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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN SOUTH CAROLINA COURT OF APPEALS

APPEAL FROM LEE COUNTY

The Honorable Clifton Newman
Circuit Court Judge

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**CASE NUMBER: 2013-CP-31-0321**

**Appellant Case Number: 2016-001-989**

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Laura Toney.....**Appellant,**

Vs.

LaSalle Bank National Association
As Trustee for the Registered Holders
Of Structured Asset Securities
Corporation, Structured Asset Investment
Loan Trust, Mortgaged Pass-Through
Certificates, Series 2004-11, AltiSource
Homes, Wayne Capell, Lee CountY
Treasure and Lee County Planning and
Zoning.....**Respondents.**

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**RULE 1.7: CONFLICT OF INTEREST**

## STANDARD OF REVIEW

The Appellant filed a complaint on the Defendants on 13, 2013, in State Court. The Defendants were served on November 13, 2013.The Respondent, LaSalle Ban filed a Notice of Removal to Federal Court on December 13, 2013, which was on the 30th day after receipt of service. The Defendants time to answer in Federal Court was 20 days which made his answer untimely in Federal Court (17 Days Late). The Defendants filed a late answer in Federal Court on November 20, 2013. The Defendants filed an Amended Answer on December 20, 2013. Pursuant to Rule 15 of the FRCP, you have 21 days to file an Amended Answer without permission from the Court. The Respondents did not filed for an Enlargement of Time to file a late answer. The Respondent, LaSalle Bank, never answered the complaint in State Court until December 1, 2014, after a Default Judgment was filed by the Appellant. The Respondent, LaSalle Bank, filed a Second Amended Answer in State Court on December 1, 2014, which is the first answer filed in State Court which was untimely without requesting an enlargement of time or permission from the Court.

Judge Pieper in ***Lawton Limehouse, Sr., Respondent, v. Paul H. Hulsey and The Hulsey Litigation Group, LLC, Petitioners***. analyzed the threshold question of when the "30" day time period for the defendants to file an answer began to run and what effect the removal of the case and its subsequent

remand had on that time period." Noting that this issue was a matter of first impression in this state, Judge Pieper ruled that any unexpired portion of the thirty-day time period to answer was tolled during the time the case was removed to federal court. Therefore, Hulsey had until August 5, 2006, to file an Answer to the Complaint. Judge Pieper found it unnecessary to decide whether Hulsey was entitled to five additional days for mailing pursuant to Rule 6(e), SCRCP because Hulsey's Answer was filed twenty-four days outside of the tolled time frame. Accordingly, Judge Pieper found the entry of default was proper. 11 He further ruled that "there was no good reason presented by the thereby who is not in default for failure to appear, and shall make a note in the case file or docket sheet of the mailing. Such mailing shall not be necessary to parties who have already received notice. Such mailing is sufficient notice for all purposes for which notice of the entry of an order or judgment is required by these rules; but any party may in addition serve a notice of entry on any other party in the manner provided in Rule 5 for the service of such papers. Because Hulsey removed the case fourteen days after he was served, Judge Pieper found Hulsey had sixteen days following the remand order to file his Answer. In support of his method of time computation, Judge Pieper relied on Cotton v. Federal Land Bank of Columbia, 269 S.E.2d 422 (Ga. 1980), and Dauenhauer v. defendants for their failure to file a timely answer other than attorney confusion about the deadline for when an answer was due." Judge Pieper found "no reasonable basis for defense counsel's assumption that the 30 day time to file answer starts completely anew upon remand from the federal

court." Thus, Judge Pieper declined to set aside the entry of default. The majority of the Court of Appeals affirmed Judge Pieper's decision, finding there was no authority in this state to support Hulsey's position that a removing party is entitled to a fresh thirty days to answer a Complaint upon remand. Limehouse, 397 S.C. at 68-69, 723 S.E.2d at 221-22. After reviewing state and federal rules of procedure,12 the majority declined to adopt a new rule that extended the time for filing beyond the thirty-day limit. Id. at 69, 723 S.E.2d at 222. Although there is authority from other jurisdictions to support Hulsey's claim that the time for filing began anew after the case was properly remanded to state court,13 we agree with the Court of Appeals and decline to adopt such a rule. As previously discussed, once the case was removed to federal court, the state court's jurisdiction was suspended or held in abeyance until the case was properly remanded. When the state court resumed jurisdiction, it had a duty "to Superior Court In and For Sonoma County, 307 P.2d 724 (Cal. Ct. App. 1957), wherein the appellate courts tolled the time for filing during removal. 12 The majority considered Rule 12(a), SCRCP (stating, "A defendant shall serve his answer within 30 days after the service of the complaint upon him"), and Fed. R. Civ. P. 81(c)(2) (providing a defendant twenty-one days to file an Answer after a civil action is removed from a state court). 13 See Ark. R. Civ. P. 12(a)(3) (West 2013) (providing an adverse party with thirty days from receipt of notice that the remand order was filed in state court to file an Answer); Cal. Code Civ. Proc. § 430.90 (West 2013) (providing thirty days from the state court's receipt of the order of remand to file an Answer); Iowa Code Ann. § 1.441(7) (West

2013) (providing that the time for pleadings shall begin anew after a remand order is filed in the state court); N.C. Gen. Stat. Ann. § 1A-1, Rule 12(a)(2) (West 2013) (providing thirty days to file an Answer from the date a remand order is filed in the state court); Tex. R. Civ. P. 237a (West 2013) (providing fifteen days to file an answer after notice that a remand order was filed in state court). proceed as though no removal had been attempted." State v. Columbia Ry., Gas & Elec. Co., 112 S.C. 528, 537, 100 S.E. 355, 357 (1919). Thus, the time for filing an Answer was tolled until the state court resumed jurisdiction. Notably, other jurisdictions have reached a similar conclusion. See Lucky Friday Silver-Lead Mines Co. v. Atlas Mining Co., 395 P.2d 477, 480 (Idaho 1964) ("While the cause is before the Federal court, the state court has no jurisdiction or authority to receive any pleadings in the cause nor can it issue any orders concerning the cause. . . . Thus the period of time the cause is before the Federal court, cannot be considered in computing the time within which the appellant had to appear and plead to the cause."); Peoples Trust & Sav. Bank v. Humphrey, 451 N.E.2d 1104, 1109 (Ind. Ct. App. 1983) (finding removal of action to federal court tolled ten-day time limit to apply for change of venue and stating that "tolling the time period eliminates uncertainty, preserves the status quo, and is easily applied"); Jatczyszyn v. Marcal Paper Mills, Inc., 27 A.3d 213 (N.J. Super. Ct. App. Div. 2011) (concluding that discovery period established by state court rules is tolled during the time a motion to remand is pending before the federal court); see also Gen. Elec. Credit Corp. v. Smith, 484 So. 2d 75 (Fla. Dist. Ct. App. 1986) (holding that

time for filing appeal was tolled during period when case was removed to federal court); Hartlein v. Illinois Power Co., 601 N.E.2d 720 (Ill. 1992) (finding removal of action to federal court tolled time limit on petition for leave to appeal circuit court's grant of preliminary injunction). Based on the foregoing, we hold that removal of a state court case to federal court tolls the time period for filing responsive pleading

## STATEMENT OF THE CASE

### LaSalle Bank

Laura Toney filed a complaint on the Defendants on November 13, 2013, in State Court. The Defendants were served on November 13, 2013. The Defendant, LaSalle Bank filed a Notice of Removal to Federal Court on December 13, 2013, which was on the 30th day after receipt of service. The Defendants time to answer in Federal Court was 20 days which made his answer untimely in Federal Court (17 Days Late). The Defendants filed a late answer in Federal Court on November 20, 2013. The Defendants filed an Amended Answer on December 20, 2013. Pursuant to Rule 15 of the FRCP, you have 21 days to file an Amended Answer without permission from the Court. He did not filed for an Enlargement of Time to file a late answer. The Defendant never answered the complaint in State Court until December 1, 2014, after a Default Judgment was filed by the Plaintiff. The Defendant filed a Second Amended Answer in State Court on December 1, 2014, which is the first answer filed in State Court which was untimely without requesting an enlargement of time or permission from the Court.

LaSalle Bank filed its first answer in Federal Court December 20, 2013.

An Amended Answer was filed in Federal Court on January 20 , 2014.

A Second Amended Answer was filed in State Court on December 1, 2014.

La Salle Bank never filed a first answer in State Court and is attempting to file a Second Amended Answer in State Court. Federal jurisdiction ended after the case was remanded back to State Court. The Defendant, LaSalle Bank also failed to get the consent of all of the Defendants before removal.

The Honorable Margaret Seymour remanded the case back to State Court on August 4, 2014, stating that the Defendants' case did not have any merit.

Mr. Finkel has stated that the Plaintiff misidentified the Defendant, LaSalle Bank. Mr. Finkel has included "US Bank" as the correct name. After research and verification, it was discovered that US Bank is a "Trustee" and has no authority or liability in this litigation.

Mr. Finkel is also attempting to use Federal documents in State Court. Federal jurisdiction ended after the case was remanded.

The Plaintiff has filed Motions to Strike the Defendants' untimely answers.

## Lee County Treasurer and Lee County Planning and Zoning

The Defendants, Lee County Treasurer and Lee County Planning and Zoning were served on November 13, 2013, and failed to answer within the mandatory time in State Court or Federal Court. The Defendants, Lee County Treasurer and Lee County Planning and Zoning answered in State Court on December 20, 2013, a Motion 12B(6) which was untimely. They did not file an answer in Federal Court until January 6, 2014, which was also untimely.

The Plaintiff filed an answer to Lee County on December 10, 2013, in State Court.

The Defendants, Lee County Treasurer and Lee County Planning and Zoning also filed another Motion 12 stating "Insufficient Service." This motion is null and void because of the answer Motion 12(b)6 that was filed on December 20, 2013. They have waived any rights to file another Motion 12 being that this was not claimed in the Motion 12(b)6 on December 20, 2013.

Mr. Fata's Firm has represented me and my family in numerous legal manners. His firm deeded the original lot (14) to me from my husband, Milton Toney. His firm also wrote our Last Will and Testament and other real estate transactions which constitutes "Conflict of Interest."

The Commission on Lawyer Conduct has reprimanded Mr. Paul Fata for Conflict of Interest and still continued to preside in this case.

**ARGUMENTS**

I. DID THE TRIAL JUDGE ERR IN HOLDING AN EXPARTE HEARING WHEN THE PLAINTIFF WAS ADMITTED INTO THE HOSPITAL FOR A SERIOUS ILLNESS AND NOTIFIED THE COURTS?

The Appellant was admitted into the hospital for a serious illness and informed the Court. (r.) The Court continued with the hearing in the absence of the Appellant. (r.)

Historically, "ex parte communication" has described communication between legal counsel and the court when opposing counsel is not present. Individuals unhappy with a public official's action are now using the term to describe any communication that excludes any interested party, suggesting all such communications are improper.

Whether an "ex parte" communication with a public official is prohibited typically depends on whether the official is engaged in a legislative or quasi-judicial process. South Carolina law (Section 1-23-360) states, members or employees of an agency "assigned to *render a decision or to make findings of fact and conclusions of law*

*in a contested case* shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or its representative, except upon notice and opportunity for all parties to participate." (Emphasis added)

Likewise, Rule 6(b) of the Model Rules of Parliamentary Proceedings of South Carolina provides: "When conducting a *quasi-judicial* hearing, county council takes on the role of an impartial trier of fact in a dispute involving the legal rights of one or more parties . . . . Further, council members must base their decisions on the evidence presented at the hearing and must not discuss the case beforehand or be influenced by the opinions of others who are not a part of the proceedings." (Emphasis added) Both state law and the model rules address situations where the public official is acting in a quasi-judicial role. What if a public official is performing a legislative function? The South Carolina Supreme Court has not stated directly and conclusively that "ex parte" communications with public officials are permissible in all matters involving legislative functions. However, most courts that have dealt with this issue have permitted it.In 2002, a Tennessee court explained why

"ex parte" communications are treated differently depending upon the official's role. "In judicial and administrative proceedings, the litigants are entitled to the cold neutrality of an impartial tribunal. . . . The same cannot be said for the legislative arena. . . .Members of legislative bodies are not acting like judges when they consider a proposed change in an existing zoning ordinance. . . . They listen to their constituents; they test the wind; they try to please as many people as possible consistent with the constitution and good conscience. They are not to be condemned for doing so. That is their job." Prohibiting "ex parte" communications in matters traditionally considered to be within the legislative function, such as rezoning, continues to be raised and tested in the courts. Some courts have prohibited "ex parte" contacts if a council is considering a site-specific rezoning. They ruled this situation is more quasi-judicial than legislative in nature. Canon 3(g) of the South Carolina Code of Judicial Conduct states that :A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the

parties concerning a pending or impending proceeding except that: (a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided: (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond. This canon creates the following directives for judges in considering *ex-parte* requests: 1) judges cannot have *ex-parte* communications that deal with substantive issues; 2) judges can have *ex-parte* communications that deal with scheduling or administrative issues or emergencies that are not substantive; 3) judges can only have *ex-parte* communications that deal with scheduling or administrative issues or emergencies that are not substantive if the judge a) reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex-parte* communication; b) makes provision promptly to notify all other parties of the substance of the *ex-parte* communication and; c) allows an opportunity to

respond.Perhaps the most important rule regarding *ex-parte* requests is the ethical obligation created by Rule 3.3(d) SCRPC: "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, *whether or not the facts are adverse*" (emphasis added). This rule creates an ethical obligation for counsel seeking *ex-parte* relief to provide the court all material facts known to the lawyer, not just the material facts that support the client's request. While no reported South Carolina case involves an attorney's failure to comply with this rule, attorneys in other states have been subjected to discipline based on violation of this rule. *See e.g., In re Arabia*, 283 Kan. 851, 156 P.3d 652 (2007); *Iowa Supreme Court Attorney Disciplinary Bd. v. Gottschalk*, 729 N.W.2d 812 (Iowa 2007); *Reciprocal Discipline of Page*, 326 Or. 572, 955 P.2d 239 (1998); *Matter of Black*, 262 Kan. 825, 941 P.2d 1380 (1997).

The Defendants were served on November 18, 2013, but failed to consent to the removal filed by Mr. Finkel on December 13, 2013. Pro Capital Investors filed a Notice of Removal on December 31, 2013, which was **(43)** days since the date of service of complaint. Mr. Finkel has committed fraud on the court in his Notice of

Removal. Deadlines for removal cannot be extended by agreement of the parties or even by order of court. The deadlines are jurisdictional. That is, if they are not satisfied, the court does not have jurisdiction to hear the case. The Defendants' Notice of Removal was defective because it did not include the consent of all of the codefendants in a timely manner. Pro Capital was served on November 18, 2013, but failed to answer until December 31, 2013. The Defendants failure to obtain the consent before removal of its co-defendants as required by the federal removal statute 28 U.S.C. § 1441(a). constitutes a defect in the Defendants removal.

In State v. Columbia Ry., Gas & Elec., 112 S.C. 528, 537, 100 S.E. 355, 357 (1919) (stating that upon remand it is the duty of the state court to proceed as if no removal had been attempted).Public officials can be sued for a variety of reasons, ranging from land use decisions to denying or revoking a license. Increasingly, plaintiffs are alleging "ex parte communications" to support their lawsuits. They are claiming these communications show a lack of impartiality and fairness in the official's decision making process.

II. DID THE TRIAL JUDGE ERR IN RULING THAT THE DEFENDANT DID NOT HAVE TO FILE IN STATE COURT AFTER REMAND EVEN IF THE DEFENDANT DID NOT FILE A TIMELY ANSWER IN STATE OR FEDERAL C DID THE TRIAL JUDGE ERR IN HOLDING AN EXPARTE HEARING WHEN THE PLAINTIFF WAS ADMITTED INTO THE HOSPITAL FOR A SERIOUS ILLNESS AND NOTIFIED THE COURTS?

The Plaintiff was suffering from heart related illness during the course of this action and notified the court that she was admitted into the hospital for days.(r.) The trial court denied my request to continue the hearing and proceeded to rule in the case.(r.)

The Defendants LaSalle Bank and AltiSourceHomes were served the Complaint on November 14, 2014, and had (30) days to answer. (r.) The Defendants filed a Summary Judgment on December 20, 2013, which was not timely filed. Mr. Wayne Capell, Lee County Treasurer and Lee County Planning and Zoning were served on November 13, 2013, but failed to answer in a timely manner.(r.)

**Rule 81 of the SCRCP states:**

**(c) REMOVED ACTIONS.**

(1) *Applicability.* These rules apply to a civil action after it is removed from a state court.

(2) *Further Pleading.* After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:

(A) 21 days after receiving—through service or otherwise—a copy of the initial pleading stating the claim for relief;

(B) 21 days after being served with the summons for an initial pleading on file at the time of service; or

(C) 7 days after the notice of removal is filed.

**In Lawton Limehouse, Sr., Respondent, v.Paul H. Hulsey and The Hulsey Litigation Group, LLC, Appellants the South Carolina Court of Appeals states**:

In order to find the August 29 answer was timely Husley urges this court to adopt a rule that the thirty-day time period in which to answer starts over upon remand. We are not inclined to adopt such a rule.

Rule 12(a), SCRCP, provides: "A defendant shall serve his answer within 30 days after the service of the complaint upon him[] . . . ." However, federal rules provide "[a] defendant who did not answer [in state court] before removal must answer . . . within the longest of . . . :" (A) twenty days after being served or otherwise receiving the initial pleading or (B) within five days after notice of removal is filed. Rule 81(c)(2), FRCP.

In this case, Hulsey removed fourteen days after being served. Thus, although under Rule 12(a), SCRCP, he was entitled to another sixteen days to answer, by choosing to remove the case to federal court, he willfully subjected himself to the shortened time period of Rule 81(c)(2), FRCP – providing he must answer within six days (twenty days after being served). However, in the seventy-six days between removal and the entry of remand, Husley neglected to answer.

Initially, we find no authority in this state to support the position that a removing party is entitled to a fresh thirty days to answer a complaint upon remand. Neither did the trial court. Rather, looking at both the federal rules and state rules, in the exceptionally rare

circumstance in which a case would be remanded to the state court before an answer was due pursuant to Federal Rule 81(c)(2), a plain reading of South Carolina Rule 12(a) would require an answer within thirty days of service. However, seemingly giving Hulsey the benefit of the doubt, the trial court determined that because the state court is to proceed as if no removal had been attempted, removal to federal court tolls the thirty day time period and therefore, upon remand Hulsey should be allowed the remainder of any unexpired time See State v. Columbia Ry., Gas & Elec., 112 S.C. 528, 537, 100 S.E. 355, 357 (1919) (stating that upon remand it is the duty of the state court to proceed as if no removal had been attempted).

In this case, because Hulsey failed to answer under the plain reading of either Rule 12(a), SCRCP, or Rule 81(c)(2), FRCP; or under the more liberal approach provided by the trial court, it is of no consequence which approach we would adopt. Therefore, we are not occasioned to opine on the more acceptable method. It suffices that we find no indication that a party is entitled to a fresh thirty-day period upon remand. Accordingly, we are disinclined to adopt a

rule allowing the same. Such action is not the province of this court, but that of our legislature or supreme court.

III. DID THE TRIAL JUDGE ERR IS ALLOWING THE ATTORNEY FOR THE RESPONDENTS TO CONTINUE REPRESENTATION AFTER THE COURT WAS NOTIFIED THAT THE ATTORNEY WAS REPRIMANDED BY THE COMMISSION ON LAWYER CONDUCT FOR CONFLICT OF INTEREST?

The attorney for the Defendants, Lee County has served as the Appellant's attorney for several years on numerous occasions. The Appellant filed a complaint with the Commission on Lawyer Conduct and Mr. Paul Fata was reprimanded, but still continued to represent the Defendants.

**RULE 1.7: CONFLICT OF INTEREST**

1. (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
2. (1) the representation of one client will be directly adverse to another client; or

3. (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
4. (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
5. (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
6. (2) the representation is not prohibited by law;
7. (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
8. (4) each affected client gives informed consent, confirmed in writing.

# CONCLUSION

THE STATE OF SOUTH CAROLINA

IN SOUTH CAROLINA COURT OF APPEALS

APPEAL FROM LEE COUNTY

The Honorable Clifton Newman
Circuit Court Judge



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Homes, Wayne Capell, Lee CountY
Treasure and Lee County Planning and
Zoning.....**Respondents**

**CERTIFICATE OF COUNSEL**

The undersigned certifies that this Initial Brief complies with Rules 211(b), SCACR.

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THE STATE OF SOUTH CAROLINA

IN SOUTH CAROLINA COURT OF APPEALS

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Homes, Wayne Capell, Lee CountY
Treasure and Lee County Planning and
Zoning.....**Respondents**.

CERTIFICATE OF MAILING

The Appellant, Laura Toney, certifies that she mailed a copy of the Corrected Appellant's Initial Brief and Designation of Matter on March 15, 2017, via United States Postal Service to the following addressed as follows:

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Laura Toney

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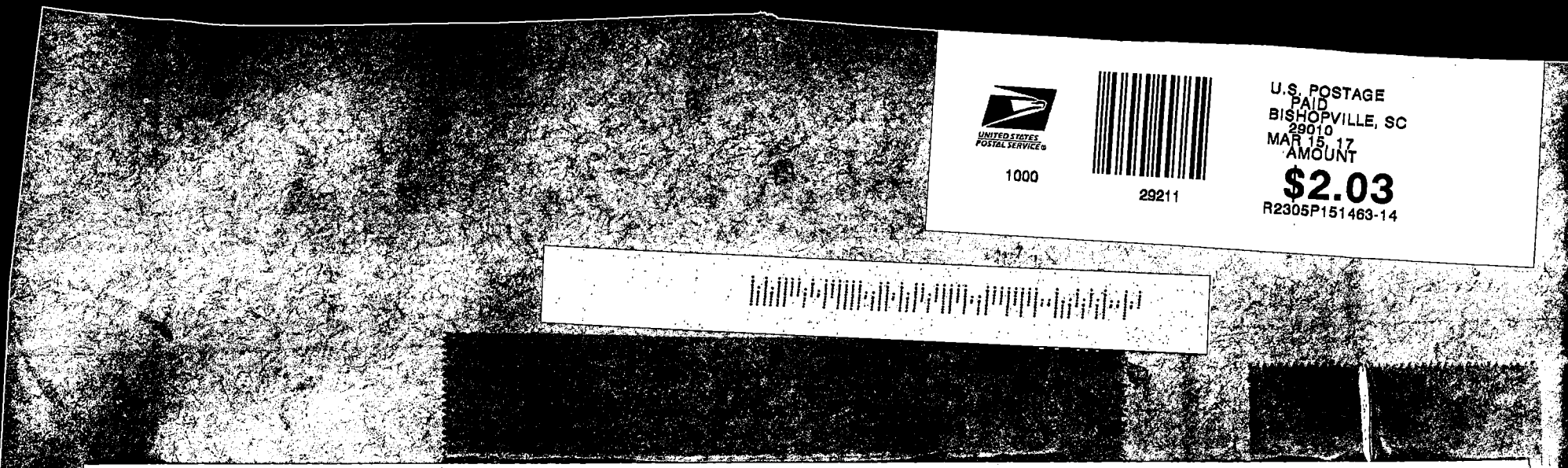


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