THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
THE HONORABLE JOSEPH M. STRICKLAND
MASTER IN EQUITY

RECEIVED
APR 06 2017
SC Court of Appeals

APPELLATE CASE NO. 2016-001468
CIVIL ACTION NO. 2008-CP-40-8887

South Carolina Community Bank,

RESPONDENT,

versus

Carolina Procurement Institute, Inc., Gary A. Washington, Michele A. Washington, First Palmetto Savings Bank, F.S.B., Branch Banking and Trust Company of South Carolina, Palmetto Health Alliance, State of South Carolina Department of Revenue,

DEFENDANTS,

Of whom Carolina Procurement Institute, Inc., Gary A. Washington, and Michele A. Washington are the

APPELLANTS.

FINAL BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Appellants' argument that the Master-In-Equity's order denying the motion to reconsider fails to comply with Rule 52(a) of the South Carolina Rules of Civil Procedure is not preserved for appellate review; furthermore, the requirement of Rule 52(a) that a judgment of the trial court include findings of fact and conclusions of law does not apply to decisions on motions.

II. Appellants' argument that the Notice of Sale did not comply with the requirements of Rule 71(b) of the South Carolina Rules of Civil Procedure is also not preserved for appellate review; in any event, the Notice of Sale complied with all requirements of South Carolina law.

III. The alleged failure of Appellant Gary Washington to receive notice of the judicial sale does not warrant the setting aside of the sale because there is no requirement that a party to a foreclosure action be given personal notice of a judicial sale; in addition, Appellants were in default such that personal service was not required, and the evidence showed that Appellants were in fact served with notice of the sale.

COUNTERSTATEMENT OF THE CASE

Respondent South Carolina Community Bank ("SCCB") initiated this foreclosure action against Appellants Carolina Procurement Institute, Inc.[1], Gary A. Washington, and Michele A. Washington on December 17, 2008 in the Richland County Court of Common Pleas seeking to foreclose on a mortgage given by the Washingtons on certain real properties located at 1811 and 1815 Gervais Street, Columbia, South Carolina in Richland County. [R.pp. 1-35; Foreclosure Summons and Complaint.] On July 31, 2009, the case was referred to Joseph M. Strickland, the Master-In-Equity for Richland County. [R.pp. 37-38; Order of Reference.] Appellants failed to respond to the foreclosure action, and thereafter, on July 31, 2009, SCCB filed an Affidavit of Default. [R.pp. 39-42; Aff. of Default; Aff. of Nonmilitary Service.]

Following Appellants' default, the Master-In-Equity issued its Report and Judgment of Foreclosure on October 8, 2009. [R.pp. 43-54; Judgment of Foreclosure.] The Judgment noted that Appellants were in default for failure to respond to the suit. [R.p. 45; Id. at p. 2.] The Master-In-Equity ordered that SCCB was entitled to foreclose on the mortgaged properties and further ordered the properties to be sold, after due advertisement, at a public auction at the Richland County Judicial Center on a convenient sales day thereafter. [R.pp. 49-50; Id. at pp. 6-7.]

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[1] Carolina Procurement Institute, Inc. ("Carolina Procurement") was dismissed pursuant to a Stipulation of Dismissal filed on September 30, 2015. [R.p. 66; Stipulation.] The dismissal of Carolina Procurement was not appealed; therefore, Carolina Procurement is in fact not a proper party to this appeal. Furthermore, Carolina Procurement did not join in the Motion to Set Aside the Foreclosure Sale filed on January 27, 2016 or the Motion to Reconsider filed on April 14, 2016. [R.pp. 87-92; 104-107; Mtn. to Set Aside; Mtn. to Reconsider.]

The foreclosure action was stayed on multiple occasions by various bankruptcy filings by Appellants. Supplemental orders to the Master-In-Equity's Judgment of Foreclosure were issued by the court for the limited purpose of updating and adjusting the judgment debt figures. [R.pp. 55-56; 60-61; 64-65; Supplemental Order filed December 20, 2010; Second Supplemental Order filed September 10, 2014; Third Supplemental Order filed July 17, 2015.] Appellants neither moved to set aside or reopen the Judgment of Foreclosure and the supplemental orders nor appealed such orders.

The judicial sale of the mortgaged properties at issue was scheduled for November 2, 2015 at 12:00 p.m. at the Richland County Judicial Center before the Master-In-Equity. [R.p. 70; Notice of Sale.] The Notice of Sale was advertised in The Columbia Star, a weekly newspaper of general circulation published in the City of Columbia, for three consecutive weeks preceding the sales day (October 16, 23, and 30, 2015). [R.p. 70; Aff. of Publication filed November 4, 2015.] In addition, on October 1, 2015, counsel for SCCB mailed the Notice of Sale to Appellants at their 1815 Gervais Street, Columbia, South Carolina address which was the address of one of the properties subject to the foreclosure sale. [R.pp. 67-69; October 1, 2015 Letter.] The letter was also mailed to Robert H. Cooper, an attorney representing Appellants in a bankruptcy proceeding at the time, as well as to the Master-In-Equity. [R.p. 67; Id.]

The mortgaged properties were sold on November 2, 2015 to SCCB which entered the highest bid in the amount of $370,000.00. [R.pp. 77-78; Master's Report on Sale and Disbursements and Order of Confirmation.] The Master-In-Equity's Deed conveying the properties at issue to SCCB was recorded on December 18, 2015. [R.pp. 81-83; Deed.] An order of deficiency judgment was also filed by the Master-In-Equity

on December 18, 2015 ordering that SCCB was entitled to a deficiency judgment in the amount of $187,365.21 through December 3, 2015. [R.pp. 84-85; Order.]

On January 27, 2016, Appellants Gary and Michele Washington moved to set aside the foreclosure sale. [R.pp. 87-92; Mtn. to Set Aside.] In this motion, the Washingtons argued that the sale was accompanied by other circumstances warranting the interference of the court, in particular, allegations that the Washingtons' bankruptcy counsel was deficient in the bankruptcy proceedings with respect to valuation of the properties resulting in the lifting of the automatic stay by the bankruptcy court so that SCCB could proceed with the foreclosure. [R.pp. 90-91; Id. at pp. 4-5.] The Washingtons furthered argued that the Judgment of Foreclosure and the Third Supplemental Order, neither of which had ever been challenged or appealed, failed to meet the requirements of Rule 71 of the South Carolina Rules of Civil Procedure. [R.pp. 91-92; Id. at pp. 5-6.] Finally, the Washingtons contended that Gary Washington did not receive notice of the sale date. [R.pp. 91-92; Id.]

On February 1, 2016, SSCB filed a Petition for Writ of Assistance to remove Appellants and their tenants from the properties after Appellants and their tenants refused to vacate the properties following the sale. [R.pp. 93-95; 96; Petition for Writ of Assistance; Rule to Show Cause.]

A hearing was held before the Master-In-Equity on February 19, 2016.[2] Following the hearing, the Master-In-Equity issued an order on March 23, 2016 finding (1) the Washingtons were in default; (2) the sales price of $370,000.00 was not so gross as to shock the conscience to warrant setting aside the judicial sale previously

2 To SCCB's knowledge, the February 19, 2016 hearing was not transcribed. [R.p. 114; April 28, 2016 Hearing Tr., p. 7, ll. 10-12.]

consummated; (3) no other circumstances existed warranting the interference of the court into the judicial sale; (4) the Washingtons' argument as to deficient bankruptcy counsel was appropriately addressed by the United States Bankruptcy Court for the District of South Carolina and was not grounds for setting aside the judicial sale; (5) the notice of the November 2, 2015 sale date of the properties was appropriately published and noticed to the Washingtons; and (6) the Master-In-Equity's Judgment of Foreclosure, filed October 8, 2009, as supplemented by the Third Supplemental Order, filed July 17, 2015, complied with the requirements of Rule 71, SCRCP. The Master-In-Equity therefore denied the Washingtons' motion to set aside the foreclosure sale. [R.pp. 97-100; Order.] On March 28, 2016, the Master-In-Equity also granted SCCB's Petition for a Writ of Assistance to remove Appellants and their tenants from the properties. [R.pp. 101-102; Order for Writ of Assistance.]

On April 14, 2016, the Washingtons filed a motion requesting reconsideration of the Order Denying the Motion to Set Aside the Foreclosure Sale and Order for Writ of Assistance. The motion reargued that the judicial sale should be set aside because of the circumstances attendant to the bankruptcy proceeding, the alleged failure of the Judgement of Foreclosure and Third Supplemental Order to comply with Rule 71(b), SCRCP, and the alleged failure of Gary Washington to receive notice of the foreclosure sale date. [R.pp. 104-107; Mtn. to Reconsider.]

A hearing was held on the motion for reconsideration on April 28, 2016 before the Master-In-Equity. [R.pp. 108-157; Hearing Tr.] The Master-In-Equity thereafter issued an order denying the motion for reconsideration on June 1, 2016 and additionally ordered that the Sheriff of Richland County be authorized to remove Appellants and their

tenants from the properties any time after 5:00 p.m. on June 6, 2016 and that any rent by tenants should be paid and delivered to SCCB. [R.pp. 159-160; Order Denying Mtn. to Reconsider.]

Appellants did not file their Notice of Appeal with this Court until July 12, 2016, stating that the appeal deadline was stayed due to an automatic bankruptcy stay which expired on June 30, 2016. Appellants appealed only the June 1, 2016 order of the Master-In-Equity denying the motion for reconsideration.

STANDARD OF REVIEW

A motion to vacate a judicial sale is equitable in nature, and the determination of whether a judicial sale should be set aside is a matter left to the sound discretion of the trial court. Eastern Sav. Bank, FSB v. Sanders, 373 S.C. 349, 354, 644 S.E.2d 802, 805 (Ct. App. 2007). Courts are reluctant to set aside judicial sales on technical grounds. Wooten v. Seanch, 187 S.C. 219, 223, 196 S.E. 877, 879 (1938).

The policy of our courts is to sustain a judicial sale when to do so does not violate principles of justice. Eastern Sav. Bank, FSB, 373 S.C. at 355, 644 S.E.2d at 805; Cumbie v. Newberry, 251 S.C. 33, 37, 159 S.E.2d 915, 917 (1968); Brownlee v. Miller, 208 S.C. 252, 265, 37 S.E.2d 658, 663 (1946). A judicial sale can be set aside for two reasons: "(1) if the inadequacy of the price is so gross as to shock the conscience of the court; or (2) if the price is inadequate and this inadequacy is accompanied by other circumstances that warrant the interference of the court." Eastern Sav. Bank, FSB, 373 S.C. at 356, 644 S.E.2d at 806. Therefore, a judicial sale will not be set aside because of a mere irregularity in the proceedings of the sale, unless the party seeking to set aside the

sale would be manifestly prejudiced by the irregularity. Wooten, 187 S.C. at 222, 196 S.E. at 878 (1938).

ARGUMENT

I. Appellants' argument that the Master-In-Equity's order denying the motion to reconsider fails to comply with Rule 52(a) of the South Carolina Rules of Civil Procedure is not preserved for appellate review; furthermore, the requirement of Rule 52(a) that a judgment of the trial court include findings of fact and conclusions of law does not apply to decisions on motions.

Appellants first argue that the Master-In-Equity's order denying the motion for reconsideration fails to comply with Rule 52(a), SCRCP. As an initial matter, this issue is not preserved for appellate review. Following the Master-In-Equity's issuance of the order denying the motion for reconsideration, Appellants did not move or request the Master-In-Equity to include findings of fact and conclusions of law. An issue not raised to or ruled upon by the trial court is not preserved for appellate review and cannot be properly presented to an appellate court. See, e.g., Singleton v. Sherer, 377 S.C. 185, 208, 659 S.E.2d 196, 208 (Ct. App. 2008); Jackson v. Speed, 326 S.C. 289, 311-12, 486 S.E.2d 750, 761 (1997); see also Pruitt v. State, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992) (observing that if an order fails to comply with Rule 52 standards, that deficiency must be raised to the trial court to be preserved for appeal).

Even if this issue is preserved for appellate review, Appellants' argument lacks merit. Rule 52(a), which requires the court, in all actions tried upon the facts without a jury, to "find the facts specially and state separately its conclusions of law thereon," expressly omits decisions on motions from this requirement: "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)." Rule 52(a); see also Collins Music Co.

v. IGT, 353 S.C. 559, 565, 579 S.E.2d 524, 527 (Ct. App. 2002) (recognizing that Rule 52(a) does not apply to motions).

Appellants argue that the Master-In-Equity failed to make findings of fact and conclusions of law in its order denying Appellants' motion for reconsideration and that Rule 52(a) required such findings and conclusions. Yet by its explicit language, Rule 52(a) does not mandate that a lower court include findings of fact and conclusions of law in a ruling upon such a motion. The Master-In-Equity's order on Appellants' motion for reconsideration was therefore properly issued in compliance with the South Carolina Rules of Civil Procedure.

Even though Appellants only take objection with the Master-In-Equity's order on the motion for reconsideration, SCCB will nevertheless point out that Judgment of Foreclosure as later supplemented fully complies with Rule 52(a), containing extensive findings of fact with respect to Appellants' default and separately stated conclusions of law with respect to the judgment of foreclosure in favor of SCCB. [R.pp. 43-54; 55-56; 60-61; 64-65; Judgment of Foreclosure; Supplemental Orders.]

Accordingly, Appellants' argument that the Master-In-Equity failed to comply with Rule 52(a) is unwarranted and should be rejected as a basis for a remand to the Master-In-Equity.

II. Appellants' argument that the Notice of Sale did not comply with the requirements of Rule 71(b) of the South Carolina Rules of Civil Procedure is also not preserved for appellate review; in any event, the Notice of Sale complied with all requirements of South Carolina law.

Appellants next argue that the Notice of Sale did not comply with the requirements of Rule 71(b), SCRCP. This issue is also not preserved for appellate review because Appellants never argued before the Master-In-Equity that the Notice of

Sale was deficient or otherwise not in compliance with Rule 71(b). Instead, Appellants argued that the Judgment of Foreclosure, as supplemented by the Third Supplemental Order, failed to comply with Rule 71(b). [See R.pp. 91-92; 106; 115-119; Mtn. to Set Aside, pp. 5-6; Mtn. to Reconsider, p. 3; Hearing Tr., pp. 8, l. 8 – 12, l. 24.] Any argument by Appellants that the Notice of Sale did not comply with Rule 71(b) is not properly before this Court for review. See, e.g., Singleton v. Sherer, 377 S.C. 185, 208, 659 S.E.2d 196, 208 (Ct. App. 2008).

Second, Rule 71(b) does not control the requirements for a notice of sale. Rule 71(b) applies to the judgment of foreclosure and specifies that the judgment will "contain a good and sufficient legal description of the property being sold, a provision for the necessary legal advertisement, the time and location of the sale, and notice of any senior liens, taxes or other rights to which the property to be sold is subject," as well as "the amount of good faith deposit necessary at the time of the sale, and the date that compliance must be made with the bid."

A notice of sale is rather controlled by the provisions of S.C. CODE ANN. § 15-39-660. See also Ex parte Moore, 352 S.C. 508, 510, 575 S.E.2d 561, 562 (2003) (observing § 15-39-660 contains requirements for the notice of sale). Section 15-39-660 requires a notice of sale to specify "the property to be sold, the time and place of sale, the name of the owner of the property and the party at whose suit the sale is to be made."

The Notice of Sale in this case complied with the required contents specified in § 15-39-660. The Notice of Sale, published on October 16, 23, and 30, 2015 in The Columbia Star, contained (1) legal descriptions and addresses of the properties to be sold; (2) a notification that the sale would occur on Monday, November 2, 2015 at 12:00 Noon

at the Richland County Judicial Center, 1701 Main Street, Columbia, South Carolina; (3) the naming of Gary A. Washington and Michele A. Washington as the owners of the properties; and (4) the name of the lawsuit identifying SCCB as the plaintiff at whose suit the sale was to be made. [R.p. 70; Aff. of Publication with Notice of Sale.]

Even if Rule 71(b) could be construed to apply to a notice of sale, the Notice of Sale in this case nevertheless complies with its requirements. As noted above, the Notice of Sale contains legal descriptions of the properties and the time and location of the sale. In addition, the Notice of Sale warns that the properties are subject to "assessments, county taxes, existing easements, easements and restrictions of record, and other senior encumbrances" and lists the names of the other parties to the lawsuit which have an interest in the properties. Finally, the Notice of Sale specifies the amount of the good faith deposit necessary at the time of the sale (5%) and provides the deadline for compliance (20 days). [R.p. 70 ;Id.]

The Notice of Sale undoubtedly complied with all requirements under South Carolina law, and there is no merit to Appellants' contention that it was deficient in some unspecified manner.

In addition, while Appellants do not appear to complain in this appeal of any alleged deficiencies in the Judgment of Foreclosure, any such argument would be likewise unavailing. First, Appellants did not appeal the Judgment of Foreclosure or any of the related supplemental orders or move to have the Judgment of Foreclosure reopened. The terms of the Judgment of Foreclosure as supplemented are final and not subject to review on appeal. See Peoples Fed. Sav. and Loan Ass'n v. Graham, 291 S.C.

178, 182, 352 S.E.2d 511, 513 (Ct. App. 1987) (holding mortgager was not entitled to have foreclosure judgment reopened since such relief was not sought in the trial court).

Second, Appellants' argument is merely conclusory and contains no argument on how the Judgment of Foreclosure or the Notice of Sale were deficient or failed to include any of the requisite matters outlined in Rule 71(b). An issue is deemed abandoned on appeal if the argument is only conclusory. Jones v. Builder Inv. Group, LLC, 415 S.C. 321, 330-31, 781 S.E.2d 737, 742-43 (Ct. App. 2015). Here, Appellants' argument as to compliance with Rule 71(b) is largely conclusory because Appellants provide no explanation as to how Rule 71(b) was violated in this case.

Third, the Judgment of Foreclosure, entered on October 8, 2009, was properly issued in accordance with Rule 71(b). The Judgment contained (1) the legal descriptions of the properties to be sold [R.p. 53; Judgment, p. 10]; (2) provision for the necessary legal advertisement [R.pp. 49-51; Id. at pp. 6-8]; (3) notice of any senior liens, taxes, or other rights to which the properties to be sold were subject [R.pp. 48-49; Id. at pp. 5-6]; (4) the amount of the good faith deposit necessary at the time of the sale (5%) [R.p. 50; Id. at p. 7]; and (5) the date that compliance should be made with the bid (20 days after the sale). [R.p. 51; Id. at p. 8.]

The Judgment of Foreclosure further provided that the properties would be sold by the Master-In-Equity "at the Richland County Judicial Center . . . on some convenien[t] sales day hereafter and should the regular day of judicial sales fall on a legal holiday, then and in such event, the sales day shall be on Tuesday next succeeding such holiday." [R.pp. 49-50; Id. at 6-7.] See also S.C. CODE ANN. § 15-39-680 (specifying that regular day of judicial sales "is the first Monday in each month except when the first

Monday in any month is a legal holiday in which case the sale day is on the Tuesday next succeeding the holiday").

While a specific sales day was not listed in the Judgment, it would have been futile given the numerous bankruptcy filings by Appellants which delayed the Master-In-Equity from carrying out the foreclosure. Instead, the specific sales day and time, Monday, November 2, 2015 at 12:00 Noon, was properly listed in the Notice of Sale which was duly advertised in The Columbia Star for the three consecutive weeks prior to the sale. [R.p. 70; Aff. of Publication with Notice of Sale.] Through both the Judgment of Foreclosure and the Notice of Sale, the public was properly informed of every material element of the judicial sale, including its time and location.

Given the reluctance of courts to set aside judicial sales on technical grounds, Wooten v. Seanch, 187 S.C. 219, 223, 196 S.E. 877, 879 (1938), and the policy to sustain a judicial sale when to do so does not violate principles of justice, Eastern Sav. Bank, FSB v. Sanders, 373 S.C. 349, 355, 644 S.E.2d 802, 805 (Ct. App. 2007); Cumbie v. Newberry, 251 S.C. 33, 37, 159 S.E.2d 915, 917 (1968); Brownlee v. Miller, 208 S.C. 252, 265, 37 S.E.2d 658, 663 (1946), the judicial sale of the properties in this case, properly advertised with all requisite elements of the sale contained in the Judgment of Foreclosure and Notice of Sale, should not be set aside.

III. The alleged failure of Appellant Gary Washington to receive notice of the judicial sale does not warrant the setting aside of the sale because there is no requirement that a party to a foreclosure action be given personal notice of a judicial sale; in addition, Appellants were in default such that personal service was not required, and the evidence showed that Appellants were in fact served with notice of the sale.

Finally, Appellants assert that the judicial sale of the properties should be set aside and rescheduled because Gary A. Washington allegedly did not receive notice of the sale.

This argument is without merit because South Carolina law contains no requirement that a party to a foreclosure action be given personal notice of a judicial sale. Cumbie v. Newberry, 251 S.C. 33, 37-38, 159 S.E.2d 915, 917 (1968); Peoples Fed. Sav. and Loan Ass'n v. Graham, 291 S.C. 178, 182, 352 S.E.2d 511, 514 (Ct. App. 1987).

In Graham, this Court addressed this same issue in the context of a foreclosure sale. After the plaintiff purchased the property at a foreclosure sale, Graham and two lien holders moved to have the foreclosure sale set aside based on the fact that they were not served with notice of the foreclosure sale. Id. at 180, 352 S.E.2d at 512. The trial court denied the motion, reasoning the lack of service "is not the sort of unfairness which will void the sale" and "the lack of personal service [is] insufficient grounds upon which to vacate the judicial sale." Id. at 181, 352 S.E.2d at 513. This Court affirmed, holding "[t]here is no requirement of law that parties to a suit for foreclosure be given personal notice of a judicial sale." Id. at 182, 352 S.E.2d at 514.

Appellants' argument also fails for an additional reason. On October 1, 2015, SCCB sent notice of the sale to both Gary and Michele Washington at the 1815 Gervais Street property which was subject to the sale as well as to the Washingtons' bankruptcy attorney at the time, Robert H. Cooper. [R.pp. 67-69; October 1, 2015 Ltr. With Notice

of Sale.] Appellants' attorney acknowledged at the hearing that the Notice of Sale was sent by SCCB to the 1815 Gervais Street property. [R.p. 121; Hearing Tr., p. 14, ll. 4-6.]

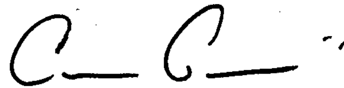
Furthermore, Appellants never filed an answer to the foreclosure complaint and, as found by the Master-In-Equity, were in default. [R.pp. 39-41; 45; 98; Aff. of Default; Judgment of Foreclosure, p. 2; Order Denying the Mtn. to Set Aside, p. 2.] Personal service is not required when a party is in default. See Rule 5(a), SCRCP; Rule 71(a), SCRCP (providing "[o]nly parties who have appeared and filed pleadings in the action shall be entitled to the usual notice of hearings and other proceedings . . . ."); see also Bartles v. Livingston, 282 S.C. 448, 454, 319 S.E.2d 707, 711 (Ct. App. 1984) (upholding the validity of a foreclosure sale where the defaulting defendant had actual notice of the foreclosure proceedings and constructive notice of the judicial sale through publication in accordance with the statutory requirements).

The Notice of Sale was properly advertised in The Columbia Star for the three weeks immediately previous to the sales day. See S.C. CODE ANN. §§ 15-39-650, 660. [R.p. 70; Aff. of Publication.] At a minimum, the Washingtons had constructive notice of the sales day. The purported lack of service of the Notice of Sale cannot provide a basis to set aside the foreclosure sale, and the Master-In-Equity properly rejected this argument by Appellants. SCCB respectfully requests this Court to affirm.

CONCLUSION

The Notice of Sale complied with all necessary requirements of South Carolina law and was properly advertised to the public. There is no argument by Appellants in this appeal that the resulting sales price for the properties following the sale was inadequate. Given that the judicial sale was held and conducted in compliance with the requirements of South Carolina law and the price received was adequate, Respondent South Carolina Community Bank respectfully requests this Court to affirm the Master-In-Equity's order denying Appellants' motion to set aside the foreclosure sale and the order denying Appellants' motion for reconsideration.

Respectfully submitted,



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April 6, 2017.

CERTIFICATE OF COMPLIANCE

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

Respectfully submitted,

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