

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

**RECEIVED**

JAN 23 2017

**SC Court of Appeals**

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Appeal from Greenville County  
Master in Equity  
Honorable Charles B. Simmons, Jr.

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Appellate Case No. 2016-001576

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CACV of Colorado, LLC.....Respondent,

v.

Robert H. Bishop.....Appellant.

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INITIAL BRIEF OF RESPONDENT

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## STATEMENT OF ISSUES ON APPEAL

- I. Should this Court enforce an arbitration award that was obtained through fraud, deception, and abuse of process?
- II. Does SCRCP 60 give authority to correct this improperly entered arbitration award?
- III. Does the failure to provide an arbitration agreement when seeking to enter an arbitration award deprive the Court of subject matter jurisdiction?
- IV. Can lack of subject matter jurisdiction be raised during supplemental collection proceedings?

## STATEMENT OF THE CASE

This appeal arises from the proper denial of Robert H. Bishop's untimely attempt to attack collaterally both a 2008 arbitration award and a 2009 judgment that confirmed the arbitration award. In 2016, nearly seven years after the judgment, Bishop filed SCRCP 60(b) and 59(e) motions, only after supplemental proceedings were initiated to collect on the judgment. Bishop now attacks the arbitration award and judgment, having previously chosen not to appear or participate in either of the proceedings in which they were granted. As explained in more detail below, this Court should affirm the Honorable Charles B. Simmons's order denying the motion for relief from judgment because the motion was untimely; Bishop waived these arguments; and Bishop's delayed attempt to undo a seven-year-old judgment is a waste of judicial resources and disrupts the interest of finality of judgments.

CACV of Colorado, LLC respectfully submits that Judge Simmons' denial of Bishop's motions was proper, and well within his discretion, and should be affirmed. CACV should not now be forced to re-litigate claims that Bishop could have litigated years ago but waived when he chose: (1) not to contest (or even appear in) the 2008 arbitration proceedings; (2) not to file a motion to modify or vacate the 2008 arbitration award within the time period prescribed by the FAA; (3) not to contest (or even appear in) the 2009 proceedings to confirm the arbitration award; (4) not to file a motion to vacate or for relief from the 2009 order confirming the arbitration award in the time and manner prescribed by SCRCP 60(b); and (5) not to appeal the 2009 order confirming the arbitration award.

## STATEMENT OF FACTS

Bishop opened a credit card account with a bank, which, after his default, sold and assigned the account to CACV. The credit card agreement stated that it was governed by Delaware law and any applicable federal laws. The credit card agreement contained an arbitration provision in which Bishop acknowledged that the agreement was made pursuant to a transaction involving interstate commerce and was to be governed by the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16. It also provided that any court having jurisdiction could enter judgment upon any arbitration award. Pursuant to this agreement, CACV filed a claim against Bishop with the National Arbitration Forum (“NAF”). NAF served as the arbitration administrator, assigning the case to an attorney arbitrator who was licensed to practice law in South Carolina. NAF was not, itself, the arbitrator, and it was the attorney arbitrator, not NAF, who ultimately issued the arbitration ruling.

Bishop was properly notified of the arbitration proceeding, but he chose not to dispute the existence and enforceability of the arbitration agreement and not to respond, contest, or participate in that proceeding. Bishop was sent written notice of the arbitration award in favor of CACV on July 3, 2008, but he again did not challenge the arbitration agreement, arbitration proceeding, or arbitration award in any fashion. Instead, he continued to sit silently on the sidelines.

On January 23, 2009, CACV then brought an action to confirm the arbitration award and enroll it as a judgment. It filed with the Court below a Notice of Entry of Arbitration Award and a Motion to Confirm Arbitration Award and Enter Judgment in Conformity Therewith. A copy of the credit card agreement containing the arbitration agreement was attached thereto as Exhibit A, and a copy of the arbitration award was attached thereto as Exhibit B. All of those documents

were properly served on Bishop on February 20, 2009, a fact that is not in dispute. The Notice of Entry of Arbitration Award advised Bishop that he had thirty days from the service thereof to seek relief from the enforcement of the arbitration award. Bishop, however, continued to ignore the litigation. He did not challenge the arbitration agreement, the arbitration proceedings, or the arbitration award. He chose not to appear at, or participate in, the proceeding to confirm the arbitration award. The arbitration award was enrolled as a judgment of the court by Order of the Honorable Larry Patterson, filed on May 7, 2009. Bishop did not file a timely Rule 60(b) motion, and he never appealed the Order.

Six years later, on July 14, 2015, CACV obtained an Execution of Judgment, which was subsequently returned unsatisfied by the Sheriff's Office. On November 16, 2015, Bishop was served with an Order requiring him to appear for supplementary proceedings before the Master in Equity for Greenville County. In response to that Order, Bishop filed a SCRCP 60(b) Motion for Relief from Judgment on February 10, 2016. The motion was heard and denied by Order of the Honorable Charles B. Simmons, which was filed on May 9, 2016. Bishop then filed a SCRCP 59(e) motion to reconsider, which was also heard and denied by Order of Judge Simmons filed June 28, 2016. Bishop now appeals the denial of his motions in a further attempt to force CACV to litigate issues that he could have previously raised, but waived long ago.

## STANDARD OF REVIEW

"Whether to grant or deny a motion under Rule 60(b) is within the sound discretion of the trial judge." BB & T v. Taylor, 369 S.C. 548, 633 S.E.2d 501 (S.C. 2006). The standard of review for an appellate court is therefore "limited to determining whether there was an abuse of discretion." Id., at 551. An abuse of discretion occurs when the order of the court is controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support. Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885,88 (S.C. 2009). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." Simpson v MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (S.C. 2007).

## ARGUMENTS

### I. BECAUSE BISHOP'S MOTION FOR RELIEF PURSUANT TO RULE 60(b) WAS UNTIMELY, IT WAS PROPERLY DENIED.

Bishop's motion for relief was untimely. In South Carolina, SCRPC 60(b) sets for the requirements for relief from a judgment and states:

**(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud, misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. During the pendency of an appeal, leave to make the motion must be obtained from the appellate court.

(emphasis added). Bishop did not file his Rule 60(b) motion until February 10, 2016. Therefore, to the extent Bishop made his motion under subsections (1), (2), and (3) of SCRPC 60(b), his

motion was not timely since the motion was filed almost seven years after the Court's May 7, 2009 Order enrolling the arbitration award as a judgment was entered, and SCRCP 60(b) expressly mandates that motions made under subsections (1), (2), and (3) shall be made "not more than one year after the judgment, order or proceeding was entered and taken."

Furthermore, to the extent that Bishop claims he requested relief from the 2009 judgment under subsections (4) and (5) of SCRCA 60(b) in his motion, CACV contends that those grounds have been waived by Bishop and are not properly before the Court because nowhere in his SCRCP 60(b) motion did Bishop assert that the May 2009 judgment was void (subsection (4)) or that the May 2009 judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the May 2009 judgment should have prospective application (subsection (5)). Indeed, Bishop only asserted subsections (4) and (5) grounds in his subsequently filed SCRCP 59(e) motion for reconsideration, and he did not raise subsection (5) grounds in his appellate brief. Accordingly, Bishop has waived both his subsection (4) and (5) arguments, and those grounds are not properly before the Court.<sup>1</sup> Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 54 n.4, 677 S.E.2d 32, 36 n. 4 (S.C. App., 2009) (deeming an issue waived on appeal if it is not argued in the appellant's brief) (citing to Rule 208(b)(1)(D), SCACR (stating an issue on appeal must be argued in the appellate brief)). However, even if Bishop had not waived those arguments, CACH submits that filing a motion under subsection (4) or (5) grounds almost seven years after the Court's order enrolling the arbitration award as a judgment was entered and he was notified of same, is not a motion "made within a reasonable time." Judge Simmons correctly found that

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<sup>1</sup> CACV also asserts that Bishop waived grounds under subsection (2) because nowhere in his SCRCP 60(b) motion did Bishop assert that there was "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Nor did he raise subsection (2) in his appellate brief.

Bishop had been properly notified of the arbitration proceedings and its results; that Bishop had been properly served with CACV's Motion to Confirm Arbitration Award and Enter Judgment in Conformity Therewith; and, that Bishop had been notified of the May 2009 judgment more than a year before his SCRCP 60(b) motion was filed. Bishop did not contest these findings in his appellate brief and, therefore, any attempt by Bishop to do so now has been waived. Guinan, supra; Rule 208(b)(1)(D), SCACR. CACV further respectfully submits that Judge Simmons' Order denying Bishop's belated attempt to now seek relief from the May 2009 judgment on any SCRCP 60(b) grounds was correct, within his discretion, and should be affirmed.

II. BECAUSE THE JUDGMENT WAS NOT APPEALED, BISHOP'S MOTION FOR RELIEF WAS PROPERLY DENIED.

Despite being notified of the judgment more than a year prior to filing his motion, Bishop never appealed the judgment for which he sought relief pursuant to Rule 60(b), SCRCP. An unappealed ruling is the law of the case and requires affirmance. Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013); Transp. Ins. Co. v. South Carolina Second Injry Fund, 389 S.C. 422, 699 S.E.2d 687 (S.C., 2010). "Rule 60 should not be considered a substitute for appeal from a final judgment, particularly when it is clear the party seeking relief could have litigated at trial and on appeal the claims he now makes by motion." Smith Companies of Greenville, Inc. v. Hayes, 311 S.C. 358, 428 S.E.2d 900 (S.C. App., 1993). As such, the denial of Bishop's SCRCP 60(b) motion was proper.

III. BECAUSE BISHOP WAS NOT DENIED DUE PROCESS OF LAW, HIS MOTION FOR RELIEF WAS PROPERLY DENIED.

Even if this Court determines that Bishop's Rule 60(b) motion was timely, Bishop cannot establish a basis for vacating the seven-year-old judgment. Bishop claims that he was not

afforded due process based upon speculative and conclusory allegations he makes regarding NAF (and not even the arbitrator who rendered the award). To the contrary, Bishop was not deprived of due process of law. The fundamental requisite of due process of law is the opportunity to be heard. Universal Benefits, Inc., v. McKinney, 349 S.C. 179, 561 S.E.2d 659 (S.C. App., 2002). Bishop had multiple opportunities to be heard. He was given notice of the arbitration proceeding and an opportunity to participate in the proceeding, but declined. He was given notice of the arbitration award, but failed to challenge it as provided for in the FAA. He was personally served with CACV's notice of arbitration award and motion to confirm the arbitration award, and he did not respond. He was given the opportunity to challenge the award and the existence of the arbitration agreement, yet he failed to do so. He was provided notice of the judgment, but he did not file a timely Rule 60(b) motion or an appeal. Bishop was provided due process of law in this matter at every step of the proceedings. A litigant's decision to ignore legal proceedings is not a denial of due process, and Bishop cannot manufacture a due process claim by choosing to ignore every notice and opportunity afforded him to be heard on the arbitration proceedings, the arbitration award, the proceedings to confirm the arbitration award, and the judgment that CACV obtained against him. Bishop's only legitimate complaint is with his own conscious indifference in ignoring every opportunity that he had to be heard until after the passage of seven years.

Apart from waiving the procedural rights afforded to him under South Carolina Law, Bishop also waived the procedural rights that federal law afforded him to challenge the award. The FAA requires confirmation of an arbitration award unless it is vacated, modified, or corrected: "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any

time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon *the court must grant such an order* unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. § 9 (emphasis added). A party may move to vacate, modify, or correct the award under 9 U.S.C. §§ 10 or 11, but the grounds for such motions are very limited. *See* 9 U.S.C. § 10 (limiting orders to vacate to cases in which the arbitrator engaged in corruption, fraud, or other misconduct, etc.); 9 U.S.C. § 11 (limiting orders to modify or correct to cases in which there was "an evident material mistake in the description of any person, thing, or property referred to in the award" or the "material miscalculation of figures"; "the arbitrators have awarded upon a matter not submitted to them"; or "the award is imperfect in matter of form not affecting the merits of the controversy").

The FAA further explicitly provides that "[n]otice of a motion to vacate . . . an award *must* be served upon the adverse party or his attorney within three months *after* the award is filed or delivered." 9 U.S.C. § 12 (emphasis added). In this case, it is undisputed that Bishop did not file a timely motion to vacate within three months after the arbitration award was filed or delivered, as required by the FAA. Thus, the arbitration award was properly confirmed by the Circuit Court and enrolled as a judgment in 2009. Had Bishop timely challenged the arbitration award or the existence of the arbitration agreement, CACV would have been given the opportunity to prove that Bishop agreed to the terms in the arbitration agreement by continuing to use the credit card after having received the notice of change in terms of the agreement. However, since Bishop never challenged or contested in any way the arbitration agreement, the arbitration proceedings, the arbitration award, and motion to confirm the arbitration award,

CACV was never given the opportunity nor was it required to present this supporting evidence at arbitration proceedings or the proceedings to confirm the award.

Furthermore, Bishop's arguments that he was deprived of due process because this arbitration occurred through NAF are based purely on speculation and conjecture, rather than any competent evidence presented to the court below. Other courts have denied similar arguments made in attempt to vacate or contest awards issued in arbitration proceedings that occurred before the NAF. See, e.g., Dzanoucakis v. Chase Manhattan Bank USA, No. 06-CV-5673 (JFB)(ARL), 2009 U.S. Dist. LEXIS 27299 (E.D.N.Y. March 31, 2009) (finding Plaintiff's conclusory assertion of bias of the arbitrator was insufficiently supported by any indication of bias to justify vacating the arbitration award); Cline v. Chase Manhattan Bank USA, Civil No. 2:09-CV-00728 (BSJ), 2009 U.S. Dist. LEXIS 7104 (D. Utah Jan. 30, 2009) (finding that arbitration award was not procured by fraud and further finding that "Cline's bare allegation that the NAF was biased toward Chase because they will likely receive future business from Chase is remote, uncertain and speculative, and is therefore not sufficient to set aside the arbitration award."); Cronin v. Citifinancial Servs., Civil Action No. 08-1523, 2008 U.S. Dist. LEXIS 57356 (E.D. Pa. July 25, 2008) (rejecting plaintiff's argument of lack of arbitral neutrality of the NAF noting that "plaintiff...provided no...evidence of procedural or substantive unconscionability...and no evidence that...AAA or NAF are biased than his own speculation."); Millan v. Chase Bank USA, N.A., 533 F. Supp. 2d 1061, 1068 (C.D. Cal. 2008) (finding plaintiff's "general observations about the 'symbiotic relationship' between NAF and Chase . . . insufficient to establish a basis to vacate the award."). In this case, there was no competent evidence presented by Bishop that NAF, much less the South Carolina attorney arbitrator who actually conducted the arbitration in his case, was biased, prejudiced or unduly influenced.

CACV would truly be denied due process of law and prejudiced if it was now required to re-litigate and prove its case anew after the passage of all this time. That is why timing is an issue in Rule 60(b) motions. It recognizes the unfairness that increases with the passage of time.

IV. BECAUSE NO EVIDENCE OF FRAUD, DECEPTION, OR ABUSE OF PROCESS WAS PRESENTED TO THE COURT, BISHOP'S MOTION FOR RELIEF PURSUANT TO RULE 60(B)(1),(2) AND (3), SCRPC WAS PROPERLY DENIED.

Bishop also cannot establish that the seven-year-old judgment was garnered by fraud or deception. In South Carolina, a judgment may be set aside on the ground of fraud only if it is "extrinsic" fraud. Robinson v. Estate of Harris, 388 S.C. 616, 626, 698 S.E.2d 214, 219 (2010). Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard." Chewning v. Ford Motor Co., 346 S.C. 28, 550 S.E.2d 584 (S.C. App., 2001); Robinson, *supra*. To set aside a judgment, extrinsic fraud must be proven by clear and convincing evidence. Hagy v. Pruitt, 39 S.C. 425, 529 S.E.2d 714 (2000). Bishop presented no competent evidence that he was induced to not appear and defend himself at the 2008 arbitration proceedings or the 2009 proceedings to confirm the arbitration award. He presented no evidence that he was limited in in any way in his opportunity to be heard, present a defense, or challenge the existence of the arbitration agreement, the arbitration proceedings, or the proceedings to confirm the arbitration award. Even if Bishop had made a timely Rule 60(b) motion (which he did not), there is no evidence of extrinsic fraud that would have justified vacating the judgment. Bishop should not be allowed to litigate issues now which he could have litigated in the prior proceedings, and which he waived.

V. BECAUSE THE JUDGMENT ENTERED AGAINST APPELLANT WAS NOT VOID BISHOP'S MOTION FOR RELIEF PURSUANT TO RULE 60(b)(4), SCRPC, WAS PROPERLY DENIED.

"Generally speaking, subject matter jurisdiction refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong." Metts v.

Mims, 384 S.C. 491, 682 S.E.2d 813 (2009). Circuit courts have jurisdiction to enroll arbitration awards as judgments of the court. §15-48-120 *et. seq.* S.C. Code of Laws Ann. There is a difference between a want of jurisdiction, in which case the court has no power to adjudicate, and a mistake in the exercise of undoubted jurisdiction, in which case the court's action is not void, but is subject to direct attack on appeal. Universal Benefits, Inc., *supra*. A void judgment is one that, from its inception, is a complete nullity and is without legal effect and must be distinguished from one that is merely "voidable". Thomas & Howard Co. v. T.W. Graham and Co., 318 S.C. 286, 457 S.E.2d 340 (S.C., 1995) (quoting 46 AmJur2d Judgments §31 (1994)). A judgment is not rendered void by irregularities which do not involve jurisdiction. Universal Benefits, Inc., *supra*.

Notably, the FAA simply requires that "The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk: "(a) The agreement." 9 USC §13. There is no particular format required for the arbitration agreement and there is no requirement that signatures appear thereon. There is also no requirement that supporting affidavits or other evidentiary documents be filed with the agreement to prove the assent of both parties to the agreement. The arbitration agreement was attached to Respondent's motion to confirm the arbitration award. The cases cited by Bishop only require further proof of the existence of an arbitration agreement *when there is a timely challenge by one of the parties*. Here, there was no such challenge. Prior to his untimely Rule 60(b) motion, Bishop never challenged the existence of the arbitration agreement until almost seven years after the arbitration award was confirmed as a judgment of the court. This is not a case where the customer disputed the existence of the arbitration agreement before the arbitration award was

enrolled as a judgment, as in the cases cited by Bishop. Rather, Bishop waited many years after this case had already wound its way through both the arbitration process and litigation process to confirm the arbitration award before he first decided to challenge the arbitration agreement, arbitration proceedings, arbitration award, litigation proceedings to confirm the arbitration award, and the judgment.

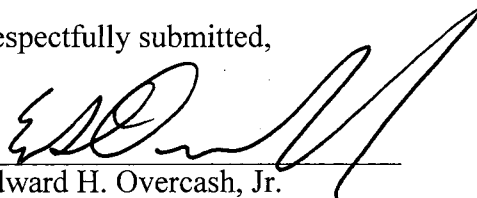
In his Order denying Bishop's motion for relief, Judge Simmons found that "Defendant had a credit card account with the original creditor; that the account was sold to Plaintiff; that Plaintiff submitted the account to arbitration; that Defendant was properly notified of both the arbitration proceeding and its results; that Defendant was properly served with Plaintiff's Motion to Confirm Arbitration Award and Enter Judgment in Conformity Therewith; and that Defendant was notified of this judgment more than a year before this motion was filed." None of these findings were appealed or challenged. Bishop was notified of the arbitration proceeding, and he ignored it. He was notified of the arbitration award, and he ignored it. He was properly served with the notice and motion to confirm the arbitration award, and he ignored it. He was notified of the judgment over half a decade before he brought his motion for relief, and he ignored it. These circumstances are very distinguishable from the cases cited by Bishop. Further, the May 7, 2009 judgment against Bishop was never appealed. In light of his repeated waivers, Bishop should not now be allowed to take the position that he may challenge the existence of the arbitration agreement, the arbitration proceedings, the arbitration award, the proceedings to confirm the arbitration award, and the judgment confirming the arbitration award at any time of his own choosing, even years after the arbitration award has been entered, the award has been confirmed as a judgment, and the judgment has not been appealed.

**CONCLUSION**

The Record shows that the court below did not abuse its discretion in denying Bishop's motions; therefore, those orders should be affirmed and all relief sought by the Appellant should be denied.

1/20/2017  
Date

Respectfully submitted,



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Attorney for Respondent

STATE OF SOUTH CAROLINA  
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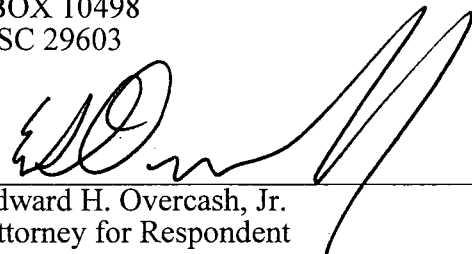
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PROOF OF SERVICE

---

This is to certify that on January 20, 2017, the undersigned served a copy of the INITIAL BRIEF OF RESPONDENT by depositing a copy of same into the United States Mail, postage pre-paid and in the correct amount to the following:

WILLIAM H. THOMAS, III  
POST OFFICE BOX 10498  
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January 20, 2017  
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January 20, 2017

SOUTH CAROLINA COURT OF APPEALS  
ATTN: JENNY ABBOTT KITCHINGS  
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JAN 23 2017

**SC Court of Appeals**

Re: CACV of Colorado, LLC v. Robert H. Bishop  
Appellate Case Number: 2016-001576

Dear Ms. Kitchings:

I am enclosing herewith the Respondent's Designation of Matter and Initial Brief, together with Proof of Service on opposing counsel.

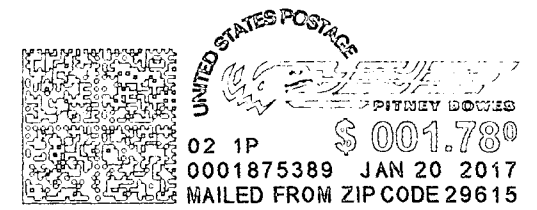
Please contact me if you should have any question or require any further information.

Sincerely,

Edward H. Overcash, Jr.  
Attorney for Respondent

cc: William H. Thomas, III  
Post Office Box 10498  
Greenville, SC 29603  
Attorney for Appellant

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SOUTH CAROLINA COURT OF APPEALS  
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