THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master-In-Equity

The Honorable James O. Spence

Civil Action No. 2013-CP-32-01709

Appellate Case No. 2017-000874

The Bank of New York Mellon, f/k/a The Bank of New York as successor-in-interest to JPMorgan Chase Bank, N.A. as successor in interest by merger to Bank One, N.A. as Trustee for Structured Asset Mortgage Investments, Inc., Mortgage Pass-Through Certificates, Series 2002-AR4,..... Respondent,

v.

Cathy C. Lanier; Branch Banking and Trust Company, Regions Bank,..... Defendants,

Of Whom Cathy C. Lanier is the Appellant, ... Appellant.

Initial Brief of Respondent

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Statement of the Case

Respondent the Bank of New York Mellon, f/k/a The Bank of New York as successor-in-interest to JPMorgan Chase Bank, N.A. as successor in interest by merger to Bank One, N.A. as Trustee for Structured Asset Mortgage Investments, Inc., Mortgage Pass-Through Certificates, Series 2002-AR4 (hereinafter the "Bank") initiated this foreclosure action against Appellant Cathy C. Lanier ("Lanier") in 2013. {Complaint, R. ___}. The Bank owns the note and mortgage executed by Lanier. {Supplemental Order dated December 15, 2015 p. 1, R. ___}. JPMorgan Chase Bank, N.A. (hereinafter, "Chase"), services the loan of Lanier, which is at issue in the foreclosure action, and acts as attorney-in-fact for the Bank. {Affidavit of Joseph G. Devine, Jr., at ¶ 1, R. ___}. Chase, as the Bank's servicer and attorney-in-fact, holds the original note and mortgage at issue. {Affidavit of Joseph G. Devine, Jr., at ¶ 12, R. ___}. The sole issue in this appeal is whether the master-in-equity properly found that the Bank had standing to initiate this foreclosure action against Lanier.

In her answer, Lanier challenged the Bank's ability to initiate the foreclosure action based on an unsupported claim that the Bank lacked standing. {Answer dated June 20, 2013 at ¶ 16, R. ___}. Lanier also filed a motion to dismiss the foreclosure based on this alleged lack of standing. {Motion to Dismiss, R. ___}. The Bank moved to strike the affirmative defenses and refer the matter to the master. {Motion to Strike, R. ___}. The circuit court addressed Lanier's motion to dismiss and Respondent's motion to strike. The court granted the motion to strike, denied the motion to dismiss, and referred the matter to the master. {Order dated January 17, 2014. R. ___}.

Lanier did not appeal the grant of the motion to strike her affirmative defenses, including that of standing. Rather, Lanier continued to pursue the litigation and her standing arguments to

the lower courts. Lanier filed a motion for summary judgment that again argued Respondent lacked standing to initiate the foreclosure. {Lanier Motion for Summary Judgment, R. ___}.

The Bank also filed a motion for summary judgment and argued that it had standing to initiate the foreclosure action. {Motion for Summary Judgment dated October 19, 2015, R. ___ ("Plaintiff has standing to foreclose the subject mortgage in this case and the loan is in default. Defendant has not produced any evidence to contradict Plaintiff's standing . . . ."); Memorandum in Support of Motion for Summary Judgment p. 2 ("The indisputable facts further demonstrate that Plaintiff is the current holder of the Mortgage and entitled to foreclose")}. The master granted the Bank summary judgment on the standing issue, finding that:

> First, there is no genuine issue of material fact that Plaintiff has possession of the original subject note and mortgage, had possession at the time the foreclosure action was filed, and the note is made payable to Plaintiff through an allonge. Thus, Plaintiff has standing to enforce the note and mortgage. S.C. Code Ann. §§ 36-3-301, 36-3-205. Plaintiff's Motion is granted on this issue, and Defendant's Motion is denied.

{Order on Cross Motions for Summary Judgment dated November 5, 2015 at p. 1, R. ___}. Lanier did not appeal this ruling granting Respondent summary judgment on standing.

Instead, when the master allowed additional briefing on other issues in the case, Lanier again raised the standing issue. In addressing the remaining issues for which the master sought briefing, the master reiterated that it had ruled on and rejected the standing argument in the November 5th order. The master ruled that:

> Following the hearing, the Court issued an Order on Cross Motions for Summary Judgment . . . in which the Court ruled that Plaintiff had possession of the original note and mortgage, and had standing to enforce the notice and mortgage.

{Supplemental Order dated December 15, 2015 p. 1, R. ___}.

Lanier then filed a motion to reconsider that again raised the standing of Respondent to foreclose. {Motion to Reconsider dated January 13, 2016, R. ___}. The master denied the motion. {Order dated March 22, 2017, R. ___}. Lanier appealed that order to this Court. {Notice of Appeal, R. ___}.

Statement of the Facts

The Bank initiated this foreclosure action against Appellant Cathy C. Lanier ("Lanier") in 2013. {Complaint, R. ___}. In her motion to dismiss, affirmative defenses, and summary judgment motion, Lanier claimed, without support, that the Bank lacked the standing to initiate the foreclosure. {Answer dated June 20, 2013 at ¶ 16, R. ___; {Motion to Dismiss, R. ___}. The only[1] admissible evidence presented to the master-in-equity unequivocally established that the Bank had standing to initiate the foreclosure action.

In response to Lanier's claim, the Bank filed and served an affidavit from the loan's servicer and the Bank's attorney-in-fact for the loan. {Affidavit of Joseph G. Devine, Jr., with all exhibits, R. ___}. JPMorgan Chase Bank, N.A., services the loan of Lanier. {Affidavit of Joseph G. Devine, Jr., at ¶ 1, R. ___}. Chase, as the Bank's servicer and attorney-in-fact, holds the original note and mortgage at issue. {Affidavit of Joseph G. Devine, Jr., at ¶ 12, R. ___}. Moreover, the Bank presented the original note and original mortgage to the master at a hearing on this standing issue. {Transcript dated October 29, 2015 p. 10-11, R. ___}. The Bank further presented the allonge to the note that established that:

> [The] Chain of custody of the Note, the [Bank} has had, through it's[sic] servicer Chase, has had possession of the Note since it became owner of the loan.

{Trans. dated October 29, 2015 p. 20, R. ___; Allonge, R. ___}.

[1] Lanier failed to provide any admissible evidence to support her claim.

Thus, the master found that the Bank had standing to foreclose under settled South Carolina law. {Order on Cross Motions for Summary Judgment dated November 5, 2015 at p. 1, R. ___; Supplemental Order dated December 15, 2015 p. 1, R. ___}. The master found specifically that:

> First, there is no genuine issue of material fact that [the Bank] has possession of the original subject note and mortgage, had possession at the time the foreclosure action was filed, and the note is made payable to [the Bank] through an allonge. Thus, [the Bank] has standing to enforce the note and mortgage. S.C. Code Ann. §§ 36-3-301, 36-3-205. Plaintiff's Motion is granted on this issue, and Defendant's Motion is denied.

{Order on Cross Motions for Summary Judgment dated November 5, 2015 at p. 1, R. ___}.

To support her standing argument, Lanier relied solely on an inadmissible and improper affidavit from a purported expert witness, William McCaffrey. {Supplemental Order dated December 15, 2015 p. 2, R. ___}. Mr. McCaffrey, however, lacked any knowledge of the facts relating to the origination and servicing of the loan at issue. Rather, he claimed to have performed "extensive research" of "major banking databases" to come to his legal conclusions as to the ownership of the loan at issue. The master properly excluded the affidavit on numerous grounds. First, the master found the affidavit and its attachments constituted inadmissible hearsay. {Supplemental Order dated December 15, 2015 p. 2, R. ___}. Second, Lanier failed to properly authenticate the documents relied upon in the affidavit, and, therefore, the documents were inadmissible. {Id., R. ___}. Third, the master excluded the affidavit on the grounds that the affidavit based its statements on impermissible legal conclusions. {Supplemental Order dated December 15, 2015 p. 3, R. ___}. Fourth, the master noted the affidavit was inconsistent with South Carolina law because South Carolina law does not require a mortgage assignment to be recorded in order for a note or mortgage to be transferred to a servicer or other lender or to establish possession of the note or mortgage. {Id., R. ___}. The master, therefore, concluded that:

> The Court will not consider Mr. McCaffrey's affidavit or [the supporting documents]. The testimony and exhibits are inadmissible and do not create any issue of fact that [the Bank] is the current owner and holder of the subject note and mortgage, and has standing to foreclose.

{Supplemental Order dated December 15, 2015 p. 4, R. ___}.[2]

Argument

I. This Court should affirm because Lanier cannot establish a genuine issue of material fact on the issue of the Bank's standing to foreclose.

On appeal, Lanier claims an issue of fact exits as to the issue of standing based on three arguments. Each argument is meritless.

First, Lanier claims that she "contended throughout this litigation that there appear to be significant factual issues as to who has the right or standing to initiate . . ." this foreclosure. See Br. App., Section B, p. 8-9. Despite this assertion, Lanier fails to cite **any evidence** to support this claim. The citations in her brief are to her answer, her motion for summary judgment arguments, her memorandum in support of her summary judgment arguments, and her motion to reconsider.

Such citations are not evidence and cannot be used to withstand summary judgment. Once the Bank presented its evidence[3] of standing, namely an affidavit from the loan's servicer and the Bank's attorney-in-fact for the loan, and presented the original note and original mortgage to the master, Lanier had the obligation to present **evidence** sufficient to create a genuine issue of

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[2] In her brief Lanier does not appeal each of these independent grounds upon which the master excluded the affidavit. Rather, Lanier only challenged the master's hearsay and legal conclusion rulings. See Br. of App. p. 12-13. As noted above, however, the master provided two additional grounds to exclude the affidavit. Thus, the two-issue rule precludes Lanier from challenging the exclusion of the affidavit as more fully set forth in Section II herein.

[3] {Affidavit of Joseph G. Devine, Jr., with all exhibits, R. ___; Affidavit of Joseph G. Devine, Jr., at ¶ 1, R. ___; Affidavit of Joseph G. Devine, Jr., at ¶ 12, R. ___; Transcript dated October 29, 2015 p. 10-11, R. ___, Trans. dated October 29, 2015 p. 20, R. ___}.

material fact. Rule 56(e), SCRCP; Fowler v. Hunter, 380 S.C. 121, 125, 668 S.E.2d 803, 805 (Ct. App. 2008) ("However, when a party has moved for summary judgment the opposing party may not rest upon the mere allegations or denials of his pleading to defeat it"). "Rather, the non-moving party must set forth specific facts demonstrating to the court there is a genuine issue for trial." Id. Thus, Lanier cannot rest on pleadings or argument of counsel. See, e.g., West v. Gladney, 341 S.C. 127, 135, 533 S.E.2d 334, 338 (Ct.App.2000) (holding that "this court ordinarily will not consider statements of fact presented only in an attorney's argument in determining whether a genuine issue of material fact exists sufficient to preclude summary judgment"); Humana Hospital–Bayside v. Lightle, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991) ("Where the plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law"). Thus, Lanier's first argument lacks merit.

Second, Lanier further represents to this Court that "the note and mortgage are not in the possession of [the Bank]," and, thus, summary judgment was improper. See Br. App. p. 10. This is a material misrepresentation to this Court. The Bank presented the original note and original mortgage to the master at a hearing on this standing issue. {Transcript dated October 29, 2015 p. 10-11, R. ___}. Moreover, the master found that "there is no genuine issue of material fact that [the Bank] has possession of the original subject note and mortgage, had possession at the time the foreclosure action was filed, and the note is made payable to [the Bank] through an allonge." {Order on Cross Motions for Summary Judgment dated November 5, 2015 at p. 1, R. ___}. In this case, "ownership [was] transferred from South Star Funding Bank to Bank One; and then it was transferred by Chase, which was the successor to Bank One by merger," to "the Bank of New

York Mellon." {Transcript dated October 29, 2015 p. 14, R.___}. The "[mortgage] assignments of record completely follow the chain of the allonge as well." {Id.} Thus, the court properly ruled that "Plaintiff has standing to enforce the note and mortgage." {Order on Cross Motions for Summary Judgment dated November 5, 2015 at p. 1, R. ___} As a result, the record plainly refutes Lanier's second argument..

Third, Lanier challenges the grant of summary judgment as premature on the basis that discovery was necessary with respect to the Bank's status as a trust (Br. App., Section C, p. 10-12) and the assignment of the mortgage to the Bank (Br. App., Section F, p. 15-16). That argument fails. As an initial matter, Lanier did not raise this issue to the master, and the master did not rule on any such argument. It is well settled that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial court to be preserved. See generally Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 531 S.E.2d 282 (2000); Staubes v. City of Folly Beach, 339 S.C. 406, 529 S.E.2d 543 (2000). Thus, the issue is not preserved for appellate review.

Moreover, Lanier did not file the required Rule 56(f), SCRCP, affidavit with the master. If the party opposing summary judgment asserts he or she cannot present by affidavit facts justifying opposition, he must set forth this belief and the reasons for this belief in an affidavit for the trial court's review. Rule 56(f), SCRCP. Specifically, Rule 56(f) states the following:

> Should it appear **from the affidavits** of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

(emphasis added). In other words, to obtain the benefit of Rule 56(f), a party must file an affidavit setting forth the reasons that he is unable to "present by affidavit facts essential to justify his opposition." See Doe ex rel. Doe v. Batson, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001) ("Rule

56(f) requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery"). Lanier failed to do so and cannot, therefore, oppose summary judgment on that basis.

Finally, even if the issue was properly raised and the required Rule 56(f) affidavit was filed, Lanier lacks standing to challenge the transfer or assignment under the trust agreement. South Carolina law is clear that "a third person not in privity of contract with the contracting parties has not right to enforce a contract." Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 445, 494 S.E.2d 827, 833 (Ct. App. 1997). Numerous courts in South Carolina and other jurisdictions have rejected the argument that Lanier advances concerning the trust agreement. The Honorable Michelle Childs of the United States District Court for the District of South Carolina recently affirmed a bankruptcy court decision finding that "[a] majority of courts addressing the issue have determined that, where the matter concerns a negotiable instrument payable upon presentation by the holder in possession, the third-party debtor who is not a beneficiary of the pooling and servicing agreement lacks standing to challenge holders' rights to enforce the negotiable instrument due to an alleged invalidity in or noncompliance with the pooling and servicing agreement." In re Kain, C/A No. 7:12-cv-02031, 2013 U.S. Dist. LEXIS 36845, at *5–6 (D.S.C. Mar. 18, 2013); see also Ginn v. CitiMortgage, Inc., 465 B.R. 84, 95 n.42 (Bankr. D.S.C. 2012) ("It is also noteworthy that courts have recently held that debtors, who are not a party to or third party beneficiary of a pooling and servicing agreement, lack standing to challenge a mortgage's chain of title based on the terms of the pooling and servicing agreement."); Junger v. Bank of Am., N.A., No. 11-10419, 2012 U.S. Dist. LEXIS 23917, at *7 (C.D. Cal. Feb. 24, 2012); Correia v. Deutsche Bank Nat'l Trust Co., 452 B.R. 319, 324 (1st Cir. 2011) ("[T]he bankruptcy court concluded that the Debtors lacked standing to challenge the mortgage's chain of title under

the PSA. Again, we agree."); Paatalo v. J.P. Morgan Chase Bank, N.A., No. 10-119, 2012 U.S. Dist. LEXIS 90101, at *18 (D. Mont. June 28, 2012). Because Lanier is not a party to the trust agreement, she cannot challenge the assignment of the loan to the trust based on the trust documents.

II. The master properly excluded the McCaffrey affidavit on multiple grounds, and Lanier failed to appeal each ruling.

Lanier argues in her brief to this Court that a genuine issue of fact exists on the standing claim based on the McCaffrey affidavit. See Br. of App. p. 7, 12-14. The master, however, excluded the McCaffrey affidavit on four grounds. Lanier did not appeal each ruling. Thus, the two-issue rule requires affirmance of the McCaffrey affidavit. As a result, no genuine issue of material fact existed, and the master correctly granted summary judgment to the Bank. This Court should affirm.

As noted above, the master excluded the McCaffrey affidavit on four grounds. First, the master found the affidavit and its attachments constituted inadmissible hearsay. {Supplemental Order dated December 15, 2015 p. 2, R. ___}. Second, the master found Lanier failed to properly authenticate the documents relied upon in the affidavit, and, therefore, the documents were inadmissible. {Id., R. ___}. Third, the master excluded the affidavit on the grounds that the affidavit based its statements on impermissible legal conclusions. {Supplemental Order dated December 15, 2015 p. 3, R. ___}. Fourth, the master noted the affidavit did not reflect South Carolina law because South Carolina law does not require a mortgage assignment to be recorded in order for a note or mortgage to be transferred to a servicer or other lender or to establish possession of the note or mortgage. {Id., R. ___}.

On appeal, Lanier only challenges two of those findings. Lanier first claims that the affidavit and its attachments did not constitute inadmissible hearsay. See Br. App. p. 13 (second

full indented paragraph). Lanier then alleges that the master improperly concluded that McCaffrey's opinions "contained legal conclusions." See App. Br. p. 13-14.

Lanier did not appeal the ruling (1) that Lanier failed to properly authenticate the documents relied upon in the affidavit or (2) that the affidavit did not reflect South Carolina law because South Carolina law does not require a mortgage assignment to be recorded in order for a note or mortgage to be transferred to a servicer or other lender or to establish possession of the note or mortgage. As a result, those rulings are not before this Court. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (holding that an unappealed ruling is law of the case).

Thus, our rules bar Lanier from challenging the exclusion of the McCaffrey affidavit on appeal. Under the two-issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case. Anderson v. S.C. Dep't of Highways & Pub. Transp., 322 S.C. 417, 420 n. 1, 472 S.E.2d 253, 255 n. 1 (1996) (holding that the two-issue rule "is applicable under other circumstances on appeal, including affirmance of orders of trial courts"); Anderson v. Short, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996); Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (holding that an "unappealed ruling, right or wrong, is the law of the case" and precludes reversal when the party fails to challenge both findings by the trial court). As a result, this Court should affirm the master's exclusion of the McCaffrey affidavit and grant of summary judgment to the Bank.[4]

[4] The McCaffrey affidavit is also irrelevant to this matter. As fully set forth in Section III, infra, a recorded assignment of a mortgage is not required to transfer a mortgage, and our law does not even require an assignment to be recorded to establish ownership of the loan by the party seeking to foreclose. See BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 623, 731 S.E.2d 547, 549 (2012) (holding that "the assignment of a mortgage does not need to be recorded, and failure

III. This Court should affirm the grant of summary judgment because Lanier's argument regarding the need for a recorded assignment to the Bank prior to initiating foreclosure contradicts South Carolina law.

Lanier also alleges that a genuine issue of material fact exits regarding whether the loan was assigned to the Bank prior to initiating the foreclosure. See Br. App., Section E, p. 14-15). Lanier specifically claims no assignment exists from Bank One to Chase and then Chase to Respondent. Lanier's argument simply misapprehends settled South Carolina law regarding assignments.

First, Lanier's argument that no assignment exists from Bank One to Chase is a red-herring and meaningless. The only evidence in the record reflects that the loan originator assigned the note to Bank One National Association. {Affidavit of Joseph G. Devine, Jr., at ¶ 5 and Exhibit B thereto, R. ___}. As is plainly evident from the caption in this litigation, and supported by the Affidavit of Joseph G. Devine, Jr., Bank One National Association then merged with Chase. {Affidavit of Joseph G. Devine, Jr., at ¶ 6 and Exhibit C thereto, R. ___}. The Bank of New York Mellon, f/k/a, The Bank of New York, was successor in interest to Chase's interest in the loan via an allonge. {Id., R. ___; Trans. dated October 29, 2015 p. 14, R. ___}. Thus, the master correctly found that "the note is made payable to [the Bank] through an allonge." Lanier's argument lacks any support.

Moreover, Lanier's argument that a recorded assignment is required prior to initiating the foreclosure in order to close the "gap" in the assignment chain contradicts settled South Carolina law. South Carolina law is clear. A recorded assignment of a mortgage is not required to transfer a mortgage, and our law does not even require an assignment to be recorded to establish ownership

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to do so has no effect on the rights of the assignee . . . . Therefore the date of recordation of the assignment has no effect on the transfer of Systems' rights to BAC"); In re Woodberry, 383 B.R. 373, 377 (Bankr. D.S.C. 2008).

of the loan by the party seeking to foreclose. See BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 623, 731 S.E.2d 547, 549 (2012) (holding that "the assignment of a mortgage does not need to be recorded, and failure to do so has no effect on the rights of the assignee . . . . Therefore the date of recordation of the assignment has no effect on the transfer of Systems' rights to BAC"); In re Woodberry, 383 B.R. 373, 377 (Bankr. D.S.C. 2008). This Court should, therefore, reject Lanier's argument because it lacks support under South Carolina law. In fact, Lanier offers no citation or authority to support her position. Thus, the argument has been abandoned on appeal. See, e.g., Bennett v. Investors Title Ins. Co., 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) (holding that the appellant abandons the issue on appeal when an appellant fails to cite any supporting authority for a position and makes conclusory arguments).

Conclusion

Based on the foregoing, this Court should affirm the master-in-equity and return this matter to proceed with the foreclosure action.

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January 4, 2018

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The Honorable James O. Spence

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v.

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Of Whom Cathy C. Lanier is the Appellant, ... Appellant.

PROOF OF SERVICE

I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for JPMorgan Chase Bank, N.A., do hereby certify that I have served all counsel in this action with copies of the pleading(s) hereinbelow specified to the following address(es):

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January 4, 2018

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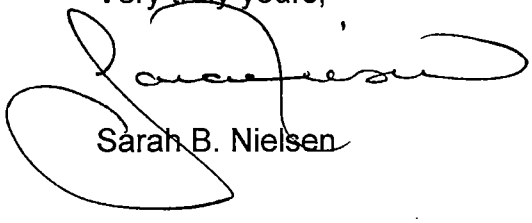
RE: The Bank of New York Mellon v. Cathy C. Lanier, et al.
Civil Action No. 2013-CP-32-01709
Appellate Case No. 2017-000874
Our File No. 11281/02473

Dear Ms. Kitchings:

Enclosed for filing in the above-reference matter please find the original and one copy of the Initial Brief of Respondent and Respondent's Designation of Matter for the Record on Appeal. Please return a clocked-in copy of each to us via our courier.

By copy of this letter, we are serving all counsel with this document.

Very truly yours,



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Enclosures
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