inc., and Irene)
Santacroce,)

Plaintiffs,)

v.)

John R. Rakowsky, Adrian L. Falgione, and)
The Law Offices of Adrian Falgione, LLC,)

Defendants.)

IN THE COURT OF COMMON PLEAS
THE FIFTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-40-5384

AFFIDAVIT OF JOHN R. RAKOWSKY

PERSONALLY APPEARED BEFORE ME, John R. Rakowsky, who, under oath, states
as follows:

1. I am over the age of 18 years and competent to give this affidavit.
2. I have personal knowledge of the facts contained in this affidavit.
3. The facts herein are true and correct to the best of my knowledge.
4. I was named as a Respondent in a Demand for Arbitration filed with the American Arbitration Association ("AAA") by New Amsterdam Partners, LLP ("Law Max") on July 19, 2007 ("Arbitration").
5. The law firm of Carlock Copeland & Stair, LLP, was retained to represent me in the Arbitration through my errors and omissions carrier. Amanda Dudgeon and David Overstreet, both of Carlock Copeland & Stair, LLP, represented me in the matter.
6. No attorney from the law firm of Carlock Copeland & Stair, LLP represented James Spencer, who was also named as a Respondent in Law Max's Demand for Arbitration.

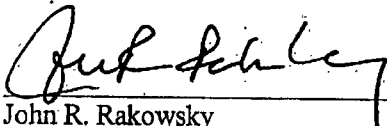


7. In response to the Demand for Arbitration, I, through my counsel, opposed jurisdiction of the AAA as well as the New York locale and maintained I was an improper party to the action.

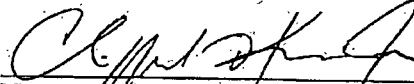
8. Law Max ultimately ceased pursuing the action.

9. No settlement monies were paid by me or on my behalf to Law Max.

FURTHER AFFIANT SAYETH NOT.


John R. Rakowsky

SWORN to and subscribed before me
this 7 day of June, 2012


Notary Public for South Carolina

My commission expires:
12/22/20

2995488v.1



American Arbitration Association
Dispute Resolution Services
ORIGINAL

Northeast Case Management Center
Catherine Shanks
Vice President
Christopher Fracassa, Yvonne L. Bnglini
Assistant Vice Presidents

VIA ELECTRONIC MAIL

950 Warren Avenue, East Providence, RI 02914
telephone: 866-293-4033 facsimile: 401-433-6529
internet: <http://www.adr.org/>

June 21, 2008

Daniel Zolberg
LawMax
459 Columbia Avenue
New York, NY 10024-5129

Amanda K. Dudgeon
Carlock, Copeland, Semier & Stair, LLP
134 Meeting Street
Suite 500
Charleston, SC 29401

Re: 13 194 01700 07
New Amsterdam Capital Partners, LLC
and
James Spencer
and
John Rakowsky, Esq.

Dear Parties:

The Association has been notified that New Amsterdam Capital Partners, LLC has reached a settlement agreement with Carlock, Copeland, Semier & Stair, LLP, for James Spencer and John Rakowsky, Esq. As of this date there is no outstanding balance. Therefore, the entire case file will be destroyed per request.

Cordially yours,

James F. Medeiros
Case Manager
401-431-4724
MedeirosJ@adr.org

Supervisor Information: Karen Fontaine, 401 431 4798, fontaine@adr.org

cc: Walter G. Gans, Esq.

CERTIFIED TO BE A TRUE AND
EXACT COPY OF THE ORIGINAL

BY

Catherine J. Palotta

Dudgeon, Amanda K.

From: Melanie Rutherford <RutherfordM@adr.org>
Sent: Monday, May 06, 2013 2:01 PM
To: Dudgeon, Amanda K.
Subject: RE: 13 194 01700 07 New Amsterdam Capital Partners, LLC v. James Spencer and John Rakowsky, Esq.

Ms. Dudgeon,

Per our conversation regarding the email below and its attachments, this matter was closed in our system as of June 2, 2008, upon the issuance of our June 2, 2008 letter. No copy of the June 21, 2008, letter remains in our electronic record. Also, no requests for certified copies of documents are in our electronic record. I do not recognize the signature of Catherine Ralston, on Mr. Spencer's copy of the letter.

Sincerely,

Melanie Rutherford



Melanie Rutherford
Manager of ADR Services
American Arbitration Association
950 Warren Ave.
East Providence, RI 02914-1414
www.adr.org
T:401 431 4715
F:866 644 0234

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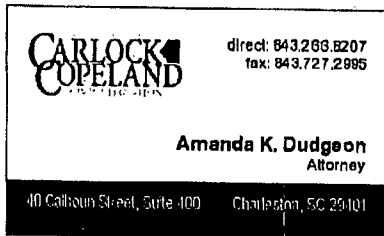
From: Dudgeon, Amanda K. [mailto:adudgeon@carlockcopeland.com]
Sent: Monday, May 06, 2013 12:05 PM
To: Melanie Rutherford
Subject: RE: 13 194 01700 07 New Amsterdam Capital Partners, LLC v. James Spencer and John Rakowsky, Esq.

Melanie,

Could you please give me a call about closed case number 13 194 01700 07 and your email to me below as soon as possible?

Thanks,

Mandi Dudgeon



5/27/2012 1:54 PM

Confidentiality Note: This e-mail and any attachments are confidential and may be protected by legal privilege. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of this e-mail or any attachment is prohibited. If you have received this e-mail in error, please notify us immediately by returning it to the sender and delete this copy from your system. Thank you for your cooperation.

From: AAA Melanie Rutherford [mailto:melanierutherford@adr.org]
Sent: Wednesday, June 27, 2012 1:54 PM
To: daniel@fundmycase.com; Dudgeon, Amanda K.
Subject: 13 194 01700 07 New Amsterdam Capital Partners, LLC v. James Spencer and John Rakowsky, Esq.

Dear Counsel,

Please see the attached correspondence from the Association.

Melanie Rutherford



American Arbitration Association
Dispute Resolution Services Worldwide

AAA Melanie Rutherford
Melanie Rutherford, Manager of ADR Services
950 Warren Ave.
Providence, RI 02914-1414
Tel: 401 431 4715
Fax: 866 644 0234
E-mail: melanierutherford@adr.org
www.adr.org

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For more information please visit <http://www.symanteccloud.com>

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

James Spencer, individually and on behalf of the Estate of the Estate of Doris Holt and on behalf of Southern Holdings, Inc; and Irene Santacroce;

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTH JUDICAL CIRCUIT

) CASE NO. 2011-CP-40-5384


Plaintiff)

v.)
John R. Rakowsky; Adrian L. Falgione; and the Law)
Offices of Adrian Falgione, LLC)

MOTION INFORMATION FORM

Defendant)

AND COVER SHEET

Plaintiff's Attorney: James B. Spenser <i>pro se</i> Address: 7001 Saint Andrews Road, Suite 183 Columbia, SC 29212 e-mail:	Defendant's Attorney: Benjamin C. Bruner No. 77544 Address: P.O. Box 61110 Columbia, SC 29260 phone: 803-252-7693 fax: 803-753-0060 e-mail: Bbruner@brunerpowell.com
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: Motion to Change Venue	
Estimated Time Needed: 30 min Court Reporter Needed: YES / NO	
SECTION II: Motion Type	
<input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion -- I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	May 16, 2012 Date submitted
SECTION III: Motion Fee	
<input checked="" type="checkbox"/> PAID - AMOUNT: 25.00 <input type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other:	
JUDGE'S SECTION	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	JUDGE: _____ CODE: _____ Date: _____
CLERK'S VERIFICATION	
Date Filed: _____	
Collected by: _____	
<input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

James Spencer, individually and on behalf)
of the Estate of Doris Holt and on behalf)
Southern Holdings, Inc; and Irene)
Santacroce;)

C/A No. 2011-CP-40-5384

Plaintiffs,)

v.)

**NOTICE OF MOTION AND
MOTION TO CHANGE VENUE**

John R. Rakowsky; Adrian L. Falgione; and)
The Law Offices of Adrian Falgione, LLC;)

Defendants.)

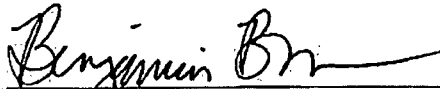
TO: ALL PARTIES, AND THEIR COUNSEL

You will please take notice that Defendants Adrian L. Falgione and The Law Offices of Adrian Falgione, LLC, by and through their undersigned counsel, will move before the Presiding Judge of the Court of Common Pleas for the Fifth Judicial Circuit at 1701 Main Street in Columbia, South Carolina, on the tenth (10th) day after service hereof, or at such time as the Court may schedule, for and Order changing venue of this action to Lexington County, South Carolina pursuant to S.C. Code §§ 15-7-30 and 100 and the following grounds:

- (1) Both the individual Defendants have been residents of Lexington County at all times relevant to this action;
- (2) The Defendant limited liability company held its principal place of business in Lexington County at all times relevant to this action; and
- (3) The most substantial part of the alleged acts or omissions giving rise to the Plaintiffs' claims did not occur in Richland County.

Accordingly, the Defendants move for an Order changing venue of this action to Lexington County because Richland County is not the proper venue pursuant to statute. This Motion may be further supported by the record in the case, by affidavit, and by such cases as

have been made and provided. Pursuant to Rule 11, SCRPC, the undersigned has no duty to consult with the *pro se* Plaintiffs before filing this Motion.



Warren C. Powell, Jr.
Benjamin C. Bruner
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260
803-252-7693
*Attorneys for Adrian L. Falgione and The Law
Offices of Adrian L. Falgione, LLC*

May 16, 2012

Columbia, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 16, 2012, the document(s) described below was(were) served on all parties of record in this case by mailing a copy, first class mail, postage prepaid and addressed as set forth below.

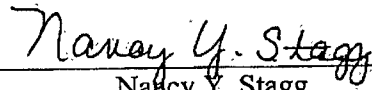
Documents served: NOTICE OF MOTION AND MOTION TO CHANGE VENUE

Parties served:

James B. Spencer
7001 Saint Andrews Road, Suite 183
Columbia, South Carolina 29212
Pro Se

Irene Santacroce
205 Deer Trace Circle
Myrtle Beach, South Carolina 29588
Pro Se

Amanda K. Dudgeon
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, South Carolina 29401
Attorneys for John R. Rakowsky



Nancy Y. Stagg

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

James Spencer, individually and on behalf)
of the Estate of Doris Holt and on behalf)
of Southern Holdings, Inc.; and Irene)
Santacroce;)

C/A No. 2011-CP-40-5384

Plaintiffs,)

v.)

John R. Rakowsky; Adrian L. Falgione;)
and The Law Offices of Adrian Falgione,)
LLC;)

**MEMORANDUM IN SUPPORT OF
DEFENDANTS ADRIAN L. FALGIONE
AND THE LAW OFFICES OF ADRIAN
FALGIONE, LLC'S MOTION TO DISMISS**

Defendants.)

Defendants Adrian L Falgione ("Falgione") and The Law Offices of Adrian L. Falgione, LLC (collectively, "Falgione Defendants"), offer this memorandum for the Court's consideration in support of their Motion to Dismiss filed November 4, 2011 and amended December 22, 2011. The Defendants seek dismissal based upon the Plaintiffs' failure to file an expert affidavit, failure to timely commence this action, failure to timely serve the Complaint, and failure to properly serve the Complaint.

FACTUAL/PROCEDURAL BACKGROUND¹

This is a legal malpractice action arising out of a case in which John Rakowsky and Falgione represented the Plaintiffs. Rakowsky and Falgione are licensed attorneys whose practices are in Lexington, South Carolina. The underlying case was filed in federal court for the District of South Carolina, Florence Division, and assigned Civil Action No.: 4:02-cv-1859-RBH ("Underlying Case"). The complaint in the Underlying Case was filed on May 29, 2002

¹ For the limited purposes of this Motion, the pertinent facts are set forth herein construing the well-pleaded allegations in the Complaint in accordance with the standard for a motion to dismiss under Rule 12(b)(6), SCRPC.

(by two attorneys not named as defendants herein). (Compl. ¶ 8.) Plaintiffs' alleged a wide array of claims against former business partners, the Horry County Sherriff's Department, and the Myrtle Beach Police Department, as well as various officials, deputies, and officers in those agencies, all of whom took some part in an attempt to take over Southern Holdings, Inc. Rakowsky became involved in the case relatively, early; however, Falgione did not appear in the case until over four years later, on December 3, 2006, when the Plaintiffs were preparing for the trial. (Compl. ¶¶ 11, 16.)

On May 8, 2007, the day before trial, the Court conducted a pretrial hearing, at which it heard arguments on evidentiary motions. (Compl. ¶ 23.) After the hearing, the presiding judge held a conference in chambers with the attorneys. (Compl. ¶ 24.) Following that conference, the Plaintiffs were lead to believe that the judge had ruled a majority of the Plaintiffs' evidence was inadmissible, including all evidence of damages. (Compl. ¶¶ 26-27.) Rakowsky and Falgione attempted to coerce the Plaintiffs to accept a settlement offer of \$55,000. However, the Plaintiffs would not agree. (Compl. ¶¶ 28-32, 37, 44.)

On the following day, May 9, 2007, immediately prior to trial, the Plaintiffs attended a hearing at which the settlement terms were placed on the record. The Court announced the settlement and dismissed the jury pool. (Compl. ¶ 49.) Contrary to Rakowsky's and Falgione's representations, the Court did not poll the Plaintiffs about whether they agreed to accept the settlement. Id. In a subsequent letter dated May 17, 2007, Rakowsky blamed the evidentiary problems on two other attorneys who had previously represented the Plaintiffs in the case, and suggested the best course of action was a malpractice claim against those other attorneys. (Compl. ¶ 51.)

In late May 2007, several plaintiffs in the Underlying Case began inundating the Court

with letters “pointing out inconsistencies in Rakowsky’s letters, the transcript of the [pretrial] evidentiary hearing, and why the Judge made the evidentiary rulings he did, as reported by Rakowsky and Falgione behind closed doors.” (Compl. ¶ 54.) The Court construed those letters as motions, and on July 3, 2007, issued an Order denying the motions. (Compl. ¶ 55.)

More than three years later, on August 15, 2011, the Plaintiffs filed this *pro se* malpractice suit against Rakowsky and Falgione. The Plaintiffs base their allegations on events that occurred leading up to and during the settlement on May 9, 2007. The Plaintiffs attempted to serve the Summons and Complaint on the Falgione Defendants on December 15, 2011, and on Rakowsky on December 16, 2011. To date, the Plaintiffs have not filed an expert affidavit.

Rakowsky and the Falgione Defendants have moved to dismiss the Complaint for the following reasons: (i) Plaintiffs have failed to file an expert affidavit pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §§ 15-36-10 to 100; (ii) Plaintiffs claims are barred by the three-year statute of limitations established in S.C. Code § 15-3-530; and (iii) Plaintiffs failed to serve the Summons & Complaint within the 120-day deadline in Rule 3(a)(2), SCRPC. In addition, Falgione and his law firm seek dismissal based upon the Plaintiffs’ failure to properly serve the Summons and Complaint pursuant to Rule 4, SCRPC.

STANDARD

“In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint.” Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). Documents incorporated into or attached to the complaint are considered part of the pleading. Rule 10(c), SCRPC; Brazell v. Windsor, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009).

“If the facts alleged and inferences reasonably deducible therefrom, viewed in the light

most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper.” Doe, 373 S.C. at 395; 645 S.E.2d at 247. “The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.” Id.

DISCUSSION

I. The Plaintiffs failed to timely file an Failure to File Expert Affidavit

In South Carolina, a plaintiff in a legal malpractice action is required to file an expert affidavit as part of his complaint. S.C. Code §§ 15-36-100(B), (G)(2). This requirement protects professionals licensed by the State of South Carolina from frivolous claims. See Hall v. Fedor, 349 S.C. 169, 174, 561 S.E.2d 654, 656-57 (Ct. App. 2002) (plaintiff must generally establish standard of care by expert testimony). While an exception to the contemporaneous filing requirement exists when the statute of limitations will expire within ten days of filing the complaint, the plaintiff must nevertheless supplement the complaint with an expert affidavit within forty-five days of the date of filing. S.C. Code § 15-36-100(C)(1). If the plaintiff fails to file an expert affidavit within the specified period, “the complaint is subject to dismissal for failure to state a claim.” Id.

There can be little doubt that the expert affidavit requirement applies to this action. The Plaintiffs acknowledge as much in Paragraph 7 of the complaint, which purports to be filed “pursuant to S.C. Code § 15-36-100(c)(1). . . .” Since the Complaint alleges the statute of limitations was about to expire, § 15-36-100(C)(1) required the Plaintiffs to file an expert affidavit no later than September 29, 2011, forty-five days after the Complaint was filed. To date, more than five months after filing the Complaint, the Plaintiffs have still failed to file an expert affidavit. Accordingly, for their continuing disregard of the expert affidavit requirement,

it is only proper that the Falgione Defendants' Motion be granted and the Complaint be dismissed with prejudice for failure to state a claim.

II. Statute of Limitations

"The statute of limitations in a legal malpractice case is three years." S.C. Code § 15-3-530; Kimmer v. Wright, ___ S.C. ___, 719 S.E.2d 265 (Ct. App. 2011), *reh'g denied* (Dec. 19, 2011). "Under the discovery rule, the three-year clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." *Id.* (internal quotations omitted). In Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005), the Supreme Court explained that reasonable diligence means,

an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.

363 S.C. at 376, 610 S.E.2d at 818 (emphasis in original). Applying that understanding of the discovery rule to the facts of this case, it is apparent the Plaintiffs failed to commence their action within the statute of limitations.

In the Complaint, the Plaintiffs allege various acts of misconduct by Rakowsky and Falgione that culminated in the May 9, 2007 settlement. Perhaps most importantly, the Plaintiffs allege they refused to settle the case, despite their attorneys' attempts to coerce them. That the Plaintiffs were present in the courtroom on May 9, 2007, and saw their attorneys settling their case on the record cannot be ignored. If the Plaintiffs did refuse to settle, as they allege, then surely they were on notice that day of a malpractice claim.

To the extent the Plaintiffs contend they did not believe the settlement was final at that time, certainly they understood the finality of the settlement weeks later, when they began

inundating the Court with letters requesting to vacate the settlement and reopen the case. According to Judge Harwell's July 3, 2007, Order,² many of the grounds for relief in those letters are the same ones the Plaintiffs allege in this action: (i) fraud designed to coerce the Plaintiffs to settle; (ii) misrepresentation of evidentiary rulings the court had made or was going to make; (iii) poor legal advice concerning an Offer of Judgment; and (iv) the Plaintiffs' disagreement with the settlement. S. Holdings, Inc. v. Horry County, 4:02-cv-1859-RBH, 2007 WL 1960590 at *2 (D.S.C. July 3, 2007).

Importantly, with respect to the evidentiary rulings, the Court clearly stated in that Order that he reserved ruling on those issues until the next day, at which time the court was advised the case had settled. S. Holdings, Inc., 2007 WL 1960590 at *1 n.3. Furthermore, the Court wrote, "In the event there was any breach of the standard of care owed by Plaintiffs' attorneys to the Plaintiffs as a result of alleged coercion, improper inducement, fraud, or inadequate representation, Plaintiffs have an available remedy for damages against their own attorneys." 2007 WL 1960590 at *4. Considering these facts, it strains credulity for the Plaintiffs to contend they had no notice of their claims until August of 2008.

Based solely on the allegations in the Complaint, the Plaintiffs were aware on May 9, 2007, of facts giving rise to their claims. Even assuming a person of common knowledge would not have been on notice of a malpractice claim after watching his attorneys settle his case without consent, the Plaintiffs' cannot deny that Federal Court issued its July 3, 2007 Order only because the Plaintiffs voiced serious concerns about the manner in which their attorneys handled the Underlying Case. At the absolute latest, the three-year clock began to run in July of 2007.

² While this Court need not rely on this document to dispose of this Motion, the Court may consider the orders of the District Court for the Underlying Case because they are incorporated into the Complaint and they are public records.

Accordingly, since the Plaintiffs filed the Complaint on August 15, 2011, more than three years later, their claims are barred, and the Complaint should be dismissed with prejudice.

III. Untimely Service of Process

In addition to the grounds discussed above, this Court should dismiss the Plaintiffs' case because they failed to serve the Summons and Complaint within the period set forth in Rule 3(a), SCRCF. This rule provides, "A civil action is commenced when the summons and complaint are filed with the clerk of court . . . if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing." Rule 3(a)(2), SCRCF.

This time limitation is consistent with S.C. Code § 15-3-20, which provides:

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- (B) A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing.

"If a plaintiff files but fails to make actual service upon the defendant the action has not yet commenced." Blyth v. Marcus, 322 S.C. 150, 154, 470 S.E.2d 389, 391 (Ct. App. 1996).

"Therefore, because the statute of limitations period continues to run, unless the plaintiff can correct this 'failed' commencement before expiration of the limitations period, the claim will normally be time barred." Id. (citing McLain v. Ingram, 314 S.C. 359, 360, 444 S.E.2d 512, 513 (1994)).

The Plaintiffs in this case filed the complaint on August 15, 2011. On December 15, 2011, more than one hundred twenty days after the complaint was filed, a process server walked into Falgione's office and gave a temporary employee, Julie Owens, a copy of the summons, which bore no file stamp, and a copy of the complaint, which bore a file stamp. *See* Rule 5(d),

SCRCP (summons and complaint must be filed, and then served). By rule, the deadline for service was December 13, 2011. Thus, the Plaintiffs failed to timely serve the summons and complaint, and this action should be dismissed with prejudice.

IV. Insufficient Service of Process

Finally, the complaint should be dismissed because the Plaintiffs have not yet properly served the Summons and Complaint. Instead, the Plaintiffs attempted to serve Falgione and the Law Firm by delivering a copy of the Summons and Complaint to a temporary employee, who had no authority—actual, implied, or apparent—to accept service of process. In a recent decision, the Supreme Court of South Carolina recognized,

The class of persons authorized to sign on behalf of defendants is narrow: “Actual appointment for the specific purpose of receiving process normally is expected and the mere fact a person may be considered to act as defendant's agent for some purpose does not necessarily mean that the person has authority to receive process.” Service on an employee is effective when the employee has apparent authority to receive it on behalf of the employer.

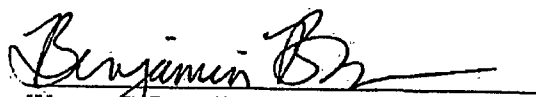
Graham Law Firm, P.A. v. Makawi, Op. No. 27086, 2012 WL 130671 (S.C. Jan. 17, 2012) (quoting Moore v. Simpson, 322 S.C. 518, 473 S.E.2d 64 (Ct.App.1996)). The Makawi court relied in part on Roberson v. S. Fin. of S. C., Inc., 365 S.C. 6, 615 S.E.2d 112 (2005), a case in which the plaintiff attempted service by certified mail. In Roberson, a clerical employee of the defendant signed the return receipt, and the defendant failed to answer and the trial court entered a default judgment. 365 S.C. at 8-9, 615 S.E.2d at 114. The defendant/employer moved to set aside the judgment under Rule 60(b), but the court denied the motion. 365 S.C. at 9, 615 S.E.2d at 114. On appeal, the Court noted that the employee testified she was never authorized to accept service of process. Id. (“[A]n agent has no implied authority unless she herself believed she had such authority.”). Reversing the trial court, the Supreme Court held there was no evidence on the record that the defendant/employer had manifested that the employee was its

agent for service of process, nor was there any evidence that the employee had actual or implied authority to act as the defendant's registered agent. 365 S.C. at 11, 615 S.E.2d at 115.

Similarly in this case, there is no evidence that Julie Owens, the temporary clerical employee who received the Summons and Complaint, was authorized to accept service of process for either Falgione or his law firm. To the contrary, the Affidavits of record demonstrate that Ms. Owens never had authority to accept service of process. Therefore, the Plaintiffs have failed to properly serve the Falgione Defendants in accordance with the South Carolina Rules of Civil Procedure, and the Complaint should be dismissed pursuant to Rule 12(b)(5), SCRCP.

V. Conclusion

Based upon these several grounds, the Falgione Defendants seek dismissal of the claims against them. Not only have the Plaintiffs failed to file the required expert affidavit, they also failed to commence their action within three years of the May 9, 2007, hearing, at which they watched their case being settled without their consent. Furthermore, dismissal is appropriate because the Plaintiffs' failed to timely and properly serve the summons and complaint pursuant to the South Carolina Rules of Civil Procedure. Although the Plaintiffs are appearing in this action *pro se*, these Rules and statutes still apply with full force.



Warren C. Powell, Jr.

Benjamin C. Bruner

Bruner, Powell, Wall & Mullins, LLC

P.O. Box 61110

Columbia, SC 29260

803-252-7693

*Attorneys for Adrian L Falgione and The Law
Offices of Adrian L. Falgione, LLC*

January 25, 2012

Columbia, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 25, 2012, the document(s) described below was(were) served on all parties of record in this case by mailing a copy, first class mail, postage prepaid and addressed as set forth below.

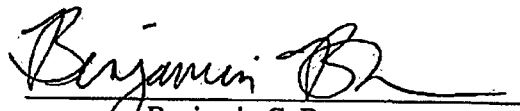
Documents served: MEMORANDUM IN SUPPORT OF DEFENDANTS ADRIAN L. FALGIONE; AND THE LAW OFFICES OF ADRIAN FALGIONE, LLC'S MOTION TO DISMISS

Parties served:

James B. Spencer
7001 Saint Andrews Road, Suite 183
Columbia, South Carolina 29212
Pro Se

Irene Santacroce
205 Deer Trace Circle
Myrtle Beach, South Carolina 29588
Pro Se

David W. Overstreet
Amanda K. Dudgeon
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40 Calhoun Street, Suite 400
Charleston, South Carolina 29401
Attorneys for John R. Rakowsky


Benjamin C. Bruner

Mike McCall

From: Bridget Steele
Sent: Friday, June 03, 2016 3:41 PM
To: 'JamesBSpencer@sc.rr.com'
Cc: Ben Bruner; 'david.overstreet@earhartoverstreet.com'; 'mike@earhartoverstreet.com'
Subject: Rakowsky v. Spencer, et al.
Attachments: Ltr to Spencer - 6.3.16.pdf

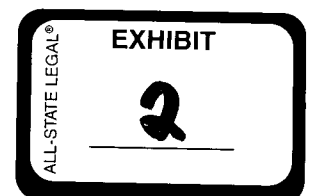
Good Afternoon –

Attached please find correspondence from Mr. Bruner.

Thank You!

Bridget S. Steele
LEGAL ASSISTANT
BRUNER POWELL
BRUNER, POWELL, WALL & MULLINS, LLC
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E. WADE MULLINS III, P.A.
BRIAN P. ROBINSON, P.A.

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BENJAMIN C. BRUNER, P.A.

ANN F. ALLISON
CAITLIN C. HEYWARD
ROBERT C. OSBORNE III
BRYAN M.J. TRIPLETT

AUTHOR'S E-MAIL: BBRUNER@BRUNERPOWELL.COM

June 3, 2016

James B. Spencer
7001 Saint Andrews Rd. Box 183
Columbia, SC 29212

Re: *Rakowsky v. Spencer, et al.*
Appellate Case No.: 2014-000091
BPWM File No.: 3-1742-108

Mr. Spencer:

Please find enclosed Falgione's Motion to Change Venue, filed May 17, 2012, and Falgione's Memorandum in Support of Motion to Dismiss, dated January 27, 2012, in the above-referenced matter. I have searched my file and cannot find a copy of Court's Exhibit 2 from the June 5, 2013 hearing, which as best I can tell was a letter you submitted to the Court when you were arguing your motion to disqualify Carlock Copeland as defense counsel.

Sincerely,



Benjamin C. Bruner

BCB/gh
Enclosures

cc: The Honorable Jenny Abbott Kitchings
David W. Overstreet, Esq.
Michael B. McCall, Esq.
(with encl.)

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

James Spencer, individually and on behalf)
of the Estate of Doris Holt and on behalf)
of Southern Holdings, Inc.; and Irene)
Santacroce;)

C/A No. 2011-CP-40-5384

Plaintiffs,)

v.)

John R. Rakowsky; Adrian L. Falgione;)
and The Law Offices of Adrian Falgione,)
LLC;)

**MEMORANDUM IN SUPPORT OF
DEFENDANTS ADRIAN L. FALGIONE
AND THE LAW OFFICES OF ADRIAN
FALGIONE, LLC'S MOTION TO DISMISS**

Defendants.)

2012 JAN 27 PM 4:27
JEANNETTE W. HARRIS
C.C.P. & C.S.
RICHLAND COUNTY
FILED

Defendants Adrian L Falgione (“Falgione”) and The Law Offices of Adrian L. Falgione, LLC (collectively, “Falgione Defendants”), offer this memorandum for the Court’s consideration in support of their Motion to Dismiss filed November 4, 2011 and amended December 22, 2011. The Defendants seek dismissal based upon the Plaintiffs’ failure to file an expert affidavit, failure to timely commence this action, failure to timely serve the Complaint, and failure to properly serve the Complaint.

FACTUAL/PROCEDURAL BACKGROUND¹

This is a legal malpractice action arising out of a case in which John Rakowsky and Falgione represented the Plaintiffs. Rakowsky and Falgione are licensed attorneys whose practices are in Lexington, South Carolina. The underlying case was filed in federal court for the District of South Carolina, Florence Division, and assigned Civil Action No.: 4:02-cv-1859-RBH (“Underlying Case”). The complaint in the Underlying Case was filed on May 29, 2002

¹ For the limited purposes of this Motion, the pertinent facts are set forth herein construing the well-pleaded allegations in the Complaint in accordance with the standard for a motion to dismiss under Rule 12(b)(6), SCRPC.

(by two attorneys not named as defendants herein). (Compl. ¶ 8.) Plaintiffs' alleged a wide array of claims against former business partners, the Horry County Sherriff's Department, and the Myrtle Beach Police Department, as well as various officials, deputies, and officers in those agencies, all of whom took some part in an attempt to take over Southern Holdings, Inc. Rakowsky became involved in the case relatively, early; however, Falgione did not appear in the case until over four years later, on December 3, 2006, when the Plaintiffs were preparing for the trial. (Compl. ¶¶ 11, 16.)

On May 8, 2007, the day before trial, the Court conducted a pretrial hearing, at which it heard arguments on evidentiary motions. (Compl. ¶ 23.) After the hearing, the presiding judge held a conference in chambers with the attorneys. (Compl. ¶ 24.) Following that conference, the Plaintiffs were lead to believe that the judge had ruled a majority of the Plaintiffs' evidence was inadmissible, including all evidence of damages. (Compl. ¶¶ 26-27.) Rakowsky and Falgione attempted to coerce the Plaintiffs to accept a settlement offer of \$55,000. However, the Plaintiffs would not agree. (Compl. ¶¶ 28-32, 37, 44.)

On the following day, May 9, 2007, immediately prior to trial, the Plaintiffs attended a hearing at which the settlement terms were placed on the record. The Court announced the settlement and dismissed the jury pool. (Compl. ¶ 49.) Contrary to Rakowsky's and Falgione's representations, the Court did not poll the Plaintiffs about whether they agreed to accept the settlement. Id. In a subsequent letter dated May 17, 2007, Rakowsky blamed the evidentiary problems on two other attorneys who had previously represented the Plaintiffs in the case, and suggested the best course of action was a malpractice claim against those other attorneys. (Compl. ¶ 51.)

In late May 2007, several plaintiffs in the Underlying Case began inundating the Court

with letters “pointing out inconsistencies in Rakowsky’s letters, the transcript of the [pretrial] evidentiary hearing, and why the Judge made the evidentiary rulings he did, as reported by Rakowsky and Falgione behind closed doors.” (Compl. ¶ 54.) The Court construed those letters as motions, and on July 3, 2007, issued an Order denying the motions. (Compl. ¶ 55.)

More than three years later, on August 15, 2011, the Plaintiffs filed this *pro se* malpractice suit against Rakowsky and Falgione. The Plaintiffs base their allegations on events that occurred leading up to and during the settlement on May 9, 2007. The Plaintiffs attempted to serve the Summons and Complaint on the Falgione Defendants on December 15, 2011, and on Rakowsky on December 16, 2011. To date, the Plaintiffs have not filed an expert affidavit.

Rakowsky and the Falgione Defendants have moved to dismiss the Complaint for the following reasons: (i) Plaintiffs have failed to file an expert affidavit pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §§ 15-36-10 to 100; (ii) Plaintiffs claims are barred by the three-year statute of limitations established in S.C. Code § 15-3-530; and (iii) Plaintiffs failed to serve the Summons & Complaint within the 120-day deadline in Rule 3(a)(2), SCRCPP. In addition, Falgione and his law firm seek dismissal based upon the Plaintiffs’ failure to properly serve the Summons and Complaint pursuant to Rule 4, SCRCPP.

STANDARD

“In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint.” Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). Documents incorporated into or attached to the complaint are considered part of the pleading. Rule 10(c), SCRCPP; Brazell v. Windsor, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009).

“If the facts alleged and inferences reasonably deducible therefrom, viewed in the light

most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper.” Doe, 373 S.C. at 395; 645 S.E.2d at 247. “The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.” Id.

DISCUSSION

I. The Plaintiffs failed to timely file an Failure to File Expert Affidavit

In South Carolina, a plaintiff in a legal malpractice action is required to file an expert affidavit as part of his complaint. S.C. Code §§ 15-36-100(B), (G)(2). This requirement protects professionals licensed by the State of South Carolina from frivolous claims. See Hall v. Fedor, 349 S.C. 169, 174, 561 S.E.2d 654, 656-57 (Ct. App. 2002) (plaintiff must generally establish standard of care by expert testimony). While an exception to the contemporaneous filing requirement exists when the statute of limitations will expire within ten days of filing the complaint, the plaintiff must nevertheless supplement the complaint with an expert affidavit within forty-five days of the date of filing. S.C. Code § 15-36-100(C)(1). If the plaintiff fails to file an expert affidavit within the specified period, “the complaint is subject to dismissal for failure to state a claim.” Id.

There can be little doubt that the expert affidavit requirement applies to this action. The Plaintiffs acknowledge as much in Paragraph 7 of the complaint, which purports to be filed “pursuant to S.C. Code § 15-36-100(c)(1). . . .” Since the Complaint alleges the statute of limitations was about to expire, § 15-36-100(C)(1) required the Plaintiffs to file an expert affidavit no later than September 29, 2011, forty-five days after the Complaint was filed. To date, more than five months after filing the Complaint, the Plaintiffs have still failed to file an expert affidavit. Accordingly, for their continuing disregard of the expert affidavit requirement,

it is only proper that the Falgione Defendants' Motion be granted and the Complaint be dismissed with prejudice for failure to state a claim.

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Graham Law Firm, P.A. v. Makawi, Op. No. 27086, 2012 WL 130671 (S.C. Jan. 17, 2012) (quoting Moore v. Simpson, 322 S.C. 518, 473 S.E.2d 64 (Ct.App.1996)). The Makawi court relied in part on Roberson v. S. Fin. of S. C., Inc., 365 S.C. 6, 615 S.E.2d 112 (2005), a case in which the plaintiff attempted service by certified mail. In Roberson, a clerical employee of the defendant signed the return receipt, and the defendant failed to answer and the trial court entered a default judgment. 365 S.C. at 8-9, 615 S.E.2d at 114. The defendant/employer moved to set aside the judgment under Rule 60(b), but the court denied the motion. 365 S.C. at 9, 615 S.E.2d at 114. On appeal, the Court noted that the employee testified she was never authorized to accept service of process. Id. (“[A]n agent has no implied authority unless she herself believed she had such authority.”). Reversing the trial court, the Supreme Court held there was no evidence on the record that the defendant/employer had manifested that the employee was its

agent for service of process, nor was there any evidence that the employee had actual or implied authority to act as the defendant's registered agent. 365 S.C. at 11, 615 S.E.2d at 115.

Similarly in this case, there is no evidence that Julie Owens, the temporary clerical employee who received the Summons and Complaint, was authorized to accept service of process for either Falgione or his law firm. To the contrary, the Affidavits of record demonstrate that Ms. Owens never had authority to accept service of process. Therefore, the Plaintiffs have failed to properly serve the Falgione Defendants in accordance with the South Carolina Rules of Civil Procedure, and the Complaint should be dismissed pursuant to Rule 12(b)(5), SCRCP.

V. Conclusion

Based upon these several grounds, the Falgione Defendants seek dismissal of the claims against them. Not only have the Plaintiffs failed to file the required expert affidavit, they also failed to commence their action within three years of the May 9, 2007, hearing, at which they watched their case being settled without their consent. Furthermore, dismissal is appropriate because the Plaintiffs' failed to timely and properly serve the summons and complaint pursuant to the South Carolina Rules of Civil Procedure. Although the Plaintiffs are appearing in this action *pro se*, these Rules and statutes still apply with full force.



Warren C. Powell, Jr.
Benjamin C. Bruner
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260
803-252-7693
*Attorneys for Adrian L. Falgione and The Law
Offices of Adrian L. Falgione, LLC*

January 25, 2012
Columbia, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 25, 2012, the document(s) described below was(were) served on all parties of record in this case by mailing a copy, first class mail, postage prepaid and addressed as set forth below.

Documents served: MEMORANDUM IN SUPPORT OF DEFENDANTS ADRIAN L. FALGIONE; AND THE LAW OFFICES OF ADRIAN FALGIONE, LLC'S MOTION TO DISMISS

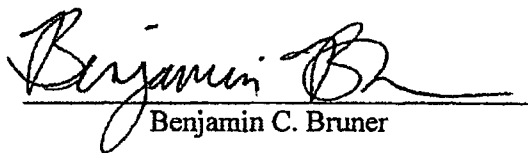
Parties served:

James B. Spencer
7001 Saint Andrews Road, Suite 183
Columbia, South Carolina 29212
Pro Se

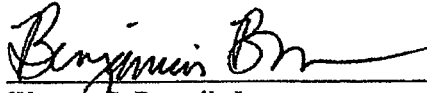
Irene Santacroce
205 Deer Trace Circle
Myrtle Beach, South Carolina 29588
Pro Se

David W. Overstreet
Amanda K. Dudgeon
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, South Carolina 29401
Attorneys for John R. Rakowsky

RICHLAND COUNTY
FILED
2012 JAN 27 PM 1:28
JEANNETTE W. MCBRIDE
C.C.P. & G.S.


Benjamin C. Bruner

have been made and provided. Pursuant to Rule 11, SCRPC, the undersigned has no duty to consult with the *pro se* Plaintiffs before filing this Motion.



Warren C. Powell, Jr.

Benjamin C. Bruner

Bruner, Powell, Wall & Mullins, LLC

P.O. Box 61110

Columbia, SC 29260

803-252-7693

*Attorneys for Adrian L. Falgione and The Law
Offices of Adrian L. Falgione, LLC*

May 16, 2012

Columbia, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 16, 2012, the document(s) described below was(were) served on all parties of record in this case by mailing a copy, first class mail, postage prepaid and addressed as set forth below.

Documents served: **NOTICE OF MOTION AND MOTION TO CHANGE VENUE**

Parties served:

James B. Spencer
7001 Saint Andrews Road, Suite 183
Columbia, South Carolina 29212
Pro Se

Irene Santacroce
205 Deer Trace Circle
Myrtle Beach, South Carolina 29588
Pro Se

Amanda K. Dudgeon
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, South Carolina 29401
Attorneys for John R. Rakowsky

RICHLAND COUNTY
FILED
2012 MAY 17 AM 11:08
JEANETTE W. McBRIDE
C.C.P. & G.S.

Nancy Y. Stagg

Nancy Y. Stagg

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr.

Case No.: 2014-000091

James Spencer, individually and on behalf of the Estate of Doris Holt
and on behalf of Southern Holdings, Inc., Plaintiffs,

of whom James Spencer is the Appellant,

v.

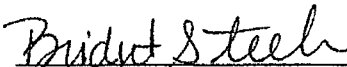
John R. Rakowsky, Adrian L. Falgione, and The Law Offices
of Adrian Falgione, LLC, Defendants,

of whom John R. Rakowsky and Adrian L. Falgione are the Respondents.

PROOF OF SERVICE

I hereby certify that I served *Falgione's Motion to Change Venue filed May 17, 2012, and Falgione's Memorandum in Support of Motion to Dismiss, dated January 27, 2012* by depositing a copy of it in the United States Mail, postage prepaid, on June 3, 2016, addressed to the *pro se* Appellant, James B. Spencer, 7001 Saint Andrews Road, Suite 183, Columbia, South Carolina 29212, and to Respondent John R. Rakowsky's attorneys of record, David W. Overstreet, Esquire and Michael B. McCall, Esquire at Carlock, Copeland & Stair, LLP, 40 Calhoun Street, Suite 400, Charleston, South Carolina 29401.

June 3, 2016


Bridget Steele

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2014-000091

James Spencer, individually and on
behalf of the Estate of Doris Holt
and on behalf of Southern Holdings,
Inc.; and Irene Santacroce, Plaintiffs,

of whom James Spencer is the,

Appellant,

v.

John R. Rakowsky, Adrian L.
Falgione, and the Law Offices of
Adrian Falgione, LLC, Defendants,

of whom John R. Rakowsky
and Adrian L. Falgione are the,

Respondents.

AFFIDAVIT OF COUNSEL

PERSONALLY APPEARED BEFORE ME, Michael B. McCall, who being duly
sworn, deposes and says as follows:

1. David W. Overstreet and I are the attorneys for Respondent John R.
Rakowsky in the above-captioned appeal.
2. I am submitting this affidavit to supplement Respondent Rakowsky's
opposition to Appellant Spencer's motion to reinstate this appeal, which was dismissed on



March 4, 2016 for failure to serve and file a record on appeal that included all matters designated by the parties.

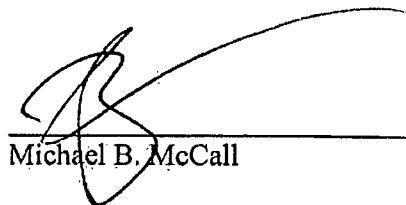
3. On May 26, 2016, the Court issued an order requiring Respondents Rakowsky and Falgione to provide copies of certain documents in their possession to Appellant Spencer within ten days, and requiring Appellant Spencer to serve and file an amended record within twenty days of receipt of the documents. The May 26, 2016 order further stated that the Court will consider Appellant Spencer's motion to reinstate upon receipt of the amended record or the expiration of thirty (30) days.

4. I am informed and believe that on June 3, 2016, Appellant Spencer received all of the documents necessary to prepare an amended record on appeal.

5. On June 27, 2016, I received an envelope from Appellant Spencer that contained nothing more than another empty envelope. The envelope and the empty envelope contained therein were sent on June 24, 2016, and are attached as Exhibit 1.

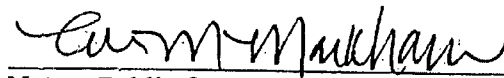
6. In the thirty-three (33) days that have elapsed since the Court's May 26, 2016 order, I have not received any correspondence, communications, or documents from Appellant Spencer other than the empty envelope received on June 27, 2016.

FURTHER AFFIANT SAYETH NOT.



Michael B. McCall

SWORN to and subscribed before me
this 28th day of June, 2016.



Notary Public for South Carolina
My commission expires: 3/31/2025

Box 183
7001 Saint Andrews Road
Columbia, SC 29212

David W. Overstreet
PO Box 22528
Charleston, SC 29413

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2014-000091

James Spencer, individually and on
behalf of the Estate of Doris Holt
and on behalf of Southern Holdings,
Inc.; and Irene Santacroce, Plaintiffs,

of whom James Spencer is the,

Appellant,

v.

John R. Rakowsky, Adrian L.
Falgione, and the Law Offices of
Adrian Falgione, LLC, Defendants,

of whom John R. Rakowsky
and Adrian L. Falgione are the,

Respondents.

PROOF OF SERVICE

I, Camille M. Gardner, an employee of Earhart Overstreet LLC, attorneys for Respondent John Rakowsky, certify that I served a copy of the Affidavit of Counsel by depositing a copy of it in the U.S. Mail, postage prepaid, on June 28, 2016, addressed to the *pro se* Appellant, James B. Spencer, 7001 Saint Andrews Road, Suite 183, Columbia, South Carolina 29212, and to Respondent Adrian Falgione's attorneys of record, Benjamin C. Bruner, Esquire and Warren C. Powell, Jr., Esquire, at Bruner, Powell, Wall & Mullins, LLC, P.O. Box 61110, Columbia, South Carolina 29260.

June 28, 2016


Camille M. Gardner

SHIPMENT ID: HMTUYW8BAN7HD



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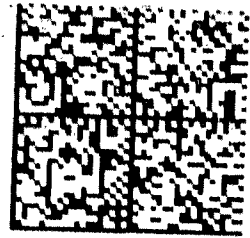
US POSTAGE AND FEES PAID

PRIORITY MAIL

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JAMES B SPENCER
7001 SAINT ANDREWS RD
PMB 183
Columbia SC 29212

0024

SHIP TO:

DAVID W. OVERSTREET
PO BOX 22528
CHARLESTON SC 29413-2461

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EXHIBIT

4

RECORD ON APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case No: 2014-000091

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr. Circuit Court Judge

John R. Rakowsky, *Respondent*
Adrian Falgione, *Respondent*

v.

James Spencer, *Pro Se, Appellant*

RECORD ON APPEAL

VOLUME I OF II

David W. Overstreet, Esquire
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
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(843) 727-0307
Attorney for Respondent John Rakowsky

Benjamin C. Bruner, Esquire
Bruner, Powell, Wall & Mullins, LLC
1735 St. Julian Place, Suite 200
Columbia, SC 29260-1110
(803) 753-0060
Attorney for Respondent Adrian Falgione

James B. Spencer, *Pro Se*
Box 183
7001 Saint Andrews Road
Columbia, SC 29212
Appellant



PROOF OF SERVICE

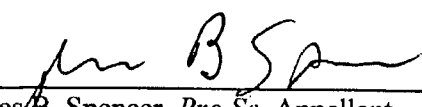
The undersigned hereby certifies that on , the document described below, was(were) served on all parties of record in this case by mailing a copy, by US mail and/or delivery by courier on this date June 22, 2016.

Documents served: **Record On Appeal, Volume I of II**

Parties Served:

Benjamin C. Bruner
Bruner, Powel, Wall & Mullins, LLC
1735 St. Julian Place, Suite 200
Post Office Box 61110
Columbia, South Carolina 29260-1110

David W. Overstreet
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, South Carolina 29401
Attorneys for John Rakowsky

By: 
James B. Spencer, *Pro Se*, Appellant
Suite 183
7001 Saint Andrews Road
Columbia, SC 29212
(803) 414-0889

RECORD ON APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case No: 2014-000091

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr. Circuit Court Judge

John R. Rakowsky, *Respondent*
Adrian Falgione, *Respondent*

v.

James Spencer, *Pro Se, Appellant*

RECORD ON APPEAL

VOLUME II OF II

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Attorney for Respondent John Rakowsky

Benjamin C. Bruner, Esquire
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1735 St. Julian Place, Suite 200
Columbia, SC 29260-1110
(803) 753-0060
Attorney for Respondent Adrian Falgione

James B. Spencer, *Pro Se*
Box 183
7001 Saint Andrews Road
Columbia, SC 29212
Appellant

PROOF OF SERVICE

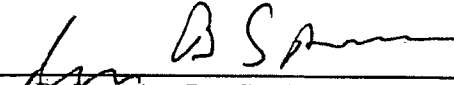
The undersigned hereby certifies that on , the document described below, was(were) served on all parties of record in this case by mailing a copy, by US mail and/or delivery by courier on this date June 22, 2016.

Documents served: **Record On Appeal, Volume II of II**

Parties Served:

Benjamin C. Bruner
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Columbia, South Carolina 29260-1110

David W. Overstreet
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, South Carolina 29401
Attorneys for John Rakowsky

By: 
James B. Spencer, *Pro Se*, Appellant
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7001 Saint Andrews Road
Columbia, SC 29212
(803) 414-0889

RECORD ON APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr. Circuit Court Judge

John R. Rakowsky, *Respondent*
Adrian Falgione, *Respondent*

v.

James Spencer, *Pro Se, Appellant*

RECORD ON APPEAL

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Attorney for Respondent John Rakowsky

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(803) 753-0060
Attorney for Respondent Adrian Falgione

James B. Spencer, *Pro Se*
Box 183
7001 Saint Andrews Road
Columbia, SC 29212
Appellant

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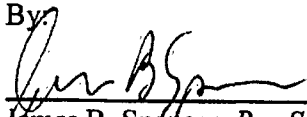
EXHIBIT

6

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

By



James B. Spencer, *Pro Se*
Suite 183
7001 Saint Andrews Road
Columbia, SC 29212

RECORD ON APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case No: 2014-000091

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr. Circuit Court Judge

John R. Rakowsky, *Respondent*
Adrian Falgione, *Respondent*

v.

James Spencer, *Pro Se, Appellant*

RECORD ON APPEAL

VOLUME II OF II

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Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
(843) 727-0307
Attorney for Respondent John Rakowsky

Benjamin C. Bruner, Esquire
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1735 St. Julian Place, Suite 200
Columbia, SC 29260-1110
(803) 753-0060
Attorney for Respondent Adrian Falgione

James B. Spencer, *Pro Se*
Box 183
7001 Saint Andrews Road
Columbia, SC 29212
Appellant

CERTIFICATE OF COMPLIANCE

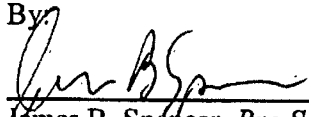
RECEIVED

JUN 30 2016

SC Court of Appeals

The undersigned certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

By



James B. Spencer, *Pro Se*
Suite 183
7001 Saint Andrews Road
Columbia, SC 29212



Earhart Overstreet
ATTORNEYS AT LAW

Main: 843.972.9400
www.earhartoverstreet.com
PO Box 22528, Charleston, SC 29413

Mike@earhartoverstreet.com
Direct: 843.628.3780

June 29, 2016

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

RECEIVED
JUN 30 2016
SC Court of Appeals

Re: James Spencer v. John R. Rakowsky, et al.
Case No.: 2014-000091
EO File No.: 110-0159

Dear Ms. Kitchings:

Enclosed for filing please find the original and 6 copies of *Respondent John R. Rakowsky's Supplemental Return to Appellant's Motion to Reinstate* and *Proof of Service* in this case. By copy of this correspondence, I am serving a copy of the same upon Appellant and all counsel of record. If you have any questions, please do not hesitate to contact me. With kind regards, I am

Sincerely,



MICHAEL B. McCALL

MBM/cmg

Enclosures

cc: Benjamin Bruner, Esq.
Warren C. Powell, Esq.
James Spencer

Expre

RT 103
FZ B20
06:30
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 TRK# 8064 4083 3650
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Express US Airbill

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1 From
 Date: 6/29/16
 Sender's Name: Michael P. ...
 Company: ...
 Address: 1037 ...
 City: ... State: ... ZIP: 29404

2 Your Internal Billing Reference
 ...

3 To
 Recipient's Name: ...
 Company: ...
 Address: 1220 ...
 City: ... State: ... ZIP: 29201

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5 Packaging *Declared value limit \$500

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 NOT available for FedEx Standard Overnight, FedEx 2Day A.M., or FedEx Express Saver.

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 Package may be left without obtaining a signature for delivery.

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No Yes
 As per attached Shipper's Declaration. Shipper's Declaration not required. Dry Ice, 1

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Sender Recipient Third Party

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Total Packages: ... Total Weight: ... lbs



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